DRAFTING NATIONAL LEGISLATION ON CONFLICT OF LAWS: THE SWISS EXPERIENCE

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I

WHY A CODIFICATION OF CONFLICT OF LAWS IN SWITZERLAND?

Debate continues whether conflict of laws is a suitable subject for legislation. To codify conflict of laws in comprehensive legislation in the late 20th century may even be regarded as an anachronistic undertaking.

David Cavers' preoccupation has been how the pursuit of justice in the individual case and ease and certainty can be combined in prefixed rules.[1] His careful investigation of old and new experiments with codification, focusing specifically on that point, convinced him that "the persistent reluctance of American conflicts scholars to advocate legislative solutions" was justified.[2]

It therefore requires some explanation why the Swiss Government, following examples in neighboring States, entrusted to a commission the task of presenting to the Parliament draft legislation covering the whole field of conflict of laws. Although I never hid my skepticism whether for all fields of law a legislative solution is superior to a judicial approach,[3] I had the honor of being nominated chairman of this Commission, consisting of all conflicts specialists in Switzerland. But since undertaking this task, and with the development of the draft which will be published early in 1978, I became more and more convinced of the merits of such a joint effort requiring concentration on each problem until a suitable solution was found. I became aware how much more difficult the task of the legislator is in comparison with that of the scholar reviewing the work afterwards.

International issues have increased greatly in the last decades. Deciding conflict-of-laws questions has become an almost everyday task of the Swiss judge. The great number of migrating workers and their family problems, the wide dispersion of Swiss nationals living abroad, the increase in and complexity of foreign trade, international tourism with its risks for the individual,

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1. Cavers, *Legislative Choice of Law: Some European Examples*, 44 S. CAL. L. REV. 340 (1971).
2. *Id.* at 359-60.
3. See Vischer, *Das Problem der Kodifikation des schweizerischen internationalen Privatrechts*, 90 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT II 1 (1971).

and the activities of multinational corporations, to name only some factors, may account for this perhaps special situation in Switzerland.

The old fragmentary legislation of 1891,[4] covering only some questions of capacity, family law and the law of succession, is, despite amendments, rightly regarded as outdated. Its primary purpose was to deal with intercantonal conflicts, which to a great extent have disappeared as a result of the national codification of the private law. In addition, questions of judicial competence, of the recognition of foreign judgments and of the administration of foreign law in the courts were heretofore mainly left to the Cantons; accordingly, when such questions were not the subject of a bilateral or multilateral treaty, they were not nationally coordinated. The judiciary and the administrative bodies concerned with conflict-of-laws questions urged comprehensive legislation which could provide for greater intelligibility, certainty, and uniformity. This call is the more understandable in a country adhering to the civil law system, where, since the Age of Enlightenment, the development of the law has always been centered on the legislature and codification has been the point of departure and of crystallization for scholarly legal exploration.

The situation in Switzerland is in many respects different from that in the United States. At least some of recent conflicts theories there were developed mainly on interstate and not international issues. Conflicts often involve the application of statutes "built upon a substratum of common law, modifying in details only the common law foundation,"[5] a situation reminiscent of that in Italy at the time of the statutist theorists. Questions of status in family law, in the United States, have been spared to a great extent from the "revolution" in conflict of laws; that may mainly be due to the Full Faith and Credit Clause guaranteeing the mutual recognition of judgments and public acts of the states of the Union.[6]

In contrast with the United States, in Europe, and especially in Switzerland, conflicts questions in the field of family law have been of a primary concern. Here the old principles of conflict of laws have been fundamentally reconsidered.[7] As the result of this reconsideration, the interconnection be-

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4. Federal Law of June 25, 1891 regarding the Private Law Relations of Residents and Sojourners (NAG), as amended. Partly translated in A. NUSSBAUM, AMERICAN-SWISS PRIVATE INTERNATIONAL LAW 79 (2d ed. 1958).

5. B. CARDOZO, THE GROWTH OF THE LAW 136 (1924).

6. I do not dare to express a view on the much debated question of the extent to which the Full Faith and Credit Clause of the U.S. Constitution could be used for development of a federal conflict of laws. *See* Cavers, *Contemporary Conflicts Law in American Perspective*, 131 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL (hereinafter cited as RECUEIL DES COURS) 75, 109 (1970 III); Nadelmann, *Impressionism and Unification of Law: The EEC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations*, 24 AM. J. COMP. L. 1, 4 (1976); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958), *reprinted in* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 188 (1963).

