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HUMANISATION OF PRIVATE INTERNATIONAL LAW

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The search for conflict of laws rules for two new areas: *de facto* partnerships and gender identity

Katharina Boele-Woelki

1. Concepts and objectives

Humanization refers to a process that makes an object, an area, an institution more human than it was before. Related to the term humanization are humanity or humankind, humanness, humanism, and *the* humanities. The human being is at the centre and, because of this, various notions thereon have developed. In the context of *law* and for our specific purposes of *private international law*, we usually associate humanization with human rights, which are morally based, and the individual rights of freedom and autonomy to which every human being is equally entitled simply by virtue of being human. Human rights are universal, undisputable, indivisible and they influence almost all areas of law. In this contribution the impact of human rights on private international law provides the framework within which the elaboration and emergence of new conflict rules in the field of international family law will be examined. This exploration covers both the cross-border *de facto* relationships of couples who are neither married nor registered,[1] and gender identity (non-binary gender recognition), including

[1] Dieter Martiny, *De facto* cohabitation in European private international law – Diversity rather than uniformity, in: Marie Linton/Mosa Sayed (eds) Festskrift till Maarit Jänterä-Jareborg, Iustus Förlag, Uppsala 2022, 217-230; Maarit Jänterä-Jareborg, Property relations in *de facto* unions: Finding ways of promoting legal certainty and fairness in Europe, in Helmut Grothe/Peter Mankowski /Frederick Rieländer (eds), Europäisches und internationales Privatrecht: Festschrift für Christian von Bar zum 70. Geburtstag, C.H. Beck, Munich 2022, 149-156. The article discusses the confusion surrounding EU instruments and how they relate to the property relations of *de facto* couples. It argues that the harmonisation of substantive law is necessary to make it less important which Member State has jurisdiction, which law is applied and where the judgment is delivered. The author suggests that legislation is more effective than case law in achieving this goal. While private autonomy, such as joint property contracts, insurance policies and joint wills, is important, studies show that very few couples make use of it. Moreover, she confirms that the CEFL Principles of European Family Law regarding Maintenance, Property and Succession Rights of *de facto* Partnerships encourage the separation of property, while allowing compensation for contributions to the other partner's property, business, or profession, as well as significant contributions to the household. However, recent decisions by the Dutch, Finnish and Swedish Supreme Courts have rejected compensation claims, illustrating the limitations of compensation as an instrument of fairness. Therefore a closer

transsexuality.[2] Both questions have long been dealt with in several jurisdictions in substantive law in various forms by statute or case law. The substantive law regulations currently in place, however, are not yet in calm waters. The discussions on whether and how *de facto* unions should be regulated by statutory law as well as the many recent (draft) laws on self-determination regarding gender show that more changes in substantive law are to be expected. Hence, the debate on how the approach to private international law should be shaped is also ongoing.

2. Course of action

This contribution discusses the research topic as follows. In the first part, *Setting the Context*, it briefly describes the influence of human rights on private international law, in particular how the rules on the applicable law have been adapted in relation to cross-border family relationships. Fundamental and thought-provoking work has been done here by a number of legal scholars.[3] In this general part, the legal-theoretical considerations for the humanization of international family law are explained. The second part, *Applying the Context*, will focus on *de facto* relationships and gender identity, two areas that have recently received more attention in family law because of differences in substantive law that in turn affect cross-border situations. The cross-border dimension of a *de facto* relationship[4] and the status of gender identity are both relatively under-researched and have received little legislative attention compared to the more well-known issues in family law and the law of persons. In both areas, the analysis will focus on the human rights perspective.

3. Setting the human rights and international family law context

alignment with the default property regimes of matrimonial law may be necessary. Katharina Boele-Woelki, Private International Law Aspects of Registered Partnerships and Other forms of Non-Marital Cohabitation in Europe, Louisiana Law Review 2000, 1053-1060.

[2] Susanna Roßbach, Kollisionsrecht und Geschlecht im Wandel, Die internationalprivatrechtliche Behandlung der Geschlechtszugehörigkeit de lege lata und de lege ferenda, in: Konrad Duden (ed), IPR für eine bessere Welt, Vision – Realität – Irrweg?, Mohr Siebeck Tübingen 2021, 125-142. Anatol Dutta/Walter Pintens, Private International Law Aspects of Intersex, in: Jens Scherpe/Anatol Dutta/Tobias Helms (eds), The Legal Status of Intersex Persons, Intersentia 2018, 415-425.

[3] Christine Budzikiewicz, Der Einfluss der Menschenrechte auf das IPR, Deutsche Gesellschaft für Internationales Recht, Band 51, C.F. Müller Verlag, Cologne, 2023, 153-188. The author discusses the influence of human rights on private international law. She argues that human rights set limits on the scope of action in PIL and should be considered as principles underlying norm formation. However, human rights do not provide specific guidelines for the choice of connecting factors. The protection of human rights in the EU is mainly based on the Charter of Fundamental Rights, and its importance for the European conflict-of-law regime is highlighted in the recitals of several regulations. The discussion also includes the use of so-called intervention norms and due diligence obligations for globally operating companies. Finally, it is noted that human rights play an important role in the general public policy exception to the private international law rules.

[4] Not to be confused with the PIL issues that arise in other formalized couple relationships, such as registered partnerships. See Hans-Ulrich Jessurun d'Oliveira, Autonome kwalificatie in het internationaal privaatrecht: geregistreerd niet-huwelijkse relaties, in: Katharina Boele-Woelki/Chrisje Brants/Gerd Steenhoff (eds), Het plezier van de rechtsvergelijking, Nederlandse Vereniging voor Rechtsvergelijking, No. 63, 2003, 1-37.

In his article on "Revisiting the Humanization of International Law", Vassilis Tzevelekos argues that international law is, literally, 'humanised' as it now contains a mature set of substantive rules, as well as an institutional apparatus, both regional and universal, for safeguarding human rights.[5] Is the influence and significance of human rights also of comparable importance in the field of international family law[6] which for the purpose of this investigation deals with cross-border family relations and the status of persons? Or, and in line with the aims of this contribution, is the significance of human rights for the formation of conflict-of-law rules limited primarily to the specification of principles, so that human rights are only a meta-order that provides the framework but leaves the details to the norm-maker?[7]

3.1. *Human rights and family relations in substantive law*

First and foremost, the vast array of instruments, many of which contain the same or similar human rights,[8] have had and continue to have an impact on substantive family law through the respective human rights courts and commissions. At the global level, human rights protection is mainly based on nine international human rights instruments, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[9] At the regional level, several instruments such as the European Convention on Human Rights, the EU Charter of Fundamental Rights, the American Convention on Human Rights or the African Charter on Human and People's Rights have to be taken into account, while additionally at the national level constitutional rights also guarantee human rights. Human rights adjudicative bodies have regularly examined substantive family law in the light of human rights and they have identified violations, which in turn have led to the adaptation of the respective family law. The legal literature examining the influences of human rights on domestic family law is overwhelming.[10]

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[5] Vassilis P. Tzevelekos, Revisiting the Humanisation of International Law: Limits and Potential, Obligations Erga Omnes, Hierarchy of Rules and the Principle of Due Diligence as the Basis for Further Humanisation, Erasmus Law Review 2013, no. 1, 62-76 (66). He understands the process of the humanization of international law as a legitimate movement, calling for change, but it is something different to perceive that very aim as a universal, well-digested, mature reality in positive law that has already succeeded in radically reforming the international order, so that the latter may now be seen as predominantly humanized, with sovereignty receding 'ipso jure' in favour of the protection of community interests (75).

[6] The term 'international family law' has two meanings. It entails both the rules on cross-border family relations, on the one hand, and the body of international and (European) instruments and decisions of supranational courts which regulate family relationships, on the other. Katharina Boele-Woelki, What comparative family law should entail, Utrecht Law Review 2008, 1-24 (4).

[7] Christine Budzikiewicz, Der Einfluss der Menschenrechte auf das IPR, Deutsche Gesellschaft für Internationales Recht, Band 51, C.F. Müller Verlag, Cologne, 2023, 153-188 (184).

[8] Alexandra Hunees/Mikael Rask Madsen, Between universalism and regional law and politics: A comparative history of the American, European, and African human rights systems, International Journal of Constitutional Law, Volume 16, Issue 1, January 2018, 136–160.

[9] United Nations. Office of the High Commissioner for Human Rights, The core international human rights treaties, 2014.

[10] Of particular note in this context is the study supervised by Maarit Jänterä-Jareborg and Hélène Tigroudja within the Centre for Research of the Hague Academy of International Law on Women's Human Rights and the Elimination of Discrimination, Brill Nijhoff, 2016, which deals mainly with family law issues. Maribel González Pascual/Aida Torres Pérez (eds), The Right to Family Life in the European Union, Routledge, London/New York 2017 which explores the main developments and challenges for the right to family life in the context of European integration.

