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

Written by Thalia Kruger (University of Antwerp) and Laura Carpaneto (University of Genoa)

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 lax 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.

Book launch: Brooke Marshall, 'Asymmetric Jurisdiction Clauses'

On behalf of our former editor Brooke Marshall, we are happy to share the invitation to the UNSW Law & Justice Book Forum, which will host the launch of her book on Asymmetric Jurisdiction Clauses.

The event will feature the following speakers:

- **Professor Mary Keyes**, Director of the Law Futures Centre; Professor, Griffith Law School, Griffith University
- **Professor Caroline Kleiner**, Professor, Centre for Business Law and Management (CEDAG), Faculty of Law, Université Paris Cité, Paris, France
- Chaired by **Professor Justine Nolan**, Director, Australian Human Rights Institute; Professor, UNSW Faculty of Law & Justice

It will take place in a hybrid setting on Wednesday, 5 July, at 4:30pm AEST = 8:30am CEST = 7:30am BST. You may register using this link.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2023: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)“ features the following articles:

(These abstracts can also be found at the IPRax-website under the following link: https://www.iprax.de/en/contents/)

B. Heiderhoff: **Care Proceedings under Brussels IIter – Mantras, Compromises and Hopes**

Against the background of the considerable extension of the text of the regulation, the author asks whether this has also led to significant improvements. Concerning jurisdiction, the “best interests of the child” formula is used a lot, while the actual changes are rather limited and the necessary compromises have led to some questions of doubt. This also applies to the extended possibility of choice of court agreements, for which it is still unclear whether exclusive prorogation is possible beyond the cases named in Article 10 section 4 of the Brussels II ter Regulation. Concerning recognition and enforcement, the changes are more significant. The author shows that although it is good that more room has been created for the protection of the best interests of the child in the specific case, the changes bear the risk of prolonging the court proceedings. Only if the rules are interpreted with a sense of proportion the desired improvements can be achieved. All in all, there are many issues where one must hope for reasonable clarifications by the ECJ

G. Ricciardi: **The practical operation of the 2007 Hague Protocol on the law**

applicable to maintenance obligations

Almost two years late due to the COVID-19 pandemic, in May 2022 over 200 delegates representing Members of the Hague Conference on Private International Law, Contracting Parties of the Hague Conventions as well as Observers met for the First Meeting of the Special Commission to review the practical operation of the 2007 Child Support Convention and the 2007 Hague Protocol on Applicable Law. The author focuses on this latter instrument and analyses the difficulties encountered by the Member States in the practical operation of the Hague Protocol, more than ten years after it entered into force at the European Union level. Particular attention is given to the Conclusions and Recommendations of the Applicable Law Working Group, unanimously adopted by the Special Commission which, in light of the challenges encountered in the implementation of the Hague Protocol, provide guidance on the practical operation of this instrument.

R. Freitag: **More Freedom of Choice in Private International Law on the Name of a Person!**

Remarks on the Draft Bill of the German Ministry of Justice on a Reform of German Legislation on the Name of a PersonThe German Ministry of Justice recently published a proposal for a profound reform of German substantive law on the name of a person, which is accompanied by an annex in the form of a separate draft bill aiming at modernizing the relevant conflict of law-rules. An adoption of this bill would bring about a fundamental and overdue liberalization of German law: Current legislation subjects the name to the law of its (most relevant) nationality and only allows for a choice of law by persons with multiple nationalities (they max designate the law of another of their nationalities). In contrast, the proposed rule will order the application of the law of the habitual residence and the law of the nationality will only be relevant if the person so chooses. The following remarks shall give an overview over the proposed rules and will provide an analysis of their positive aspects as well as of some shortcomings.

D. Coester-Waltjen: **Non-Recognition of "Child Marriages" Concluded**

Abroad and Constitutional Standards

The Federal Supreme Court raised the question on the constitutionality of one provision of the new law concerning “child marriages” enacted by the German legislator in 2017. The respective rule invalidated marriages contracted validly according to the national law of the intended spouses if one of them was younger than 16 years of age (Art. 13 ss 3 no 1 EGBGB). The Federal Supreme Court requested a ruling of the Federal Constitutional Court on this issue in November 2018. It took the Federal Constitutional Court nearly five years to answer this question.

The court defines the structural elements principally necessary to attain the constitutional protection of Art. 6 ss 1 Basic Law. The court focuses on the free and independent will of the intended spouses as an indispensable structural element. The court doubts whether, in general, young persons below the age of 16 can form such a free and independent will regarding the formation of marriage. However, as there might be exceptionally mature persons, the protective shield of Art. 6 ss 1 Basic Law is affected (paragraphs 122 ff.) and their “marriage” falls under the protective umbrella of the constitution. At the same time, the requirement of a free and meaning ful will to form a marriage complies with the structural elements of the constitutionally protected marriage. This opens the door for the court to examine whether the restriction on formation of marriage is legitimate and proportionate.

After elaborating on the legitimacy of the goal (especially prevention and proscription of child marriages worldwide) the court finds that the restriction on the right to marry is appropriate and necessary, because comparable effective other means are missing. However, as the German law does not provide for any consequence from the relationship formed lawfully under the respective law and being still a subsisting marital community, the rule is not proportionate. In addition, the court demurs that the law does not provide for transformation into a valid marriage after the time the minor attains majority and wants to stay in this relationship. In so far, Art. 13 ss 3 no 1 affects unconstitutionally Art. 6 ss 1 Basic Law. The rule therefore has to be reformed with regard to those appeals but will remain in force until the legislator remedies those defects, but not later than June 30, 2024.

