REFLECTIONS ON THE CO-ORDINATION OF NATIONAL SYSTEMS*

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I. Contemporary Challenges to the Conflict of Laws Method

Over recent years, the idea that private international law seeks a co-ordination of national systems has received attention; it seems worthwhile to reconsider and to clarify this idea, in order to meet current objections to what may be called the "conflict of laws method." It has long been accepted that this method is the principal branch—and in many countries, the only branch—of private international law; private relations of an international character, in the sense that they have connections with more than one legal system, must be governed by one of the laws vying for application, and the applicable law must be determined under conflict rules. This method of settling issues which arise from private relations of an international character, or those which require considering several legal systems within a single country, has long enjoyed considerable prestige because it allows for subtle, ingenious analyses based on more or less general principles; it thus provides an excellent exercise for the mind, and promotes well-ordered international relations. Recently, however, the conflict of laws method has encountered growing challenges as to its value and implications; these challenges would tend to reduce its scope, with other methods taking up the slack.

A. Increasing Scope of Public Policy and Public Law

These challenges can be traced to two very distinct phenomena. The first is linked to the expansion of state intervention in private relations. Everywhere, it may be observed that these relations are increasingly subject to ever more pervasive legislative and regulatory control; the most powerful companies have been

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nationalized, and the others are supervised—or, at the very least, monitored—by the government in a variety of ways. The notion of a "publicization" of private law, whereby everything becomes a matter of public law, has often been invoked. The public law of a state forms a whole which leaves little room for the taking into consideration of foreign laws, that is to say, for the operation of the conflict of laws. Each state organizes private relations in keeping with its own views, and this organization will be applied in its entirety for all relations which fall under the jurisdiction of its officials and judges. This notion [of overriding public policy] has long been embodied in France in the concept of *lois de police*, mentioned as early as 1804 in the Napoleonic Code; the current trend consists in transforming these from specific cases into a general principle, as a result of the state's greater control over the country's social, economic, and political organization.[1]

B. Preponderance of the Law of the Forum

Moreover, this phenomenon is said to be beneficial by those who hold that a judge applying foreign law is procedurally abnormal and gives rise to various difficulties. It is sufficient to add that the judge would not know the foreign law. He could not interpret the law properly because of the great difficulty in choosing between the contradictory constructions presented by the parties. These interpretations were originally destined for, and may be bound by, a different and unique forum from that in which the judge decides. Finally, the law of the judge necessarily submerges substance with procedure, resulting in innumerable problems.[2]

C. Increasing Development of Specific Rules for International Relations

A second challenge arises from an entirely different, if not diametrically opposed, direction. The conflict of laws method is criticized for ignoring the international character of the relations in question. "A peculiar method," it is said, "to hold that these relations must be subject to one and only one law, given that they involve, by definition, more than one legal system." Although international, they are held subject to a single national system.

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[1] *See* Francescakis, *Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflits de lois*, 1966 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [R.C.D.I.P.] 1.

[2] *See* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); A. EHRENZWEIG, TREATISE ON CONFLICT OF LAWS (1962).

The national system was naturally organized for exclusively domestic relations, and by applying this system to a material for which it was not designed, the world of international relations is caught between systems of domestic law, thus negating its unity and specificity. The true course consists in drawing up specific, appropriate rules for these relations. Examples have long been available in the form of treaties, such as the 1890 Berne Convention on International Carriage by Rail, which provide substantive rules instead of merely determining the applicable law. In many domestic legal systems, there are also specific rules for relations of an "international" character; and, in countries like the Soviet Union, these rules occupy a prominent position, in any case as far as the scholars are concerned.[3]

In addition, private initiative is moving in to fill the gaps left by public law, on the one hand, and international treaty on the other. In the essential matter of contract law, the parties rarely designate the applicable law, as they would be entitled to do under most systems' conflict rules. They prefer to draft their stipulations so as to meet the specific requirements of international commerce; indeed, they are often careful to exclude expressly the application of any national law, either because it is not appropriate to their case or to avoid giving an advantage to either party. This movement has been further amplified through the use of "general conditions of contract" drawn up by professional organizations, and is crowned by resort to arbitration to settle disputes, with the arbitrator in no way obliged to apply the law of any given state, as a court of law would probably still have to do. Professor Philippe Kahn's work on international commercial sales shows the strength of this movement.[4] Up to now, this movement has been limited to contracts, but the underlying idea—a new *jus gentium*, in the words of Professor Franceskakis[5]—could potentially be extended to other areas; in any case, it would remedy the shortcomings in the conflict of laws system which have been observed in the area of contracts.

