

Communitarization of Private International Law : Tendencies to « liberalise » International Family Law

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1. A new actor: the EU. New interferences from an unexpected angle

Fairly unexpectedly a new actor has entered the domain of regulation of International Family law (“IFL”); an actor on a supranational level that traditionally has acted almost entirely for economic reasons and with economic motives. Indeed, it is known that the 1997 Treaty of Amsterdam substantially and controversially changed the EC Treaty, and the changes that affected the field of Private International Law (“PIL”) are known as “the Europeanisation of PIL.” This phenomenon of Europeanisation of PIL can be seen as a process whereby the EU has given itself powers to create PIL rules, through the new article 65 in the EC Treaty. This concerns procedural law (jurisdiction on the one hand and recognition and enforcement on the other) as well as rules of applicable law - in short all PIL traits.

In the last couple of years, it was not expected that this would happen, certainly not concerning the sub-discipline of IFL. A confrontation with the difficulties of (International) Family Law did naturally exist, but the European authorities always took a restrictive stance.¹ Of course there are family legal terminologies in EC Law, but in the past, family legal matters in the jurisprudence of the European Court of Justice were very incidental and of a subsidiary nature. The ECJ did, for example, come with a verdict on the legitimacy of foreign judicial decisions whereby a date of birth was rectified, in matters of rules on name, or in matters of alimentation. But in the case of family legal terminologies that are central to EC Regulations and Directives, Co-operation Treaties, etc the ECJ has traditionally been rather reserved in any interference in (International) Family Law of member states. The European Court of Justice has thus acted subdued with regards to IFL of member states, also in cases such as European legislation whereby family members of EU employees made use of the right of residence, or in similar cases where legislation was applicable through co-operation or association treaties that gave social and economic advantages to those involved.² What was particularly distressing, was the promulgation of *legislation* in this area by European institutions themselves.

¹ See A.V.M. Struycken, “Les conséquences de l’intégration européenne, Recueil des Cours, 1992-I, p. 307-8 and p. 351-358 and Roth, “Der Einfluss des Europäischen Gemeinschaftsrechts auf das Internationale Privatrecht”, *RabelsZ* 1991, p. 634-636. See also recently, but briefly, on this issue K. Siehr, « Family unions in private international law », *NILR* 2003, p. 419-435.

² See particularly Diatta (Case 267/83 (1985) ECR 567, Reed (Case 59/5 , (1986) ECR 1283) and Singh (C-370+90 (1992) ECR I-4265). Also European Court of Justice 5 February 1981, NJ, note Schultz and the decision Johannes (see for comments on this last judicial decision: S. Francq, “Droit civil, droit familial et droit international privé: un cocktail qui plaît peu à la Cour. Décision de la CJCE du 10 juin 1999”, *ZEUP* 3/2002, p. 597-610 ; F. Rigaux (“Vorsorgungsausgleich” and art. 12 EC: discrimination based on

The Treaty of Amsterdam changed all this. European institutions want to interfere substantially in the field of IFL. It is clear that, in previous years, European institutions have been creating ambitious plans for a unification of IFL, or, even better, the EU has been *focussing* on unification of IFL – see the Action Plan³ and the Draft Programme.⁴ Obviously the EU sees itself as being largely responsible for unification of IFL rules. The *justification* for this is less clear and needs clarification⁵: it is unclear whether policy makers at the creation of the Treaty of Amsterdam intended to intervene from the beginning in IFL as sub-discipline of PIL and from which perspective and angle one actually wanted to intervene from. For example, is the real goal, the completion of freedom of movement of persons or the freedom of movement of judicial decisions – and what is the relation between both?

2. Why is there EU interference in International Family Law: two visions?

In my point of view there are two possible visions on the Europeanisation of IFL. Even if the policy makers did not have one of those visions as possible explanations for EU interventions from the beginning, the presentation of the visions could of course still give us justification afterwards as well as a further insight into the development of the process of Europeanisation of IFL. In other words, the matter of explaining the justification of EU interference may seem academic but could also give us clarification about the manner in which unification could be best developed, and answer the question whether a unification of rules of PIL is enough or whether there should also be unification regarding the rules of material Family Law and / or a unification of the rules in the field of Public Law. Thus, a clear vision of the why about the process of Europeanisation, regarding possible justification of which matters that fall within EU responsibility, is important.⁶ In short any clarification of the above can give us a valuable insight into the development of the unification process and give us the direction in which the EU will move.

2.1. “Free movement of persons and an area of freedom, security and justice”⁷

nationality and German private international law”, Iprax 2000, p. 287-288 he talks about the disinterest of the Court of Justice) and M. Traest, “Internationaal privaatrecht inzake echtscheiding discriminatoir ?” note attached to ECJ 10 June 1999, Johannes t. Johannes nr. C-340/97, *Algemeen Juridisch Tijdschrift* 1999-2000, p. 619-624. Regarding the Johannes-judgement, see also *infra*, footnote 30 and 44.

³ Vienna Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice – Text adopted by the Justice and Home Affairs Council of 3 December 1998, OJ C019, 23/01/1999 p. 0001-0015.

⁴ Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ C012 15.01.2001, p. 0001-0009. In Tampere the European Council asked for the implementation of a programme for mutual recognition. Concerning IFL especially – and in particular on alimentation and authority – the draft text wishes to see a greater advance.

⁵ See also for a discussion about this with more references O. Remien “European Private International Law, the European community and its emerging area of freedom, security and justice” CMLR 2001, p. 53-86, particularly p. 74 where he states “Family Law has ever been named as “le vecteur essentiel” for the European judicial area”. See also on this point M. Traest, *De Europese Gemeenschap en de Haagse Conferentie voor het internationaal privaatrecht*, Antwerpen: Maklu 2003.

⁶ On the one hand it is about which areas of Family Law can be regulated (specifically: can it be just “matters of status” or also wider family legal matters) and on the other hand the question about which PIL domains can be regulated (all the PIL questions or not).

⁷ See the terminology used in article 2 of the Treaty on the European Union and article 61 of the EC Treaty.

The key question is how exactly IFL is related to the EU.⁸ If one attempts to answer this question then one will inevitably see that the authority to interfere with PIL is regulated in the new Title IV of the EC Treaty with the title: “Visas, asylum, immigration and other policies related to free movement of persons”. Even though it may not have been the direct intention of having PIL placed in the EC Treaty in this way, the place in which these powers are summed up in the Treaty could be relevant for further augmentation of EU interference in IFL.⁹

It is interesting to notice that up till now only one of the list of aspects of “Migration Law” in Title IV has been given serious attention, namely that of “free movement” - as one of the fundamental freedoms of the EC Treaty. Quite often it is stated that the aim is to get rid of differences in legislation that hamper mobility of people, but it boils down to vague pointers as to how exactly IFL is related to this fundamental freedom of movement of persons.

2.2. The uniform definition of family legal terminology as a “preliminary question” and / or the furtherance of legal security.

In my point of view, if one really would like to point out the importance of the freedom of movement of persons, there are two categories in which arguments could fall – whereby, possibly, one could also think of a combination of the two. The first category emphasises the stimulation of mobility within the EU through the uniform filling-in of terms of family law where they are relevant in EU law. The second category emphasises the stimulation of the freedom of movement within Europe through an increase in general legal security.

Perhaps in drafting the Treaty of Amsterdam the primary idea was defining “family member” in a uniform manner where this term is used in European legislation. Thus, it becomes possible to argue that the EU in Europeanising PIL primarily sought to Europeanise international *family* law. But perhaps the aim was to give the citizens a greater feeling of legal security through legislating PIL rules in the field of PIL outside IFL as well as IFL. Both categories have aspects of legal security, but in the first category the importance of IFL as a cornerstone (IFL as a link between the rules of Family Law and public legal claims) is evidently visible, whereas this is not the case in the second category. I shall explain below.

In the first category one can assume that the creators of Title IV were trying to come to a uniform definition of family legal terminology in EU-regulations regarding the freedom of movement of employees. The first issue would then be the interpretation of the term

⁸ Concerning questions about how the criterion of “necessity” is to be interpreted and applied in the context of article 65, see, briefly, M. Tenreiro and M. Ekstrom, “Unification of private international law in family matters within the European Union”, in K. Boele-Woelki (red.), *Perspectives for the unification and harmonisation of family law in Europe*, Antwerpen: Intersentia 2003, p. 185.

⁹ Further on this (also sceptical), Struycken (Interview with MR. A.V.M. Struycken and mr. J.G.A. Struycken, *Ars Aequi* 2001, p. 747) and C. Joustra, *Mededelingen van de Nederlandse Vereniging voor Internationaal recht, Verslag van de Algemene Vergadering* 2003, p. 36. It is interesting to note that authors such as Joustra argue for a disconnection of PIL on the one hand and migration law on foreigners on the other in the EC Treaty, specifically through the accommodation of the respective areas in different titles in the EC Treaty.