Beside the constitutional issues, the reasoning of the court raises many questions

on aspects of private international law. The following article focuses on the impact of this decision.

O.L. Knöfel: **Discover Something New: Obtaining Evidence in Germany for Use in US Discovery Proceedings**

The article reviews a decision of the Bavarian Higher Regional Court (101 VA 130/20), dealing with the question whether a letter rogatory for the purpose of obtaining evidence for pre-trial discovery proceedings in the United States District Court for the District of Delaware can be executed in Germany. The Court answered this question in the affirmative. The author analyses the background of the decision and discusses its consequences for the long-standing conflict of procedural laws (Justizkonflikt) between the United States and Germany. The article sheds some light on the newly fashioned sec. 14 of the German Law on the Hague Evidence Convention of 2022 (HBÜ Ausführungsgesetz), which requires a person to produce particular documents specified in the letter of request, which are in his or her possession, provided that such a request is compatible with the fundamental principles of German law and that the General Data Protection Regulation of 2018 (GDPR) is observed.

W. Wurmnest/C. Waterkotte: **Provisional injunctions under unfair competition law**

The Higher Regional Court of Hamburg addressed the delimitation between Art. 7(1) and (2) of the Brussels Ibis Regulation after Wikingerhof v. Book ing.com and held that a dispute based on unfair competition law relating to the termination of an account for an online publishing platform is a contractual dispute under Art. 7(1) of the Brussels Ibis Regulation. More importantly, the court considered the requirement of a “real connecting link” in the context of Art. 35 of the Brussels Ibis Regulation. The court ruled that in unfair competition law disputes of contractual nature the establishment of such a link must be based on the content of the measure sought, not merely its effects. The judgment shows that for decisions on provisional injunctions the contours of the “real connecting link” have still not been conclusively clarified.

I. Bach/M. Nißle: **The role of the last joint habitual residence on post-marital maintenance obligations**

For child maintenance proceedings where one of the parties is domiciled abroad, Article 5 of the EuUnterhVO regulates the – international and local – jurisdiction based on the appearance of the defendant. According to its wording, the provision does not require the court to have previously informed the defendant of the possibility to contest the jurisdiction and the consequences of proceeding without contest – even if the defendant is the dependent minor child. Article 5 of the EuUnterhVO thus not only dispenses with the protection of the structurally weaker party that is usually granted under procedural law by means of a judicial duty to inform (such as Article 26(2) EuGVVO), but is in contradiction even with the other provisions of the EuUnterhVO, which are designed to achieve the greatest possible protection for the minor dependent child. This contradiction could already be resolved, at least to some extent, by a teleological interpretation of Article 5 of the EuUnterhVO, according to which international jurisdiction cannot in any case be established by the appearance of the defendant without prior judicial reference. However, in view of the unambiguous wording of the provision and the lesser negative consequences for the minor of submitting to a local jurisdiction, Article 5 of the EuUnterhVO should apply without restriction in the context of local jurisdiction. De lege ferenda, a positioning of the European legislator is still desirable at this point.

C. Krapfl: **The end of US discovery pursuant to Section 1782 in support of international arbitration**

The US Supreme Court held on 13 June 2022 that discovery in the United States pursuant to 28 U.S.C. § 1782 (a) – which authorizes a district court to order the production of evidence "for use in a proceeding in a foreign or international tribunal" – only applies in cases where the tribunal is a governmental or intergovernmental adjudicative body. Therefore, applications under Section 1782 are not possible in support of a private international commercial arbitration, taking place for example under the Rules of the German Arbitration Institute (DIS). Section 1782 also is not applicable in support of an ad hoc arbitration

initiated by an investor on the basis of a standing arbitration invitation in a bilateral investment treaty. This restrictive reading of Section 1782 is a welcome end to a long-standing circuit split among courts in the United States.

L. Hübner/M. Lieberknecht: **The Okpabi case — Has Human Rights Litigation in England reached its Zenith**

In its Okpabi decision, the UK Supreme Court continues the approach it developed in the Vedanta case regarding the liability of parent companies for human rights infringements committed by their subsidiaries. While the decision is formally a procedural one, its most striking passages address substantive tort law. According to Okpabi, parent companies are subject to a duty of care towards third parties if they factually control the subsidiary's activities or publicly convey the impression that they do. While this decision reinforces the comparatively robust protection English tort law affords to victims of human rights violations perpetrated by corporate actors, the changes to the English law of jurisdiction in the wake of Brexit could make it substantially more challenging to bring human rights suits before English courts in the future.

Notifications:

H. Kronke: Obituary on Jürgen Basedow (1949–2023)

C. Rüsing: Dialogue International Family Law on April 28 and 29, 2023, Münster

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XVI Conference of the American Association of Private

International Law

XVI CONFERENCE OF THE AMERICAN ASSOCIATION OF PRIVATE INTERNATIONAL LAW – ASADIP

The **American Association of Private International Law – ASADIP** is pleased to announce that the registrations for its annual event are now open. The **XVI ASADIP Conferences: "Private international law between the innovation and the disruption"** will take place on **August 10-11, 2023** in the city of **Rio de Janeiro**, at the premises of PUC Rio and University of State of Rio de Janeiro – Uerj.