II. SYSTEM-CO-ORDINATION

It is beyond the scope of this article to consider whether the

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[3] *E.g.*, II L. LUNTZ, MEZHDUNARODNOE CHASTNOE PRAVO 104, 213 (Moscow 1959-1963); *see* von Overbeck, in DE CONFLICTU LEGEM: ESSAYS PRESENTED TO D. KOLLEWIJN AND J. OFFERHAUS 362-79 (1962); de la Mucla, in 1963 REVISTA ESPECIALDADES DE DERECHO INTERNATIONAL 425.

[4] P. KAHN, LA VENTE COMMERCIALE INTERNATIONALE (1961).

[5] *See* 1 J. MAURY, MÉLANGES 113 (1960).

development of the two methods described above may eliminate the conflict of laws method; indeed, it is most difficult to determine the exact scope of these two ideas. It should suffice to point out that no satisfactory definition has ever been provided for *lois de police*; that this concept, if invoked, still requires determination of the relations to which the laws in question are applicable, and thus the development of rules of connection; and that one cannot preclude the possibility of applying foreign *lois de police*. So, whatever progress may be claimed for the first approach, it will certainly not simplify matters.

The other movement raises the very awkward problem as to whether the burden of legislating may be abandoned to private persons without any control by governmental authority. It may be thought that fairness and utility will not always be satisfied, because, even in international relations, some are powerful and others weak; moreover, general interests do exist, to mention only the consequences which contracts may have for third parties.[6] The substantive law created by international treaties provides all due guarantees in this respect, but everyone knows how difficult it is to negotiate such instruments, to mention only this strictly material factor.

Given that the conflict of laws method seems likely to remain for at least some time, and since the future will probably see the continuing existence of these several procedures, it should be shown that the conflict of laws method is not as vulnerable as the foregoing objections might lead one to believe. The most serious reproach is undoubtedly that formulated by the second movement examined above, namely that the conflict of laws maintains an isolation among the several national systems, denying the existence of an international milieu of private relations with its own realities and specific requirements. Rather than organizing a collaboration, this view holds, the conflicts method simply reinforces the boundaries between national systems.

System-co-ordination seeks to meet precisely these objections; in this view, conflict rules, far from treating existing systems as closed, mutually exclusive entities, seek to organize their coexistence or, more specifically, their "symbiosis," a term whose scope will have to be specified more fully. Co-ordination also responds to one of the objections raised by the first tendency, namely the difficulty in obtaining harmonious application of two

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[6] Judgment of May 28, 1936, Reichsgericht, 1936 JURISTISCHE WOCHENSCHRIFT [JW] 2058 (French translation at 1936 CLUNET 1951).

different laws, when one applies to substance and the other to procedure.

A. Co-Ordination: Initial Manifestations

The system-co-ordination concept seems to have first appeared in the mechanism of *renvoi*. According to a system well-established in many countries, when the conflict rules of the forum provide that a foreign law controls, for instance the national law of the interested party, the judge must ascertain the conflict rules of that foreign law, and then effect any *renvoi* those rules may prescribe to another law, for example the law of the state where the party is domiciled, notably when the party is domiciled in the same state as the forum. As to the fundamental objection to *renvoi* which consists in the judge's abandoning his own conflict rules in order to follow a foreign rule, those who have wished to explain a system so manifestly natural and practical, in many cases, have responded that the judge applies the foreign conflict rules only because the rules of the forum required him to do so, which boils down to taking into account—in a particular way which need not be analyzed here—both sets of rules simultaneously, in brief, co-ordinating them. There is no longer a mutual ignorance between the two systems; rather, they are considered within the framework of an overall superstructure.[7]

Then it was observed that, at the simpler, more immediate level of applying the foreign law's applicable substantive rules, it would be an oversimplification to conclude that conflict rules provide a few general principles for matching private law issues to specific legal categories, so the laws can then be applied immediately. It is undoubtedly necessary first to interpret the conflict rule to ascertain how it distinguishes between matters subject to the *lex loci rei sitae* or the *lex loci actus* and, more precisely, the exact scope of a property regime or proper form of a judicial act under that rule. But the real problem arises after the foreign law's content has been determined, and that law must be applied concurrently with another law. This is because—and this is one of the truths too easily overlooked by the oversimplified conception discussed above—if the choice-of-law problem is resolved in favor of a foreign law, that law will never be applied to the exclusion of others: at the very least, the foreign law governing substantive matters will be applied concurrently with the procedural rules of the forum. Moreover, it is not rare for substantive matters to be

[7] *See* H. BATIFFOL, DROIT INTERNATIONAL PRIVÉ 304 (4th ed. 1967).

subject to several laws: the form of a contract or other judicial act will be subject to the law of the place of its execution, whereas substantive matters will be subject to the law intended by the parties in the case of contracts, and to the law governing personal status in the case of marriage-related matters. Resolving a conflict of laws does not consist of simply subjecting a complicated situation to a determined law, but quite often requires identifying which elements in this situation are subject, for a variety of reasons, to any of several laws, which must be sought out. It may be objected that this makes for overcomplication, but the ends of utility and fairness require an objective, happy medium between complication and oversimplification.

