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CHAPTER 42

COMPARATIVE LAW AND PRIVATE INTERNATIONAL LAW

MATHIAS REIMANN

*Michigan**

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Comparative law and private international law (conflict of laws)[1] have long had an intimate relationship (Section I). Traditionally, comparative law has interacted with private international law in three basic dimensions which can loosely be termed academic, legislative, and judicial: Comparative law has made private international law the object of scholarly study; it has assisted in the making of private international law rules; and it has provided a method for the application of existing conflicts norms (Section II). Recently, however, the emergence of supra-national legal orders has had a significant impact on the relationship between these disciplines, which are now jointly facing the challenges posed by the coexistence of overlapping legal regimes on multiple levels (Section III). These challenges can only be met through even greater cooperation than in the past (Section IV).

I. An Intimate Relationship

Private international law has a more intimate relationship with comparative law than all the other subject-areas addressed in Part III of this *Handbook*. The main reason is that both disciplines deal with foreign legal systems—comparative law

[1] Both terms are often used interchangeably. As has been pointed out repeatedly, both are equally infelicitous. 'Private international law' is misleading for two reasons. First, the respective principles and rules are not 'private law', at least not in the traditional sense of directly regulating private relationships and entitlements; instead, they are secondary law telling decision-makers how to proceed, eg, what law to apply in transboundary cases. Second, such law is not really 'international' in the traditional sense because most of it is simply part of national legislation and case law; it merely deals with international cases. 'Conflict of laws' is also misleading because the subject is not necessarily about resolving such conflicts at all. In several areas (jurisdiction, judgments recognition), there is usually no conflict because the forum's own rules govern without further ado. Even with regard to choice-of-law regimes (determining which jurisdiction's substantive or procedural rules apply), their rules do not necessarily conflict but can often be reconciled or combined.

because it studies them directly, private international law because it needs to solve potential conflicts between domestic and foreign law. Private international law has to deal with foreign law in all its three main branches. This is most obvious with regard to choice of law as its core, that is, the set of principles and rules telling decision-makers in transboundary cases which of the several involved jurisdictions' laws they should apply. But it is also often true for questions of jurisdiction which may require looking at the respective foreign rules. Finally, the recognition of foreign judgments can easily raise questions about the law of the judgment's country of origin.

To be sure, significant differences between the disciplines remain. Most importantly, comparative law is not a body of rules but rather an academic discipline as well as a legal method and thus comparable (and related) to, for example, legal history. Thus its primary purpose is academic, that is, the pursuit of knowledge in and of itself,[2] its enormous practical utility notwithstanding. By contrast, private international law *is* a body of positive rules and thus comparable (and related) to, for example, civil procedure. Its primary goal is practical, that is, the decision of transboundary issues in actual disputes, though it is also of considerable theoretical and academic interest. As we shall see, these differences actually foster the two fields' quasi-symbiotic relationship because their respective orientations complement each other in numerous ways.

How much the two disciplines tend to go hand-in-glove is also visible on the personal and institutional level. Comparative law scholars are often also private international law scholars and vice versa. This is because both fields presuppose an interest in thinking beyond one's own legal system, because both have traditionally shared a focus on private law, and also because both cater to individuals with foreign language capabilities. This combination of jobs, however, is much more common in some countries (like Germany, Switzerland, or the United States) than in others (like France, Italy, or Japan). Institutions often also pair the disciplines together. This is largely because both fields engender similar kinds of work, require a foreign law library, and thrive on relationships with foreign countries. The most famous example of such an institutional combination is the Max Planck Institute for Foreign and International Private Law in Hamburg. Another manifestation is the frequent combination of university chairs for comparative and private international law in some countries. Yet, this close personal and institutional relationship is gradually diminishing as both disciplines grow more specialized and complex so that keeping up in both fields becomes increasingly impossible.

