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## **The personal status of migrants: still a matter of private international law? – the dark side of the picture**

### **I. The personal status of migrants: still a matter of private international law? Yes and no**

This topic is being presented in the form of a question: The personal status of migrants: still a matter of private international law (“PIL”)? This is certainly a rather provocative question for a PIL lawyer. My own answer to this question would be both negative and positive, a combined yes and no. I will also give some comments on the speech of Prof. Meeusen while explaining the reasons for my yes and no.

### **II. The personal status of migrants: less and less a matter of private international law !?**

I believe that the personal status of migrants is tending to become less and less a matter of PIL, as there are at least three other disciplines trying to take over parts of PIL, trying to overrule and influence it, or at the very least functioning in interaction with it. Each is interwoven with principles of human rights.

#### **II.A. The interaction with the discipline of substantive family law**

The first discipline to be focused on is the discipline of substantive family law. The starting-point taken here is that PIL establishes a kind of what I would call hidden legal cultural pluralism in a legal system. Different categories of people rely on different rules of family law, but the pluralism is limited. One condition is that PIL only plays a role if an “international element” is present. Some people now believe that legal pluralism should go further, in fact they would like to allow more diversity and flexibility in the substantive law itself. They argue, for example, that a situation could be seen as completely “internal” from a PIL perspective, once the people involved are established and naturalized, but that even then, there may still be a ‘cultural’ belonging to another legal system. An example of a question arising in this context is whether PIL is still a convenient way for dealing with cultural differences, in times where there is a lot of mobility and where people settle down. The connection with principles of human rights becomes obvious when one remembers the relevance of respect for cultural identity and all related issues and debates, as Prof. Meeusen also already showed through the example of repudiation.

PIL could also function in another way, as a catalyst for modifications in substantive family law. Let me use, as an example, the institution of same-sex marriage, which can serve as an interesting case-study. If, for example, a European member state has not yet introduced same-sex marriages into its legal system, it is imaginable that this country would however recognize a same-sex marriage created elsewhere, perhaps even if it would concern two national citizens living abroad. It could happen that the European court of justice would, sooner or later, force this country to recognize this marriage – e.g. in analogy with the Grunkin-Paul-case!/? Now, citizens whose relationships are situated in a purely internal context might see this as a kind of reverse discrimination if they are not given access to the same institutions: people who never migrated are in fact being denied

access to this institution. People could argue that what is possible under rules of recognition should also be made possible in the country itself, ultimately even in substantive law. This kind of argumentation, possibly resulting in a kind of “backwards progression”, isn’t necessarily a successful one, but it is a possibility. Awareness of this possible mechanism could either stimulate or refrain people from pleading for liberal rules of recognition. Examples of the principles to be taken into account here are principles of non-discrimination, (combat of) fraud, and respect for the cultural values of a society.

## **II.B. The influence of and interaction with European law**

I have already touched on the second relevant discipline which is interwoven with PIL by referring to the possibility that the European Court of Justice could force European countries to recognise same-sex marriages under certain circumstances, and that is the discipline of European law. Indeed, it is clear that European institutions tend to intervene more and more in PIL.

The dynamics of this discipline are basically centered around the central principle of freedom of movement of EU-citizens and their family members. The tendency is, as Prof. Meeusen explained, to liberalize international family law - in the sense of stimulating party-autonomy, creating more possibilities within law concerning names, more possibilities to marry or to divorce ...-, in order to stimulate the freedom of movement.

Thus, the principle of freedom of movement of EU-citizens pushes international family law into a process of liberalization: the awareness that mobility of European citizens within the Union can be influenced by the way people weigh the pros and cons of the impact of mobility on the regulation of their family life, spurs on the elaboration of a liberal European international family law. Apparently European authorities are convinced that a liberal system of PIL could stimulate freedom of movement, and from there we can see interventions in PIL both by the court of justice as well as by the European legislator.