“family members” in Regulation 1612/68 – the Regulation on freedom of movement for workers within the Community.¹⁰ The hypothesis in this category would be the following: a uniform and liberal interpretation of IFL terminology would stimulate greater usage of claims in the field of freedom of movement. So a person married in accordance to the laws of one member state, moving to another and falling under the provisions of the Regulation 1612/68 would not have to worry about the other states authorities not recognising a partner as his husband or wife. In other words it is important to ensure clarity concerning who, from an IFL angle, falls under the provisions, as they are now formulated, where family members are granted a derived right of residence. The first thing that should then be done is work on unification of rules of recognition. In this specific field more legal security could certainly be achieved. It is also possible to go a step further in this category by including family legal terms in legislation where the issues are not about the freedom of movement of persons, but about social advantages,¹¹ claims granted via association treaties,¹² and so forth – perhaps even legislation coming from the Council Directive of 22 September 2003 on the right of family reunification where family legal terminology also exists.¹³

In the second category, however, the essence is about stimulating legal security for those that have already been allowed to be mobile within Europe.¹⁴ The assumption here is

¹⁰ Similar to other regulations with regards to other categories that move within the EU such as students and pensioners. Regarding the question whether the right to family reunion can also be based on article 18 of the EC Treaty see the recent conclusion by Hacene Akrich, no. 54 and 106 with more references. See also in short infra footnote 29 and 43, the recent Garcia Avello case (ECJ 2003-10-02, C-148/02), where an explanation was given about the principles of Community Law in terms of citizenship and freedom of movement of persons. See also in this context, the Proposal for a Directive on the right of Union Citizens and their family members to move and reside freely within the territory of the Member States.

¹¹ Regarding social advantages and the question who family members are that receive these advantages; see G. Brinkmann, “Family reunification of third-country nationals. Access of family members to social protection benefits”, *European journal of migration and law* 2002, p. 291-308, specifically p. 292-293, where he states that “EC law does not recognize a single concept as to the meaning of family member for these purposes. As a matter of principle, it is for the Member States to define who are the relatives of a third-country national or a Union citizen exercising his/her market freedoms provided that such definition cannot be regarded as an obstacle to said freedom. Although the meaning of family members has been specified in secondary Community legislation, such as Article 10 of Directive 1612/68, it, however, refers to the circle of family members entitled to family reunification but not to entitlement of family members to social protection benefits”.

¹² See in this context C.A. Groenendijk, note in the Baumbast Case (Baumbast and R. 2002-09-17 C-413/99, JV 2002/466), where Groenendijk argues that regarding a decision by the Court of Justice on family reunion, article 10 of 1612/68 does not limit itself to the mutual children, but also children of one of the parents – such as the daughter of Baumbast. Groenendijk basis his arguments on the fact that the ECJ basis its decision on the aim of the regulation - the wife would be hindered in joining a future husband if she would have to leave a daughter behind to do so. Then he points out that this will also have consequences for those that fall under the provisions of association treaties. Such a question is already centre of proceedings regarding article 7 Decision 1/180 of the Association Council EEC-Turkey (case C-275/02, Ayaz, PbEG 2002, C 261/2). Can then be argued that *mutatis mutandis* PIL rules must also fall in line and be treated in a consistent way?

¹³ Council Directive 2003/86/EC of 22 September 2003 on the right of family reunification, OJ L251, 3 October 2003, p. 0012-0018. For an analysis of terms of family law in European legislation, see M. Bell, “We are family? Same-sex partners and EU migration law”, *Maastricht Journal of European and Comparative law*, 2002, p. 335-355.

¹⁴ About the differences and interactions between being allowed to be *mobile* or to be *resident* (in an EU member state where one would like to migrate to, another EU-member state that one has migrated to in the first instance, or the home country of one’s partner): see ECJ Singh (C-370/90 (1992) ECR I-4265), and see

that a unification of regulations of IFL on a liberal basis will stimulate claims regarding free movement within Europe, or at least shall remove any obstacles to that effect: if this is realised, people will be more able to know what they can expect in circumstances of internationalisation of their legal relationship by exerting their right to freedom of movement; at any rate they can rely upon the fact that they shall not lose any family legal claims by moving freely within Europe. In this category it is easier for one to distance oneself from the limitations to unify regulations regarding family legal terminology that appear within EC Law and of limitations in regulating problems concerning *recognition*. Rather than focussing on problems regarding a derived right of residence for family members of a EU employee, the second category is far wider and aims to stimulate mobility through the creation of a climate of legal security in the area of family law. The idea is that people will be more reserved in moving from one member state to another, if they are afraid of losing claims by immigrating, or if simply they do not know what changes in their legal position they can expect on a family legal basis. Included in the latter is the matter of *what* Law is applicable regarding their family relationship and which authorities can be addressed, and finally what value a judicial decision has in another country.¹⁵ As far as this category is more direct than the first regarding the three PIL questions,¹⁶ one can say that this category can justify in a greater manner the unification of rules of IFL, though in this category, more than in the first, the goal of reaching a unification of rules of IFL in an intra-communitarian context becomes clear.¹⁷ However, additionally, one can surely say that it is a possibility that

also the recent judicial decision in Hacene Akrich (C-109/01 2003-09-23) and the conclusion of the advocate-general in this case, particularly no. 123. See, critically, on Hacene Akrich, comments of C.A. Groenendijk, JV 2004/1, also referring to the “Chen-case” (C-200/02, OJ 2002 C180, p. 12, to be expected) and recent developments in legislation concerning right of freedom of mobility and residence of citizens of Union and their family members. See also the Council Common Position of 5 December 2003, *not* introducing a preliminary condition of residence. On the questions arising after Hacene Akrich, see also H. Oosterom-Staples, “Wanneer is er sprake van misbruik van het recht op het vrij verkeer van personen ? Het arrest Akrich: meer vragen dan antwoorden,” NTER 2004, afl. 4, p. 77-83.

¹⁵ In this sense one is creating, for example, liberal rules, being a guarantee for “liberal access to justice.” Regarding the question on whether one could limit oneself to unifying PIL rules see for example K. Boele-Woelki, “Divorce in Europe: unification of private international law and harmonisation of substantive law”, in H.F.G. Lemaire en P. Vlas (red.), *Met recht verkregen: Bundel opstellen aangeboden aan mr. Ingrid S. Joppe*, Deventer: Kluwer 2002, p. 17-28. It is possible that from this perspective a push could even be made for unifying claims on a *public* legal basis (here it could be stated immediately that “unification” in the area of claims of public law based on family relations, could be elaborated in a double way: on the one hand, one could think of unification in the sense of unification of the family-law-concepts used in public law, on the other hand, one could think of unification in the sense of unification of claims of public law themselves).

¹⁶ I should point out however immediately that although in the first category it is all about the defining of family legal terminology, and from that possibly the aim of free movement of judicial decisions - in other words, the focus is put on the unification of rules of recognition and enforcement – also within the first category it could still be argued that to achieve the aim of freedom of movement of judicial decisions, an unification of the rules of jurisdiction and applicable law (the latter to stop “shopping”) is necessary. Further information about the possibility and reality of the unification of rules of applicable law in divorce, a study by the Asser-institute in 2002

(http://europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm)

¹⁷ See further about the question what matters should be unified, seen from the perspective of increasing legal security and not losing rights if one moves from one country to another, N. Dethloff, “Arguments for the unification and harmonisation of family law in Europe”, in K. Boele-Woelki (red.), *Perspectives for the unification and harmonisation of family law in Europe*, Antwerpen: Intersentia 2003, p. 37-64, specifically on whether just IFL or also material Family Law should be unified. In this context, Dethloff makes a

work will be made of legal security *also* regarding the applicability of association treaties, the Directive on the right of family reunification etc.

2.3. Possible conclusions from the Brussels II Regulation?

The first piece of EU unification in the field of IFL – the Brussels II Regulation¹⁸ – can still be explained in two ways and can support the two categories mentioned above. This is because Brussels II fits in with the second category in the sense that it is favourable to the encouragement of mutual recognition, within the EU, of judicial decisions on divorce and thus stimulates legal security. At the same time it fits in with the first category: although the Brussels II Regulation explicitly enters into *termination* of marriage, this naturally influences the status of family members with regards to laws on residence, albeit in a negative manner.¹⁹ It also paves the way for entering into a new marriage where a new partner appears that must also be granted certain privileges through a derived right of residence.²⁰

If one looks at the way in which Brussels II came into existence, then it seems to be pure luck that article 65 was used as the basis for the Regulation.²¹ Following on from this, it is my opinion that Brussels II does not contain anything conclusive.

A greater amount of evidence is the fact that the EU has let it be known that PIL rules should be unified in the areas of Marital Property Law and Law of Succession²². These

distinction between a loss of status or of family-law relationships on the one hand, a loss of the legal effects of a status or legal relationship on the other hand.

¹⁸ Council Regulation (EC) no. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160 30.06.2000, p. 19. The situation will change as of 1 March 2005, when current rules will be replaced by a new Regulation (see Council Regulation (EC) no 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) nr 1347/2000, OJ 23 December 2003, p. 1-29). See for a presentation of these recent developments M. Tenreiro and M. Ekstrom, l.c. and, in a critical way, D. van Iterson, “Het Franse voorstel tot afschaffing van het exequatur voor beslissingen inzake omgangsrecht” en M. Sumampouw, “Voorstel Verordening ouderlijke verantwoordelijkheid: een voorbeeld hoe het niet moet”, both in H.F.G. Lemaire and P. Vlas (red.), *Met recht verkregen: bundel opstellen aangeboden aan mr. Ingrid S. Joppe*, Deventer: Kluwer 2002.

