Is traditional multilateral rule relating to capacity to marry in line with the Constitution? Some observations with respect to two recent conflicts cases submitted to the Italian Constitutional Court

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IS MULTILATERAL CONFLICT RULE ON CAPACITY TO MARRY IN LINE WITH THE ITALIAN CONSTITUTION?

SOME OBSERVATIONS SUGGESTED BY TWO RECENT CONFLICT CASES SUBMITTED TO THE ITALIAN CONSTITUTIONAL COURT

Gian Paolo Romano*

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I. Introduction

In two recent conflict cases, the Tribunal of Rome raised some doubts as to the constitutional compatibility of Italian rules of private international law on capacity to marry. In the first case, a Tunisian woman wished to marry an Italian man in Italy. However, because her intended spouse was not Muslim, the Tunisian authorities were unwilling to deliver a certificate stating that there were no impediments to the marriage under Tunisian law. In the second case, a Syrian man proposed to marry an Italian woman in Italy. He too was unable to obtain the requisite certificate from the Syrian authorities because he had not yet served in the army in Syria. In both cases, the civil registrar in Rome refused to authorise the bans and, as a result, to solemnise the marriage. The interested parties challenged this refusal before the Tribunal of Rome. The Tribunal of Rome submitted to the Constitutional Court the question whether the rule of Italian law leading to the refusal to solemnise an Italian marriage between foreign citizens and Italian citizens based on their inability to obtain the ‘no-impediment certificate’ may be held to be contrary to the constitutionally-based right to marriage. The Constitutional Court dismissed the challenge.

Although the facts triggering the ruling are rather trivial, the suspicion they arouse in the mind of the Tribunal of Rome and the subsequent reasoning of the Constitutional Court in dismissing the cases act as a stimulus to look at the traditional conflict rule on essential validity of marriage under a perspective which is virtually unexplored so far in Italy: that of its compliance with the Constitution.

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2 This is also true of most European countries, the notable exception being Germany, where a spectacular ruling concerning the traditional conflict rule on capacity to marry was rendered by the Federal Constitutional Tribunal (Bundesverfassungsgericht) on 4 May 1971, in: BVfG, vol. 31, 58 ff., also in: RabelsZ. 1972, 145 ff. and in: BAREL B. / COSTANTINO B. (eds.), Norme di conflitto italiane e controllo di costituzionalità, Padova 1990, 202 ff.
II. The Legal Framework and the Decision of the Court

A. The Provisions at Stake

According to Article 27 of the Italian Private International Law Act 1995, the law applicable to the capacity to marry is the national law of each spouse. Article 116(1) of the Italian Civil Code specifies the way the civil registrar shall make sure that foreign law is complied with. The interested party has to obtain from the authority of the country of his or her nationality a certificate stating that he or she has the capacity to marry by the law of that country (the ‘no-impediment certificate’). Failure by the authorities to deliver such a certificate may have two different bases, which may be referred to as purely procedural (or administrative or technical), on the one hand, and substantive, on the other. A procedural failure arises where a certificate is not delivered due to an administrative oversight or breakdown or negligence of the foreign authority or simply because there is no such authority having the power to deliver it. A substantive failure occurs where the certificate is not delivered because the party requesting it is under a legal impediment to marry according to the foreign applicable law.

B. Grounds for Constitutional Challenge

The provision formally considered by the Court was Article 116(1) of the Civil Code. In its reference to the Constitutional Court, the Tribunal of Rome invoked Article 2 of the Italian Constitution that ‘protects and fosters the enforcement of fundamental rights of human beings’, tacitly including the ‘right to marry’. The Tribunal of Rome first submitted that Article 116(1) fails to allow for proof of capacity other than by way of the foreign no-impediment certificate. By limiting the means of proving foreign law to the production of the certificate, Article 116(1) restricts the enforcement of the right to marry. This follows because enforcement of this right in Italy depends exclusively on the attitude of foreign authorities; the forum judge before whom the refusal is challenged has no power under existing provisions to authorise the marriage without the certificate. As a result, the Tribu-

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4 See D’ARIENZO S. (note 1), at 928, who makes a distinction between ‘impedimenti formali’ and ‘impedimenti sostanziali’; see also the arguments of the Italian government before the Constitutional Court quoted in the Court’s ruling (note 1), at 939.

5 See e.g. the anonymous commentator of the decision by Trib. Reggio Emilia, 29 September 1986, in: Dir. fam. pers. 1987, 268 ff., at 271. Also see D’ARIENZO S. (note 1), at 933 and CANTA A., ‘Coppie miste e limiti di applicazione dell’art. 116 c.c.’, in: Fam. e dir. 1996, 455 ff., at 456, note 5.
nal of Rome concluded that, for the process to be in line with the Constitution, Article 116(1) should either be struck down or include the possibility that capacity be proved directly to the civil registrar by adequate documentation offered by the parties themselves and that, should any uncertainty arise, the judge be empowered to make further enquiries.

C. The Court's Answer

The Court observed that Article 116(1) more often than not results 'in facilitating rather than restricting the celebration of marriage', for its purpose is to release the civil registrar from any potentially burdensome investigation into foreign law. As the case law shows, where the certificate is not delivered for administrative or procedural reasons, the Italian judge is allowed to look into foreign law despite the inaction or silence of the foreign authority, notably by giving weight to other evidentiary documents offered by the parties. Though the Tribunal of Rome does not seem to have expressly raised the question of substantive impediments in the cases at issue, the Constitutional Court took care to suggest that marriages prohibited under applicable foreign law may be solemnized in Italy despite these impediments because the rules under attack do not operate in isolation but together with other rules, notably the public policy clause, which allow solemnisation notwithstanding any foreign prohibition which is contrary to public policy. Because the certificate requirement could be circumvented based on existing provisions and principles, the Court concluded that there was no basis, and no need, to question the constitutionality of the rules at stake.

As implicitly noted by the Court, a distinction should be made between cases where non-delivery of the certificate is due to procedural or technical reasons, on the one hand, and those where such non-delivery flows from substantive reasons, on the other. A proper analysis of the issues should proceed from this distinction.

III. Non-Delivery of the Certificate for Procedural Reasons

In the view of the Court, the judicial authority before which the denial is challenged may itself verify that the conditions under foreign law are met. It is not entirely clear, however, from which legal basis, according to the Court, this possi-

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bility flows. Neither Art. 116(1) nor Art. 98 of the Civil Code alone can reasonably be invoked in support. The case law to which the Court refers shows that public policy – now codified in Article 16 of the PIL Act – is what has been resorted to.¹

One may wonder, however, whether public policy is a proper basis to justify bypassing the certificate requirement when non-delivery is due to procedural reasons. To be sure, in each country there is almost invariably an authority able to confirm at least the identity of the citizens involved and their civil status. The case may well arise, however, where there is no foreign authority to deliver the no-impediment certificate. Some legal systems do not require such a certificate in similar circumstances and, consequently, do not contemplate such an authority to deliver it for use abroad.² This is a case of technical impossibility for Art. 116(1) to operate.³ Is the public policy exception the appropriate tool to escape this impossibility, which ultimately flows from the somewhat parochial belief of the Italian legislator that the certifying power is distributed abroad as it is in Italy?⁴ First, if one wishes to speak of public policy, one should note that it is not the substantive public policy which is at stake here – for it is not the substantive foreign law which raises difficulty – but a sort of procedural public policy. More importantly, public policy implies in its traditional meaning a value judgment with respect to the contents of the foreign law. It would not seem to be reasonable to formulate a value judgment on the way the certifying power is organised or distributed abroad.⁵ It appears nonetheless reasonable in these cases to grant Italian authorities the power to assess

⁷ Art. 98 (2) of the Civil Code allows the interested party to challenge the refusal of the civil registrar before the Tribunal, who then settles the issue after having heard the public prosecutor (pubblico ministero).
⁹ According to MIELE A. (note 6), at 32, this is a case of an ‘impossibilità giuridica’; of ‘impasse d’ordre technique’, talks MUIR WATT H., La fonction de la règle de conflit de lois, thèse dactyl., Paris II 1985, at 490 f., and CALLE P., L’acte public en droit international privé, Paris 2004, at 87.
¹⁰ Cp. PANOZZO R. (note 6), at 557.
¹¹ Cp. PANOZZO R. (note 6), at 540 who warns of the risk of a ‘pericoloso sindacato sull’organizzazione amministrativa adottata dall’ordinamento giuridico straniero’.

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the capacity to marry under foreign law, just as it does in any case of application of foreign law. One can most assuredly argue that not to do so would run against constitutional principles. Indeed, first-instance courts have often suggested this.

If this is so, one may wonder whether what raises doubts under these circumstances as to its being in harmony with fundamental conceptions incorporated in the Constitution is actually the foreign law — more precisely the foreign procedural or administrative system — in that it does not contemplate an authority able to deliver the certificate of no impediment required by the Italian rule or rather the Italian rule itself which provides that, lacking this certificate, the civil officer has to refuse to solemnize the marriage even if other evidence reasonably suggests that foreign law is complied with. The Tribunal of Rome’s reasoning leads one to suspect that the public policy device is here actually used to attack not so much the foreign rule but rather the rule of the forum. If this is so, the natural purpose of the public policy clause, i.e. to make sure that foreign rules are in tune with fundamental policies and values — which, according to the Italian courts, are, at least in this matter, almost invariably incorporated in the Constitution — has been silently


15 With regard to substantive impediments, Trib. min. Bologna, 9 February 1990, in: *Dir. fam. pers.* 1990, 928 f. appears to confirm such a suspicion.

extended to monitor the compliance with the Constitution of the rule of the forum itself and to make its circumventing possible when it is not.

