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Striking the Balance Between Cultural Diversity and Human Rights: Early Marriage as a Case-Study for Testing the Fairness of (Private) International Law

Angelica Bonfanti

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Abstract

Striking the balance between the protection of cultural diversity - including the protection of custom - and human rights in the field of family relations – where several harmful traditional practices occur - is extremely complex. This difficulty deserves to be examined in the framework of the debate between universalism and relativism of human rights. To this aim, early marriage can be referred to as a case-study. Domestic laws show a variety of approaches in this regard, in terms of prohibition, exceptions and recognition of early marriages celebrated abroad. The aim of this paper is to analyze these laws, as to assess if and how international law – and especially private international law – is fair.

Keywords

early marriage, human rights, cultural diversity, fairness, private international law, universalism, relativism

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1. Introduction

Striking a fair balance between cultural diversity and human rights can be complex. The fairness of international law turns out to be even more critical when the protection of cultural diversity and human rights in the field of family relations is at stake. As the United Nations acknowledge, the backlash against women's and girls' rights "too often starts in the family where, for example, women and girls are undervalued, may be limited to certain roles, experience harmful practices and patriarchal oppression, and suffer other human rights abuses, including domestic violence and sexual abuse".[1] Customs and traditions – including those based on religion - are well-established in the realm of family relations and worthy of protection, as the object of the internationally recognized individual right to take part in cultural life. The difficulty of coordinating the protection of cultural diversity and cultural rights, including the preservation of customs and traditional practices, on the one hand, with other fundamental rights put at risk when harmful traditional practices occur, on the other, is emphasized by the high number of reservations to the Convention on the Elimination of Discrimination against Women (hereinafter 'CEDAW')[2] and their impact on the corresponding principle of non-discrimination, as well as by the very significant number of customary and religious laws conflicting with fundamental human rights – nonetheless applied or tolerated at the domestic level by many countries. Within this context, the claim for a relativistic approach to human rights by several States, in the name of which some fundamental rights could potentially be watered down, cannot be underestimated.

Against this backdrop, early marriage can be referred to as a case-study. Domestic laws show a variety of approaches to early marriages - in terms of prohibition, exceptions and recognition of marriages celebrated abroad – worthy of examination. The aim of this paper is to analyze these laws, in the framework of the debate about universalism and relativism of human rights, and to assess if and how international law – and especially private international law – is fair.

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[1] Working Group on the issue of discrimination against women in law and in practice, A/HRC/38/46, 14 May 2008, par. 26.

[2] Convention on the Elimination of Discrimination against Women, 18 December 1979. See: Meeting of States Parties to the Convention on the Elimination of All Forms of Discrimination Against Women, Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/SP/2006/2, 10 April 2006.

2. Early marriage in the framework of the debate between universalism and relativism of human rights

Early marriages are a very widespread phenomenon. Early marriages involve spouses who are under the age of eighteen, but considered adults under national law, despite they are not sufficiently mature from an emotional, sexual or psychological point of view. Early marriages are different from child marriages, which instead involve spouses who are under the age of eighteen and minors under national law. The two phenomena share the limited ability of spouses to give their consent due to their inadequate development. Globally, child and early marriage affects approximately 15 million girls every year, with differences according to geographical areas.[3] The United Nations Working Group on discrimination against women specifies that, although many countries have proceeded to repeal traditionally discriminatory laws linked with family matters, they are unfortunately still enforced in many others: "in some countries, women are deprived of their fundamental rights due to, inter alia, a lower minimum age of marriage for girls, guardianship systems, forced marriage, polygamous marriage, discrimination in nationality rights, divorce rights and unequal rights to custody, inheritance and access to property and land. In the name of perceived honour, purity and tradition, girls and women are subject to 'honour' killing, child marriage, widowhood rites and female genital mutilation, among other violations of their rights. In some regions, there has been no progress at all towards eliminating child marriage".[4]

