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Codification of Private International Law: Pros and Cons

François Rigaux*

The last hundred years have been a century of codification of private international law. The starting-point was the EGBGB which entered into force on January 1, 1900, but the movement, which relented during the first half century, received a fresh impulse after the end of World War II. The last thirty years have been the "thirty glorious years" of recording private international law on the statutory books. In Europe, the last most striking events of that kind were the Swiss law on private international law of December 18, 1987,¹ and the Italian law of May 31, 1995.² Liechtenstein has also adopted new provisions on private international law in 1997,³ as well as Russia.⁴ Belgium is following suit. At the end of 1999, the Belgian government sought a consultative opinion from the Conseil d'Etat on the draft statute containing a code of private international law.⁵

Although, on the other side of the Atlantic, "conflicts law and legislation are still perceived as antithetical themes,"⁶ two major exceptions have to be mentioned: the Louisiana Act 923 of 1991⁷ and the new provisions of the Code Civil of Quebec, which entered into force on January 1, 1994.⁸ It is no mere coincidence that both jurisdictions imported in the first years of the nineteenth century a French inspired Civil Code. The theme of this issue of the *Louisiana Law Review* has been purposefully chosen since Professor Symeonides was the much acclaimed reporter of the Louisiana Act.

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1. Loi fédérale sur le droit international privé (LDIP) du 18 décembre 1987, Feuilles fédérales, 1983 I 255, and Message concernant une loi fédérale sur le droit international privé 82-072 (10 novembre 1982).

2. Legge 31 Maggio 1995, N. 218, Riforma del sistema italiano di diritto internazionale privato, Gazzetta Ufficiale, suppl. ord. N. 68 al n. 128 del 3 giugno 1995. See Paolo Mengozzi, La riforma del diritto internazionale privato (Editoriale Scientifica, Napoli 1996).

3. Gesetz vom Sept. 19, 1996 über das internationale Privatrecht, Liechtensteiner Landesgesetzblatt 1996, Nr 194, Nov. 28, 1996. See Fritz Sturm, Das neue internationale Privatrecht Liechtensteins, Ludwig Boltzmann Institut für Europarecht, Heft 2, Wien 1997.

4. M.D. Bogouslavski, Le droit international privé en Russie et dans les autres Etats membres de la CEI au seuil du XXle siècle, Clunet 413-34 (1999).

5. Avant-projet de loi portant code de droit international privé.

6. Symeon C. Symeonides, *Private International Law Codification in a Mixed Jurisdiction: The Louisiana Experience*, 57 *RabelsZ* 460, 461 (1993).

7. Articles 15 through 49 of Act 923 have been redesignated as Articles 3515 through 3459 to form Book IV of the Louisiana Civil Code.

8. Loi du 18 décembre 1991 insérant un nouveau Livre 10 dans le Code civil du Québec. French text in 81 *Rev. crit. dip* 574 (1992). See Patrick Glenn, *Codification of Private International Law in Quebec*, *IPRaX* 308-12 (1994); *RabelsZ* 231-68 (1996) with both French and English version.

This present paper does not purport to analyze the various instruments embodying new rules of private international law. This task would be tremendous.⁹ The aim is instead to submit some reflections on the very principle of codification in private international law.¹⁰

The following questions will be dealt with:

- What are the competing sources of private international law?
- What does "codification" mean?
- What areas of private international law are better adapted to some kind of legislative action?
- What judgement, if any, can be passed on codification of private international law?

I. THE SOURCES OF PRIVATE INTERNATIONAL LAW

The word "sources" has various meanings. It can refer to the origin of a branch of law, and conveys at the same time a specific approach to it. When Roman law survived the dislocation of the Empire, it had to compete with different conflicting statutes (*statuta*) adopted by local jurisdictions. Italian scholars such as Bartolo da Sassoferrato (1314-1357) drafted rules to make a choice between the competing statutes. Those rules were applied by the courts.¹¹ Scholarly from its origin, the science of conflict of laws won access to the courts.