To be sure, such a heteroclite use of public policy as a conflicts device makes practically redundant any constitutional control of Art. 116(1) by the Constitutional Court itself. This is indeed the conclusion reached by the Constitutional Court in the case at issue.17 One may argue however that, in order to make the certificate prerequisite ineffective, a constitutional challenge of the rigorous forum rule inescapably requiring such a certificate would have been a better option with respect to both conflicts and constitutional methodology than the use of conflict public policy, which, to reach the same result, forces the judge to retrieve a foreign rule and to judge it repugnant to a fundamental forum policy. It has even been suggested that the use by courts of public policy to make domestic rules or values ineffective through their mere non-application in the specific case instead of transiting through the declaration of non-compliance with the Constitution may represent a serious infringement of constitutional principles.18 Be that as it may, though neither the Tribunal of Rome nor the Constitutional Court took any particular interest in scholars’ discussions on the subject, commentators have increasingly


17 As Prof. Ballarino noted in a similar context (BALLARINO T., ‘Le norme di diritto internazionale privato davanti alla Corte costituzionale. L’abrogazione parziale dell’art. 18 Disp. prel.’, in: Riv. not. 1987, at 663-664, note 1), ‘fa parte dello stile della nostra Corte Costituzionale ricorrere a scappatoie formali per evitare pronunce su materie forse poco sentite’.

18 BARILE G. (note 16), at 6: ‘Il procedimento di difesa incentrato sui principi di ordine pubblico internazionale non può, invece (…) essere seguito dal giudice ordinario nei confronti di regole nazionali. Un tale procedimento infatti, costituirebbe un inammissibile attentato ai principi supremi della divisione dei poteri e della certezza del diritto. Tali principi non permettono che autorità diverse da quelle costituzionalmente competenti possano condizionare (pure solo attraverso il procedimento della disapplicazione nel caso concreto) la validità e l’efficacia di valori ‘nazionali’ direttamente posti dallo Stato’.

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shown dissatisfaction with Art. 116(1) itself and some of them have directly questioned its compliance with the Constitution.¹⁹

IV. Law as a Facility and the Beneficiaries of the Law

Moving to the arguably more important question of the substantive impediments, which were the ones at stake in the two cases at issue,²⁰ the Constitutional Court unequivocally suggested that, here again, no constitutional concerns are justified because the judicial authority before which the refusal is challenged may, under existing legislation, take no account of those impediments that are against public policy and thereby authorise the celebration of the marriage despite the non-delivery of the certificate. According to the Court, the legal basis for this outcome is here again, more explicitly, the substantive public policy of Art. 16 of the PIL Act. Again, this raises the question whether this is an appropriate instrument. This point is arguably more complex than the Court suggests and deserves some further attention. In so doing, we will take the liberty to depart from the specific arguments which were raised in the proceedings and reason in general terms.

A. Law as a Facility for Private Arrangements

The purpose of a significant proportion of private law rules – so two distinguished legal theorists, Hart²¹ and Raz²², remind us – is to provide facilities for private arrangements. These rules are “facilitative rules”²³ in that they set out the conditions

¹⁹ PANOZZO R. (note 6) puts an end to his thorough study on Art. 116(1) by categorically maintaining that this provision is contrary to the Constitution ‘nella parte in cui non dispone che il giudice italiano possa autonomamente acclarare la capacità matrimoniale dello straniero sulla base della legge nazionale (…)’. This is precisely what the Tribunal of Rome suspected, except that, according to latter, the provision should state that adequate documentation may be supplied by the parties to the civil registrar itself, without having to transit through the judicial authority. In favour of an amendment of Art. 116(1) also pleads ARENAS S. (note 9), at 493; also see VENCHIARUTTI A. (note 16), at 448-449.

²⁰ It is clear that the procedural fact of non-delivery of the no-impediment certificate by the foreign authority on the basis that, according to foreign law, the party concerned has no capacity to marry, cannot itself be contrary to Italian public policy. Of course, it would be more practical if the reasons for refusal were substantiated by the foreign authority itself, but Art. 116(1) does not and indeed cannot require the foreign authority to do it. The interested parties or the judicial authority may be informed by the relevant diplomatic channels, as took place in the two cases at issue: see the Order of the Tribunal of Rome (note 1), at 117.

²¹ The Concept of Law, 2nd ed., Oxford 1994, particularly at 9 and at 27 f.


²³ This expression is taken from TEITELBAUM L.E., ‘Family History and Family Law’, in: Wis. L. Rev. 1135 (1985), e.g. at 1178; HART L. (note 21), at 41, speaks of ‘power-
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under which an individual may, if he or she so wishes, take advantage of the facilities they offer, e.g. to make valid contracts or wills, to establish valid companies, to have parentage validly declared, to validly adopt and be adopted, and so on. Whatever the legal system to which they belong, substantive rules on capacity to marry do fall within this category. These rules provide that, if one of the individuals to whom they are addressed fulfils conditions A, B and C (age, mental ability, no consanguinity with the other spouse, and so on), he or she may, if he or she so wishes, get married, thereby giving rise to a legal relationship, the marital relationship, from which a number of legal effects flow. Under this perspective, facilitative rules offer ‘huge and distinctive amenities’²⁴ to the individuals to whom they are addressed — which may therefore be best described as the potential users or beneficiaries of these rules — because ‘by providing facilities for private arrangements between individuals [they] help [] individuals pursuing ends of their choice’.²⁵

B. The Conflict Rule and the Beneficiaries of the Law

The deep-rooted paradigm in conflicts methodology is the bilateral or multilateral choice of law rule. The purpose of this type of rule is notoriously to identify, for each category of legal relationships, the contact which is perceived by the forum as being the strongest, the one expressing the most significant relationship. According to the usual phraseology, such a contact becomes the connecting factor for that category. To the extent that the law is a facility for private arrangements, it may legitimately be said that conflicts rules of a country are called upon to establish in the first place which category of individuals may take advantage of the laws of that country, that is, which category of individuals may, by fulfilling the conditions set out in the relevant substantive facilitative rules, validly give rise to the legal relationships of their wishes.²⁶ Under this perspective, the conflict rule of a country has the purpose or the effect of determining the circle of potential users or beneficiaries of the facilities provided by the substantive facilitative rules of this country.²⁷

conferring rules’. On the ‘función facilitadora’ of private law in a similar sense, see in the conflicts literature GARCÍMARTÍN F.A., La racionalidad económica del derecho internacional privado, Cursos de derecho internacional y relaciones internacionales de Vitoria Gasteiz, 2001, esp. at 128 f.

²⁴ So HART L. (note 21), at 41.

²⁵ So RAZ J. (note 22), at 170.


²⁷ See clearly HEUZÉ V., ‘La volonté en droit international privé’, in: Droits 1999, 113 f., at 122 (with regard to succession): ‘si la loi française permet, dans une certaine mesure, au de cuius de disposer de ses biens à cause de mort, le rôle de la règle de conflit successorale doit être de délimiter le cercle des individus qui jouissent de cette autorisation de la loi française’.

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By so doing, the conflict rule inevitably procures that any and all categories of individuals who fall outside this circle cannot in principle take advantage of this facility. Each connecting factor identifies one category of beneficiaries and each traditional multilateral rule, as said above, incorporates only one connecting factor. As a consequence, only one category of individuals may benefit from the facilitative rules of the State, i.e. the individuals which have with the relevant State the link selected as a connecting factor. Accordingly, all other categories of individuals are excluded by the conflict rule from using the facility offered by the law of the forum, no matter how otherwise strong may be their relation with that country. This is a logical necessity flowing directly from the structure of the single connecting factor conflict rule.

C. The Consequences of the Nationality Nexus

By choosing nationality to govern capacity to marry, Italy has restricted to Italian citizens the benefit of the Italian rules of the Civil Code enabling individuals fulfilling a number of conditions to give rise to a marital relationship in Italy. As a consequence, Italy in principle refuses the right to invoke Italian rules to any other categories of individuals, including foreigners domiciled or resident in Italy or wishing to get married to an Italian citizen, including when the latter is also domiciled or resident in Italy.

It would seem that the Tribunal of Rome faced this very state of affairs. In the two cases under its scrutiny, this particular effect of the traditional conflict rule was apparent in all its crudeness. A Syrian man and a Tunisian woman, very possibly having both their domicile and residence in Italy (this is certainly the case for...
the Tunisian woman), wished to marry, in Italy, Italian citizens having their domicile or residence in Italy. They wished in practice to take advantage of the Italian rules enabling a person to get married if he or she fulfils a number of essential conditions set forth in the Italian Civil Code, which they did fulfilled. The conflicts rule excludes these persons from the circle of the individuals who may directly claim the benefit of Italian provisions on capacity to marry. Is this exclusion in line with the Italian Constitution? Before attempting to answer this question, let us look briefly at solutions in other countries.

D. A Comparative Law Look

The conflict rules of a number of countries differ significantly from the Italian ones. They do not restrict the benefit of their law to only one particular category of individuals, to be identified by one particular connecting factor, be it nationality or domicile or residence, to be referred to the interested party only. Instead, they enlarge the range of beneficiaries, often considerably, in two cumulative ways: a) by adopting two connecting factors — both nationality, on one side, and domicile/residence, on the other side — which are alternatively sufficient for the individual to claim the benefit of their laws; and b) by enabling an individual having no such ties but wishing to get married to an individual who does have one such tie to avail him or herself of their laws. Let us take some examples.