¹⁹ It is interesting to note that the EU is busy shoring-up the legal position of divorced partners and widows/widowers of persons that used their right of freedom of movement. See Proposal Com (2001) 257 OJ C 270E, 25.09.2001 on the right of Union Citizens and their family members to move and reside freely within the territory of the Member States. For ECJ cases that already moved in this direction: see Diatta (267/83 (1985) ECR 567) and Baumbast (2002-09-17 C-413/99).

²⁰ See also, *mutatis mutandis*, in a non-European context, for a recognition of the same link my comments on the judicial decision by the Dutch Hoge Raad, HR 9 November 2001, V. Van Den Eeckhout, “Gelijkheid in het internationaal privaatrecht. Een kritiek op de gangbare structurering van het debat”, *Nemesis* 2003, p. 177-189: whether the gentleman could let his “second” wife come over or not depended on whether the divorce would be recognised or not.

²¹ See for example V. Van Den Eeckhout, “Europees echtscheiden. Bevoegdheid en erkenning van beslissingen op basis van de EG verordening 1347/2000” in H. Van Houtte en M. Pertegas-Sender (red.), *Het nieuwe Europese IPR: van verdrag naar verordening*, Antwerpen: Intersentia 2001, p. 69-102.

²² It is, for example, foreseen in the Draft programme that future legal instruments will be drawn up on jurisdiction, recognition and enforcement of judgments relating to property rights arising out separation between married and unmarried couples and to wills and successions. Moreover, Brussels II itself also contains rules on *parental responsibility* – even in an extended way in the new Brussels II Regulation.

rules do not directly influence the status of a family member based on a derived right of residence and are completely separated from matters of residence. Therefore a link with the first category is far fetched. But interference in these areas could lead to a greater legal security for those that already have claims regarding the freedom of movement. Therefore, it is my opinion that, the second category offers more support to the way in which the EU wishes to interfere in IFL. The Draft Council Rapport of 29 October 2001 also seems to support this theory.²³

3. The tendency of liberalisation in an intra-communitarian context – how far and in what sense?

3.1. Liberalisation of (International) Family Law

A situation of legal security can be achieved that guarantees a minimum or maximum of claims and can therefore to a greater or lesser extent show favour-tendencies.²⁴ It is interesting to see how things have been worked out in Brussels II.

Looking at the manner in which the Brussels II Regulation has been formulated, one can distil the following concerns: the promotion of the goal of mobility through the increase in legal security, a legal security to be realised by achieving a situation of international harmony. Once one has been granted a divorce it will no longer be questioned, which ensures that any achievements made will not be lost by migrating within the EU; the opposite case would hamper movement.

Through an examination of the Brussels II Regulation it is clear that the creators of that Regulation were led by the principle of “favor divortii.”²⁵ This favor-tendency is, for

Here, it could be noticed however that residence claims could be influenced by decisions on parental responsibility ...

²³ Specifically, no. 6 and no. 14. Draft Council Report 13017/01 on the need to approximate Member States’ legislation in civil matters of October 29th, 2001, adopted at November 16th 2001. See also the explanatory memorandum on the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (“Rome II”) Com (2003) 427 (01), focusing on legal security.

²⁴ Indeed, a difference has to be made between the goal of legal security on the one hand (improving the foreseeability of solutions), and goals such as preventing a loss of rights on the other hand. Not only in the second category but also in the first can the EU take on a more or less liberal stance in the execution of powers in the field of unification of IFL: it is possible for the EU, in the search for IFL uniformity in the area of solutions for IFL problems of family legal terminology, to achieve a liberal or less liberal regulation whereby the IFL rules are measure according to either the “softest” or “strictest” EU member state.

²⁵ For more about the favor divortii principle in the Brussel II Regulation, see V. Van Den Eeckhout, “Internationaal privaatrecht en migratierecht. De evolutie van een tweesporenbeleid”, *Nemesis* 2002, p. 75-88 and V. Van Den Eeckhout, “Nieuw internationaal echtscheidingsprocesrecht: Brussel II”, *Tijdschrift voor Civiele Rechtspleging* 2001, p. 69-102. The new Brussels II Regulation does not introduce any changes concerning matrimonial matters. As regards rules on parental responsibility, the new Brussels II Regulation pretends to have taken into account the principle of the interest of the child (see for example consideration 12 of the Regulation, “The ground of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity (...), resulting inter alia in the principle that jurisdiction should lie in the first place with the Member State of the child’s habitual residence. One could argue that thus, the elaboration of the principle of the liberal access to justice has been reduced. But whatever what may be said about the elaboration of the principle of the interest of the child in the Regulation, the general idea of the EU is apparently that childs in general *benefit* from being subjected to a European regulation, particularly from the benefit of the system of mutual recognition: in consideration 5 of the new Brussels II Regulation, it is

example, realised through a composition of rules of jurisdiction that express the principle of liberal access to justice. Moreover, no hierarchy is made between the different grounds on which competence could be based. If one had chosen a stricter form of competence then this would certainly not have been favourable for the influence of the *favor divortii* in the Regulation.²⁶ The draft of the Brussels II Regulation explicitly chooses not to reduce the amount competent fora – and in line with that, not to reduce access to the courts – even though forum shopping could be avoided. This is even more remarkable as one has not yet reached the stage where conflict law between member states is unified and so forum shopping becomes all the more plausible. The principle of *favor divortii* is not only elaborated in rules of jurisdiction: the principle reemerges in the way in which the Regulation views recognition and enforcement, amongst other things through the flexibility and the provision of extra chances to achieve a divorce when one has not been granted it in the first place. This is because judicial decisions where the granting of divorce has been refused do not fall under the provisions of Brussels II. At the same time it is plausible that authorities in several Member States are competent, which could result in people being able to re-try a divorce somewhere else. All in all one can say, then, that Brussels II certainly has a liberal spirit.

Brussels II limits itself in the unification of PIL rules to those of procedure. The question then is in how far the same goals apply regarding the rules of applicable law; particularly goals concerning the abolition of hurdles to mobility, international harmony, legal security, no loss of achieved rights, and the creation of rules that stimulate access to the family legal institute. In the manner in which Brussels II was created the goal of achieving

said “In order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding.” The grounds for non-recognition are kept to the minimum required, as well in Brussels II as in the new Brussels II Regulation. Moreover, in the new Brussels II regulation, judgments on rights of access and judgments on return that have been certified in the Member State of origin in accordance with the provisions of the Regulation should be recognised and enforceable in all other Member States without any further procedure being required. See in this context, on the Brussels Regulation, H.U. Jessurun D’Oliveira, “The EU and a metamorphosis of private international law” in J. Fawcett, *Reform and development of private international law: essays in honour of Sir Peter North*, Oxford: Oxford University Press 2002, p. 111-136, especially p. 131-132, arguing that *too much* precedence is given to the free circulation of decisions, thus neglecting the interest of the child, in Brussels II. See also on the issue of “interest of the child” in the new Brussels II regulation D. van Iterson and M. Sumampouw, l.c.

²⁶ Due to the fact that the rules of applicable law and substantive law differ with regards to divorce in the different member states, a stronger canalisation would coincide with more hurdles in the possibility of getting a divorce. There are historical examples of how a particular order is prescribed concerning the relevant authorities in order to make one’s own authorities exclusively competent, which then results in the hampering of the possibilities of achieving a divorce. See for example, V. Van Den Eeckhout, “De wisselwerking tussen materieel recht en internationaal privaatrecht: eenrichtings- of tweerichtingsverkeer?”, *Rechtskundig Weekblad* 1999-2000, p. 1258-1259, and also V. Van Den Eeckhout, *Huwelijk en echtscheiding in het Belgische conflictenrecht. Een analyse vanuit de invalshoek van nationaliteitsgemengde partnerrelaties*, Antwerpen: Intersentia 1998, p. 210 etc. For an example where people are forced to address their own national authorities and face negative consequences by then not being able to address another judicial institute, the Treaty of Istanbul (CIEC-agreement on the changing names and surnames of Istanbul of 4 September 1958). The treaty provides the national authorities with the exclusive jurisdiction on liberalising tendencies such as trans-sexuality. H.U. Jessurun D’Oliveira (“Weg met exclusieve jurisdictie in het namenrecht”, *NJB* 1985, p. 1305) calls this treaty a “hurdle” to new developments in trans-sexuality. See for recent developments, R. Lawson, “In de schaduw van Goodwin”, note under *Rb. ‘s Gravenhage* 14 October 2002, *NJCM-Bulletin* 2003, p. 313.

international harmony has lost its importance regarding the drafting of rules on applicable law: in the regime of recognition in Brussels II there is no control through conflict laws. In other words, in areas where the regime on recognition is applicable in the sense of the Brussels II Regulation, enough freedom is left to draft rules on applicable law without having to worry about the problems and goals regarding international harmony.