It is important to note that, quite rightly, none of the human rights systems is specific about what kind of family it wishes to protect. Had these human rights systems provided a definition, then society's understanding of what constitutes a family, which has evolved over time, would not have led to the corresponding protection of family life through human rights. In the Inter-American context, for example, it has been argued that its human rights system has from its inception had an expansive notion of equality and non-discrimination, which today includes the family rights of non-heterosexual and gender non-conforming persons.[11] The same understanding has been confirmed for the European human rights framework.[12]

3.2. *Human rights and cross-border family relations*

When it comes to cross-border family relations, the process of "humanization" can also be detected in particular in the drafting and adoption of private international instruments and rules.[13] Human rights guarantees have been taken into account in the formulation of conflict rules. With the progressive concretization of human rights objectives, not least through the jurisprudence of supranational courts, the question of the need to adapt and optimize the thematically-linked conflict rules arises again and again.[14]

In this author's view three major developments can be identified. *Firstly*, the shift from the nationality to the habitual residence of a person and, in addition, the balanced use of the two connecting factors combined with the non-discrimination of gender; *second*, the result-oriented formulation of conflict rules in certain areas; and *third*, the possibility for individuals to choose the applicable law within certain limits. Taken together, these features show that the impact of human rights on international family law has grown considerably.

3.2.1. Determining the closest connection: the shift from nationality to habitual residence and the non-discrimination of gender

For various legal institutions such as adoption, marriage, or divorce, conflict rules assign the applicable law by means of generally recognized connecting factors. These connecting factors "link" the private relationship with a specific set of legal rules under the relevant national law. The choice of the connecting factor is generally based on the consideration that, on the one hand, the factor must be relevant to the specific relationship and, on the other, that a national

[11] Macarena Saez, In the Right Direction: Family Diversity in the Inter-American System of Human Rights, North Carolina Journal of International Law 2019, 317-352 (319). In her view the drafters of the American Convention on Human Rights have adopted a broader idea of family than the drafters of the European Convention on Human Rights and the Universal Declaration on Human Rights (350).

[12] Maribel González Pascual/Aida Torres Pérez (eds), The Right to Family Life in the European Union, Routledge, London/New York 2017, Introduction, 3.

[13] The generally accepted objectives of conflict-of-law rules are international and internal consistency, substantive harmony, legal certainty and fairness in the individual case. Felix Dörfelt, Gesetzgebungsziele im Internationalen Privatrecht, Bucerius Law School Press, 2017.

[14] Christine Budzikiewicz, Der Einfluss der Menschenrechte auf das IPR, Deutsche Gesellschaft für Internationales Recht, Band 51, C.F. Müller Verlag, Cologne, 2023, 153-188 (167).

system which is found to have, conceptually, the closest connection with that relationship is to be applied.[15] In choosing the relevant connecting factors human rights prescribe that the connecting factors for determining the applicable law must avoid any form of discrimination as prohibited by international law instruments that are binding on the forum state.[16] In international family law we used to use the person's nationality which to an increasing extent has been replaced by the habitual residence of one or more of the parties.[17] This was one of the most important changes since the 1960s, when the older Hague Conventions were replaced by new ones.[18] The reasons for this change of approach are many and varied, ranging from integration policy to regulatory policy, from considerations specific to the legal field to purely pragmatic ones (such as the unity of forum and *ius*).[19] On the whole, however, it cannot be maintained that habitual residence has completely replaced nationality.[20] A more nuanced picture has emerged.

First, connecting factors such as the nationality of the husband in the case of marital effects, matrimonial property law or in the case of divorce have been banished from conflict-of-law rules for decades. Today, equality prevails.[21] The principle of non-preference or non-discrimination between gender is indisputably enshrined in international conventions, regional legislation, and national private international law. For example, in the case of couple relationships, the choice of non-discriminatory connecting factors such as the *common* nationality or the *common* habitual residence of the spouses is dominant. Both habitual residence and nationality are generally suitable for determining the personal status. Whether the persons concerned feel culturally connected to the law of the habitual residence or the law of their nationality (or neither) is a question of self-perception that cannot be determined by general, abstract considerations. Whether one or the other is preferred is a decision for the legislator since it is generally acknowledged that human rights do not prescribe a primacy of the habitual residence or nationality as connecting factors.[22] Insofar as the human rights guarantees can be achieved in different ways (which is likely to be the case as a rule), it is up

[15] Maarit Jänterä-Jareborg, Report of the Director of Studies, in: Maarit Jänterä-Jareborg/Hélène Tigroudja, Women's Human Rights and the Elimination of Discrimination, Brill Nijhoff, 2016, 73.
[16] Confirmed by Article 7 of the Resolution of the *Institut De Droit International* of 4th September 2021, Fourth Commission chaired by Fausto Pocar, https://www.idi-iil.org/app/uploads/2021/09/2021_online_04_en.pdf.
[17] Katharina Boele-Woelki, Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws, Recueil des cours, Volume 340 (2009), 287.
[18] Gülüm Bayraktaroglu-Özçelik, Gender Identity, in: Ralf Michaels/Véronica Ruiz Abou-Nigm/Hans van Loon (eds), The Private Side of Transforming the World, Intersentia 2021, 159-188 (167). Johan Meeuwsen, Le droit international privé et le principe de non-discrimination, Recueil des Cours, tome 353 (2011), 13-183 (49-59).
[19] Christine Budzikiewicz, Der Einfluss der Menschenrechte auf das IPR, Deutsche Gesellschaft für Internationales Recht, Band 51, C.F. Müller Verlag, Cologne, 2023, 153-188 (161).
[20] In the PIL Regulations of the European Union the habitual residence has become the decisive connecting factor since between the Member States any difference of treatment based on nationality is forbidden. Maarit Jänterä-Jareborg, Report of the Director of Studies, in: Maarit Jänterä-Jareborg/Hélène Tigroudja, Women's Human Rights and the Elimination of Discrimination, Brill Nijhoff, 2016, 78-79.
[21] Gülüm Bayraktaroglu-Özçelik, SDG 5: Gender Equality in: Ralf Michaels/Verónica Ruiz Abou-Nigm/Hans van Loon (eds)m The Private Side of Transforming our World, UN Sustainable Development Goals 2030 and the Role of Private International Law, 2021 Intersentia, 159-188.
[22] Christine Budzikiewicz, Der Einfluss der Menschenrechte auf das IPR, Deutsche Gesellschaft für Internationales Recht, Band 51, C.F. Müller Verlag, Cologne, 2023, 153-188 (163).

to the legislator to decide. This also applies to the freedoms guaranteed in the ECHR, which must be observed by the convention states (such as the right to marry, Article 12 ECHR).[23]

3.2.2. Achieving a (more) favourable result

Sketching the nuanced picture of the connecting factors used in international family law reveals a second aspect. International family law has evolved into a balanced system in which the two so-called objective connecting factors are applied successively - usually habitual residence first, followed by nationality - or alternatively. This applies to both vertical and horizontal family relationships. The successive or alternative use of the two connecting factors in conflict-of-law rules is also based on the consideration that a (more) favourable result should be achieved for the parties concerned, so that more than one jurisdiction with which the relationship is connected may be applied in order to achieve the desired result, e.g. for the partners to marry,[24] for a divorce to be granted,[25] for maintenance to be obtained[26] or for parenthood to be established.[27] This approach characterizes contemporary international family law as a field in which humanization is increasingly based on the interests of the parties concerned. The respective rules have mastered the transformation in such a way that they no longer *only* look for the law that is territorially most closely connected to the case. Instead, they offer a variety of options when it comes to the question of the applicable law whereby the legal systems that are relevant to the case are considered in a predetermined order to achieve a particular result.

3.2.3. Party autonomy as an expression of human rights

[23] Christine Budzikiewicz, Der Einfluss der Menschenrechte auf das IPR, Deutsche Gesellschaft für Internationales Recht, Band 51, C.F. Müller Verlag, Cologne, 2023, 153-188 (167).

[24] The *favor matrimonii* is reflected in the Hague Convention on Celebration and Recognition of the Validity of Marriages (1978). Ann Laquer Estin, Marriage and Divorce Conflicts in International Perspective, Duke Journal of Comparative & International Law, 2017, 485-517.

[25] The *favor divortii* is recognised in Dutch private international law; it leads to the application of the *lex fori* in divorce cases. Katharina Boele-Woelki, Der *favor divortii* im niederländischen internationalen Scheidungsrecht, in: Katharina Boele-Woelki/Willem Grosheide/Ewoud Hondius/Gert Steenhoff (eds), Comparability and Evaluation, Essays in honour of Dimitra Kokkini-Iatridou, Martinus Nijhoff Publishers – Dordrecht/Boston/London 1994, 167-181.

[26] The *favor alimenti* is recognized in Art. 4 of the Hague Protocol on the law applicable to maintenance obligations (2007). Felix Dörfelt, Gesetzgebungsziele im Internationalen Privatrecht, Bucerius Law School Press, 2017, 74-100.

[27] The Proposal for an EU Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (COM(2022) 695 final, 7.12.2022) provides the most recent example of the *favor* principle. Article 17 of the Proposal stipulates that the law applicable to the establishment of parenthood is the law of the State of the habitual residence of the person giving birth at the time of the birth. If this cannot be determined, the law of the State of birth of the child is applicable. If the applicable law results in the establishment of parenthood in relation to only one parent, the law of the State of nationality of that parent or of the second parent or the law of the State of birth of the child may apply to the establishment of parentage in relation to the second parent.