According to Section 44 of the Swiss Private International Law Act 1987, when marriage is to be celebrated in Switzerland, capacity to marry is in principle governed by Swiss law. A marriage may be celebrated in Switzerland — so Section 43(1) tells us — if one of the spouses is a Swiss national or has his or her domicile in Switzerland. As a result, Swiss law is offered to all those couples of proposed spouses of whom one is either Swiss national or domiciled in Switzerland. More specifically, Swiss law is directly offered to four categories of individuals (instead of one): Swiss nationals, foreigners having their domicile in Switzerland, foreigners having their domicile abroad wishing to marry a Swiss national, foreigners having their domicile abroad wishing to marry a foreigner having his or her domicile in Switzerland. The situation is identical in the Netherlands. Pursuant to Article 2(a) of Private International Law Marriages Act of 1989, a marriage may be celebrated in the Netherlands if each of the spouses fulfils the requirements set forth by Dutch substantive law and one of the spouses has Dutch nationality or...
habitual residence in the Netherlands.\textsuperscript{34} Here again, four categories of individuals may have direct access to Dutch rules on capacity to marry. Recent developments in Swedish law are most enlightening. Until recently, the nationality principle was basically followed in matters relating to capacity to marry. New provisions were enacted in December 2003 making Swedish law relating to capacity to marry available to both spouses, including foreign ones, when the marriage is to be solemnised in Sweden, provided only that one of the spouses has either Swedish nationality or habitual residence in Sweden.\textsuperscript{35} It would seem that the situation is identical in Finland as of 2002 and most similar in the other Nordic countries.\textsuperscript{36} In England, according to the general rule, which adopts the ante-nuptial domicile of origin of each spouse as a connecting factor, access to English law may be claimed by English domiciliaries of origin only. This rule is subject to an important exception, which one may arguably best describe as a \textit{second}, parallel rule: a non-English domiciliary may benefit from English law if he or she wishes to marry an English domiciliary.\textsuperscript{37} Is a U.K. citizen domiciled abroad prevented from invoking English law to solemnise his or her marriage? This does not seem to be the case to the extent that he or she is allowed to request solemnisation abroad before U.K. consular authorities. Again, it would seem that, in these situations, English law also applies to his or her spouse, who may well be neither a British citizen nor an English domiciliary.\textsuperscript{38} According to Article 3(3) of the French Civil Code, French citizens, event if resident abroad, may claim the benefit of French law in status matter, including capacity to marry.\textsuperscript{39} Does this mean that access to the French rules in

\textsuperscript{34} For an English translation of the Act see \textsc{Sumner} I. / \textsc{Warendorf} H., \textit{Family Law Legislation of the Netherlands}, Antwerp [etc.] 2003, at 220 f.

\textsuperscript{35} See \textsc{Jäntera-Jareborg} M., \textit{Foreign Law in National Courts}, Rec. cours 2003, t. 304, at 212.


\textsuperscript{37} Such a rule has been inferred from \textsc{Sottomayor v. De Barros} (No. 1) (1877), 3 P.D. 1, 6-7 and received the approval of the \textit{Court of Appeal} in \textsc{Ogden v. Ogden} [1908], p. 46, 74-77. See also \textsc{Chetti v. Chetti}, [1909] and \textsc{Vervaeke v. Smith} [1981]. See \textsc{Clarkson C.M.V.}, ‘Marriage in England: Favouring the \textit{Lex fori}’, in: 10 \textit{Legal Stud.} 80 (1990), at 83-85; \textsc{Dicey A.V. / Morris P.}, \textit{Conflict of Laws}, vol. II, 13\textsuperscript{th} ed., London 2000, at 685; \textsc{Cheshire G. / North P.}, \textit{Private International Law}, 13\textsuperscript{th} ed., London 1999, at 732-733; \textsc{Briggs A.}, \textit{Conflict of laws}, Oxford 2002, at 226-228.

\textsuperscript{38} See for the conditions stated by the Foreign Marriage Act 1892, \textsc{Morris P. / McLean I.}, \textit{The Conflict of Laws}, 5\textsuperscript{th} ed., London 2000, at 190-191. Marriage may be solemnised by U.K. authorities outside the U.K. ‘between parties of whom at least one is a United Kingdom national’: s. 1(1) of the Foreign Marriage Act 1892.

\textsuperscript{39} See \textsc{Ancel B. / Lequette Y.}, \textit{Grands arrêts de la jurisprudence française de droit international privé}, 4\textsuperscript{th} ed., Paris 2001, at 3 f.; \textsc{Mayer P. / Heuzé V.}, \textit{Droit international privé}, 7\textsuperscript{th} ed., Paris 2004, at 365; \textsc{Audit B.}, \textit{Droit international privé}, 3\textsuperscript{rd} ed., Paris 2000, at 537; \textsc{Loussouarn Y. / Bourel P. / de Varelles Sommières P.}, \textit{Droit international privé}
point should be denied to any non-French national? This is not so. The Instruction générale de l'état civil directs that the civil registrar shall celebrate the marriage even if the foreigner fails to produce a certificate stating that he or she has capacity to marry by his or her national law, provided that he or she complies with the requirements set forth by French law, no matter what the reasons, procedural or substantive, for the non-delivery by the foreign authority or the non-production of the certificate by the interested party. As a result, a non-French national having capacity under French law can marry in France a French national (who has capacity under French law). To reach this result, there is no need to transit through the public policy exception or through any judicial procedure. Although the Instruction says that the civil registrar should warn the parties that the marriage may not be recognized abroad and may possibly be held void in France, no case is ever cited where a marriage solemnised in France between two individuals, of whom one is a French national, both having capacity under French law, has actually been held void. The situation in Spain is less clear, due to the silence of the Civil Code. A number of authors take the view that Spanish law should apply if the marriage is celebrated in Spain, which may be the case if one of the spouses is a Spanish national or has his or her habitual residence in Spain. According to a recent study, it would seem that this is what takes place in practice. If this is so, again, four categories of individuals may take advantage of the Spanish provisions on substantive requirements.

Had Italy adopted the same rules as any of the above countries (as well as a wide range of others), the spouses could in both cases have had their marriage privé, 8th ed. Paris 2004, at 360; HOLLEAUX D. / FOYER J. / GEOUFRÉ DE LA PRADELLE G., Droit international privé, Paris 1987, at 516; VIGNAL TH., Droit international privé, Paris 2005, at 144.


42 OREJUDO PRIETO DE LOS MOZOS P. (note 41), at 64: 'las autoridades españolas (…) atienden la ley española más endémica que excepcionalmente (…)'.

43 This generous offer by a State of its law on capacity to marry seems to gain momentum in recent codifications. See e.g. Lithuania, where, according to Art. 1.25 of the Civil Code, Lithuanian law on capacity to marry is made available to all prospective spouses of whom at least one has either Lithuanian nationality or is domiciled in Lithuania: see MIKELENAS V., 'Reform of Private international law in Lithuania', in: this Volume, at 169. Similar is in essence the solution adopted by the Ukrainian legislator (Art. 55 and 57 of the Law on Private International Law of 2005): see DOVGERT A., 'Codification of Private International Law in Ukraine', in: this Volume, at 156.
solemnized in Italy, and this with no delay. This would have flowed directly from the conflict rule itself, because this conflict rule would have directly incorporated in the circle of beneficiaries of Italian provisions both the foreign citizen having his or her domicile or residence in Italy (which was the case at least for the Tunisian national) and the foreign citizen having his or her domicile or residence abroad wishing to marry an Italian citizen (which was certainly the case in both situations). No intervention of the judicial authority would have been necessary, for the civil officer would have had the power (and the duty) to make sure the requirements under Italian law are fulfilled by the foreign spouse. In contrast, to reach this result the current Italian system compels the civil registrar to refuse the solemnisation, forces the interested party to challenge this refusal and leaves the judicial authority with no other possibility than to resort to public policy to authorise the solemnisation. One may indeed wonder whether this is a satisfying situation with respect to both conflicts and constitutional methodology and values.44

V. Distorted Use of Public Policy

A. Foreign Rule or Conflict Rule as Target of Public Policy?

When a foreign substantive rule is given effect in the forum, this is the result of the application of two different rules: the conflict rule of the forum, on the one side, and the substantive rule of the foreign State, on the other. As mentioned earlier, when the substantive foreign rule on capacity to marry does not apply due to public policy, Italian courts invariably refer to a constitutional provision or principle (often more than one) to assist in specifying the meaning of the forum’s fundamental policy which cannot be set aside.45 In their view, a foreign rule shall be ineffective in Italy because its application is contrary to the Italian Constitution. One may talk of ‘constitutional public policy’.46

Since, on the one hand, the two elements of the chain – domestic conflict rule and foreign substantive rule – operate jointly and, so to say, generate a single

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45 See note 16 above.
46 See particularly Trib. Genova, 4 April 1990, in: Giur. mer. 1990, at 1195, and Trib. Verona, 6 March 1987, Stato civ. it. 1987, at 201. Interestingly, courts have sometimes found it sufficient to resort to constitutionally-based fundamental rights without really mentioning conflicts public policy: see recently Trib. Belluno, 18 May 2002, in: Riv. dir. int. pr. proc. 2002, 1071 f., at 1072. Also LAGOMARSINO G. (note 16: 1990), at 1210, appears to consider superfluous the resort to public policy in these cases, which he described as a ‘sovrastruttura concettuale’. The idea of a direct non application of foreign law because of a contrast with constitutional principles has been rather popular among Italian scholars: BALLARINO T. (note 16), at 145 f. and PISILLO MAZZESCHI R. (note 16), at 25 (see also ibidem, note 8 for other references).
Multilateral Rule on Capacity to Marry and the Italian Constitution

‘product’, and, on the other, the last element of the chain is the foreign substantive rule, it is rather natural to instinctively conclude that when this ‘product’ is perceived as a whole to be undesirable and contrary to constitutional public policy, it is the foreign rule, the last one to operate, which is undesirable and contrary to constitutional public policy. Logically, however, when the foreign substantive rule does not apply (allegedly) due to constitutional public policy, this may also be because the conflict rule itself is not in line with the Constitution.47 The truth is that the two elements of the chain are so inextricably linked that, if one of them yields, the whole chain collapses and any inquiry into which element is responsible appears to have little practical importance for the outcome is the same: forum substantive law applies and foreign substantive law does not.

