Pre-print article on SSRN on “Mirin” and the Future of Cross-Border Gender Recognition

I recently published the pre-print version of an article on SSRN that was accepted by the *International Journal of Law, Policy and the Family*. The article is called “**“Mirin” and Beyond: Gender Identity and Private International Law in the EU“**. The article is part of a special issue dealing with questions of gender identity that (probably) will come out at the beginning of 2026.

As it deals with matters of private international law (regarding gender identity) and the CJEU decision **“Mirin”**, I thought it might be interesting for the readers of this blog to get a short summary of the article. If it sparks your interest, of course, I would be glad if you consider reading the whole text – and to receive feedback and further thoughts on this topic.

I. Divergence in National Gender Determination Systems as Starting Point

National legal systems display significant divergence in how legal gender is determined and changed. Approaches vary widely, covering systems where the **self-determination** of the individual is largely sufficient, sometimes requiring only a self-declaration (e.g., Germany, Iceland, Ireland, Malta, and Spain). Furthermore, some jurisdictions have adopted non-binary gender options (e.g., Austria, Germany, Iceland, Malta, and the Netherlands).

However, this liberal trend is countered by explicitly restrictive systems. For example, in Spring 2025, Hungary introduced its 25th constitutional amendment, which stipulates that Hungarian citizens are solely male and female.

This fragmented legal landscape is not just a theoretical issue. It is the direct cause of profound practical and legal problems for individuals who live, work, and travel within the supposedly borderless European Union. Thus, questions of PIL become paramount for the individual concerned.

II. The Private International Law Framework: Choice of Law vs. Recognition

In international situations concerning gender determination, PIL distinguishes between two scenarios: determining the **applicable law** (Choice of Law rules) when a person seeks to change or register their legal gender, and addressing the **recognition or acceptance** of a legal situation already created abroad. Both scenarios have in common that the public policy exception can restrict the application or recognition/acceptance of foreign law. The article will deal with all three considerations separately.

A. Applicable Law and Party Autonomy

Legal gender is often categorized as part of a person's **personal status**. In traditional conflict of laws regimes, this translates into a connecting factor referring to the individual's nationality. However, recent legislative developments exhibit a tendency toward **limited party autonomy**. E.g., the Swiss PIL Code, since 2022, applies the law of residence but grants the individual the option to choose the law of their nationality. Similarly, the new German PIL rule on gender identity primarily refers to nationality but allows a choice for German law if the person has their habitual residence in Germany. This incorporation of choice is coherent in systems prioritizing individual self-determination, as the person is viewed as responsible and capable of making decisions regarding their own gender identity, and, subsequently, the law applicable to this question.

B. Recognition/Acceptance and Portability of Status

The recognition or acceptance of a gender status established abroad is crucial for ensuring the **continuity and stability of the status**. Recognition or acceptance, as everybody here will know, generally follows two paths:

1. **Procedural Recognition:** This traditionally applies to foreign judgments but has been extended in some jurisdictions (like Malta) to cover other acts by public authorities, such as a foreign registration of status. Furthermore, in general we can see a tendency to expand the notion of "judgment" due to the decreasing role of judges in status questions and the increasing involvement of registries and notaries.
2. **Non-procedural Recognition:** This involves either reviewing the status using the domestic conflict of laws rules (the "PIL test") or utilizing separate rules designed explicitly to enhance the portability and acceptance of a status established abroad. Such separate rules typically

require only minimum standards and a public policy control. There seems to be a general tendency within PIL to enhance the recognition or acceptance of foreign gender determination, as stability and continuity of status are primary interests. It might be feasible that countries using the PIL test reconsider whether this test is necessary or whether the introduction of separate, easier rules might be possible. Private International Law logic does not require such a test.

C. Public Policy Restrictions and the ECHR

Any recognition or acceptance of a legal situation created abroad can be refused in case of a public policy (*ordre public*) violation. Regarding gender identity, public policy issues usually arise either due to radical differences in approach (e.g., self-determination vs. biological focus) or the acceptance of gender options unknown to the forum (non-binary gender in a binary system). The article looks at different national approaches how to handle public policy considerations. It discusses briefly – and very critically – the Swiss Court decision regarding the (non-)recognition of a non-binary gender registration. Since gender forms part of an individual's identity, personality, and dignity, reasons for refusal must be balanced against the individual's interest in the continuity of status and avoiding disadvantages caused by having different genders in different jurisdictions. This reasoning is supported by the case law of the European Court of Human Rights (ECtHR). According to this case law, a refusal based on public policy must remain a **rare exception** and requires a manifest violation. "Mere administrative reasons" or "certain inconveniences" are insufficient to justify the denial of recognition.