The rules on early marriage deserve to be read in the context of the debate between universalism and relativism of human rights.[5] At the international level, it is established that marriages must be celebrated between spouses of an appropriate age. The provision of state obligations to reform family law, where necessary, argues in favor of a universalist conception of human rights, tending to uniformly protect, in the different regions of the world and independently of the cultural, religious and traditional substratum, the fundamental rights of girls. Exemplary in this regard are articles 5 and 16 of the CEDAW, which require State Parties to take appropriate measures in changing the social and cultural patterns and stereotypes that contribute to discrimination against women and the customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. The CEDAW also aims to introduce reforms in family and marriage laws which will be suitable in guaranteeing men and women the right to contract marriage on a non-discriminatory basis and ensure equal subjective positions in personal and financial relationships with their spouses, also when it comes to dissolution and relationships with

[3] E. Lowe, N. Kharoufeh, B. McKinley, E. McDonald, P. Alphonse, R. Boustani, M. Milivojevic, R Ferguson, "The development of global responses to child, early and forced marriages," in HAQ Center for Child Rights, 2017.

[4] Working Group on the issue of discrimination against women in law and in practice, cit., par. 26.

[5] A. Bonfanti, "Il contrasto ai matrimoni infantili e precoci, tra universalismo e relativismo dei diritti umani: considerazioni sull'incostituzionalità della Gesetz zur Bekämpfung von Kinderehen", in Diritti umani e diritto internazionale, 2023, 769. On the debate: M. Iovane, "The Universality of Human Rights and the International Protection of Cultural Diversity: Some Theoretical and Practical Considerations", in International Journal of Minority and Group Rights, 2007, 231; A. Koroma, "International Law and Multiculturalism", in S. Yee, J.-Y. Morin (eds), Multiculturalism and International Law. Essays in Honour of Edward McWhinney, Leiden/Boston, 2009, 82; F. Lenzerini, The Culturalization of Human Rights, Oxford, 2014.

children. Article 16 finally establishes that child betrothal and marriage do not produce legal effects and that States must identify a minimum age for contracting marriages and make official registration mandatory. However, it is interesting to note that neither article 16 of the Universal Declaration of Human Rights, article 17 of the United Nations Covenant on Civil and Political Rights, nor the CEDAW (whose Committee, however, has repeatedly called for the minimum age to be set at eighteen),[6] identify a specific age limit below which marriage must be prohibited or considered invalid.

The perceived conception of human rights does not neglect culture as a relevant factor in the human rights protection system. The right to take part in cultural life - including traditional lifestyles and customs - is in fact itself a fundamental human right, protected by article 15 of the Covenant on Economic, Social and Cultural Rights.[7] In this regard, the Committee on Economic, Social and Cultural Rights - in line with the Vienna Declaration of the World Conference on Human Rights [8]- specifies, however, that States, while having to take into account national and regional particularities and different historical, cultural and religious contexts, must promote and protect human rights regardless of the existing political, economic and cultural systems.[9] Cultural diversity, which the 2001 UNESCO Declaration considers the common heritage of humanity, cannot therefore be invoked as a justification for limiting or violating human rights protected by international law.[10] According to the Special Rapporteur on cultural rights, in fact, not all its terms are acceptable from the perspective of human rights and "[e]ach tradition and practice identified as 'cultural' has to stand the test of universal human rights and show its capacity in building and maintaining human dignity as legitimate".[11]

The universalistic approach is criticized by the States and scholars who support theory of human rights relativism, according to which, since moral judgments can only be culturally relative, there are no international standards, of a moral or legal nature, that represent a benchmark for human rights.[12] This cultural variety therefore corresponds to different conceptions of what is right or wrong, with consequences on perceptions of what must be

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[6] CEDAW Committee, General Comment No. 2: Equality in Marriage and Family Relation, UN/Doc. A/39/38, 1994, par. 36.