For our purposes, however, it is key to attempt to ‘pierce the veil’ and discover which element is actually the rebellious one in the chain: is it the foreign rule designated by the Italian conflict rule in that it sets forth a requirement that is unknown to Italian law and is repugnant to some fundamental policy with respect to the right to marry, or rather is it the Italian conflict rule itself in that it excludes a foreigner having his or her domicile in Italy or wishing to marry an Italian citizen in Italy from access to the benefit of Italian law? Whereas the traditional public policy clause is arguably an appropriate instrument in the first case, a brief overview of the nature and the logic of public policy suggests that this is not so in the second.48

B. The Nature of the Public Policy Exception

Public policy is usually referred to as an exception.49 The meaning of this phraseology is twofold. First, whenever public policy operates, the conflict rule does not apply in its logic and purpose: public policy is an obstacle to the ordinary operation of the conflict rule.50 Secondly, the use of public policy should occur in exceptional circumstances only.51 This means that whenever the forum law and the foreign law differ and generate different substantive results, resort to public policy should be a relatively rare occurrence.52 With respect to the Italian conflict rule on capacity to

47 See clearly BARILE G. (note 16), at 8. For a warning against any confusion between the constitutional assessment of foreign substantive rules and that of a domestic conflict rule, see GIARDINA A. (note 16), at 17.

48 See BARILE G. (note 16), passage quoted above, note 18.

49 See e.g. in the Italian scholarship MOSCONI F., ‘Exception to the operation of Choice of Law Rules’, Rec. cours 1989-V, 9-214.

50 See e.g. MOSCONI F. (note 38), e.g. at 158.

marry, if in virtually all cases the marriage is solemnized in Italy because the foreigner has capacity by Italian law, despite the prohibition under foreign law, then the public policy device appears to be somewhat distorted in its nature, because, far from operating exceptionally, it does operate regularly, which is precisely at the opposite end of the spectrum. One may suspect, therefore, that, in these cases, the problem lies not so much with the foreign law but rather with the conflict rule of the forum.53

C. Regular Use of Public Policy by the Courts

A close look at Italian case law shows that in those situations where no certificate is delivered by the foreign authority for whatever reasons, Italian courts tend to resort directly to Italian law and, as a result, to authorise the marriage if Italian law is complied with.54 In other words, public policy, which is the only actual device

52 Logically, one may say that, when it comes to rules setting forth the requirements to give rise to a particular legal relationship, out of all cases in which the foreign law does not allow a particular individual to give rise to the proposed legal relationship in a situation where the forum law does allow him or her to do so, the cases in which the foreign law is disregarded, and in which, as a consequence, the creation of the proposed legal relationship is permitted, should, at least in principle, be a minority with respect to those in which the foreign law is not disregarded, and in which, as a consequence, the creation of the proposed legal relationship is not permitted.

53 The contradiction no longer occurs between the foreign law and the public policy of the forum, but between the conflict rule of the forum providing for an application of foreign law, which implies that the forum is willing to accept different substantive results, and the public policy of the forum providing that foreign law shall apply only insofar as it leads to no different substantive results than under the law of the forum.

one may positively wield in order to attain this outcome, is practically triggered as soon as a) no such certificate is delivered and b) Italian requirements are met.\textsuperscript{55} Indeed, as a court has recently pointed out – ‘the authorisation to publish the bans [and, consequently, to solemnise the marriage] in the absence of the foreign no-impediment certificate [not delivered for substantive reasons] has constantly been granted’ by the Italian courts.\textsuperscript{56} Not a single case appears to have ever been reported where the solemnisation of a marriage in Italy between two spouses both having capacity by Italian law has been denied by the judicial authority hearing a challenge of the refusal by the civil registrar where the refusal was based on the foreigner being under an impediment by his or her national law. A court went as far as saying, though incidentally, that any and all foreign provisions limiting or excluding the right to marry to an individual who is adult and not already married – which conditions are required by Italian law – shall have in any event no effect in the forum.\textsuperscript{57}

In the cases at issue, Tunisian law did not allow solemnization for religious reasons and Syrian law because service in the army had not yet been performed by the Syrian citizen. Neither the Tribunal of Rome nor the Constitutional Court bothered to assess the merits of these impediments. Neither shall we. Arguably, the Tribunal of Rome saw a general problem here, one that exceeds the restricted scope of the circumstances at stake. Though the Tribunal did not express it clearly, its confusion suggests that what may be contrary to (constitutional) public policy is

\begin{itemize}
\item Courts of Appeal is reported on this issue, which leads one to believe that the public prosecutor has never objected to such an authorisation (it appears from a number of rulings that the public prosecutor was expressly favourable: see e.g. Trib. Treviso, 15 April 1997, Trib. Reggio Emilia, 29 September 1986, Trib. Torino, 24 February 1992, Trib. Napoli, 29 April 1996, Trib. Pisa, 30/31 May 1996, all of which cited in this note).\textsuperscript{55}
\item This is particularly apparent when non-delivery is due to procedural reasons: the simple non-delivery is automatically viewed as contrary to public policy and, as a result, Italian law is practically left to govern, even if a substantive assessment of foreign law remains possible. See typically Trib. Camerino, 12 April 1990 (note 54), at 801, where the mere fact that the Romanian authorities failed to deliver the certificate led the court to resort to Italian law, no enquiry about Romanian law being performed.\textsuperscript{56}
\item Trib. Pisa 30/31 May 1996 (note 54), at 1006.
\item Trib. Reggio Emilia, 29 September 1986 (note 54) at 270; also cp. Trib. Verona, 6 March 1986 (note 54), at 201, and Trib. Taranto, 13 July 1996 (note 54), at 284. Arguably, this reality tends to go undetected because in any event the interested party has to, or does in practice, produce one or more foreign documents, notably the one confirming his or her identity and unmarried status, which the forum authority has to, or does in any event in practice, examine: see e.g. Trib. Treviso, 15 April 1997 (note 54), at 745; Trib. Torino, 24 February 1992 (note 54), at 987; Trib. Potenza, 30 November 1989 (note 54), at 559; Trib. Reggio Emilia, 29 September 1986 (note 54), at 272; Trib. Belluno, 18 May 2002 (note 54), at 1071-1072. This may generate the belief that foreign law is being proved and looked into. The purpose of this is, however, simply to make sure that the unmarried status that is required by Italian law – and, as the case may be, some other requirements which are also set forth by Italian law and may be best certified by foreign authorities – are effectively complied with.
\end{itemize}
the mere fact that the conflict rule does not allow solemnisation of a marriage in Italy between an Italian citizen and a foreign citizen domiciled or resident in Italy when both have capacity to get married by Italian law, regardless of the nature of the impediments under foreign law and the extent of the substantive gap between domestic and foreign conceptions. This line of reasoning diverts focus from the foreign substantive law and places it rather on the Italian conflicts rule in that it does not include in the beneficiaries of Italian law the foreign citizens who are in the situation above. To put it otherwise, the defendant in this 'constitutional (public policy) trial', is no longer the foreign rule but the conflict rule of the forum.\textsuperscript{28}