Despite the intimacy of their relationship, comparative law and conflicts law can, in some sense, actually be at loggerheads. At least in the tradition dominant throughout much of the twentieth century, comparative law has displayed a strong

[2] See Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung* (3rd edn, 1998), 14.

bias in favour of international legal uniformity, mainly as an agenda for legal unification,[3] but also by focusing on the similarity of actual outcomes.[4] Viewed from that perspective, comparative law is, of course, the enemy of private international law: where comparative law overcomes the diversity of law through international unification (or at least tends to find similarity of actual results), conflicts among laws tend to disappear, and so does the need for a discipline to handle them. In short, the success of comparative law as a uniformity agenda deprives private international law of its *raison d'être*[5]—a point to which we shall return in the context of recent developments (Section III). Yet, there is no reason for conflicts lawyers to fear for their existence. Experience has shown that international unification of law is an extremely difficult and rarely successful enterprise; that even where it succeeds, it does not cover all the issues; and even where it covers an issue, it leaves plenty of room for divergent interpretation and results. In a world consisting of different legal systems, comparative law provides a certain centripetal force but, at least on a global level, the centrifugal forces will always remain strong enough to create conflicts and thus to guarantee a place for private international law.

II. Traditional Interactions

As mentioned, comparative law plays three principal roles *vis-à-vis* private international law. First, it is a possible method of studying private international law: it can subject domestic and foreign conflicts law to comparative inquiry (subsection 1). Second, comparative law is a foundation for private international law: it often assists in the process of making conflicts law by informing lawmakers about the existing material and available options (subsection 2). Finally, comparative law is a tool serving the application of private international law: it helps decision-makers to operate conflicts norms in a variety of ways (subsection 3). To be sure, these three roles overlap and interact. Still, they are sufficiently distinct to merit separate analysis.

[3] Ibid 24–31.

[4] See eg Zweigert and Kötz's famous '*praesumptio similitudinis*', ibid 39.

[5] See Bénédicte Fauvarque-Cosson, 'Comparative Law and Conflict of Laws: Allies or Enemies? New Perspectives on an Old Couple' (2003) 49 *AJCL* 403, 413–17.

1. Comparative Law as a Method of Study: Comparing Conflicts Regimes

Comparative law has long made private international law one of its favourite topics.[6] With regard to the *specific rules* (the special part), particularly those determining which country's law governs a particular issue, comparative conflicts law is nothing out of the ordinary. These rules are rules like many others and can be compared just like those of contract, tort, or family law. In this regard, comparative conflicts law employs the usual techniques (identifying similarities and differences, and so on) and pursues essentially the usual goals (recognition of alternative solutions, better understanding of one's own system, inspiration for law reform, and so on). Given the particularly close relationship between the two disciplines, comparison of specific conflicts rules may come more naturally than in other fields, but beyond that, it is pretty much business as usual. Yet, with regard to the *general concepts* of private international law (its general part), comparative conflicts law transcends the usual juxtaposition and evaluation of different regimes: 'the worldwide exchange of ideas, which is taking place with regard to the general doctrines of private international law, is more than mere comparative law—to a certain degree, it is the expression of an international legal community'.[7] As a result of the strong academic tradition in conflicts law, and especially of the centuries-long international interaction between conflicts scholars, there is a universally shared stock of basic principles, problems, and solutions which transcend national borders. One who has mastered these basics will feel immediately at home in virtually every conflicts regime in the world. In this regard, comparative conflicts law approaches the ideal of a worldwide jurisprudence.

The study of comparative conflicts law is essentially a scholarly enterprise (although it may serve eminently practical ends[8]). We will begin by looking at its origins and development from the nineteenth through the mid-twentieth century (subsection a), then survey the more contemporary scholarship in various geographic regions (subsection b), and finally outline the major areas of debate (subsection c).

(a) The Development of the Field

The comparative study of conflicts law in the modern sense of looking for similarities and differences between national laws began in the nineteenth century. Of course, the theory and practice of private international law were highly developed

[6] Ulrich Drobnig (ed), *The International Encyclopedia of Comparative Law* (1971 ff) allocates an entire volume (III), K. Lipstein (ed), comprising almost 2,000 pages, to private international law.

