

The connection between international family law and immigration law



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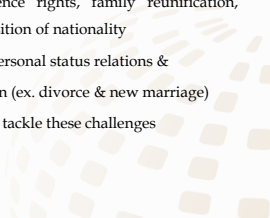
MARRIAGES, DIVORCES AND IMMIGRATION LAW

- I. Introduction
- II. Recognition of Marriages
- III. Recognition of Divorces
- IV. Conclusions



I. Introduction

- Validity & Recognition of civil status (marriages) often determines access to certain rights: residence rights, family reunification, pension rights, allowances, acquisition of nationality
- Need for continuity for existing personal status relations &
- Need for evolution and integration (ex. divorce & new marriage)
- Private international law needs to tackle these challenges



II. Recognition of Marriages

- No EU Regulation on the recognition of Marriages
- Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages: only 3 signatories: 3 : Australia, Luxembourg, Netherlands, Liberal Conflict of law rule & recognition system
- National conflict-of-law rules



II. Recognition of Marriages

- Caraslanis case Cass. civ. 1re, 22 juin 1955, Bull. civ. I, n° 268 – “Caraslanis”
- Religious marriage
- Characterisation (*Qualifikation*)
- Under French law: issue of form ⇒ Lex loci celebrationis
- Under Greek law: ceremony considered to be according to Greek law an issue of substance, therefore governed by law of Nationality.



II. Recognition of Marriages

- The other side of the coin: Greece's experience
- Greece up to 1981 recognised only religious marriages
- Civil marriages between 2 Greek citizens or a Greek citizen & alien in a foreign country: inexistent; - serious problems – New Law & transitional provisions



II. Recognition of Marriages

- Modern practices
- Divergence of perceptions & institutions persists
- State authorities, religious authorities
- Civil status authorities ≠ Lack of civil status authorities & certificates
- Iranian marriages concluded : negative answer by Administrative authorities: lack of recognition/ difficulty to get married and to have their status recognised
- Solution allowing to overcome the difficulty: Rejection/ Court application to get an authorisation to marry



II. Recognition of Marriages

- Modern practices
- « Nikah nama » marriage: religious marriage
- Can be recognised (obiter) MultiMember Court of Athens 2772/2013; Ct appeal Athens 5018/2011



III. Recognition of Divorces

- Talak divorce : unilateral divorce
- Case: Egyptian M + Greek-egyptian woman
- Divorce problem in Greece
- 2 possibilities: recognition of foreign private divorce / initiation of new divorce proceedings in Greece
- Public policy Exception
- Drawbacks/ Advantages: Solution



III. Recognition of Divorces

- National conflict-of-law rules
- Preponderant connecting factor: Nationality (Germany, Austria, Italy, Greece, etc)
- Example: Greek conflict-of-law rule & German conflict-of-law rule
- French conflict-of-law rule Rule: article 309 Civil code : typical example of Unilateral conflict-of-law rule
- *Divorce and legal separation are governed by French law:*
 - where both spouses are of French nationality;
 - where both spouses are domiciled on French territory;
 - where no foreign law recognizes itself as applicable, whereas French courts are competent in matters of divorce and legal separation



III. Recognition of Divorces

- Greek civil code arts 16 & 14 (inspired by arts 17 & 14 EGBGB)
- Art 16: « Divorce and judicial separation are governed by the law that applies to the spouses' personal relations at the commencement of the divorce or separation proceedings. »
- Art. 14: « The personal relations of the spouses are governed, in order of priority, by: the law of their **last common nationality** during the marriage, provided that one of them still retains it; the law of their **last common habitual residence** during the marriage; the law with which the spouses are most closely connected.



III. Recognition of Divorces

- Change of paradigm
- Rome III Regulation (1259/2010) on the applicable law on divorce and separation
- Adopted through the mechanism of reinforced cooperation ⇒ no uniform private international law
- Positive impact of the new conflict of law rules on migrant populations



III. Recognition of Divorces

- Rome III Regulation
- Article 8 **Applicable law in the absence of a choice by the parties**
- In the absence of a choice pursuant to Article 5, divorce and legal separation shall be subject to the law of the State:
 - (a) where the spouses are **habitually resident** at the time the court is seized; or, failing that
 - (b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized; in so far as one of the spouses still resides in that State at the time the court is seized; or, failing that
 - (c) of which both spouses are nationals at the time the court is seized; or, failing that
 - (d) where the court is seized.



