



Institut suisse de droit comparé  
Schweizerisches Institut für Rechtsvergleichung  
Istituto svizzero di diritto comparato  
Swiss Institute of Comparative Law

1 June 2023  
SICL, Lausanne

# Personal Identity and Status Continuity A focus on Names and Gender in the Conflict of Laws

3<sup>rd</sup> session of the Conference Family status, Identities and Private International Law  
A Critical Assessment in the Light of Fundamental Rights



FAMILY AND  
SUCCESSION LAW  
SIG



---

## PROGRAMME

Central European Time Zone/UTC

Information and registration: [news.isdc@unil.ch](mailto:news.isdc@unil.ch)

## About the *Journée de droit international privé* or IPR Tag

This year marks the 34<sup>th</sup> edition of the Swiss Institute of Comparative Law's traditional conference series. Originally a birthday tribute to Professor Alfred von Overbeck, who inspired the founding of the Swiss Institute of Comparative Law, the conference has always reflected or even anticipated the *Zeitgeist* and developments of private international law, in theory and practice. The diversity and richness of the themes are shown by the following selection: The 1980 Vienna Convention on the International Sale of Goods (1984/1985); International Commercial Arbitration (1989); The service of documents (1997); Registered partnerships in Europe (2004); The trust in private international law (2005); The law applicable to rights in financial instruments held with an intermediary (2006); The Lugano Convention (2008); The Rome I Regulation on the law applicable to contractual obligations (2008); The Swiss Private International Law Statute, twenty years later (2009); International successions (2010); The revision of EU Regulation No 44/2001 (2011); International bankruptcy (2013); Dissolution of family ties and private international law (2015); Trilateral legal situations created by contracts with banks and insurance companies (2016); Digital platforms and private international law (2018).

## The Conference “FAMILY STATUS, IDENTITIES AND PRIVATE INTERNATIONAL LAW”

Organised under the auspices of the ELI Family and Succession Special Interest Group (SIG) and the University of Pisa, the 34<sup>th</sup> Private International Law Day is the third session of the conference on "Family Status, Identities and Private International Law", following the [first two sessions on 5 and 12 May 2022](#).

The conference will examine the theoretical and practical consequences of the current use of private international law and fundamental rights as drivers to promote legislative reforms in the field of family law.

It analyses counter-arguments, such as those characterising the deduction of new fundamental rights from existing ones, partly through private international law, as a means of circumventing democratic processes and creating contradictory rules within national legal orders.

The CJEU line of cases initiated by Garcia Avello, and followed by Coman and Pancharevo, has highlighted the need to reconcile conflicting views on how the EU could respect its motto “united in diversity”, and intervene to ensure a common social development that respects the rights of all, especially the most vulnerable: children. In this regard, the 1989 Convention on the Rights of the Child also provides valuable guidance for adults, as gender identity and the right to know one's origins belong to every human being, regardless of age.

This third panel aims to provide a forum for discussing the conflict of laws on names and gender and its impact on the lives of citizens and their enjoyment of human rights.

### Scientific organisation:

#### Ilaria Pretelli

Legal advisor at the SICL and Editor of the Yearbook of Private International Law  
Chair of ELI's Family and Succession Law SIG

#### Elena Bargelli

Professor at the University of Pisa  
Chair of ELI's Family and Succession Law SIG

**09.30-09.35**      **Welcome**  
**Lukas Heckendorn Urscheler** – Vice Director of the SICL

**09.35-10.00**      **Introduction on the Importance of Legal Scholarship in Identifying New Imperatives of Justice**  
The role of the ELI in the Development of EU Law  
**Christiana Fountoulakis** - Council Member of the European Law Institute

The Swiss Federal Court and Art. 1(3) of the Swiss civil code: does the Court follow, adhere or is simply inspired by "established doctrine and case law"?