[7] Jan Kropholler, 'Die vergleichende Methode und das internationale Privatrecht', (1978) 77 *Zeitschrift für vergleichende Rechtswissenschaft* 3 (the translation is mine).

[8] See below Section II.2 and II.3.

even before that time. But as long as the discipline was simply part of the general *ius commune*, that is, of an internationally shared body of legal knowledge, there were no distinct systems to compare. It was only when private international law, like many other areas, began to be enshrined in the codes or statutes of the modern nation state that it lost its essential unity and became divided into various national regimes. This process began in the later eighteenth, and then characterized the whole nineteenth, century.[9] Once positive rules of conflicts law were established on the national level, they could be studied comparatively. Of course, at this point, private international law had lost its truly international character: it had become national law dealing with transboundary cases.

The first full-fledged comparative study of the field[10] was presented by the German-French jurist Jean-Jacques Gaspard Foelix in his *Traité du Droit international privé ou Du conflit de lois de différentes nations en matière de droit privé* in 1843. At around the same time, his German colleague Wilhelm Schaeffner published his *Entwicklung des internationalen Privatrechts*, which was similarly oriented. Yet, at the time, these books were more the exception than the rule. Most other conflicts scholars in the nineteenth century paid scant or no attention to comparative aspects. This is also true for Friedrich Carl von Savigny whose treatise on private international law was clearly the most influential work not only of that period but probably of the whole modern era.[11]

At the beginning of the twentieth century, the famous Paris Congress on Comparative Law (1900) included several presentations on private international law topics. The following decades then brought a fairly steady stream of comparative studies of conflicts law. Some appeared as books[12] while many others were published as articles in various law journals. But none of these studies endeavoured to encompass the whole body of private international law on a worldwide level.

That step was taken by Ernst Rabel around the middle of the twentieth century. Rabel, who had become the director of the prestigious *Kaiser-Wilhelm Institut für ausländisches und internationales Privatrecht* in Berlin[13] in 1926, and who was arguably the most eminent comparative law scholar of his generation, lost all

[9] There were some choice-of-law provisions already in the Bavarian codification (*Codex Maximilianeus Bavaricus Civilis*) of 1756 and in the Prussian General Land Law (*Allgemeines Landrecht für die Preußischen Staaten*) of 1794. Yet, the first conflicts provision with a long-lasting impact was the famous Art 3 of the French civil code (*Code civil*) of 1804, which is still in force and, despite its rudimentary character, has formed the basis for French private international law ever since.

[10] Curiously, though, the first modern conflicts works displaying comparative perspectives appeared not in Europe but in the United States, see below.

[11] Friedrich Carl von Savigny, *System des heutigen römischen Rechts* (vol 8, 1849).

[12] See Arthur Nußbaum, *Deutsches internationales Privatrecht. Unter besonderer Berücksichtigung des österreichischen und schweizerischen Rechts* (1932); Arthur K. Kuhn, *Comparative Commentaries on Private International Law or Conflict of Laws* (1937); Henri Batiffol, *Les conflits de lois en matiére de contrats. Etude de Droit international privé comparé* (1938).

[13] The *Institut* was the predecessor of the present *Max Planck Institut für ausländisches und internationales Privatrecht* in Hamburg.

his positions when he was forced to flee Nazi Germany in 1937. Two years later, he emigrated to the United States where he found a new academic home at the University of Michigan Law School in Ann Arbor. Here, marooned in the American Midwest, Rabel wrote his *magnum opus, The Conflict of Laws: A Comparative Study* (1945–58). Deeply international by professional experience and conviction, Rabel pursued the goal of initiating 'a radical turn of choice-of-law rules from provincial to world-wide thinking'.[14] In four volumes comprising almost 2,500 pages (not counting various introductions and indices), his study presents a comparative review of the conflicts rules (including many procedural norms) applicable in roughly a hundred jurisdictions throughout the world. It is organized not by country but rather by subject-matter and presents not only the black-letter rules but also analyses the material from a functional and practical perspective. In both its sweep and its unfailing control of massive amounts of material, it is truly a work of monumental proportions. It could only be written by a multilingual scholar of enormous erudition and over a period of many years. *The Conflict of Laws* is a classic of legal scholarship and continues to be considered the definitive comparative study on private international law even today. It is one of those law books, like Blackstone's *Commentaries on the Laws of England* (1765–69) 200, or Savigny's *System des heutigen römischen Rechts* (1840–9) 100 years before, whose contents become inevitably dated but whose accomplishment remains timeless.