III. Recognition of Divorces

- The default conflict-of-law rule
- Limited party autonomy
- Sohyouni case: Court of Justice of European Union
- Facts: religious and private divorces outside the scope of the new regulation ⇒ more fragmentation



IV. Conclusions

- Despite efforts of coordination: problems persist
- Practical ways to tackle difficulties and the importance of flexibility
- Role of the European Convention of Human rights to deal with some of these problems : Article 8 ECHR
- Alternative solutions



THANK YOU !

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Questions of descent as a prerequisite for a child's nationality

Descent and Migration Law from a German National and International Private Law (PIL) and International Procedure Law perspective



WHY ARE QUESTIONS OF NATIONALITY AND DESCENT/PARENTAGE SO IMPORTANT?

- Descent/parentage is not only a family law concept, but has major consequences in:
 - > **German Nationality law** (=StaatsangehörigkeitsG= StAG): regulates how German nationality is acquired
 - > **Migration law** (=Act of Residence=AufenthG): addresses family reunification, residence rights in Germany
- And has also consequences > inheritance law, maintenance obligations, custody (parental responsibility), identity



NATIONALITY BY DESCENT AS AN ENTRY POINT TO MIGRATION RIGHTS ACCORDING TO THE GERMAN NATIONALITY ACT

- Migration rights addresses right to reside in Germany and economic activities of foreigners in Germany
- Citizenship/Nationality = exemption from residence law:
Germans are not subject to the Residence Act and have freedom of movement > Descent decides



NATIONALITY BY DESCENT AS AN ENTRY POINT TO MIGRATION RIGHTS (1)

- Sec. 4 par. 1 StAG (= German Nationality Act): A child automatically acquires German citizenship by descent from a German parent > jus sanguinis > depends on legal parentage!
- Sec. 6 StAG: Adoption as a child by Germans > automatic citizenship > qual treatment with biological descent
 - > The place of birth is primarily irrelevant (jus sanguinis)
 - > Therefore: descent = central requirement for the acquisition of a German nationality
- Equal status of mother and father, but legal parenthood has to be established



NATIONALITY BY DESCENT AS AN ENTRY POINT TO MIGRATION RIGHTS (2)

- If a child is German > family reunification of parents (Sec. 28 Residence Act) > Parents of a minor German child receive right of residence, meaning the child's nationality by descent gives the parents rights to immigrate
- If parents are German, but the child is not German e.g., mother is German, but descent is not recognized (lack of acknowledgment of paternity, sperm donation) > Child might be considered as a foreigner > residence permit is required



LEGAL PARENTHOOD ACCORDING TO GERMAN LAW

- German substantive law:
 - > *Maternity: Mater semper certa est* (Sec. 1591 German Civil Code (=BGB))
 - > *Paternity: Marital birth* > presumption of paternity according to Sec.1592 No. 1 BGB
or
Acknowledgement of Paternity or judicial determination, Sec. 1592 No. 2, 3 BGB.



LEGAL PARENTHOOD ACCORDING TO GERMAN LAW (2)

- till now: no analogous application of Section 1592 No. 1 BGB to the woman who is married to the mother (Federal Court of Justice, decision of October 10, 2018 – XII ZB 231/18 -)
- 6 (!) cases (of two married mothers) pending at the German Federal Constitutional Court, because the mother married to the birth mother still has to adopt the child born in the marriage
- Instead of deciding these cases:

In its ruling of April 9, 2024 (Ref. 1 BvR 2017/21, NJW 2024, 1732) regarding the law of descent, the Federal Constitutional Court strengthened the rights of biological fathers and instructed the legislature to revise (only) the law on contesting paternity by June 30, 2025



GERMAN INTERNATIONAL PIL RULES ON PARENTAGE AS INDIRECT NATIONALITY/MIGRATION RULES

- Who is descended from whom, if
 - Child does not live in Germany
 - Child does not have a German Nationality
 - Parents or one parent does not have a German Nationality

> Which law is applicable (statute of parentage)?

