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THE IMPACT OF HUMAN RIGHTS ON APPLICATION OF PUBLIC POLICY CLAUSES IN PRIVATE INTERNATIONAL LAW

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LIST OF ABBREVIATIONS

Charter of Fundamental Rights of the EU (EUChFR)

European Court of Human Rights (ECtHR)

European Court of Justice (ECJ)

European Convention on Human Rights (ECHR)

European Enforcement Order (EEO)

European Center for Law and Justice (ECLJ)

The American Convention on Human Rights (ACHR)

Treaty on the Functioning of the European Union (TFEU)

Universal Declaration of Human Rights (UDHR)

INTRODUCTION

Problem of research.

Human rights developed in a powerful tool, which has an increasing influence on legal reality. The application of human right by its nature has no boundaries, so the involvement of foreign element and difference of the world's legal systems gave rise to private international law rules. In its turn, the private international law tends to a balance of private and public interests by introducing a *public ordre clause*.

The application of public policy clauses in a private international law could not avoid interference with the human rights, which has been proven to be a backbone of national legal orders. However, an involvement of a public order exception faced numerous critic as a restriction to the free circulation of judgments, especially within EU, and unpredictable instrument interpreted on a case by case basis. Consequently, public policy clauses received a limited scope of application in European legal instruments and finally abolition of *exequatur* procedure in the secondary legislation, which is one of the key safeguards that public policy poses.

Taking into account the real cases when public policy was applied, the significant positive role of the last in human rights protection could be detected regarding the right to a fair trial as well as the influence of the human right' judicial interpretation towards a progressive disappearance of the public policy exception.

A separate attention should be given to public policy in family matters and the right to respect for private and family life, where crucial changes took place in recent decades. Recognition of registered relationships and same-sex marriages in EU private international law constitutes groundbreaking debates. Another actual issue is an implementation of the principle of mutual recognition in civil and commercial matters, that becomes a first chapter in transforming public policy clauses into commonly recognized within EU "minimum procedural standards".

In this light, the relevant questions are addressed in the research: Whether human rights limits the expression of state sovereignty (public policy) or are the ground for public policy? How differs the application of public policy clauses if human rights themselves are viewed as public policy? What are the limitations on the influence of the right to respect for private and family life on the application the public policy regarding the registered

relationships and same-sex marriages? Does a country, family life' vision of which is traditional, may use public policy clauses as a ground for "ignoring behavior" regarding the family status of those who are in "nontraditional" registered partnership? How human rights impact have changed European public policy?

Relevance of the final thesis.

The addressed in the research questions are of particular need to be explored due to the continues changes in practical implementation of public policy clauses and human rights, emerging of European "public order" through ECJ case law and controversial practice of ECtHR. In addition, the lack of common conflict rules and absence of particular consensus among State Members on registered relationships appeared to press on national legal orders and public policy clauses respectively. Besides, the introduced minimum procedural standards in the framework of Brussels Regulations reduce the pre-examination stage of the case and European Enforcement Order established, basically, automatic enforcement in case of uncontested claims. However, the procedural rights, that supposed to be safeguarded with the exclusion of *exequatur* procedure seems to be not reasonably sacrificed in favor of the administrative sureness.

Accordingly, comparably new challenges in private international law need to be faced. As far as the issues are directly affecting the rights, a legal status of a person and reserved by a state the right of non-compliance a consistent analysis of the outcomes should be made in response to a new legal reality.

Scientific novelty and overview of the research on the selected topic.

The research logically combines the already existing research on public policy implementation in private international law with critical analysis of the groundbreaking, controversial and recent cases where human rights were involved, and provide a new disclose on the topic concern.

The novelty of the research is predetermined by the fact that, the existing research regarding the public policy clauses and the right to a fair trial in private international law mostly focused on their negative interpretation and there is notable lack of studies regarding the public policy and respect for private life in family matters. The research centralised a dual nature of human rights and public policy paradigm in private international law where on the one hand human rights could be viewed as public policy itself and restrictive application of the last often provokes the violation of human rights; on another hand developed

interpretation of international provisions aimed to protect human rights suppress state' reserved right to refuse.

Public policy clauses in a family matters become limited in their implementation because of mutual recognition and reciprocity systems established the Brussels Regulations. From some point the approach is favorable for judgment with a declaratory character, what is usual for foreign family law judgment. From another side, a position of ECtHR in the interpretation of Article 8, EU system of mutual recognition and reciprocity that tends to establish automatic recognition and does not refer to a common conflict rules appeared to press on national legal orders and public policy clauses respectively.

Besides, in the existing literature, recognition of registered relationships and same-sex marriages in EU private international law as well as its effect on public policy is poorly investigated. Most of the studies are regarding the legal status of a person within registered relationship and analyses of ECtHR case law in the general light of the right to marry and respect for private life. It is argued that *de facto* recognition of the registered partnerships and same-sex marriages in countries, where it is no relevant legal regime is exactly that possible "manifest breach" of essential legal order on which ECJ and ECtHR are referring in the case law. The case of *Orlandi and Others v. Italy,* (2017) serve as the example of practical implementation of the conclusions made regarding the impact of human right on an application of public policy clauses in family matters.

In addition the impact of the human right have changed European public policy a lot and those changes have a dual character as well. Public policy clauses are constantly evolving in simplified procedural standards losing by that original substantive function. It is important to detect consequences, which those changes caused in private international law.

Significance of research.

Thesis contributes and develops addressed questions and may be used in further legislation development of conflicts rules or in research of other scholars. Moreover, this study will add a further focus on the meaning of Article 6 (1) and Article 8 of ECHR in context of public policy clauses application for private international law. In addition, research will add to the debate on the human rights and public policy interrelation as well as pointed out "insufficiency" links in minimum procedural standards in European Enforcement Order.

The aim of research.

The research aimed to contribute to theoretical and practical analyses of both human rights as one of the main public policy definer within national legal orders and role of public policy clauses in safeguarding against violation of the human rights in private international law. Moreover, examination will be focused on analysis of existing jurisprudence in order to detect a restrictive application of public policy clauses in ECtHR and ECJ practice.

The objectives of research.

Taking into account the problem and aim of the research the objectives to be reached are:

1. To analyze groundbreaking and recent cases on human rights and public policy involvement in private international law in order to detect character of their intercorrelation.
2. To define the insufficient or problematic elements, which follows from human rights impact on public policy institution in private international law.

Research methodology.

In particular, in order to achieve the aim of the thesis, the following methods were used:

1. Analytical method invoked in the analysis of relevant law instruments and available theoretical sources.
2. Description method was used for presenting the relevant case law.
3. Systematic method was used throughout the thesis in order to analyze legal acts, groundbreaking and actual case law in relation to private international law and draw conclusions.
4. Critical method was used while the identification of a human rights impact in the chosen structural division.
5. Comparative method was used to determine differences in the interpretation of the public policy on national and international levels as well as in the context of the comparison of judicial practice.

Structure of research.

The thesis is structured into the following sections, arranged in a coherent and cohesive manner: introduction, body text, which is divided into the three chapters, each of which is divided into subchapters, conclusions, recommendations, bibliography, abstract, and summary.

The first chapter provides theoretical basis on public policy and human rights paradigm and concepts of public policy, and considers human rights as public policy in private international law. Apart of theoretical analysis, the chapter is filled with the inserts from judicial practice of different national legal system. A separate attention is given to a question of whether human rights limits the expression of state sovereignty (public policy) or are the ground for public policy as well as to interrelation of the right to fair trial and public policy clauses in practice of ECtHR and ECJ.

The second chapter considers public policy application in the family matters by taking into account recent changes imposed by Brussels Regulation. Rights to respect for private and family life especially interfere in a state right to refuse to recognize the foreign case decision as almost in all considered cases the right was acknowledged to dominate. So, case law of ECtHR and ECJ is investigated by using critical, comparative and systematic methods. Also, it includes the analyses of the problematic aspects of the recognition of registered relationships and same-sex marriages in EU private international law. Further, the research focuses on it effect on public policy and uses received conclusions to explore one recent case of ECtHR.

The third chapter of the thesis devoted to analyses of the human rights impact on European public policy in the context of the right to a fair trial and the free movement of judgments. Replacement of public policy clauses by minimum procedural standards and EEO is considered as one of the consequences of human rights impact on application of public policy. The thesis ends with conclusions and recommendations.

Defence statements.

Public policy clauses in private international law are proved to be complex and problematic institute. In response to it nature the human rights appears to suppress public policy clauses both in the instrumental and judicial domain. However, public policy clauses should be interpreted as a safeguarding level for the human right. The link between ECJ as well as ECtHR practice and introduced changes in public policy was established in many

aspects of human rights application. Consequently, *de facto* insufficient or problematic elements regarding public policy implementation in private international law should be fixed.

1. PUBLIC POLICY AND HUMAN RIGHTS PARADIGM

This chapter is devoted to the analysis of theoretical and legal categories of a human rights and public policy both as a separate and interrelated phenomenon. By detecting the human rights as a basis for national legal orders and effective international instrument it will be shown their vital impact on the private international law. A particular attention is given to the multidimensional nature of the public policy clauses. Description and systematic methods were used for presenting the relevant case law. Further research develops a different element of the correlation between human rights and public policy exceptions.

By providing an alternative disclosure on the moral purpose of the state and functional relation between the last an individual[1], human rights become a universal tool for modern development and imposed new standards in the application of public policy in private international law. Such global impact of human rights is explained by their universal nature and the fact that human rights are accumulating the common values of all human beings. The Preamble of the Universal Declaration of Human Rights (UDHR) underlines that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[2] This is one of the first and vital step in establishing international regime and a visible solution is "progressive denationalization of human rights" with gradual transformation of the "rights of citizens" to the "right of all human being".[3]

Secondly, they are established on both national and international level. Four generation of the human rights are fixed in binding treaties upon countries that have ratified them and help to define the objectives of development programmes.[4] A truly positive picture of human rights and human rights based approach in any area respectively, automatically is getting added value in topic to discuss. However, inherent nature of international human

[1] David Armstrong, Theo Farrell, Hélène Lambert, Handbook of International Relations (Thousand Oaks, CA: Sage, 2002), 170.

[2] "Universal Declaration of Human Rights, 10 December 1948, 217 A (III)," Refworld, http://www.refworld.org/docid/3ae6b3712c.html.

[3] Alice Edwards and Laura Waas, Nationality and Statelessness under International Law (UK: Cambridge University Press, 2014).

[4] Office of the UN High Commissioner for Human Rights, FAQ on a Human Rights-Based Approach to Development Cooperation (New York and Geneva, 2006), 22 http://www.ohchr.org/Documents/Publications/FAQen.pdf.

rights law developed through numerous international treaties has internal dependency due to the obligation of the state to provide adequate remedies, Armstrong argues that such situation limits sovereign right of states to act with wholly economical, security or other interest "in their own domain".[5] Taking into account the origin of public policy that is considered as a substitute and expression of sovereignty, and private international law that to be viewed as systematization of particular situation when the law of the *forum* collided with policies and doctrines of other nations[6], it seems that human rights could be a limitation to public policy as substitute of sovereignty. In such approach, using the public policy exception is the most flexible instrument that allow the national courts of the contracting parties to consider the impact of the human rights instruments on a case by case basis.[7]

For the sake of the argument, it should be mentioned that international human rights law is considering as different from the international legal regime itself. The whole modern international legal regime is far away from being universal and application of public policy in private international law is a direct argument for supporting that statement. In theory, it is possible to choose for applying the law of any state of the world, but in practice mechanism of national public policy plays decisive role. Consequently, human rights and public policy just could not avoid interference.

The private international law in its turn tends to a balance of private and public interests by introducing the *public ordre* clause[8] (in continental terminology, *ordre public),* that some scholars consider, could be a gateway to take on board human rights issues when applying private international law.[9] The classical example of the invocation of human rights in an issue of private international, for instance, in England is *Oppenheimer v. Cattermole*,[10] when English court refuse to recognize law Nazi era laws relating to the appropriation of Jewish property by establishing the connection between the law and morality "[...] a law of this sort constitutes so grave an infringement of human rights that the courts of this country

[5] David Armstrong et al., International Law and International Relations (Cambridge: Cambridge University Press, 2nd ed., 2012), 163, 177-178.

[6] David J. Bederman, Compulsory Pilotage, Public Policy, and the Early Private International Law of Torts, 64 Tul. L. Rev. 1033 (1989-1990), 1034-136.

[7] Kiestra Louwrens, The Impact of the European Convention on Human Rights on Private International Law. Den Haag: T.M.C. Asser Press, 2014. eBook Collection (EBSCOhost), EBSCOhost (accessed March 16, 2018) 201.

[8] O. N. Nagush, "Public Policy Clause in Private International Law", Journal of Odessa I. I. Mechnikov National University, 19, 4 (25) (2004): 85.

[9] Jan Oster, "Public policy and human rights," Journal of Private International Law 11, 3 (2015): 542.

[10] Kiestra Louwrens, 192.

ought to refuse to recognize it as a law at all."[11] The case is groundbreaking for that times and shows how powerfully human rights developed after the Second World War.

Of course, constitutional values should not be taken out from the public policy context. In particular, from European context where they were developed in Constitutional principles through the earliest case law of the ECJ and the principle of autonomy of the EC legal order is doubtless the most important among those principles.[12] The principle established in the famous *Costa v. E.N.E.L case*:[13] "'By contrast with ordinary international treaties, the EC Treaty has created its *own legal system*, which, on the entry into force of the Treaty, became *an integral part* of the legal systems of the Member States and which their courts are *bound* to apply." Back in 1964, it was hard to imagine how vital case will be for the human rights impact on national public policies and establishing, in particular, European legal order.

From mentioned above, the main question is arising: whether *human rights limits expression of state sovereignty (public policy) or are the ground for public policy?* In order to answer on the question the restrictive and affirmative application of public policy clauses should be researched as well as correlation of the last with human rights. It is vital as even though public policy is fully recognized institute of private international law aimed to regulate private relations of an international character,[14] public policy clauses are also self-judging clauses that allow states to reserve a right of non-compliance in cases, determined by states themselves.[15]

Therefore, public policy clauses are multidimensional in terms of the application in particular situation and in particular state. It should be noted that the European Court of Human Rights (ECtHR) as the oldest international court in the field of the protection of human rights cooperate with national judicial authorities and national supreme and

[11] *Oppenheimer v Cattermole* (1976) AC 249, 278.

[12] Roel de Lange, "The European Public Order, Constitutional Principles and Fundamental Rights," Erasmus Law Review 1, no. 1 (2007): 15.

[13] *Flaminio Costa v E.N.E.L.* (1964) Case 6/64, ECLI:EU:C:1964:66, 3.

[14] O. N. Nagush, 84.