7. *See* Vischer, *Der Wandel im Familienrecht und das internationale Privatrecht*, in FESTSCHRIFT H. HINDERLING 96 (Basel 1976).

tween recognition of foreign judgments and acts done in a foreign country on the one hand, and the conflicts question on the other, have become more and more obvious and have influenced the solutions proposed in the Swiss draft.

It would have been advisable, in the view of many specialists, not to include contracts and torts in the codification. Especially in the field of contracts, the Swiss Federal Court has done pioneer work in developing a system with the "characteristic obligation" of the contract[8] as its basis, which has had wide success on the Continent of Europe. The system is certainly open to refinements and modifications. It is true, for instance, that, in Germany, statutory rules for contracts are lacking mainly because, as Kurt Nadelmann states, "Traditionally, contracts has been viewed as a field that does not lend itself to codification of choice of law rules."[9] But the E.E.C. Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations[10] indicates clearly a reverse of the tide. Indeed, contracts and torts are those fields where the need for certainty and predictability of the result is a goal of prime importance, where lawyers and judges are often lost without clear guidance.[11] Again, the special situation of Switzerland, whose small territory makes international contacts almost unavoidable, must be emphasized. And, at least for the present time, it seems preferable for Switzerland to formulate its own solutions rather than, as a non-member of the European Economic Community, to wait for the E.E.C. Convention, since Switzerland could adhere to such a convention only on a take-it-or-leave-it basis.

II

HOW DOES THE SWISS DRAFT FIT INTO THE MODELS OF LEGISLATION ON CONFLICT OF LAWS?

David Cavers, in reviewing European choice-of-law legislation, reported the "emerging of three models" for legislation,[12] namely, (1) the "classic model": a short seemingly simple provision designed to do duty over a wide spectrum of choice-of-law cases; (2) the "succinct basic rule" to which is attached a brief escape clause or concept designed to afford play for judicial discretion; and (3) a set of rules designed with particularity to the points at which departure from the basic rule will be permitted, chosen with a view to

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8. *See* Vischer, *The Antagonism between Legal Security and Search for Justice in the Field of Contracts*, 142 RECUEIL DES COURS 1, 63 (1974 II).

9. Nadelmann, *supra* note 6, at 5.

10. English text of the EEC Draft Convention of 1972 on the Law Applicable to Contractual and Non-Contractual Obligations in 21 AM. J. COMP. L. 587 (1973); also in EUROPEAN PRIVATE INTERNATIONAL LAW OF OBLIGATIONS 230 (O. Lando, B. von Hoffmann & K. Siehr eds. 1975).

11. *See generally* Vischer, *supra* note 8, at 9.

12. Cavers, *supra* note 1, at 360; Cavers, *The Common Market's Draft Conflicts Convention on Obligations: Some Preventive Law Aspects*, 48 S. CAL. L. REV. 603, 626 (1975).

alleviating some of the situations in which the basic rule has given rise to complaint.

The Swiss draft does not fit into any of the three models. It comes nearest to a combination of models (2) and (3), with an attempt, however, to present a somewhat different solution.

I should in the first place underline the special structure of the draft which in itself indicates the attempt to find new ways. Through the whole draft for each set of coherent questions a tripartite approach is followed: Each section starts with the question of the conditions under which a Swiss court or administrative body is competent to deal with the issue. Next comes the choice-of-law rules to be applied. The section ends by stating the conditions under which a foreign judgment, a legal act done abroad, or a legal relationship (other than a contract or tort) created abroad is to be recognized in Switzerland. Differing from any legislation of which I am aware, the questions of competence and of recognition thus are not dealt with in separate chapters but for each subject matter treated together with the choice-of-law issue. The three questions are interconnected, each containing in a wide sense a choice-of-law aspect, but the answer to each is controlled by different policies.

III

JUDICIAL AND ADMINISTRATIVE COMPETENCE

Judicial and administrative competence, heretofore a matter left mainly to the Cantons, and choice of law are tightly bound together. It was perhaps one of the shortcomings of traditional conflicts law to separate the two questions too strictly. *Ius proprium in foro proprio* is a leading principle of the draft. The difference between competence and the question which law the Swiss judge or a Swiss authority is to apply *in concreto* is obvious and has an effect on the solution. Where the principle of correspondence of forum and *ius* is not followed, the choice of the proper forum may very often influence the choice of the applicable law.