The humanization of international family law can be discussed, thirdly and finally, in the context of the recognition of private autonomy, which leads to the parties being allowed to choose the applicable law from among those laws that have a close connection with the specific facts of the case. While this subjective approach was allowed almost everywhere in the international law of obligations, party autonomy did not find its way into international family law until much later. Opinions are divided on the theoretical question of whether party autonomy is rooted in human rights. Surprisingly and in contrast to earlier communications,[28] the *Institut de Droit International*, in its resolution of 4 September 2021 on *Droits de la personne humaine et droit international privé,* for example, was clearly reticent. Doubts were expressed as to whether the freedom of choice of law in conflict-of-law situations was actually rooted in human rights. Therefore, no statement was made on private autonomy. The protection of individual liberty, however, has strong ties to the *a priori* view of party autonomy. The proclamations contained in the UN's Universal Declaration of Human Rights are echoed in the European Convention on Human Rights, the EU Charter of Fundamental Rights and the Treaty on the European Union. In particular within the European context underpinnings of the free will concept in private international law have been convincingly identified within its human rights framework and enlightenment notions based on natural law through outlining the values ascribed to free will.[29] Personal responsibility and self-determination are the key words, based on human rights, that justify the ever-expanding possibilities of choosing the applicable law in international family law. How decisive the influence of human rights has been in this process is obviously difficult to measure and quantify.

A different issue concerns the enforcement of human rights guarantees through the public policy exception,[30] which remains topical. General public policy clauses are found not only in national systems of private international law, but also in international conventions and regional law-making. They serve to prevent the application of foreign law if it is contrary to the value system of the forum state. Human rights from regional and international sources play an essential role.[31]

4. Applying the context of human rights and international family law

As mentioned above, the significance of human rights in relation to the design of conflict of law rules for *de facto* partnerships and gender identity will be examined below. For both areas, a brief comparative analysis of the substantive law is necessary. Identifying the main features of the relationship, on the one hand, and of the status, on the other, makes it possible to define and delimit the category for which a conflict of law rule is to be formulated.

[28] Erik Jayme, Rapport définitif (1991) (64(1) Annuaire de l'Institut de Droit International 62, 64 and 77.
[29] Jacqueline Gray, Party Autonomy in EU Private International Law, Choice of Court and Choice of Law in Family Matters and Succession, European Family Law Series No. 49, 2021, 23-34 (23).
[30] Tobias Helms, Ordre public – Der Einfluss der Grund- und Menschenrechte auf das IPR, Praxis des Internationalen Privat- und Verfahrensrechts 2017, 153-159.
[31] Christine Budzikiewicz, Der Einfluss der Menschenrechte auf das IPR, Deutsche Gesellschaft für Internationales Recht, Band 51, C.F. Müller Verlag, Cologne, 2023, 153-188 (156).

4.1. De facto relationship of couples crossing borders

The extent to which the partners in a *de facto* relationship have links with other legal systems has not yet been the subject of socio-legal research as far as this author was able to detect. In view of the few existing statutory conflict of law rules, a few court decisions but above all a rather productive discussion in legal literature, only an analysis of both the substantive and the private international law dimension fulfils the objectives of this contribution, which concludes with a proposal on how the *de facto* partnership should be regarded from the point of view of conflict of laws.

4.1.1. Comparative overview of substantive law

Living together as a couple without formalizing the relationship through marriage or registration is a factual situation of varying intensity. It is not always easy to determine when the *de facto* partnership begins and when it ends[32] but in retrospect - in the case of separation or the death of one partner, as well as in the case of a transition to a formalized relationship - the duration of the *de facto* partnership can be established, and it is precisely then that disputes over property, maintenance or inheritance arise. *De facto* unions come in different forms[33] and there are no clear-cut borders. In addition to the question of conceptualization, other controversial issues arise from a private international law point of view, such as characterization, conflicts with other relationships and preliminary issues, as well as the mutability of the applicable law.[34]

Conceptually there are huge differences in substantive law between jurisdictions.[35] They can be divided into three categories.[36] At one end of the spectrum are the majority of jurisdictions which do not recognize the *de facto* relationship as a family relationship. There are no specific

[32] Janeen Carruthers, De facto cohabitation: the international private law Dimension, Edinburgh Law Review, 2008, 51-76 (54).
[33] Janeen Carruthers, De facto cohabitation: the international private law Dimension, Edinburgh Law Review, 2008, 51-76 (52-53).

[34] Dieter Martiny, *De facto* cohabitation in European private international law – Diversity rather than uniformity, in: Marie Linton/Mosa Sayed (eds), Festskrift till Maarit Jänterä-Jareborg, Iustus Förlag, Uppsala 2022, 217-230 (218-220).
[35] Elise Goossens, One Trend, a Patchwork of Laws. An Exploration of Why Cohabitation Law is so Different Throughout the Western World, International Journal of Law, Policy and the Family, 2021, 1-36. Anatoliy Pashynskyi, Property Relations Between Unmarried Cohabitants in International Family Law, Teise 2020, 154-162. Katharina Boele-Woelki/Charlotte Mol/Emma van Gelder (eds), European Family Law in Action, V. Informal Relationships, European Family Law Series No. 38, Intersentia 2019 encompassing 29 European jurisdictions.
[36] Katharina Boele-Woelki, Frédérique Ferrand, Cristina González Beilfuss, Maarit Jänterä-Jareborg, Nigel Lowe, Dieter Martiny and Velina Todorova, Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in de facto Unions, European Family Law Series Vol. 46, Intersentia, Cambridge 2019, 39-44.

statutory rules, and the courts apply contract, property or company law or the rules on unjust enrichment in the event of disputes, usually when the relationship comes to an end.[37] At the other end of the spectrum, the second category consists of jurisdictions that have legislated comprehensively on *de facto* relationships and consider them to be family relationships.[38] The partner in such a relationship has rights and responsibilities. These jurisdictions are in the minority. So far Sweden (1973), Kosovo (1974), Hungary (1978), Slovenia (1978), Croatia (1979), Bosnia Herzegovina (1980), Serbia (1980), Catalonia (1998), Portugal (1999), Scotland (2006), Norway (2008), the Republic of Ireland (2010) Finland (2011), Argentina (2015) Ecuador (2015) and Italy (2016) have explicitly regulated informal relationships. Admittedly, these jurisdictions have different definitions in their regulations and different legal effects granted to partners in an informal relationship. Generally, the effects of marriage and registered partnerships are extended to unmarried cohabitants by treating them equally or in a similar manner to spouses or registered partners. While Bosnia Herzegovina, Croatia, Hungary, Kosovo, Serbia, Slovenia and Sweden have had regulated informal relationships for almost fifty years, in the other countries the regulation of informal relationships is a more recent development covering the last twenty years.[39] Somewhere in between the two diametrically opposed positions are a number of legal systems which, to some extent, have recognized certain consequences of *de facto* partnerships through case law or some statutory rules. In different areas they recognize that *de facto* partners need to be protected. These areas (property, maintenance, inheritance) vary from one jurisdiction to another, as does the level of protection.

When analyzing the reasons or incentives for regulation, five aspects have been identified as motivating the regulation of informal relationships, namely: (1) the steady increase in informal relationships as a new social reality; (2) the financial protection of a vulnerable party; (3) the influence of the national Constitution; (4) the recognition of same-sex couples; and (5) the protection of a common child. In contrast, there are two main motives for not creating provisions on informal relations. On the one hand, the legislator wants to protect marriage in its traditional form and refuses to create a 'marriage-like' institution by regulating informal relationships. This may be due to religious, social, or political reasons. On the other hand, imposing mandatory provisions on unmarried couples, who have consciously chosen not to marry, can be seen as an infringement of their rights to self-determination.[40]

Inspiration as to how a legal regulation could look like is offered in the United States by the Uniform Act regarding the Cohabitants' Economic Remedies (UCERA), which the American

[37] Exemplary for the legal situation in the Netherlands see Wendy Schrama/Jet Tigchelaar, Aims of Family Law Tested Against Dutch Family Law, What's love got to do with it?, in: Jens Scherpe/Stephen Gilmore (eds), Family Matters, Essays in Honour of John Eeckelaar, Intersentia 2022, 329-347 (338-242).

[38] Petar Šarčević, Cohabitation without Marriage - the Yugoslavian Experience, American Journal of Comparative Law 1981, 315-338.

[39] Katharina Boele-Woelki, Legislating the Relationship of Couples who are Neither Married nor Registered, in: Jens Scherpe/Stephen Gilmore (eds), Family Matters, Essays in Honour of John Eeckelaar, Intersentia 2022, 449-467.

[40] Charlotte Mol, Reasons for Regulating Informal Relationships: A Comparison of nine European jurisdictions', Utrecht Law Review 2016, 98–113. <https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.347/> accessed 23.04.2023.

Uniform Law Commission adopted in July 2021.[41] For Europe, the Commission on European Family Law has developed a model law in the form of Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in *de facto* Unions, which were published in 2019.[42] Hence, the time for legislative action has never been better. Moreover, the rapid rise of *de facto* partnerships is not something that the law can ignore. The enormous increase in couples who live together without marrying or entering into registered partnerships urges us to create legal certainty. Courts, which have been at the forefront of deciding on legal disputes, should be provided with more guidance.

At present, the wide disparity - full, no or a partial legal recognition of the *de facto* relationship - explains, as will be developed in the next section, the finding that, firstly, there are few jurisdictions with explicit conflict of law rules and, secondly, there is also more diversity than uniformity.