[15] in circumstances that "will harm its sovereignty, security, public policy, or more generally, its essential interests" see Robyn Briese, "Djibouti v. France - Self-Judging Clauses before the International Court of Justice."(2009) Melb J Int'l L 10(1) as cited at Susan Rose-Ackerman and Benjamin Billa, 'Treaties and National Security' (2008) New York University Journal of International Law and Politics.

constitutional courts.[16] Thereby, the reviewed by ECtHR cases are direct insert into domestic legal orders.[17] In the further discussion some cases, in particular, on family matters as an example of a positive application of public policy clauses by ECtHR will be analyzed as well as cases where the restrictive application of clauses provoked a violation of human rights.

Summing up the mentioned above, it must be emphasized that:

a. human rights as a tool and private international law influencer developed with entering into force the ECHR and establishing of the ECtHR;

b. public policy clauses are self-judging clauses, which depend on state interpretation;

c. human rights could be a limitation to public policy as a substitute of sovereignty.

1.1 Concepts of Public Policy

This part of studies emphasizes the differences and similarities of national public policy approaches, which often depends on a legal system. The subchapter developed a distinction between narrow and broad approaches as well as "offensive" or "defensive" with references to practical examples. Besides, based on reviewed scholar' researches the notion of the public policy with the core theoretical and practical elements is introduced. Systematic and comparative methods were used to show the difference in terminology and case law regarding the topic concern. Finally, the relevant legal instrument of public policy application established on international, regional and partially on national levels will be pointed out.

Public policy is viewed to be a highly debated, controversial and complex subject because of the diverse approach developed and taken by national courts.[18] Nonetheless international jurisprudence tends to align concepts of public policy and imposed more universal and simplified for application notion, such is "European public order" or

[16] Jean-Paul Costa, "European Court of Human Rights and its recent Case-law," Texas International Law Journal 38, 3 (2003): 457.

[17]see further discussion of cases *Kuwait Airways Corporation v Iraqi Airways Company and others* (UKHL 2002); *Government of the United States of America v Montgomery* (No 2) (UKHL 2004); *Dieter Krombach v André Bamberski* (2000) Case C-7/98, ECR, I-01935; *Pellegrini v Italy,* no. 30882/96, 20 July 2001; *Schalk and Kopf v Austria*, (2011) no 30141/0, ECHR

[18] S. Sattar; "Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach," TDM 5 (2011): 2, www.transnational-dispute-management.com/article.asp?key=1759.

"transnational public policy" that reflects a generally and internationally accepted core principles, which thus are part of the public policy of the majority of states.[19] In order to understand the whole picture of human rights and public policy interrelation in international private law the origins of public policy clauses as well as their form should be analyzed.

By examining different sources some terminological differences in the topic concerned were found. For instance, the Continental approach used to apply term "*ordre public*" (ital. *ordine pubblico*, span. *orden publico*) where in the Anglo-American law of conflict of laws the term "*public policy*" is used.[20] For the purpose of the research, the mentioned above terminology will be used with the same meaning, otherwise use of a term in particular context will be specified.

Besides, it appears that there is no unified or universally accepted definition of public policy.[21] Indeed, the doctrines and laws which were developing for centuries could not be consolidated or unified in a few decades. However, it is not controversial that public policy is a safeguard to a basic moral principles and legal order of particular state or community as it is with European Union (EU).

It appears, that in some of European Community law instruments the concept of ordre public rarely, but used to denote the status of particular fundamental provisions, however the meaning of the use is distinguished sharply from the traditional context of a public security.[22] Jeroen Schokkenbroek states that ordre public in this sense "refers to the principles of a system of positive law, which in the context of that system have to be considered of special value".[23] According to the case *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others*, Article 101 (concerted practices that restrict competition) and Article 102 (abuse of dominant position) of the Treaty on the Functioning of the European

[19] Richard H. Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators," Journal of World Investment 4, 2 (April 2003): 239-250.

[20] Gerhart Husserl, "Public Policy and Ordre Public" 25 Va. L. Rev. (1938-1939), 37.

[21] Loukas Mistelis,"International Law Association – London Conference (2000) Committee on International Commercial Arbitration "Keeping the Unruly Horse in Control" or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards," International Law FORUM Du Droit International 2, 4 (November 2000): 248-253. Academic Search Complete, EBSCOhost (accessed April 14, 2018) 250.

[22] Roel de Lange, "The European Public Order, Constitutional Principles and Fundamental Rights," Erasmus Law Review 1, 1 (2007): 8.

[23] Roel de Lange, 10 as cited at J.G.C. Schokkenbroek, "De openbare orde als beperkingsgrond voor de vrijheid van meningsuiting" (Public order as a ground for limiting the freedom of expression)
NJCM-bulletin 11, 3 (1986): 4-5.

Union (TFEU) (formerly Articles 81 and 82 of the treaty establishing the European Community (EC Treaty) should be categorized as a matter of public policy: "Moreover, it should be recalled that Articles 81 EC and 82 EC are a matter of public policy which must be automatically applied by national courts."[24] The approach is definitely used to create a provisional basis for further development of a common European public order. The more precise discussion on the aspect of the fundamental provisions of EC in European public order will take place in the last section of the research.

One of the proposed definition reflects the main idea: "Naturally public policy differs according to the character and structure of the state or community to which it appertains, and covers those principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception."[25] In the same way, Murphy emphasized: "public policy and ordre public are judicially administered exceptions to the usual commitment of individual nations to recognize and give effect to foreign law in circumstances deemed appropriate by the *forum*."[26] To the definitions should be added as well note: "public policy clauses apply in the frameworks of both the recognition of foreign judgments and the determination of the applicable law."[27] The complex of mentioned above components is a core of term "public policy", so the final definition could be seen as principles and standards which apply in the frameworks of both the recognition of foreign judgments and the determination of the applicable law in individual state, according to which state reserves a right of non-compliance in exceptional cases determined by state itself.

International private law as a system of rules of conflict of laws is a field that historically familiar with public policy clauses, especially in family matters were often the *lex fori* states were in "conflict" with states following the *lex domicilii* and *lex patriae* principles.[28] Public policy in that cases was very effective instrument against possible negative outcomes.

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[24] *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* (2006) Joined cases C-295/04 to C-298/04, ECR, I-06619, 31.

[25] Loukas Mistelis as cited at Lew, Applicable Law in International Commercial Arbitration (Oceana 1978), 532.

[26] Kent Murphy, "The Traditional View of Public Policy and Ordre Public in Private International Law," Ga. J. Int'l & Comp. L., 11, 3 (1981), 591.

[27] Jan Oster, 544.

[28] F. A. De Villiers, "Private International Law and Public Policy: Two Recent Dutch Cases," Comp. & Int'l L.J. S. Afr., 3 (1970) 99.

Nonetheless, because of the lack of a common identification of the clauses and consolidate terminology time to time the restrictive scope of the Anglo-American legal systems was formally in clash with the wider Continental-European approach.[29] The tendency is changing with globalization and development of international law, yet it is still impossible to avoid diversity. On the one hand it is an obstacle to a mutual recognition and reciprocity system, on the other public policy clauses are functioning in individual state in the way they aimed.

From practical point of view public policy reflects its common law origin where it was recognized back in the fifteenth century and was constituting protection from something "illegal" or "immoral" and very soon was shaped in approach very similar to modern.[30] Regarding common law jurisprudence, *Phillips v Eyre* (1870)[31] is a well-known English decision on the conflict of laws in tort. As a result of consideration, Court has developed a "dual-actionability test" or "double actionability test".[32] From the decision: "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England [...] Secondly, the act must not have been justifiable by the law of the place where it was done."[33]

From narrow and restrictive approach of the judgment, it follows that in order to paste double actionability test, a legal regulation where an action took place should be, in particular case, identical to English. In a more recent case *Kuwait Airways Corpn v. Iraqi Airways Co*[34] the conception of public policy was interpreted with it direct correlation to international law obligation and Iraq's conduct in relation to Kuwait. It should be noted that in this case notions of private and public international law were reconsidered by the English Court, that makes the case even more groundbreaking.[35] The English Court refused to give effect to the resolution of an Iraqi government and decided that recognition or, moreover, enforcement of an Iraqi government resolution that affects Kuwait Airways Corporation' title would be manifestly

[29] F. A. De Villiers, 100-102.

[30] Kent Murphy, 592.

[31] *Phillips v Eyre* (1870) LR 6 QB 1 28.

[32] "PHILLIPS V EYRE: CEC 1870," Sawarb.Co.Uk, accessed 2018 March 1, http://swarb.co.uk/phillips-v-eyre-cec-1870/.

[33] Ibid.

[34] *Kuwait Airways Corporation v Iraqi Airways Company and others* [2002] UKHL 19.

[35] Martin Davies, "Kuwait Airways Corp v. Iraqi Airways Co," Melbourne Journal of International Law 2, 2 (2001): 525.

contrary to the public policy of English law and contrary to the UK's obligations under the UN Charter.[36] Similar, Dutch courts based on internationally accepted standards of jurisdiction are applying three criteria for recognition of the judgments: first, the foreign judge had jurisdiction to hear the case; second, there was a fair trial and this standard as it will be analyzed through a case law is highly developed not only in Netherlands; and, last, the foreign judgment does not violate Dutch public policy. [37]

On the contrary, public policy is not defined as such by Chinese law.[38] According to Chinese law protocols, public policy is associated with "social public interests"[39] and according to the Deputy Director of the Enforcement Bureau of the SPC constitutes: "[...] a concept that falls within the political domain rather than a term of law. […] For a foreign related or foreign arbitral award, social public interests are the same as the State's sovereign interests.", which due to the political regime is often a subject of manipulation.[40]

In case of USA public policy clauses are functioning in intrastate, interstate, and international contexts.[41] Such variety of application of clauses is occurred obviously due to the federal system of USA. Court in one state has invoked interstate public policy against recognition of judgment or vindication of rights acquired in another state.[42]

Multidimensional nature of public policy clauses provokes numerous theoretical discussions regarding the functional application depending on the branch of law among states, for instance, in case of the enforcement of arbitral awards and in family matters.[43] At the same

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[36] Ibid.

[37] Kiestra Louwrens, 241 as cited at Cf. N. Rosner, Cross-Border Recognition and Enforcement of Foreign Money Judgments in Civil and Commercial Matters, Doctoral Series, dissertation Groningen 2004, 31.

[38] McDermott Will and Emery, "Public policy" and the enforcement of foreign arbitration awards in China," LEXOLOGY, 2010, https://www.lexology.com/library/detail.aspx?g=f96e8738-5cfe-4e39-8d1d-7a6dbfbd4c21.

[39] McDermott Will & Emery.

[40] Ibid.

[41] Kent Murphy, The Traditional View of Public Policy and Ordre Public in Private International Law, 11 Ga. J. Int'l & Comp. L. 591 (1981), 594, also Kent Murphy, The Traditional View of Public Policy and Ordre Public in Private International Law, 11 Ga. J. Int'l & Comp. L. 591 (1981), O. N. Nagush, Public Policy Clause in Private International Law, Journal of Odessa I. I. Mechnikov National University, Law, Vol. 19, 4 (25).

[42] Ibid.

[43] the way in which national laws make reference to international public policy in case of the enforcement of arbitral awards see Mistelis, Loukas. "International Law Association – London Conference (2000) Committee on International Commercial Arbitration "Keeping the Unruly Horse in Control" or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards." International Law FORUM Du Droit International 2, no. 4 (November 2000): 248-253. Academic Search Complete, EBSCOhost (accessed April 14, 2018), 251.

time, there are debates on legal distinction of subject that is under objections of public policy.[44] The question is whether the enforcing court should involve public policy clause on the objections: to the original obligation that comes from the subject of the foreign judgment,[45] to the obligation that comes from the foreign judgment itself[46] or to the enforcement of the foreign judgment itself.[47] The answer to the question is in the legal language which was used in particular instrument that defines public policy exceptions.

Public clause may take the form of "offensive" or "defensive"[48] and there is developed distinction between *procedural* and *substantive* public policy.[49] Difference between offensive and defensive public policy clauses is in the scope of application, offensive clause is based on own law and aimed to ensure it application on domestic level, at the same time defensive works *vice versa* against the application of foreign law and this form dominates in the most of the modern private international law[50], it is exactly a clause that reserves a right of non-compliance in exceptional cases determined by state itself. As an example, Law of Ukraine "On Private International Law" includes provision:

> "The legal norm of a foreign state shall not apply in cases where its application leads to consequences manifestly incompatible with the basic legal order (public policy) of Ukraine. In such cases, the law which has the closest connection with the legal relationship should be applicable, and if it is impossible to define or apply such a law, the law of Ukraine should be applied. Failure to apply the law of a foreign state may not be based only on differences in legal, political or economic systems of the foreign state from legal, political or economic systems of Ukraine."[51]

Similar provision is in one of the main sources of the conflict of laws' rules, namely the Civil Code of the Republic of Lithuania:

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[44] Yeo Tiong Min, "Statute and Public Policy in Private International Law: Gambling Contracts and Foreign Judgments - Liao Eng Kiat v. Burswood Nominees Ltd.," Singapore Year Book of International Law 9 (2005): 133-134.

[45] Yeo Tiong Min.

[46] Ibid.

[47] Ibid.

[48] O. N. Nagush, 86 - 87.

[49] Jan Oster, 543.

[50] O. N. Nagush.

[51] "Law of Ukraine "On Private International Law," Відомості Верховної Ради України 32, 422 (2005) Revision on Junuary 3, 2017, Article 12 http://zakon3.rada.gov.ua/laws/show/2709-1.

> (1)The provisions of foreign law shall not be applied where the application thereof might be inconsistent with the public order established by the Constitution of the Republic of Lithuania and other laws. In such instances, the civil laws of the Republic of Lithuania shall apply. [...]
> (3) In accordance with this Code, the applicable foreign law may not be given effect where, in the light of all attendant circumstances of the case, it becomes evident that the foreign law concerned is clearly not pertinent to the case or its part, with the case in question being more closely connected with the law of another state. This provision shall not apply where the applicable law is determined by the agreement of the parties.[52]

In both Lithuania and Ukraine legislation the reference is made to the domestic legal system, when in jurisdictions such as England, France, Luxembourg or Italy mainly reference regarding the application of the public policy exception is made to EU law.[53]

Regarding the distinction between procedural and substantive public policy it should be mentioned that difference has functional character, and if case public policy preventing a breach of fundamental procedural standards of *forum*, then substantive public policy involved against a breach of substantive standards of enforcing state.[54] It was established, that the procedural public policy is much more often invoked and applied than substantial public policy.[55] Despite the fact, that substantive public policy as such is not very often used as its involving is limited by the prohibition of a review of the substance of the decision[56] there are some groundbreaking cases. The effect of the right to a fair trial on procedural public policy could be found in the case *Krombach v Bamberski*,[57] which was settled by the ECJ. In the first time, ECJ had to decide on an issue concerning the substantive public policy clause. By solving that case ECJ established a precedent on the difference of legislation among Member States of the EU that is not considered to be an infringement of public policy in the state where the enforcement supposed to take place.