Rather sensational examples of the issues at stake here are often highlighted in the media, for example the already-mentioned issue of same-sex-marriages, and in particular the problems non-recognition of these marriages might cause for EU-citizens who make use of their right of freedom of movement in a European country.

A question to be asked is how far exactly could European law push member states towards liberalization of their PIL. “How liberal should we be?” seems to be one of the main questions PIL is nowadays confronted with within the European context. This gives rise, of course, to large-scale discussions on the right to protect national cultural or moral values. Focus on the protection of these values could certainly slow down tendencies in the liberalizing of international family law. But the tendency to liberalization is strong, and as Prof. Meeusen explained human rights could certainly also lend support to the tendency towards liberalization of PIL. The aim of stimulating the freedom of movement and the aim of promoting human rights, such as protection of family life, finally appear to go rather well together, and liberal rules of PIL fit well together in this movement.

Prof. Meeusen warns however that member states should not be obliged to adapt their rules of PIL completely for the sake of stimulating the freedom of movement. Basically, I agree, even though personally I think I have more sympathy than Prof. Meeusen has for the tendency to liberalization of international family law. Say, for example, that even if no human rights as such would be effected, I would be in favor of liberalizing the rules of PIL in several cases, for example on the basis of principles such as favoring marriage and favoring divorce.

### **II.C. The influence of and interaction with migration law – the dark side of the dynamics of influences of socio-economic concerns on PIL**

By talking about freedom of movement, a link has already been made to the third discipline that I want to discuss: migration law. Freedom of movement could possibly be seen as one aspect of migration law. Another aspect is, of course, migration coming “from outside” and mobility of third party nationals. We talk here about the discipline of migration law as a whole, and I would even understand migration law in this context to also include aspects of nationality law and social security law.

I think it is necessary to pay attention to the dynamics going on in the interaction between PIL and migration law, in addition to the contribution of Prof. Meeusen, because when focusing on these dynamics, we find in fact another side to the picture. I would call it the dark side of the picture; the influences of socio-economic concerns on PIL. Whereas in the European context, it is clear that PIL is developing in a liberalizing way, and the question is just how far exactly this tendency will go, in the context of the relation to immigration law I would say the dynamics are working in the opposite direction. I notice here that there is a tendency to manipulate PIL in a restrictive way. The question seems rather to be one of how far exactly this tendency of restriction could go. In the context of confrontation with migration coming from outside the Union, the main question seems to be “how restrictive can we be?”, in particular how restrictive can we be in legislating on residence claims, social security claims, and nationality claims for non-occidental foreigners. In fact, it often seems as if the rules of PIL are sometimes simply left aside and that margins within PIL are used just to ensure a negative result for those who claim rights of residence, social security or nationality based on family relationships.

The dynamics of restriction is obvious. What is more: legal interventions are flanked by the divulgence of ideologies justifying these changes, ideologies calling to go even further in restricting claims being made by foreigners. It has become mainstream to pretend that in the past foreigners were given too many rights, that authorities were too soft in dealing with abuses and fraud and that now the time has come to change rules and apply rules in a tougher way, for the sake of foreigners themselves; it has become mainstream to pretend that having a double sense of belonging is not really possible, and certainly not something desirable; it has become mainstream to argue that so-called cultural or religious problems, such as inequality between men and women, are to be seen as the main causes of integration problems, ... Such a presentation and problematization certainly influences the way one will be inclined to act, intervene, and legislate. This kind of mainstream thinking is very prevalent in the Netherlands. I think actually that these ideas need to be demystified.