4.1.2. Comparative overview of the conflict of laws approaches

For almost 40 years, the Hague Conference on Private International Law has been monitoring developments in national and private international law relating to cohabitation outside marriage. Initially, comparative information was provided and analyzed only for unmarried couples, but since 2000 these relationships have been combined with registered partnerships.[43] Even then, marriage and registered partnerships were among the formalized relationships from which the *de facto* relationship was to be distinguished. As a result, this decision placed much more emphasis on registered partnerships which have been legislated on in many jurisdictions. The most recent update on cohabitation outside marriage, including registered partnerships based on a questionnaire, provides 33 national reports and is from 2016.[44] Since then, no further steps have been taken to develop a convention or protocol.

As several Private International Law Regulations on family matters and succession apply within the European Union, the question of whether their scope of application includes *de facto* partnerships has already been examined. The question is which relationship can qualify ‘as

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[41] https://www.uniformlaws.org/committees/community-home?CommunityKey=c5b72926-53d2-49f4-907c-a1cba9cc56f5. Accessed 25 April 2023. Barbara Atwood/Naomi Cahn, The Uniform Cohabitants’ Economic Remedies Act: Codifying and Strengthening Contract and Equity for Nonmarital Partners, Virginia Public Law and Legal Theory Research Paper No. 2023-31, available at SSRN: https://ssrn.com/abstract=4409696.

[42] Katharina Boele-Woelki/Frédérique Ferrand/Cristina González Beilfuss/Maarit Jänterä-Jareborg/Nigel Lowe/Dieter Martiny/Velina Todorova, Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in de facto Unions, European Family Law Series, vol. 46, Intersentia, Cambridge 2019.

[43] The same distinction was made by Kirsten Schümann, Nichteheliche Lebensgemeinschaften und ihre Einordnung im Internationalen Privatrecht, Europäische Hochschulschriften Reihe II Rechtswissenschaften, Peter Lang 2001.

[44] https://www.hcch.net/en/projects/legislative-projects/cohabitation (accessed 25 April 2023).

comparable to marriage'.[45] With the exception of the EU Succession Regulation,[46] this is not the case.[47] Regarding the scope of application of the EU Regulation on matrimonial property regimes it has been proposed to include *de facto* partnerships, if these relationships are treated in the same way as marriage under the applicable national law.[48] In contrast, the Brussels I Recast Regulation has been declared applicable by the European Court of Justice to a partner's claim for compensation under Hungarian law,[49] the rules on unjust enrichment in Article 10 of the Rome II Regulation on non-contractual obligations has been applied in an English court case[50] and the application of the Rome I Regulation for contractual obligations to compensation claims has been defended in the legal literature.[51]

The comparative overview of the few countries that provide a conflict-of-law rule for *de facto* partnerships shows an interesting development. The former Yugoslav Law on Private International Law of 1982 was the first to include a conflict-of-law rule for "persons who live in cohabitation". Article 39 of this Law[52] declares the law of the common nationality of the cohabitants to be applicable and, in the absence thereof, the law of their common domicile. In the Yugoslavia successor states of Bosnia-Herzegovina and Serbia the original Yugoslav regulation continues to apply, whereas the legislators in Croatia,[53] Macedonia,[54] and Slovenia[55] have adopted this norm, while Kosovo,[56] North Macedonia[57] and Montenegro[58] in their more recent Private International Law Acts have declared the conflict-of-law rules of marriage to be

[45] Maarit Jänterä-Jareborg, Property relations in *de facto* unions: Finding ways of promoting legal certainty and fairness in Europe, in Helmut Grothe/Peter Mankowski /Frederick Rieländer (eds), Europäisches und internationales Privatrecht: Festschrift für Christian von Bar zum 70. Geburtstag, C.H. Beck, Munich 2022, 149-156 (153).

[46] Art. 23(2)(b) and Art. 65(3)(d) EU Succession Regulation No. 650/2012.

[47] Dieter Martiny, De facto cohabitation in European private international law – Diversity rather than uniformity, in: Marie Linton/Mosa Sayed (eds), Festskrift till Maarit Jänterä-Jareborg, Iustus Förlag, Uppsala 2022, 217-230 (223-225).

[48] Marlene Brosch/Cristina Mariottini, The European model of "couple" within the dissolution of marriage, in: Elsa Bernard/Marie Cresp/Marion Ho-Dac (eds), La famille dans l'ordre juridique de l'Union européenne, Brussels Bruylant 2020, 175-194 (193).

[49] ECJ 6 June 2019 – C-361/2018 Weil v. Gulácsi and ECJ 19 December 2019 - C-460/18 P *HK v. European Commission and Council of the European Union*. But see Janeen Carruthers, De facto cohabitation: the international private law Dimension, Edinburgh Law Review, 2008, 51-76 (58-59): Relations akin to marriage should be excluded from the Brussels I regime.

[50] Gray v. Hurley (2019) EWHC 1636 (QB) para. 188-190.

[51] Claudia Mayer, Die nichteheliche Paarbeziehung im Internationalen Privatrecht, in: Christine Budzikiewcz/Bettina Heiderhoff/Frank Klinkhammer/Kerstin Niethammer-Jürgens (eds), Europa als Taktgeber für das Internationale Familienrecht, Baden-Baden, Nomos, 2022, 141-160.

[52] Art. 39 Act Concerning the Resolution of Conflict of Laws with the Provisions of Other Countries in Certain Matters 1982.

[53] Art. 39 Act Concerning the Resolution of Conflict of Laws with the Provisions of Other Countries in Certain Matters 1991.

[54] Art. 45 Private International Law Act 2007.

[55] Art. 41 Private International Law and Procedure Act of 1999.

[56] Artt. 34-39 Private International Law Act 2022.

[57] Artt. 32-27 Private International Law Act 2020.

[58] Artt. 81-84 Private International Law Act 2023.

applicable to *de facto* partnerships.[59] Only a few other jurisdictions provide for specific conflict-of-law rules for non-formalized relationships. Hungarian law, for example, also uses the common nationality of the partners as a connecting factor, their common habitual residence in the absence of a common nationality and, as a last resort, the *lex fori* has been declared to be applicable, while cohabitants can choose the law that is applicable to their property relations in the same way as spouses.[60] In contrast, the law of Macau refers to the law of the common habitual residence of the cohabitants and in the absence thereof to the law of the place most closely connected thereto,[61] whereas the law of Argentina[62] determines that the cohabitation union is governed by the law of the state where it is intended to be alleged. According to Italian law,[63] too, the law of the principal place of residence is applicable unless the cohabitants do not have the same nationality. In that case, this law also applies.

Surprisingly, not all jurisdictions that have legislated on *de facto* partnerships have also enacted conflict-of-law rules. For example, of the fourteen European countries with (full or partial) legislation on *de facto* relationships, only Croatia,[64] Hungary,[65] Slovenia[66] and Sweden[67] have conflict rules, while Ireland[68] and Scotland,[69] in line with their common law tradition, provide for rules on jurisdiction in the case of disputes with a cross-border element. This means that once jurisdiction has been determined, the *lex fori* applies.[70] This approach is followed by Australia[71] and New Zealand,[72] and to some extent by the US Uniform Act regarding the Cohabitants' Economic Remedies. In addition to the substantive framework for resolving economic disputes between non-marital cohabitants at the end of their cohabitation, whether

[59] Serbia will follow this line once the Draft New Private International Law Act 2014 will be adopted (Arts. 79-85, 87/1).
[60] Sec. 35 and 36 in conjunction with Sec. 28 Act on Private International Law 2018.
[61] Art. 58 Civil Code 1999.
[62] Art. 2628 Commercial and Civil Code 2014. For Scottish law after the enactment of the 2006 Act on Cohabitation it has been proposed to determine the proper law of the cohabitation (the law of closest connection). This would allow the court to find the "centre of gravity" of the parties' relationship. Janeen Carruthers, De facto cohabitation: the international private law Dimension, Edinburgh Law Review, 2008, 51-76 (69).

[63] Art. 30bis Private International Law Act.
[64] Art. 39 Act Concerning the Resolution of Conflict of Laws with the Provisions of Other Countries in Certain Matters 1991.
[65] Sec. 35 et seq. Act XXVIII of 2017 on Private International Law.
[66] Art. 41 Private International Law and Procedure Act of 1999.
[67] Act (1990:272) on International Questions Concerning the Property Relations of Spouses and Cohabitees.

[68] Art. 196 (3) Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.
[69] The 2006 Act lacks rules when applying its provisions. This will change once the proposals of the Scottish Law Commission will be adopted. See Section 28(9) Cohabitants (Financial Provision) Bill, Scottish Law Commission, Aspects of Family Law: Discussion Paper on Cohabitation (DP No. 170) < https://www.scotlawcom.gov.uk/news/areview-of-cohabitation-law-in-scotland/ > (accessed 24 April 2023). Until then it has been proposed to determine the proper law of the cohabitation (the law of closest connection). This would allow the court to find the "centre of gravity" of the parties' relationship. Janeen Carruthers, De facto cohabitation: the international private law Dimension, Edinburgh Law Review, 2008, 51-76 (58, 69).

[70] Janeen Carruthers, De facto cohabitation: the international private law Dimension, Edinburgh Law Review, 2008, 51-76 (67-68).
[71] Section 90SD Family Law Act 1975 as amended by the Family Law Act 2009.
[72] Section 22 et. seq. Property (Relationships) Act 1976. Bill Atkin, The Challenge of Unmarried Cohabitation - The New Zealand Response, Victoria University of Wellington Legal Research Papers, 2016, http://ssrn.com/abstract=2545170.

the end is brought about by separation or by death, this uniform law contains a rule which provides that the *lex fori* of the State which enacted the law shall apply, whereas the validity, enforceability, interpretation and construction of a cohabitation agreement shall be governed by the law of the jurisdiction designated in the agreement if such a designation is valid under another law of that State or, in the absence of an effective designation, by the law of the State which enacted the law.[73] New Mexico is the first state to adopt the Act and it will enter into force in July 2023.[74]

There is also the question whether the development of additional conflict-of-law rules is not much easier when there is a clear concept in national substantive law.[75] Would the absence of a corresponding substantive law not be a leap into the void? [76] The fact that in such a situation there is logically no corresponding conflict rule cannot be confirmed for all legal systems.