Three guidelines govern the solutions with regard to judicial and administrative competence. Firstly, the solution should not be too remote from the rules of the E.E.C. Convention on Judgments of 1968.[13] Secondly, competence is to be denied if a foreign court has a closer relation to the issue; the principle of avoiding conflicts should govern the solution.[14] Lastly, Swiss

13. EEC Convention of September 27, 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, English text in [1968] 2 COMM. MKT. REP. (CCH) ¶ 6003. Switzerland has not yet decided whether to request accession to this Convention.

14. As an example: The jurisdiction of Swiss authorities in matters of succession at the last domicile of the deceased does not extend to immovable property if the country of the situs claims exclusive jurisdiction.

citizens[15] domiciled abroad have access to our courts whenever the claim in question (*e.g.*, divorce) cannot be lodged before the courts in the state of domicile or when (also taking the desired substantive results into account) this may be considered inappropriate in view of the circumstances. In that case, judicial competence is joined with the application of Swiss law. A forum based on nationality in Switzerland is, however, not generally retained. To do so would contradict the main bases of competence in Switzerland, domicile and habitual residence.

In money matters an agreement on a Swiss forum is acceptable; but the Swiss judge is only bound to take the case if one of the parties has his domicile or habitual residence in Switzerland or when Swiss law is to be applied to the case under the conflicts rule.

In two respects, however, the principle of the *forum proprium* had to give way to other considerations, to which greater importance was attached:

a) Despite severe criticism, for the time being the forum at the *locus arresti*, for which most Cantons provide, is retained, although it is often regarded as an improper forum. If, for example, a debtor not domiciled in Switzerland has assets here, a creditor can attach them but must prove his claim by initiating a lawsuit at the forum of the *locus arresti*. In relations with the E.E.C. member States, this forum will have to be abandoned, if Switzerland should join the E.E.C. Convention on Judgments.[16] But this forum is regarded by the business world, not only in Switzerland, as being of such importance that its abandonment is inconceivable. Of course, execution is confined to the assets attached in Switzerland.

The attachment of assets of a foreign debtor gives a preference to the creditor who comes first. This is especially unsatisfying when bankruptcy has been decreed in a foreign state. The draft, therefore, makes a step towards a certain internationalization of bankruptcy by alleviating the strict territorial principle. Under certain conditions, a foreign declaration of bankruptcy will be recognized in Switzerland when the debtor with a foreign domicile has assets here, with the consequence that special liquidation in Switzerland takes place. The creditors of a Swiss establishment and a spouse domiciled in Switzerland are given priority in the distribution. Remaining assets will be handed over to the principal bankruptcy administration abroad. If a foreign declaration of bankruptcy is recognized, individual attachments of assets are excluded. This will lessen the importance of the special attachment and, therefore, the *forum arresti*.

b) Apart from the *forum arresti*, which presupposes that the defendant is

15. Normally, in the case of a person having different nationalities the most effective nationality will prevail. This, however, does not apply in the case of a Swiss national having a second nationality, so far as access to the Swiss courts is the issue.

16. *See* article 3 of the Convention, *supra* note 13.

not domiciled in Switzerland, a general forum of necessity in Switzerland is offered to foreigners when the absence of this forum has a totally inappropriate effect for the claimant, in the sense of an international denial of justice. The grant of this forum of necessity must be applied in a restrictive way, but its availability stems from the fact that there may always be situations not foreseen by the legislator making it absolutely imperative to provide access to our courts.

IV

RECOGNITION OF FOREIGN JUDGMENTS AND ACTS

Leaving aside for a moment the conflicts rules in the strict sense, I now turn to the third issue in each section, the recognition of foreign judgments and acts.

1) The main principle governing the recognition of acts done abroad, especially in matters of status (like marriage and adoption), is the *favor recognitionis.* The rationale is that in matters of personal and family status the foreign act has created a social factum which should not be destroyed at a later time by a court in Switzerland. A marriage celebrated abroad in conformity with foreign law should not be challenged without serious reason. Nonrecognition in Switzerland cannot cancel the social effect the marriage has produced. The technical instrument for realizing the *favor recognitionis* is alternative reference, which has long been used, for instance, in dealing with questions of form in contracts and last wills and testaments. The act is valid either if it is in conformity with the laws of those States having a reasonable connection with the issue, or if those States recognize the act done in another State as valid. Of course, alternative reference, along with the maxim *ut res magis valeat quam pereat* expresses a substantive value judgment. As Judge Cardozo,[17] writing for the New York Court of Appeals, said: "There is a growing conviction that only exceptional circumstances should lead one of the states to refuse to enforce a right acquired in another. The evidences of this tendency are many." This principle certainly does not apply to contracts and torts but is valid for acts abroad affecting status. In that respect, the draft tries to realize what may be called an international full faith and credit clause. I suspect that this idea is also hidden behind the vested-rights theory which has retained its value, at least with reference to status. The system of alternative reference reserves to the court the necessary control but, on the other hand, expresses a policy of restriction which I consider wise in administering justice as to acts which have already created a given status.