[7] R. O'Keefe, "The 'Right to Take Part in Cultural Life' under Article 15 of the ICESCR", in International and Comparative Law Quarterly 1998, 904; L. Pineschi, "Cultural Diversity as a Human Right? General Comment No. 21 of the Committee on Economic, Social and Cultural Rights", in S. Borelli, F. Lenzerini (eds.), Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law, Leiden/Boston, 2012, 29.

[8] Vienna Declaration and Program of Action, World Conference on Human Rights, Vienna, 25 June 1993, par. 5.

[9] Committee on Economic, Social and Cultural Rights, General comment no. 21, Right of everyone to take part in cultural life (article 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, 21 December 2009, par. 18.

[10] Universal Declaration of Cultural Diversity, Paris, 2001, article 4.

[11] Report of the Special Rapporteur in the field of cultural rights, Universality, cultural diversity and cultural rights, UN Doc. A/73/227, 25 July 2018, par. 71.

[12] J. Donnelly, "Cultural Relativism and Universal Human Rights", in Human Rights Quarterly 1984, 400; Id., "The Relative Universality of Human Rights," in Human Rights Quarterly 2007, 281; F. A. Pollis, "Cultural Relativism Revisited", in Human Rights Quarterly 1996, 316 ss.; D. Renteln, "The Unanswered Challenges on Relativism and the Consequences for Human Rights", in Human Rights Quarterly 1985, 514; J. Tilley, "Cultural Relativism", in Human Rights Quarterly 2000, 501; R. Tesón, "International Human Rights and Cultural Relativism", in Virginia Journal of International Law 1985, 870 ss.

considered and protected as a fundamental human right. Exemplary in this sense is the number of reservations to article 16 of the CEDAW, expression of the approach based on defensive relativism, manifested with the will of those numerous Contracting Parties to apply the treaty provisions only to the extent that they are consistent with their national laws, mostly of a religious or traditional nature.[13]

An example of this relativistic approach is the position taken by Mali in the dispute before the African Court of Human and Peoples' Rights[14] for the alleged non-compliance of its domestic family law with the African Charter on Human and Peoples' Rights,[15] the Protocol on the Rights of Women in Africa,[16] and the African Charter on the Rights and Welfare of Children.[17] The petitioners complained about the inconsistency with the aforementioned international legal instruments of the domestic rules establishing the minimum age for contracting marriage - set at eighteen years old for grooms and fifteen for brides, and further reduced to twelve with the authorization of the parents - and for the lack of provisions meant to eliminate the harmful traditional practices. Pursuant to the Protocol, the Contracting Parties must modify the social and cultural patterns of behavior of women and men, in order to achieve the elimination of harmful cultural and traditional practices that are based on the idea of inferiority of one of the two sexes or on stereotypes,[18] and must set the minimum age for women to marry at eighteen years old.[19] Similarly, the African Charter on the Rights and Welfare of Children establishes that States must take all appropriate measures to eliminate harmful social and cultural practices that affect children's well-being, dignity, growth and development, and in particular customs prejudicial to health and life and discriminatory practices.[20] It also provides that

[13] F. Cowell, Defensive Relativism: The Use of Cultural Relativism in International Legal Practice, Philadelphia, 2022, 147; M. De Pauw, "Women's rights: from bad to worse? Assessing the evolution of incompatible reservations to the CEDAW Convention", in Utrecht Journal of International and European Law, 55; Y. Donders, "Cultural Pluralism in International Human Rights Law: The Role of Reservations", in A. F. Vrdoljak (ed.), The Cultural Dimension of Human Rights, Oxford, 2014, 205; C. Redgwell, "Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties", in British Yearbook of International Law, 1994, 245; J. Riddle, "Making CEDAW Universal: A Critique of CEDAW's Reservation Regime under Article 28 and the Effectiveness of the Reporting Process", in The George Washington Law Review, 2002, 605; W. A. Schabas, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child", in Mary Journal of Women and the Law 1997, 80; B. Simma, G. I. Hernandez, "Legal Consequences of an Impermissible Reservation to A Human Rights Treaty: Where Do We Stand?", in E. Cannizzaro (ed.), The Law of Treaties Beyond the Vienna Convention, Oxford, 2011, 60.