**Monique Jametti** - President of the First Civil Law Division Federal Supreme Court of Switzerland

The role of Legal Scholarship in Swiss Legal Practice  
**Franz Werro** - President of the SICL Council

**10.00-12:15**      **Session I: Cross-border Portability of Names**  
**Chair:** **Elena Bargelli** - Professor at the University of Pisa

**10.05-10.30**      **The ICCS's Contribution to the Portability of Names**  
**Nicolas Nord** – General Secretary of the International Commission on Civil Status and Associate Professor at the University of Strasbourg

*The aim of the presentation is to examine the main instruments adopted by the International Commission on Civil Status in the field of names.*

*Five conventions are of particular interest. Their main goal is to ensure the continuity of the name across borders and, as a consequence, to prevent the persons concerned from experiencing difficulties, particularly of an administrative nature, as a result of a discrepancy.*

*The most important provisions of the conventions will be studied. In particular, the original methods created by the International Commission on Civil Status are essential to know in this field. This is why they will serve as a guideline for the presentation. A critical approach will be adopted in order to highlight the advantages as well as the disadvantages of the texts.*

**10.30-11.00**      **The Recognition of Names between EU Law and Human Rights Law: Recent Developments**  
**Giulia Rossolillo** - Professor at the University of Pavia

*The continuity of names over time and across borders is inherent in their function as a manifestation of an individual's identity. It is therefore no coincidence that national systems of private international law and relevant international conventions seek to ensure such continuity, both when using nationality as a connecting factor and when using criteria such as domicile or habitual residence, through techniques such as the common resolution of preliminary questions.*

*Albeit from a different perspective than private international law, the European Court of Human Rights and the Court of Justice of the European Union have also ruled on the continuity of names, the former on the basis of Article 8 of the European Convention on Human Rights, the latter by applying the principles developed in the context of the free movement of persons. There are some points of convergence between these judgments, both because the European Court of Human Rights has repeatedly cited judgments of the Court of Justice of the European Union in its decisions on personal identity, and because, when assessing the proportionality of national measures hindering freedom of movement, the Court of Justice applies the Charter of Fundamental Rights of the European Union, the provisions of which, when they correspond to provisions of the European Convention, must be interpreted in the light of the case-law of the European Court of Human Rights.*

*However, as the European Court of Human Rights pointed out in *Kunsberg Sarre v. Austria*, the fundamental rights issue of private and family life is not normally addressed in the Court of Justice's judgments on the recognition of names, so that very similar cases may lead to different results depending on which of the two Courts is called upon to decide.*

*This does not exclude the possibility that in the future the Court's judgments on the recognition of names will move away from an exclusive focus on freedom of movement and give greater weight to the protection of private and family life, as was the case with family reunification in *Chavez-Vilchez and Coman*.*

**11.00-11.15**      *Coffee Break*

**11.15-11.45** **You Name It: On the Cross-Border Regulation of Names**  
**Sharon Shakargy** - Professor at the University of Jerusalem

*Is your name "yours"? Are you free to choose your own name? Does a name survive the crossing of borders and even the acquisition of new citizenships? In the common law world, the unequivocal answer is yes. In the civil law world, instead, the answer is not so clear. While the global trend in recent decades has been to relax the norms governing names, old traditions die hard, and in some cases are now re-emerging in other parts of the world. In an increasingly globalised world, with widespread immigration, refugees and people with dual (or even multiple) citizenships, the different national attitudes towards names and the lack of adequate cross-border regulation of names become a relevant and pressing issue. The presentation maps and conceptualises the challenge of names by highlighting the different approaches to names and suggesting possible cross-border regulation (i.e. choice of law rules) that would address this issue for the benefit of the individuals and countries involved.*

**11.45-12:15** **Q&A**

12.15-13.15 *Lunch Break*

**13.15-16.00** **Session II: Third Gender and Status Continuity of TIQA + Persons**  
**Chair:** **Ilaria Pretelli** – Legal advisor, SICL

**13.20-13.50** **Report of the Federal Council of 2022 on the question of the introduction of a third gender and Swiss practice**  
**Michel Montini** – Swiss Federal Office of the Civil Status and Lecturer at the University of Fribourg

*The presentation will explain Swiss legislation and practice on gender determination and gender reassignment in national and international private law.*

*In particular, the speaker will focus on the reform that will enter into force on 1 January 2022, which will make it possible to change one's gender and first name by means of a declaration submitted to the civil registrar.*

