

Private International Law: Lost in Nationality?

Susanne Gössl - Jinske Verhellen
Universität Bonn, Germany - Ghent University, Belgium



Outline

(1) Relevance of nationality in PIL in Europe

(2) Nationality as connecting factor

(3) Influence of EU law

(4) Challenges for the future



Nationality in European countries' PIL

A premature swan song

- Status, legal capacity: Albania, Austria, Belgium, France, Germany, Italy, Montenegro, the Netherlands, Poland, Rumania
- Name: Albania, Austria, Belgium, France, Germany, Italy, Montenegro, the Netherlands, Poland, Rumania
- Parenthood: Albania, Belgium, Austria, France, (Germany,) Italy, Montenegro, the Netherlands, Poland, Rumania
- Adoption: Albania, Belgium, France, Italy, Montenegro,
- Marriage: Albania, Belgium, France, Germany, Italy, Montenegro, Poland, Rumania
- Personal relations between spouses: Austria, Germany, Italy, Montenegro

Nationality in Conventions and Regulations in Europe

- ICCS/CIEC Conventions
- Rome III Regulation
- Succession Regulation
- Planned Regulations on Matrimonial Property/Partnership Property

Nationality as connecting factor

- **How?**
 - Nationality as sole connecting factor
 - Common nationality as connecting factor
 - Party autonomy as connecting factor



Nationality as connecting factor (2)

- **Why?**

- Open approach to foreign law - room for legal and cultural diversity
- Principle of reciprocity - equivalence between legal orders
 - “une manière de courtoisie internationale: si j’applique leur droit international à vos ressortissants, vous appliquerez mon droit à mes ressortissants” (Carlier)*
- Cross-border continuity of personal status
- Stability and foreseeability

Nationality as connecting factor (3)

- **Key preconditions**

- Solutions to multiple nationality and absence of nationality
 - Forum nationality + foreign nationality
 - Two foreign nationalities
 - Stateless persons and refugees
- Tools to ascertain and understand foreign law

Legal practice lost in nationality?

- Nationality-based conflict rule combined with unconditional preference for the forum nationality at odds with higher, fundamental rights
- Homeward trend in favour of the forum law
 - Application of forum law as a substitute for untraceable foreign law
 - Public policy (ordre public)
 - Development of ‘lois d’application immédiates’ in substantive family law (= voorrangsregel/Eingriffsnorm)
- More emphasis on parties’ expectations → search for appropriate solutions for the parties involved

An illustration

Cross-border name case

- Claim for a correction of the birth certificate of a Russian girl
 - Parents: ‘regularized’ asylum seekers
 - Two children born in Belgium: a boy and a girl
 - In birth certificate of both boy and girl: family name of father *K[...]ov*
 - Parents want a gender specific family name for daughter *K[...]ova*
- Legal proceedings: June 2011 - February 2016

An illustration

Cross-border name case (2)

- Court of Appeal Gent (23 January 2014)
 - Nationality of the girl is not a decisive factor
 - Linguistic matter: parties do not ask for ‘another’ name, but only for a ‘gender specific’ name for daughter
 - Same name in Belgium and Russia is in the interest of the child
 - Correction of the name shall be without prejudice to any further integration of the child in Belgian society
- Attorney General - appeal before *Cour de Cassation*
 - Public Prosecutor can intervene every time public policy requires this intervention
 - There is no free choice of name
 - Name is a matter of public policy

Much ado about nothing?

- *Cour de Cassation* 6 February 2015
 - The Court of Appeal justifies its finding by the fact that the birth certificate contains a material (linguistic) error in the spelling of the name.
 - The decision of the Court of Appeal does not endanger public policy to such an extent that the performance of the Public Prosecutor on its own motion is justified.
- 19 February 2016: correction of the name by the civil registrar

Influence of EU law

Art. 18 TFEU (ex Article 12 TEC)

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

[...]



EU law – Court of Justice

Garcia Avello (Case C-148/02)

- Born in Belgium, Belgium-Spanish national
- Spanish name law \neq Belgium name law

Hadadi (Case C-168/08)

- Competence of a court based on nationality in case of dual nationality

General Conclusion

- Preference of the forum's nationality can create a discrimination
- Preference of the effective nationality can create a discrimination
- Different names in different states impede the free movement of EU citizens

EU legislative activity

- Harmonization of PIL rules
 - Especially in the area of family law
 - Purpose to avoid those discriminations and favour the free movement of citizens
- Preference to more party autonomy

Rome III

Art. 5(1)

The spouses may agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws:

[(a) and (b) mutual and last mutual habitual residence];

(c) the **law of the State of nationality of either spouse** at the time the agreement is concluded; or

(d) the law of the forum

Rome III

Art. 8 Rome III Regulation:

In the absence of a choice pursuant to Article 5, divorce and legal separation shall be subject to the law of the State:

[(a) and (b) mutual and last mutual habitual residence];

(c) of **which both spouses are nationals** at the time the court is seized; or, failing that

(d) where the court is seized.

Dual nationality – As you like it

Rome III Regulation

Recital (22)

Where this Regulation refers to nationality as a connecting factor for the application of the law of a State, the question of how to **deal with cases of multiple nationality should be left to national law**, in full observance of the general principles of the European Union

Influence of EU law

Art. 22(1) Succession Regulation

A person may choose as the law to govern his succession as a whole the law of the State whose **nationality** he possesses at the time of making the choice or at the time of death.

A person **possessing multiple nationalities may choose the law of any of the States** whose nationality he possesses at the time of making the choice or at the time of death.