2) Foreign judgments must be recognized if the court was competent under a possible alternative reference. There is no absolute parallelism be-

17. Loucks v. Standard Oil Co., 224 N.Y. 99, 113, 120 N.E. 198, 202 (1918). *See* Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 17 (1945).

tween the competence of the Swiss courts and the acknowledged competence of a foreign court. The main reason is that, in money matters, the Swiss Constitution[18] reserves for Swiss citizens domiciled in Switzerland the *forum domicilii* compulsorily. Therefore, whereas competence of Swiss courts at the place of tort or the place of the performance of a contract is admitted, in money matters normally a foreign judgment against a Swiss defendant domiciled in Switzerland cannot be recognized.

Following modern tendencies, no *revisio in iure* is allowed, so that control of the conflicts rule applied by the foreign court is also excluded. On the other hand, recognition of a foreign judgment is conditioned by a due process clause and by *ordre public*; but the *ordre public* clause should be applied very restrictively in this indirect use.[19]

3) It may be said that, with regard to recognition both of foreign acts affecting status and of foreign judgments, the Swiss draft tends to some degree, taking into account the diversity of laws, to realize on an international basis what the Full Faith and Credit Clause does internally for the purpose of the Union. For that reason, especially in the field of recognition of foreign acts affecting status, it is ultimately a question of taste whether that problem is regarded as belonging to choice-of-law in the strict sense or to something only "related to" choice of law.

V

THE CONFLICT-OF-LAWS RULES "STRICTLY SPEAKING"

Conflict-of-laws rules should indicate for each topic the law to be applied by the Swiss judge. The main goal was to comply with two general policies: strengthen certainty on the one hand, but avoid unjust results in the individual case on the other.

1) The conflicts rules of the draft relate to narrow questions. In the chapter dealing with torts, for example, various typical tort situations (like torts by mass-media, unfair competition, product liability, etc.) are covered by special rules. The general tort rules, which again try to meet special situations (like the interconnection of the tort with a preexisting relationship or the common habitual residence of the parties) are restricted to the few cases not covered by the special rules. To that extent the draft meets the demands for narrowing of the issues.

On the other hand, normally—but not in all cases—the conflicts rules select a jurisdiction, not rules. Whenever a coherent legal relationship is involved,

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18. Swiss Constitution art. 59. *See* NUSSBAUM, *supra* note 4, at 49.

19. It has long been acknowledged that when the recognition of a foreign judgment is involved, the *ordre public* clause has to be applied more restrictively than when direct application of foreign law is in issue. *See* Vischer, *Internationales Privatrecht*, in 1 SCHWEIZERISCHES PRIVATRECHT 509, 536 (M. Gutzwiller et al. eds. 1969); F. VISCHER, DROIT INTERNATIONAL PRIVÉ 28 (Fribourg 1974).

the tendency is not to dismantle it by splitting it up into numerous separate issues. Material harmony, rightly regarded as a goal of high value, should not be sacrificed to the demand that conflicts rules should select rules only. Only those issues which are severable without danger for the whole are covered by special rules. I do not think that depeçage is a goal in itself and do not share the enthusiasm often expressed for that method. Depeçage increases the danger of contradictory solutions resulting from reference of different aspects of a question to different laws. Divorce and its consequence for remarriage, for instance, should be governed by the same law, although, in principle, marriage is dealt with separately and differently from divorce. Many recent cases in family law decided in Switzerland, Germany, and elsewhere have revealed the necessity of maintaining the inner harmony existing in one law and of not disrupting it by the play of conflicts rules. Material harmony is regarded as a goal of greater value than international harmony.

The substantive result is taken into account in the rules of choice of law when a result is regarded a priori as desirable. This goal is achieved either by combining the competence of Swiss courts or authorities with the application of Swiss law or by using alternative references. In this way the draft tries to reconcile conflicting policies.[20]

2) The goal of codification of conflict of laws is to strengthen certainty, but excessive certainty leads to rigidity. Therefore, even detailed codification must allow for an escape in case the judge faces a situation where the rationale behind the normal rule does not apply, where the normally just rule leads to injustice. Or in the words of David Cavers: "Now and then, however, one of our rules appears to be miscarrying in an atypical situation. We become disturbed, alarmed. It is then that we cry out for justice."[21] Although the draft tries to identify in all fields the typical situation, it is certainly not possible for a legislator to foresee all situations and combinations of facts. Only after long discussions and admittedly with some hesitation, a general escape rule was included in the draft.