The ASADIP invites all PIL scholars and community to be able to attend the event and meet again in person this exceptional year in Rio. The XVI Conferences will cover special topics on **PIL and international organizations** – Organization of American States-OAS, Mercosur, the HCCH, Uncitral, Unidroit; perspectives on **PIL, gender and sustainable development**; **PIL legislative trends and (re)codification**; i**nternational legal cooperation** and **new technologies**, **procedural conventions**and **cross-border family affairs**, amongst others.

In addition, as a **warm-up PIL initiative** to engage PIL scholars, travellers and friends coming to Rio, the Brazilian Research Network on Private International Law, the Latin American Network of International Civil Procedural Law, the Open Latin American Chair of Private International Law and ASADIP will jointly convene a preparatory meeting – the **IV Workshop on Research Strategies for Private International Law**.

The Workshop will be generously hosted by **PUC Rio** on **August 9, 2023**, and is coordinated by Professors Nadia de Araujo (PUC Rio), Fabricio Polido (University of Minas Gerais – UFMG); Valesca Borges (University of Espírito Santo – UFES) and Inez Lopes (University of Brasilia – UnB).

A **Call for Papers** has been launched and is currently available on ASADIP´s website and social media. PIL scholars are invited to submit their draft proposals for the Workshop and special meeting of the PIL research networks and projects active in ASADIP region and overseas. Papers and abstracts in **English,**

Portuguese or Spanish are accepted and may be submitted in line with one of the thematic sessions of the Workshop to the e-mail: 4workshop.dipr.pucrio2023@gmail.com. For further information and instructions, participants can follow the updates on relevant submission and feedback deadlines (end of June to mid-July) on ASADIP social media.

The opportunity presented by those activities under the auspices of ASADIP and the gathering of specialists of the highest level from all continents is once again unique. We encourage you to participate.

Relevant links and repercussions on media:

- https://www.asadip.org
- facebook.com/profile.php?id=100057610233127
- https://www.instagram.com/asadip1/?hl=en
- https://www.sympla.com.br/xvi-jornadas-asadip-e-iv-workshop-de-estrategias-de-pesquisa-em-direito-internacional-privado-2023__2027233

– Call for Papers –

The Brazilian Research Network on Private International Law ("Brazilian PIL-RN"), an initiative of the Inter-institutional Research Group "Private International Law in Brazil and International Fora" (CNPq/DGP), the Latin American Network of International Civil Procedural Law, the Open Latin American Chair of Private International Law and the American Association of Private International Law – ASADIP – will jointly host the IV Workshop on Research Strategies for Private International Law on August 9, 2023, on the occasion of the awaited XVI ASADIP Conference 2023 ("PIL between the Innovation and the Disruption") in Rio de Janeiro.

PUC Rio will be our host institution for the IV Workshop on Research Strategies in PIL, in this edition structured in two main clusters:

1. **Joint Meeting of PIL Research Groups and Networks in Brazil, ASADIP Region and global partners**
2. **Thematic panels on IPR research with presentation of scientific**

papers in Working Groups on PIL and Emerging Issues

- WG I: Sustainable Development Goals-SDGs and Private International Law
- WG II: Dialogues between PIL, International Law and International Trade
- WG III – Migrations, human rights and private international law
- WG IV – PIL between data flow, artificial intelligence and new technologies
- WG V – Current developments on International legal cooperation

This Call for Papers invites participants and specialists to submit proposals – articles/papers, expanded abstracts (for Master and Doctoral candidates) and posters (Undergraduate students) for the presentation of scientific pieces at the IV Workshop on PIL Research Strategies. It is open to submissions of unpublished/ongoing works by faculty professors, investigators, as well postgraduate and undergraduate students, on topics of interest for the research agenda of Private International Law, its strategies and potential impacts on society, local/regional spaces, and international organizations. Proposals may be submitted in any of the three official languages for ASADIP: Spanish, English and Portuguese.

A such warm-up academic initiative is a part of the main proceedings of the XVI ASADIP Conference2023 "PIL between Innovation and the Disruption",which will take place between 10-11 August 2023 in Rio de Janeiro (PUC Rio and University of Estado do Rio de Janeiro – UERJ).

Highlight on relevant deadlines:

- 06/28/2023 – 1st deadline for submission of proposals
- 05/07/2023 – 2nd deadline for submission of proposals
- 10/07/2023 – Deadline for the evaluation feedback on the proposals
- 07/17/2023 – Deadline for issuing invitation letters and acceptance of selected proposals
- 24/07/2023 – Confirmation of participation and registration of participating authors
- 09/08/2023 – IV Workshop – PUC Rio – preparation for the XVI ASADIP Conference (2023)

General information and submission rules:

- The proposals of papers – articles, expanded abstracts and posters – in the official languages for ASADIP – Spanish, English and Portuguese – should be submitted and sent within the deadlines to the e-mail: *4workshop.dipr.pucrio2023@gmail.com.*
- There will be no registration fees and the organising committee will issue acceptance letters according to the flow of requests from selected participants.Participants will be solely responsible for arranging financial support in their respective institutions for transportation, accommodation, travel logistics and per diems for the presentation of selected papers at the IV Workshop.
- The papers selected by peer review and approved should be adjusted according to the guidelines for authors and will be published in books/collections and proceedings of the event, with support from Brazilian and international funding agencies.

More information can be found on the ASADIP website, social media of the organizing institutions and updates on Sympla.