\textsuperscript{28} Interestingly, this has been indirectly confirmed by a court (Trib. min. Bologna, 9 February 1990, in: \textit{Dir. fam. pers.}, 1990, 928 f., at 929) which ruled that the verification of compliance with the Constitution of Art. 116 and, accordingly, of the nationality conflict rule stated in what is now Art. 27 of the Italian PIL Act may be dispensed with because the public policy instrument is sufficient to make these provisions. According to the Tribunal, Art. 116(2) may indeed be contrary to the constitutional principle of equality in that it denies the protection of Italian law—notably of Art. 84 of the Civil Code which prevents a minor below 16 to get married in Italy—to the foreign minor; there is no need, however, to resort to a constitutional control of Art. 116 because the public policy (laid down in Art. 31 of the \textit{Preleggi}) is the appropriate instrument to prevent Art. 17 of the \textit{Preleggi} (which makes provisions for application of foreign law to foreign national) from generating unconstitutional consequences. By contrast, the public policy device has been implicitly set aside in favour of constitutional control by the Constitutional Court in two important decisions of 1987 (n. 71 and n. 477: see the text in: \textsc{Barel B. / Costantino B.} (note 2), at 147 f.), whereby the Court notoriously held two conflict rules—Art. 18 and Art. 20(1) respectively of the previous \textit{Preleggi}—contrary to the Constitution. As regards Art. 18 relating to personal relationships between spouses, which is more directly in point here, some authors suggested that the same result could also have been reached by using the public policy device: see e.g. \textsc{Pisillo Mazzeschi R.} (note 16), at 24; \textsc{Ballarino T.} (note 17), at 667-688. Two of the three courts which had requested the intervention of the Constitutional Court, that is the Tribunals of Rome (16 January 1984, n. 929) and Turin (11 January 1985, n. 514: see the texts in \textsc{Barel B. / Costantino B.} (note 2), at 161 f. and 171 f.) opined that a foreign law ignoring the institution of divorce or separation could hardly be considered to be repugnant to Italian public policy (the Tribunal of Palermo, 30 March 1984, n. 864, \textit{ibidem}, 168 f., did not mention any public policy). All three cases triggering the ruling of the Court involved an Italian woman (resident in Italy in the three cases) and a foreign husband (respectively a Chilean, resident in Italy, a German, resident in Germany, and a Tunisian, whose residence does not emerge clearly from the relevant decision). The requested divorce and separation orders could not be rendered based on the national law of the husband, which was designated by Art. 18, because Chilean law did not contemplate divorce and neither German nor Tunisian law contemplated separation. The Constitutional Court held that the problem lay not in the relevant foreign rules (see expressly decision n. 71, quoted above, at 151) but in the Italian conflict rule delimiting the circle of beneficiaries of the Italian rules on divorce and separation by using nationality of the husband (only), so that neither the Italian woman (at least when she is resident in Italy: Trib. Torino) nor his foreign spouse (Trib. Palermo) nor both of them jointly (Trib. Rome) were allowed to invoke Italian law to obtain divorce or separation in Italy. It would seem that Italian authors all agreed that the declaration of non compliance with the Constitution of the forum rule was the best option to reach this result: see intervention by \textsc{Strozzi G.}, in: \textsc{Barel B. / Costantino B.} (note 2), at 103 f.
D. Parallel to a French Decision on Declaration of Parentage

This situation recalls a much discussed decision by the French Cour de cassation with respect to declaration of parentage.\(^59\) The Court held that foreign law, in the specific case Algerian law, is not in itself contrary to French public policy to the extent it prohibits the declaration of parentage in situations where French law allows it. What is contrary to French public policy is rather the fact that minors having either French nationality or habitual residence in France are prohibited from relying on French law when wishing to establish parentage before French courts, which prohibition flows from the French conflict rule reserving French law to French mothers only. Interestingly, an author has contended that the use of the ordre public clause to justify this result is inappropriate (she figuratively talks of ‘ordre public dévoyé’).\(^60\) Indeed, it would seem that what is attacked by the public policy device is not the foreign law – which, in the view of the Court, is expressly not *per se* contrary to it – but, as curious as it may sound, the conflict rule itself in that it reserves the ‘amenities’ of French law regarding conditions to establish parentage only to mothers having French nationality and, as a result, excludes from this benefit children having either French nationality or French habitual residence. A new conflicts rule – it has been submitted – has been created or rather discovered by the Court.\(^51\) This new conflict rule allows – in addition to French mothers – French children and children having their habitual residence in France, as well as foreign mothers on their behalf, to rely on French law in order to judicially establish parentage in France.

One is tempted to apply a similar reasoning to the creation of a marital relationship through solemnisation of marriage in Italy. If the source of perplexities with respect to public policy is the single connecting factor conflict rule of the forum and not the foreign substantive rule, and if this public policy finds its source in a constitutional rule or principle, one is tempted to suggest that it is the single connecting factor rule which may be contrary to this constitutional rule or principle. If so, which rule or principle is involved?

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\(^51\) PULIJK M.-P. (note 60), at 309 f. This conflict rule adopts *three* connecting factors instead of one and extends in this way the circle of the beneficiaries of French law. It would appear that no value judgment with respect to the contents of foreign law, no assessment of the extent of the cleavage between French law and foreign law, will be necessary in future. French law may in these situations be invoked not *exceptionally* and as a result of the unpredictable chicane of public policy artifice, but *regularly* and directly by virtue of a conflict rule.
VI. The Proper Constitutional Basis for a Challenge

A. Fundamental Rights vs. Principle of Equality

The whole debate between the Tribunal of Rome and the Constitutional Court revolved around Article 2 of the Constitution providing for 'fundamental rights', tacitly including the right to marry. It is undisputed that these rights accrue to foreigners.62 Can it be claimed that it is against the fundamental right to marry, as incorporated in Article 2, to prevent a foreigner, having his or her residence in Italy and/or wishing to marry an Italian citizen, from invoking the benefit of Italian law? To be able to say this, one has to argue that Italian substantive provisions on capacity to marry are the only ones complying with Article 2.63 This reasoning is not convincing in that it runs against the constitutional teachings. One of the underlying features of constitutional provisions on fundamental rights is that they set a core framework within which the legislator may determine freely the single rules implementing each particular right. As a result, two or more different specifications, that is two or more different sets of requirements to get married, may equally be compliant with the right to marry under Article 2.63 This is clearly recognised by scholars.64 There does not seem to be any reason why it should not be so with respect to foreign rules as well. Accordingly, there can be foreign rules differing from Italian ones and leading to a different substantive result in an individual case – typically to a refusal of solemnisation of marriage to a foreigner having capacity under Italian law – which are nonetheless not contrary to the fundamental right to marry under Art. 2, because, had the Italian legislator enacted such rules itself, they would have passed the constitutional test. If the denial of the benefit of Italian rules to the foreign citizen in these situations continues to be perceived as being contrary to constitutional public policy, a different constitutional basis should be searched for.

We take the view that Article 3 setting forth the general principle of equality before the law may be of assistance. Though Article 3 mentions citizens only, the Constitutional Court has extended the benefit of equal treatment to foreigners,

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63 Cpr. BVergG, 4 May 1971 (note 2), at 212-213, where the Court stresses both the discretionary power of the legislator when fixing the conditions of essential validity of marriage (such as the minimum age) as well as the constitutional limits within which such a power shall be used.

notably when it comes to fundamental rights, whenever there is no particular reason not to do so.\textsuperscript{65} Interestingly, the Court of cassation has on two occasions indirectly confirmed this by denying effect in Italy to a foreign labour law which was less favourable than Italian labour law, and by consequently awarding the benefit of Italian labour law, with respect to a foreign employee, the principle of equal treatment of Art. 3 being invoked as a legal basis.\textsuperscript{66} The Constitutional Court has itself ruled that an unequal treatment of foreign minors compared to Italian minors with respect to the possibility of benefiting from Italian law concerning the conditions for adoption is contrary to the principle of equality.\textsuperscript{67} While ruling on conflict cases regarding legal impediments to marry, a number of lower courts have also assumed that the principle of equality also applies to foreigners.\textsuperscript{68} A court went as far as to say that the non application to a foreign minor of the Italian rule protecting minors by preventing them to marry before 16 years of age may result in discrimination between citizens and foreigners which is contrary to the principle of equality before the law laid down in Art. 3.\textsuperscript{69} If citizens and foreigners wishing to marry Italians or being themselves Italian residents have to be treated jointly with respect to the application of Italian law.

\textsuperscript{65} See Corte Cost., 15 November 1967, n. 120, in: Raccolta, 311 f., at 341: ‘(...), se è vero che l'art. 3 si riferisce espressamente ai soli cittadini, è anche certo che il principio di eguaglianza vale pure per lo straniero quando trattisi di rispettare [i diritti fondamentali] (i.e. those to which refers Art. 2); also see Corte Cost., 19 June 1969, n. 104, in: Raccolta 1969, 173 f., at 183; Corte Cost. 18 July 1983, in: Raccolta 1983, 479 f., at 486, 491, 495, as well as Corte Cost., 20 April 1988, n. 490 (ordinanza), in: Raccolta 1988, 83 f., at 85.\textsuperscript{66} Cass. 6 September 1980, n. 5156, in: Giust. civ. mass. 1980, fasc. 9, and Cass. 25 May 1985, in: Giust. civ. mass. 1985, n. 3209, fasc. 5.\textsuperscript{67} Corte Cost., 18 July 1986, n. 199, in: Giur. cost. 1986, 1562 f: ‘Pure il principio di eguaglianza risulta violato, restando limitato il favor minoris soltanto al cittadino e non anche allo straniero (...).’\textsuperscript{68} Trib. Genova, 4 April 1990 (note 54); Trib. Turin, 24 February 1992 (note 54), Trib. Potenza, 30 November 1989 (note 54), Trib. Barcellona, 9 March 1995 (note 54), Trib. Reggio Emilia, 29 September 1986 (note 54), Trib. Napoli, 29 April 1996 (note 54); Trib. Taranto, 13 July 1996 (note 54); Trib. Pisa 30/31 May 1996 (note 54), at 1007. PANOZZO R. (note 6), at 552, CANTA A. (note 5), at 455, VENCHIARUTTI A. (note 16), at 447, D'ARIENZO S. (note 1), at 933; cp. MESSINA S., ‘Capacità matrimoniale, impedimenti razziali e ordine pubblico internazionale’, in: Giur. compl. Corte Cass. 1946 I, 441 f., at 444. To be sure, the principle of equality was mainly used to reject unequal treatment based on religious beliefs of the interested parties, which means that Art. 3 may also be invoked by foreigners (who, in the reported cases, were predominantly Italian residents), in the sense that citizens and foreigners (who are resident in Italy) cannot receive a different treatment in Italy when wishing to enforce in Italy their right to marry based on religious reasons. However, the phrasing used by the courts is so general as to lead one to believe that different treatment between a citizen and a foreigner (who is resident in Italy) with respect to the enforcement of right to marry in Italy is hardly in line with the principle of equality regardless of the particular source of this different treatment: cp. GIARDINA A. (note 16), at 28-29.\textsuperscript{69} Trib. min. Bologna, 9 February 1990, in: Dir. fam. pers. 1990, 928 f., esp. at 529; Trib. min. Roma, 19 July 1989, in: Dir. fam. pers. 1990, at 538, esp. at 540. See on these decisions, BALLARINO T. (note 13), 398-399.
to this particular rule on capacity to marry, one may wonder why this should not be the same also with respect to the other rules on capacity to marry.