In areas where there is no such regime on recognition, one should logically still look at the goals of international harmony in the phase of drafting rules of applicable law. One would, in other words, have to look at how international recognition can be helped by the rules of applicable law. On this point, a question arises after reading the ECJ Gilly case²⁷, namely, that the jurisprudence of the ECJ could lead to a connection with nationality or domicile as being the most important in such cases, if the principle of connection through nationality or domicile proves to be the most promoted. Seen from the perspective of the goal of international harmony, the connection through nationality seems to me at first glance the best option as authorities are more likely to recognise foreign judicial decisions when the national laws have been applied to those involved, particularly concerning foreign judicial decisions on *omni* citizens.

Or is the goal of international harmony not the only issue – or perhaps not of primary interest – and therefore do other issues (such as the importance of “integration”) need researching, issues that the EU perhaps also sees as being important?²⁸ And do these point in the same or another direction if it comes to create rules of applicable law?²⁹ An

²⁷ Gilly Case (ECJ 12 May 1998, C-336/96). The case revolved around a double tax payment regarding the use of the principle of nationality. For a short analysis of the Gilly case, see A.H. van Hoek, *Internationale mobiliteit van werknemers: een onderzoek naar de interactie tussen arbeidsrecht, EG-recht en IPR aan de hand van de Detacheringsrichtlijn*, Den Haag: Sdu Uitgevers 2000, p. 290 etc. also concerning Conflicts Law. Van Hoek introduces the requirements “reasonable and customary.” Whether this can be used in PIL in terms of a “suitable and reasonable criterion” has to be seen through the ultimate goal accorded to PIL. The question is then for which goal the criterion is useful and reasonable. In the past (V. Van Den Eeckhout, “De wisselwerking tussen materieel recht en internationaal privaatrecht: eenrichtings- of tweerichtingsverkeer?”, l.c.) I have differentiated two possible ultimate legitimisations” in PIL, namely showing respect to peoples culture on the one hand, the stimulating of situations of international harmony on the other hand (whereas the goal of international harmony via the drafting of rules on applicable law must probably be seen in the light of rules on applicable law combined with rules on jurisdiction and recognition).

²⁸ And that in light of the Gilly case, could also be used as a legitimisation in the interest of those issues and could link in with the “reasonable and suitable” criterion. Considerations that could also fit in with the jurisprudence of the ECHR - (see particularly EHRM *Gaygusuz v. Austria*, 16 September 1996) regarding the question when a difference in treatment can be justified – in the search for “objective and reasonable justification.”

²⁹ See also the reaction of the advocate-general and the ECJ in the *Garcia Avello* case regarding the Danish argument that no difference in treatment may be made between those with multiple nationalities and national citizens because the same treatment meant an increase in better integration. The case revolved around the question of whether the Belgian authorities were forced to deviate from the Belgian rule that gives right of way to the Belgian laws on names if the person in question had more than one nationality of an EU member state (including the Belgian nationality) and whether this was in effect contrary to the ban on discrimination as stated in articles 12 and 17 of the EC Treaty. The ECJ answered positively: the Belgian practice to forbid any exception to the application of Belgian rules was not allowed. Interesting are the remarks made by the advocate-general in the conclusion of the *Hacene* case (no. 79) about how integration should be viewed in this context. See also the conclusion of the advocate-general in the *Garcia Avello* case (2003-10-02 C-148/02, no. 72) where he states that, “I would moreover take issue with the argument that

interesting remark in this context can be formulated from the Garcia Avello case, namely that from this case it seems that the EU is less inclined, or so it seems – albeit perhaps only in the treatment of people with multiple nationalities in (international) law on names – to reason in terms of considerations in the sense of “respect for culture” or “integration”. At any rate these issues do not seem to have first priority when compared to goals such as legal security and international harmony for the increase of mobility. Ultimately, one could also present it this way: “integration” is stimulated by the elimination of problems concerning mobility and international harmony.

It can be expected that if the EU decides to regulate IFL aspects of certain family legal issues through Regulations, then the EU will unify rules of recognition before unifying rules of applicable law. If there are already European rules on recognition, the argument of drafting PIL rules for the goal of harmony in international decision-making becomes irrelevant, then the question arises on the basis of which arguments a useful agreement on applicable law can be drafted - or on what basis the ECJ could judge a national regulation on applicable law on its merits. If, hypothetically, there were no European rules on recognition at all, it would still not seem unreasonable to suggest that the ECJ would be asked for a ruling at some stage on (national) rules of applicable law.³⁰ In such a situation the argument

the principle of non-discrimination seeks essentially to ensure the integration of migrant citizens into their host Member State. The concept of “moving and residing freely in the territory of the Member States” is not based on the hypothesis of a single move from one Member State to another, to be followed by integration into the latter. The intention is rather to allow free, and possibly repeated or even, continuous, movement within a single area of freedom, security and justice”, in which both cultural diversity and freedom from discrimination are ensured”. In the Garcia Avello case, article 12 is used to justify a *difference* in treatment between “Belgian” citizens and “Belgian-Spanish” citizens (see especially Garcia Avello, consideration nrs. 34, 36 and 37). On the issue of considerations about “integration”, “respect for culture” and “mobility” in PIL, see also V. Van Den Eeckhout, *De wet toepasselijk op het huwelijk en de huwelijksontbinding van nationaliteitsgemengde paren. De impulsen van de confrontatie van het I.P.R. met “gemengde” partnerrelaties voor de ontwikkeling van het conflictenrecht*, PhD KULeuven 1997 (corresponding mainly with the vision of the ECJ) and V. Van Den Eeckhout, “De wisselwerking tussen internationaal privaatrecht en materieel recht” l.c., where I distinguish between respect for the “State legal culture” (on the issue of respecting the *prohibitions* of foreign law, see *infra*, footnote 40 and following and footnote 67) and respect for “the culture of an individual”. See also *infra* footnote 49.

³⁰ See *infra*, footnote 44, about the Johannes Case (C-430/97 1999-06-10). If, hypothetically, there were no European rules of recognition, it would also not seem unreasonable to suggest that the ECJ would be asked for a ruling at some stage on *national rules of recognition*. In such an evaluation by the ECJ of national rules of recognition - as in the evaluation of national rules of applicable law - considerations could come forward such as the concern to combat fraud, the concern to create a system that is non-discriminatory on the basis of nationality, e.g. through the creation of a system of “contrôle de la loi convenable (see, on this issue, in the context of Belgian rules of recognition concerning divorce, V. Van Den Eeckhout, *De wet toepasselijk op het huwelijk en de huwelijksontbinding van nationaliteitsgemengde paren. De impulsen van de confrontatie van het I.P.R. met “gemengde” partnerrelaties voor de ontwikkeling van het conflictenrecht*, PhD KULeuven 1997, p. 612-617. See also in this context, in the *European* rules of recognition on divorce, article 18 of the Brussels II regulation, concerning “differences in applicable law”, and saying “The recognition of a judgment relating to a divorce, legal separation or a marriage annulment may not be refused because the law of the Member States in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts”. On the allegation of discrimination on the basis of nationality in the *European jurisdiction rules* of the Brussels II regulation, see and H. Tagaras, “Questions spéciales relatives à l’unification communautaire du droit international privé de la famille”, in *Mélanges en hommage à Jean-Victor Louis*, Bruxelles, Editions de l’Université Libre de Bruxelles 2003, p. 460-462 the references made in V. Van Den Eeckhout, “Europees echtscheiden”, page 85, footnote 64 and 65.

of attaining international harmony through rules on applicable law would still be valid. Then, the issue of how this interest should be seen in the light of other interests would need looking at as far as it concerns rules of applicable law.

So, in short, mainly in areas where the goal of international harmony has been reached via the creation of a recognition regime, the question emerges about what issues need to be consulted when drafting rules on applicable law.³¹ If the goal of international harmony has been achieved via rules of recognition, is it then possible to build any imaginable system of applicable law and reason purely in terms such as “integration” and “respect for culture,”³² or are there other “European legal” issues that need to be looked at that can affect the eventual outcome?

Above I already mentioned the consideration that people should not be able to lose their granted rights when migrating.³³ Perhaps it could be argued that much importance should be attached to this concern, especially in the context of the EU, as peoples’ reasoning will be that if rights could be lost by migrating, they won’t be stimulated to use their right of mobility. Concerning this last point I think it is possible to see an analogy with considerations of ECJ in other matters. So, for example, *mutatis mutandis*, regarding the issue that one should not be allowed to lose attained rights, the recent *Hacene Case*³⁴ may be relevant. *Hacene* revolved around residence, but the reasoning, in both the judicial decision and the conclusion of the advocate-general, is about how one can avoid discouraging the movement of people if they perceive the risk of losing certain rights they would otherwise have.

Concerning the drafting of rules of applicable law with regards to the issue of avoiding that people may lose rights, I can make the following remarks. Firstly, the interest in this issue may be seen as one of the greatest reasons³⁵ to unify rules of applicable law.³⁶

³¹ And, so, in other areas the question is whether other issues point in the same direction or in others regarding the goal of international harmony.