Now there will be an interplay among the provisions of these several laws so as to provide a homogeneous and satisfactory settlement. It gradually became clear, however, that, because they differ in content, the multiplicity of laws applicable to a situation which constitutes a concrete unity does not always make for a smooth, easy process. It is necessary to organize the interplay of the several systems, so that their provisions fit together without gaps, overlappings, or inconsistencies. Ultimately, this involves coordinating the systems, that is, establishing a symbiosis, rather than considering them as isolated, mutually exclusive entities.

These problems of coexistence could be studied in terms of a variety of aspects.[8] I will cite as an example the problem raised when an English or American "trustee" appears before a continental judge. As judicial experience shows,[9] to render a coherent decision, the judge will have to determine exactly what a "trust" is, as well as the powers of the "trustee." Here, a foreign institution thrusts itself into a domestic procedure, and it is indeed necessary to know what the institution really involves, in order to determine if and how it can set in motion the procedural mechanisms of the forum. Here, the co-ordination consists primarily in analyzing the foreign institution in terms of concepts recognized by the legal system of the forum.[10] This, of course, would require an examination of the problem of characterization and definition.

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[8] *See* De Nova, *Solution du conflit de lois et règlement satisfaisant du rapport international,* 1948 R.C.D.I.P. 179.

[9] Judgment of June 4, 1941, Cass. crim., 1942 RECUEIL DALLOZ, CRITIQUE JURISPRUDENCE [D.C. JUR.] 1; Nast, 1942 D.C. JUR. 4 (note on decision); Maury, 1942 SEMAINE JURIDIQUE ET JURIS CLASSEUR PERIODIQUE [J.C.P.] II 2017 (same).

[10] *See* Maury, 1944 RECUEIL SIREY JURISPRUDENCE [S. JUR.] I 133 (note).

B. Adaptation

At this juncture, I would like to consider a more specific and undoubtedly more difficult problem, namely "adaptation," which German scholars have named *Anpassung*.[11] This involves cases of the type discussed above, where the interplay of several laws results in gaps, overlappings, or inconsistencies. The following example will help to clarify this matter.

The classic legal example, one raised many times in the past, concerns the rights of the widow when the law governing the husband's estate, and the law governing the marital property regime, are different. For example, an English couple marry in England where the husband is domiciled, and where the marriage domicile remains for some time; then they settle in France, where the husband dies, having acquired domicile there. According to French conflict rules—and it appears that the English rules cannot be so very different—this couple's marital property regime, assuming no special contract with respect to property, will be governed by English law, while that of the husband's estate, at least as far as concerns movables, will be governed by French law. Because English law does not establish a community of property between the spouses, the widow not benefiting from her husband's gains under the settlement of the marital property regime; on the other hand, English law confers on the widow rather important rights to her husband's estate. But, in this case, the French law applicable to the husband's estate, considering that the wife has acquired half of the "community property," and again assuming the absence of any special contract with respect to property, accords her only extremely limited rights of inheritance. The result is such that the widow will receive nothing or almost nothing, neither upon settlement of the marital property regime nor upon settlement of the estate, although both legal systems, each in its own way, provide for her needs. In the case of a French community property regime and an English succession, the widow will reap the benefits of both systems, to the detriment of the husband's heirs. This situation, which has already come up before French courts, clearly illustrates the damaging effects of applying two different laws to matters which are closely related to each other; dissociating these matters so as to subject them to distinct laws can result in overlooking their close relationship.

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[11] Or *Angleichung*. On the preference for *Anpassung*, see NEUHAUS, DIE GRUNDBEGRIFFE DES INTERNATIONALES PRIVATRECHTS 248 (1962).

Professor Kegel[12] has demonstrated that these troublesome results are the consequence of the multiplicity of conflict rules; in matching the several elements of a situation to several laws, "borderline" problems will inevitably arise. It should be added that these problems would appear to be more pronounced to the extent that the aspects thus dissociated are closely interrelated; this problem indeed highlights the systematic nature of domestic law.[13] Accordingly, scholars generally consider that the solution to this problem is to be found by two approaches: 1) on the one hand, one must seek to arrange, interpret, or even modify conflict rules; 2) on the other hand, one must seek a suitable arrangement or interpretation of domestic law.[14]

We will now examine these two approaches in turn.