No Recognition in Switzerland of the Removal of Gender Information according to German Law

This note has been kindly provided by Dr. Samuel Vuattoux-Bock, LL.M. (Kiel), University of Freiburg (Germany).

On 8 June 2023, the Swiss Federal Supreme Court (Bundesgericht) pronounced a judgment on the removal of gender markers of a person according to German Law

and denied the recognition of this removal in Switzerland.

Background of the judgment is the legal and effective removal 2019 of the gender information of a person with swiss nationality living in Germany. Such removal is possible by a declaration of the affected person (accompanied by a medical certificate) towards the Registry Office in accordance with Sect. 45b para. 1 of the German Civil Status Act (*Personenstandsgesetz*, PStG). The claimant of the present judgment sought to have the removal recognized in Switzerland and made a corresponding application to the competent local Swiss Office of the Canton of Aargau. As the Office refused to grant the recognition, the applicant at the time filed a successful claim to the High Court of the Canton of Aargau, which ordered the removal of the gender markers in the Swiss civil and birth register.

The Swiss Federal Office of Justice contested this decision before the Federal Supreme Court. The highest federal Court of Switzerland revoked the judgment of the High Court of the Canton of Aargau and denied the possibility of removing gender information in Switzerland as it is not compatible with Swiss federal law.

According to Swiss private international law, the modification of the gender indications which has taken place abroad should be registered in Switzerland according to the Swiss principles regarding the civil registry (Art. 32 of the Swiss Federal Act on the Private International Law, IPRG). Article 30b para. 1 of the Swiss Civil Code (ZGB), introduced in 2022, provides the possibility of changing gender. The Federal Supreme Court notes that the legislature explicitly refused to permit a complete removal of gender information and wanted to maintain a binary alternative (male/female). Furthermore, the Supreme Court notes that the legislature, by the introduction in 2020 of Art. 40a IPRG, neither wanted to permit the recognition of a third gender nor the complete removal of the gender information.

Based on these grounds, the Federal Supreme Court did not see the possibility of the judiciary to issue a judgment *contra legem*. A modification of the current law shall be the sole responsibility of the legislature. Nevertheless, the Supreme Court pointed out that, due to the particular situation of the affected persons, the European Court of Human Rights requires a continual review of the corresponding legal rules, particularly regarding social developments. The Supreme Court, however, left open the question of whether the recognition of the removal of gender information could be a violation of Swiss public policy. The

creation of a limping legal relationship (no gender marker in Germany; male or female gender marker in Switzerland) has not been yet addressed in the press release.

Currently, only the press release of the Federal Supreme Court is available to the public (in French, German and Italian). As soon as the written grounds will be accessible, a deeper comment of the implications of this judgment will be made on ConflictOfLaws.

Change of gender in private international law: a problem arises between Scotland and England

Written by Professor Eric Clive

The Secretary of State for Scotland, a Minister of the United Kingdom government, has made an order under section 35 of the Scotland Act 1998 blocking Royal Assent to the Gender Recognition Reform (Scotland) Bill 2022, a Bill passed by the Scottish Parliament by a large majority. The Scottish government has challenged the order by means of a petition for judicial review. The case is constitutionally important and may well go to the United Kingdom Supreme court. It also raises interesting questions of private international law.

At present the rules on obtaining a gender recognition certificate, which has the effect of changing the applicant's legal gender, are more or less the same in England and Wales, Scotland and Northern Ireland. The Scottish Bill would replace the rules for Scotland by less restrictive, de-medicalised rules. An unfortunate side effect is that Scottish certificates would no longer have automatic effect by statute in other parts of the United Kingdom. The United Kingdom government could remedy this by legislation but there is no indication that it intends to do so. Its position is that it does not like the Scottish Bill.

One of the reasons given by the Secretary of State for making the order is that having two different systems for issuing gender recognition certificates within the United Kingdom would cause serious problems. A person, he assumes, might be legally of one gender in England and another in Scotland. There would therefore be difficulties for some organisations operating at United Kingdom level – for example, in the fields of tax, benefits and pensions. This immediately strikes a private lawyer as odd. Scotland and England have had different systems in the law of persons for centuries – in the laws on marriage, divorce, legitimacy, incapacity and other matters of personal status – and they have not given rise to serious problems. This is because the rules of private international law, even in the absence of statutory provision, did not allow them to.

In a paper on *Recognition in England of change of gender in Scotland: a note on private international law aspects*[1] I suggest that gender is a personal status, that there is authority for a general rule that a personal status validly acquired in one country will, subject to a few qualifications, be recognised in others and that there is no reason why this rule should not apply to a change of gender under the new Scottish rules.

The general rule is referred to at international level. In article 10 of its Resolution of September 2021 on *Human Rights and Private International Law*, the Institute of International Law says that:

> *Respect for the rights to family and private life requires the recognition of personal status established in a foreign State, provided that the person concerned has had a sufficient connection with the State of origin … as well as with the State whose law has been applied, and that there is no manifest violation of the international public policy of the requested State ….*

So far as the laws of England and Scotland are concerned, there are authoritative decisions and dicta which clearly support such a general rule. Cases can be found in relation to marriage, divorce, nullity of marriage, legitimacy and legitimation. A significant feature is that the judges have often reasoned from status to particular rules. It cannot be said that there are just isolated rules for particular life events. And the rules were developed at common law, before there were any statutory provisions on the subject.