Many future challenges

- Private international law and migration policy
 - Combatting ‘migration fraud’ → ad hoc adaptations of family law concepts: marriages and partnerships of convenience, false declarations of parenthood
 - Current refugee flows to Europe: proof of civil status, recognition of child marriages, religious marriages, ...
 - ...
- Characterization issues
 - Partnerships and same-sex marriages
 - Sex change and intersexuality
 - ...
- Changing concepts of parentage and families
- ...

False declarations of parenthood

- Acknowledgement of a child for the sole purpose of acquiring residence in/nationality of an EU country
- Report European Migration Network (June 2012):
“There are very few statistics available on false declarations of parenthood, which may be indicative that this form of misuse is rare. Alternatively, it may indicate that the problem is not monitored to a sufficient degree.”

Current legal framework in Belgium

- Little case law → no measures to combat false declarations of parenthood?
- Civil registrar: passive role
- Possible court proceedings
 - Application for annulment by the Public Prosecutor
 - Contestation of the paternity recognition by the mother, the child, the man who recognised the child, ...
 - Non-recognition of a foreign act
- Migration authorities: DNA tests

Future legislation in Belgium (?)

- Preliminary draft law on false declarations of parenthood ('strijd tegen schijnafstamming')
 - Copy/paste rules on marriages/cohabitations of convenience

Not 2 but 3 persons involved

The child makes the difference

- More active role for civil registrar

Role of the judge?

More city shopping?

Future legislation in Belgium (?)

- Refusal/annulment ‘even in case of biological ties’ between child and person recognising the child

Art. 3 UNCRC

Art. 8 ECHR

- From multilateral conflict rule to *loi d’application immédiate*

- More legislative attention to combatting fraud than to reflecting on good family law

False paternity recognition

German response

Sec 1600 BGB Persons entitled to contest [paternity acknowledgments]

(1)The following are entitled to contest the paternity:

5. the competent authority (authority entitled to contest paternity) in the cases of section 1592 no. 2.

[...]

(3)The contestation under subsection (1) no. 5 requires that there be **no social and family relationship between the child and the person acknowledging**, nor was there a social and family relationship at the date of the acknowledgment or of his death and the recognition satisfies legal requirements for the permitted entry or the permitted residence of the child or of a parent.

False paternity recognition

German response (2)

Bundesverfassungsgericht (Federal Constitutional Court), 17.12.2013, case 1 BvL 6/10: invalidity of those provisions

- as too broad and unclear and
- too strong intrusion in rights of the child (which loses a parent and the nationality *ex tunc*)

Since then: no new legislation



Characterization issues – Partnerships and marriages under German law

Art. 13 EGBGB Marriage

(1) The conditions for the conclusion of marriage are, as regards **each person** engaged to be married, governed by the law of the country of which he or she is a **national**.

[...]

Partnerships/marriages

German Law: Problem of characterization

Art. 17b Registered life partnership

(1) The formation of a registered life partnership, its general effects and property regime, as well as its dissolution are governed by the substantive provisions of the country in which the **life partnership is registered** [...].

(4) The effects of a life partnership registered abroad shall not exceed those arising under the provisions of the German Civil Code and the Registered Partnership Act.



Marriage

Constitutional Court:

Marriage as

- Union between **man and woman**
- Intention of a life-long union
- Involvement of a public authority



Partnership

- Art. 17b EGBGB: Originally created combined with Life Partnerships Act (for same-sex couples)
- Same definition as marriage, only limited to unions of the same sex

Same-Sex Marriage

- Characterized as not marriage (as union between man and woman)
- Reduced to a partnership under German law
→ celebration = “registration”

Lost in translation?

Registered partnerships between man and woman

- Fulfil definition of marriage
- Historically Art. 17b EGBGB is supposed to apply on same-sex unions (only)
- Courts apply Art. 17b EGBGB nevertheless

Marriages/partnerships

Belgian response

Art. 46 PIL Code

[...] the conditions regarding the validity of the marriage are governed, for each spouse, by **the law of the State of the spouse's nationality** when the marriage is celebrated. A provision of the law designated by par. 1, which prohibits the marriage between two persons of the same sex, is **not applicable** if one of the persons has the nationality of a State of which the law allows such marriage or has his habitual residence on the territory of such State.

Marriages/partnerships

Belgian response (2)

Art. 60 PIL Code

The relationship of co-habitation is governed by **the law of the State** on the territory of which the relationship was **first registered**. [...]

Art. 58 PIL Code

[...] the term 'relationship of co-habitation' refers to a situation of co-habitation that requires registration with a public authority and that does **not create a bond equal to marriage**.

Characterization

Equivalence to marriage or not?

- Recognition in Belgium of foreign marriages and foreign partnerships: control of the applicable law → different conflict rule (nationality v. place of first registration) → **classification of crucial importance**
- Tool to support civil servants: Circular of the Ministry of Justice 29/5/2007

Further future challenges

PIL and migration policy

- Current refugee flows to Europe: child/religious marriages, proof of civil status, ...
- ...

Recognition of unknown/new status

- Sex change and sex allocation (m, f, x ...)
- ...

Changing concepts of parentage and families

...



Concluding thoughts

- Nationality as a connecting factor has not lost its relevance
- Nationality has lost its simplicity
 - Complexity of life situations
 - Complexity of legal sources
 - Complexity of different policy issues
- We should not get lost in complexity ...

Thank you for your attention
Merci pour votre attention
Dank voor uw aandacht
Vielen Dank für Ihre Aufmerksamkeit