C. *Adaptation of Conflict Rules*

In discussing the adaptation of conflict rules, we will not attempt to examine radical processes which would challenge the method itself, nor will we set forth guidelines on how to determine which law provides the more suitable solution to a given case. Clearly, with the conflicts system, the example given above is easily resolved, and other conflict of laws problems are resolved as well, but it would be beyond the scope of this article to consider whether or not the conflict of laws process is well-founded, as Professor Cavers asks.[15] Here, we will simply examine whether or not the troublesome results pointed out above can be remedied without abandoning the conflicts method.

Long ago, in 1890, the distinguished Dutch scholar Jitta indicated that certain situations should be removed from the workings of ordinary conflict rules and decided under specific rules, or even substantive provisions, if required. Similar ideas advanced by other scholars were analyzed by Professor De Nova in his remarkable 1948 article in *Revue Critique de Droit International*

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12 KEGEL, INTERNATIONALES PRIVATRETCHT 107 (2d ed. 1964).

13 On this result of what he terms the "analytical" method, see Goldschmidt, in Festschrift für Martin Wolff 208.

14 *See* Cansacchi, *Le choix et l'adaptation de la regle éntrangère dans le conflit de lois*, II RECUEIL DES COURS 79 (1953) (Hague Academy of International Law Collected Courses); Lewald, *Règles générales des conflits de lois*, III RECUEIL DES COURS 6 (1939); *see also* J. OFFERHAUS, ANPASSUNG IN HET PRIVATRECHT (1963); Struycken, 1964 R.C.D.I.P. 627 (review of Offerhaus's book).

15 D. CAVERS, THE CHOICE-OF-LAW PROCESS (1965); *cf.* Cheatham, *Problems and Methods in Conflict of Laws*, I RECUEIL DES COURS 233 (1960).

Privé.[16]

But the difficulty is to foresee which concrete cases call for an adaptation of ordinary conflict rules. If each case is unique, is it possible to provide an exhaustive list?

D. Examples of Specific Provisions and Solutions

A topical example is that of the attempt made by a Polish law of August 2, 1926, and again by a Czechoslovakian law of March 11, 1948, to resolve a difficulty which had long been pointed out by German scholars, primarily the late Professor Raape.[17] The distinguished jurist considers a German girl—a minor—who marries a foreigner whose personal status law submits her to her husband's authority, whereas German law keeps her under paternal authority during her minority, even though she is married. German law submits paternal authority to the law governing the father's personal status, in this case German, and marital authority to the law governing the husband's personal status, in this case the foreign pre-revolutionary Russian law. There can obviously be no common ground between these two mutually incompatible institutions. The Polish law of August 2, 1926 on Conflicts of International Law, article 19, paragraph 4 reads: "The relationship between parents and their married daughter is subject to the national law of the daughter's husband, in the event that the rights of the parents, under their law, are incompatible with the rights of the husband under his personal law." The Czechoslovakian law of March 11, 1948 incorporates a similar provision in article 24.

This method consists of derogating from ordinary conflict rules to the extent that the rights thereunder are incompatible, and in giving preference to one of them, in this case the law governing the relationship between the spouses. The result is assuredly satisfactory, but the method's drawback is that it would be necessary to foresee all possible conflicts. But this is impracticable because conflicts arise from the incompatibility of certain internal provisions of the opposing rules. It is impossible to draw up a systematic catalogue of all possible incompatibilities in order to decide in advance which of the two laws will prevail. This is perhaps the reason why neither the Czechoslovakian law of December 4, 1963, nor the Polish law of November 12, 1965, in-

[16] *See* De Nova, *supra* note 8, at 179; *see also id.* at 181 (references to Jitta, Hijmans, Fränkel, and Kollewijn).

[17] KEGEL, INTERNATIONALES PRIVATRETCHT 102 (4th ed.).

clude the above-mentioned provisions; it seems peculiar indeed to make legislation covering such specific situations.

E. Rights of the Surviving Spouse and the Right of Option

As things now stand, however, it is possible to overcome the most important and well-known incompatibilities: from this viewpoint, the problem of the widow's rights brings to light the necessary interrelationship of two main chapters of domestic civil law, namely the two phases of formation and transmission of the family estate (*patrimoine*), that is to say, the consequences of marriage and death. This case is all the more suitable for our purposes, in that problems in this area arise from the division of contemporary systems into two main groups: countries which institute a community of property between spouses, and "separatist" countries. The formal and material causes, so to speak, of the problem seem sufficiently general to justify seeking an overall solution.