As a prominent author recently pointed out, it is "when nationality (...) results in denying [foreigners] certain rights or benefits [awarded by the law of the forum] (...) then it may result in discrimination." This is arguably the case when it comes to the right to marry. On the other hand, one should hasten to add that had a single connecting factor rule adopting residence or domicile been preferred by Italy, the inconsistency with Article 3 would have been even more difficult to justify, since all citizens are equal before the law, and the fact that a citizen lives abroad does not seem to represent per se a sufficient reason to deprive him or her of the benefit of national law to get married in his or her country (or abroad by consular authorities) based on the law of this country, as the venerable Article 3 of the Code civil and the widely recognized possibility of consular or diplomatic marriages seem to confirm.

B. The Two Steps of the Equality Assessment

As has been authoritatively suggested, the assessment of the compliance or non-compliance of a particular provision with the principle of equality is divided into two distinct steps, which we will address separately here: the equality or rather the equivalence of two situations (giudizio di eguaglianza o di equivalenza) and the reasonableness (or unreasonableness) of the difference of treatment with respect to these two situations (giudizio di ragionevolezza).71

This assessment involves three elements: 1) the principle of equality, 2) the rule suspected of breaching this principle, which sets forth a particular treatment for a particular situation and 3) the rule setting forth a different treatment for a distinct situation, against which the equivalence of the two distinct situations caught by the two rules and, if this is verified, the reasonableness or unreasonableness of the difference of the treatment effected by the two rules have to be assessed.

The rule suspected of breaching the principle of equality is the 'outward-looking' branch of the conflict rule. The breach flows from its failure to grant the benefit of Italian law to foreigners who are resident or domiciled in Italy or wish to marry Italian citizens. The rule against which the assessment is conducted is the 'inward-looking' branch of the conflict rule that ensures the benefit of forum law

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to Italian citizens even if they are domiciled or resident abroad. The purpose is to see whether the treatment reserved by the second rule (application of Italian law) to the individuals caught by it (Italian citizens, even if resident abroad, wishing to marry in Italy) may be extended to the situations caught by the first rule (foreigners resident in Italy or wishing to marry Italian citizens in Italy) to which the first rule reserves a different treatment (denial of application of Italian law) because the situations are equivalent and the difference of treatment does not pass the reasonableness test.

C. Assessing the Equivalence of the Situations

1. Substantive Equivalence and Spatial Equivalence

The condition triggering equal treatment of two individuals is that these two individuals are in equivalent situations or conditions (‘treat like cases alike’). When a State applies this principle in international cases, the equivalence (or ‘likeness’) requirement is arguably twofold: substantive conditions should be equivalent and ‘conditions of proximity’, i.e. the strength of the connections, should be equivalent. With respect to equivalence in terms of proximity, which one may also describe as ‘spatial equivalence’, the principle of equality in its negative formulation (‘treat different cases differently’)

appears to direct that the law of the forum allowing for marriage in the forum should not benefit all foreigners but, as will be shown below, only those foreigners who have an otherwise significant link with the forum. Indeed, the legitimacy of an individual’s claim to the protection of the law of a country is proportional to the strength of the connection between this individual and that country. An individual having no ties directly or indirectly with that country cannot claim the protection of the law of that country, in any event not on an equal basis with an individual having a connection with that country, because


73 As GHERA F. (note 71), at 50-51, points out, the equality assessment may aim at one of two following purposes: a) extension of the reach of a particular rule to other situations due to a similarity of these situations to those already caught by that rule; b) restriction of the scope of application of a particular rule due to the fact that it illegitimately fails to differentiate between different situations.


these two individuals are most assuredly non in ‘like cases’ or situations in terms of proximity, even if the requirement of substantive equivalence is fulfilled.76

2. Equivalence Between Citizens Domiciled Abroad and Foreigners Domiciled in the Forum

Interestingly, the Constitutional Court suggested (almost forty years ago) that what may reasonably justify a difference of treatment between a citizen and a foreigner with respect to the enforcement of a fundamental right is a difference in the ‘factual situation’ of the two subjects.77 The Court reasoned that, while the citizen usually has a domicile in the forum and may reside there freely and with no limitation, a foreigner usually has no such domicile and his or her stay in the forum has to be authorised and is generally limited, unless he or she is granted a right of establishment. All this – the Court concluded – comes down to the ‘basic difference existing between the citizen and the foreigner’, according to which the citizen normally has a connection with the forum which ‘is original and in any event permanent’, while the foreigner is usually connected to the forum ‘in a non-original and precarious way’.78 This phraseology, whose current aptness is not explored here any further, shows that the proximity between an individual and the forum may play a role when it comes to equal treatment before the law of the forum. If what may ultimately justify unequal treatment is that a citizen is domiciled or resident in the forum and, more generally, has a strong, permanent connection with the forum, whereas the foreigner has no such domicile or residence and his or her connection is therefore usually tenuous and temporary, one is driven to conclude that this

76 Interestingly, an author (SALERNO F., note 75, esp. at 38-39), suggested that the constitutional principle of equality may also positively direct how to fill the lacuna brought about when the Constitutional Court struck down Art. 18 of the Preleggi because it contradicted the principle of equality (see note 56). In his view, a solution would be to ‘ensure [the application of] the same substantive law to all situations which are in abstracto comparable’ (the translation is ours). This law is arguably the lex fori (the context of the author’s reasoning seems to confirm this). The author is careful to caution that it is advisable to ‘restrict the scope of the principle of equality on the basis of reasonableness by considering the specific connection which the single situation presents with a particular legal order’. If this legal order is, under the perspective of a State, the one of the forum (again, this appears to be the framework of the author’s stance), the principle of equality may direct that Italian (substantive) law shall apply to all situations presenting with Italy (not necessarily the same connection, but) connections which are ‘reasonably significant’. The author concludes that is arguably the most appropriate way of understanding equality in private international law (‘pur mancendo indicazioni specifiche della Corte sul punto in esame, le sue recenti decisioni in materia di diritto internazionale privato possono essere lette proprio nel senso testé indicato, che è poi quello maggiormente coerente con l’approccio tradizionale seguito dal giudice della costituzionalità in merito all’applicazione del principio di uguaglianza’).


78 Ibidem.
balance of proximity changes if the citizen has his or her domicile or residence abroad while the foreigner has a permanent domicile or residence in the forum. 79

Indeed, nationality is normally a strong link but domicile or residence are normally strong links as well, so much so that, as comparative conflicts law has never ceased to confirm, any attempt to state which of the two is more significant is probably doomed to permanent failure. 80 Accordingly, one may argue that two individuals fulfilling the requirements to get married under the law of a country (substantive likeness), of whom one is connected to that country through nationality (even if he or she resides abroad) and the other through domicile or residence (even if he or she is foreign national), also comply with the likeness requirement in terms of proximity, and as such may claim equal treatment.

If this is so, the Italian conflict rule may prove incompatible with the principle of equal treatment of individuals finding themselves in equivalent situations - such individuals being, on the one hand, Italian citizens, even if domiciled or resident abroad, and, on the other, domiciliaries or residents in Italy, even if foreign nationals. This incompatibility, which may result in a prohibited discrimination if it does not pass the reasonableness test, flows from the fact that they are treated unequally before the law - before the substantive law of the forum - for the former is allowed to claim the benefit of such law and the latter is not, even though in principle they both demonstrate a substantially equivalent links with the Italian social community and comply with the same substantive conditions. As has been authoritatively suggested by a French author, a way, arguably the only one, for a State to avoid any such discrimination is to adopt both nationality and domicile or residence 81 to the effect of allowing both citizens and residents or domiciliaries to benefit from its law. A similar conclusion has been reached by some Italian authors with respect to Italian provisions on divorce. 82

79 GAJA G., 'Sulle relazioni fra norme di diritto internazionale privato e principio di eguaglianza', in: BAREL B. / COSTANTINO B. (note 2), at 80, suggests that, in order to be compatible with the principle of equality of Art. 3 of the Constitution, the selection of the connecting factors incorporated in the conflict rule by the forum should not be 'arbitrary' and should respond to 'reasonableness', which is, according to the author, substantiated by the strength and the significance of the selected connections. As a result, one may also say that the exclusion of a connecting factor shall be 'reasonable' and 'non-arbitrary' and argue on this basis that offering the right to marry under forum law to a citizen who is resident abroad and excluding it to a foreigner having residence in the forum may be problematic with respect to the 'reasonableness' test.

80 The Italian reported cases on capacity to marry (see note 54) are insofar uninteresting as all the Italian citizens (without exception) involved were also resident in Italy. One may argue therefore that the application of Italian law could retrospectively be just as well justified on the basis of their residence in Italy.

81 LAGARDE P., 'Nationalité' (note 70), at 217: 'si le critère de l’Inlandsbeziehung [i.e. the connection with the forum which directs the application of the law of the forum] est alternativement la nationalité et le domicile, le problème [of the discrimination] disparaît'.