³² In doctrine a difference of opinion has developed on how these goals should be attained. From this perspective, some pleaded for a link with the laws on domicile (see for example M. Traest, *l.c.* with reference to *Lenaerts and Van Hecke*) and others pleaded for a link with the laws on nationality (see for example A.V.M. Struycken, “Les conséquences de l’intégration européenne”, *Recueil des Cours*, 1992-I, p. 355). Struycken argues: “Le respect de l’identité nationale empêchera la Communauté de dénier aux Etats membres le droit de préférer, en principe, pour des motifs respectables le rattachement à la loi nationale, du moins pour leurs propres ressortissants.”

³³ This issue often links with, and is often even similar to the issue of international harmony. But one can already state that in order to achieve the goal of international harmony it is a necessary and sufficient condition to unify rules of recognition. Concerning the goal of not losing one’s attained rights though, unification of rules of recognition could be seen as a necessary condition but not a sufficient one.

³⁴ *Hacene Akrich C-109/01 2003-09-23*. On *Hacene Akrich*, see already above, footnote 10 and 14.

³⁵ Unless one would understand “obtained rights” and/or the concern to prevent a loss of rights in a very strict sense, namely that the rights that ought to be protected only deal with *judgments* (claims that already have been put before authorities) and don’t include “law” or “rules” as such (claims that someone could rely on, but actually did not). For discussions on “obtained rights”, see for example I. Joppe, *Overgangsrecht in het internationaal privaatrecht en het fait accompli*, Arnhem: Gouda Quint 1987, 360 p. and A.V.M. Struycken, “‘s lands wijs ‘s lands eer (afscheidscollege KUNijmegen 31 August 2001, KUNijmegen 2001, 41 p. In this hypothesis, it seems as if there would also be more room to plead for unification of rules of applicable law with a preference for the law of the domicile, or with a preference for the systematic application of the *lex fori*. It could already be stated here that reference to the domicile

The next question is then of course how exactly, from this angle, rules of applicable law can best be unified. It must indeed be noted though that not all forms of unification can guarantee that people would not lose any rights when migrating: a complete following of the domicile principle would, for example, incur a loss of rights, because after migration the concept “domicile” will have a different filling-in than before which results in other rules being applicable, which in turn can imply a loss of rights.³⁷ A similar remark can be made concerning application of the *lex fori*.³⁸ All in all the above seems to suggest a preference for nationality as a connecting factor, *particularly* if *national* citizens of one Member State move from this “home” country to another Member State³⁹. Thus, in a rather paradoxical way, it

criterion would be able to encounter forum shopping, preference for the *lex fori* would not. Moreover, reference to the domicile criterion would lead to the following situation: only if one would move to a Member state with a more liberal substantive family law, unification of IFL in this sense would have a „liberalising“ effect (in this opposite situation, the person who claims rights in court before moving, would be better off than the one who does not); on the issue of whether the „State of origin“ would, subsequently, be forced to recognise what is obtained in the „State of residence“, the problematic is very similar to what will be discussed below.

³⁶ See for an analysis of the necessity of unifying rules of applicable law from an idea that a lack of uniformity would mean that people lose rights when migrating, Dethloff, (N. Dethloff, l.c., specifically p. 52 where she states that: “Only unified rules on conflict of laws can ensure internationally uniform decision-making so that a status existing in one state, whether created by operation of law or based on a court decision, remains in effect in another”. *According to the Action Plan* work needs to be done on the unification of rules concerning Conflicts Law in order to avoid *forum shopping*. Dethloff also focuses on the need to avoid “a race to the court” – a situation which would hamper the equality between the parties - in her argumentation to unify rules of applicable law. See also, on the concern of avoiding forum shopping, as well as on the concern of avoiding a “race to the court”, Jantera-Jareborg, “Marriage dissolution in an integrated Europe”, *Yearbook of private international law*, 1999; especially concerning the need to unify at the same time *ancillary* claims if one reasons from this perspective.

³⁷ This is recognised by Dethloff, l.c., p. 52: “(...) even if the rules on conflict of laws are unified, a loss of legal positions can arise with a change in residence. Such a loss of legal position will always occur where the connecting factor is not immutable, but where the applicable law is based on the habitual residence in question”. Dethloff does not go into the hypothetical that such a new situation would create a “gain”: the primary concern here is to ensure that those involved are guaranteed of keeping their old rights; something they could not have if the criterion of domicile were used. On the attaining of new claims in the case of migration and the question of whether these new rights could be used when returning to one’s home country, *infra*. See also, recently, in PIL outside IFL, the explanatory memorandum on the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (“Rome II”) Com (2003) 427 (01), where – after referring to the issue of forum shopping, it is put this way (p. 7): “(...) the harmonisation of the conflict rules also facilitates the implementation of the principle of the mutual recognition of judgments in civil and commercial matters. The mutual recognition programme calls for the reduction and ultimately the abolition of intermediate measures for recognition of a judgment given in another Member State. But the removal of all intermediate measures calls for a degree of mutual trust between Member States which is not conceivable if their courts do not all apply the same conflict rule in the same situation”.

³⁸ One could of course suggest that as long as authorities from the sending state (the home country) as well as the receiving state (the residence state) are competent, no loss of rights would exist in the case of application of the *lex fori*: one would then be able to start proceedings in one’s “own” authorities in order to enforce the law of the home country, and the country of residence would in turn have to recognise the result. One argument against this is that this practice could only be executed by those able to return to their home country to start proceedings. This situation thus also seriously hampers the access to justice and could even be seen as a form of class justice. Should one not be able to get the same “service” in the new country of residence to exact one’s rights?

³⁹ It could be argued that in drafting IFL-rules this way, one would respect the „principle of mutual recognition“ – often understood as a preference for the legislation of the Member State of origin. See, for a

could be argued that difference in treatment of EU-citizens on the ground of nationality would be the best way to remove obstacles to free movement and thus to ensure the principle of freedom of movement and to.

Assuming now that the analysis based on the angle of “avoiding the loss of rights” points, in general, to a link with nationality, another question arises: does one want to go as far as saying that all *prohibitions* that exist in the national law of a Member State be respected?⁴⁰ If so, would this not be a break on the process of liberalisation of IFL as wanted by the EU, through ensuring that one does not get less, but also no more, rights than one had in one's home country? Such a strict application of the principle of nationality would lead to people being condemned to having their national law applied with all its advantages and disadvantages, and could be contrary to the favor and liberalising tendencies as laid out in the Brussels II Regulation. Should we then not have to work towards a system that is more favor-centred? Or at least a system that has the advantages of using nationality as a connecting factor – no loss of rights when migrating - *and* includes favor-tendencies?

The above can be illustrated by the problems surfacing with registered partnerships and same-sex marriages. These are areas where there are still no European rules of recognition. In the Belgian PIL on same-sex marriages *before* the new codification comes into force⁴¹ the principle of nationality is primarily used. The consequence of this is that the entry

recent discussion of the principle of mutual recognition – especially dealing with the question whether the principle of mutual recognition could function as a hidden choice-of-law-rule, M. Fallon and J. Meeusen, „Private international law in the European Union and the exception of Mutual recognition“, Yearbook of private international law 2002, p. 37-66. See also M. Traest, o.c.

⁴⁰ In the case of missing rules of recognition, one could argue that only in acting this way a situation international harmony can be attained.

⁴¹ See M. Pertégas Sender, “Huwelijk tussen personen van hetzelfde geslacht in België: internrechtelijke en internationale implicaties” in P. Senaevé en F. Swennen (red.) De hervormingen in het personen- en familierecht 2002-2003, Antwerpen: Intersentia 2003 and P. Wautelet, “Note sur l’ouverture du mariage aux ressortissants étrangers de même sexe”, to be consulted on the electronic journal tijdchrift@ipr.be 2004 (1), p. 97-105 (www.ipr.be). It has to be noted immediately that the Belgian practice has been changed in January 2004, with the publication of a new circular letter. See the circular of 23 January 2004, Belgisch Staatsblad 2004, 27 January 2004 (also to be consulted on tijdschrift@ipr.be 2004 (1), containing rules of how should act in the field of applicable law and recognition. Concerning the issue of applicable law, through the use of the principle of the “exception of public order”, a system is established which is similar to the Dutch legislative system ! Thus, the Belgian system has been transformed in a much more “liberal” system. Nevertheless, this Belgian legislative system is still interesting to study, both seen from the perspective of studying a “European typical case-study” (the Belgian legislative system doesn’t seem to be “unique” in its way of dealing with PIL-issues of new forms of family life, see the comparative report K. Waaldijk, “Major legal consequences and procedures of civil marriage, registered partnership and informal cohabitation for different-sex and same-sex partners in nine European countries, to be published. This report also gives information about the Belgian way of dealing with PIL-issues of registered partnerships and informal cohabitation in Belgium) and from the perspective of developments in Belgian legislative PIL: with the introduction of the circular, an administrative change has been realized, but the question arose how the Belgian legislator would handle in the future. Meanwhile it has become clear: the Code on Private international law has been voted, and the new article 46 stipulates – in french – “Sous réserve de l’article 47, les conditions de validité du mariage sont régies, pour chacun des époux, par le droit de l’Etat dont il a la nationalité au moment de la célébration du mariage. L’application d’une disposition du droit désigné en vertu de l’article 1er est écartée si cette disposition prohibe le mariage de personnes de même sexe, lorsque l’une d’elles a la nationalité d’un Etat ou a sa résidence habituelle sur le territoire d’un Etat dont le droit permet un tel mariage”. In this context, it is worth mentioning the remarks of P. Wautelet:

to the institute of a same-sex marriage is very limited. The question arises if the Belgian regulation can be seen as one that is in line with EU concerns: can the difference in treatment on the basis of nationality be justified on the basis of considerations⁴² in the drafting of international harmony and no-loss-of-rights⁴³? Or can one speak of discrimination on the grounds of nationality,⁴⁴ seen from the point of view that it is unfair to use the nationality criterion so that one person would achieve entry into a family legal institute and another would not. Should one not be thinking more along the favor-lines?⁴⁵ It is possible that the principle of non-discrimination on the grounds of nationality could be interpreted in such a manner that a pure link with nationality would no longer be allowed. It is even possible that access to the institute of same-sex marriage would be seen as a human right⁴⁶; this would mean that the preference for nationality should be corrected in some cases