[14] African Court on Human and Peoples' Rights, Association pour le progrès et la défense des droits des femmes maliennes and the Institute for human rights and development v. Republic of Mali, no. 046/2016, 11 May 2018.

[15] African (Banjul) Charter on Human and Peoples' Rights, 27 June 1981. E. G. Bello, "The African Charter on Human and Peoples' Rights: a legal analysis", in Collected Courses of the Hague Academy of International Law, 1981, v. 194; R. Murray, The African Charter on Human and Peoples' Rights: A Commentary, Oxford, 2019.

[16] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Maputo, 11 July 2023, article 2.2. C. Beyani, "Toward a More-Effective Guarantee of Women's Rights in the African Human Rights System", in R. J. Cook, Human Rights of Women. National and International Perspectives, Pennsylvania, 1994, 285.

[17] African Charter on the Rights and Welfare of Children, Addis Ababa, July 1990.

[18] Protocol on the Rights of Women in Africa, article II.2

[19] Ibid., article VI.

[20] African Charter on the Rights and Welfare of Children, article 21.

engagement and early marriage are prohibited and that the States shall set the minimum marriage age at eighteen and make registration compulsory. Noting the worrying rates of early marriages in Mali (over 22% of brides are under the age of eighteen, 13% under the age of fifteen and 3% under the age of twelve), the Court rejects Mali's counter-argument, according to which "the established rules must not eclipse social, cultural and religious realities" and they "should not be seen as a lowering of the marriage age or a discrimination against girls, but should rather be regarded as provision[s] that [are] more in line with the realities in Mali", especially since "at the age of fifteen (15), the biological and psychological conditions of marriage are in place, and this, in all objectivity, without taking sides in terms of the stance adopted by certain Islamist circles".[21] According to the Court, therefore, Mali's conduct is unlawful: it cannot be qualified as an opportunity of "adapt[ing] the said obligations to social realities", but rather as a violation of international law[22]. The decision reflects a culturally oriented universalist conception of human rights. Indeed, without ignoring the value of culture, emphasized by the African Charter on Human and Peoples' Rights, whose preamble recalls "the virtues of the [..] historical tradition and the values of African civilization which should inspire and characterize the [..] concept of human and peoples' rights", the decision highlights the responsibility of the defendant State regarding the inadequacy of the actions undertaken in combating child and early marriages and underlines the value of the international commitments and of the obligation to modernize national laws as to overcome traditional practices and precepts which are incompatible with protected human rights.

All this being said, it must be emphasized that the European laws also show a certain lack of homogeneity in the identification of the minimum age requirements for contracting marriage. For instance, pursuant to German law (*Gesetz zur Bekämpfung von Kinderehen*, introduced on 17 July 2017) minors under the age of eighteen cannot marry, but, while marriage under the age of sixteen is invalid, marriage with a child over the age of sixteen is voidable; the latter action, however, may not be proposed by the minor after reaching the age of eighteen, having ascertained her/his will to keep the marriage valid, or that this is preferable in her/his interest.[23] Pursuant to UK[24] and Dutch laws[25] spouses younger than eighteen cannot marry. Under French law, both spouses must be eighteen years old and the marriage contracted by a minor can be declared null and void within 30 years of the marriage date, at the request of anyone who has an interest or of the prosecutor.[26] According to Italian law persons under the age of eighteen cannot marry;[27] however the Italian Civil Code establishes that a court may authorize a marriage of persons older than sixteen, following the assessment of their physical and psychological level of development and the seriousness of the reasons for marrying.[28] Marriages can be annulled when the minimum age rules have not been complied with, upon the request of the spouse, the parents or the public prosecutor; the action must be filed by the