82 These authors have argued in essence that the 'technique of alternative connecting factors', which appears to be the only way to make forum law available beyond the single category of beneficiaries identified by the single connecting factor rule, is more in line with
3. Equivalence Between Citizens Regardless of the Nationality or Residence of their Proposed Spouse

So far we have focused on the situation of foreigners who are resident or domiciled in Italy, which accounts for a fair proportion of the reported cases. Equality may arguably operate in yet another direction. The refusal to solemnise in Italy the marriage between an Italian citizen and a foreign citizen—both of whom have capacity under Italian law—equally affects the Italian citizen because the right to marry the person of his or her choice is ultimately denied to him or her. The Constitution: see clearly MARI L., 'Valori costituzionali e valori di diritto internazionale privato: i termini del confronto', in: BAREL B. / COSTANTINO B. (note 2), 47 f., at 66 (also see the communication by STROZZI G, ibidem, at 104 f.); BALLARINO T. (note 13), at 74. As an author—GAJA G. (note 79), at 80—suggested, also in the context of divorce, Art. 3 of the Constitution may be of further relevance in relationships between two foreigners. It would not amount to a 'reasonable' difference of treatment between two foreigners (resident in Italy) whose national laws prohibit the marriage in a specific case whereas Italian substantive law would permit it in such a case, consisting in allowing one of them to invoke Italian law because his or her law so widely differs from Italian law that it thoroughly ignores the institution of divorce, and to prevent the other to do so on the basis that his or her law does contemplate such an institution but considers that the conditions for divorce in the particular case are not fulfilled (see in this sense BARATTA R., Scioglimento e invalidità del matrimonio nel diritto internazionale privato, Milano 2004, at 26 and BÜCHER A., Le couple en droit international privé, Genève [etc.], 118-119). By the same token, it is difficult to defend the reasonableness of the difference of treatment consisting in allowing the solemnisation of a marriage based on Italian law to a foreigner (resident in Italy) where the foreign substantive impediment is contrary to the basic conception of the forum and to refuse such a solemnisation to a foreigner (equally resident in Italy, equally having no capacity under his or her national law and equally having such a capacity under Italian law) because the foreign substantive impediment is not per se contrary to the forum basic conception of marriage.


84 Trib. Pisa 30/31 May 1996 (note 54); cp. BVerfG (note 2), at 220. Interestingly, the case law shows that the Italian spouse more often than not joins the foreign spouse in challenging the refusal of solemnisation by the civil registrar (see Trib. Roma, 9 July 1968, Trib. Reggio Emilia, 29 September 1986, Trib. Potenza, 30 November 1989, Trib. Treviso 15 April 1997, Trib. Barcellona 9 March 1995, Trib. Pisa, 30/31 May 1996, Trib. Taranto 13 July 1996, all of which quoted in note 54 above) and sometimes he or she is the only one who formally takes action (e.g. Trib. Camerino, 12 April 1990). It is also interesting to note that the Tribunal of Pisa asserted jurisdiction on the basis inter alia of Art. 9 of the
seems to be some arguments in support of construing the principle of equality between (this time) two Italian citizens so as to imply that both shall be able to marry the partner of their choice - regardless of the latter’s nationality or citizenship-residence\textsuperscript{85} - under the same conditions. Under this perspective, the substantive requirements imposed upon their partners are ultimately - at the same time - substantive requirements imposed upon themselves, for the enforcement of their own right to marry is entirely conditional on compliance with these requirements as well. Accordingly, a rule requiring the two proposed spouses of two Italian citizens to comply with different substantive requirements depending on their national laws may be contrary to the principle of equality between these two Italian citizens because, in spite of them fulfilling identical conditions with a view to enforcing their right to marry, including with respect to their partners (all four having \textit{ex hypothesi} capacity under Italian law), these two Italian citizens are treated unequally in that one of them may enforce his or her right to marry and the other may not.\textsuperscript{86} Interestingly, a recent decision has authorised solemnisation of marriage despite foreign prohibition by focusing particularly on the situation of the Italian spouse.\textsuperscript{87} One may argue, therefore, that, in the few cases where Italian PIL Act by maintaining that the ‘decision [on the challenge] concerns an Italian citizen’.

\textsuperscript{85}Cp. the anonymous annotator of Trib. Reggio Emilia, 29 September 1986 (note 54), at 271: ‘Fra le libertà del cittadino vi è certamente quella di potere contrarre matrimonio con chi desidera’.

\textsuperscript{86}The practical purpose for which the decision n. 71 of 1987 by the Constitutional Court was sought (the three cases triggering it - see note 56 – indicate this) was to allow all Italian citizens (at least if resident in Italy), no matter whether husbands or wives, to obtain a divorce or separation in Italy under Italian law (cp. the commentary of this decision by ANCEL B., in: Rev. crit. 1987, 569 f., at 577; in favour of this solution, see MARIL., note 82, at 66 f., SALERNO F., note 75, at 41 f., PISILLO MAZZESCHI R., note 16, at 34 f., GAJA G., ‘Divorzio per indivorziabilità secondo leggi straniere’, in: Riv. dir. int. 1987, at 352 f. and I., note 71, at 80). This implies of course that the national law of the foreign spouse, whichever it is and whatever it provides, should not stand in the way, e.g. should be disregarded. The inevitable ‘by-product’ of the implementation of such a ‘scheme’ is that the Italian law on conditions for divorce and separation extends to the foreign spouse (whether man or woman) of the Italian citizen: not only does she or he inevitably have to endure the application of Italian law but he or she can also benefit from it, notably by joining the Italian citizen in invoking it or even by invoking it against the Italian spouse (see MARIL., note 82, at 66 f.), as happened in the case before the Tribunal of Palermo (see note 58; cp. ANCEL B., in this note, at 573). Similar reasoning may apply with respect to solemnisation of marriage: if one wishes to grant an Italian citizen (at least when he or she is resident in Italy) the full benefit of Italian law, the national law of the foreign spouse, whichever it is and whatever it provides, shall not stand in the way, i.e. shall be disregarded. As a ‘by-product’ of this, the benefit of Italian law is extended to the foreign spouse to the effect that he or she may also invoke this law regardless of his or her nationality and residence (contrary to what happens in divorce or separation, it would be unthinkable for him or her to invoke Italian law \textit{against} the proposed Italian spouse!).

\textsuperscript{87}Trib. Pisa, 30/31 May 1996 (note 54), at 1006 and 1009.
courts allowed non-resident foreign citizens to marry in Italy, the extension of the benefit of Italian law to these foreigners is the consequence or the 'by-product' rather than the ultimate purpose, such a purpose being primarily to allow the Italian spouse to enforce his or her right to marry under Italian law, which includes the right to marry the partner of his or her choice regardless of his or her nationality or residence and upon no stricter conditions than the ones set forth by such a law.  

D. Assessing the Reasonableness of the Difference of Treatment

According to constitutional teachings and case law, the difference of treatment may still be justified under Art. 3, despite the equivalence of two situations, if such a difference of treatment is 'reasonable'. The assessment of reasonableness implies the identification of the purpose of the rule at stake, and, consequently, of the difference of treatment (which is sometimes called ratio distinguendi). However diverse the reasoning techniques and patterns used by the Constitutional Court, one may generally say that the reasonableness test implies reasonableness of purpose, on the one hand, and reasonableness of instrument, on the other. The purpose is reasonable when the difference of treatment fosters other constitutional values or, at least, when it is not contrary to other constitutional values. This brings into play other provisions of the Constitution and, if more than one is at stake and they are in

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88 Trib. Pisa, 30/31 May 1996 (note 54); Trib. Belluno, 18 May 2002 (note 54).
89 This line of reasoning leads one to conclude that, while a foreigner having his or her residence or domicile in Italy may directly claim the benefit of Italian law for him or herself based on his or her connection with this country, such benefit is extended to the foreigner having no residence in the forum only indirectly, i.e. through the person of his or her spouse, an Italian citizen or, possibly, an Italian resident, and, so to say, by way of 'attraction'. Be that as it may, it is interesting to note that GAJA G. (note 79), at 79 concludes (with respect to divorce) that the 'Italian rules implementing constitutional principles' shall have a certain scope of application (internationally) and that according to BALLARINO T., *Diritto internazionale privato*, Padov 1982, at 148 – the Constitution requires that this scope of application shall be independent of, i.e. shall not be restricted to, the one which the traditional conflict rule reserves to law of the forum, i.e. – we take the liberty of so explicating the author's view – shall be larger than this one (also see BVerfG 4 May 1971, note 2, at 218). In a similar vein, GIARDINA A. (note 16), at 28, suggests that this scope is determined by all situations having 'the contacts deemed to be necessary and sufficient' with Italy. If Italian rules on capacity to marry do fall within this category, one may conclude that the Constitution directs that beneficiaries of such rules shall be all those presenting a sufficient contact with Italy, including foreigners who are resident in the country.
90 GHERA F. (note 71), at 53-54.
92 GHERA F. (note 71), at 56 f.
conflict between one another, a balancing of them may be necessary or advisable. The instrument is reasonable when it is appropriate, that is when it is neither insufficient nor disproportionate with respect to the purpose.

1. **Purpose of the Difference of Treatment**

The essential purpose for which foreigners having their residence or domicile in Italy or wishing to marry Italian citizens are denied access to Italian marriage law in Italy is that the marriage so celebrated might not be recognized in their national country, which would generate for them and their Italian partners a limping relationship. Having said this, one may doubt whether this philosophy would pass either of the two tests discussed above.

