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DEVELOPMENTS IN EUROPEAN INTERNATIONAL FAMILY LAW: A LIBERAL APPROACH TO TRANSNATIONAL SITUATIONS

“European international family law”!? = a mouthful!

International family law: part of Private International Law (rules of PIL in area of family law)

When studied PIL “in the old days”, learned:

PIL two basic lessons:

(Always distinguish three PIL-questions (rules of international jurisdiction, rules of applicable law, rules of recognition and enforcement))

PIL deals with international situations, but is in essence national law (only, sometimes supranational sources are available (mainly: conventions) (so, always check sources on supranational level)

Nowadays: these lessons are still two basic PIL-lessons, but recently something quite new:

Phenomenon of “europeanization” of PIL: Europe has taken up – and is making full use of – competences in PIL

Said: “Before and after”: Before and after Treaty of Amsterdam (1997). This Treaty: change of EC-Treaty, very important changes for PIL because: Competences for Europe on PIL-issues!

Why change of EC-Treaty in this sense? Said: came “out of the blues”!?

In any case:

“Before”: no PIL-regulations, ECJ reticent

AFTER: NEW ACTORS IN PIL (European Legislator and European Court)

“After”: competences. Thought no real use, but meanwhile clear: Europe obviously very eager to interfere in PIL, including international family law

See tsunami of regulations (procedural aspects divorce, all aspects maintenance etc.)

See also cases Court of Justice (e.g. Garcia Avello and Grunkin, both concerning law of names)

Interference HOW? Interference in a “LIBERAL” way

Pressure from respect for principle of non-discrimination and fundamental European freedoms (in international family law mainly: freedom of movement)

European institutions: PIL can serve realization of specific goals such as

- “liberal access to justice” (cfr. often several judges competent within Europe – see rules themselves in regulations and interpretation of these rules by ECJ - cfr recently case Hadadi about couple with double French-Hungarian nationality: can rely on each of nationalities),
- making “easier” life of European citizens,
- stimulate use of “freedom of movement”
- ...

resulting in

European Legislator: making “liberal” PIL-rules,
ECJ: “functional” approach of double nationality (selection of nationality that is most favorite for person involved)
etc.

Foregoing seems to fit with “liberal” tendencies elsewhere

e.g. international labour law (under pressure of “freedom of services” of companies),

e.g. international company law (under pressure of “freedom of establishment” of companies)

Cfr. e.g. ECJ: when citizens/companies take benefit of differences in legislation of Member States: should not be seen as fraud, just shopping.
Allowed to take profit of transnational character.

Criticism: Excesses!? Prices to pay for this liberalism? Price to be paid by whom? (e.g. social protection of employees, e.g. undermining law of Member States?)

Thus, in sum: criticism, but in essence a liberal approach to transnational situations

VERSUS

Developments in *Dutch* private international law: when look from Dutch perspective at what going on on European Level with “European situations”: can observe quite opposite tendencies between what going on there and what going on on Dutch national level (regulating “what is left” for Member States)

Interference HOW? Interference in a “RESTRICTIVE” way.

Especially when confronted when issues about international marriages and international filiation involving Third Country Nationals (who sometimes also possess Dutch nationality: “touches” sometimes people with double nationality),

Tendencies: clear dynamics on Dutch national level into restriction of residence claims, social security claims etc. of “third country nationals”; whereas PIL can influence/in interaction, PIL sometimes “used” to obtain this result – cfr. examples in legislation (cfr. very recently project about amendment of PIL-rules on “cousin-marriages”), cfr. practices in national case-law (sometimes impression of “regressive reasoning” by Dutch judges)

Rules of PIL often seem to complicate life of citizens, contribute to problems in family law and areas linked with family law (migration law, social security claims, nationality claims), allegations of “fraud” when people want to rely on foreign law, etc.

Justification: sometimes integration, sometimes also explicitly “restriction of migration”

= “Dark” side of the picture (of influence of “migration policy” on PIL, “instrumentalization” of PIL)

HOW GO ON, positions to take by actors (European legislator, Dutch legislator, European Court, Dutch courts, judges, people involved and their lawyers?)

- How go on on European level when regulating PIL-issues in “European cases”
– e.g. in sensitive areas such as marriage

- How go on when dealing with “non-European cases”? Note: European interference: tends to include also situations which were considered before as “falling out” of European scope. PIL tends to become more and more European. European PIL-legislation: already includes sometimes (under conditions) position of Third Country Nationals.

Position in this process “The Netherlands”? My impression: The Netherlands attempt to bring national practices on European level (cfr. Directive Family Reunification – opposite to e.g. Denmark: wanted to continue national practices on immigration law, realized through “opting out”). Thus: will Dutch practices become “common” on European level?

Position people involved/their lawyers?

Sometimes: can observe attempts of lawyers to use arguments of what going on in European context (e.g. in discussions about confrontation with “double nationality” (including Dutch nationality) when application of Directive on Family Reunification is pleaded by persons involved; in discussions about recognition of foreign Turkish judgment containing a change of birth date, etc.)

Important challenges for ECJ, when ECJ will be asked to discuss national PIL-rules

In any case:

seems to be very important, if one discusses PIL-rules on “national” level, to take notice of what is actually going on on European level.

There, at this moment: a complete other tendency going on.

Observation of this “double track”: requires - at least – attention and some reflection from all of us??