For example, for Germany, which has not regulated non-formalized relationships, at least in the legal literature, proposals have been made as to how a conflict-of-law approach should look like. It has been proffered that the legal effects of the *de facto* relationship of two partners outside marriage should be governed by the same rules as those applicable to spouses, which means that the partners should first be able to choose the applicable law. If the partners have not made a choice of law, the following rules will apply: the law of the State in which both partners have their habitual residence; if not, the law of the State in which both partners had their last habitual residence during the cohabitation, if one of them still has his or her habitual residence there; if not, the law of the State of which both partners are nationals; if not, the law of the State with which the partners are most closely connected by other means.[77] These proposals have not yet been taken up by the legislature, but they are fully in line with the more modern approach of bringing the conflict-of-law rules for *de facto* partnerships into line with those for marriage and registered partnerships. If the German courts are confronted with a cross-border *de facto* relationship, the proposed approach could be applied.

This brief comparative survey, which certainly does not cover all the legal systems with conflict rules on which we are focusing, confirms the picture of great diversity already hinted at, not only as regards the choice of objective and subjective connecting factors, but also and above all as regards the absence of any conflict rules on *de facto* partnerships.[78]

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[73] See footnote … Section 5.

[74] House Bill 273. https://trackbill.com/bill/new-mexico-house-bill-273-uniform-cohabitants-econ-remedies-act/2350575/ (accessed 24 April 2023).

[75] Dieter Martiny, *De facto* cohabitation in European private international law – Diversity rather than uniformity, in: Marie Linton/Mosa Sayed (eds) Festskrift till Maarit Jänterä-Jareborg, Iustus Förlag, Uppsala 2022, 217-230 (229).

[76] Urs Peter Gruber, Überlegungen zur Reform des Kollisionsrechts der eingetragenen Lebenspartnerschaft und anderer Lebensgemeinschaften, IPRax 2021, 39-52 (45).

[77] Urs Peter Gruber, Überlegungen zur Reform des Kollisionsrechts der eingetragenen Lebenspartnerschaft und anderer Lebensgemeinschaften, IPRax 2021, 39-52 (52).

[78] Janeen Carruthers, De facto cohabitation: the international private law dimension, Edinburgh Law Review, 2008, 51-76 (69) proposes to apply a flexible connecting factor, namely the proper law of the cohabitation. In the absence

4.1.3. The most appropriate conflict rule

In the light of the above synthesis, there are two issues to be decided regarding the most appropriate conflict-of-law rule for *de facto* relationships. The first is how to classify the relationship, and the second is how to identify the connecting factors which satisfy the requirement to apply the law which is most closely connected.

In this author's view, the approach of classifying *de facto* partnerships as a (non-)contractual relationship fails to recognize the true nature of such a relationship in which two adults live or have lived together as a couple in an enduring relationship.[79] The partners stand up for each other, they feel responsible for each other in good times and bad, they support each other financially and morally, and they usually have an affective relationship with each other. Spouses and registered partners feel such a strong personal bond to the same extent.[80] These circumstances cannot be captured by a purely contractual characterization of the relationship.[81] As a result, and as the brief comparative overview has shown, the most recent legislation and proposals rightly qualify the *de facto* relationship as a family relationship and treat it similar to a marriage or a registered partnership for conflict-of-law purposes. More importantly, and given the focus of this contribution, the European Court of Human Rights[82] has granted family life rights to partners of an unmarried relationship as long as they show some functional attributes, such as long-term cohabitation and the subsistence of the relationship. The same protection has been advocated for the Inter-American Human Rights regime, by stating that 'trans families, single-parent households, and *de facto* couples exist in parallel to married families. All these

of regulation by the parties of their own affairs in a contract, their rights in immoveable property should be determined by the lex situs; and if the parties spent, say, the last five years cohabiting in State X, the law of that State should (in the absence of private regulation) be presumed to govern their rights in moveable property.

[79] This is the definition of Principle 5:1(1) of the Principles on European Family Law Regarding Property, Maintenance and Succession Rights of Couples in a *de facto* Union which corresponds to the common core of 29 European jurisdictions surveyed by the Commission on European Family Law. Katharina Boele-Woelki/Frédérique Ferrand/Cristina González Beilfuss/Maarit Jänterä-Jareborg/Nigel Lowe/Dieter Martiny/VelinaTodorova, Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in *de facto* Unions, European Family Law Series, No. 46, 2019.

[80] John Eekelaar/Mavis Maclean, Marriage and the Moral Bases of Personal Relationships, Journal of Law and Society 2004, 510-538. The authors examined an empirical study conducted by the Oxford Centre for Family Law and Policy about the ways people in married and unmarried relationships understood the nature of their personal obligations. Their evidence showed that there were 'many variations between those who are married, and many similarities with those who are not.' Cutting across them all, though, they found a range of values that were held in common, and which had a substantial effect on generating ideas of personal obligation.

[81] Despite the wording of Art. 1(1)(b)(c) of the Regulation this view is taken by a few German legal scholars like Karsten Thorn, in: Grüneberg, BGB, 81st edition 2022, Art. 17b EGBGB Rn. 13 and Claudia Mayer, Die nichteheliche Paarbeziehung im Internationalen Privatrecht, in: Christine Budzikiewcz/Bettina Heiderhoff/Frank Klinkhammer/Kerstin Niethammer-Jürgens (eds), Europa als Taktgeber für das Internationale Familienrecht, Nomos, Baden-Baden, 2022, 141-160.

[82] Serife Yigit v. Turkey, no. 3976/05, (2011; Schalk & Kopf v. Austria no. 30141/04 (2010).

groups are part of the family landscape of the region.' [83] Essentially it is therefore only consistent and fair that, in addition to the existing substantive rules, which consider the *de facto* union as a family law relationship and declare – where available - a family court to be competent for any disputes between the partners, the protection of human rights should also be taken into account at the level of conflict of laws, in particular when answering the first question as to the classification of the legal nature of the relationship.

Instead of the traditional approach of using the common nationality of the partners as a connecting factor,[84] it has been rightly suggested that the Hague Conventions and, in addition for Europe, the basic approach of the European Private International Law Regulations on family matters should be followed, starting with the common habitual residence of the partners.[85] Above and beyond this, party autonomy has gained in importance and has become a constant element of international family law. Paradigmatically, it has been recognized that it has a distinct, restrictive character, reflecting the delicate balance between respect for the individuals' free will, the juxtaposition of legal and societal interests in family law, and the need to protect the interests of specific parties in international family law.[86] As a result, the choice of the applicable law option by *de facto* partners[87] should be placed at the beginning of a corresponding conflict rule. Such a choice made in an agreement between partners should be recognized, as should a subsequent choice made at the time of separation or in the event of a dispute over property or maintenance. With regard to appropriate restrictions on the subjective choice of applicable law, the law of the common habitual residence of the partners, the law of their common nationality and the law of the habitual residence of one of the partners could alternatively be chosen, provided that the cohabitation of the partners coincides with the latter law. Both the equalization of formalized and non-formalized relationships and the combination of subjective and objective connecting factors in such a conflict-of-law approach meet the established human rights requirements for international family law, of which cross-border *de facto* partnerships are a part.

4.2. *Gender identity of persons crossing borders*

[83] Macarena Saez, In the Right Direction: Family Diversity in the Inter-American System of Human Rights, North Carolina Journal of International Law 2019, 317-352 (351-352).
[84] Anatolyi Pashynskyi, Property Relations Between Unmarried Cohabitants in International Family Law, Teise (155) 2020, 154-162 (159).
[85] Dieter Martiny, De facto cohabitation in European private international law – Diversity rather than uniformity, in: Marie Linton/Mosa Sayed (eds) Festskrift till Maarit Jänterä-Jareborg, Iustus Förlag, Uppsala 2022, 217-230 (228).
[86] Jacqueline Gray, Party Autonomy in EU Private International Law, Choice of Court and Choice of Law in Family Matters and Succession, European Family Law Series No. 49, 2021, 318.
[87] Also proposed by Dieter Martiny, De facto cohabitation in European private international law – Diversity rather than uniformity, in: Marie Linton/Mosa Sayed (eds) Festskrift till Maarit Jänterä-Jareborg, Iustus Förlag, Uppsala 2022, 217-230 (228); Janeen Carruthers, De facto cohabitation: the international private law Dimension, Edinburgh Law Review, 2008, 51-76 (69) and Kirsten Schümann, Nichteheliche Lebensgemeinschaften und ihre Einordnung im Internationalen Privatrecht, Europäische Hochschulschriften Reihe II Rechtswissenschaften, Peter Lang 2001, 156.