Wautelet appears to be, in principle, in favor of a system such as the Dutch system, but argues that if one is looking for a convenient connecting factor, one should take into account the fact that marriage legislation is connected with migration: “(…), il ne faut pas oublier que le mariage a des conséquences dans bien des domaines du droit, notamment sur les droits des époux en matière de sécurité sociale et de titre de séjour. Ces conséquences doivent être prises en compte pour déterminer quelles attaches sont nécessaires pour permettre l’application du droit belge.”

⁴² Citizens of countries that recognise same-sex marriage can still make claims to this institute in Belgium. However, citizens of countries that do not recognise same-sex marriage cannot. Analogous to the Hacene case, one could argue that people that hail from countries where same-sex marriages are prohibited would not be discouraged from migrating to a country that would not give them the possibility of a same-sex marriage as they were never able to have one in the first place. Must one reason on a strict basis only regarding the “no-loss-of-attained -rights” or can one expect a more pro-active stance from the EU whereby the EU would itself create such rights? See for example *mutatis mutandis* (revolving around the field of residence) the strict form of reasoning in Hacene Akrich in the case of article 10 of the Regulation 1612/68, in stark contrast to the dynamism in the Carpenter Case (C-60/00 2002-07-11, where article 49 EC is interpreted in the light of the ECHR). On experiences in PIL in a negative sense, see V. Van Den Eeckhout, *De wet toepasselijk op het huwelijk en de huwelijksontbinding van nationaliteitsgemengde partners, o.c.*, concerning the situation where parties are married under a system of law where a divorce is not possible and after a change in nationality one of the parties claims that on the basis of the “old” applicable laws divorce is not possible and whereby the other party claims that divorce should now be possible.

⁴³ Difference in treatment on the basis of nationality seems to be consistent with jurisprudence from the Garcia Avello case (see footnote 29). Concerning reservations that can be made in this area see *infra*.

⁴⁴ The Johannes case is interesting in this context (see *supra* footnote 2 and 30). The ECJ decided that article 6 EC (after revision, article 12 EC) does not stand in the way of the law of a member state that uses the nationality of the persons in question as reference, should lead to a European Civil Servant having a larger burden in one case than another who is in effect in the same situation. Traest (M. Traest, l.c.) argues in his commentary on this case that after the coming into effect of the Treaty of Amsterdam with the basis for rules for competence in the field of PIL the ECJ would – at any rate now - be competent and therefore the ECJ may now judge differently. See also M. Fallon, comments with Johannes, *Revue trimestrielle de droit familial* 2000, p. 247-249.

⁴⁵ Regarding the hypothesis that no rules of recognition are available and the nationality link can be pleaded from an angle of „respect for international harmony“ I personally stated that only using nationality as a reference would be discriminatory. I also stated that the principle of international harmony is not the only one and that holding on to the principle of nationality could also be seen as disproportionate in order to achieve the goal of combating fraud. See, *mutatis mutandis*, concerning registered partnerships, V. Van Den Eeckhout, *Huwelijk en echtscheiding in het Belgische conflictenrecht, o.c.* At that time, I was mainly orientated on the “non-european context”, but the issue now prominently also rises in a “european context”.

⁴⁶ See, recently, ECHR Karner 24 July 2003, 40016/98, EHRC 2003/83, with comments of J. Gerards. See also the contribution of O. Lassoie, reasoning from the principle of article 12 ECHR and pleading from this perspective for liberal rules of applicable law, to be published in *Revue du Droit des Etrangers*. See also, *mutatis mutandis*, the judicial decision by the German Constitutional Court of 4 May 1971 (see V. Van Den Eeckhout, *Huwelijk en echtscheiding in het Belgische conflictenrecht, o.c.*, p. 300-301) where the argument

– as was recently realized through the introduction of a new circular, using the concept of “exception of public order” to mitigate the nationality preference, *and* will be realized in the future through article 46 of the code on Belgian private international law. The Netherlands paid immediately more attention to arguments of this last type. At any rate the Dutch government can be labelled as being much more liberal than the old Belgian system; people that had a claim to enter into marriage in their country of origin keep this claim when they migrate to the Netherlands, but the category of people that have access to this institute is interpreted even wider. The fact that a person hails from a country where same-sex marriages are illegal is not of consequence in Dutch PIL and therefore does not hamper the possibility of entering into a same-sex marriage in the Netherlands.⁴⁷ Access is given to liberal substantive law⁴⁸ through the liberal construction of PIL.⁴⁹ The Netherlands does not limit itself so that people, when they migrate, don’t lose claims, but when they migrate “new” claims are allowed.

Perhaps it is not *necessary* from an EU perspective to issue such favor-type PIL rules, they don’t seem prohibited anyway. From the perspective of improving mobility, one can say that if one has a favor-type system people would possibly be stimulated to move abroad because when they migrate they could possibly gain more rights than they had before migrating – at least if they move to a country with a liberal system. Viewed from this perspective, intra-communitarian mobility can only be improved. But put in this way, a

of freedom of marriage, a constitutional right, was used in order to set aside international harmony. See in this context D. Van Grunderbeeck, *Beginselen van personen- en familierecht. Een mensenrechtelijke benadering*, Antwerpen: Intersentia 2003, p.201, where she states that the entering into of a marriage that has references in more than one legal system, it is possible under article 12 ECHR that IPL rules are used as an integral part of national law and foreign laws are made applicable. (Van Grunderbeeck is referring to ECHR nr. 9057/80 X t. Zwitserland, 5 October 1981), “as far as those substantive rules don’t violate as such a convention” –Van Grunderbeeck illustrates this last sentence with the example of the violation of a convention by the national judge himself in the application of foreign law, for example if this judge refuses to allow a marriage on the basis of a foreign interdiction on marriage which is contrary to the ECHR” (See also, ECRM 11 April 1996 appl. No. 24001/94 Gill en Malone tegen VK, by T. Loenen, (“Onderscheid naar sekse de rechtsorde uit of er juist weer in”, FJR 2002, p. 228-234). The former clearly shows us that in view of human rights, the principle of nationality should not be taken too far. In my point of view, even when no human rights are affected, the principle of nationality should not be used absolutely. See V. Van Den Eeckhout, *Huwelijk en echtscheiding in het Belgische conflictenrecht*, o.c.

⁴⁷ A same-sex marriage that comes into existence in the Netherlands would not have to rely upon recognition abroad.

⁴⁸ Especially along the lines of article 2 Wet Conflictenrecht Huwelijk; requiring for marriage that one partner has residence in the Netherlands or has Dutch citizenship (since April 2001, the same applies to partnership registration (art. 80 a(4) Book 1 CC, as amended by the law of 13 December 2000, Staatsblad 2001, nr. 11). Whether or not the law of the Country of origin of a foreigner permits or recognises registered partnership or same-sex marriage is not relevant in the Netherlands (see K. Boele-Woelki, *Registered Partnerships and Same-Sex marriage in the Netherlands*” in: K. Boele-Woelki and A. Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerpen: Intersentia 2003, p. 43).