Recently I contributed to a project coordinated by the Dutch Family Council (“Nederlandse Gezinsraad”). In this project we also dealt with the question of how migration law and ideologies going together with a restrictive migration policy influence other areas of law. One of the questions addressed was whether the way different areas of law interplay - such as the interplay between family law, migration law and social security law - leads to a weakening of the situation of foreigners. And indeed, this appears to happen, rules in some areas of law appear to function as a spoilsport for claims in other areas of law. In this study, the discipline of PIL was included as a case-study of the dynamics on how migration law and migration policy influences other areas of law and weaken the position of foreigners. In fact, it was quickly apparent by that the way PIL-rules are promulgated and applied, the position of foreigners could be weakened in an indirect way. Because by regulating mobility, residence, social security and nationality issues of foreigners, one is inevitably confronted with the intricacies of PIL. For example, the recognition of a foreign marriage or of a foreign judgment containing a change of age of a foreigner – both typical issues of PIL – could be decisive in evaluating a residence claim or a retirement claim; thus PIL, in reality, often functions as a building block and a hinge between family law and other areas of law: so, for example, it is not the field of PIL that determines whether one can ascribe residence claims based on certain family relationships or not; but when a decision in migration law has been taken that under certain circumstances a marriage could lead to a residence claim PIL rules could become crucial, as they can decide whether, for example, a marriage created abroad should be recognized or not. Now it appears that rules of PIL could be manipulated in the sense that they are promulgated or applied in a way ensuring a negative effect for foreigners. If such manipulation takes place, in one way or another, one could speak of a kind of instrumentalization of PIL for restrictive migration policy. In 1997 I finished my PhD in Belgium in a rather dramatic way by warning for the consequences of negative instrumentalization of PIL for objectives of restrictive migration law. I really feared this, but perhaps it was also attractive to write about, as it can sound very interesting and dramatic to do so. Nowadays, 8 years later, I believe the phenomenon of instrumentalization of PIL for restrictive migration policy should still not be overestimated, and thus perhaps talking about this may still seem more dramatic than it is. However, after having migrated from Belgium to the Netherlands and having studied Dutch PIL over the past number of years, I have found more and more incidents and illustrations of this phenomenon. Where PIL-issues involve non-European foreigners, Dutch authorities sometimes tend to use PIL-rules in such a way as to prevent non-European migrants from claiming residence, social security and nationality, and so selectively restrict the mobility of non-European foreigners. Examples could be found, for example, in the context of legalization and verification of documents, as explained by Prof. Boeles in his book on the subject of legalization and verification of foreign documents, or in some practices in social security law, dealing with claims for child allowances based on filiation, or widow pensions based on a marriage, or in the way concerns of restrictive migration law are actually introduced in conflict rules themselves, for example, concerning marriages and filiation. I have described and criticized these incidents in several publications in a rather technical way.

As I said, the phenomenon should not be overestimated; there are of course counterexamples to be given, and sometimes practices even change in a positive way. But the main tendency appears to be a tendency to restricting the claims of foreigners, with an echo in PIL. In PIL-debates, one could also find echos of the ideologies going on today. There is, for example, as I mentioned, this overwhelming presentation of fraud, a clear call to combat fraud, and the question how PIL should deal with allegations of fraud; there are the ideas about dominance of non-occidental men and subordination of women. Here one often thinks of issues such as repudiation and polygamy. But I think that it is interesting to mention here, as a kind of striking example of what happens in reality, that in the Netherlands, for example, for several years a number of Moroccan men were, through rules of PIL, completely hindered in their efforts to divorce their wives who wouldn't agree to divorce; a repudiation was not recognised because the women didn't accept the repudiation, but at the same time a "Dutch" divorce wasn't offered to them; one case had to go to the highest Dutch court before the man could divorce. This example seems striking to me, mainly in a Dutch context, because in the Netherlands both men and women can, in fact, divorce without the consentement of the partner, but these Moroccan men were in fact blocked from doing so.

In fact, more generally speaking, I think that foreigners, both women and men, are nowadays more and more hindered and destabilized in several ways in the organization of their family life. They have less and less choices on how to organize their family life, and I fear that rules of PIL contribute far too often to the further complication of their lives.