The second part of applying the human rights context to international family law is devoted to gender identity. First of all, terminological issues will be clarified. In recent decades, sexual and gender diversity has developed its own vocabulary, which is constantly evolving and changing. This is a desirable development: it gives people a precise language to express individual experiences and makes it easier for them to share and network with others. The key acronym used internationally to describe sexual and gender diversity is LGBTIQ. The L, G and B stand for lesbian, gay and bisexual and describe different sexual orientations. The T and I stand for trans and intersex, which are terms used to describe gender diversity. The last letter, Q, stands for queer. The acronym is a self-designation that is not always used consistently: Sometimes additional letters are added to emphasize individual aspects, such as asexuality, and sometimes a + is added to the end to symbolize openness to all forms of sexual and gender diversity. The groups behind each letter are not strictly separate: a person can be both trans and lesbian, or intersex and bisexual. There are also people who do not identify as either of these two sexes and whose gender is non-binary. Furthermore, there are people who are neither (only) men nor (only) women, but both or neither. They are referred to as non-binary. This is a generic term for a variety of gender experiences that can be filled by more specific terms such as bigender or genderfluid.[88]

4.2.1. Comparative overview of substantive law

The once widespread view that every child is born with a distinct and unchangeable gender limited to two options is scientifically outdated. In modern societies, the lives and concerns of intersex and non-binary people have received increased attention. A person's identity is a defining characteristic of their personality, and the right to gender identity is a fundamental and intimate aspect of private life. It falls within the scope of human rights. Moreover, gender is a matter of substantive civil status law, not a mere fact.[89] Since about a decade gender identity, particularly the question of the legal recognition of a non-binary gender, has been high on the agenda internationally, but also in many national jurisdictions.[90]

This is mainly due to international human rights standards, which require states to legally recognize a person's gender identity. The framework for fulfilling this obligation demands the removal of abusive requirements such as sterilization, medical intervention and divorce, and the provision of a quick, transparent and accessible process that is inclusive of all ages. To date, nine Council of Europe member states, for example, have opted for an approach based largely on self-determination, where the recognition of a person's gender identity is self-defined and

[88] Susanna Roßbach, Ein Regenbogen an Begriffen: Das Vokabular rund um sexuelle und geschlechtliche Vielfalt, Zeitschrift des Deutschen Juristinnenbundes 2023, 1-3.

[89] Anatol Dutta/Walter Pintens, Private International Law Aspects of Intersex, in: Jens Scherpe/Anatol Dutta/Tobias Helms (eds), The Legal Status of Intersex Persons, Intersentia 2018, 415-426 (415-419).

[90] Jens Scherpe/Anatol Dutta/Tobias Helms (eds), The Legal Status of Intersex Persons, Intersentia 2018. Marjolijn van den Brink, 'The Legitimate Aim of Harmonising Body and Soul', Changing Legal Gender: Family Life and Human Rights, in: Katharina Boele-Woelki/Angelika Fuchs (eds), Same-sex Relationships and Beyond, Gender Matters in the EU, European Family Law Series No. 42, Intersentia, 2017, 203-224.

not determined by anyone other than the individual.[91] At the global level, the implementation of the international standard has found expression in the Yogyakarta Principles which were developed by human rights experts in 2006 and complemented in 2017.[92] These Principles, although non-binding, contain 38 principles on sexual orientation and gender identity. Principles 3[93] and 31[94] state that everyone has the right to legal gender recognition which is seen as an expression of personal autonomy and self-determination. Outside Europe, in more than a dozen jurisdictions the recognition of a non-binary gender through legislation or court rulings, either for civil registration (birth certificates) or other identity documents, has taken place.[95]

In terms of European jurisdictions, the most recent comparative overview of gender identity registration is provided by the European Court of Human Rights which ruled on 31 January 2023 in the case of *Y v. France*[96] that the French authorities had not violated the applicant's right to respect for private life when they refused to replace the word "male" on the applicant's birth certificate with "neutral" or "intersex". The applicant, an intersex person, claimed that there was a discrepancy between his gender identity and his legal identity. The Court recognized that personal identity, including gender identity, falls within the scope of the right to respect for private life under Article 8 of the European Convention on Human Rights. However, it also recognized that the case concerned a topical issue, open to debate and controversy, on which democratic societies could differ widely. It found that the respondent State had a wide margin of appreciation in implementing its positive obligation to ensure effective respect for the applicant's private life. The Court emphasized the importance of safeguarding the principle of the inalienability of civil status, ensuring the reliability and consistency of civil status records and legal certainty as public interests in the general interest. The Court went on to say that the

[91] These are: Belgium (2018), Denmark (2014), Iceland (2014), Ireland (2015), Luxembourg (2018), Malta (2015), Norway (2016), Portugal (2019) and Switzerland (2021). See the Council of Europe's Thematic Report on Legal Gender Recognition in Europe 2022, 14-18, 23-27. https://rm.coe.int/thematic-report-on-legal-gender-recognition-in-europe-2022/1680a729b3 (accessed 27 April 2023). Finland adopted the Gender Recognition Act (2023) and Germany (*Entwurf eines Gesetzes über die Selbstbestimmung in Bezug auf den Geschlechtseintrag und zur Änderung weiterer Vorschriften* of 2 May 2023) will soon follow. Spain?

[92] The Yogyakarta Principles plus 10 (YP+10), https://yogyakartaprinciples.org (accessed 27 April 2023).

[93] 'Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.'

[94] 'Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.'

[95] In alphabetical order these are currently: Argentina (2021), Australia (2003), Brazil (2022), Canada (2017), Chile (2022), India (2014), Nepal (2007), New Zealand (2012), Pakistan (2009), Taiwan (2018), Thailand (2004), the United States (2022) and Uruguay (2018). See for references to the various jurisdictions https://en.wikipedia.org/wiki/Legal_recognition_of_non-binary_gender (accessed 26 April 2023).

[96] Request 76888/17, with a dissenting opinion by judge Šimáčková. (accessed 26 April 2023).

fair balance required by Article 8 meant that intersex persons should be given the opportunity either to have their civil status omit any gender category or to change their assigned gender, but only if the assigned gender "does not correspond to their physical appearance and social behaviour". In this case, the Court rejected the applicant's request because he had a male appearance and was married.

The Court's extensive comparative law research covered 37 States Parties to the Convention other than France.[97] In 31 of these States it is not possible to opt for the inclusion of a gender marker other than 'male' or 'female' on the birth certificate and official documents,[98] whereas five countries – Austria (2018),[99] Germany (2018),[100] Iceland (2020),[101] the Netherlands (2018)[102] and Malta (2015)[103] - have opened up the possibility of obtaining references other than 'male' or 'female'. Meanwhile Scotland[104] with its Gender Recognition Reform Bill can be added to the list although, however, this was vetoed by the UK Government in January 2023 by preventing the Bill from receiving royal assent. In April 2023 the Scottish Government announced its intention to launch a judicial review of the UK Government's decision. The ECtHR also mentioned that the issue of non-binary gender recognition has recently been or is being debated at governmental or parliamentary level in several countries, including Belgium, Cyprus, Ireland, Norway and Spain,[105] whereas in Finland, too, the debate on a third gender continues after the adoption of the Gender Recognition Act,[106] which came into force on 3 April 2023.

[97] Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Northern Macedonia, Malta, the Netherlands, Norway, Poland, Portugal, the Republic of Moldova, the Slovak Republic, Romania, Serbia, Slovenia, Spain, Turkey, Ukraine and the United Kingdom (See note …No. 34).

[98] For Armenia it was noted that the birth certificate and subsequently the identification documents may, on the basis of a medical certificate, indicate "uncertain" as a gender (No. 35). The Court also referred to the decision of the UK Supreme Court of 15 December 2021 (R (on the application of Elan-Cane) (Appellant) v Secretary of State for the Home Department (Respondent), [2021] UKSC 56), which overturned the view of the Court of Appeal that a future positive obligation to recognize non-binary identity could arise from Articles 8 and 14 ECHR, having regard in particular to the wide margin of appreciation available to the State parties in the absence of consensus, the complexity and sensitivity of the issue, and the need to balance competing private and public interests (See note …No. 36).

[99] Intersex people can have the words 'various', 'inter' or 'open' entered or the sex removed from their birth certificate, which is the basis for identification documents such as passports and driving licences. Provisions?

[100] The Federal Constitutional Court ruled on 10 October 2017 (Order of the First Senate of 10 October 2017 - 1 BvR 2019/16 -, paras. 1-57) that the rejection of an intersex person's request to replace the female entry in the birth register with the entry "inter/diverse" constituted a violation of his or her rights to the protection of personality and protection against discrimination on the basis of sex. As a result, the Civil Status Act was amended in 2018, and the entry 'miscellaneous' can now be included in the birth register, at the request of the parents when the post-natal registration is carried out, or afterwards, at the request of the person concerned.

[101] It is possible to obtain 'neutral' on the birth certificate and 'X' on passports. Provisions?

[102] Several court decisions have allowed the substitution of the words "male" or "female" on the birth certificate of intersex persons with the words "gender cannot be established", which then allows for "X" instead of "M" or "F" on the passport. Provisions?

[103] "Undeclared" can be entered on the birth certificate as a gender, and "X" can be entered on passports. Provisions?

[104] https://www.gov.scot/news/gender-recognition-reform-bill-passed/ (accessed 26 April 2023).

[105] See note .. No. 38.

[106] https://valtioneuvosto.fi/en/-/1271139/act-on-legal-recognition-of-gender-enters-into-force-on-3-april-2023 (accessed 26 April 2023).