[21] African Court on Human and Peoples' Rights, Association pour le progrès et la défense des droits des femmes maliennes and the Institute for human rights and development v. Republic of Mali, cit., par. 66.
[22] Ibid., par. 67.
[23] Gesetz zur Bekämpfung von Kinderehen, 17 July 2017.
[24] Marriage and Civil Partnership (Minimum Age) Act 2022.
[25] Forced Marriages (Prevention) Act (Wet tegengaan huwelijksdwang), 7 October 2015.
[26] French Civil Code, article 144 and 184.
[27] Italian Civil Code, article 84.
[28] Ibid., article 117.

minor no later than one year after reaching the age of eighteen. The request filed by the parent or the public prosecutor must be rejected if the minor has reached the age of eighteen, conception or procreation has occurred and, in any case, his/her will to keep the marriage valid has been ascertained.[29] A marriage celebrated in violation of these rules may be void. The Committee on the Rights of the Child has expressed concern about the exceptions to the minimum age requirements established by Italian law.[30]

3. Early marriage pursuant to private international law in Europe

This article aims to assess whether the solution based on private international law can improve the fairness of international law in balancing cultural diversity and human rights, with a specific focus on early marriages. To this aim, the provisions regarding the recognition and attribution of civil effects to international early marriages in Europe deserve attention. In this regard, for instance, Dutch law provides that a marriage celebrated abroad by a minor under the age of eighteen cannot be recognized in the Netherlands, unless both spouses have reached adulthood.[31] In Sweden, a 2014 law prohibits the recognition of marriages contracted abroad if coercion has occurred — regardless of the age of the spouses and the presence of connections with Sweden at the time of the celebration — and of marriages involving spouses under the age of eighteen, at least one of which has Swedish citizenship or habitual residence in Sweden. The law was strengthened in 2018 with the elimination of the required connection with the Swedish territory.[32] The approach of the Italian law is more flexible. The Italian Private International Law 218/1995 (articles 27 and 28) provides that the capacity and the other conditions for contracting marriage are regulated by the law of each spouse's country of nationality at the time of marriage, while the form is subjected to the law of the place where it is celebrated, the national law of at least one of the two spouses or the law of their common residence at the time of the marriage. Foreigners who want to marry in Italy must comply with the requirements set out at article 116 of Civil Code, the lack of compliance with which, as overriding mandatory provisions, affects the validity of the marriage, regardless of the applicable law; the minimum age is not included among these requirements. This allows for the positive assessment of the validity of the marriages celebrated in compliance with the different - and even less stringent - conditions prescribed by the national laws of the spouses, if their effects are consistent with public order.[33]

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[29] Ibid.

[30] Committee on the Rights of the Child, Concluding Observations on the combined fifth and sixth periodic reports of Italy, 28 February 2019.

[31] A. Wijffelman, "Child Marriage and Family Reunification: An Analysis Under the European Convention on Human Rights of the Dutch Forced Marriage Prevention Act", in Netherlands Quarterly of Human Rights, 2017, 104.

[32] M. Bogdan, "Some Critical Comments on the New Swedish Rules on Non-Recognition of Foreign Child Marriages", in Journal of Private International Law 2019, 250.

[33] On this issue: C. Campiglio, "Il matrimonio in età precoce nel diritto internazionale privato", in Rivista di diritto internazionale privato e processuale, 2020, 787-791; G. Carella, "Articolo 27", in Legge 31 maggio 1995, n. 218. Riforma del sistema italiano di diritto internazionale privato, S. Bariatti (ed.), in Le nuove leggi civili commentate 1996, 157; Ibid., "Articolo 28", ivi, 166. On the notion of public order pursuant to private international law: O. Feraci, L'ordine pubblico nel diritto dell'Unione europea, Milan, 2012; Bucher, "L'ordre public et le but social des lois en droit international privé" in Collected Courses of the Hague Academy of International Law, v. 239, 2019; P. de Vareilles-Sommières "L'exception d'ordre public et la régularité substantielle internationale de la loi étrangère", ivi, v. 371, 2014; 170 ss.; F. Mosconi, "Exceptions to the Operation of Choice of Law Rules", ivi, v. 217, 1989, 8 ss.; G. Perlingieri,

The aforementioned German Act to Prevent Child Marriage (hereinafter 'the Act') provides for stringent requirements for the recognition of early marriages celebrated abroad, distinguishing between marriages involving spouses older than sixteen-year-old, the marriage of which is voidable (article 13, par. 3, n. 2 EGBGB), and spouses under sixteen, the marriage of which is void and devoid of any recognition (article 13, par. 3, n. 1 EGBGB)[34], regardless of its celebration in accordance with the requirements established by the foreign applicable law and without any consideration of the specific circumstances of the case.