Possible exceptions to the general rule – public policy, no sufficient connection, contrary statutory provision, impediment going to a matter of substance rather than procedure – are likely to be of little if any practical importance in relation to the recognition in England of changes of gender established under the proposed new Scottish rules.

If the above arguments are sound then a major part of the Secretary of State's reasons for blocking the Scottish Bill falls away. There would be no significant problem of people being legally male in Scotland but legally female in England, just as there is no significant problem of people being legally married in Scotland but unmarried in England. Private international law would handle the dual system, as it has handled other dual systems in the past. Whether the Supreme Court will get an opportunity to consider the private international law aspects of the case remains to be seen: both sides have other arguments. It would be extremely interesting if it did.

From the point of view of private international law, it would be a pity if the Secretary of State's blocking order were allowed to stand. The rules in the Scottish Bill are more principled than those in the Gender Recognition Act 2004, which contains the existing law. The Scottish Bill has rational rules on sufficient connection (essentially birth registered in Scotland or ordinary residence in Scotland). The 2004 Act has none. The Scottish Bill has a provision on the recognition of changes of gender under the laws of other parts of the United Kingdom which is drafted in readily understandable form. The corresponding provisions in the 2004 Act are over-specific and opaque. The Scottish Bill has a rule on the recognition of overseas changes of gender which is in accordance with internationally recognised principles.

The 2004 Act has the reverse. It provides in section 21 that: A person's gender is not to be regarded as having changed by reason only that it has changed under the law of a country or territory outside the United Kingdom. This is alleviated by provisions which allow those who have changed gender under the law of an *approved overseas country* to use a simpler procedure for obtaining a certificate under the Act but still seems, quite apart from any human rights aspects, to be unfriendly, insular and likely to produce avoidable difficulties for individuals.

[1] Clive, Eric, Recognition in England of change of gender in Scotland: A note on private international law aspects (May 30, 2023). Edinburgh School of Law Research Paper No. 2023/06, Available at SSRN: https://ssrn.com/abstract=4463935 or http://dx.doi.org/10.2139/ssrn.4463935

Trade, Law and Development: Call for Submissions

Posted at the request of Shiva Patil, Technical Editor at Trade, Law *and* Development.

Trade, Law and **Development**

Call for Submissions

Special Issue

"**Sustainability and Inclusivity: Evolving Paradigms of the Global Economy**"

Founded in 2009, the philosophy of Trade, Law and Development (TL&D) has been to generate and sustain a constructive and democratic debate on emergent issues in international economic law and to serve as a forum for the discussion and distribution of ideas. Towards these ends, the Journal has published works by noted scholars such as the WTO DDG Yonov F. Agah, Dr. (Prof.) Ernst Ulrich Petersmann, Prof. Steve Charnovitz, Prof. Petros Mavroidis, Prof. Mitsuo Matsuhita, Prof. Raj Bhala, Prof. Joel Trachtman, Dr. (Prof.) Gabrielle Marceau, Prof. Simon Lester, Prof. Bryan Mercurio, and Prof. M. Sornarajah among others. TL&D also has the distinction of being ranked the best journal in India across all fields of law for several years by Washington and Lee University, School of Law.

Pursuant to this philosophy, the Board of Editors of TL&D is pleased to announce "***Sustainability and Inclusivity: Evolving Paradigms of the Global***

Economy" as the theme for its next Special Issue.

It is indisputably true that sustainability which comprises the three interdependent pillars of "*economic growth, social equity, and environmental protection*", is increasingly gaining traction among governments, businesses, research organisations, scholars and the general populace. Discussions in international economic law, including those surrounding world trade, cross-border investment, and development, have abundantly focused on this. Economic benefits of trade ultimately decline while the social and environmental costs rise to unbearable levels, if sustainable trade rules are not in place. Whereas, a more sustainable trade strategy would recognise the need for a more varied export mix, invest in technology, and have minimal trade barriers while balancing long-term resilience with short-term ambitions. Since TL&D's objective is to provide a forum of exchange of ideas and constructive debate on legal and policy issues, the above-mentioned factors arguably constitute some of the biggest issues for international economic law discourse this year.

While the theme is broad enough to cover a wide range of issues, an indicative list of specific areas is as follows:

- Trade Rules and Environmental Interactions
- Environmental Protection Clauses in International Investment Agreements
- Trade and Human Rights
- Promoting Entrepreneurship/ Trade Facilitation
- Trade and Gender Justice
- Transparency and Good Governance Obligations
- Sustainable Agriculture
- Sustainable Fisheries
- Indigenous Peoples Interaction with International Trade and Investment
- Sustainable Development Goals

These sub-issues are not exhaustive, and the Journal is open to receiving submissions on all aspects related to sustainability and inclusivity in the global economy.

Accordingly, the Board of Editors of TL&D is pleased to invite original, unpublished manuscripts for publication in the Special Issue of the Journal in the

form of ‘Articles’, ‘Notes’, ‘Comments’ and ‘Book Reviews’, focusing on the theme of “*Sustainability and Inclusivity: Evolving Paradigms of the Global Economy*”.

In case of any queries, please feel free to contact us at: editors[at]tradelawdevelopment[dot]com.

Cautio iudicatum solvi in Belgium: partly unconstitutional but still in existence

The Belgian Court of Cassation found in a judgment of 10 March 2023 (in Dutch) that the Brussels Court of Appeal was wrong to refuse the granting of a *cautio iudicatum solvi* against a US company, with principal seat in Colorado.