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[52] "Civil Code of the Republic of Lithuania, of July 18, 2000, Law No. VIII-1864 (Last amended on April 12, 2011, No XI-1312)," WIPO, Article 1.11 http://www.wipo.int/wipolex/en/text.jsp?file_id=202088.

[53]Pierre Beaudoin, Flore Mevel and Nicoline Tourtet, "The public policy exception against the recognition and enforcement of European judgments," paper presented at Themis Competition, 2016, 7.

[54] Jan Oster, 545.

[55] Hess Burkhard and Thomas Pfeiffer, "Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law Policy," Department C: Citizens' Rights and Constitutional Affairs Note, 2011. http://www.europarl.europa.eu/RegData/etudes/STUD/2011/453189/IPOL-JURI_ET(2011)453189_EN.pdf.

[56] Tomaž Keresteš, "Public Policy in Brussels Regulation I: Yesterday, Today and Tomorrow," Lexonomica 8, 2 (2016), 85 as cited at Francq, S. in Magnus, U., Mankowski, P. [ed.] (2012) Brussels I Regulation (Munich: Sellier European Law Publishers) 662.

[57] *Dieter Krombach v André Bamberski* (2000) Case C-7/98, ECR, I-01935.

The aforementioned could be summed up in a few notes:

a. the multidimensional nature of the public policy clause reflects in its instrumental implementation in the case *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others*, which in its turn is definitely the basis for further development of a common European public order;

b. because of the lack of common rules on the public policy, historically the last has developed in the narrow approach in states with the common law system and in broader approach in states with the civil;

c. in Lithuania a defensive application of the public policy clauses is used as in most of the European countries;

d. considering available theoretical material the notion of "public policy" could be defined as principles and standards which apply in the frameworks of both the recognition of foreign judgments and the determination of the applicable law in an individual state, according to which state reserves a right of non-compliance in exceptional cases determined by state itself.

1.2 Legal frameworks of public policy

As it was mentioned before the clauses on the recognition of foreign judgments and the determination of the applicable law are different among the states. However, the relevant legal instruments of public policy application are established in international, regional and national levels. Among international instruments: The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958[58], Article 5; Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, 2007,[59] Article 22 and 30; Convention on Choice of Court Agreements, 2005,[60] Article 6 and 9; Convention on

[58] "United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards from 10 June 1958," United Nation Treaty Collection, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en.

[59] "Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance," HCCH, https://www.hcch.net/en/instruments/conventions/full-text/?cid=131

[60] "Convention of 30 June 2005 on Choice of Court Agreements," HCCH, https://www.hcch.net/en/instruments/conventions/full-text/?cid=98.

Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, 1996,[61] Article 22 and 23; Convention of 4 May 1971 on the Law Applicable to Traffic Accidents, 1971, Article 10.

EU system: Article 30, 39, 46, 58, 186 of Treaty establishing the European Community;[62] Article 27, 28, 50 of Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 1968;[63] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels Ia");[64] Article 22(a) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("Brussels IIa");[65] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I);[66] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II);[67] Article 24 of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction,

[61] "Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children," HCCH, https://www.hcch.net/en/instruments/conventions/full-text/?cid=70.

[62] "Treaty establishing the European Community (Consolidated version 2002)," EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12002E%2FTXT.

[63] "1968 Brussels Convention on jurisdiction and the enforcement of judgments," EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A41968A0927%2801%29/.

[64] "Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters," EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R1215.

[65] "Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility," EUR-Lex, https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32003R2201.

[66] "Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)," EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008R0593.

[67] "Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)," EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007R0864.

applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.[68]

Domestic law under Anglo-American law: 9(1) and (2) (f) of the Administration of Justice Act, 1920;[69] 4(1)(a)(v) of the Foreign Judgments (reciprocal enforcement) Act 1933.[70] Some relevant case law will be discussed respectively.

The important here is to distinguish the scope of the Rome I and II Regulation from Brussels Ia and IIa regarding public policy. The concept of the public policy clause behind the Regulations is the same:

Articles 21 of Rome I and 26 of Rome II states "The application of a provision of the law of any country specified by this Regulation may be refused only if such application is *manifestly incompatible* with the public policy (ordre public) of the forum";

Article 22(a) and 23(a) of Brussels Ia and Article 45(1) of Brussels IIa: the recognition of a judgment shall be refused "if such recognition is *manifestly contrary* to the public policy of the Member State." However, the Regulations reflect two forms of public policy involvement, the Rome I and II Regulations serve as a limitation of foreign law in the *forum* country and is applicable to a choice of law; and public policy clause in the Brussels Regulations prevent recognition and enforcement of a foreign judgments, which could affect *forum* basic legal order. As far as in the Rome I and Rome II Regulations "need for a substantive public policy defense has been reduced by the harmonization of applicable law rules,"[71] the focus mainly will be on Brussels Regulations and application of public policy clause in the recognition and enforcement of a foreign judgments.

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[68] "Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations," EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009R0004.

[69] "Administration of Justice Act on judgments obtained in superior courts in other British dominions, 1920," Legislation.gov.uk, http://www.legislation.gov.uk/ukpga/Geo5/10-11/81/section/9.

[70] "Foreign Judgments (reciprocal enforcement) Act 1933," Legislation.gov.uk, http://www.legislation.gov.uk/ukpga/Geo5/23-24/13/contents.

[71] Tomaž Keresteš, "Public Policy in Brussels Regulation I: Yesterday, Today and Tomorrow," Lexonomica 8, 2 (2016): 80.

1.2 Human Rights as Public Policy

This subparagraph examines the different angles of the human rights and public policy relation, which are directly affecting their application in international private law. By analyzing public policy theories and practical implementation of clauses the link the between restrictive application of the last and violation of human rights will be shown. It argues that human rights itself may be viewed as public policy, consequently compliance with international human rights law leads to domestic legal systems. Besides, this part of research examines the public policy as a ground involved for safeguarding the procedural rights of the defendant and exceptional cases when public policy was involved, however, was not accepted, that leads to violation of the particular human rights.

As it was already mentioned, protection of human rights has increased and developed after the Second World War and become an essential characteristic of democratic state. States "have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms"[72] and that universal respect to human rights was further translated on regional level[73] changing international and national legal orders to the such extent that some scholars argue that growing corpus of human rights law is can be applicable to all states regardless of what treaties they have signed up for.[74]

However, from the practical point of view, the extent of compliance with human rights law eventually depends on the state will to transfer the international rules in domestic legal systems[75] and further compliance is wholly internal matter.[76] According to the Report on the implementation of international human treaties in domestic law and the role of courts adopted

[72] "Universal Declaration of Human Rights," UN General Assembly, Preamble (Paris, 1948).

[73] European Convention on Human Rights (ECHR) (1950), The American Declaration of the Rights and Duties of Man (1948), The African Charter on Human and Peoples' Rights (1981).

[74] David Armstrong, Theo Farrell and Hélène Lambert, Handbook of International Relations. Thousand Oaks, CA: Sage, 2002, 165.

[75] David Armstrong, Theo Farrell and Helene Lambert, International Law and International Relations (Cambridge: Cambridge University Press, 2nd ed., 2012), 177.

[76] David Armstrong, Theo Farrell and Helene Lambert, International Law and International Relations (Cambridge: Cambridge University Press, 2nd ed., 2012), 177 as cited at 51 Louis Henkin, 'Compliance with international law in an inter-state system', Recueil des cours, Acad emie de droit international 1989, Tome 216 (Dordrecht, The Netherlands: Martinus Nijhoff, 1990), 250.

by the Venice Commission at its 100th plenary session there are four main factors influencing the legal effect of human rights treaties in domestic law: the conceptualisation of the relation between international and domestic legal orders (1); the status of treaties in the domestic legal order and their place in the hierarchy of norms (2); the direct and indirect effect and the interpretation of conformity clauses in the domestic constitutions (3); and the existence of legislation enabling the reception of human rights treaties into the domestic legal order (4).[77] Based on Report one of the most effective ways of making international provisions work is the incorporation clause in Constitution or another legal instrument of a similar status[78] as it is in Constitution of the Netherlands, Article 93: "Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published."[79]

Focus on human rights as on backbone of existing legal order and positive obligation for a state is stipulated in various international and domestic legal acts. The impact of human rights, on private international law was fixed in German *Bundesverfassungsgericht* that held back in 1971 that the German rules of private international law had to comply with the fundamental rights enshrined in the German *Grundgesetz*.[80]

The link between human rights, domestic legal order and public policy clauses could be detected by analyzing content of another instrument. With the respect and thought the prism of a spiritual and moral heritage the Charter of Fundamental Rights of the EU (EUChFR) as primary source of EU law underlines necessity of the protection of fundamental rights as "the Union is founded on the...universal values of human dignity, freedom, equality and solidarity; it is based on the rule of law".[81] Taking into account how Oster pointed out the correlation between human rights and public policy: "human rights by their nature and functions belong to the values public policy clauses aim to protect"[82] the Preamble of the EUChFR has making an additional value. In other words, by referring to the rule of law and

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[77] "Report on the implementation of international human treaties in domestic law and the role of courts," European Commission for Democracy Through Law (Strasbourg, 2014) 6 http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)036-e.

[78] Ibid., 7.

[79] "Constitution of the Kingdom of the Netherlands of August 24, 1815 (consolidated version of 2002)," WIPO, http://www.wipo.int/wipolex/en/text.jsp?file_id=228263.

[80] Kiestra Louwrens, 382 as cited at Bundesverfassungsgericht 31 May 1971, (NJW 1971) 1508.

[81] "Charter of Fundamental Rights of the European Union, Preamble, 26 October 2012, 2012/C 326/02," Refworld, http://www.refworld.org/docid/3ae6b3b70.html.

[82] Jan Oster, Public policy and human rights, 547.

universal values as to the base of EU in the sense of the protection of human rights the EUChFR could be viewed as an instrument of public policy. Indeed, it could not be denied that rule of law and shared values among the Member States, including human rights are the vital foundation of the EU that constitute it legal order.

Consequently, human rights constitute the legal order of EU and in direct protection of public policy clauses. Another example is the American Convention on Human Rights (ACHR) that refers to the States Parties to the ACHR as duty bearers regarding human rights within their jurisdiction: "to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction"[83] presented by that human rights based approach in domestic legal order and thus public policy.

Moreover, human rights could constitute public policy itself. This follows, first, from the concept of *erga omnes* obligations regarding human rights that apply to the international community as a whole and not just individual states because of the shared interest in their protection introduced by the ICJ in the *Barcelona Traction* case (1970).[84] Strictly speaking, human rights that were already a part of domestic legal order constituting a shared legal order on international level, giving the rise to shared public policy regarding human rights. Secondly, European Court of Human Rights (ECtHR) has recognized the European Convention on Human Rights (ECHR) an instrument of European public order for the protection of individual human beings.[85] That decision is in line with conclusions made on EUChFR as an instrument of EU public policy. Jean-Paul Costa, President of the ECtHR[86] while giving his recommendation on ECtHR in 2013 mentioned that produced case law: "contribute to the Europe-wide human rights jurisprudence and that help to build up the European "public order."[87] Does it mean, that European public order is common only regarding the rights protected under ECHR or EU public policy enjoy the same level of consensus among the State Parties? In fact, most of the cases of ECtHR and European Court

[83] "American Convention on Human Rights, "Pact of San Jose, Costa Rica, 1969," Article 1, Refworld, http://www.refworld.org/docid/3ae6b36510.html.

[84] David Armstrong, Theo Farrell and Helene Lambert, International Law and International Relations, (Cambridge: Cambridge University Press, 2nd ed., 2012) 163, 167-168.

[85] Loizidou v. Turkey (1995), no. 40/1993/435/514, ECHR, 75.

[86] From 19 January 2007 to 31 October 2012.

[87] Jean-Paul Costa, "European Court of Human Rights and its recent Case-law," Texas International Law Journal 38, 3 (2003): 467.

of Justice (ECJ) regarding which public policy clauses were involved include references to human rights violation or possibly close consequence.[88]

Nonetheless, case *Omega Spielhallen- und Automatenaufstellungs-gmbH v. Oberbitrgermeisterin der Bundesstadt Bonn*[89] shows completely different approach in relation to EU public policy and lack of European consensus on the values that should be turned into standards of human rights protection. The case, reviewed by ECJ involves questions on relationship between economic activities, public policy and fundamental rights as well as proportionality of the measures which are used on grounds of public policy and are different in the systems of protection in other Member States, Article 46 and 49 of EC.

In 2001, the German Federal Administrative Court decided to ban a game that supposed to be played in one of cities due to the fact that one part of the participants in this game proclaimed to "kill" the other players and Mayor of the city found that the game is "incompatible with the fundamental values of society."[90] German Federal Administrative Court in its turn, concluded that the game and its possible outcomes is "incompatible with the constitutional guarantee of human dignity" and as result with public policy.[91] ECJ was asked about the preliminary ruling on: "[...] whether the power of Member States to restrict fundamental freedoms arising from the Treaty due to overriding reasons relating to the public interest [...] is subject to that restriction being based on general legal opinion in all the Member States."[92] According to the ECJ ruling the prohibition of the game may take part within one state which shared "local values", national law is compatible with the provisions of the EC. However, ECJ mentions public policy as not common among States: "[...] as a concept of Community law — attempts to strike a balance between, on the one hand, the necessary stemming of exceptions to the fundamental freedoms assured under primary legislation and the associated possibilities of justification, and, on the other, the scope of

[88] See *Pellegrini v Italy* (2001) no. 30882/96, ECHR*; Omega Spielhallen- und Automatenaufstellungs-gmbH v.Oberbitrgermeisterin der Bundesstadt Bonn* (2004) Case C-36/02, ECR, I-09609*; Mark v Mark* (UKHL 2005).

[89] *Omega Spielhallen- und Automatenaufstellungs-gmbH v.Oberbitrgermeisterin der Bundesstadt Bon*n (2004) Case C-36/02, ECR, 1-09609.

[90] Roel de Lange, "The European Public Order, Constitutional Principles and Fundamental Rights," Erasmus Law Review 1, 1 (2007): 4.

[91] Roel de Lange.

[92] Case C-36/02, 20.

discretion afforded to Member States."[93] Consequently, a system of protection in one State is different from that adopted by another State.

Despite the fact, that human rights itself may be viewed as public policy, the restrictive application of the public policy clauses are generally accepted as well as reducing their regulatory effect on stage of the adoption of new law or codification of the existing. Besides, Judge Burrough's spirit on public policy back in 1824: "I protest arguing too strongly upon public policy. It is a very unruly horse and once you get astride it, you never know where it will carry you."[94] is continued to be actual in modern judicial practice. According to the Luxembourg Court even in case when the human rights were on board for violation: "recourse to the public policy clause must be regarded as being possible *in exceptional cases* where the guarantees laid down in the legislation of the state of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach."[95] Basically, according to the Court opinion, the infringement of the public policy should be the last ground involved for safeguarding the right that is on board.