The decision adopted on 1 February 2023 by the German Constitutional Court (hereinafter 'the Decision') is of decisive importance in this framework, as it declares the unconstitutionality of the Act,[35] where it establishes the nullity of marriages involving minors under the age of sixteen (article 13, co. 3, n. 1 EGBGB), regardless of their validity under the foreign applicable law. Such is the case concerning a couple of Syrian citizens who immigrated to Germany; they had married in Syria under Islamic law when the young woman was fourteen[36]. Following the introduction of this Act, the marriage was considered invalid in Germany and, in the absence of recognition of the civil effects, the minor bride was placed in a custody facility for unaccompanied minors. According to the regime in force before the introduction of the Act, there would have been no reasons to deny the validity of the marriage, as it complied with the foreign applicable law and was not contrary to public order, to the extent that there were no indications that it was a forced marriage and that the best interest of the minor was not guaranteed.[37] Instead, pursuant to the more stringent requirements introduced by the German Act, it was declared void. Although the objective pursued by the German Act to Prevent Child Marriage is legitimate and the automatism imposed by the Act is functional in ensuring a greater level of legal certainty, the absence of evaluation of the concrete case and the invalidity of all marriages, regardless of the recurring circumstances, can jeopardize - and in many cases do jeopardize - the very interests of minor spouses, who find themselves facing the loss of civil, pension, maintenance and related inheritance rights.[38] Furthermore, by preventing the recognition in Germany of marriages validly contracted abroad and by not regulating the legal

G. Zarra, Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale, Neaples, 2019; G. Zarra, Imperativeness in Private International Law: A View From Europe, The Hague, 2022.

[34] J. von Hein, "Germany: Legal Consequences of the Draft Legislation on Child Marriage", 2017, available at www.conflictoflaws.net.

[35] Bundesverfassungsgericht, Order of 1 February 2023, 1 BvL 7/18.

[36] A. Bonfanti, "Matrimoni forzati, infantili e precoci e tutela dei diritti umani fondamentali in Europa: considerazioni di diritto internazionale privato", in Genlus 2020-2, 13; Id., "Il contrasto ai matrimoni infantili e precoci, tra universalismo e relativismo dei diritti umani: considerazioni sull'incostituzionalità della Gesetz zur Bekämpfung von Kinderehen", cit., 769; F. Pesce, "Il complesso bilanciamento tra diritti fondamentali dell'individuo nell'attesa pronuncia del Bundesverfassungsgericht sui matrimoni precoci", available at www.sidiblog.org; Id., "I child marriages tra tutela dei diritti e portabilità degli status", in Diritti umani e diritto internazionale, 2021, 53; CC. Rainer Lück, "Foreign Child Marriages and Constitutional Law. German Constitutional Court Holds Parts of the German Act to Combat Child Marriages Unconstitutional", 30 March 2023, available at www.conflictoflaws.net; C. Rath, "Underage, Married, Separated. A German Law Abolishes Child Marriages in General - Not Always in the Interest of Those Affected", Max Planck Institute for Comparative and International Private Law, Hamburg, 2019, www.mpg.de/12797223/childmarriage-legislation-germany.

[37] Bundesverfassungsgericht, Order of 1 February 2023, cit., para. 50.