While no other comparative study of conflicts law has rivalled Rabel's work (no author has even tried), the fifty-plus years that have passed since its completion have none the less yielded a fairly impressive crop in that field. To a considerable extent, this is due to the influence of Rabel's call for a sustained comparative perspective in conflicts law and to the example he had set.

Since the 1950s, a major source of comparative private international scholarship has been the series of lectures given annually at the Hague Academy of International Law (especially the General Courses on Private International Law) by the most prominent private international law scholars in the world. The lectures are published by the Hague Academy in *Recueil des cours* and, subsequently, often in book form as well. Together they constitute a sizeable library on comparative conflicts law, which by now consists of several dozen volumes.

(b) A Regional Survey

A complete survey of the comparative conflicts scholarship in the various countries of the world is neither possible nor necessary here. It is interesting to look at a few geographic regions, however, because it shows both that there is a substantial body of work out there and that there are considerable regional (or country-specific) differences in the development of comparative conflicts law.

[14] Ernst Rabel, *The Conflict of Laws: A Comparative Study* (vol I, 1945), 98.

In many parts of continental Europe, comparative conflicts scholarship has become fairly common as well as quite highly developed in the last half-century. French private international law has often suffered from a reputation of nationalism but this reputation is no longer justified, if it ever was. In recent decades, the studies of Henri Batiffol, Paul Lagarde, Pierre Lalive, and Marc Ancel have often gone beyond national boundaries. Today, a younger generation of scholars keeps producing comparative conflicts work, and the *Revue critique de droit international privé* regularly publishes articles and reviews in that genre. In Germany, comparative perspectives are virtually *de rigueur* in conflicts scholarship. The leading treatise by Gerhard Kegel is replete with foreign and comparative references[15] and the current generation of scholars has continued and solidified that tradition. The Max Planck Institute for Foreign and International Private Law in Hamburg is probably the world's major centre of comparative conflicts law, and the *Rabels Zeitschrift*, edited by its directors, is a leading journal in that area. Similarly live traditions of comparative conflicts scholarship have long existed in many of the smaller European countries, especially in Switzerland, but also in Austria, Belgium, and the Netherlands. If we turn south, however, the picture becomes more uneven. In some Mediterranean countries, comparative conflicts scholarship has a solid and live tradition, as in Italy and Greece, while that is less true in others, such as Spain. In Central and Eastern Europe, comparative conflicts scholarship is experiencing a gradual revival after long hibernation during the communist period.

On the other side of the channel, the comparative element in private international law has, on the whole, been weaker than on the continent. Still, there is considerable comparative conflicts law in England as well. In part, the work has been done by the previous generation (R. H. Graveson *et al*) which included some prominent German immigrants (especially Kurt Lipstein and Otto Kahn-Freund); in considerable part, it also comes from academics active today. Notably, the United Kingdom is the birthplace of the recent *Journal of Private International Law*. According to the prospectus, this periodical it is not only 'the first English language journal devoted exclusively to private international law', it also pursues explicitly comparative goals, that is, 'the sharing of information and ideas from legal systems around the world'.