In comprehensive legislation it is almost impossible to indicate with accu-

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20. I should illustrate that endeavor by an example: Swiss authorities are competent to celebrate a marriage if one of the spouses is domiciled in Switzerland or is a Swiss national. In addition, the authority may (but need not) allow celebration of a marriage in Switzerland if both spouses are foreigners or domiciled abroad, provided that the marriage to be celebrated in Switzerland will be recognized in the State of the domicile or the nationality of one spouse at least. Swiss competence is joined with application of Swiss law. However, to facilitate marriage, the authority can apply the law of the nationality or of the domicile of the spouses, instead of Swiss law, if Swiss law would prohibit the marriage. This set of rules expresses in the first instance the *favor matrimonii*. But in conditioning the competence of the Swiss authorities where both spouses are foreigners or domiciled abroad, a second policy is aimed at: Switzerland should not become a marriage paradise; the *favor matrimonii* should not be extended to those cases where either no real connnection of the spouses with Switzerland exists or where the other most involved States would not permit such a marriage.

21. D. CAVERS, THE CHOICE-OF-LAW PROCESS 79 (1965).

racy the elements which would justify escape from the application of the normal rule. The mopping-up clause of the draft acquiesces in stating that, exceptionally, a rule need not be applied if from all circumstances it becomes evident that the issue has an especially weak contact with the law designated by the rule but obviously a much closer contact with the law of another State.

Certainly, such a clause brings into the codification an element of "legal impressionism" and, therefore, is open to all criticism directed to such an approach.[22] In Swiss legislation, however, such a clause must be judged against the background of long experience in dealing with general clauses. They contain a mandate for the judge to analyze and group the atypical cases and, by identifying the relevant factors, step-by-step to develop additional rules and subrules meeting the "typical atypical" situations, which will be binding for cases yet to be decided. In other words, following the demand of the famous art. 1 § 2 of the Swiss Civil Code,[23] facing the interpretation of an indeterminate rule, the judge has to do quasi-legislative work. Certainly, there will always remain cases which are not suitable as a nucleus for development of a rule. For these entirely "individual" cases only a problem-centered law-finding process can provide a solution. Here the analysis must necessarily be carried out on a retrospective basis. But, as a rule, judicial discretion is limited. The escape clause does not just "open-end" the normal rule as does the approach used for the *Restatement (Second) of Conflict of Laws*.

What then, we may ask, are the factors and situations which could lead to a departure from the normal rule? I can only indicate some of them:

a) The expectations of the parties in the application of given law, different from that designated by the rule, provided that the expectations were not mere speculation but justified under the circumstances at the moment when the relationship was entered into: It is the same rationale which controls the question of recognition of foreign status acts. I would attribute to the justified expectations of the parties a greater value than being just "an auxiliary consideration in justifying choice of law."[24] The draft quite generally tries to honor expectations. To that end the draft allows a limited autonomy of the parties outside contracts, when no third persons or state interests are involved (*e.g.*, for matrimonial property, for the law applicable to divorce, for internal relations with regard to the transfer of a chattel, for the consequences of torts after the occurrence of the event).

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22. *See* Nadelmann, *supra* note 6, at 9.

23. *See* Vischer, *supra* note 8, at 60. Swiss Civil Code art. 1(2) (1907): "Where no provision is applicable, the judge shall decide according to the rules which he would lay down if he had himself to act as legislator."

24. D. CAVERS, *supra* note 21, at 69. In this respect, I share the opinion of Max Rheinstein that "avoidance of the injustice that would result if a controversy were decided under a law unfamiliar to the parties" is an important goal of conflict-of-laws law. Rheinstein, Book Review, 32 U. CHI. L. REV. 369, 374 (1964-65).

b) Specially close connection with a given legal order and isolation of the normal point of contact which has become almost meaningless: The escape clause also performs the function of taking into account renvoi, which otherwise is admitted only in exceptional cases, especially to strengthen the *favor negotii vel recognitionis* where recognition of a foreign status act is under review. If, however, in a given case the other interested States agree on a conflicts solution, it may be advisable for the Swiss judge to join in the harmony.