The Court position could be explained by not always predictable outcome from public policy involvement based on different clauses origins. For instance, International Court of Arbitration administering ICC Arbitration (International Commercial Arbitration) covers business disputes of an international character (Art.1(1)); the arbitrators can be of proposed nationality (Art. 2); the parties are free to determine the law to be applied by the arbitrators to the merits of the dispute, in case of the absence of such determination by the parties, the arbitrators shall apply the law designated as the proper law by the rules of conflict which they deem appropriate (Art.13(3)); the decision is final and the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made (Art.24).[96] From Court rules it is clear that the main goal is to reach decisions that would be identical to those that could be reached by the State courts, the laws of which they apply in order to avoid possible negative

[93] Ibid., 96.

[94] Kent Murphy, "The Traditional View of Public Policy and Ordre Public in Private International Law." Ga. J. Int'l & Comp. L. ,11,3 (1981): 592 as cited at Richardson v. Mellish, 130 Eng. Rep. 294, 303 (Ex. 1824).

[95] Case C-7/98, 3.

[96] "Rules for the ICC Court of Arbitration," Int'l Tax & Bus. Law. 4, 422 (1986) http://scholarship.law.berkeley.edu/bjil/vol4/iss2/17.

effect on stage of recognition and enforcement of the decision.[97] And because of different background of parties and "privileged treatment" the enforcement of the decision could be limited on ground of public policy.[98] However, in case of refusing to recognize and enforce arbitral awards, public policy is the most frequently invoked and shown to be the most unpredictable.[99]

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Arbitration Convention"[100] is a direct instrument for applying mentioned above ground and it sets, that "recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) the recognition or enforcement of the award would be contrary to the public policy of that country."[101] According to the judicial practice, in cases BeckRS 2005, No. 02036 (Brandenburg Court of Appeal, Germany); *Schreter v. Gasmac Inc.*, (1992) 7 O.R. (3d) 608 (Ontario Court, Canada); *YCA* XXX (2005), 557 (at 560) (Cologne Court of Appeal, Germany) to invoke the public policy clauses under Article V(2), "courts have held that a violation must be severe and deprive one party of fundamental rights".[102] Such severe violation is most usually violation of procedural rights of parties during the dispute, the French Supreme Court held in case involving party autonomy and consolidation of multiparty in International Commercial Arbitration, where the two respondents challenged the rule requiring their joint nomination of a single arbitrator, that "the principle of the equality of the parties in the appointment of arbitrators is a matter of public policy (*ordre public*)".[103] By that case it is shown how domestic court by using public policy clause can change previously existing practice and interpretation of *lex causae*. Nonetheless, it is well known that possible parties to any agreement want to enjoy sustainable interpretation of

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[97] Werner Melis, "Force Majeure and Hardship Clauses in International Commercial Contracts in View of the Practice of the ICC Court of Arbitration," TRANS-LEX, accessed 2018 March 16. https://www.trans-lex.org/126600.

[98] Ibid.

[99] Inae Yang, "Procedural Public Policy Cases In International Commercial Arbitration," Dispute Resolution Journal 69, 4 (2014): 59.

[100] "United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards from 10 June 1958," United Nation Treaty Collection, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en.

[101] Ibid., Article 5.

[102] Inae Yang, 63.

[103]Inae Yang, 65 as cited at Siemens AG/BKMI Industrienanlagen GmbH v. Dutco Construction Company (1993) XVII Y. B. Com. Arb. 140-142 (1993).

norms as well as their predictable outcomes. That is way clauses based on public policy are viewed as one to be reduced in implementation.

On the other hand, public policy as a ground has been involved for safeguarding the procedural rights of the defendant[104], and *vice versa* in exceptional cases when public policy was involved, however, rarely accepted it leads to violation of mentioned rights.[105] The last group was a subject to the judicial review of the European Court of Human Rights (ECtHR), where the (non-)application of public policy clauses is alleged to have violated human rights.

In the case *Government of the United States of America v Barnette*[106] the appellant's former husband, previously convicted on a number of counts of fraud and related offences in USA, transferred some of his founds to the appellant and as a result of that the last has received a confiscation order. The appellant filed appeals to the US Court of Appeals against the order of the district court, however the court had a discretion to refuse to hear or decide the appeal, on the ground that the appellant had a "fugitive status".[107] However, taking into account the fact that assets of the appellant were situated in the United Kingdom, the confiscation order has a character of an external.[108] The respondent government seeks in these proceedings to register the confiscation order under section 97 of the Criminal Justice Act 1988, with a view to enforcing it by process against assets of the appellant in the United Kingdom. The main issue in the case was that a state which is a signatory to the ECHR has shut applicant out from pursuing an appeal and it constitutes a breach of Article 6"[109] [ECHR].[110] Basically, appellant was arguing that it would be contrary to the interests of

[104] Discussed previously case *Kuwait Airways Corporation v Iraqi Airways Company and others* [2002]; see also *Oppenheimer v Cattermole* (1976).

[105] Jan Oster, 543, 557.

[106] *Government of the United States of America v Montgomery* (No 2) (UKHL 2004)

[107] "Opinions of The Lords of Appeal for judgment in the cause *Government of the United States of America v Montgomery* [2004] UKHL 37," Parliament.uk, 9, accessed 2018 March 28, https://publications.parliament.uk/pa/ld200304/ldjudgmt/jd040722/barn-1.htm.

[108] Ibid.

[109] Ibid., 12.

[110] Article 6 of ECHR: "Right to a fair trial In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

justice to register the order and the US procedure would be unlawful under the ECHR. After long consideration on exceptions to the principle of territoriality, which may conveniently be described as giving indirect effect to provisions of the ECHR, was found no breach of the applicant's human rights and decided that the order should be registered.

Through a prism of public policy doctrine, the decision may be seen as contrary to domestic public order as well as European public order, namely to human right stated in Article 6 of the ECHR. According to the Guide on Article 6 of the ECHR:[111] "the mission of the system set up by the Convention is thus to determine issues of public policy in the general interest, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States"[112] and ECHR is a "constitutional instrument of European public order".[113] Thus, the standards of protection of human rights developed by ECtHR in Strasbourg regarding involvement of Article 6 required a serious nature of the dispute[114]. Taking into account the circumstances of the case the serious nature in particular situation should be measured by possible outcomes of the involving or not involving by the USA Court "fugitive status" in relation to appellant. Arguing in that line, UK could refuse to enforce the confiscation order and prevent *de facto violation* of Article 6 of the ECHR incorporated into UK law by Human Rights Act 1998. The amount of cases that are related to public policy, in particular to issue of enforcement of foreign judgment and involving Article 6 (1) of ECHR were triggered by obligation to recognize and enforce judgments based on a guarantee of a fair trial as well as obligation to recognize and enforce judgments under Article 1 of Protocol No. 1 ECHR, which guarantees the right to property and Article 8 ECHR, which guarantees respect for private and family life, including an obligation to recognize and enforce.[115]

In the final analysis several conclusions should be underlined:

a. the EUChFR likely to ECHR could be viewed as the mechanism of public policy (European) implementation, consequently fixed human rights constitute the legal order of EU and are under the direct protection of public policy clauses;

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[111] "Guide on Article 6 of the European Conventionon Human Rights Right to a fair trial (civil limb)," Council of Europe and European Court of Human Rights, 2017, https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf.

[112] *Konstantin Markin v. Russia* (2012) no. 30078/06, ECHR, 89.

[113] *Bosphorus Hava Yolları Turizm v. Ticaret Anonim Şirketi v. Ireland* (2005) no. 45036/98, ECHR, 156.

[114] *Sporrong and Lönnroth v. Sweden* (1984) no. 7151/75 and 7152/75, ECHR, 81.

[115] Kiestra Louwrens. The Impact of the European Convention on Human Rights on Private International Law. Den Haag: T.M.C. Asser Press, 2014. eBook Collection (EBSCOhost), EBSCOhost (accessed March 16, 2018) 225.

b. however, the examination of the cases Case C-36/02 shows that consensus on European public order among the Member States is limited to the mentioned legal instruments as well as involvement of the public policy clauses by national court is strictly regulated, especially regarding issues, which may affect other Member States;

c. domestic courts tend to use public policy clause in a protective way that can change previously existing practice, even interpretation of *lex causae*, on contrary ECtHR and ECJ practice regarding the right to a fair trial impacts on further public policy application in a restrictive way.

2. PUBLIC POLICY CLAUSES IN FAMILY MATTERS

The chapter considers public policy application in the family matters by taking into account recent changes imposed by Brussels Regulation. Rights to respect for private and family life especially interfere in a state right to refuse to recognize the foreign case decision as almost in all considered cases the right was acknowledged to dominate. So it is important to detect the development of the possible further impact by using critical, comparative and systematic methods.

Since public policy involves human rights and plays vital role in their safeguarding and v*ice versa* the last have undeniable influence on application of public policy clauses in private international law, the family matters will serve as a perfect tool for detecting interrelation of both. It is worthy to mention, that successfully invoked against the normally applicable law provisions of ECHR are related to issues of international family law.[116] The respect for "family life" is guaranteed under Article 8 of ECHR and Article 7 of EUChFR, and constitutes one of the main shared value under Art. 2 of EU Treaty among the Member States.

Family matters should be understood as all "[...] relations between persons who are connected with one another by descent (for example, the relationship between a child and its mother or father) or by marriage (or registered partnership)."[117] Regarding a family life, which is a legal category and may be seen as normative expression of the family matters, ECtHR maintains a flexible approach to the interpretation of the concept.[118] So, to relations mentioned in the notion of family matters should be added all categories of relations developed by ECtHR within the scope of Article 8.[119] Since different countries have different

[116] L.R. Kiestra, "The impact of the ECHR on private international law: An analysis of Strasbourg and selected national case law", (PhD thesis, Amsterdam Center for International Law, 2013), 382, http://hdl.handle.net/11245/1.395313.

[117] "Family matters," European e-justice, accessed 2018 March 2, https://e-justice.europa.eu/content_family_matters-44-en.do.

[118] Ursula Kilkelly, "The right to respect for private and family life", A guide to the implementation of Article 8 of the European Convention on Human Rights (2001) 16, https://rm.coe.int/168007ff47.

[119] For instance relationship between adoptive parents and children, unmarried couples who live together with their children etc. see more in Ursula Kilkelly' guide to the implementation of Article 8.

state policy on family matters, for instance, on recognition of same sex marriage[120] or civil unions.

However, public policy clauses in a family matters become limited in their implementation because of mutual recognition and reciprocity systems established the Brussels Regulations. From some point the approach is favorable for judgment with a declaratory character, what is usual for foreign family law judgment. From another side, a position of ECtHR in the interpretation of Article 8, EU system of mutual recognition and reciprocity that tends to establish automatic recognition and does not refer to a common conflict rules appeared to press on national legal orders and public policy clauses respectively. Besides, there are important differences in terminology among the EU Member States, for instance, Member States do not interpret term "enforcement" in a uniform manner, which has resulted in requirement of a declaration of enforceability concerning parental responsibility.[121]

At the same time, within EU, the correlation of human rights protection regime established in ECHR, EUChFR, EU Treaty and mutual recognition and reciprocity systems established by secondary legislation show different levels of possible public policy involvement. Especially, if protection of human rights is viewed through the prism of public policy clauses. On the first place, the reference to ECHR was established in Article 6 of the Treaty on EU.[122]

The next step was closely connected to EU constitutional reforms and the Lisbon Treaty, which in its turn refers to EUChFR, one of the primary sources of EU law, and giving the rise to the even broader protective human rights regime within EU. Yet, further procedural implementation of family rights, in particular return of a child to the state of his or her original habitual residence under 1980 Hague Convention on the Civil Aspects of International Child Abduction[123] do not require *exequatur* under current EU regulations.

[120] Within EU, same sex marriage is recognized in Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden and United Kingdom.

[121] European Commission, "Report from the Commision to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000," EUR-Lex, 2014, 2. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014DC0225.

[122] "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [...]"

[123] Article 4 and 8.

Consequently, the higher standards of protection regime are in the core of the instrument, the less human rights violation is possible. If in the beginning, with developing of EU law the standards were developing intensively, then mutual recognition and reciprocity systems established by secondary legislation, and reduce of procedural clauses "pierce" human rights wheel.

Because of sensitive nature of the family matter it was excluded initially from the scope of regulation of Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 1968. But, received normative implementation with adoption of recast Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility in family matters (Brussels IIa). Brussels IIa established a system with a central role of the court which has jurisdiction in particular state the role of a court of another Member States is limited to "almost automatic"[124] recognition and enforcement of judgments.[125] Moreover, according to Main Recommendations from External Experts to the European Parliament[126] "the abolition of *exequatur* should also be granted to placement orders […] and […] Automatic recognition should be extended in order to cover not only visitation rights and the orders of return of a child, but also decisions that attribute custody". As we see the range of rights in the relation of which the *exequatur* is recommended to be excluded applies to the situations when the best interest of a child may prevail.

Brussels IIa complements the Hague Conventions on the Civil Aspects of International Child Abduction, 1980 and on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children into EU law, 1996 and takes precedence over these conventions in relations between the Member States.[127] One of the main Regulation's goals is to deal with the same rules to settle conflicts of jurisdiction between Member States and facilitates,

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[124] Case C-211/10 PPU, Povse v. Alpago, (2010) ECR I-06673, 384 as cited at Janys M. Scott, "A question of trust? Recognition and enforcement of judgments," Conflicts of Laws 1, (2015): 27.

[125] Janys M. Scott, "A question of trust? Recognition and enforcement of judgments," Conflicts of Laws 1, (2015): 27.

[126] Cinzia Peraroet al., "Brussels IIa: Towards a Review (2) - Main Recommendations from External Experts to the European Parliament," European Parliament Think Tank, 2016, http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_BRI(2016)571366.

[127] Céline Chateau, "Brussels IIa: Towards a Review", Policy Department C: Citizens' Rights and Constitutional Affairs, Briefing paper, 2015, http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/536451/IPOL_BRI(2015)536451_EN.pdf.

authentic instruments and agreements in the Union by laying down provisions on their recognition and enforcement in another Member State. In relation to applicable law in November 2004 European Council presented a Green paper concerning conflict-of-law rules in difficult divorce situations.[128] In 2006, the Commission proposed amendments to the Regulation about applicable law in matrimonial matters. Using the new Commission proposals, 14 Member States decided to establish enhanced and increased cooperation.[129] But the absence of harmonized conflict-of-law rules in the entire Union may persuade a spouse to apply quickly for divorce before the other spouse finds out which law is applicable to protect his or her own interests.[130] It may further make complicated the process of reconciliation between the two sides and take a little time for mediation.

