PIL and (De)coloniality: For a Case-by-Case Approach of the Application of Postcolonial Law in European States

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1. PIL and (De)coloniality in Europe

This post follows Susanne Gössl's blog post series on 'Colonialism and German PIL' (especially s. 3 of post (1)) and offers a French perspective of the issue of PIL and (de)coloniality – not especially focused on French PIL but based on a francophone article to be published soon in the law and anthropology journal *Droit et Culture*. This article, called 'For a decolonisation of law in the global era: analysis of the application of postcolonial law in European states', is addressed to non-PIL-specialist scholars but builds on a European debate about PIL and (de)coloniality that has been nourished by scholars like Ralf Michaels, Horatia Muir Watt, Veronica Ruiz Abou-Nigm, as well as by Maria Ochoa, Roxana Banu, and Nicole Štýbnarová, notably at the occasion of the 2022 Edinburgh conference (reported about on this blog, where I had the chance the share a panel with them in relation to my PhD dissertation (see a short presentation on the EAPIL blog)).

The PIL and (de)coloniality analysis proposed in this post is based on decolonial theory and postcolonial studies, which I will here call 'decoloniality'. Given this framework (notably nicely presented here), I shall preliminarily stress that it requires acknowledging the limit of the contribution I can make to the debate on PIL and (de)coloniality as a Western jurist. Therefore, this post aims at encouraging non-Western and/or non-legal scholars to contribute to the discussion. It also urges the reader to consider that the non-West and non-legal scholarship about law and (de)coloniality is extremely rich and should not be missed by the Western PIL world.

2. For a Case-by-Case Approach

Against this background, the argument made here is that the decolonisation of Western PIL, if it is to happen (which decoloniality demands, based on the concept of global coloniality), should be based on a certain methodology (see eg the decolonial legal method elaborated by Tchepo Mosaka). Such methodology may require a case-by-case approach, to complement the study of the applicable legal framework. This seems at least necessary in the context, studied in the aforementioned article, where **a postcolonial law is to be applied as foreign law by the Western forum** (typically but not only in the context of migration), given that 'postcolonial law' hides a form of legal pluralism. It thus potentially covers not only state law, but also customary law and/or religious law.

To study this kind of situation, I argue, a case-by-case approach is needed because the legal pluralism of each postcolonial state is idiosyncratic. Notably, the postcolonial state law may refer to some religious or customary norms (which is a form of official legal pluralism); or these non-state norms may be followed by the population because the state institution is deficient or because a large part of the population simply does not follow the state legal standards (which is a form of de facto legal pluralism); or yet, certain state legal concepts or standards may reflect some custom or religious norms or practices.

More generally, the case-by-case approach allows a more nuanced (although also more complex) analysis of the (de)colonial character of current Western PIL standards. For PIL rules and judicial practices may appear colonial (ie, as imposing a Western 'worldview') or decolonial (ie, as granting space to 'colonised' worldviews) depending on the case, rule and/or judicial practice concerned. In addition, the case-by-case approach enables the consideration of the personal experience and possible vulnerable position of the parties – something that is also demanded by decoloniality. Therefore, **the case-by-case approach seems appropriate to also study other questions** than the application of postcolonial law discussed here, such as the limits of the Western definition of some important PIL concepts (like family and habitual residence, discussed in Susanne Gössl's post (2), or party autonomy, of which I have shown a colonial aspect via a case study in my PhD dissertation (see here) and that is also discussed in Susanne Gössl's post (4)).

3. The Example of *X v Secretary of State for the Home Department* ([2021] EWHC 355 (Fam))

To illustrate the argument, I choose a UK case that enters into a direct dialogue with Susanne Gössl's reflection about the notion of habitual **residence** (see post (2)). In this case, *X v Secretary of State for the Home Department* ([2021] EWHC 355 (Fam)), the claimant demanded the recognition by the UK authorities of her child's adoption in Nigeria. Under the applicable UK PIL rules, this adoption had to be recognised in the UK if it complied with the Nigerian law, ie Article 134(b) of the 2004 Child Rights Law. This article provides that the adopter and the adopted must have their residence in the same state. In the absence of any Nigerian caselaw interpreting the notion of residence under Article 134(b), the question came as to whether it had to be interpreted based on **UK law** or on **local customary norms**.

Pursuant to the relevant customary law, two circumstances should be considered that could lead to locate the claimant's residence in Nigeria. On the one hand, the claimant had an 'ancestral history and linkage' with Nigeria. One the one hand, as she lived most of the time in the UK to work, she entrusted her adopted child to her mother but took full financial responsibility for the child and made all decisions relating to the child's upbringing. Pursuant to UK law, more specifically *Grace* ([2009] EWCA Civ 1082), in case where someone lives in between several countries, the notion of residence had to be interpreted following a 'flexible nuanced approach' (para. 84(5)).

In February 2021, the UK judge recognised the adoption established in Nigeria, based on the interpretation of residence in UK law. To this end, the judge used the **presumption, which is part of UK PIL, of similarity between foreign law and domestic law**. Following *Brownlie* ([2021] UKSC 45), the judge applied the presumption because, like the UK, Nigeria is a common law system. Then, referring to *Grace*, the judge located the claimant's residence in Nigeria. In this regard, she considered the claimant's 'close cultural and family ties' with Nigeria, the fact that she maintained a home there for her mother and children, and the circumstance that '[h]er periods of time in [Nigeria] were not by chance, but regular, family focused and with a clear purpose to spent time with her children' (para. 84(6)).

4. A PIL and Decoloniality Analysis: Opening the Floor

From a PIL and decoloniality perspective, several points can be made. Notably, from a strict legal point of view (lacking anthropological insights), the judge's interpretation of the UK law notion of residence in this case seems flexible enough to include various, Western and non-Western, worldviews. Yet, one may question the application of the UK legal presumption. Because Nigerian state law is common law indeed, but it shares legality with customary laws and Sharia. Therefore, from a decolonial point of view, the judge could have usefully investigated the question as to whether, to interpret similar laws as the Child Rights Law, Nigerian courts consider customary law (and potentially, the judge did so (see para. 84(5)), but then it would have been welcome to mention it in the judgment). If so, she could have interpreted the notion of residence, not based on UK law, but based on the relevant local customary norms.

These case comments are made just to start a wider discussion – not only about this case but also about other cases. For, in my view, the PIL and (de)coloniality debate is a great occasion to have another, alternative, look at some rules and caselaw, and to open the floor to non-Western and/or non-PIL scholars.