While the lives of these foreigners becomes more and more complicated, I recall at the same time that the ambition of European authorities, as they expressed it themselves, is to "make easier" the life of European citizens, through PIL. Making European citizens' lives easier seems to require a unification of PIL in a liberalizing way. Personally, I have sympathy for the process, judged on its own merits, for the liberalization of international family law that takes place under European impulses. I realize that the process of liberalization can't be, and shouldn't be, without any limit, but in its essence I think it is a good evolution as evaluated from its substance, as I am in favor of liberalization tendencies and as I think basic PIL-concerns about, for example, international harmony, no-loss-of-rights, legal security, non-discrimination, do ultimately and basically fit well together in a tendency to stimulate the mobility of people. At the same time, seeing what is going on in European PIL, I also have some hope that the dynamics going on within the European context could have a wider positive effect. In fact, European interferences with PIL could possibly also influence PIL in general, for example, through arguments based on the indirect effect of European law, or arguments based on the need for consistency in PIL. If this effect does not take place, or if only a limited category of people could pull themselves up to the European dynamics, ultimately we could be confronted with the emergence of a kind of double-track policy in the process of dealing with PIL: liberalizing tendencies in PIL as opposed to restrictive tendencies, in parallel with current two-track policies in migration law itself, in fact as an echo and amplification of migration law itself. Ultimately, one could imagine that the EU's interference with PIL itself would be a double-track one, depending on the nature of the case – purely intracommunitarian or including external aspects, to the extent that the EU

would interfere with PIL in cases having “external aspects”. In fact, since the EU has enlarged its competency over immigration law and PIL and aims to unify rules on issues such as “family reunification” of non-European immigrants, interference of the EU in PIL issues that are not purely “intracommunitarian” becomes conceivable. This raises the possibility that actual tendencies in national ways of dealing with PIL, going along with restrictive migration policy, may be the precursors of future European practices. It is also conceivable that the elaboration of a “liberal” system of European PIL will undergo a “backlash” under the influence of concerns that are currently perceptible on a national level. Seen this way, PIL finds itself caught in fields of forces of competence, substance and political influences acting on the discipline

Of course, one could pretend that it is quite logical that politics, including migration policies, which have been generally accepted, have an effect on several areas of law, including a discipline such as PIL. Each discipline should just do its own bit, one could say. Moreover, it is not quite new or unique that tendencies of instrumentalization are felt in PIL for political goals. It is, for example, striking that actually right now, in the Netherlands, legislation is being prepared to make PIL even useful in combating terrorism, namely through adaptation of PIL-rules on international company law and non-governmental organizations. There are also older examples. I recall here, for instance, the discussions in Dutch PIL on how PIL could contribute to combat environmental pollution. In the 90’s, a book on this issue of environmental pollution and PIL was published under the title “pollution in PIL”. So, the issue of instrumentalization of PIL isn’t quite unique or new, but still, I think that it is a specific one as far as it concerns the instrumentalization of PIL for restrictive migration policy. As far as one would present this instrumentalization as a kind of interest analysis of governments, this should be seen as a particular way of weighing interests of states: states influence the way international family law is ruled out and applied from the interest they have in the effect the existence of the international family relationship will have on a public claim, based on this family relationship.

I think that if restrictive migration law affects PIL, we can speak of a real “pollution” of PIL, which should be regarded in a negative way. Not only because I think the restrictive migration policy itself and ideologies going along with this policy are to be criticized, and PIL should at least not collaborate with this policy, but also because I think aims of restrictive migration policy, in any case, basically don’t fit at all with principles of PIL; moreover, manipulating PIL for objectives of restrictive migration policy constitutes a rather tricky way of frustrating claims and sometimes even frustrating respect for human rights such as the protection of family life. If one says that when a person is married he or she should enjoy protection of family life, then this right could be frustrated through the subtle application of PIL rules dealing with the definition of marriage in an international context.