As previously reported, the *cautio iudicatum solvi* as stated in the Belgian Code of Civil Procedure (or Judicial Code), Article 851 was declared unconstitutional by the Belgian Constitutional Court in 2018. The Constitutional Court found that the criterion of nationality as basis for the granting of the *cautio* was not relevant to reach the goal pursued by the legislator, namely to ensure payment of procedural costs and possible damages if the plaintiff loses the suit. The Court called on the legislator to amend the article, but this never happened.

The Brussels Court of Appeal refused to issue the *cautio* requested by a Belgian defendant as against the US plaintiff, on the basis of the unconstitutionality of the provision. The Court of Cassation, however, stated that Article 851 does not in general infringe Article 6 of the European Convention on Human Rights; the Constitutional Court's finding of unconstitutionality was based on the principle of non-discrimination, in so far as a Belgian defendant could not use the *cautio* against any plaintiff without property in Belgium, but only against a non-Belgian plaintiff. As long as the legislator has not rectified the provision, it must according to the Court of Cassation be interpreted in line with the Constitution. This means that the *cautio* may be granted against any plaintiff with insufficient property in Belgium, irrespective of the plaintiff's nationality. The Court reiterated that the *cautio* is outlawed by several international conventions, but none of these conventions applied in the present case.

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This post has been prepared by Prof. Paris Arvanitakis

Corporate cross-border disputes in modern commercial world have taken on a much more complex dimension than in the early years of the EU. Issues such as the relationship between the registered and the real seat (see e.g. CJEU, 27.9.1988, Daily Mail, C-81/87), the possibility of opening a branch in another Member State (e.g. ECJ, 9.3.1999, Centros/Ehrvervs-og, C-212/97), or the safeguarding of the right of free establishment by circumventing contrary national rules not recognizing the legal capacity of certain foreign companies (CJEU, 5.11.2002, Überseering/Nordic Construction, C-208/00), which were dealt with at an early stage by the ECJ/CJEU, now seem obsolete in the face of the onslaught of new transnational corporate forms, cross-border conversions and mergers, the interdependence of groups of companies with scattered parent companies and subsidiaries, or cross-border issues of directors' liability or piercing the corporate veil, which create complex and difficult problems of substantive, procedural and private international law. These contemporary issues of corporate cross-border disputes were examined during an online conference of

Lex&Forum on 23.2.2023, and are the main subject of the present issue (Focus.

In particular, the Preafatio of the issue hosts the valuable thoughts of Advocate General of the CJEU, Ms *Laila Medina*, on the human-centered character of the European Court's activity ("People-centered Justice and the European Court of Justice"), while the main issue (Focus) presents the introductory thoughts of the President of the Association of Greek Commercialists, Emeritus Professor *Evangelos Perakis*, Chair of the event, and the studies of Judge *Evangelos Hatzikos* on "Jurisdiction and Applicable Law in Cross-border Corporate Disputes", of Professor at the Aristotle University of Thessaloniki *Rigas Giovannopoulos* on "Cross-border Issues of Lifting the Corporate Veil", of Dr. *Nikolaos Zaprianos* on "Directors Civil Liability towards the Legal Person and its Creditors", of Professor at the University of Thrace *Apostolos Karagounidis* on the "Corporate Duties and Liability of Multinational Business Groups for Human Rights' Violations and Environmental Harm under International and EU Law", and of Professor at the Aristotle University of Thessaloniki *George Psaroudakis*, on "Particularities of cross-border transformations after Directive (EU) 2019/2121".

The case law section of the issue presents the judgments of the CJEU, 7.4.2022, V.A./V.P., on subsidiary jurisdiction under Regulation 650/2012 (comment by *G.-A. Georgiades*), and CJEU, 10.2.2022, Share Wood, on the inclusion of a contract of soil lease and cultivation within the Article 6 § 4 c of Rome II Regulation (comment by *N. Zaprianos*). The present issue also includes judgments of national courts, among which the Cour d' Appel Paris no 14/20 and OLG München 6U 5042/2019, on the adoption of anti-suit injunctions by European courts in order to prevent a contrary anti-suit injunction by US courts (comment by *S. Karameros*), are included, as well as the decision of the Italian CassCivile, Sez.Unite n. 38162/22, on the non-recognition of a foreign judgment establishing parental rights of a child born through surrogacy on the grounds of an offence against public policy (comment by *I. Valmantonis*), as well as the domestic decisions of Thessaloniki Court of First Instance 1201/2022 & 820/2022 on jurisdiction and applicable law in a paternity infringement action (comment by *I. Pisina*). The issue concludes with the study of the doctoral candidate Ms. *Irini Tsikrika*, on the applicable law on a claim for damages for breach of an exclusive choice-of-court agreement, and the presentation of practical issues in European payment order matters, edited by the Judge Ms. *Eleni Tzounakou*.

Polish Constitutional Court about to review the constitutionality of the jurisdictional immunity of a foreign State?