Professor Kegel[18] proposes to examine whether the law governing the marital property regime establishes a community of property between spouses, either upon the death of one spouse, or while both are still living. In the first instance, he considers that the rights of the surviving spouse will be equitably settled by the law applicable to the succession alone. Consider, for example, spouses married under the Swedish marital property regime, which institutes a community upon the death of one spouse; the spouses become British subjects, and the husband, assumed to be domiciled in England, leaves an estate governed by English law. The widow will receive a fair settlement under the English law. If, on the other hand, the marital property regime established a community during the spouses' lives, the widow must content herself with whatever the community regime allows her. Thus, in the case of an English succession and a French marital property regime (which recognizes a community of spouses while both are living), the widow could not claim what English law would accord her. But, if the regime were an English one and the succession French, the widow would have the inheritance rights provided under English law.

This system is complicated, and it hardly seems possible for it to be adopted without legislative action, as it demands too much judicial interpretation of conflict rules. The second solution would even leave the widow at a disadvantage with respect to

[18] *Id.* at 110.

what she would have received had the succession, like the marital property regime, been French: the surviving spouse, under French law (article 767 of the Civil Code) has inheritance rights in addition to those arising from the settlement of the community. And in the case of a Swedish-type marital property regime, what would the widow receive if the succession had been governed by French law?

Must one go so far as to subject the surviving spouse's inheritance rights to the law governing the marital property regime? The French Court of Cassation indeed decided that a French woman having married a Camerounian, being entitled to invoke French law with regard to her marital property regime, could therefore invoke French law with respect to her rights of usufruct in the succession of her husband.[19] But this decision was restricted to the specific conflict of laws issues arising in territories under French trusteeship between French law and local customary laws. The grounds of this decision were not set forth at sufficient length to allow any general solution to be inferred.

Professor Neuhaus carries this idea to its logical conclusion and proposes that marital property be governed by the normally applicable law while both spouses are living, but that its settlement upon the death of either spouse be subject to the law governing the succession.[20] It is to be feared that this will give rise to major difficulties, because a marital property regime forms a whole with a close interrelationship between the provisions applicable to the spouses' relationship during their lives and to the settlement of their interests upon the dissolution of marriage.

A more prudent measure would consist of permitting each spouse to express, by testament, his or her desire that the other spouse's inheritance rights be determined by the law applicable to the marital property regime, so as to provide for an objective settlement. This flexibility would permit the testator to weigh the advantages and drawbacks of each solution. More generally, Professor Neuhaus recommends allowing a choice as to applicable law,[21] and this may be, in the current state of our knowledge, the most general remedy to this sort of difficulty.

F. Hierarchy of Conflict Principles

Professor Neuhaus goes even further, proposing what is in-

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[19] Judgment of Dec. 23, 1954, Cass. civ. Ire, 1956 R.C.D.I.P. 671.
[20] NEUHAUS, *supra* note 11, at 252.
[21] *See id.*

deed a *hierarchy of conflict rules*.[22] Let us consider his example of an illegitimate child born to a German woman, and whose relationship with his mother is governed by German law, as German private international law provides. If the child is recognized by a Frenchman, the relationship with the child will be subject to French law, again under the provisions of German private international law. Now, German law grants what we may term custody—to use a familiar term, for the sake of clarity—of an illegitimate child to the mother, whereas French law grants custody to the father, at least in certain cases. Professor Neuhaus is of the opinion that, since these two conflict rules lead to contradictory results, it is necessary to give preference to the former, because, in the German conception, there is a tighter bond between the mother and her illegitimate child than between the father and the child. The idea is interesting because it does not modify the conflict rule because of inconsistencies, which cannot be foreseen or catalogued, between the two domestic legal systems. The idea simply establishes a hierarchy between these rules, without modifying their scope. Of course, it is hardly possible to construct this hierarchy in advance because one cannot foresee all potential difficulties; but it is not impossible to propose a method of interpretation.