> Are foreign parentage decisions to be recognized in Germany? > Question of International Procedure Law rules



LEGAL PARENTHOOD ACCORDING TO GERMAN PIL – ART. 19, 20 INTRODUCTORY ACT TO THE CIVIL CODE (= EGBGB)

- Applicable law = law of the child's habitual residence at the time of birth
or in relation to each parent the descent can also be determined by the law of the State of this parent's (mother or father) nationality
or if the mother is married, the descent can also be determined by the law that governs the general effects of the marriage under Article 14 paragraph 1 at the time of the birth of the child > (favor filii principle)
- Alternative connecting factors with the goal to make acknowledgment as easy and valid as possible
- Formal validity: Art. 11 EGBGB
- Contesting parenthood (including motherhood), Art. 20 EGBGB, but not in the case of loss of parenthood through adoption



LEGAL PARENTHOOD IN EUROPE

Commission proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of public documents in matters of parentage, and establishing a European Parentage Certificate dated December 7, 2022; COM(2022) 695 final.

Is still in progress



LEGAL PARENTHOOD – PROBLEMS IN INTERNATIONAL PIL AND INTERNATIONAL PROCEDURE LAW

- anonymous birth
- surrogacy (abroad)
- foreign birth certificates
- Adoption
- Unclear paternity > refusal of recognition
- Without legal parenthood > no acquisition of German nationality
- Child may be stateless > residence problems, registration difficult etc.



SURROGACY

- Germany: Surrogacy is prohibited.
 - Permitted abroad > Who is the mother?
- Federal Court of Justice (2014 ff.): Foreign decisions can be recognized (ordre public only to a limited extent)
- Consequence: Child might receive German citizenship > automatic right of entry and residence



SURROGACY BASED ON GERMAN INTERNATIONAL PROCEDURAL LAW IN THE CONTEXT OF THE RECOGNITION OF FOREIGN JUDGMENTS

- Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (=FamFG), here Sec. 108, 109
- Impediments to Recognition, Sec. 109 No. 4: violation of public policy due to: violations of human dignity, threats, exploitation of a predicament, etc.
- This concerns exclusively the recognition of surrogacy carried out abroad, in particular in the US, Mexico, Ukraine, Canada, and also the UK



SURROGACY BASED ON GERMAN DECISIONS IN THE CONTEXT OF THE RECOGNITION OF FOREIGN JUDGMENTS BY THE GERMAN FEDERAL COURT OF JUSTICE (BGH)

- Principle: genetic parenthood must exist > then no violation of public policy, foreign decision (!) is recognizable, cf. BGH NJW 2015, 479 > Consequences: Registration of the German intended parents in the civil register
- Pre-birth registration based on a foreign decision: US immediately in the civil register, cf. BGH, NJW 2022, 2273
- Postnatal decisions on parentage: Ukraine > the problem here is, whether the decision has retroactive effect to the birth of the child or ex nunc (at the time of the decision) > BGH left this question open
- Review of surrogacy after birth, then correction of the birth certificate and issuance to intended parents > Mexico, UK, states in the USA --> also controversial



QUINTESSENCE

- In Germany, descent is not only the basis for nationality/citizenship, but also a central gateway to apply migration law or not.
- For those who are German by descent migration law does not apply.
- Those who are not German by descent must migrate as foreigners.
- The descent of the child can generate migration rights for parents.
- Foreign decisions on parentage may or not may be recognized in Germany.



LINK BETWEEN IMMIGRATION LAW AND FAMILY LAW

- **I - The impact of immigration law on the return of illegally displaced children**
- A. The impact on the unlawfulness of the removal
- UK Supreme Court in *G v. G* on 19 March 2021.
- Court of Justice of the European Union 2 August 2021 (CJEU, 2 August 2021, C-262/21)



- B. The impact on the child's integration into their environment
- Cass. Civ. 1^{ère}, 13 July 2017, No. 17-11. 927).

II - The impact of immigration law on the exercise of visiting and accommodation rights