c) The avoidance of contradictory results in a given case, the preservation or restoration of material harmony to be maintained in interconnected legal issues: The drafters of the Code are convinced that from such a quasi-legislative approach guidelines for application of the escape clause will emerge, clear enough not to leave the judge in too great embarrassment. In addition, the escape clause can save the Code from the dangers of petrification and help to meet the demand of Judge Cardozo: "The law, like the traveler, must be ready for the morrow. It must have a principle of growth."[25] It should not be forgotten that the classic civil codes survived only because their general clauses permitted constant adaptations to new situations and avoided overrigidity without destroying security in law to any relevant degree.[26]

3) The social-welfare state has undermined the classic codification by constantly reforming parts of the codification and by passing a mass of special legislation.[27] At the same time, bureaucratic power, its unavoidable escort, has increased and to a certain degree supplanted judicial power. Each State has a growing set of rules whose existence we find acknowledged already by Savigny who identified them as laws of a strictly positive, imperative nature which may rest on reasons of politics, police, or political economy.[28] In the words of Savigny, these rules have the nature of conflicts rules which the judge must always apply strictly.[29] More recently Francescakis labelled these rules, which are connected with the "organisation étatique" and "dont l'observation est nécessaire pour l'organisation politique, sociale et économique du pays," as "lois d'application immédiate."[30] With a growing body of unilateral rules, each State tries to delimit specially the "sfera di efficacia" (De

25. Cardozo, *supra* note 5, at 20.

26. *See* G. GARDINER & A. MARTIN, LAW REFORM NOW 11-12 (1964).

27. *See* Wieacker, *Aufstieg, Blüte und Krise der Kodifikationsidee*, in FESTSCHRIFT FÜR GUSTAV BOEHMER 34 (1954).

28. F. C. VON SAVIGNY, TREATISE ON THE CONFLICT OF LAWS § 349 at 77, 78 (Wm. Guthrie transl. of 8 SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS (1849), 2d ed. Edinburgh 1880).

29. *Id.*

30. PH. FRANCESCAKIS, LA THÉORIE DU RENVOI ET LES CONFLITS DE SYSTÈMES EN DROIT INTERNATIONAL PRIVÉ 11 (1958); Francescakis, *Quelques précisions sur les "lois d'application immédiate" et leurs rapports avec les règles de conflit de lois*, 55 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 1 (1966).

Nova)[31] of these rules of an economical-political-social character. This "publicisation du droit privé" (Batiffol)[32] has far-reaching consequences for conflict of laws. Unilateral rules, mostly deduced from the purpose of the substantive law rule, displace the normal conflicts rule. According to Batiffol, only where private law in the traditional sense subsists will the classic conflict-of-laws rules also subsist. The tendency to unilateralism confronts the legislator in the field of conflict legislation.

The Swiss draft tries to cope with the problem along the following lines:

1) If a rule expressing a dominant state interest belongs to the Swiss *lex fori*, the judge is bound to enforce it when a situation comes within the purpose of the rule and its scope of application. In addition, the positive function of *ordre public* character is secured by express unilateral conflicts rules.

2) If a rule belongs to the *lex causae*, it is included in the applicable law irrespective of whether it is of a private or more public character. However, when applying such a state-interest rule, especially if it is part of so-called public law, the judge must take an inherent spacial limitation into account. This respect for the "autolimitazione" of the rule is, as De Nova has explained,[33] a problem different from renvoi. In some cases, the fact that a legal relationship is to a large degree regulated by imperative rules may determine the choice-of-law rule governing the relationship in question; that is, the State which has the power to enforce its imperative rules should have control over the whole issue. Of course, the judge retains ultimate control by way of the negative *ordre public* clause through which he may exclude those rules whose effects for the persons involved cannot be tolerated.

3) If a rule belongs to a third State, which is neither the *lex fori* nor the *lex causae*, the most debated situation is faced. Different approaches have been suggested. All agree that it is impossible simply to ignore these "superimperative" rules of third States. The Swiss draft in principle follows the approach proposed by article 7 of the E.E.C. Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations,[34] a solution now taken over by the Hague Conference in its Draft Convention on the Law Applicable to Agency of June 1977.[35]

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31. De Nova, *I conflitti di leggi e le norme con apposita delimitazione della sfera di efficacia*, 13 DIRITTO INTERNAZIONALE I 13 (1959).

32. Batiffol, *L'avenir du droit international privé*, in INSTITUT DE DROIT INTERNATIONAL, LIVRE DU CENTENAIRE 1873-1973 162 (1964).