Conflict law is law on the law. Its realm is beyond the power of any legislator. The unifying shadow of Roman law lent support to the hope of overcoming the division of sovereignty through the device of common rules of conflict. After the invention of international law, *tout court* conflict rules found shelter in it. Francisco de Vitoria's *ius communicationis*, which justifies the colonial conquests,¹² concerns the relationships between the subjects of various sovereigns and is more akin to what is now called private

9. See, e.g., Paolo Picone, *La riforma italiana del diritto internazionale privato* (1998); W. Riering, *IPR-Gesetze in Europa* (1997); Symeon C. Symeonides et al., *Conflict of laws: American, Comparative International* (1998); *Aussereuropäische IPR-Gesetze* (1999); *Conflict of laws statutes* (R. Maclean ed., 1996).

10. 55 Boris Nolde, *La codification du droit international privé, Recueil des cours de l'Académie de droit international*, 303-431 (1936-I); 177 Eric Jayme, *Considérations historiques sur la codification du droit international privé, Recueil des cours . . .*, 9-102 (1982-IV).

More recently: Catherine Kessedjian, *La codification en droit international privé*, et Emmanuel Putman, *Réflexions sur la question de la codification en droit international privé*, in *La codification du droit international*, Colloque d'Aix-en-Provence de la Société française de droit international 101-16 (1999); H. Muir Watt, *La codification en droit international privé*, *Droits* 149-60 (1998).

11. See, e.g., Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 *Am. J. Comp. L.* 297-317 (1953).

12. De Indis recenter inventis, text of lessons (*relectiones*) delivered at Salamanca during the last years of the fifteenth century and published on the notes of a student at Lyons in 1537. The quoted text was revised by H.F. Wright, *The Classics of International Law*, III, 1, at 257 (1917).

international law¹³ than to the "public" subdivision of the *ius inter gentes*. Grotius as well as Vitoria and the seventeenth to eighteenth century school of natural law do not separate the two branches of international relationships. Vitoria's justification of colonization is twofold: first is the freedom of communication between the peoples, and the second is the freedom of evangelization.¹⁴ It is striking how Story adhered to Vitoria's perspective. He states "The truth is, that the law of nations, strictly so called, was in a great measure unknown to antiquity, and is the sole growth of modern times, under the combined influence of Christianity and commerce."¹⁵ From Blackstone¹⁶ to Phillimore,¹⁷ Lorimer¹⁸ and Wharton,¹⁹ the law of nations is divided into two realms, the relationships between independent Christian princes and the dealings of those princes' subjects between themselves.

Continental scholars of the nineteenth century, Savigny²⁰ and Mancini,²¹ do not part company with their Anglo-American colleagues of the same period. All of them profess international law to encompass the whole field of human intercourse as between Christian nations and the subjects thereof. Laurent alone takes a more enlightened position.²² Savigny intends "to establish a scientific basis for conflicts law, congruent with the international community of law among independent states."²³ At the turn of the century another endeavour is gaining ground, namely the drafting of international treaties in the field of conflicts law. It is contemporary

13. The expression *international law* (instead of *law of nations*, *droit des gens*, *ius gentium*, *Völkerrecht*) was coined by Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, chap. XCVII, § 25, at 296 (1st ed. J.H. Burns & H.L.A. Hart eds., Univ. of London, The Athlone Press, 1970) (1789). It was taken up by Etienne Dumont, *Traité de législation civile et pénale* (1802). Later on Joseph Story denominated private international law the branch of conflicts of laws: *Commentaries on the Conflicts of Laws, Foreign and Domestic* § 9, at 9 (1834). Afterwards Schäffner used the title *Entwicklung des internationalen Privatrechts* (1841) and he was followed by Foelix, *Traité du droit international privé ou du conflit des lois de différentes nations en matière privée* (1843).

14. Vitoria, *De Indis*, *supra* note 12, at III, 9, 265.

15. Story, *supra* note 13, § 3, at 4.

16. W. Blackstone, *Commentaries on the laws of England*, t. IV, ch. V, at 66 (1st ed. 1765-1769, 14th rev. ed. with the last corrections of the author, London, Strahan, 1803).

17. Sir Robert Phillimore published four volumes from 1854 to 1861, under the same title *Commentaries upon international law*. The fourth one (1861) bears a proper title: *Commentaries upon international law, private international law or comity*.

18. James Lorimer divides international law into three branches, the third one being private international law: *The Institutes of the Law of Nations* (W. Blackwood and sons, Edinburg and London, 1883-1884), t. Ier, at 4 (1883).