⁴⁹ In doctrine (Dethloff, l.c., p.51, see already supra, footnote 36) it has already been said that a too liberal rule of *jurisdiction* would contravene the protection accorded to the weakest party in a family legal case. But one could also imagine the case where *both* parties would like to proceed in the same way in a situation where one country is far more liberal than another. On the issue of creating European liberal rules of *applicable law* and favor-tendencies, also in the sense of creating *party-autonomy*, see for discussions on PIL outside of IFL, J. Israel, “Europees internationaal privaatrecht. De EG, een comitas Europaea en “vrijheid, veiligheid en rechtvaardigheid”, NIPR 2001, p. 135-149, especially p. 140-141, with further references (e.g. to Basedow and others).

following question arises. Is it possible that migration would still be hampered if, hypothetically, the attained rights in the new country of residence in a migration at a later date to the country of origin cannot be taken back? Here again, it is possible that certain analogies can be made with the ECJ and the advocate-general in the Singh and Hacene Akrich cases.⁵⁰

If we assume a flexible regime of recognition as being the one proposed then a PIL regulation as the Dutch one in the case of same-sex marriages would not pose any problems in the area of international harmony and the favor-principle would also be accomplished. If no regime of recognition is anticipated, then a PIL rule as the Dutch one for same-sex marriages could be problematic for the goal of international harmony regarding decisions. The EU could thus end up becoming a patchwork.⁵¹ But at the same time one can remark that *in the long term*, one could possibly achieve an even more general favor-movement with international harmony as the result: if a same-sex marriage is enacted in the Netherlands then it is possible that the authorities abroad could reason that as the marriage has already come into existence it might as well be recognised, especially seen from the issues about harmony in decision making and the no-loss-of-rights due to migration. In a situation where other EU countries and even the country of origin (if a remigration takes place) would reason as above then one could speak of a combined tendency in the direction of liberalisation and an achievement of the goal of international harmony created by the fact that a country has a soft recognition system. It is then imaginable that the country of origin would eventually not only adapt the rules on recognition but also the rules on applicable law.⁵² It would then perhaps also become possible that people whose legal relationship exists in an purely internal context could be given a family legal institute, especially if it would be seen as unfair not to give them access – for example because otherwise it would be felt as being a kind of reverse discrimination, in other words, people that never migrated could otherwise be held back. In this sense the final result could be a liberalisation of substantive Family Law.

Of course it could seriously be doubted whether the EU itself would try to exert such dynamisms – see, again, *mutatis mutandis*, discussions in migration law, particularly on the competence to regulate issues family reunion, with the phenomon of “reverse discrimination”, and dealt by in the ECJ in cases like Singh and Hacene Akrich. But even so, it may be possible for the Member States themselves to reason that, once PIL-rules as the

⁵⁰ The difference is that within this matter it is questionable whether this kind of claims could be categorized as “intracommunitarian” cases that fall under the EU competence, see *infra*. But see in this context also the Carpenter case in which article 8 ECHR was central, particularly in the light of the goal of freedom of movement of services.

⁵¹ Analogous from Jessurun D’Oliveira (“Vrijheid van verkeer voor geregistreerde partners in de Europese Unie. Hoog tijd !”, NJB 2001, afl. 5 – see also H.U. Jessurun D’Oliveira, “Freedom of movement of spouses and registered partners in the European Union”, in J. Basedow e.a. (ed.), *Private law in the international arena – liber amicorum Kurt Siehr*, The Hague: T.M.C. Asser Press 2000, p. 61-77), who in light of the freedom of movement of persons talks about “a Europe with different speeds, and, seen from a territorial point of view, a chequered freedom of movement which has to jump over countries not allowing registered partners in”. For more about this see II.2.3.c

⁵² In which case one could talk of backward progression. On the phenomena of the taking in of techniques in rules of applicable law through introducing them first in rules of recognition, see V. Van Den Eeckhout, *De wet toepasselijk op het huwelijk en de huwelijksontbinding van nationaliteitsgemengde partnerrelatie*, o.c.; also in this context V. Van Den Eeckhout, “Book review of G. Steenhoff (red.) *Een zoektocht naar Europees familierecht*”, *Rechtskundig Weekblad* 2001, p. 895-896.

Dutch ones are in force, taking into account “European internal market concerns”, this could force same-sex marriages to be recognised elsewhere in Europe, because it would otherwise mean a hurdle to the freedom of movement. In such a case, one would be able to notice an “indirect effect” of European rules and logic on national rules.

3.2. The liberalisation of (International) Family Law and / or public legal claims.

Case study: Working with new forms of family life of European creation

The issues of liberalising (International) Family Law as such need to be differentiated from issues of public legal claims based on family legal relationships *and* the meaning of IFL *in this context*—issues that have a number of areas that do fall within the competence of the EU.

It is interesting in this context to note a judicial decision from the Belgian labour Court of Liège of 12 June 1990, where nationality was denied importance in deciding whether an Italian was underage or not – in order to evaluate social security rights of this person: reference to the nationality criterion was in this context seen as being contrary to the EC treaty.⁵³ Could it thus be that IFL rules need balancing and possibly need including in a more liberalising trend because of the realisation that their application hampers public legal claims? Could it also be that IFL rules that are an answer to preliminary questions⁵⁴ may, sometimes, have to be left aside? With an eye on the case of Liège, we now reach the issues of public legal claims.

Once again, several can be made clearer if from a PIL perspective the question is asked as to the manner in which the EU will react to new “forms of life,” such as non marital partnerships, registered partnerships and same-sex marriages. In my point of view, this analysis should take account of two different developments: on the one hand the manner in which international aspects of new “forms of living together” are organised through PIL rules and, on the other, the manner in which these new forms of living together, that appear in an international context, have public legal consequences attributed to them, combined with the role that PIL plays in this. It is indeed conceivable⁵⁵ that the field of PIL becomes more liberalised in a sense that international legal relationships can subtly

⁵³ Liège Labour Court, 12 June 1990, JTT 1991, p. 438, referred to by M. Fallon, « Droit familial et droit des communautés européennes », *Revue trimestrielle de droit familial* 1998, p. 374 footnote 20.

⁵⁴ For the treatment of preliminary questions in the law regulating the rights and duties of Community civil servants, see Kohler, „Zum Kollisionsrecht internationalen Organisationen: Familienrechtliche Vorfragen im europäischen Beamtenrecht“, *Iprax* 1994, 416 (also referred to by N. Dethloff, *l.c.* footnote 47). See in this context also ECJ 5 February 1981, NJ 1981/654, with conclusion of Warner and comments of Shultz (Shultz refers in this context to the *Gunella* and the *Devred* cases).

⁵⁵ On the expectations on whether the EU shall be busy in this field, see V. Van Den Eeckhout, “Internationaal privaatrecht en migratierecht. De evolutie van een tweesporenbeleid,” *l.c.* p. 78 as well as L. Th. L. Pellis, “Internationaal privaatrecht. Echtscheiding, kindbescherming en gezagsvoorziening, meerderjarigenbescherming, alimentatie, adoptie (1998-2002), WPNR 2001, p. 1055-1063, where he states that the EU should look at PIL rules on non-marital partnerships, registered partnerships and homosexual marriages from a human rights perspective. Pellis refers in this context especially to the Action Plan, whereas it was stated that the principle of freedom of movement should be completed with the principle of respect for fundamental freedoms, including the principle of protection against discrimination. There is much discussion about whether or not the Brussels II Regulation is applicable regarding the dissolving of homosexual marriages. See, P.M.M. Mostermans, “De wederzijdse erkenning van echtscheidingen binnen de Europese Unie”, *NIPR* 2002, p. 263-273, with references.

create such new forms of living together and dissolve them: this can also have an effect on the manner in which the rules of jurisdiction, applicable law and recognition are drafted. But a liberal IFL does not necessarily mean a liberalisation of public legal claims on the basis of these forms of living together.

In my contribution “De vermaatschappelijking van het internationaal privaatrecht”⁵⁶ I came to the conclusion that a differentiation must be made, and developed an analysis of developments in “a non-European context” from this point of view. I pointed out that it is possible that IFL is being liberalised, but that at the same time in other areas of the law a more restrictive system is being created, as for example in Nationality Law. I therefore made a distinction between on the one hand tendencies to liberalise Dutch International Lineage Law and, on the other hand, tendencies to hamper public legal claims based on lineage relationships in a non-European context. The previous means that an evolution of IFL in liberalising sense is completely useless for several people if there are no public legal consequences attached to family legal relationships, especially if through denying public legal consequences the family legal relationships are hampered.⁵⁷

Altogether, the same sort of warning fits within a European context. Also in the European context when one talks about liberalising tendencies one should clarify in which area liberalisation is taking place. On the one hand one has the question to what extent the EU will interfere in PIL regulation of new forms of living together and, on the other hand, one has the question if these new legal practises can be linked to the principle of freedom of movement of EU employees and their families. In a wider sense, which legal consequences could be attributed to these family relationships? Imagine an employee in a EU context wishes to use his right to freedom of movement as a EU citizen and wishes to take his family members with him. The field of PIL grants him the possibility of a registered partnership that could also be recognised in another country as a registered partnership. This rule of PIL, however, can remain completely meaningless if the employee cannot take the person in question with him as a family member. This situation is still particularly prevalent if the term “spouse” as defined in the Regulation 1612/68 is strictly applied as being a married partner of another sex. This is particularly the case if the EU keeps holding on to a traditional and fairly conservative definition of family members.⁵⁸ In other words, even if the EU would

⁵⁶ See V. Van Den Eeckhout, “De vermaatschappelijking van het internationaal privaatrecht. Ontwikkelingen aan het begin van de 21ste eeuw”, *Migrantenrecht* 2002, p. 144-158

⁵⁷ See V. Van Den Eeckhout, “De vermaatschappelijking van het internationaal privaatrecht. Ontwikkelingen aan het begin van de 21ste eeuw”, *l.c.*, p.155-156