33. De Nova, *supra* note 31.

34. Draft Convention, *supra* note 10.

35. Draft Convention on the Law Applicable to Agency, signed at The Hague, June 16, 1977, 16 INT'L LEGAL MATERIALS 775 (1977), art. 16: "'In the application of this Convention, effect may be given to the mandatory rules of any State with which the situation has a significant connection, if and in so far as, under the law of that State, those rules must be applied whatever the law specified by its choice of law rules."

A rule of a third State claiming exclusive application to the case under consideration must be "applied or taken into account" when in the view of the Swiss judge: firstly, the relationship has a close enough connection with that third State; secondly, the interest of that State in having its rule applied is predominant; and, thirdly, that interest is regarded as justified in view of the circumstances of the case and of the purposes of the rule in question. The option given by the words "applied or taken into account" means that the judge may, depending upon the situation, apply the rule or only draw conclusions from its existence. The second condition enables the judge to avoid a depeçage in cases where the issue covered by the rule of the third State is not severable from the entire relationship. He can, for instance, take an export ban of a third State into account as a ground for impossibility of performance but decide the consequences of impossibility on the basis of the law of the State governing the contract.

The transformation of unilateral rules of third States into bilateral principles is certainly an extremely difficult process. It necessarily involves a more case-by-case directed evaluation of all relevant factors. The judge is asked to assess whether the relationship in question affects the economy or the social order of the third State directly and whether the interest of the State as expressed in the purposes of the laws involved is justified according to its own and to international standards; in doing so, he will often be guided by the question whether the legal measures of the third State are equivalent to those taken by the forum State or for the protection of "internationally typical interests."[36]

The substantive result and the principle of effectiveness (the question whether the third State has the *potestas de facto* to enforce its rules) will in addition be decisive factors. Obviously, this approach introduces a strong element of policy-weighing into the law-finding process. This product of the United States "revolution," although certainly always inherent in conflict of laws, in my view, is most justified when the rules under review express a specific State interest in a specially dominant way.

When facing rules of this kind on an international basis, we are in a situation similar to that in the United States when the principle of policy-weighing first commended itself as the most fruitful way of dealing with statutes of sister states of a Union grounded in the common law.

The question of protection of a person, especially in contracts, is in my view a different question, not necessarily to be dealt with under the principles just stated. Especially in the field of contracts, I hesitate to advocate solutions which would, for instance, allow a party to rely on that law connected with the transaction which gives the higher protection. It is often impossible to state

36. Vischer, *supra* note 8, at 24; Zweigert, *Nichterfüllung auf Grund ausländischer Leistungsverbote*, 14 RABELS ZEITSCHRIFT 287, 291 (1942).

which law offers a better protection; a system of law can be more favorable in one aspect and less favorable in another. Modern legislation may even have a tendency of being overprotective, not treating as adults even those persons who can look out for themselves and defend their positions. The draft, in the chapter on contracts, adheres to the principle that those contracts where one party normally has a special need for protection are subject to the law of the State at that party's habitual residence; in labor contracts, to the law of the State of the normal place of employment. A party should not be deprived of the protection given by the law on which he normally relies and which is the law of his "home" State. This principle is also a limit on party autonomy. The drafters considered at length whether it would have been preferable to use an approach in terms of "principles of preference" as suggested by David Cavers. It would have necessitated expression in the rules of a substantive value judgment with regard to the various kinds and degrees of protection offered by the States interested in the case. For the reasons indicated, a more neutral approach was preferred, influenced by the dominant rationale that where protection is in issue, the normal expectation of the person to be protected should be honored.

VI

NATIONALITY OR DOMICILE AND HABITUAL RESIDENCE AS CONTROLLING FACTORS

Since the Code Napoleon and especially under the influence of Mancini, nationality became the controlling factor in conflict of laws in continental Europe. Switzerland, as early as the legislation of 1891 (Gesetz über die Niedergelassenen und Aufenthalter (NAG)), deliberately took an opposite position.[37] Art. 2 of the NAG states as a general rule that for all matters not dealt with differently the forum of the domicile and the law of the domicile shall apply. Consciously, the legislator of 1891 put Swiss law in opposition to the then dominant trend in science and legislation. In more recent times, general development has turned more and more towards the domicile principle. I need not repeat what has been said about the reasons for the decline of the nationality principle. However, it must be noted that nationality as the main governing factor in personal, family, and succession matters is still retained in Germany, Austria, Italy, Greece, the Benelux, and in the eastern European States, for instance, even in new legislation and drafts dealing with conflict of laws.