19. According to Francis Wharton, private international law is "that part of the law of nations which concerns the determination of private claims." *Commentaries on Law* § 252, at 263 (Philadelphia, Kay & Brother, 1884).

20. Friedrich Carl von Savigny, *System des heutigen römischen Rechts* (Berlin, Veit und Comp.) t. VIII, § 348, at. 27 (1849).

21. See Eric Jayme, Pasquale Stanislas Mancini (Ebelsbad, Grener, 1980); Tito Ballarino, *Diritto internazionale privato* (2da ed. Padova), Cedam, 1996, at 30-34; Jayme, *supra* note 10, at 39-49.

22. Laurent remains noteworthy for his widening of the community of civilized nations. He strongly criticizes Savigny's narrow concept of "Christian" peoples: François Laurent, *Droit civil international* in eight volumes, t. I, § 25, § 39, § 132 f., § 147 f., § 413 (1880-1881).

23. Yntema, *supra* note 11, at 309.

with the German EGBGB. After World War II, the legislative activity of the several states and the proliferation of Hague Conventions in specific fields of the law of conflicts will reach a level that was unknown before.

II. WHAT IS CODIFICATION?

Codification can at first have very broad meaning: enacting a written formulation of the law. It stands in opposition to non-written law, such as custom. But custom itself is fashioned after judicial decisions and contractual practices, which give it some kind of a written formulation. Since customary sources are scattered and difficult to assess, it is useful to codify them in order to bring them into a coherent body.

The sources of codification are either international or domestic. Almost all branches of law can be tackled in an international agreement: not only branches of international law itself, but also various aspects of substantive domestic law, which have been submitted to a process of unification or harmonization. Private international law can be codified either at the international or at the national level. The codification of public international law can only occur through an interstate agreement, but states are able to codify their own approach to foreign relations. Such is the character of the Restatement Third Foreign Relations Law, which is a form of *äusseres Staatsrecht*, but not a codification in the proper sense.

In view of the customary origin of international law, codifying that branch of law purports to give a comprehensive and as complete as possible body of traditional solutions. The International Law Commission in the field of "public" international law, and the Hague Conference of private international law in the "private" sphere are institutions whose mission is one of codification.

Since the days of the Justinian *Codex iuris civilis* up to the French, the German and the Swiss "Civil Codes," codification has also had a more ambitious purpose. It attempts to compress the whole of a branch of law into a comprehensive unit, a civil code, a penal code, a code of civil or penal proceedings, a code of public health and so on. It does not attempt to encompass the whole machinery of law, but only a part of it under the heading of a unifying idea.

The codification of international law, both public and private, has never been so extended. What is called codification either at Geneva or at the Hague consists of choosing a specific topic and bringing it into a written form. There does not exist either a thorough code of international law patterned after a *code civil*, nor an international code of private international law.

The first codifications of civil law contained some rules of conflict. This was the case with the Prussian Code of 1792 and the Code Napoléon of 1804, where a small number of provisions of private international law were scattered within the articles of substantive law. The Italian Civil Code of 1865 took a more deliberate approach through preliminary provisions (*disposizioni preliminari*) on conflicts of law, drafted according to the nationality principle under the influence of Mancini. A similar pattern was followed in the German BGB, whose introductory law (*Einführungsgesetz*) contained basic rules of private international law.

The first and the second Italian *Codice civile*, as well as the German *Bürgerliche Gesetzbuch*, codified in the same instrument rules of civil law and conflict of laws rules. The recent Louisiana and Quebec conflict of laws rules were formally inserted in the civil codes of those jurisdictions.

Consequently, codification has two different meanings which partially overlap. One is formal. It produces a complete body of law, e.g. a civil or a penal code. Up to now such an endeavor has not been done in the field of (public) international law, where codification is always restricted to specific topics. The second meaning is of a substantive nature and it draws a distinction between two policies of codification: either fixing existing rules, for instance customary norms, or imagining original answers to new problems. National codes and international codification can equally look backward or forward. Some codes have been blamed for their obsolete character. For instance the French *Code de procédure civile* has been labelled as being dead before having been born. The German BGB also met with heavy criticism at the very moment when it entered into force.²⁴

State legislatures also insert special rules of conflict into specific statutes. This is a far cry from codification in the proper sense, even if the legislative intent is to embody in a unique instrument the substantive and conflict of laws aspects of a definite problem. While such special conflict of law rules are not inserted in a codification, there is doubt whether according to the principle *Specialia generalibus derogant*, they take precedence over the codified general rules of conflict.