The cursory comparative overview shows that legal gender recognition especially at the beginning of this century is growing. More and more legal systems provide for the possibility of changing gender markers, but there are wide variations in implementation. In the majority of legal systems, the possibility of changing gender markers is still limited to the binary gender system. A positive gender marker beyond the categories of "male" or "female" is legally possible in only a few countries. However, the 'third option' is one of the most recent achievements of civil status law. Despite the many jurisdictions not included in the comparative survey because they still uphold the binary system,[107] the emerging international trend is to move away from the traditional system of gender registration and to allow for a third gender to be registered as either X, non-binary or diverse.[108] In general, it is clear that the level of protection of legal gender recognition that has been achieved today cannot be considered to be set in stone. Like all human rights, it needs to be adapted to current needs and the legal framework needs to be adjusted in the light of impact assessments and the latest international trends.[109] In this context, target 16.9 of the UN Sustainable Development Goals 2030, which promises to realize the fundamental right of everyone to recognition as a person before the law, is also relevant, as legal identity is much broader than birth registration. It includes all aspects of one's personal status: age, name, gender, marital status, etc., and requires not only the registration of all major life events, but also their certification.[110] Hence further changes in substantive law are expected to create a legal gender status beyond the binary system, open to all people regardless of their gender characteristics, combined with a system of gender recognition based on self-determination.[111]

4.2.2. Comparative overview of the conflict of laws approaches

Given the significant differences between national legal systems, the question arises as to how to resolve cross-border gender identity situations.[112] In countries, for example, where the opposite sex of the spouses is still required at the time of marriage, the recognition of the gender identity of a trans person is still relevant. In the law of parentage, which is linked to the position of the father or mother and thus to gender, it also remains a relevant area of application. In

[107] In Hungary legal gender recognition has become explicitly impossible since 2020. According to the Hungarian civil status law, only the "sex at birth" can be entered in the civil status register. This is defined as the "biological sex defined by primary sex characteristics and chromosomes". Once registered, it can no longer be changed. This violates the ECHR. See *Rana v. Hungary* (application no. 40888/17, ECtHR), 16 July 2020.

[108] This has been confirmed by a study of the OECD in 2020, Over the Rainbow? The Road to LGBTI Inclusion https://www.oecd.org/social/over-the-rainbow-the-road-to-lgbti-inclusion-8d2fd1a8-en.htm. (accessed 27 April 2023).

[109] Council of Europe's Thematic Report on Legal Gender Recognition in Europe 2022, 14-18, 23-27. https://rm.coe.int/thematic-report-on-legal-gender-recognition-in-europe-2022/1680a729b3, 31. (accessed 27 April 2023).

[110] Sabine Courneloup/Jinske Verhellen, Peace, Justice and Strong Institutions, in: Ralf Michaels, Verónica Ruiz Abou-Nigm/Hans van Loon (eds), The Private Side of Transforming our World, UN Sustainable Development Goals 2030 and the Role of Private International Law, Intersentia 2021, 505-540 (508-510).

[111] Jens Scherpe, Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons, in: Jens Scherpe/Anatol Dutta/Tobias Helms (eds), The Legal Status of Intersex Persons, Intersentia 2018, 203-216 (216).

[112] Mirela Župan/Martina Drventić, Gender Issues in Private International Law, in: Gabriele Carapezza Figlia/Ljubinka Kovačević/Eleonor Kristoffersson (eds), Gender Perspectives in Private Law, Springer 2023, 1-28 which deals with gender-related private international law issues ranging from the personal consequences of marriage, in particular personal names, to the celebration and dissolution of marriage, child marriage, parenthood in transnational surrogacy, child abduction and domestic violence.

addition, the question of gender identity is also conceivable as the main issue of conflict of laws in the (initial) registration of civil status, for example in the case of the birth of intersex children with foreign nationality.

The first question to be answered is how to classify gender. Does it belong to the category of legal personality and capacity, or is it a specific category that is distinct therefrom? If the legal gender of a person is closely related to the category of 'legal personality and capacity' it is usually subjected to the conflict-of-laws rule, which uses a person's nationality as the connecting factor. It has been assumed that this approach is applied in most jurisdictions. However, is it appropriate to apply to a person's legal gender the law of the state of which that person is a national? This would mean that in jurisdictions that have a specific gender status for intersex persons, those rules would be limited to nationals of that country. To avoid this outcome, several authors have argued for a specific gender conflict rule.[113] They derive their proposals from a number of European jurisdictions.

Belgium (2007), Germany (2006) and the Netherlands (…)[114] have adopted specific legislation recognizing gender reassignment not only for nationals but also for foreigners who have their principal residence in that country. The approaches differ. In Belgium, the law of the country of which the applicant is a national applies. If the national law of the applicant does not exclude the registration of a new gender identity, but has no specific provisions, Belgian law applies. If there are specific requirements, the substantive requirements are governed by the national law, while the procedural requirements are governed by Belgian law. German law restricts the group of people who can apply for gender recognition to German nationals and to those foreign nationals whose national law does not allow them to obtain gender recognition, provided that the applicant has a strong connection with Germany. Under Dutch law, the *lex fori* always applies, at least to Dutch nationals, and foreign nationals must have a valid residence permit and have been domiciled in the Netherlands for at least one year.[115] For English law it has been reported that no specific nationality or residency requirements are posed by the Gender Recognition Act of 2004.[116]

4.2.3. The most appropriate conflict rule

Since parallels can be drawn from cross-border cases of foreign transgender or transsexual persons it has been proposed to subject the acquisition of an intersex legal gender status to the same conflict of law rules which govern the recognition of the preferred gender for transsexual

[113] Susanna Roßbach, Kollisionsrecht und Geschlecht im Wandel, Die internationalprivatrechtliche Behandlung der Geschlechtszugehörigkeit de lege lata und de lege ferenda, in: Konrad Duden (ed), IPR für eine bessere Welt, Vision – Realität – Irrweg?, Mohr Siebeck Tübingen 2021, 125-142. Anatol Dutta/Walter Pintens, Private International Law Aspects of Intersex, in: Jens Scherpe/Anatol Dutta/Tobias Helms (eds), The Legal Status of Intersex Persons, Intersentia 2018, 415-425. Susanne Lilian Gössl, From question of fact to question of law to question of private international law: the question whether a person is male, female, or … ?, Journal of Private International Law 2016, 261-280.

[114] Art. 1:28(3) BW.

[115] Marjolein van den Brink/Philipp Reuß/Jet Tigchelaar, Out of the Box? Domestic and Private International Law Asepcts of Gender Registration, A Comparative Analysis of Germany and the Netherlands, European Journal of Law Reform 2015, 282-293.

[116] Anatol Dutta/Walter Pintens, Private International Law Aspects of Intersex, in: Jens Scherpe/Anatol Dutta/Tobias Helms (eds), The Legal Status of Intersex Persons, Intersentia 2018, 415-425 (421-423).

or transgender persons.[117] Hence from a human rights perspective, which provides legal certainty and inclusiveness, a conflict-of-laws rule that covers all trans and intersex cases is preferable. There are two aspects to consider, the objective and the subjective connecting factors.[118]

Taking into account the impact of human rights on civil status law, it appears that the gender of a person should be determined by the law of the State in which he or she has his or her habitual residence.

Admittedly, one advantage of the principle of using nationality as a connecting factor is that it is an easy matter for civil registrars with limited decision-making and investigative powers to determine the applicable law. However, the consequence is that people are treated unequally. Adherence to the principle of nationality is therefore problematic. The substantive norms invoked by the conflict-of-law rules give effect to fundamental human rights and the rights of everyone, which do not apply to nationals but are universal. It would be paradoxical to reserve these rights for one's own nationals. A "two-tier law" for nationals and foreigners in an area so relevant to human rights is difficult to tolerate from a legal and socio-political point of view. Instead, it would be desirable to treat all persons equally. As a matter of principle, the law of the country of habitual residence should apply, with the possibility of choosing the law of the country of origin. In this way, access to a change of gender registration - and ultimately the enforcement of human rights – would not be hindered by unnecessary obstacles. As far as gender is concerned, this is the most convincing argument in favour of the law of habitual residence.[119]

5. Conclusions

What conclusions can be drawn from this search for the most appropriate conflict rules on *de facto* unions and gender identity in the context of the humanization of private international law? First, the impact of human rights on the substantive law of the respective areas is predominant. In particular in the area of legal gender recognition constitutional courts and regional human rights courts have often ruled that national law has violated the respective human rights framework. There are far fewer high-profile decisions that have changed the law in the area of *de facto* partnerships than in the area of gender identity. This is due to the strong national and international network of LGBTIQ groups, which does not exist among *de facto* partners, given the great diversity of *de facto* partnership forms. They are not organized. However, it is equally important for them to have their family relationship legally recognized as such and to enjoy the

[117] Anatol Dutta/Walter Pintens, Private International Law Aspects of Intersex, in: Jens Scherpe/Anatol Dutta/Tobias Helms (eds), The Legal Status of Intersex Persons, Intersentia 2018, 415-425 (423).