The idea of establishing a hierarchy of conflict rules is not unknown in France. In a decision on June 17, 1958,[23] the French Court of Cassation denied legal effect in France to a judgment of divorce pronounced in Guatemala between French spouses because the proceedings had accepted the defendant spouse's avowal. The opinion of the court granted that the admissibility of evidence depends upon the local law of the forum, here Guatemalan law, which admitted an avowal as evidence. But the law applicable to substantive matters, according to French conflict rules, was the national law common to the spouses, that is, French law, which did not accept an avowal as evidence in divorce proceedings, because to do so would allow divorces by mutual consent, although prohibited by French law.[24] The foreign procedural rule was considered therefore to be an obstacle to observance of the applicable French substantive law. It would ap-

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[22] *Id.*

[23] Judgment of June 17, 1958, Cass. civ. Ire, 1959 RECUEIL DALLOZ, SIREY, JURISPRUDENCE [S. JUR.] I 65; Malaurie, 1959 S. JUR. I 65 (note on decision); Francescakis, 1958 R.C.D.I.P. 436 (same); Goldman, 1959 CLUNET 114 (same); Louis-Lucas, 1958 J.C.P. II 10761 (same).

[24] Prior to 1975 — [Ed.].

pear that this reasoning can only be explained by the notion of a hierarchy of conflict rules; the rule which determines the law applicable to matters of substance has precedence over the rule giving jurisdiction to the local law of the forum in procedural matters. And it cannot be denied that this idea is realistic. So it is quite conceivable that conflict rules may be interpreted so as to establish a hierarchy based on their respective importance.

Now, in examining the second approach which has been proposed, namely adaptation by interpretation of internal law, we will arrive at similar results.

G. Adaptation by Interpretation of Internal Law

All scholars who have examined this problem consider that many difficulties could be resolved by suitable interpretation of domestic laws. Professor Kegel takes the example of an illegitimate child born to a Polish mother and a German father.[25] According to Polish law, applicable under German conflict rules to the relationship between the mother and child, parental authority is to be exercised jointly by the mother and father. But, according to German law, applicable to the relationship between the father and child, the father has no right of parental authority over the child. Here, a solution can be found through interpretation of the Polish internal law, which provides that the mother, and she alone, exercises parental authority when the father is dead or prevented from exercising such authority. In this case, it could be considered that the impediment results from submitting the father's rights to German law. This brings out the idea, which many scholars have advanced, that civil and commercial laws have been established with a view towards cases of a domestic character; it is legitimate to interpret them along the same lines in situations of an international character.

H. The Concept of the "Equivalence" of Institutions

Adaptation generally consists of the recognition that a foreign institution can have the same function as a national one, despite what may be important differences. Professor Raape[26] drew attention to this problem with the example of an adopted child's rights to inherit, when such rights are recognized by the law governing inheritance, but not recognized by the law which governed the adoption, as in England prior to the Adoption Act of

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[25] KEGEL, *supra* note 11, at 112.

[26] *Id.* at 101.

1950. He held that, in this case, the adopted child should be excluded from the succession. Conversely, in the case of a German adoption, for example, when the succession is subject to pre-1950 English law, he endorses allowing the adopted child to have inheritance rights, as under German law.

One may also reason otherwise. When the law governing inheritance, German law, for instance, provides inheritance rights for an adopted child, these rights will be recognized if the child has been properly adopted under the local law of the state having jurisdiction to grant the adoption, in this case English law. Clearly, English law at the time did not include inheritance rights among the legal incidents which arise from adoption, but it seems quite legitimate for the German judge to view the English adoption as akin to the concept recognized by the German law of inheritance. Undoubtedly, the two concepts do not coincide entirely, since the incidents arising from adoption include inheritance rights in one case, but exclude them in the other. But what is involved is to determine whether or not the two concepts have enough in common substantively to be considered as *equivalent* in the conflict of laws process.

"Equivalence" is to be found in a broad range of areas, and notably when an institution is subjected successively to two different laws. Thus, the French Court of Cassation held French law applicable to pledges constituted in Germany on automobiles later brought into France.[27] The court recognized that a German pledge and a French pledge, despite the legal differences between them, nevertheless have sufficient substance in common for the pledge made in Germany under German law to be considered a pledge under French law, once the automobiles were brought into France. Along the same lines, it has long been accepted that a polygamous marriage, although profoundly different from a monogamous marriage, has enough in common substantively for the conflict rules applicable to the latter to operate in the case of the former.

The solutions recommended by Professor Raape seem to be based primarily on a concern that the incidents arising from the initial adoption decree should be those provided by the law under which the adoption was granted. This seems to be based too much on the concern that the incidents should be exactly the same as those the parties may have foreseen; it is less concerned with ensuring the interworking of the relevant laws in keeping

[27] Judgment of May 4, 1933, Cass. req., 1935 S. JUR. I 257.

with the spirit of both laws, and in co-ordinating their application.