Written by Zuzanna Nowicka, lawyer at the Helsinki Foundation for Human Rights and lecturer at Department of Logic and Legal Argumentation at University of Warsaw

In the aftermath of the judgment of the ICJ of 2012 in the case of the Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) that needs no presentation here (for details see, in particular, the post by Burkhard Hess), by its judgment of 2014, the Italian Constitutional Court recognized the duty of Italy to comply with the ICJ judgment of 2012 but subjected that duty to the "fundamental principle of judicial protection of fundamental rights" under Italian constitutional law (for a more detailed account of those developments see this post on EAPIL by Pietro Franzina and further references detailed there). In a nutshell, according to the Italian Constitutional Court, the fundamental human rights cannot be automatically and unconditionally sacrificed in each and every case in order to uphold the jurisdiction immunity of a foreign State allegedly responsible for serious international crimes.

Since then, the Italian courts have reasserted their jurisdiction in such cases, in some even going so far as to decide on the substance and award compensation from Germany. The saga continues, as Germany took Italy to the ICJ again in 2022 (for the status of the case pending before the ICJ see here). It even seems not to end there as it can be provocatively argued that this saga has its spin-off currently taking place before the Polish courts.

A. Setting the scene…

In 2020, a group of members of the Sejm, lower chamber of the Polish Parliament, brought a request for a constitutional review that, in essence, concerns the application of the jurisdictional immunity of the State in the cases pertaining to liability for war crimes, genocide and crimes against humanity. The request has been registered under the case number K 25/20 (for details of the, in Polish, see here; the request is available here). This application is identical to an application previously brought by a group of members of the lower chamber of the Parliament in the case K 12/17. This request led to no outcome due to the principle according to which the proceedings not finalized during a given term of the Sejm shall be closed upon the expiration of that term.

This time, however, the Polish Constitutional Court has even set the date of the hearing in the case K 25/20. It is supposed to take place on May 23, 2023.

The present post is not drafted with the ambition of comprehensively evaluating the request for a constitutional review brought before the Polish Constitutional Court. Nor it is intended to speculate on the future decision of that Court and its ramifications. By contrast, while the case is still pending, it seems interesting to provide a brief overview of the request for a constitutional review and present the arguments put forward by the applicants.

Under Polish law, a request for a constitutional review, such as the one in the case K 25/20, can be brought before the Polish Constitutional Court by selected privileged applicants, with no connection to a case pending before Polish courts.

Such a request has to identify the legislation that raise concerns as to its conformity with the Polish constitutional law ("subject of the review", see point B below) and the relevant provisions of the Polish Constitution of 1997 against which that legislation is to be benchmarked against ("standard of constitutional review", see point C). Furthermore, the applicant shall identify the issues of constitutional concern that are raised by the said legislation and substantiate its objections by arguments and/or evidence (see point D).

B. Subject of constitutional review in question

By the request for a constitutional review of 2020, the Polish Constitutional Court is asked to benchmark two provisions of Polish Code of Civil Procedure (hereinafter: "PL CCP") against the Polish constitutional law, namely Article 1103[7](2) PL CCP and Article 1113 PL CCP.

i) Article 1103[7](2) PL CCP

The first provision, Article 1103[7] PL CCP lays down rules of direct jurisdiction that, in practice, can be of application solely in the cases not falling within the ambit of the rules of direct jurisdiction of the Brussels I bis Regulation. In particular, pursuant to Article 1103[7](2) PL CCP, the Polish courts have jurisdiction with regard to the cases pertaining to the extra-contractual obligations that arose in Poland.

In the request for a constitutional review of 2020, the applicants argue that, according to the settled case law of the Polish Supreme Court, Article 1103[7](2) PL CCP does not cover the torts committed by a foreign State to the detriment of Poland and its nationals. For the purposes of their request, the applicants do focus on the non-contractual liability of a foreign State resulting from war crimes, genocide and crimes against humanity. The applicants claim that, according to the case law of the Polish Supreme Court, such a liability is excluded from the scope of Article 1103[7](2) PL CCP.

Against this background, it has to be noted that the account of the case law of the Polish Supreme Court is not too faithful to its original spirit. Contrary to its reading proposed by the applicants, the Polish Supreme Court does not claim that the scope of application of the rule of direct jurisdiction provided for in Article 1103[7](2) PL CPP is, *de lege lata*, circumscribed and does not cover the liability of a foreign State for international crimes. In actuality, this can be only seen as the practical effect of the case law of the Polish Supreme Court quoted in the request for a constitutional review. Pursuant to this case law, also with regard to liability for international crimes, the foreign States enjoy jurisdiction immunity resulting from international customary law, which prevents claimants from suing those States before the Polish courts.

ii) Article 1113 PL CPP

The second provision subject to constitutional review is Article 1113 PL CPP, according to which jurisdictional immunity shall be considered by the court *ex officio* in every phase of the proceedings. If the defendant can rely on the jurisdictional immunity, the court shall reject the claim. According to the applicants, the Polish courts infer from this provision of the PL CPP the right of the foreign States to rely on the jurisdictional immunity with regard to the cases on liability resulting from war crimes, genocide and crimes against humanity.