[38] Ibid., para. 12.

effects of their invalidity.[39] the Act determines the existence of limping legal relationships, i.e., marriages that are and remain effective under foreign law, but ineffective under German law.[40] Marriage, protected by article 6.1 of the German Basic Law, is a long-term union based on free consent and equal rights, recognized in Germany as the subject of a human right to which German citizens, foreigners and stateless persons are entitled.[41] Taking into account that the requirements regulating marriage - as well as the relevant rules of private international law - must be compatible with the relevant constitutional rules, the Constitutional Court concludes that article 13, par. 3, no. 1 EGBGB is unconstitutional to the extent that, by establishing the nullity of marriages concluded by spouses under the age of sixteen, it disproportionately limits the protection of the right in question. In this regard, the Court argues, article 6.1 of the Basic Law does not intend to set a minimum age for marriage, nor does it exclude that in all cases minors under the age of sixteen have the capacity to marry.[42] Even though article 13, par. 3, no. 1 EGBGB pursues constitutionally protected objectives (such as the protection of the rights of minors), it interferes unproportionally with the right to marry[43]. If, on the one hand, alternative measures - such as the examination of the concrete case or the annulment (instead of the nullity) of the marriages - would not guarantee the achievement of the objective pursued by the provision (i.e. discouraging child marriages and ensuring legal certainty),[44] on the other hand, nullity is a disproportionate measure, excessively harmful to the constitutionally protected right, due to the lack of provisions to regulate its legal consequences and to allow minors to possibly preserve the validity of marriages once they reach the age of eighteen years.[45] Having said all this, the Constitutional Court declares the incompatibility of article 13, par 3, no. 1 EGBGB with article 6.1 of the Fundamental Law, but specifies that it will continue to apply until the entry into force of the new legislation with which the legislator will remedy the incompatibility and the occurrence of limping marriages.

4. Concluding remarks

The aforementioned analysis shows that the fairness of international law in the field of the regulation and recognition of early marriages can be strengthened via different solutions adopted in conformity with private international law. We share the view of a prominent scholar, according to whom “dans la société pluraliste contemporaine, il serait opportun d’appliquer la loi qui représente le mieux l’appartenance ou la conscience d’adhésion de l’individu, afin d’aboutir aux rapports juridiques que chacun prévoit et auxquels il s’attend. Cela permettrait de consacrer des rapports juridiques de famille qui reflètent les mœurs, les traditions, la morale, les religions et la culture. L’Etat peut certainement se réserver la possibilité de faire jouer l’ordre public international pour défendre l’intérêt public et l’ordre juridique du for, ou d’intervenir dans les relations familiales pour appliquer les normes des droits fondamentaux ou des droits de l’homme”.[46] Flexible approaches, legitimizing the possible recognition of legal

[39] Ibid., para. 23.
[40] Ibid., para. 18-19.
[41] Ibid., para. 109.
[42] Ibid., para. 123.
[43] Ibid., para. 176.
[44] Ibid., para. 148-153.
[45] Ibid., para. 154, 167, 173, 180, 181.
[46] Y. Nishitani, “Identité culturelle en droit international privé de la famille”, in Collected Courses of the Hague Academy of International Law, 2019, v. 401, 239.

effects to early marriages, celebrated in compliance with applicable foreign laws based on different cultural and sociological conceptions, when – an only when - the specific circumstances of the case allow for the conclusion that the attribution of these civil effects is not inconsistent with public order, follow this direction. Albeit not explicitly, they ensure due consideration to diverse cultural and traditional backgrounds. If, on the one hand, the rules on annulment and rejection of recognition are instrumental for combatting child and early marriages, on the other hand, such flexible approaches embrace a notion of a 'family relationship' based on the cultural, traditional and religious conceptions followed in the countries of the spouses' nationality at the time of the celebration of the marriage, and allow the courts to examine the specific circumstances of the case, as to evaluate how the minors involved can be better protected in the specific case, whether through the annulment of the marriage or the recognition of its civil effects. These approaches are suitable to highlight the function of private international law as a tool for protecting cultural identity, in line with the universalist and culturally oriented conception of human rights, which we believe constitute the theoretical approach that best interprets the protection of human rights and grants the fairness of (private) international law.