⁵⁸ In the Reed case a softening happened in the jurisprudence of the ECJ: if a member state grants non-married partners “social advantages” – and thus the issue was qualified - then the member state must also grant these advantages to those that migrate (on the patchwork and a situation of “two speeds” that could come to pass within the EU because of this see, H.U. Jessurun D’Oliveira (supra footnote 51) and M. Bell, *l.c.* For a critique on the restrictive definition of developments see K. Waaldijk, “Towards equality in the freedom of movement of persons” in K. Krickler (red.) After Amsterdam: sexual orientation and the European Union. A guide, Brussels, ILGA Europe 1999, p. 40-49. See in this context also M. Bell, *l.c.* In the Council Common Position of 5 December 2003, it is stated that “family member” also includes the registered partner *if the legislation of the host Member State treats registered partnership as equivalent to marriage*. See also, in this context, the changes made in the recent Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulation of Officials of the Europa Communities and the conditions of Employment of other servants of the European Communities, OJ L 124, April 27th 2004. In the 8th consideration, it is also argued as a principle that “Officials in a non-marital relationship recognised

interfere with IFL concerning these new forms of living together, it does not automatically mean that the term family member would be widened.⁵⁹

It can be said, however, that the PIL interference could at any rate be an important *impulse* in the widening of the definition of family member.⁶⁰ The question is also whether the EU can be more progressive than the European Court of Human Rights,⁶¹ concerning forcing member states to recognise new “forms of life,” particularly when the analysis is from a perspective of free movement of persons,⁶² or other claims that are granted in EC Law. If so, then the process of Europeanisation of PIL could mean a wider process of liberalisation, and it would also mean that a larger group of people would attain derived rights of residence in EC Law than before. If not, then the liberalisation via unifying PIL rules will be limited. All in all, the foregoing leads to the conclusion that one should be not too quick to speak of a process of liberalisation within Europe.

4. Looking further a field

Exactly how far Europe will systematically liberalise on a pure *PIL* field will become clear when Europe takes the reigns of matters that, seen from this perspective, really matter – namely, PIL regulations on marriage and lineage. The sensitive areas of marriage and lineage that, more so than for example divorce and Marital Property Law or Law of Succession can have a direct impact on the question to what extent someone has the right of

by a Member State as a stable partnership who do not have legal access to marriage should be granted the same range of benefits as married couples”.

⁵⁹ In this context see, H.U. Jessurun D’Oliveira, “Geregistreerde partnerschappen en de Europese Unie. Kanttekeningen over de internationale reikwijdte van het wetsvoorstel”, NJB 1995, 1566-1570, regarding the differences that must be made between the regulation of access to certain institutes on the one hand, and the consequences of the granting of those types of living together in European legal sense on the other.

⁶⁰ A comment that is perhaps useful here is that if in future, EC regulations on the terminology of “family members” are widened, then this could also be an important impulse in unifying PIL rules in this field: the necessity to have European PIL rules in this field would then also become more acute. Thus, the interference of the EU with IFL would not only have consequences for public legal claims, but also vice-versa the regulation of public legal claims could provide an impulse for EU interference in IFL. If one looks at it this way, the freedom of movement of persons (or in a wider sense the fundamental freedoms) and the regulation of IFL become linked and a reciprocal way of influencing each other emerges.

⁶¹ On the jurisprudence of the ECJ see D. Van Grunderbeeck, o.c.

⁶² On this see V. Van Den Eeckhout, “Internationaal privaatrecht en migratierecht. De evolutie van een tweesporenbeleid”, l.c. For a short allusion on this see M. Fallon, « Droit familial et droit des communautés européennes », *Revue trimestrielle de droit familial* 1998, pp. 361-400, especially p. 383-384. It may be important to point out that in this context the ECJ has already been more lenient in interpreting article 8 ECHR than the ECHR itself. See especially the Carpenter case (11 July 2002, C-60/00) and the note by Forder (EHRC 2002/76), specifically on the area of the importance of “illegal residence” and the possibility to have a family life elsewhere. This could be clarified by the fact that the EU wishes to protect family life *in order to* eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty. See also H. Toner, Comments on *Mary Carpenter v. Secretary of State*, 11 July 2002 (Case C-60/00), *European Journal of Migration and Law* 2003, p. 163-172 and H. Toner, Community law, immigration rights, unmarried partnerships and the relationship between European Court of Human rights jurisprudence and Community law in the Court of Justice, *Web Journal of Current Legal Issues* 2001, 5, on the fundamental question of whether the Community Institutions, Member States or Court of Justice can develop a distinctive understanding of what respect for family and private life means in the context of Community migration law.

residence⁶³, have not yet been brought up by the EU. The fact that Europe has not yet touched upon a PIL ruling of creation of family relations – particularly in legal relationships concerning external aspects – is probably also the reason why the theme has not yet been discovered by those that wish to aid foreigners. For jurists oriented on legal aspects concerning foreigners of third countries, EU interference will probably only become a sensitive issue if PIL regulations of family forming and family reunion of third countries come to pass. Here, it has to be noted that EU interference is currently in full swing in the area of consequences concerning residence of family relationships between and with persons from third countries.⁶⁴ But a regulation of IFL aspects of these issues has not yet been put to table. Thus, one can only speculate on the manner in which the EU wishes to regulate IFL issues: there are no clear signals on how one wishes to regulate marriage and succession.

Elsewhere, I developed an analysis of IFL in the “extracommunitarian” context: I both treated actual developments on a national (mainly Dutch) level, and *possible* developments on a supranational European level⁶⁵ – if the EU would also interfere on a fundamental basis in family relationships with external aspects.

In this contribution, I focused on “the intracommunitarian context”, treating both pure IFL-issues and IFL-issues as they are connected with public claims. Of course, it has to be noticed immediately that there is naturally still a large discussion about the right of respect of cultural identity and sovereignty of the member states. More in general, the instrumentation of IFL (or even more of substantive Family law) for economic reasons⁶⁶ has already been strongly criticised⁶⁷. This is a discussion that could inject subtle distinctions

⁶³ It may seem paradoxical that especially those areas where EU interference could be seen as most expected are the ones that are not (yet) being dealt with. International Marital Law and International Lineage Law are crucial matters in terms of filling in family legal terminology in EC Law as well as in general the improvement of legal security.

⁶⁴ See the Directive on the right of family reunification, OJ 3 October 2003

⁶⁵ See the chapter III.1. „Current developments on a Dutch national level“ and the chapter IV „EU interference in legal relationships with external aspects“ of „Communitarization of International Family Law as seen from a Dutch perspective: what is new? – A prospective analysis“, to be published in A. Nuyts (red.), *Transnational civil litigation in the European judicial area and in relations with third states*, Brussels: Bruylant 2004. See also V. Van Den Eeckhout, “Voetangels bij pleidooien voor recht op respect voor culturele diversiteit” in P.B. Cliteur and V. Van Den Eeckhout (red.), *Multiculturalisme, cultuurrelativisme en sociale cohesie*, Den Haag: Boom Juridische uitgevers 2001, p. 363-382; V. Van Den Eeckhout, “Internationaal privaatrecht en migratierecht. De ontwikkeling van een tweesporenbeleid”, *Nemesis* 2002, p. 75-88 and V. Van Den Eeckhout, “De vermaatschappelijking van het internationaal privaatrecht. Ontwikkelingen aan het begin van de 21ste eeuw”, *Migrantenrecht* 2002, p. 144-158

⁶⁶ Eventhough the EU is loosing its purely economic character and goals, and is now also working in areas such as Human Rights, it is still a fact that the EU is primarily inspired by economic motives. See on this the Draft Council Report 13017/01 on the need to approximate Member States’ legislation in civil matters of October 29th, 2001, adopted at November 16th 2001.

⁶⁷ See for recent discussions on this matter K. Boele-Woelki (red.), *Perspectives for the unification and harmonisation of Family Law in Europe*, Antwerpen: Intersentia 2003, particularly M. Jantera-Jareborg, “Unification of international family law in Europe – a critical perspective” in K. Boele-Woelki (red.), *Perspectives for the unification and harmonisation of family law in Europe*, Antwerpen: Intersentia 2003, p. 194-216, especially p. 211 footnote 45 and W. Pintens, “Europeanisation of family law”, in K. Boele-Woelki (red.), *Perspectives for the unification and harmonisation of family law in Europe*, Antwerpen: Intersentia 2003, p. 3-29.

in the tendency of liberalisation of IFL that has been started by the EU.⁶⁸ But at least, I hope to have made clear in this contribution that *European concerns themselves, combined with respect for human rights*, point in the direction of liberalisation of (international) family law.

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⁶⁸ See e.g. already supra, footnote 32, the argumentation of Struycken. See also N. Dethloff, *l.c.*, p. 56 regarding the consideration that restrictions on free movement arising from substantial legal differences are only permissible if they are justified by public interest, are not disproportionate, and are furthermore in agreement with the fundamental rights (with reference to the Bosman Case of the Court of Justice). See also, *mutatis mutandis* (Bell addresses the issue of the variety of national laws on partnerships) and as well with reference to the Bosman case, M. Bell, *l.c.*, for a discussion of “combat of fraud” and “protection of the national cultural or moral values” as justifications for keeping up obstacles to free movement.