Another problem is the concurrence between a state codification and rules of conflict embodied into an international instrument. The solution will depend on the answer given in each jurisdiction to the conflict between international and domestic law.

III. WHAT AREAS OF PRIVATE INTERNATIONAL LAW ARE BETTER ADAPTED TO SOME KIND OF LEGISLATIVE ACTION?

It follows from the preceding division that two sources of written law, state legislation and international treaties, compete in the various areas of private international law. The problems of judiciary jurisdiction and mutual recognition of judgments are better regulated through the second category of sources. Indeed, they are linked with the idea of reciprocity. The Full Faith and Credit Clause of Article IV, Section 1, of the Constitution of the United States is more "exacting" when applied to judgments than to statutes.²⁵ That very provision also indicates that between international treaties and state legislation there exists a third *genus*: in a

24. The civil law provisions of the BGB were, from the outset, heavily criticized by such an influential scholar as Gierke and by the *Freirechtslehre*. Some specialists of private international law addressed specific critics to the EG: Theodor Niemeyer, *Zur Vorgeschichte des Internationalen Privatrechts im Deutschen Bürgerlichen Gesetzbuch* ("Die Gebbardschen Materialien"), Veröffentlichungen des Seminars für Internationales Recht an der Universität Kiel, 1 Heft (München und Leipzig, Duncker und Humblot, 1915), p. 1 with references on note 2.

25. See, e.g., *Baker v. General Motors Corp.*, 522 U.S. 222, 231, 118 S. Ct. 657, 663 (1998) (quoting *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277, 56 S. Ct. 229, 234 (1935)).

federal system interstate conflicts can be regulated through federal legislation. The United States Supreme Court has sporadically controlled the application of the Full Faith and Credit Clause as between sister states,²⁶ and during the nineteenth century the same court did not refrain from setting forth conflict of laws rules.²⁷ It has been convincingly argued that Congress would be empowered to pass legislation unifying international and interstate conflict rules in the United States.²⁸ Should that be the case, state codification would be preempted by an Act of Congress just as it can be controlled by the United States Supreme Court under Article IV, Section 1 of the Constitution.

The European Community presents rather similar features. In some special fields, European regulations and directives combine substantive laws with rules of conflict²⁹ which preempt state legislation or case law. The unification of the law applicable to contractual obligations between Member States took the form of an international treaty, the Convention of Rome of June 19, 1980. Their interpretation can be checked by the Court of Justice of the European Communities but the European Commission contemplates the transformation of the provisions of the Brussels Convention on the mutual recognition and enforcement of judgments into a regulation binding upon the states.³⁰ Subsequently, when codifying their conflict

26. The most famous cases are *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 52 S. Ct. 571 (1932); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 55 S. Ct. 518 (1935); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 59 S. Ct. 629 (1939). More recently: *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 101 S. Ct. 633 (1981); *Phillips Petroleum Co. v. Shuttt (Shutt III)*, 472 U.S. 797, 105 S. Ct. 2965 (1985). All those cases are interstate cases to which the Full Faith and Credit Clause is applicable. In truly international cases, the choice of law process is submitted to the Due Process Clause: *Home Ins. Co v. Dick*, 281 U.S. 397, 50 S. Ct. 338 (1930); *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 84 S. Ct. 1197 (1964); *Day and Zimmermann v. Challoner*, 423 U.S. 3, 96 S. Ct. 167 (1975).

27. *Smith v. Condry*, 42 U.S. (1 How.) 28 (1843); *Dennick v. Railroad Co. of New York*, 103 U.S. 11 (1880); *Stewart v. Baltimore and O.R. Co.*, 168 U.S. 445, 18 S. Ct. 105 (1897); *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120, 24 S. Ct. 581 (1904); *Davis v. Mills*, 194 U.S. 451, 24 S. Ct. 692 (1904); *Western Union Tel. Co. v. Brown*, 234 U.S. 542, 34 S. Ct. 955 (1914); *Spokane and Inland R.R. v. Whitley*, 237 U.S. 487, 35 S. Ct. 655 (1915).