Being surrounded by "nationality-states," Switzerland cannot simply ignore this fact, if it is to avoid a certain isolation. The drafters of the new Code had to recognize that a single-track solution is not appropriate for all questions. In

37. Law of 1891, *supra* note 4.

principle, the legislation follows the domicile principle. In all questions of recognition, an alternative reference goes to the *lex patriae*. But sometimes reference is made to the *lex patriae* even as a matter of direct application. Where a family-group relation is in issue (*e.g.*, relations between parent and child) a hierarchy of references is used. The first reference goes to the common domicile; failing a common domicile, the question is referred to the common nationality; and so forth. That law should prevail which is common to the "group" members and therefore can be regarded as a common bond.

An extension of party autonomy to matrimonial property and succession allows the parties to choose their national law instead of the normally applicable law of the domicile and in this way to express their closer attachment to the legal system of their national State. Or, in divorce cases, the parties can insist that the judge apply to the case the national law in order that the judgment be recognized in the State of nationality.

Under the draft a person has his domicile in the State where the center of his personal, family, and professional interests is located.[38] That is not necessarily the place of residence. In addition to domicile, habitual residence is used as a connecting factor. This term is understood as the place where a person usually dwells and is used when the important element is the appearance vis-à-vis third persons, as in contracts and torts or, in family-law, when a person—like a dependent child under age—has not yet a domicile in the above-named sense. Habitual residence is often in addition one of the alternative points of contact in the question of recognition of foreign acts affecting status.

A FINAL REMARK

Will the Swiss draft, when completed, be regarded as a contribution toward mitigating "six centuries of frustration"[39] in conflict of laws? Even as the result of long and careful work, legislation can certainly not bring definite solutions for problems which are still under debate and always will be. One who regards a policy-weighing approach in the pure sense as the only possible method will dismiss the draft a priori as a useless endeavour. A law-finding process when it starts fundamentally from the content and purposes of the substantive-law rules of the States interested in the case can indeed hardly be transformed into prefixed rules, even if they contain an element of flexibility. The results of the *Restatement Second* in my view show this approach as not commending itself for codification.[40] What is merely a method can be expressed in a recipe but not in conflicts rules in the traditional sense.

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38. Perhaps the word "home" used by Cavers comes nearest to this concept of domicile.
39. CAVERS, *supra* note 21, at 1.
40. *See* Vischer, *Das neue Restatement "Conflict of Laws"*, 38 RABELS ZEITSCHRIFT 128, 149 (1974).

The Swiss draft, which I have attempted to describe in a sketchy way, uses different approaches depending on the issues under consideration. The policy-weighing method as understood by United States scholars has its place also, especially where a question is more open to judicial assessment, but it cannot be the exclusive or even the dominant element. Abstract rules, too, are built upon a rationale which has a deliberate policy as an end. The emphasis which the draft places upon the interconnection between competence, choice of law, and recognition perhaps helps to make underlying policies more intelligible.

One may question whether in this field of the law the national legislator should not yield to the international legislator. National conflict-of-laws rules are to some extent a contradiction in terms; from an idealistic point of view, only an international legislator should attribute competence to the States for international cases. Switzerland has always been a fervent supporter of international conventions and has perhaps ratified more conventions of the Hague Conference than any other State. The draft incorporates them or reserves their application. But these conventions, whether bilateral or multilateral, deal with some narrowly circumscribed aspects only. The endeavour to cover whole fields, like the E.E.C. draft on contracts and torts, has so far not been too successful. In the important field of the recognition of foreign judgments, the Hague conventions, in contrast to those dealing with choice-of-law problems *stricto sensu*, are applicable only in relation to third States which have ratified them. Therefore, supplementary regulation by the national legislator is needed. For the time being and certainly for a long time ahead, international instruments cannot replace national solutions.

National legislation, specifically new, should, however, never shackle the negotiator of international instruments. The negotiator must make an effort to overcome natural tendencies to regard the national solution as the most valuable. In conflict of laws, the search for better solutions is a never-ending process and must not be barricaded by national legislation; international interchange of views remains an absolute necessity. Scholars in the United States will perhaps note that in many respects the Swiss draft pays tribute to the important work done in their country.

Especially my long and friendly discussions with David Cavers at Harvard have given me a better understanding of his ideas, which so fundamentally have changed and even revolutionized conflict of laws. I feel impelled to express to him my sincere thanks and my deep respect for his work.