C. Standard of constitutional review (relevant provisions of Polish constitutional law)

In the request for a constitutional review of 2020, four provisions of Polish constitutional law are referred to as the standard of constitutional review, namely:

i) Article 9 of the Polish Constitution of 1997 ("Poland shall respect international law binding upon it");

according to the applicants, due to the general nature of Article 9, it cannot be deduced thereof that the rules of international customary law are directly binding in Polish domestic legal order. The applicants contend that the Polish Constitution of 1997 lists the sources of law that are binding in Poland. In particular, Article 87 of the Constitution indicates that the sources of law in Poland are the Constitution, statutes, ratified international agreements, and regulations. No mention is made there to the international customary law. Thus, **international customary law does not constitute a binding part of the domestic legal order and is not directly applicable in Poland. Rather, Article 9 of the Polish Constitution of 1997 must be understood as providing for the obligation to respect international customary law exclusively "in the sphere of international law"**;

ii) Article 21(1) of the Polish Constitution of 1997: "Poland shall protect ownership and the right of succession",

here, the applicants contend that Article 21(1) covers not only the property currently owned by the individuals, but also property that was lost as a result of the international crimes committed by a foreign State, which, had it not been lost, would have been the subject of inheritance by Polish nationals;

iii) Article 30 of the Polish Constitution of 1997: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities",

the applicants infer from Article 30 that the respect and protection of dignity is the duty of public authorities. Such a protection can be guaranteed by creating an institutional and procedural framework, which enables the pursuit of justice against the wrongdoers who have taken actions against human dignity. For the applicants, this is particularly relevant in the case of liability for war crimes, genocide and crimes against humanity;

iv) Article 45(1) of the Polish Constitution of 1997: "Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court",

in short, Article 45(1) enshrines to the right to access to a court; this provision conceptualizes this right as a mean by which the protection of other freedoms and rights guaranteed by the Constitution can be realized; the applicants argue that the jurisdictional immunity of a foreign State is a procedural rule that, in its essence, limits the right to a court. They acknowledge that the right to a court is not an absolute right and it can be subject to some limitations. However, the Constitutional Court should examine whether the limitation resulting from the operation of jurisdiction immunity is proportionate.

D. Issues and arguments raised by the request for a constitutional review

After having presented the subject of the request and the relevant provisions of Polish constitutional law, the applicants identify the issues of constitutional

concern that, in their view, are raised by the jurisdictional immunity of a foreign State upheld via the operation of Article 1103[7](2) PL CCP and Article 1113 PL CCP in the cases on the liability resulting from international crimes. The applicants then set out their arguments to substantiate the objection of non-constitutionality directed at Article 1103[7](2) PL CCP and Article 1113 PL CCP.

The main issue and arguments put forward boil down to the objection that the upholding of the jurisdictional immunity results in the lack of access to a court and infringes the right guaranteed in the Polish Constitution of 1997, as well as enshrined in the international agreements on human rights, ratified by Poland,

- in this context, first, the applicants reiterate the contention that **while ratified international agreements constitute a part of the domestic legal order, this is not the case of the rules of international customary law**; furthermore, in order to "reinforce" this contention, a recurring statement appears in the request for a constitutional review, according to which the international customary law is not consistently applied with regard to the jurisdictional immunity of a foreign State;

- second, **a foreign State cannot claim immunity from the jurisdiction of a court of another State in proceedings which relate to the liability for war crimes, genocide or crimes against humanity, if the facts which occasioned damage occurred in the territory of that another State**; there is a link between those international crimes and the territory of the State of the forum and the latter must be authorised to adjudicate on the liability for those acts;

- third, the applicant claim that **a foreign State does not enjoy jurisdictional immunity in the cases involving clear violations of universally accepted rules of international law** – a State committing such a violation implicitly waives its immunity;

- fourth, the applicants acknowledge the ICJ judgment of 2012 but claim that it (i) failed to take into account all the relevant precedent on the scope of jurisdictional immunity; (ii) held that the illegal acts constituted *acta iure imperii*, disregarding the conflict between the jurisdictional immunity and the acts violating fundamental human rights; (iii) preferred

not to explicitly address the question as to whether the jurisdictional immunity should be enjoyed by a State that violated human dignity or not – doing so, the ICJ left space for the national courts to step in; (iv) the ICJ judgments are biding only to the parties to the proceedings; with regard to the non-parties they have the same binding force as national decisions; (v) due to the evolving nature of the doctrine of jurisdictional immunity and its scope, a national court can settle the matter differently than the ICJ did in 2012.

Subsequent issues of constitutional concern seem to rely on the same or similar arguments and concern:

- violation of international law binding Poland due to the recognition of jurisdictional immunity of a State with regard to the cases on liability for war crimes, genocide or crimes against humanity;
- violation of the human dignity as there is no procedural pathway for claiming the reparation of damages resulting from those international crimes;
- violation of the protection of ownership and other proprietary rights by barring the actions for damages resulting from those international crimes.

E. The controversies regarding the Constitutional Court

The overview of the request for a constitutional review in the case K 25/20 would not be complete without a brief mention of the current state of affairs in the Polish Constitutional Court itself.

In the 2021 judgement in Xero Flor v. Poland, the European Court of Human Rights held, in essence, that the Constitutional Court panel composed in violation of the national constitution (i.e. election of one of the adjudicating judges "vitiated by grave irregularities that impaired the very essence of the right at issue") does not meet the requirements allowing it to be considered a "tribunal established by law" within the meaning of the Article 6(1) of the European Convention.

One of the judges sitting on the panel adjudicating the case K 25/20 was elected under the same conditions as those considered by the ECHR in its 2021 judgment.

The other four were elected during the various stages of the constitutional crisis ongoing since 2015. In practice, and most regretfully, the case K 25/20 that revolves around the alleged violation of the right to a court provided for in Polish constitutional law risks to be deliberated in the circumstances that, on their own, raise concerns as to the respect of an equivalent right enshrined in the European Convention.