The trend in recent EU instruments in civil matters is to allow for some party autonomy (see, for instance, the 2012 Successions Regulation).[131] According to the Article 15 of Brussels IIa, if it is in the best interests of the child, jurisdiction transfers to the court best placed to hear the case, but there are difficulties in performing a function of some instances, particularly, when the requested court often fails to inform the requesting court in time that it accepts jurisdiction. However, the absence of a uniform and exhaustive rule on residual jurisdiction in context of matrimonial and parental responsibility matters may cause unequal access to justice of Union citizens. In the first section, it was already shown the examples of affecting the right to fair trial by involvement or non-involvement of public policy clauses. In family matters, especially, parental responsibility and marriage, there is a mutual influence between public and the right to private life as well. If in the first case the public policy clause may prevail on application of right to fair trial, then in the second case right to private life definitely predominance over the possible public policy involvement not only in established EU secondary legislation, but in judicial review as well. Yet, one category of cases, namely, registered relationship, which is falling under the protection of private life right is still struggling for establishing a clear line regarding a public order.

[128] The Hague Programme: strengthening freedom, security and justice in the European Union, adopted by the European Council on 4-5 November 2004.

[129] European Commission Report, 3.

[130] Ibid.

[131] "Council Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession," OJ L, 201 (2012).

In order to fully implement the idea that is behind the regulation system there should be (1) a mutual trust between Member States courts[132] and (2) no dispute regarding the rights that follows from scope of regulation. However, concentration on reaching automatic recognition and enforcement of judgments could cost a backfire on human rights, which *exequatur* aimed to prevent. For instance, the practical application of the immediate return of a child under Article 11(8))[133] has proved to be difficult and Member States have encountered problems in the cross-border enforcement because the national courts can not refer to the public policy exception.[134] As a result, national courts referred several cases to the ECJ for an interpretation of Brussel IIa.[135]

Nonetheless, it should be mentioned that regarding the recognition of judgments in both matrimonial and parental responsibility matters, the use of the "public policy" ground of non-recognition has been rare[136], however often groundbreaking.

Concerning a public policy provision in the Article 23(a)[137] of Brussels IIa ECJ stated, in case which involved rights of custody to the children and a jurisdiction to rule on the custody within Member States, that provision "must be interpreted as meaning that, in the absence of a *manifest breach*, having regard to the best interests of the child, of a rule of law regarded as *essential in the legal order* of a Member State or of a right recognized as being fundamental within that legal order, that *provision does not allow a court* of that Member State which considers that it has jurisdiction to rule on the custody of a child *to refuse to recognise a judgment of a court of another Member State* which has ruled on the custody of

[132] Janys M. Scott, 28.

[133] An order of the immediate return of a child is directly enforced in every other Member State without any declaration of enforceability.

[134] Hess B and Pfeiffer T, "The Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law", presented at European Parliament's Committee on Legal Affairs, Brussels, 2011, 38-40. http://www.europarl.europa.eu/RegData/etudes/STUD/2011/453189/IPOL-JURI_ET(2011)453189_EN.pdf

[135] Hess B and Pfeiffer T, see Case C-195/08 PPU *Rinau v Rinau;* C-403/09 PPU *Detiček v Sgueglia*; C256/09 *Purrucker v Vallés Pérez*; C-296/10 *Purrucker v Vallés Pérez.*

[136] European Commission Report, 10.

[137] Article 23 of of Council Regulation (EC) No 2201/2003: "Grounds of non-recognition for judgments relating to parental responsibility', provides: "A judgment relating to parental responsibility shall not be recognised: (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child; […]"

that child."[138] In order to translate the ECJ decision on the matrimonial matters left, it should be understood that possible breach of essential legal order that will constitute a manifest breach is either unacceptable law that was applied by the court of origin, or unacceptable judgment itself[139] more detailed the question was considered in section 1.2. The recognition of registered relationships in light of increasing amount of international couples will be analyzed in section 2.1. However, one unavoidable argument in favor of *exequatur* proceedings in case of child rights and against automatic recognition is the fact that children are growing and develop, their circumstances change and human factor in face of responsible judicial officer may be the instant that should be involved.[140] Overall, the field of family relations is changing a lot in recent years and regulations, in some part, legally constitute the already existing situation, but still there to many sensitive differences among states that both make a different and at the same time not always under notion of "manifest breach".

As such, family matters could serve as an example of the positive application of public policy clauses.[141] On the contrary to the usual view of the public policy as negative and "unruly horse" type of situation, Neels argues that positive role of public policy is in application of the *lex fori*, instead of the *prima facie* law "[...] on the basis that the non-application thereof would manifestly infringe local public policy."[142] Such scenario is possible in case of war when it is not possible to get married before the relevant authorities or religious marriage ceremonies, which are not recognized in the personal-law system and the non-recognition of the marriage agreement in another state would be manifestly contrary to its public policy.[143] This approach prevents many disputes about the applicable law in private international law as it is in England, where the *lex fori* tradition is accepted in international family law.[144] Nonetheless, English court often change the tradition and existing practice, *per se* in favor of family matters, as it was in case *Mark v Mark.*[145] Court examined the common law concept of "domicile" and established that a person can be viewed as a domiciled in

[138] P v Q (2015) Case C-455/15 PPU, ECLI:EU:C:2015:763, 53-54.

[139] Janys M. Scott, "A question of trust? Recognition and enforcement of judgments," Conflicts of Laws 1, (2015): 30.

[140] Janys M. Scott, 33.

[141] Jan L. Neels, "The Positive Role of Public Policy in Private International Law and the Recognition of Foreign Muslim Marriages," South African Journal on Human Rights 28, no. 2 (2012): 219-230.

[142] Jan L. Neels, 222 see also *Hooshmand v Ghasmezadegan* (2000) FLC 93-044.

[143] Ibid.

[144] L.R. Kiestra, 193.

[145] *Mark v Mark (UKHL 2005)* 42.

England and Wales, for purposes of a divorce petition, even if their presence in the United Kingdom is unlawful, in particular case residence was for the previous 12 months.[146] After such interpretation of the concept of "domicile" in context of a divorce petition, there no doubts about domination of family rights on public policy clauses in presented case.

The recognition of a judgment in a state or involving of public policy clause for refusion reflects not only on the human right(s) that is on the table, but on related and derivative rights from the main right(s) as well. The right to respect family life guaranteed under Article 8 of ECHR has linked application with right to fair trial under Article 6 (1) ECHR when it comes to the obligation to recognize a foreign judgment. In the case *Negrepontis-Giannisis v. Greece*[147] ECtHR acknowledged that the Greek decision about non-recognition of a foreign adoption order was contrary to the Article 8 ECtHR.[148] Nikolaos Negrepontis-Giannisis, who came to Michigan from Greece for studying was adopted by his uncle at the time when the last was Bishop of Detroit.[149] After the death of Bishop the adoption order was not recognized in Greece and viewed as contrary to the public due to the norm of Orthodox canon law that a monk cannot adopt a child.[150] ECtHR keeps his strong position with regard to right to respect family life in case *Wagner and J.M.W.L. v. Luxemburg*.[151] Ms. Wagnera, a national of Luxembourg, has legally adopted a three-year-old girl, a national of Peru, under a Peruvian judgment, who was recognized as abandoned in the state of nationality.[152] By the time Ms. Wagnera wanted to declare a permanent residence in Luxembourg for the adopted girl, court In Luxemburg rejected the request on the ground that adoption order contradicts to domestic law, according to which adoption by a single person is prohibited.[153] According to the ECtHR Article 8 of ECHR is applicable in this situation as Ms. Wagner had behaved as the child's mother and the fact that adoption by the single person is not regulated by Luxemburg law (aimed to protect interests of the adopted child) in

[146] Ibid.

[147] *Négrépontis-Giannisis v. Greece*, (2011) no. 56759/08, ECHR.

[148] Ted Folkman of Murphy & King, "Case of the Day: Negrepontis-Giannisis v. Greece," The Blog of International Judicial Assistance, 2012, https://lettersblogatory.com/2012/03/06/negrepontis-giannisis-greece/ .

[149] Ted Folkman of Murphy & King.

[150] Ibid.

[151] *Wagner and J.M.W.L. v. Luxemburg*, (2007) no. 76240/01, ECHR.

[152] "Case of Wagner And J.M.W.L. V. Luxembourg, no. 76240/01, ECtHR (First Section), Judgment (Merits and Just Satisfaction) of 28.06.2007," Eurocases, accessed 2017 April 13, http://freecases.eu/Doc/CourtAct/4539239.

[153] Eurocases.

particular circumstances is not justification for rejection of adoption order.[154] Following the outcome line of the cases in which family matters and public policy are involved it becomes clear that public policy clauses are limited in the implementation in favor of human right. It seems like ECtHR operate by principle of "more favorable law".

However, there are cases when public policy ground is involved for a misuse. The case *Golubovich v Golubovich*[155] is noteworthy, the dispute concerning the recognition of a decree of divorce that was obtained by one of the parties in Russia in breach of Hemain[156] injunction in England.[157] One of the main issues was the fact that both parties started divorce proceeding in different countries, England and Russia. Party to the dispute in Russian court has been arguing that there was no recognition and enforcement treaty between the two jurisdictions, so divorce order was received. Another part, in England, argued that the court should refuse to recognize the Russian decree on the grounds that it would be contrary to public policy.[158] The court in England agreed to refuse to recognize the decree, however, after the scrutiny in appeal instant it was decided that there no procedural differences in both jurisdictions and public policy ground is not relevant.

Overall, it cannot be disputed, that developed through judicial practice right to respect family and private life has influent on the application of public policy clauses globally in sense of its predominance in case of infringement of a national legal order. As well as the fact, that groundbreaking case law of ECtHR and ECJ is still does not create a full and unified picture on family matters and public policy. One of the main concerns is a global development of a family matters protected under the Article 8 of ECtHR to which not all domestic legal orders are prepared and ready to accept, moreover, the instrument that could give to the social and legal order time to prepare to those changes is constantly abolished.

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[154] Ibid.

[155] *Golubovich v Golubovich,* (2010) no: B4/2010/0916/PTA+A, EWCA Civ 831.

[156] Hemain injunctions are temporary injunctions preventing a party from pursuing litigation in a foreign jurisdiction. Its name derives from the Court of Appeal case Hemain v Hemain (1988) 2 FLR 388.

[157] "*Golubovich v Golubovich*: CA 21 MAY 2010," Swarb.Co.Uk, accessed 2018 March 3, http://swarb.co.uk/golubovich-v-golubovich-ca-21-may-2010/.

[158] Stephen Jarmain, "Golubovich v Golubovich (2010) EWCA Civ 810", Family Law Week, 2010, http://www.familylawweek.co.uk/site.aspx?i=ed62535.

2.1 Recognition of Registered Relationships and Same-Sex Marriages in EU Private International Law: Effect on Public Policy

The subchapter examines the crucial part of a family matters, where public policy clauses are often involved by states in which registered relationships and same-sex marriages are still straggles for recognition. Through the analysis of the relevant case-law a reduced effect of public policy and *de facto* recognition will be shown. Besides, it is argued that lack of consensus among EU Member States on this aspect of a family matters excludes possibly to introduce a common conflict rules regarding registered relationship and same-sex marriages.

As it was mentioned a situation with international couples or those who moved from one country to another and consequently possibly have changed an applicable legal regime requires a special attention. Even more important change has taken place in family structures. Free movement of persons within EU guaranteed by Article 3(2) of TEU; Article 21 of TFEU and Article 45 of EUChFR is a direct catalyst for mobility. Legal relationships that are following from that movement is not always regulated or could be recognized in the country of origin. Recognition of the registered partnerships and same-sex marriages is exactly that possible "manifest breach" of essential legal order on which ECJ and ECtHR are referring in the case law. On the other hand, more and more states in one or another way tend to legalize and regulate *de facto* existing relationships. The question that arises is how to ensure the protection of human rights, in particular, the right to private life, of those who are in the registered relationships, provide mutual recognition system in EU private international law and not to violate public policy clauses of Member States when approaches of the last are the opposite. Such complicate question cannot be answered in a simple way as by ensuring one element or another it is vital not to lose a balance between interests of parties involved.

As it is a comparatively new institution of family law a different terminology could be used depends on approach or domestic legal system. In some literature a general term "registered relationships" is used to describe "all forms of same-sex and opposite-sex formalized unions, except traditional (opposite-sex) marriage"[159], at the same time term

[159] Martina Melcher, (Mutual) Recognition of registered relationships via EU private international law, Journal of Private International Law, 9,1 (2013): 149.

"registered partnerships" includes only same-sex.[160] But, generally speaking, the main word "registered" is a reference to marriage alternative, the way to make partnership official without getting married with a civil union or registered partnership.[161] However, referring to civil union is usually made in case of opposite-sex couple that registered the relationship with the relevant public authority in their country of residence.[162] Taking into account that in the research will be used a reference to different domestic approaches, all the terms will be used with clarification about a context and a state.

In reality the approaches used for registration schemes are very different from state to state, for instance, both registration of same-sex relationships and heterosexual relationships is allowed Belgium, in the Netherlands and in eleven autonomous communities in Spain (Andalusia, Aragon, Asturias, Balearic Islands, Basque Country, Canary Islands, Catalonia, Extremadura, Madrid, Navarre and Valencia).[163]

Registration of a partnership is open to both heterosexuals and homosexuals couples, but marriage as such is not allowed in France and in Luxembourg.[164] Only registered partnership for same-sex couples and only marriage to opposite-sex couples system is in force in Denmark, Finland, Germany, Greenland, Iceland, Norway, Sweden and Switzerland.[165] Regarding a domestic regulation of registered partnerships there are some States within EU which do not provide any laws: Lithuania, Latvia, Poland, Romania, Slovakia, Bulgaria.[166]

When it comes to a third State which is not a Member State of EU, however is a contracting party to the relevant on recognition, enforcement and applicable law international treaties as it is, for instance, with Ukraine[167] registered partnership is excluded, in order to prevent any possible conflicts with national public order regarding this issue. In 2011

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[160] Stefania Bariatti and Carola Ricci, "The impact of the increasing numbers of same-sex marriages or legally recognized partnerships on other legal domains, such as property rights and divorce law," Briefing paper, (2007): 1-18.

[161] "Civil unions and registered partnerships," Europa.eu, accessed 2018 March 28, https://europa.eu/youreurope/citizens/family/couple/registered-partners/index_en.htm.

[162] Europa.eu.

[163] Stefania Bariatti, 3.

[164] Ibid.

[165] Ibid.

[166] Europa.eu.

[167] Ukraine is a contracting party to the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, jurisdiction and the European Convention on the Adoption of Children (revised) of 27 November 2008.

