Instrumentalisation of and by Migration Law.
Instrumentalisation and Private International Law.

“How liberal should we be?” This seems to be one of the main questions Private International Law (“PIL”) is nowadays confronted with within the European context. As explained by prof. Meeusen, 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 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 as well by the Court of Justice as by the European legislator.

In the media, incidently rather sensational examples of the issues at stake come forward, e.g. the issue of same-sex-marriages, in particular the problems non-recognition of these marriages in a European country might cause for EU-citizens who make use of their right of freedom of movement. But these days, another kind of issues of “mobility” and migration obviously gets much more attention in the media, namely migration “coming from outside Europe”. And in fact, if one looks closer, dynamics going on in this context, also reflect on PIL, pull to it, and try to instrumentalize it.

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, nationality claims of non-occidental foreigners. The dynamic of restriction is obvious. What is more: legal interventions are flanked by the divulgation of ideologies justifying these changes, ideologies calling up to go even further in restricting claims of foreigners. It has become mainstream to pretend that in the past, foreigners were given too much 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 own sake of foreigners; it has become mainstream to pretend that having a double
appartenence 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 of men and women are to be seen as main causes of integration problems, … Such a presentation and problematization certainly influences the way one will be inclined to act, intervene, legislate. This kind of mainstreaming is very present in the Netherlands. In fact, I always feel disappointed when I see that Belgium often takes the Netherlands as an example and a model to follow in this context. I think one actually is rather in need of demystification of these ideas.

As far as it concerns the Netherlands, I recently contributed to a project coordinated by the Dutch Family Council, with other people such as Sarah van Walsum. In one of my contributions to this project, I also dealt with the question how migration law and ideologies going along 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. I refer to the book for concrete examples. I also included in this publication the discipline of PIL as a case-study of the dynamic on how migration law and migration policy influence other areas of law and weaken the position of foreigners. In fact, it appears quickly that the way PIL-rules are promulgated and applied could weaken in an indirect way the position of foreigners. Because in 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 stone and a hinge between family law and other areas of law: so e.g. 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 claims, PIL rules
could become crucial, as they can decide whether e.g. 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 a kind of manipulation takes place in one way or another, one could speak of a kind of instrumentalization of PIL for restrictive migration policy. Eight years ago, I finished my PhD in Belgium in a rather dramatic way, by warning for the negative instrumentalisation of PIL for objectives of restrictive migration law. I really feared this, but perhaps it was mainly attractive to write this, as it may sound interesting and dramatic to do so. Nowadays, 8 years later, I believe the phenomenon of instrumentalisation of PIL for restrictive migration policy should still not be overestimated, and thus perhaps talking about this may still seem more dramatic that it is. But however, after migrating from Belgium to the Netherlands and studying Dutch PIL, over the past years I could find more and more incidents and illustrations of this phenomenon. Where ifl issues involve non-european foreigners, Dutch authorities sometimes tend to use ifl-rules in such a way as to prevent non-european migrants from claiming residence, social security and nationality, and so as to selectively restrict the mobility of non-European foreigners. I have described and criticized these incidents in several publications in a rather technical way. Today, I only speak in a more general, perhaps even rather political way.

But in any case, examples of instrumentalization can be found as well in Dutch legislation as in Dutch jurisprudence. 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 of restricting claims of foreigners, with an echo in PIL. In PIL-debates, one could also find echos of the ideologies going on today. There is eg., 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 predominance 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 a striking example of what
happens in reality, that in the Netherlands eg. for several years several Moroccon men were, through rules of PIL, completely blocked in their efforts to divorce from their women 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 up to the highest Dutch court before these men could divorce. The 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 Moroccon men were in fact blocked in a marriage.

In fact, more generally spoken, I think that in general foreigners, both women and men, are nowadays in several ways more and more blocked and destabilized 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 too often contribute to the further complication of their life.

While the life of these foreigners becomes more and more complicated, I remind at the same time the ambition of European authorities, as they expressed it themselves, to “make easier” the life of European citizens, through PIL. Making European citizen’s life easier, seems to require a unification of PIL in a liberalizing way. Personally, I have sympathy for the process, judged on its own merits, of 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 tendencies of liberalization and as I think basic PIL concerns about e.g. international harmony, no-loss-of-rights, legal security, non-discrimination, finally and basically fit well in a tendency to stimulate mobility of people. At the same time, seeing what is going on in European PIL, I also have 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, e.g. through argumentations based on the indirect effect of European law, or argumentations based on the need of consistency of PIL. If this effect does not take place, or if only a limited category of people could
pull up themselves 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 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 in fields of forces about competence, substance and political influences on the discipline.

Of course, one could pretend that it is quite logic 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 thus just do its own bit, one could say. Moreover, it is not quite new or unique that tendencies of instrumentalization for political goals are felt in PIL. It is e.g. striking that actually, in the Netherlands, right now legislation is prepared to make PIL even useful in combating terrorism, namely through adaptation of PIL-rules on international company law and non-governmantal organizations. There are also older examples. I remind for example discussions in Dutch PIL on how PIL could contribute to combat environment pollution. In the 90’, a book on this issue of environment pollution and PIL was published under the title “pollution in PIL”. So, the issue of instrumentalisation of PIL isn’t quite unique or new, but still, I think that as far as it concerns the instrumentalisation of PIL for restrictive migration policy, it is a
specific one. As far as one would present this instrumenatlisation 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 effects 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 critised, 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 kind of frustrating claims and sometimes even frustrating respect for human rights such as the protection of family life. If one says that if a person is married, he or she should enjoy protection of family life, this right could be frustrated through the subtle application of rules of PIL dealing with the definition of marriage in an international context.

Concluding. In the Netherlands, we can see nowadays both direct attacks and indirect attacks on claims of foreigners. 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 finally, I think it is important to criticize measures, if they are not right, both if they are presented on a humanitarian basis or on a xenophobical basis, both measures and practices frustrating directly claims, and the indirect ones, e.g. 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 effects, they often deprive foreigners even from the claims which finally still seem to be left for them.

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