28. In spite of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020 (1941). See, e.g., William Winslow Crosskey, *Politics and the Constitution in the History of the United States* 541-57 (1953); Brainerd Currie, *Selected Essays on the Conflict of Laws* 194, 272 n.19 (1963); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 *Colum. L. Rev.* 249, 331-36 (1992); Willis L. M. Reese et al., *Cases and Materials on Conflict of Laws* 376 (9th ed. 1990).

29. In an abundant doctrine see: Y. Loussouarn, *Les conflits de lois en matière de contrat d'assurance et la directive communautaire du 22 juin 1988*, *Rev. gén. ass.terr.*, 291-305 (1989); B. Smulders & P. Glazener, *Harmonization in the field of insurance law through the introduction of community rules of conflict*, *Common Market LR*, 775-98 (1991); Marc Fallon, *La protection internationale de l'acheteur sur l'interréseau dans le contexte communautaire*, in *La protection des consommateurs acheteurs à distance* 241, 273-81 (ed. Hildegard & Bernd Stauder Zürich, Schulthess Polygraphische Verlag, 1999).

30. The Title IV (articles 61 et seq.) inserted in the EC Treaty by the Treaty of Amsterdam has widened the competence of the Council in that field. See Christian Kohler, *Interrogations sur les sources du droit international privé européen après le traité d'Amsterdam*, *Rev. crit. dip.*, at 7, 9 note

of law rules, Member States have incorporated the solutions of the Rome Convention into their national instruments.³¹ One might have doubts about the wisdom of duplicating or even multiplying the same substantive wording in legal instruments of different weight. A legislative enactment, the provision of an international treaty, a constitutional rule, an EC regulation, and an EC directive each have a proper status. Their interpretation is governed by different methods, and they are submitted to emendation or modification by different authorities. The "pedagogical" intent of state legislation to "codify" into a singular instrument all relevant rules, whatever the source of each of them, can only bring more confusion into a difficult field.

IV. SOME RELUCTANCE TO CODIFY PRIVATE INTERNATIONAL LAW

When drafting conflict of law rules, a state legislature is addressing its own judiciary, supposing they have jurisdiction in the case at hand, because a state legislator is not a universal lawgiver. It faces a choice: either delineating the scope of application of its sole substantive law or deciding what law, domestic or foreign, is applicable to the case. Old examples are in favor of the first choice: under the wording of Article 3, section 3, of the French Civil Code, "the laws concerning status and capacity of persons govern French citizens even residing abroad." However, in spite of the "unilateral" formulation of the conflict rule, the provision has been applied analogically by submitting aliens to their own national law.³²

The German EGBGB raised a more awkward problem of interpretation. When it was drafted, the dilemma of adopting either unilateral or multilateral conflict rules was well known and the legislature combined both methods: some provisions were unilaterally framed, others not. The legislative history indicated that the intent embodied in the unilateral provisions was to guarantee only the application of German law to situations linked with the Reich. The correlative application of foreign law would depend upon the conclusion of treaties providing for the application of German law in the foreign jurisdiction. Nevertheless, the Reichsgericht disregarded the content of the legislative history on that point and it afforded a multilateral interpretation to the unilaterally framed provision of the EG.³³

12, 15, 24-25 (1999). See the Act of the Council 98/C 229/01 establishing on the basis of Article K-3 of the Treaty on the European Union the Convention concerning jurisdiction, recognition and enforcement of judgments in matrimonial matters, *OJEC*, C 221, July 16, 1998, p. 1.

31. While Article 27 to 37 of the German *Gesetz zur Neuregelung des Internationalen Privatrechts* of July 25, 1986 reproduce provisions of the Rome Convention, Article 57 of the Italian statute of May 31, 1993, declares that convention applicable in its proper field.

32. That interpretation dates back to a judgment of the Cour d'appel de Paris (June 13, 1814, *Styles v. Busqueta*, S 1815, 2, 67). The analogical interpretation of Article 3, section 3, was emphasized by the Belgian Cour de cassation: (1re ch.), Jan. 19, 1882, *Bauffremont*, Pas., 1882, I, 38.

33. RG Feb. 15, 1906, *RGZ* 62, 400, 401-402; Nov. 8, 1917, *RGZ* 91, 139. The last decision was all the more noteworthy since during World War I it concluded to the application of the law of a country at war with Germany. The same interpretation was reiterated after World War II: BGH May 2, 1966, *BGHZ* 45, 351.