Verkhovna Rada of Ukraine has ratified the European Convention on the Adoption of Children (revised) with reservations to Article 7, para 1 (a) (ii), which states that Ukraine, in accordance with Article 27, para 1 of the Convention reserved the right not to allow a child to be adopted by two persons of different sex who are registered partnership.[168] Apart of mentioned Article 7, the

Convention contains many provisions, which according to the Explanatory Letter of Supreme specialized Court of Ukraine in civil and criminal cases,[169] do not agree with domestic legislation of Ukraine and complicate the implementation of its provisions. In particular, Article 12 of the Convention is not in conformity with the current legislation of Ukraine. In accordance with the Article 12, the state parties promote the acquisition of their citizenship by a child adopted by one of their citizens, and the loss of citizenship, which could arise as a result of adoption, should be due to belonging to another citizenship or its acquisition, which contradicts Article 283[170] of The Family Code of Ukraine, but no reservations from Ukraine were made at that point.[171]

The legal effect of the registered relationships and status of a person within the relationship, comparing to traditional "marriage", also depends on provisions in domestic law. As example, in Netherlands same-sex marriage has all the effects of the opposite-sex, except for automatic creation of family relationship between a child and one within the marriage, on the other side, in France, Luxembourg and Belgium the legal regime of registered same-sex and opposite-sex partnerships is different.[172] In general, a remarkable difference between most registered partnerships and marriage is the smaller number of personal associated marital rights and duties.[173]

When it comes to private international law, state in which there is a possibility of registered relationship tend to introduce a conflict law rules regarding family matters in favor

[168] ВССУ, "Про практику розгляду судами цивільних справ з іноземним елементом", Лист Вищого спеціалізованого суду України з розгляду цивільних і кримінальних справ від 16 травня 2013, N 24-754/0/4-13, 14.

[169] Explanatory Letter of Supreme specialized Court of Ukraine in civil and criminal cases is one of the subsidiary sources of law in Ukraine and should be taken into account by lower courts.

[170] Article 283 (6) of the Family Code of Ukraine contains a principle of preservation of the adopted child's nationality of the country of origin

[171] ВССУ

[172] Stefania Bariatt, 4.

[173] Woelki Fuchs and Angelika Fuchs, Legal Recognition of Same-Sex Relationships in Europe - National, cross-border and European perspectives, (Cambridge, Portland: Intersentia, 2012), 271-284.

of their legal order to avoid public policy clause effect and legal invalidity in another states. Public policy involvement has very specific, preventive character in relation to recognition of registered relationships. In the context of family matters, that differs a lot from a usual case with recognition of already outcoming from the action legal consequences. In Spain the effects of marriage are governed by the common personal law of the spouses (even if only one of the couple enjoined status of habitual residence in Spain), giving priority to Spanish law according to agreed instrument prior to the celebration of the marriage.[174] Such vital effect the recognition or non-recognition of the registered relationships has not only on possible parent — child intercourse or property rights, but on way more broader scope of human rights. As it was pointed out by Melcher,[175] ECJ in its practice compare importance of recognition of registered in another Member State family status for personal identity with a surname that directly influences on personals right to free movement within EU. Nonetheless, the situation with legal recognition of a name or surname within EU is not that groundbreaking and debatable as it is with registered relationships.

Nowadays, it is hard to imagine so active contraversion on recognition of women's rights, among the states, for instance. On the other hand, recognition could be granted even where it is not expected as it was in France. French Court de cassation decided to give effect to the adoption order for women, who wanted to adopt a child born out of her partner; a same-sex couple woman received adoption order, even though the lower courts had relied on public policy clause to deny recognition to the adoption which took place in the United States.[176] Even though France is not a part of a common law system, the decision definitely could serve as argument in discussion on human rights and public policy as the best interest of a child predominated over public policy clause.

Apart from right to respect family and private life a property rights are closely related to the topic concerned. For instance, in Germany spouses may choose the applicable law by concluding a marriage contract, the spouses may not only opt for one of the alternative contractual matrimonial property regimes but may also modify the individual provisions of

[174] "Which law applies: Spain?" Couples in Europe, 2018, accessed 2018 March 6 http://www.coupleseurope.eu/en/spain/topics/1-which-law-applies/ as cited at Vigencia desde 01 de Mayo de 1889. Revisión vigente desde 15 de Octubre de 2015 hasta 29 de Junio de 2018, Art. 9.

[175] Martina Melcher, 150.

[176] Woelki & Angelika Fuchs, 167.

the respective matrimonial property regime.[177] The problem that may here is invalidity of a choice of law, when application of the law of the chosen state would be contrary to a fundamental policy of a state which will be defined as state of application of particular issue. For instance, shared property rights of same-sex couple, residence of Germany, in Poland.

Despite the overall sensitivity of the issue, it seems like same-sex marriages and registered partnerships are not covered by the Brussels IIa.[178] Indeed, after ten years of the application of Brussels IIa, the European Commission has refused to extend the scope of Brussels IIa Regulation to a registered partnership neither in the meaning of same-sex nor opposite-sex terms.[179] The argumentation for exclusion a registered partnership from the scope is obviously the same as in case *Schalk and Kopf v. Austria*, when on the time of ECtHR review only six out of forty-seven member States to ECHR granted same-sex couples equal access to marriage.[180] ECtHR underlined the absence of particular consensus on same-sex relationships: "[...] extended marriage to same-sex partners, but went on to say that this reflected their own vision of the role of marriage in their societies and did not flow from an interpretation of the fundamental right as laid down by the Contracting States in the Convention in 1950."[181] Based on that argument it is hard not to agree with statement that mutual recognition and enforcement system is vulnerable to issue of registered relationships.

Does it mean that a country, family life vision of which is traditional, may use public policy clauses as a ground for "ignoring behavior" regarding the family status of those who are in "nontraditional" registered partnership? Answer on this question, in general meaning, could be found in the same case, in the part where ECtHR is referring to elements of a name "[...] Article 21 TFEU precludes, in principle, the non-recognition of constituent elements of a name lawfully acquired in a Member State other than that of which the person concerned is a national", confirming in this way that once a status has been validly acquired in the country of

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[177] "Which law applies: Germany?" Couples in Europe, accessed 2018 March 28, http://www.coupleseurope.eu/en/germany/topics/3-how-can-the-spouses-arrange-their-property-regime .

[178] Martina Melcher, 3.

[179] European Commission, Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), 2016/0190 (CNS), Brussels, 2016, https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-411-EN-F1-1.PDF.

[180] *Schalk and Kopf v Austria*, (2011) no 30141/0, ECHR, 27.

[181] *Schalk and Kopf v. Austria*, (2011) 53.

origin, it should not change or get lost abroad.[182] The same approach could be found in case *Oliari and Others v Italy*[183], that involved violation of right to protect family life and in outcomes of the case it was confirmed that state is obliged to guarantee same-sex couples legal protection even if it does not recognized registered partnerships.

In other words, the existence of public policy clauses, that may prevent recognition of registered partnership in its procedural legal reality, is not effecting *de facto* substantive legal rights of a person. Because of that a substantive function of public policy in the context of family matters, in particular, registered relationships is fully removed. From this perspective EU and ECtHR are working in the same way, because, despite the different methods, the result in the end of the day will be identical: reduced involvement of public policy and establishment of a similar legal regime based on shared values fixed in ECHR. It seems like a good plan, however, the extent to which ECtHR is consistent and strict in its decisions determines the current practice with possible infringe to the legal order that public policy protect.

In relation to this issue, a few points are worth to mention. First of all, non of the European states can be forced to allow the establishment of same-sex marriages by their substantive rules[184] as according to the para 1 Article 67 of TFEU: "The Union shall constitute an area of freedom, security and justice with *respect for fundamental rights and the different legal systems and traditions* of the Member States." Secondly, on the contrary to the *Oliari and Others v Italy*, in case *Schalk and Kopf v. Austria,* which was mentioned above, ECtHR putted in the central position the "deep-rooted social and cultural connotations which may differ largely"[185] as definer of state policy regarding recognition of same-sex marriage. Thirdly, from a long-term perspective with development of "Citizenship of the European Union"[186] in context of progressive denationalization of human rights the substantive public policy is a last circle to protect essential order of a state, but the first circle to remove in mutual recognition and enforcement system. And the last thing to mention is obvious uncleanness, pointed out by Melcher, with how far involvement of "[...] recognition of an already established registered relationship would be able to undermine the institution of

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[182] Martina Melcher, 152.

[183] *Oliari and Others v Italy*, (2015) no. 18766/11 and 36030/11, ECHR, 106.

[184] Martina Melcher, 169.

[185] *Schalk and Kopf v. Austria,* (2011), 63.

[186] See Article 20 of TFEU, Chapter V of EUChFR.

marriage to such a degree that the public policy exception could be invoked."[187] Of course, it could be argued that the extent of involvement of public policy clauses is definite as a manifest breach, nonetheless a manifest breach may be found on cases to case basis and has no constant evaluation criteria.

Some parallels between public policy of Member States in family matters and mutual recognition and enforcement system could be found with USA states public policies' system. Similar to principle of sustainable validity of a person legal status, confirmed in *Oliari and Others v Italy* case, *Restatement of Conflict of Laws* back in 1934 mentioned regarding public policy and marriage in USA: "a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with."[188] Yet, the mutual recognition and enforcement system within EU likely to statement on USA states public policies' system, from one side, aimed to avoid public policy involvement, encourage interstate respect of human rights, on the other hand, was proved to be harmful to human rights.

2.2 **Case Studies: Orlandi and Others v. Italy**

As it was mentioned above, there is no particular consensus among the Member States on same-sex relationships.[189] In order to examine the actual practical implementation of public policy clauses in family matters the recent case *Orlandi and Others v. Italy*[190] examined by Strasburg Court should be put into perspective for further studies. Besides, presented case, where one of the Member States recently was a respondent gives an opportunity to challenge the point of view about the EU legislative framework as the best option for a unification of private international law rules in relation to registered relationships.[191] In addition, the case is a perfect tool for detecting influence of the developed right to respect private life in an actual ECtHR practice.

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[187] Martina Melcher, 169.

[188] Richard Myers, "Same-sex marriage and the public policy doctrine", Creighton Law Review, 32 (1998), 48 as cited at Restatement of (First) Conflict of Laws, para 121, (134).

[189] *See Schalk and Kopf v. Austria*, (2011) 43.

[190] *Orlandi and Others v. Italy*, (2017) no. 26431/12; 26742/12; 44057/12 and 60088/12, ECHR

[191] Martina Melcher, 158.

Thomas Hammarberg, a Swedish diplomat and human rights defender underlined that the legal limitation to marry for same-sex couple has consequences in the social life of Italian LGB couples. Indeed, individuals suffer particular challenges when they are in unrecognized partnerships: inferior tax, employment and insurance benefits; difficulties in obtaining public housing allocations.[192] To mentioned, could be added as well an immigration issues in regard of internationality couples,[193] limitations related to pension or tenancy for a surviving spouse[194] and reduced freedom of movement when one of the partners needs to move abroad.[195]

The case originated in four applications (nos. 26431/12, 26742/12, 44057/12 and 60088/12) against the Italian Republic by eleven Italian nationals and one Canadian national, in frameworks of which applicants complained that their right to respect for their private and family life (Art 8) and right to marry (Art 12) in conjunction with the prohibition of discrimination (Art 14) were violated because of denied access to the same rights as heterosexual married couples.[196] From Italy side, same-sex marriage registration was denied based on national law which does not allow it. The case has some similarities with the *Oliari and Others v Italy* case from 2015, yet Oliari main issue was a lack of any legal protection for same-sex couples in Italy and in Orlandi Court decided on possibility to register a same-sex couple's marriage in Italy when they were legally married in another country with reference to national order.[197]

ECtHR reviewed registration of marriage in context of both national and European public order. By keeping the line with the absence of a right to marry for same-sex persons within ECHR Court closed this "sensitive, but not disputable" issue. It stated that: "[...] same-sex marriage did not form part of the European public order, and Italy could not be forced to give effect (through registration) to same-sex marriages celebrated abroad, which were against its own public order." so involvement of public order is logical.[198] Taking into

[192] Thomas Hammarberg, Discrimination on grounds of sexual orientation and gender identity in Europe, (Council of Europe, 2011), 95, https://www.coe.int/t/commissioner/Source/LGBT/LGBTStudy2011_en.pdf

[193] See *C. and L. M. v. the United Kingdom* (1989), *Taddeucci and McCall v Italy* (2016).

[194] *Karner v Austria*, (2003) no. 40016/98, ECHR.

[195] *X, Y and Z v the United Kingdom*, (1997) no. 21830/93, ECHR.

[196] *Orlandi and Others v. Italy*, 1-4.

[197] Claire Poppelwell-Scevak, "Oliari, Orlandi and Homophobic Dissenting Opinions: The Strasbourg Approach to the recognition of same-sex marriages", STRASBOURG OBSERVERS, 2018, https://strasbourgobservers.com/category/orlandi-and-others-v-italy/.

[198] *Orlandi and Others v. Italy*, 188.

account, that ECHR is an instrument of European public policy and not provide same-sex couple with the right to marry[199] Italy had been in conformity with the European public order[200] as well as legally has involved public policy clause.

In the application of the Orlandi case, the relevant Italian private international law is Law 218 of 31 May 1995, Riforma del sistema italiano di diritto internazionale privato (1/circ), Articles 16-17-28-29:[201]

Article 16 "i) Foreign law shall not be applied if its effects are contrary to public order; ii) In such cases, the law according to other connecting criteria provided for in the same law shall apply. In absence of any such provision, Italian law shall apply."[202]

Article 17 "The following provisions are without prejudice to the prevalence of Italian laws which in view of their object and scope shall be applied notwithstanding reference to the foreign law."[203]

Article 28 "A marriage is valid, in relation to form, if it is considered as such by the law of the country where it is celebrated or by the national law of at least one of the spouses at the time of the marriage or by the law of the common state of residence at the time of the marriage."[204]

Article 29 "i) Personal relations between spouses are regulated by the national law common to both parties. ii) Personal relations between spouses who have different

[199] See *Schalk and Kopf v Austria* (2011).

[200] *Orlandi and Others v. Italy*, 189.

[201] Giulia Dondoli, "Orlandi and Others v. Italy: Same sex marriage in Italy, a problem of private international law", 19th International Academic Conference, (Florence 2015) 257.

[202]Articolo 16: "1. La legge straniera non è applicata se i suoi effetti sono contrari all'ordine pubblico. 2. In tal caso si applica la legge richiamata mediante altri criteri di collegamento eventualmente previsti per la medesima ipotesi normativa. In mancanza si applica la legge italiana." (English translation from Orlandi and others v Italy by Giulia Dondoli, supra note 1, at para B(1).

[203] Articolo 17: "1. È fatta salva la prevalenza sulle disposizioni che seguono delle norme italiane che, in considerazione del loro oggetto e del loro scopo, debbono essere applicate nonostante il richiamo alla legge straniera." (English translation from Orlandi and others v Italy by Giulia Dondoli, supra note 1, at para B(1).