2. **Appropriateness of the Instrument**

The instrument — denial of the benefit of Italian law — appears to be irrationally disproportionate insofar as an increasing number of countries tend to set aside the traditional choice of law test when recognising marriages celebrated abroad. Rather than peremptorily refusing access to Italian law, the conflict rule may make Italian law on capacity to marry available to foreigners on the condition that the marriage so celebrated in Italy will be recognized by the foreign country. This solution would be more rational in that it would ensure both avoidance of limping relationships and compliance with the principle of equal treatment, without unnecessarily sacrificing any of the values at stake.

3. **Reasonableness of the Purpose**

The purpose of avoiding the disruption of international uniformity by creating a limping relationship means that uniformity — which is *ex hypothesi* only attained by denying the benefit of Italian law and, as a result, by prohibiting the solemnisa-

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95 See clearly *BVerfG* (note 2), at 219; cp. ANCEL B. (note 86), at 374, BARATTA R. (note 83), at 24 (with respect to divorce).


97 See for a similar mechanism, Art. 43(2) and 44(1) of the Swiss LDIP.
tion of marriage – is a more important value than granting such a benefit to a foreign citizen having his or her domicile or residence in Italy and, more generally, to a couple involving an Italian citizen (at least if also resident in Italy), on an equal basis with a couple of two Italian citizens residing abroad, thereby solemnising a marriage which will then be valid and thoroughly effective in Italy. Does this hierarchy of values conform to the Constitution, with regard particularly to the promotion of the creation of a legitimate family through the solemnisation of a marriage (favor familiae, which implies the favor matrimonii), the awareness of whose beneficial effects to society at large emanate from a number of Constitutional provisions?98

The invariable use of public policy by the courts to the effect of allowing the extension of the benefit of Italian law in the above cases, particularly with respect to impediments of such a nature that the risk of non recognition in the country of origin is high, suggests that such a hierarchy of values is constantly reversed. Such a reversal of hierarchy – it is a fact – has been perceived by courts as more in tune with justice.99 Can one go a step further and suggest that this is because the hierarchy underlying the traditional conflict rule is not in line with the Constitution or at all events is less so than the one flowing from the reversal of this hierarchy?

In 1987 the Constitutional Court struck down the conflict rule that sought to avoid generating an Italian divorce with little or no chance of being recognized in the foreign national country of (only) one of the spouses – the husband. In its decision, the Court implicitly refused to attach any weight to such (limited) non-recognition.100 Its ruling further suggests that giving to any couple involving an Italian citizen access to Italian divorce law is a better option, arguably in that it is more respectful of the constitutional hierarchy of values.101 This ruling has led some authors to suggest that the right for international couples to obtain a divorce in Italy is now based in the Constitution, implicitly considering irrelevant or in any event


99 A court has peremptorily stated the utter irrelevance of a non recognition in the national country of the foreign spouse of a marriage to be celebrated in Italy when discussing whether or not to solemnise it. See Trib. Roma, 9 July 1968 (note 54), at 466: ‘Né, infine, può avere rilevanza, al fine che ne occupa, il fatto che il matrimonio civile de quo potrà essere dichiarato nullo nell’ordinamento spagnolo. Trattasi, infatti, di una conseguenza giuridica, peraltro eventuale, che non può avere alcuna efficacia nella sfera territoriale del nostro Stato, nel cui ambito il matrimonio potrà restare pienamente valido’.

100 See note 58 above for references.

101 This was the content of Art. 12-quinquies of law n. 74 of 1987.
less relevant the concern for the avoidance of limping divorces as well as the values underlying such a concern. Though it is not entirely clear who are the beneficiaries of such a right, it is nonetheless clear that they are by far more numerous than Italian citizens alone and presumably include at least all couples involving a spouse having Italian nationality and possibly also, alternatively, his or her residence in Italy. It is tempting to conclude that, if the Constitution mandates that the right to claim the protection of Italian law on divorce extends to these categories of individuals despite the absence of any reference whatsoever to the dissolution of marriage in the Constitution, it is all the more justified to extend a right to invoke the protection of Italian law on marriage to a similar circle of individuals, given that marriage is expressly favoured by the Constitution and – what seems paramount – that to do so invariably corresponds, contrary to divorce, to the common intention of both spouses.

Interestingly, in what has been described as the ‘most significant decision on private international law of the whole century’, the German Constitutional Court has suggested that it would not be in line with the constitutional idea of individual freedom and the associated self-responsibility, nor with the constitutional conception of marriage, to refuse the amenities of a marriage – which ex hypothesis is not only permissible under forum law but also encouraged by the forum Constitution – based on the sole concern to avoid for the proposed spouses the prospective prejudice flowing from non recognition in the foreign country (of the nationality of a spouse). It would seem therefore that such constitutional freedom and responsibility involve an equally constitutionally-based freedom to assume the risk of a limping marriage, which freedom may therefore hardly be restricted by the legislator.

For all of these reasons, the hierarchy of values underlying the traditional conflict rule may not be compliant with the Italian Constitution. By giving priority to uniformity and, consequently, refusing the benefit of a marriage permissible

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102 See PISILLO MAZZESCHI R. (note 16), at 35; cp. MARI L. (note 82), at 66 f., SALERNO F. (note 75), at 41 f.
103 Cp. BALLARINO T. (note 13), at 440; PISILLO MAZZESCHI R. (note 16), at 35.
104 The absence of any reference to the ‘principle of dissolubility’ of marriage in the Italian Constitution ultimately suggests that divorce is not imposed per se to the legislator by the Constitution. What the Constitution directs is arguably that, if the Italian legislator makes provisions for the possibility to divorce, which it is free to do or not to do (the opposite principle of indissolubility not having been incorporated in the Constitution of 1948, though the majority in favour of this solution was a thin one: 194 vs. 191: see CUOCOLO F., note 98, at 731-732), such possibility, if and once provided, should be made available to certain categories of individuals. This cannot be based but on Art. 3 of the Constitution on equal treatment before the law.

106 BVerfG (note 2), at 222-223.
107 Ibidem, at 223.
under Italian law to a foreigner resident in Italy or wishing to marry an Italian citizen on an equal basis with an Italian citizen resident abroad, the traditional conflict rule denies the benefit of Italian law to such individuals even if they are determined to take the risk of non-recognition in the national country of the foreign spouse. Against this constitutional background, the purpose of the exclusion of such individuals from the benefit of Italian law which is pursued by the single-factor nationality rule hardly meets the ‘reasonableness’ test.  

VII. Conclusions

The Tribunal of Rome suspected a lack of harmony between the Constitution and the private international law provisions relating to solemnisation in Italy of a marriage between an Italian citizen and a foreigner, notably when the latter has his or her domicile or residence in Italy. Though its attention was diverted to the ancillary question of whether the Constitution points to ways of dealing with non-delivery of the foreign no-impediment certificate, the Tribunal of Rome was not fully satisfied with recourse to public policy to resolve the issue.

To the extent that public policy is triggered each time Italian law would allow marriage to the foreign national but foreign law would not, as appears to be the case, that exceptional instrument does not operate soundly. One is tempted to suggest that the problem rests not so much in the contents of the foreign law but in the conflict rule itself in that it reserves the benefit of Italian law to Italian nationals and denies it to foreigners having their domicile or residence in Italy or wishing to marry Italian nationals. The conflict rules of a rising number of European countries directly include in the range of beneficiaries of their rules on essential validity of marriage their nationals, their domiciliaries or residents as well as individuals who are neither their nationals nor their domiciliaries or residents but who wish to

Interestingly, all European countries having enacted legislation on registered partnerships have adopted a conflict rule which also make their substantive rules on conditions for registration – which are often identical to those for solemnisation of a marriage – available to a large number of categories of individuals, including their nationals and their domiciliaries or residents and, more often than not, foreigners having no residence or domicile in the forum but wishing to marry one of its nationals or domiciliaries or residents (see ROMANO G., in: Rev. crit. 2006, forthcoming). While meditating on this new challenging field of law, a number of authors have explained that the reason why the traditional single connecting factor conflict rule has been set aside in favour of a new rule enlarging the circle of the direct beneficiaries of the forum law is that the traditional rule would have been discriminatory in that foreigners would have often been prevented from having access to forum law even if, we may add, they have their residence or domicile in the forum or wish to marry forum nationals. See e.g. KESSLER G., Les partenariats enregistrés en droit international privé, Paris 2004, at 125; also see ROMANO G., in: Rev. crit., 2006 (forthcoming).
Marry nationals or domiciliaries or residents. This is also true with respect to registered partnerships of virtually all European countries having enacted rules in the field. No recourse to judicial authority or to public policy is then necessary. The rules existing in Italy force the civil officer to refuse the celebration, the parties to challenge this refusal and the Tribunal to use public policy to authorise the celebration. This process would still make sense if there were cases in which the Tribunals did not grant authorisation even though the foreigner had capacity under Italian law. Since this, as said, does not appear to be the case, this process risks being needlessly and irrationally laborious.

Just as the concern for non discrimination between foreigners and citizens has been used to justify the new rules on capacity to register a partnership, one may argue that the same concern is responsible for the adoption of such conflict rules on marriage as exist in a number of countries and, in Italy, for the distorted use of public policy in order to attain the same result. To the extent that one considers that such discrimination is not in line with the constitutional principle of equality before the law, one may doubt whether the conflict rule adopting the sole nationality as regards capacity to marry would pass the constitutional test. If this has gone undetected so far, this is arguably because public policy, whose natural purpose and logic is to bring the foreign substantive law in harmony with fundamental policies of the forum – which more often than not, and almost invariably in the field of family law, are constitutionally-based – was silently misused to make the conflict rule of the forum reconcilable with the forum’s Constitution.