The commentary of the first draft (1881) was written by a public official (*Ministerialrat*) of the Grand Duchy of Baden, Alfred Gebhard. The text of that commentary was not published until 1915.³⁴ Although Gebhard professed a strict multilateralism, in obedience to Savigny's doctrine,³⁵ the provisions of the first draft being drawn up accordingly, some articles were transformed later on into unilateral rules. The intention to exclude any multilateral interpretation (which was well known through the French case law) was clearly expressed. However, Gebhard's multilateralism was submitted to Savigny's restrictive approach. It was limited to the law of foreign "Christian" nations whose institutions were deemed sufficiently similar to the German BGB to allow their application in virtue of the German EG.³⁶ Moreover, the Reichsgericht's decision is interesting for its treatment of legislative history. The text of some provisions of the EGBGB is silent on the law applicable to a situation which is not linked to Germany. That the legislature rejected the original Gebhard approach did not mean that it adhered to the opposite view. The courts are thus empowered to fill gaps through an analogical interpretation of the explicit rule on the applicability of German law although the Bundesrat had unequivocally condemned such interpretation.³⁷

Among the German scholars who, from the very beginning, criticized the EGBGB, some different motivations can be traced. Either they were opposed to codification as such,³⁸ or they were not satisfied with the formulation of unilateral rules (such was the situation of Gebhard), or they did not approve of the content of some rules. But it is not the same thing to pronounce oneself against codification as such as it is to be dissatisfied with the content of determinate rules of a promulgated code.

The principle of codification can be presented either in a spatial or in a time setting. Small units in a federal entity in being (as Louisiana) or in becoming (as Belgium within the EU) risk jeopardizing a broader scheme of "unification" by crystallizing local or national rules of conflict.³⁹ One can regret, as many American

34. It was first published by Theodor Niemeyer, *supra* note 24. More recently scholars have brought to light other materials of the legislative history of EGBGB: *Die geheimen Materialien zur Kodifikation des deutschen Internationalen Privatrechts*, herausgegeben durch Oskar Hartwig & Friedrich Korkisch (Tübingen, Mohr [Siebeck] 1973); Michael Benn, *Die Entstehungsgeschichte der einseitigen Kollisionsnormen des EGBGB unter besonderer Berücksichtigung der Haltung des badischen Redaktors Albert Gebhard und ihre Behandlung durch die Rechtsprechung in rechtsvergleichenden Sicht* (Frankfurt/M, 1980).

35. Hartwig & Korkisch, *supra* note 34, at 52-53.

36. *Id.* at 58-61.

37. RGZ 62, 401.

38. This was the case of Ludwig von Bar, a leading private international lawyer of the time. Ludwig von Bar, *Theorie und Praxis des internationalen Privatrechts*, t. I, p. 14 (2. Aufl. Hannover, 1889). According to the new materials unearthed by Hartwig & Korkisch *supra* note 34, Bismarck and the *Auswärtige Amt* (Foreign Office) were opposed to codification for two reasons, one was theoretical (private international law is a branch of *Völkerrecht*) and another was practical: after having recognized the application of foreign law before German courts, the Government would be worse off to negotiate treaties on the basis of reciprocity.

39. It could be retorted that when called to participate in the drafting of an international codification, the states which have codified their domestic law have a better say during the

scholars do, that the United States Supreme Court did not infer from the Full Faith and Credit Clause its power to draw up common rules of conflict on the federal level. Such a scheme would have combined two advantages: the flexibility of case law and the unifying force of a national (federal) judiciary.

In Europe the problem is not altogether different. The development of the European Union will enhance the necessity of unifying conflicts rules not only in the field of contracts (which is already done) but also regarding tort law, family law, inheritance, and so on. It will be necessary to realize it through written law (treaty provisions, regulations, directives) put under the harmonizing interpretation of the Court of Justice of the European Communities and with the hope of imaginative case law. Are national legislative efforts consistent with such a perspective? The answer is at best dubious.

Two topics still have to be dealt with. The first concerns a scientific, universalist approach to private international law. The second one is related to the constitutional validity of conflict of laws rules. In the European Community, the solutions of private international law have not only to be constitutionally valid and made in accordance with the European Convention on Human Rights and Fundamental Freedoms, but they have also to conform to the economic liberties guaranteed by the EC Treaty.