[118] In 2019, a draft of such a conflict-of-laws rule was proposed in a bill by the German Ministry of Justice and the Ministry of the Interior. The provision (Art. 7a) to be included in the German Introductory Act to Private International Law (EGBGB) reads: (1) The gender of a person is subject to the law of the state to which the person belongs. (2) For a change of gender, a person may choose the substantive law of the state in which he or she has his or her lawful and habitual residence at the time of the change. The same shall apply to a change of name under the conditions or in connection with the change of gender. (3) Declarations of choice under subsection 2 shall be publicly certified; they may also be certified or authenticated by the registrar. In the most recent *Entwurf eines Gesetzes über die Selbstbestimmung in Bezug auf den Geschlechtseintrag und zur Änderung weiterer Vorschriften* of 2 May 2023 this provision has been included.

[119] Convincingly argued by Susanna Roßbach, Kollisionsrecht und Geschlecht im Wandel, Die internationalprivatrechtliche Behandlung der Geschlechtszugehörigkeit de lege lata und de lege ferenda, in: Konrad Duden (ed), IPR für eine bessere Welt, Vision – Realität – Irrweg?, Mohr Siebeck Tübingen 2021, 125-142 (139-142).

protection of family law. In most cases, this protection is limited to the substantive law of the State in which they live. However, when national borders are crossed by a change of habitual residence, the family law qualification of their relationship is equally important. It leads to the application of family law principles which have developed under the influence of the Hague Conventions on international family law.

For both areas - *de facto* partnership and gender identity - the habitual residence of the persons concerned has been proposed as the predominant and decisive connecting factor. This is not surprising for *de facto* partnerships, as it puts this relationship in the same category as marriage and registered partnerships. It is consistent from a human rights perspective. The subjection of gender identity to the law of habitual residence is revolutionary in nature, as these issues have traditionally been thought of in terms of personal status, which is usually governed by the law of the country of origin. Here, the human rights influence has the effect that all persons are treated equally, regardless of their nationality. Since party autonomy has gained importance in international family law, it should also play a role in *de facto* partnerships and this should be equal to what is possible for spouses and registered partners. The same applies to issues of gender identity, when the person concerned might obtain a more favourable result under their national law than under the law of the habitual residence. The human rights framework is thus not limited - as doubted above[120] - to the definition of principles, but also specifies the selection of relevant connecting factors and prescribes these for the norm-maker.

In conclusion, the humanization of private international law has taken place, but the ultimate goal of equality for all, self-determination for all and the recognition of family forms other than marriage and registered partnerships has not been achieved everywhere in the world. Private international law is called upon to fill the gaps.

[120] See under 3.

GLOBAL PRIVATE INTERNATIONAL LAW IN LIGHT OF THE UN SUSTAINABLE DEVELOPMENT GOALS 2030

Outline

Hans van Loon

On 25 September 2015 the General Assembly of the United Nations unanimously adopted the Resolution *"Transforming our World: the 2030 Agenda for Sustainable Development",* following the adoption of this Agenda by the 2015 UN Summit of World Leaders. On 1 January 2016 the Agenda, "*a plan of action for people, planet and prosperity*", with 17 Sustainable Development Goals came into force. So, this year, 2023, marks the halfway point to achieving the Goals, and in September the General Assembly will assess where the world stands in relation to their realization, and the challenges ahead.

The SDGs go beyond the preceding Millennium Goals which covered the period 2000 – 2015. Those Goals centered on issues of special importance to developing countries, including extreme poverty, with some success. By contrast, the SDGs have a dual nature: they continue to pursue the goal of development, but they also aim at achieving sustainability – in the words of the Brundtland report (1987) "*meeting the needs of the present without compromising the ability of future generations to meet their own needs* ".

This gives the 2030 Agenda a more universal character, as sustainability is an all-encompassing issue affecting both the "Global South" and the "Global North". But the dual nature of the SDGs also conceals a dilemma: how can economic growth, as a condition to eradicate poverty, ending hunger, providing water and sanitation, improving education and health, among many other aims, be reconciled with respect for ecosystems and indeed for Mother Earth? This is, in fact, a general policy dilemma, also facing, e.g., the EU Green Deal and national policies.

It is becoming clearer by the day that rising global temperatures and loss of biodiversity *affect* us all. Sustainability is in fact the overarching concern. But preserving the planet also appeals to the *responsibility* of us all. So, Agenda 2030 not only appeals to public institutions, States, and "…international institutions, local authorities, indigenous peoples [– whose relationship to nature can provide inspiration also for rethinking fundamental notions of law – but also to], civil society, business and the private sector, the scientific and academic community – and all people" (par 52).

The SDGs are based on a goal-setting strategy, not on the traditional rule-making approach. Nevertheless, in many respects they depend for their attainment on the role, and indeed the *rule* of law. What is striking, however, is that while the Agenda refers to instruments and institutions in the field of *public* international law, there is a complete absence of any reference to the role of *private* international law. Yet, most transactions, investments, destruction of the environment, GHG emissions, are a matter of private activity, governed primarily by private and commercial law, and, in cross-border situations, private international law.

Where the SDGs call for "the elimination of forced marriage" (target 5.3), urge "the transfer of environmentally sound technologies to developing countries on favourable terms… as mutually agreed" (target 17.7), insist on the immediate and effective… eradication of forced labour, 'modern slavery', and child trafficking" (targets 8.7, 16.2), or appeal to "ensure equal access to justice for all" (target 16.3), private relationships and private law, and in the cross-border cases private international law, are at stake.

So, what then is the role and potential role of private international law in achieving the SDGs? Well, first, despite the lack of explicit reference to private international law, the SDGs remind us, both public and private international lawyers, that it is not simply a technical, formal discipline with no policy or political relevance and no regulatory role or potential. No, private international law plays a significant part as an instrument of global governance, and potentially even more so.

The governance role of private international law has become manifest at the regional level. In the European Union, private international law has become a strategy to achieve the aims of the Union. The TFEU, for example, provides, as a public law norm (art 174), that there should be a high level of environmental protection. The Brussels and Rome II regulations, both instruments on private international law, give nuts and bolts to this norm. They facilitate access to justice to victims of environmental damage, by offering them customized choices both regarding the court and the applicable law in environmental disputes.

In the context of the protection of human rights, the European Court of Human Rights now often considers the role of private international law in its interpretation of the European Convention on Human Rights. The same goes for the Inter-American Court of Human Rights.

At the global level, however, public international law and private international law continue to a large extent to "live apart together". Yet, more awareness of how they complement each other would reinforce the role of law in the attainment of the SDGs. Let us take again the example of the environment and climate change which are core topics of the Agenda 2030.

The UN Convention on the Law of the Sea has been described as the "international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources" (Agenda 21, 17.1, Annex II Res. 1 of the 1992 Rio Conference Report). However, its dispute settlement procedures are essentially written for States, and only exceptionally open to entities other than States Parties. Nor does the Convention provide standing, access to justice and remedies to, for example, local communities suffering harm on the marine space caused by foreign companies (cf. art. 235 (2), (3)). Yet, enabling such communities to act before the courts – both local courts and the ITLOS – could contribute, bottom-up, to reaching UNCLOS' aims.

Similar remarks can be made regarding the 1992 Convention on Biodiversity (CBD) and the UNFCCC, the Rio Climate Change Treaty. In contrast to UNCLOS, the CBD expressly recognizes the presence of local communities and calls on States to "support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced" (CBD, art. 10 (d)). But the Convention does *not* provide a mechanism for such action. And neither the Rio Climate Change Treaty nor the Paris Agreement provides for civil or administrative litigation mechanisms with remedies for citizens.

Despite the lack of such litigation opportunities for individuals in the treaties, in practice, private parties, often through NGOs, have succeeded in using private law and private international law to assert their rights in environmental and climate change cases. Recent examples include the UK *Vedanta v. Lungowe*, the Dutch *Urgenda* and *Milieudefensie v Shell* cases and the ongoing German case of *Lliuya v. RWE*. On the other hand, environmental considerations played only a minor role in the negotiations on the 2019 Hague Convention on the enforcement of foreign judgments.

So, it is fair to say that there remains a need for a comprehensive global private international law framework on environmental damage, with rules on judicial jurisdiction, applicable law,

enforcement of judgments, and cooperation. There is no shortage of precedents and preparatory work. But what is needed is a vision and a sense of urgency. The SDGs are a source of inspiration for both.

The SDGs also invite us to take a fresh look at party autonomy, the possibility for private actors in cross border situations to agree on the way to settle their disputes by choosing the court or arbitral tribunal and the applicable law. Party autonomy is a fundamental achievement of private international law. As we saw, it may assist victims of environmental harm. More broadly, party autonomy facilitates international trade and investment. However, blind deference to party autonomy, for example in foreign investment, may contribute *de facto* to a permissive legal setting where human right violations and damage to the environment may occur in the host country.

Lawyers, including corporate lawyers, will need to become increasingly aware of such negative externalities of their contractual work. Private international law scholarship will need to look deeper into how traditional corrective mechanisms such as mandatory rules overriding parties' choices or limiting the impact of such choices through public policy, should be better articulated or refined to help prevent or repair harm to people and planet. At an even deeper level, the SDGs invite us to review the concept of party autonomy itself, including systemic exceptions made to it, such as for consumers.

In conclusion, although the drafters of the Agenda 2030 may have underestimated the role of private international law in achieving the Sustainable Development Goals, a closer look at the SDGs reveals the role it plays beneath the surface, and the potential it has, to play an even more important role. This calls for greater awareness, among practitioners and academics alike, of the practical impact of private international law on the achievement of the SDGs and invites a more sensitive mind-set to its regulatory effects. And it also calls for creative legal thinking to make private international law even more "fit for purpose" in addressing the enormous global challenges before us and ahead.