This issue came up in The Netherlands in the accidental death of a Belgian who had adopted a child. The Dutch Civil Code (article 1406), in a restrictive catalogue of those who can claim damages in this case, includes the decedent's "children"; and the question arose as to whether this term could be applied to a Belgian adoption, given that Belgian law maintained ties between the adopted child and his natural family. The Court of Rotterdam, in accordance with previous suggestions by legal scholars, answered in the affirmative,[28] and this decision was approved by Professor Offerhaus.[29]

This method has a quite remarkable potential, notably in cases where it would appear that the institutions in question are difficult to approximate.

Professor Kegel considered that this method could not be applied to a case which he seems to have imagined, and which is of great interest because it actually came up before French courts.[30] He considers a Moroccan who contracts a second marriage without dissolving the first, as the law governing his personal status enables him to do. The Moroccan then acquires Spanish citizenship, so his personal status—according to the conflicts rule assumed to be applicable—is governed by Spanish law. Given that polygamy is unknown to Spanish law, how can one resolve the problem of the husband's relationship with his wives, such as his obligation to provide support, when Spanish law, however interpreted, can provide no rule—not even a subsidiary rule—applicable to a polygamous marriage? Professor Kegel abandons the method based on interpreting domestic law and returns to his initial approach by proposing that the marriage should continue to be governed by Moroccan law, under which it was validly contracted.

This proposal would have to be formulated to specify the cases to which this derogation from the new law governing the husband's status would be applicable to the relationship with his former wife or wives. This could undoubtedly be based on a distinction between systems which recognize polygamy and those

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[28] Judgment of Mar. 7, 1958, HOGE RAAD DER NEDERLANDEN, 1958 NEDERLANDSE JURISPRUDENTIE 378.

[29] J. OFFERHAUS, *supra* note 14.

[30] *Id.* at 110.

which do not, along the same lines as the previous distinction between "community" and "separatist" systems.

Yet, it is quite possible for the method based on an interpretation of domestic law to operate in this case as well. A case involving the same situation as Professor Kegel imagined actually came up before the French courts. A Tunisian named Chemouni married two wives in Tunisia, without dissolving the first marriage, as he was entitled to do because of his personal status as a Jew. Then Chemouni settled in France, where his second wife entered a claim for maintenance. That the claim was made by his second wife is not devoid of interest, since a claim by the first wife would probably not have caused any difficulty, given that it would be easy to justify recognizing the incidents arising from a first marriage, so there is no reason to invoke the concept of a "potentially polygamous" marriage.[31] The Seine First Instance Court rejected the claim on the ground that polygamy is repugnant to public policy. The Court of Cassation set the judgment aside on the well-established principle that, while the celebration of a polygamous marriage in France would undoubtedly be against public order, public order does not oppose giving effect in France to certain incidents arising from a polygamous marriage properly contracted in a foreign country, and, in particular, the maintenance obligation arising therefrom.[32] The case was remanded to the Versailles First Instance Court and a rather surprising new development came to light. Chemouni proved that he had acquired French citizenship. So, whoever reproaches Professor Kegel for having imagined a theoretical example, to be dismissed as impossible because the Spanish authorities would never naturalize a polygamous foreigner, will have to admit that truth is stranger than fiction, or that the French authorities are less vigilant or less prudent than they would like to believe.

Legally speaking, however, it seems very difficult to compel a French citizen to provide for the maintenance of two legitimate wives. Professor Kegel's objection retains its full force: French civil law contains no provisions dealing with polygamous marriages. And yet the Versailles Court awarded maintenance, and its decision was upheld by the Court of Cassation, on February 19, 1963.[33]

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[31] G. CHESHIRE, PRIVATE INTERNATIONAL LAW 265 (7th ed.).

[32] Judgment of Jan. 28, 1958, Cass. civ. lre, 1956 R.C.D.I.P. 110.

[33] Ponsard, 1963 CLUNET 986 (note); Droz, 1963 REPERTOIRE COMMAILLE 315 (note); G.H., 1963 R.C.D.I.P. 569 (note).

The Court of Cassation was, as usual, laconic in stating the grounds of its decision. It stated merely that, since under French conflict rules, the marriage pursuant to which the action was brought is valid, the French judge must determine the incidents arising therefrom (in this case, the maintenance obligation) even though their relationship was now governed by French law, given that Chemouni was a French citizen and that the spouses—now of different nationalities—were domiciled in France.