[204] Articolo 28: "Il matrimonio è valido, quanto alla forma, se è considerato tale dalla legge del luogo di celebrazione o dalla legge nazionale di almeno uno dei coniugi al momento della celebrazione o dalla legge dello Stato di comune residenza in tale momento." (English translation from Orlandi and others v Italy by Giulia Dondoli, supra note 1, at para B(1).

nationalities or several nationalities common to both are regulated by the law of the state where matrimonial life is most prevalent."[205]

The four articles can be divided in two groups, Article 16 and 17 refer to the notion of public order, while Article 28 and 29 are focused on the validity of marriage contracted abroad.[206] Consequently, the assumption in private international law that a foreign decision is in conformity with public policy, in contrary to the *lex fori* does not apply as the assumption makes equal the act of marriage and domestic law.

That is to say that, in the ECtHR jurisprudence on LGB rights, the notion of public order has to be used in association with the notion of necessity. To understand the notion of public order and necessity, two aspects need to be taken in consideration: on one hand, there is the right of same sex couples to have their marriages contracted abroad recognized by the Italian authorities; and on the other hand, there is the interest of Italian society to maintain public order.[207] Many Italian same sex couples marry in countries where that is allowed; then, they apply to have their status recognized in Italy, but because there is no law regulating same sex relationships, their applications are often rejected.[208]

It can be argued, that the case actually is more about impossibility to register in the Italian order due to the national rule which is limited to opposite-sex relationship, then about a matter of public order.[209] However, the recent case is exactly about pushing the line of interpretation of the defined in ECHR rights by ECtHR.

The discussed case is rather exception in the line of ECtHR jurisprudence on right to private life and public policy in private international law and even the first impressions, that case is in favor of public policy application is not completely right. As it was discussed in the section 2.2 the judgment *Oliari and Others v Italy* reaffirmed that Council of Europe member

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[205] Articolo 29: "1. I rapporti personali tra coniugi sono regolati dalla legge nazionale comune. 2. I rapporti personali tra coniugi aventi diverse cittadinanze o più cittadinanze comuni sono regolati dalla legge dello Stato nel quale la vita matrimoniale è prevalentemente localizzata." (English translation from Orlandi and others v Italy by Giulia Dondoli, supra note 1, at para B(1).

[206] Giulia Dondoli.

[207] Marc de Werd et al., "Dutch Overview of the Case law of the European Court of Justice Human Rights and the Court of Justice of the European Union", Rechtspraak Europa, 2 (2018): 36, www.rechtspraak.nl/SiteCollectionDocuments/nre-2018-nr-02.pdf.

[208] Giulia Dondoli, 249.

[209] Fulvia Staiano, "(In)Comparable Situations: Same-Sex Couples' Right to Marriage in European Case Law." Federalizmi.It, 6 (2017): 23, http://web.cnr.it/istituti/ProdottoDellaRicerca.html?cds=071&id=369639

states have an obligation to legally protect a same-sex couples. Comparing two judgments it may be concluded that ECtHR is putting in place a framework for the recognition of the same-sex relationship (within the meaning of respect for private and family life), that may appear as a step in the direction of same-sex couples being afforded the protection under right to marry[210] and right to respect private and family life, respectively with reduce number of public policy clauses involvement afterwards.

[210] Claire Poppelwell-Scevak.

3. HUMAN RIGHTS AND EUROPEAN PUBLIC ORDER

The chapter provides overview on specific features of implementation of public policy in EU. The mentioned influencers, such free movement of judgments and the right to a fair trial will be discussed in a separate subchapter as well as replacement of public policy by minimum procedural standards and EEO.

Public policy clauses are often viewed as "an evil since it represents an obstacle to apply foreign law or it is a ground for refusal of foreign judgments", however the "necessary evil" is a guardian for states legal orders[211] and recognized as such European public order is not an exception. ECJ in *Dieter Krombach v André Bamberski* case mentioned that states are free to "determine, according to their own conceptions, what public policy requires" as public policy aimed to safeguard national interests, but at the same time ECJ with it further practice limits and controls application by the Member States.[212] Finally, courts in France, Luxemburg and Italy mainly refer to EU law and ICJ case law, in Germany, Greece and Hungary case law plays vital role.[213] For instance, in the case *Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company* ECJ provided a complete description on functional involvement of procedural public policy:

> "[..] it is for the national court to examine whether, and if so to what extent, Mr Gambazzi had the opportunity to be heard as to its subject-matter and scope, before it was made. It is also for it to examine what legal remedies were available to Mr. Gambazzi, after the disclosure order was made, in order to request its amendment or revocation. In that regard, it must be established whether he had the opportunity to raise all the factual and legal issues which, in his view, could support his application and whether those issues were examined as to the merits, in full accordance with the adversarial principle, or whether on the contrary, he was able to ask only limited questions." [214]

Nonetheless, influence of the ECJ case law is not the only specific feature of European public order. With introduction of mutual recognition and enforcement system and European Enforcement Order (EEO) for uncontested claims and applies in civil and commercial matters respectively, the main leverage against recognition of foreign judgments within EU was suppressed. Human rights protection regime as well as free movement of judgments

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[211] Varadi, T., Bordaš, B., Knežević, G., Pavić, V. (2010) Međunarodno privatno pravo (Beograd: Službeni glasnik) as cited at Tomaž Keresteš, "Public Policy in Brussels Regulation I: Yesterday, Today and Tomorrow," Lexonomica 8, 2 (2016).

[212] Hess Burkhard and Thomas Pfeiffer,155.

[213] Ibid.

[214] *Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company* (2009) Case C-394/07, ECLI:EU:C:2009:219, 42.

influenced a lot on the emerging of EEO and further "suppression" of public policy clauses. In such situation, it is important to detect all positive and negative moments which accrued to prevent possible defects of the established system.

Overall, within EU the recognition and enforcement order is based on so called Brussels system and the modification of the procedural public policy by adoption a new regulations and amendments to existing tends to reduce influence of the public policy as such. By comparing the articles, the difference is obvious:

Art 27(1) of the Brussels Convention, which was applicable before Regulation 44/2001 came into force, states: "A judgment shall not be recognized if such recognition is *contrary to public policy* in the State in which recognition is sought." It is understandable why ECJ delimited the content of public policy in a negative way, such broad provision may be abused by the Member States.

In the Brussels Ia Regulation public policy clause was defined under Article 34(1): "A judgment shall not be recognized if such recognition is *manifestly contrary to public policy* in the Member State in which recognition is sought." This interpretation of clause in the Regulation was the result of ECJ case law on Article 27(1) of the Brussels Convention.

Art 45(1)(a) of the Brussels Ia Recast states: "On the application of any interested party, the recognition of a judgment *shall* be refused if such recognition is *manifestly contrary to public policy* (ordre public) in the Member State addressed." Under the Article 39 of Brussels Ia Recast judgment can be automatically enforced among Member State of the EU and skipping special procedure.[215] The limitation of public policy clauses to a formal stage may play a great role in an economic development and overall procedural affairs, but human rights intensively losing a safeguard on a domestic level.

The question is whether it is very effective in practice and does procedural rights are reasonably devoted in favor of the administrative sureness? In order to fully understand the picture each factor of influence should be examined separately.

3.1 **Right to a fait trial and free movement of judgments**

This part of research dedicated to the question of the influence of the right to a fair trial and free movement of judgments on application of the public policy clauses in ECtHR

[215] Tomaž Keresteš, 81.

case law. By investigating this question, the attention will be given to some of the previously examined cases in the light of obligation to recognize and enforce a judgment, which may occur from the right to a fair trial.

Citizens and legal entities must be able to exercise their rights in all Member States regardless of their nationality. The principle of mutual recognition is the cornerstone of judicial cooperation in civil matters in the European Union for skipping intermediate proceedings, such as *exequatur*. European procedural law is getting an increasingly prominent place. In the last years, it has developed into a more or less autonomous system between the private international law and national procedural law.[216] As priorities for its action, the Council established better access to justice in Europe, mutual recognition of judicial decisions and increased convergence in the field of civil law. In this regard, the public policy exception, which allows a Member State to refuse the recognition and enforcement of a judgment returned by another State, appeared to be an impediment to the free movement of judgments.[217] In this light, it could be argued that such restriction may influence on corresponding human rights, such as the right to a fair trial.

On the other hand, a general Article 67 (4) of the TFEU states that "the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters" and in correlation with specific Article 81(1) TFEU according to which "the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States" shows the whole picture of interrelation of the mutual recognition and free movement of judgments as decisive area of policy action for the EU. In its turn, Article 47 of EUChFR, which is hierarchically higher from the EU regulations regarding the "free movement of judgments", even broadens the procedural protection of individuals,[218] but the idea behind is different from in reciprocity system. Which aspect should be considered in relation with public policy

[216] Europees justitieel netwerk in burgerlijke en handelszaken. "Praktische handleiding voor de Toepassing van de Verordening betreffende de Europese Executoriale Titel." 2008. http://docplayer.nl/10582463-Praktische-handleiding-voor-de-toepassing-van-de-verordening-betreffende-de-europese-executoriale-titel.html.

[217] Ibid.

[218] Jerca Kramberger Škerl, "European Public Policy (With An Emphasis on Exequatur Proceedings)", Journal of Private International Law 7, 3 (2011).

depends on situation, similar to case of determination about the part of EU law, which constitutes "fundamental" rules of European public policy.[219]

As it was discussed in the chapter one, EUChFR creates a higher standards of human rights protection regime within EU. Although, according to the Article 52 of EUChFR the rights which correspond to rights guaranteed by the ECHR, "the meaning and scope of those rights shall be the same as those laid down by the said Convention", so ECtHR case law on the right to a fair trial under Article 6 (1) of ECHR corresponding to Article 47 of EUChFR. Taking into consideration, that ECHR is an instrument of European public policy, the judicial practice of ECtHR in line with ECJ should be involved in order to detect the balance between the right to a fair trial and free movement of judgments that definitely shapes European public policy.

Firstly, the right to a fair trial includes sureness that lawful court decision will be enforceable:

> "However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 para. 1 should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6."[220]

This aspect of the right to a fair trial interrelates with the public policy clauses the most. In cases McDonald v. France,[221] Jovanoski v. the Former Yugoslav Republic of Macedonia[222] and Vrbica v. Croatia[223] ECtHR acknowledged that refusal to recognize a foreign judgment or enforce it may violate Article 6 (1) of ECHR. In the case *Négrépontis-Giannisis v. Greece*, which was discussed in the context of family matters and right to respect for private and family life Court also have found the violation of the right to a fair trial since Greece refused to enforce the adoption order which contradicts to it domestic law. Overall, in

[219] Jerca Kramberger Škerl, 463-464.

[220] *Hornsby v. Greece*, (1998) no. 18357/91, ECHR, 40.

[221]. Kiestra Louwrens, 230.

[222] Kiestra Louwrens as cited at Jovanovski v. The Former Yugoslav Republic of Macedonia (2010) no. 31731/03, ECHR.

[223] Vrbica v. Croatia (2010) no. 32540/05, ECHR, 73.

case of non-enforcement of the foreign decision the preventive mechanism of the right to a fair trial may be involved. However, in the cases which were given as an example, some additional conditions stimulated the suppression of the enforcement in opposition to public policy clauses, for instance, best interest of a child.

Another example is also a case where court decision affects the right to a fair trial on procedural public policy.[224] In the *Pellegrini v. Italy*[225], ECtHR was dealing with the question of the compatibility of foreign proceedings with Article 6 ECHR. The applicant challenged Italy before the Strasbourg Court on the grounds that the Italian courts had granted recognition (*exaequatur*) to a nullity of marriage decree that had been pronounced, under canon law and essentially was under jurisdiction of the Vatican (not party to the ECHR).[226] ECtHR stated that it could not rule on the ecclesiastical proceedings and it compliance with guarantees under Article 6,[227] however regarding Italy obligation under Article 6 it was mentioned that: "to enquire not into whether the proceedings before the ecclesiastical courts complied with Article 6 of the Convention, but into whether the Italian courts, before granting confirmation and execution of the said annulment, duly checked that the proceedings relating there to satisfy the guarantees contained in Article 6 […]."[228] Essentially, Strasbourg Court found that Italy had violated Article 6 (1) and the last should ensure that by recognizing the validity of the judgment of the Vatican court for the purpose of its enforcement in Italy it does not affect the right to a fair trial.[229]

Based on the case decision two points should be mentioned: first, concerning the extent to which *exaequatur* may be under human rights' question in order to state in which it should be granted recognition may ask for checking the proceedings as it follows from *Pellegrini v. Italy*, and the second is standards of responsibility within State Parties to ECHR for violation Convention' provisions because of granting *exaequatur* from third countries.

[224] Jan Oster, Public policy and human rights, Journal of Private International Law, 11:3, 542-567, DOI: 10.1080/17441048.2015.1096144 (2015) 542.

[225] *Pellegrini v. Italy*, App. No. 30882/96, 35 Eur. Ct. H.R. 44 (2001).

[226] Jean-Paul Costa, "European Court of Human Rights and its recent Case-law," Texas International Law Journal 38, 3 (2003) 464.

[227] Ibid.

[228] *Pellegrini v Italy*, appl. no. 30882/96, [2001-VIII] ECHR, Para. 40

[229] Jean-Paul Costa.

Taking about *exequatur* proceedings and the right to a fair trial following from Article 6 (1) ECHR, an important here is a judgment *Saccoccia v. Austria*.[230] In this case could be found a clarification about the extent to which *exaequatur* may be under question since ECtHR has mentioned: "with regard to domestic proceedings, also found Article 6 to apply in respect of execution proceedings on the ground that it is the moment when the right asserted actually becomes effective which constitutes the determination of a civil right [...] The Court sees no need to come to a different conclusion for *exequatur* proceedings".[231] In other words, on all stages of *exequatur* proceedings Article 6 (1) ECHR is applicable, however in this particular case ECtHR found that there had not been a violation of Article 6 (1) ECHR.[232] It should be mentioned, that developed and interpreted through a case law the right to a fair trial is basically the only one principle that was so actively included in Art. 45(1)(b) Brussels I Recast and chanced procedural public policy clause.

The analysis of the cases *Pellegrini v. Italy*, *Saccoccia v. Austria* and *Krombach v Bambersk* has shown that the right to a fair trial impacts on public policy application in a restrictive way and the court, usually, on case by case basis develops limited frameworks of it application. Considering the obligation to enforce judgment in frameworks of the right to a fair trial with combination of the existing ECtHR practice on public policy clauses, the last could be used when "manifest breach" of essential legal order does not compete with special condition as best interest of a child. The same approach seems to be used in Art 45(1)(a) of the Brussels Ia Recast as provision states that state not *should* but *shall* refuse to recognize a judgment if such recognition is manifestly contrary to public policy in the Member State addressed. It was already shown how provision on public policy changed after Brussels modification. The idea behind is to leave room for additional circumstances for the Member States in contrast to public policy clause.

In this respect, it is argued that mentioned perspective on public policy is fair and logical because otherwise, it would be against the principle of the free movement of judgments and a wide use of the public policy exception would nullified the effect of Brussels Ia.[233]

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[230] *Saccoccia v. Austria* (2008) no. 69917/01, ECHR.