III. The "Mirin" Effect: EU Law and Human Rights Synergy

After setting the scene, the article now looks at the CJEU decision "Mirin". Crucially, "Mirin" combined EU primary law with the protection afforded by the EU Charter of Fundamental Rights (Article 7), interpreting it in line with the ECtHR's jurisprudence under Article 8 ECHR

As we all probably know, the CJEU has already established a long tradition of using Article 21TFEU to ensure (to a certain limit) status portability within the EU regarding names, marriage, and filiation.

The **"Mirin" ruling** (C-4/23) applied the same logic to gender identity. The case

involved a Romanian citizen who obtained a gender reassignment in the UK (then still an EU Member State) but was denied registration in Romania because Romanian law required a new proceeding according to Romanian law.

A. Recognition/Acceptance of a Binary Gender Status

The synthesis of EU Free Movement and Fundamental Rights led the CJEU to conclude that the Romanian State must acknowledge or accept a gender validity established in another Member State. As earlier decided by the ECtHR, the proceedings provided under Romanian law violate Article 8 ECHR, thus, referring the Romanian citizen to these proceedings cannot be a means to justify the impediment of the right derived from Article 21 TFEU.

What does this mean for other Member States?

Other Member States, which provide different national proceedings to adapt the legal gender, *could* theoretically refer the individual to a quick, transparent, and accessible domestic reassignment procedure. Nevertheless, this is only permitted if it does not place an "excessive burden" on the individual.

Therefore, recognition, in my opinion, can be obligatory also in cases where a national proceeding is less burdensome than the Romanian one. The CJEU indicated that a new domestic proceeding is too burdensome if the lack of immediate recognition jeopardizes the continuity of **other essential statuses**—such as filiation or marriage—that depend on the gender recorded abroad. For instance, if a person is registered as a "mother" in the first state, a requirement to undergo a new gender registration procedure that temporarily destabilizes that parental status might, in my opinion, necessitate **direct recognition** of the status acquired abroad to comply with EU law.

B. Recognition/Acceptance of a Non-binary Gender Status

The situation regarding non-binary gender markers, which the ECtHR has previously stated remain within the discretion of each State to introduce, is more nuanced, as the ECtHR left it to the discretion of the Member States whether to introduce a non-binary gender. However, in my opinion, the "Mirin" principles severely restrict a Member State's ability to invoke *ordre public* to deny recognition of an unknown non-binary status.

Member States can only deny recognition/acceptance if the refusal is based on **fundamental, constitutional-level values** that would be manifestly violated by recognition/acceptance. The state cannot justify denial by citing "mere administrative reasons" or "certain inconveniences" related to their civil status system. In accordance with the ECtHR and CJEU case law, the Member States have to prove that recognition of a non-binary gender would genuinely disrupt their constitutional orders. The Hungarian constitutional amendment limiting citizens to male and female might serve as an attempt to establish such a constitutional value, though its legal scope is restricted to Hungarian citizens

IV. Final Conclusions

My final conclusions read as follows:

1. Applicable law to determine or change the gender in a domestic case with an international element requires a rule different from private international law rules dealing with the recognition/acceptance of a gender determination from abroad. Systems that focus on gender identity and self-determination should allow individuals a choice of law between at least nationality and habitual residence. One might also consider extending that choice to the *lex fori*.
2. If a procedural recognition of a court decision is not possible, jurisdictions should provide a rule allowing acceptance of a gender registered correctly abroad if certain minimum standards are fulfilled.
3. Recognition/acceptance of a gender reassignment or an unknown non-binary gender determination should only be refused for public policy reasons in very exceptional cases, esp. in those of abuse of the law or force against the individual.
4. Following the CJEU's latest decision, "Mirin", EU Member States have to recognise or accept a gender that has been validly established in another Member State within the binary gender system. Under rare circumstances, it might be possible to refer the individuals to a quick and transparent national proceeding.
5. Recognition/acceptance of a non-binary gender in an EU Member State that follows the binary gender system can only be refused for public policy reasons if the recognising Member State provides sufficient proof that the recognition would not only constitute "certain inconveniences" in the recognising Member State.