Concluding this issue: we can see nowadays, in the Netherlands, both direct and indirect attacks on foreigners’ claims. Some are justified on a so-called humanitarian basis, some are presented just as rude as they are. Sometimes I think one should focus on the direct attacks, rather than the rather hidden ones. But ultimately, I think it is important to criticize measures, if they are not right, whether they are presented on a humanitarian

basis or on a xenophobic basis, and whether measures and practices frustrate claims directly or indirectly - for example, through practices in which PIL is used in a tricky way to frustrate claims. The indirect ones are often a reflection of the direct ones. What is more: as the indirect ones often transform claims which foreigners should still be able to invoke into pure optical illusions, they even often deprive foreigners from the claims which in the end still seemed to be left for them.

### **III. The personal status of migrants: more and more a matter of private international law !?**

As there are obviously forces in different disciplines trying to influence PIL in one way or another, the foregoing could lead to the conclusion that PIL itself tends to become less important. But at the same time, in a rather paradoxical way, there are reasons to believe that PIL has nowadays the potential to become more important than ever.

Indeed, the very fact that other disciplines try to put their mark on PIL just shows that it is acknowledged how important this discipline is and how important it is how PIL “stands” in these fields of forces. Moreover, situations in which PIL issues come forward could appear to multiply, or PIL rules could come forward in a very prominent way, just by the way people actually make use of their freedom of movement, or by the way people try to avoid obstacles created by restrictive migration policy.

For example, one could be reminded here of the EJC-case of Hacene Akrich, a case involving the UK and Ireland, but also of great importance for the Netherlands. In fact, because of the restrictions in Dutch migration law many Dutch people, who wish to live together with a “third country national”, move to another European country in order to become EU-citizens who make use of their right of freedom of movement and thus fall under the more liberal European law. Afterwards, they often move back to the Netherlands, having won the right to living together with their partner. Dutch people thus sometimes become mobile, leave their country and use, for example, the so-called “Belgian road” in order to have the right to family reunion. In the case of Hacene Akrich, the court of justice dealt with certain aspects of this strategy. PIL rules were not as such dealt with in the case. But of course, the case shows the relevance of how Belgium and the Netherlands apply their rules concerning the creation of a marriage or the recognition of each other’s marriages or marriages created in a third country, how their PIL rules deal with sham marriages and so on. In the Hacene Akrich case, the court dealt with the issue of “fraud”, and with the principle of respect for family life. The case also raises questions in PIL law on how to deal with fraud.

It seems clear that in the European context, as Prof. Meusen explained at a recent conference in Antwerpen, it is not allowed to speak too quickly about “fraud” and it isn’t allowed for member states to take measures, too easily, to combat so-called fraud. In this context, one speaks rather of “shopping” than of “fraud”. The question is whether things are seen differently in “a non-European context”. Here, one is overwhelmed these days by allegations of “fraud” by foreigners, even if the reality is that foreigners are often simply pushed into a situation of complete deadlock and are just trying to find a way out. One of my fears is that under the motto of combating fraud, foreigners will be even more

blocked, and that PIL techniques such as the exception of public policy will be used for this goal of reducing foreigners' claims.

#### **IV. In conclusion**

Speaking in a more general way, I believe that principles of PIL are largely in accordance with basic principles of European law. It remains important, as Prof. Meeusen said, that PIL's own way of thinking is taken seriously in this context, but in essence, basic principles of PIL such as the principle of stimulating legal security, and the principle of stimulating international harmony, the aim of no-loss of rights, as combined with human rights go together rather well with European concerns about stimulating freedom of movement. On the other hand, I believe basic principles of PIL are not compatible with the goals of a restrictive migration policy. I believe that mainly in this field of force, it is important to take PIL seriously in order to avoid that PIL renders itself into an instrument of restrictive migration policy, with all the ideologies that are attached to it. I believe that if PIL-lawyers want to avoid PIL being swallowed up by other disciplines and political aims within these disciplines, they should certainly also be vigilant for the way restrictive migration policy and ideologies going along with this policy try to swallow up, or at least influence PIL, and they should check if human rights are truly respected in this context.

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