The decision, therefore, does not derogate from ordinary conflict rules. It upheld the validity of Chemouni's second marriage, because it had been properly contracted under the law governing the personal status of both spouses at the time. It held that the incidents arising from the marriage were subject to the law governing the personal status of both spouses, that is, Jewish law applicable to Tunisian Jews, until 1956, when Chemouni was naturalized. It held that, the spouses being of different nationalities following Chemouni's naturalization, the law applicable to the incidents arising from their marriage is, according to a now well-established principle,[34] that of their domicile, that is to say, French law. It was therefore under French law that Chemouni was ordered to pay maintenance to his second wife. To reason along classical lines, it must be said that public order is not opposed to the consequences, pursuant to the French personal status law, of a judicial act generating legal rights, in the instant case of marriage, which had been properly contracted under a foreign law. We can concur with several commentators on the decision in pointing out that, if public policy was not invoked, that is because it is by no means scandalous in France for a man to pay support to two wives, since that occurs when a man pays alimony to his first wife. Why should one be more scandalized in this affair, given that the plaintiff was not a divorcée, but a legitimately married wife?

In other words, there was indeed an adaptive interpretation of domestic law with respect to the substantive issue. French civil law prohibits polygamy and requires the husband to provide for his wife's needs, but it never stated that the naturalization of a polygamous foreigner would entail dissolution or annulment of his second marriage. On the contrary, it affirms, by its conflict rules, that the second marriage is valid, and that a validly contracted marriage can only be dissolved by the death of one of the spouses, or by divorce. So it had to be recognized that the obli-

[34] H. BATIFFOL, *supra* note 7, at 433, 443.

gation of maintenance, which was undoubtedly intended for monogamous marriages, also applied to a polygamous marriage when private international law rules require giving effect under French law to a marriage validly contracted under foreign law.[35]

There should be nothing surprising in this sort of interpretation and adaptation. It is the normal work of a jurist who seeks to apply rules of law which are ineluctably general to specific cases which, arising from human action, are necessarily singular. The astonished layman may complain that we are reading far too much into the laws. It is for us to recognize what is permitted by intellectual honesty and the respect due to existing rules, in light of society's requirements and the need for fairness. In this case, this involves, as all the scholars have pointed out, applying domestic laws to situations of an international character; so it is not surprising that interpretations taking account of this international character should be required. The rule is not misinterpreted, but given a different scope, because, although it operates within a framework for which it was not conceived, it must nevertheless be applied.

III. Co-Ordination and the Time Factor

This provides an answer to the leading objection to the conflict of laws method, namely that it dismembers situations of an international character and fits them to domestic laws enacted in view of purely domestic situations. These problems demonstrate that there is good reason for the interpretation of domestic laws to be adapted in view of their application to international relations. They also show that if adaptations are necessary, it is because these laws operate interdependently: there is no abrupt separation, but rather linking and co-ordination.

One of the most striking features of this co-ordination is that it often operates over time, when it is necessary to link a formerly applicable law with one which becomes applicable later on. Professor Wengler correctly pointed out the underlying reasons:[36] the major problems in private international law arise when an exclusively domestic situation subsequently becomes international. Domestic situations are obviously far more numerous than those

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[35] Compare 1963 R.C.D.I.P. 425, which is the official ministerial statement of the French government concerning these cases. These cases have become more frequent since Muslim Algerians, who have domiciled in France—and who may have polygamous marriages—have been recognized as French citizens. *Id.*

[36] *See* Wengler, *The General Principles of Private International Law*, III Recueil des Cours 272 (1961).

which are international from the outset, but it is no doubt at least as frequent to see what was originally a domestic situation become international as it is to see a situation related to several systems from the start. In any event, whatever the statistics may be, this problem remains somehow in the forefront, because the conflict of laws method cannot be eliminated from this area. When a situation arises as a purely domestic matter, it is unquestionably subject to the law of the country in which it occurs. If the context changes later on and a new law becomes applicable, it is impossible to deny that the former law should be applied until the change in question actually occurs. It is therefore inevitable that the judge will apply this foreign law; it is no less inevitable that the problems of linking and co-ordination will arise.[37]

IV. Conclusion

This is not the place to predict what the future may hold in store for the conflict of laws method, in light of the tendencies discussed earlier, namely the independence of national systems dominated by state authority, and the formation of a *jus gentium*, primarily through private initiative. These two tendencies indeed represent very important movements. But the law should not establish a rigid state system in some matters, in contrast with a hands-off policy which would quickly degenerate to anarchy in others. Synthesis and continuity are essential. In the area of international law, it would seem that the specific role of the conflict of laws method is to maintain this link between matters which must be governed by public law and those which could conceivably be left, to a certain extent, to a developing system based on arbitration. I have taken this opportunity to give my opinion, which I had not previously expressed. It should be clear that the conflict of laws method does not consist in a dismemberment of international legal realities, but rather offers effective resources for organizing the co-existence of national legal systems.

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[37] This necessity is so evident that it may be seen as one of the causes behind the success of the doctrine, which would reduce the entire matter to one of respecting "vested rights."