If one does not disown the old idea of private international law as a "science,"⁴⁰ which provides for solutions available in a broader context than the national level, then a science associated with the requirements of an evolving practice, and the combining of scholarship and case law seems the most rewarding approach. Anzilotti's criticism of Savigny consists of regretting that the German scholar did not extend to private international law the lessons of the Historical School on "a slow, integrational, gradual process" (*con un processo lento, integrativo, graduale*) of the social facts.⁴¹ His negative assessment of the German codification in a text written in 1898 is a complement to a more general evaluation of codification exposed in Florence on 12 November 1893.⁴² According to Anzilotti, judge-made law is better equipped to meet "the scientific and practical needs" (*dei bisogni scientifici e pratici*).⁴³ The stressing of case law by an Italian scholar, who later served as a judge of the Permanent Court of International Justice for eighteen years, does not need to be underlined. The universalist approach of Anzilotti, which did not contradict his personal brand of positivism, sustains his hostility to state

deliberations. It is not certain whether the delegates' influence depends more on the existence of a national codification than on their skill and their country's weight.

40. See, e.g., 234 Bruno Oppetit, *Le droit international privé, droit savant*, Recueil des cours 331 (1992-III).

41. Anzilotti, Una pagina di storia della codificazione civile in Germania in *Studi critici di diritto internazionale privato* (1898), reproduced in *Opere di D.A.*, vol. III, *Scritti di diritto internazionale privato* 98, 108 (Giuffrè, 1960).

42. La codificazione del diritto internazionale privato, reproduced in *Opere, supra* note 41, at 7-71. His criticism did not spare the Italian provisions of the Civil Code of 1865 (p. 61). Anzilotti was not in favor of international codification either.

43. Eod. loco, p. 37.

legislation in the field of private international law.⁴⁴ It also explains his criticism of the dualistic approach of the EGBGB and the German legislature for not making a choice between unilateralism and multilateralism.⁴⁵

The twofold impact of the Full Faith and Credit Clause and of the Due Process Clause on the conflict of laws is familiar to American lawyers.⁴⁶ Constitutional law is also law on the law, but when it is combined with rules of conflict, it produces an alchemy of two bodies of law on the law. The judge is solely apt to arbitrate such conflicts. The recent evolution of constitutional basic rules, especially a new approach to the equal protection of the law, has rendered obsolete traditional rules of conflict which were based on the privilege of masculinity or the discrimination against children born out of wedlock. In Germany⁴⁷ and in Italy,⁴⁸ the constitutional court has declared the existing rules of conflict in the field of family law contrary to the equality principle embodied in the Republican Constitution, and it has entailed the modernization of those rules by the legislature. The origin of the crisis was the formulation of the previous norms: the legislator had expressly struck the balance between husband and wife, between father and mother in favor of the former. The very broad provision of the French Civil Code retaining the principle of nationality without further precision has been flexible enough to accommodate both sets of norms. It was possible to interpret Article 3, Section 3, of the French Civil Code in the light of an evolving constitution. If the codification of private international law goes along with very precise and definite rules, it entertains the risk of a confrontation with a future evolution of constitutional values. It would indeed be naive to think that the constitutional law in force at the day of the codification will never more be modified.

Each Member State of the European Union has to comply with its own constitutional rules and with the European Human Rights and Individual Freedoms, as well as the basic liberties guaranteed by the EC Treaty, namely the freedom of movement of persons. These rules will increasingly exert influence on the development of conflict of law rules while the European legislature will conquer broader fields.

44. Una pagina, *supra* note 41, at 173-77.

45. *Eod. loco*, p. 137-160.

46. See 234 Peter E. Herzog, Constitutional Limits on Choice of Law, *Recueil des cours* 239 (1992-III).

47. BVerfG May 4, 1971, *BVerfGE* 31, 73; Feb. 22, 1983, *BVerfGE* 63, 181; Jan. 8, 1985, *BVerfGE* 68, 384; Dec. 3, 1985, *BVerfGE* 71, 224.

48. Corte costituzionale, Mar. 5, 1987, n. 71, *Giurispr. Cost.* 1987, I, 566; 10 December 1987, n. 477, *Giurispr. Cost.*, 1987, II, 3234.