*He will discuss the content of the Federal Council's report entitled "Introduction d'un troisième sexe ou abandon de la mention de sexe dans le registre de l'état civil - Conditions et conséquences pour l'ordre juridique" (Introduction of a third sex or abandonment of the mention of sex in the civil register - Conditions and consequences for the legal order), which was adopted on 21 December 2022.*

*Finally, he will present the next steps and ongoing parliamentary work to improve the position of non-binary people without legally challenging the binary gender model.*

**13.50-14.20** **(Third) gender private international law perspectives**  
**Mirela Župan** - Professor at the University of Osijek

*Personal status in relation to gender has recently received a great deal of attention from academics, legislators and the general public across Europe. This rapid rise on the list of political priorities was a response to several issues. Namely, in some countries the binary approach to gender has been abolished in order to give legal recognition to a third gender status. These legislative movements have gone hand in hand with progress in human rights protection. In Europe, various transgender rights have been established by ECtHR judgments over the last decades. But perspectives on the legitimacy of using binary gender to identify a person are also constantly evolving. In some states, the perception of the fight against gender discrimination is evolving, leading to a radical turn in legislation on the recognition of a third gender. Such legislation introduces a new approach to self-determination, which is reflected in law as the right of persons to choose their own gender status. These legislative movements can also be attributed to a more general social impact of humanistic feminist theories. Modern legislators take a holistic approach to the legal issues at stake, adhering to a multidisciplinary consideration of facts and figures relevant to the adoption of a legislative solution. The presentation takes the above as a starting point, while further focusing on gender perspective analyses within private international law. The speaker discusses if and how feminist theories influence private international law reasoning and whether changes in substantive law would also affect its legislative evolution and interpretation. Would this lead to a new approach to conflict of laws, at least in jurisdictions that accept a third gender? Should a wider recognition of the individual's self-determination be reflected in private international law? In this sense, should we reinforce party autonomy and adopt more flexible connecting factors with the aim of allowing portability of gender across borders? Finally, is it legitimate to reconsider whether the above-mentioned ratio of recognition of a third gender is a sufficient justification for a result-oriented choice of law rule? It's important to emphasise that in some European states third gender recognition has been highly*

*debated, but the legislature has retained a binary gender approach. Would jurisdictions that are not keen on third gender recognition in domestic law be willing to accept its portability, if legitimately acquired abroad? When the stage is set for cross-border recognition of the third gender, public policy may be invoked. Given the relativity of the content of public policy, will the right to gender recognition in the future include the right to be free of any state-assigned gender label? Although the ECtHR in Y v. France (no. 76888/17 of 31 January 2023) sticks to a restrictive interpretation of Art. 8 right to privacy in matters of third gender recognition, its reasoning may be a valuable indicator of future developments.*

**14.20-14.50** **New gender statuses in Private International Law**

**Anatol Dutta** - Professor at the Ludwig Maximilians University of Munich

*The gender of a natural person has become a legal status question in many systems which allocate a certain legal gender mainly based on the individual's subjective gender identity. Furthermore, some legal systems have abandoned a binary system recognising other gender statuses beyond male and female. The presentation argues for a special conflict rule for the legal gender of a natural person and analyses which role the legal gender can play as a preliminary issue in a 'gender-sensitive' or 'binary' lex causae. Furthermore, the recognition of a special gender status acquired abroad shall be addressed.*

**14:50-15.20** **Lessons drawn from the Commission's Parenthood Proposal for further EU initiatives on personal identity and status continuity**

**Johan Meeusen** - Professor at the University of Antwerp

*Recently, the European Commission adopted a proposal for a Council regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood. The proposal intends to address current problems in the EU with respect to the recognition of parenthood for all purposes, and so strengthen the fundamental and other rights of children in cross-border situations. It will be examined what lessons can be drawn from this Commission proposal for further EU initiatives to ensure status continuity, in the field of names and gender specifically, and what the key legal issues for such initiatives under EU law would be.*

**15.20-16.00** **Q&A**

**16:00-16.20** **Closing Keynote Speech**

**Thalia Kruger** - Professor at the University of Antwerp