[231] Ibid., 61-62.

[232] Ibid., 80.

[233] Jan-Jaap Kuipers, "The Right To A Fair Trial And The Free Movement Of Civil Judgments," CYELP 6 (2010): 45, https://hrcak.srce.hr/file/100142.

In some circumstances, violation of the right to a fair trial could be as a consequence from the fact that the decision will not be qualify as a 'judgment' for the purpose of Brussels Ia and benefit from the free movement of judgments. In other circumstances, the absence of one of the parties during the original proceedings may constitute grounds for non-recognition, while public policy may be used to combat the remaining violations of the right to a fair trial.[234] ECJ held that for the purposes of Brussels I "the decision in question must emanate from a judicial body of a Member State deciding on its own authority on the issues between the parties."[235]

3.2 Replacement of Public Policy Clauses by Minimum Procedural Standards and European Enforcement Order

The subchapter continue research on changed European public order by going through instruments of exequatur abolishment. It will be shown how public policy clauses implementation has changed with introducing minimum procedural standards and EEO.

Replacement of public policy clauses within EU by minimum procedural standards and EEO is one of the consequences of the human rights impact on application of procedural public policy in private international law. The abolition of *exequatur* in civil law and the possible introduction of common minimum standards regarding the recognition and enforceability of parental responsibility decisions were identified in the Stockholm Programme[236] as key for the Commission's future work in civil matters.

The theoretical basis for introducing the minimum procedural standards as an experimental novelty in the EU international civil proceedings is the reason that the Member State of enforcement is deprived of the right to decide about the recognition and enforcement of a judgment.[237] The only procedural leverage conducted by the Member State of enforcement was principle of *non bis in idem*, so public policy clauses was involved for

[234] Jan-Jaap Kuipers, 39.

[235] Solo Kleinmotoren (1994) Case C-414/92, ECLI:EU:C:1994:221,17.

[236] "The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens, 2 December 2009, 17024/09," Refworld, 3.1.2 and 3.3.2. http://www.refworld.org/docid/58c162cb4.html.

[237] Inga Kačevska at al., Practical Application of European Union Regulations Relating to European Union Level Procedure in Civil Cases: the Experience in Baltic States (Riga, Vilnius, Talinn, Research of Law Office Of Inga Kačevska, 2012), 62. https://www.etis.ee/Portal/Publications/Display/80681c71-6702-4264-b6ec-df776902b127?lang=ENG#.

enforcement refusal.[238] The replacement of *exequatur* procedure simplified cooperation in legal affairs to almost unified system within EU, but as in was shown through the research even some procedural aspects could be interred differently among Member States and public policy safeguarding underlines them.

Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a EEO for uncontested claims and applies in civil and commercial matters.[239] EEO is a new instrument to establish a European procedural area, that following from the Tampere Conclusions (1999)[240] and the Programme on mutual recognition of judgments in civil and commercial matters (2000).[241] Regulation (EC) No 805/2004 enables the judge of the country of origin to certify a decision as EEO in case certain minimum requirements are fulfilled, and this judgment will be enforceable throughout the EU (except for Denmark) without any intermediary proceedings.[242] So, basically, if judiciary act follows under notion of judgment and constitutes uncontested claim, then it will enforceable throughout the system of the EEO. The Regulation is aimed at implementing the Community's goal of creating and expanding the area of freedom, security and justice, which is also in unison with the overarching objective of the EU of maintaining the smooth functioning of the internal market.[243]

EEO is necessary for the enforcement of decisions in a Member State, court settlements or authentic instruments issued, approved, concluded or expunged in another Member State and relate to uncontested claims, that is why EEO does not standalone and is a part of the series of regulations[244] in the field of procedural law. Some of those regulation were already mentioned in previous sections, namely Brussels I Regulation. For relations between Denmark and other EU member states, the Agreement between the European

[238] Ibid.

[239] "Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims." OJ L 143 (2004).

[240] "European Union: Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999, 16 October 1999," Refworld, accessed 29 April 2018 http://www.refworld.org/docid/3ef2d2264.html.

[241] "Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters," OJ C 12, (2001).

[242] M. Zilinsky, De Europese executoriale titel, (diss. VU) Deventer: Kluwer 2005.

[243] M. Zilinsky.

[244] Besides the Brussels I Regulation, the following EU regulations: Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (up to €2,000), OJ L 199 (2007) and Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L 399 (2006).

Community and the Kingdom of Denmark on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 21 March 2013 applies (which includes the new Brussels I Regulation).[245] For relations between EU member states and Norway, Iceland and Switzerland a separated Convention applies.[246] The system of the declaration of enforceability depends on mentioned above instruments and rules on private international law.

It should be considered, that changes occurred in Brussels system and emerging of EEO are caused among other reasons, by practice of ECJ regarding public policy clauses and human rights. For instance, discussed in previous chapters case *Dieter Krombach v André Bamberski* (2000), where ECJ defined "manifest breach" and afterwards implementation of the Court was implemented in the Brussels Ia Regulation (before recast).

Secondly, the ECJ draws its inspiration from Article 6 ECHR when interpreting Brussels Ia and the inspiration overlaps not only the right to a fair trial and public policy, but often the perception of public policy and human rights interrelation.[247] It seems as a logical approach since ECHR recognized instrument of European public order for the protection of individual human beings, but the inspiration in such case has a selective character as it does not include outcomes from the case *Pellegrini v Italy*.

The EEO Regulation (EC) No 805/2004 (Art 5)[248] does not include the possibility to oppose against the recognition of an EEO. An exception that is possible to apply under the Regulation to EEO is Article 21(1) and it is related to a refusal of enforcement in cases of irreconcilability of the judgment with a prior judgment and the suspension and the limitation of the enforcement.[249] Besides, according to Article 23 of the EEO Regulation (EC) No 805/2004, the court of Member State of application can limit the enforcement proceedings to

[245] "Council Decision of 20 September 2005 on the signing, on behalf of the Community, of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters," OJ L 299 (2005).

[246] "Strengthening cooperation with Switzerland, Norway and Iceland: the Lugano Convention (2007)," EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=URISERV%3Al16029.

[247] Jan-Jaap Kuipers, 45.

[248] Article 5: "A judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition."

[249] "Enforcement of Foreign Judgments," Getting The Deal Through, 2017, https://gettingthedealthrough.com/area/46/jurisdiction/28/enforcement-foreign-judgments-2018-france/.

(a) to protective measures; or (b) condition under security issue; or (c) suspend in exceptional circumstances.

It is clear, that EEO Regulation (EC) No 805/2004 does not include public policy exception or Article 23 may cover this ground in case of very broad interpretation of public policy which is almost impossible in circumstances of current judicial tendency to apply clause. In such case the abolition of *exequatur* is directly affecting the extended circle of all judgments from a Member State within the scope of the EEO Regulation (EC) No 805/2004.[250] The approach to the removal of the *exequatur* procedure which is so actively used in the Brussels Ia Regulation and EEO reflects a complex system regarding civil and commercial matters accepted by EU. Mentioned above Regulations, which could also affect maintenance claims, have made public policy no longer available as such and established instead minimum procedural standards in the Member States. [251] The accepted approach is aimed to control the public policy within the Member States and to abolish it function on of recognition and enforcement under EEO.

In regular situation if EEO Regulation (EC) No 805/2004 would include public policy ground as limitation for EEO, this provision would come into play when the other grounds for limitation are not applicable,[252] similar to non-recognition and enforcement of judgments. The argument in favor of EEO, apart from free circulation of judgments in civil and commercial matters within EU, is definitely more similar law in the areas of law on national level, nonetheless, it is still in some circumstances can be an obstacle to the right of access to justice.[253]

The differences between Member State procedures (for example, right of appeal) may not guarantee an effective and expeditious enforcement of judgments. However, the courts of

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[250] Etienne Pataut, "The public-policy exception and the Proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession," Policy Department C: Citizens' Rights and Constitutional Affairs Note, 2009, 9.
http://www.europarl.europa.eu/document/activities/cont/201012/20101210ATT08870/20101210ATT08870EN.pdf.

[251] Hess B and Pfeiffer T, "The Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law", presented at European Parliament's Committee on Legal Affairs, Brussels, 2011
http://www.europarl.europa.eu/RegData/etudes/STUD/2011/453189/IPOL-JURI_ET(2011)453189_EN.pdf.

[252] Jan-Jaap Kuipers, 39.

[253] Jan-Jaap Kuipers, 43 as cited at H Meidanis, "Three Greek Cases on the Brussels Convention", Ybk Private Intl L, 8 (2006): 281, 283.

origin are the only ones entitled to examine challenges to their jurisdiction, an application to suspend the enforcement of a certified return order and a change of circumstances after the certified return order that might be seriously harmful to the best interests of the child. But in practice hurdles remain with the actual enforcement of return orders.[254] For example, it is the enforcement in the territory of the Member State to which the child was abducted of a return order issued by a court of that Member State,[255] or the enforcement in that Member State of a certified return order issued by the court of origin. Enforcement procedures differ from one Member State to another (in some Member States, enforcement procedures can in fact last for over a year as enforcement courts reexamine the substance of the case, while return orders should be enforced immediately).[256] The proceedings relating to the return of the child and the enforcement of a final decision involving the return of the child require urgent handling as the passage of time can have irremediable consequences for the relations between the child and the parent with whom he/she does not live. To this end, the Commission intends to launch further policy evaluation of the existing rules and their impact on citizens and a public consultation and will take a proper action on the basis of the evaluation and the replies to the public consultation.[257] Considering the aim and nature of the introduced minimum procedural standards it is fair to conclude that public policy clauses have lost their procedural function in terms of Brussels Regulations and EEO.

[254] European Commission, "Report from the Commision to the European Parliament, the Council and the European Economic and Social Commitee on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000," EUR-Lex, 2014, 15. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014DC0225.

[255] Report, cases PP v Poland, application no. 8677/03; Shaw v. Hungary, application no. 6457/09; R aw and Others v. France, application no. 10131/11.

[256] Report, 15.

[257] Ibid., 16.

CONCLUSIONS

Based on the comprehensive analysis of the research it is possible to make further conclusions:

1. *Multidimensional nature of the public policy.* Because of the complex nature of human rights and multidimensional character of public policy, the human rights could be viewed both as a limitation of the public policy (and state sovereignty respectively, when public policy considered as a substitute) and a ground for public policy (in case of national level, when human rights are imposed in national legal order or regional as it is with ECHR). Moreover, the multidimensional nature of the public policy clause reflects in its instrumental implementation in the case *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others*, which in its turn is definitely the basis for further development of a common European public order.

2. *Human rights as a ground for public policy*. The EUChFR likely to ECHR could be viewed as an instrument of public policy (European), consequently fixed human rights constitute the legal order of EU and are under the direct protection of public policy clauses. The difference that occurred in such interpretation could be detected through the Case C-36/02, when consensus on European public order among the Member States is limited to the mentioned above legal instruments and involvement of the public policy clauses by national court is strictly observed.

3. *Limitation to recognition of registered relationship.* Developed through judicial practice right to respect family and private life has influent on the application of public policy clauses globally in sense of its predominance in case of infringement of a national legal order, however the case law still does not create a full and unified picture on family matters, especially in case of the registered relationship. Recognition of same-sex marriages and registered partnerships is not covered by the Brussels IIa and involves controversial case law. In the case *Oliari and Others v Italy*, the state obligation to guarantee same-sex couples legal protection occurred even if it does not recognized registered partnerships. In correlation with other case law it could be stated that the existence of public policy clauses, that may prevent recognition of registered partnership in its procedural legal reality, is not effecting *de facto*

substantive legal rights of a person. Because of that a substantive function of public policy in the context of family matters, in particular, registered relationships is fully removed. The main reason for *de facto* cancellation of the public policy functions is caused by the back of the common conflict rules on registered relationships and absence of particular consensus among the EU State Members. Besides, *de facto* recognition of the registered partnerships and same-sex marriages in countries, where it is no relevant legal regime is exactly that possible "manifest breach" of essential legal order on which ECJ and ECtHR are referring in the case law.

4. *Right to fair trial and European public order*. Practice regarding the right to a fair trial impacts on application of public policy clauses within EU in a restrictive way, which is proven by cases *Pellegrini v. Italy*, *Saccoccia v. Austria* and *Krombach v Bambersk.*

5. *The abolish of exequatur procedure.* Replacement of public policy clauses by minimum procedural standards is one of the consequences of human rights impact on application of public policy in private international law. The main stage aimed to prevent possible procedural violation of human rights is now removed by Brussels Regulations and EEO. Based on tendency of the ECJ and ECtHR case law regarding public policy, and development of secondary EU legislation restrictive public policy application will be removed by minimum procedural standards in most of the civil matters.

RECOMMENDATIONS

1. In order to prevent human rights violation in case of restrictive application of the public policy clauses, to the developed in case law approach of a "manifest breach" should be added proportionality criteria. The criteria will indicate legitimacy of aim pursued public policy involvement.
2. The proportionality criteria could be used as well in *de facto* recognition of the registered partnerships and same-sex marriages in countries, where it is no relevant legal regime. Regarding recognition of registered partnerships and same-sex marriages it would be more relevant to develop a common conflicts rules, but for now, due to the significant differences among states' approach to the question, it seems unrealistic.
3. Finally, it has also been suggested that public policy clauses should be used in a less restrictive way when it comes to the provision of ECHR as it was not only recognized as an instrument of European public order but proven to be effective outside EU members.

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ABSTRACT

As a universal tool for modern development, human rights impose new standards in the application of public policy in private international law. By analyzing public policy theories and practical implementation of clauses the link the between restrictive application of the last and violation of human rights will be shown. It is argued that practice of ECJ and ECtHR as well as established by secondary legislation system of mutual recognition and enforcement *de facto* suppressed functional application of public policy.

Keywords: human rights, public policy, private international law, family matters, European enforcement order.

SUMMARY

The master thesis “The impact of human rights on application of public policy in private international law” analyses human rights as one of the main public policy definers on both national and EU level. By focusing on the role of public policy clauses in safeguarding against violation of the human rights in private international law the dual role of the last is shown. Besides, the examination is focused on ECtHR and ECJ practice in order to detect a restrictive application of public policy clauses and abolishment of *exequatur* procedure.

The research consists of the three main chapters. The first chapter provides theoretical basis on public policy and human, considers human rights as basis for public policy with the inserts from judicial practice of different national legal system. It is argued that public policy interrelation has a dual character: restrictive regarding public policy and protective for human rights. The second chapter considers public policy application in the family matters in the light Brussels IIa Regulation. Also, it includes the analyses of the problematic aspects of the recognition of registered relationships and same-sex marriages in EU private international law arguing that existing practice of ECtHR provides *de facto* recognition to the new institute of family law. The last chapter of the thesis provides overview on specific features of the restrictive application of public policy within EU, such are free movement of judgments, the right to a fair trial and replacement of public policy by minimum procedural standards in line with EEO.