

Seminar Report on Personal identity and status continuity - a focus on name and gender in the conflict of laws

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On 1 June 2023 the European Law Institute (ELI) and the Swiss Institute of Comparative Law (SICL) held the third session of a conference on personal identity and status continuity. The focus of this third session was on names and gender in the conflict of laws. The programme included recent amendments to Swiss legislation, the portability and recognition of names, and new gender statuses in private international law.

The conference, including a screening of the film 'The Danish Girl' (Tom Hooper, 2015), illustrated the importance of gender and names as part of people's identity, beyond the law. Names can be essential for people to identify with their religious group. In central and southern Africa, the use of names taken from people's own language instead of English names has been part of the black consciousness movement. The film showed the struggle of a person to change her sex despite the absence of any legal framework. And yet, Lukas Heckendorn Urscheler (director of the SICL) and Martin Föhse (University of St Gallen) showed that the societal issues turn into legal ones. Sharon Shakargy (University of Jerusalem) explained that the law is important when individuals have to use identity cards, credit cards, licences, certificates and the like. The law struggles to provide the most appropriate solutions, respecting the rights of all involved and ensuring portability of gender and names.

When talking about **rights**, there is a blurring, or at least a lack of terminological clarity, between human rights and fundamental rights. The free movement of persons in the EU is also classified as a fundamental right. Giulia Rossolillo (University of Pavia) compared the approaches of the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) with respect to the

recognition and continuation of names. She showed that the solutions reached by the two courts can be quite different, as a result of their different approaches. The ECtHR uses the (human) right to the respect of private and family life protected by Article 8 of the European Convention of Human Rights (ECHR) while the CJEU uses the (fundamental) right to free movement of EU citizens. Moreover, the ECtHR is not so much concerned with the cross-border aspect, but focuses on the right to a person's identity. The CJEU emphasises continuity of name in cross-border contexts. For instance, the facts in the ECtHR case *Künsberg Sarre v. Austria* and the CJEU case *Sayn-Wittgenstein* were quite similar, dealing with the Austrian prohibition on the use of noble titles. The ECtHR found that Austria, but allowing for a long time the use of the noble 'von' and then disallowing it, violated the applicant's rights under Article 8 of the ECHR. The CJEU, on the other hand, found the obstacle to the right to free movement in the EU to be justified.

Different approaches to rights can also result in conflicting rights, i.e. the society's right to equality (no noble titles) versus the individuals' rights to continuity of name. Other rights that come into play, include the LGBTIQ+ rights and rights of women (a gender logic, *Ilaria Pretelli SICL*), and the rights linked to the free market (economic logic), societal rights, and the right to self-determination and autonomy, such as the right to freely choose and change a name.

Johan Meeusen (University of Antwerp) considered the **specific approach** of the European Commission to matters of gender, drawing lessons from the Commission's Parenthood Proposal, Com(2022) 695. The lessons are that the Commission uses PIL to pursue its political ambition to advance non discrimination and LGBTIQ rights in particular; is on a mission to achieve status continuity; invests in legal certainty and predictability; approaches status continuity first and foremost from a fundamental rights perspective; acts within the limits of the Union's competence but tries to maximize its powers; ambitious with an eye for innovation...but within limits.

Anatol Dutta (Ludwig Maximilians University of Munich) explained the different waves of changes in gender legislation nationally. He indicated that private international law influences people's status differently depending on whether it considers sex registration and sex change as substantive or procedural. This would determine whether the *lex fori* or *lex causae* is used. Even when agreeing

on a classification as substantive law, different legal systems use different connecting factors. Nationality is often used, but sometimes the individual is given a choice between the law of the habitual residence and nationality. Yet, public policy can still play a role (bringing back the ideas of human rights, discussed earlier).

All in all, it is becoming increasingly clear that the idea that private international law is a neutral and merely technical field of law is nothing more than a fiction. Besides the different right and approaches at play, as discussed above, feminist approaches (set out by Mirela Zupan, University of Osijek) also influence connecting factors and recognition rules.