US-American conflicts scholarship has often been criticized for its parochialism but the picture in the United States is neither so simple nor so bleak. Certainly, the nineteenth-century beginnings were anything but parochial. In fact, the earliest conflicts works including serious comparative elements were published not in Europe but in the United States. In 1828, Samuel Livermore presented his *Dissertations on the Questions which Arise from the Contrariety of Positive Laws of Different States and Nations*. Six years later, Harvard law professor

[15] Gerhard Kegel and Klaus Schurig, *Internationales Privatrecht* (8th edn, 2000).

and United States Supreme Court Justice Joseph Story published a much fuller treatment in his *Commentaries on the Conflict of Laws* (1834), in which he drew heavily on foreign learning. And in 1872, Francis Wharton's *Treatise on the Conflict of Laws* bore the subtitle *A Comparative Study of Anglo-American, Roman, German, and French Jurisprudence*. At the beginning of the twentieth century, even Joseph Beale, much maligned by later generations for the narrow-mindedness of his vested rights approach, was more widely read in foreign conflicts law than all but a handful of American conflicts scholars today.[16] It has really only been the 1920s, and especially with the advent of legal realism, that American conflicts scholarship has taken a decidedly parochial turn.[17] This trend worsened during the so-called 'choice-of-law revolution' of the 1950s through the 1980s.[18] Its leaders (especially Brainerd Currie) showed no interest in foreign approaches, and the intense theoretical discussions of these decades hardly ever looked beyond American borders. It is not surprising therefore, that, despite early efforts to bring in comparative perspectives,[19] the *Second Restatement of Conflicts* (1971) shows scant influence of foreign ideas (with the exception of some English approaches). It was at this point that mainstream American conflicts scholars and theories were indeed, as Gerhard Kegel famously put it, 'stewing in their own juices'.[20] Still, even in those decades, there were always a few American conflicts scholars with a soundly comparative outlook. Not accidentally, most of them were European immigrants (Albert Ehrenzweig, Friedrich Juenger, Kurt Nadelmann, and Arthur Nussbaum[21]) but the group included some indigenously American scholars as well (especially Arthur von Mehren and Hessel Yntema). But particularly in the last two decades, American conflicts scholarship has overcome most of its erstwhile parochialism.[22] Today, comparative scholarship is both

[16] See Joseph Beale, *A Treatise on the Conflict of Laws* (1916); Beale's 66-page bibliography lists works from all over the world in half a dozen languages.

[17] In 1945, Hessel Yntema justly lamented that 'inadequate attention has been given in this country to the relations between the doctrines of conflicts of law as here evolved and those of foreign countries other than England', Hessel Yntema, 'Foreword', in Rabel (n 14), vol I, xci.

[18] For an authoritative review, see Symeon Symeonides, *The American Choice-of-Law Revolution in the Courts: Today and Tomorrow* (2003).

[19] In fact, Ernst Rabel's comparative study of conflicts law was originally planned as a contribution to a Second Restatement of Conflicts. It was based on an initiative, and largely financed by, the ALI for that purpose. Soon, however, Rabel's work took on a life of its own; see William Draper Lewis, 'Foreword', in Rabel (n 14), vol I, ix–x.

[20] ('Kochen im eigenen Saft'), Gerhard Kegel, 'Wandel auf dünnem Eis', in Friedrich Juenger (ed), *Zum Wandel des internationalen Privatrechts* (1974), 35, at 41.

[21] See eg Albert Ehrenzweig and Erik Jayme, *Private International Law, A Comparative Treatise on American International Conflicts Law Including the Law of Admiralty* (3 vols, 1967); Friedrich Juenger, *Choice of Law and Multistate Justice* (1993); Kurt Nadelmann, *Conflict of Laws, International and Interstate* (1972); Arthur Nußbaum (ed), *American-Swiss Private International Law* (1951, 2nd edn, 1958); Arthur Nußbaum (ed), *Bilateral Studies in Private International Law* (vols 2–13, 1953–65).

[22] See eg 'Symposium, International Issues in Common Law Choice of Law: American Conflicts Teaching Exits the Middle Ages', (1995) 28 *Vanderbilt Journal of Transnational Law* 361.

frequent and part of the mainstream, thanks especially to the work of Symeon Symeonides (another immigrant)[23] but also thanks to a sizeable group of others who pay regular attention to the comparative and international dimensions of their discipline. As a result, the heyday of American parochialism in conflicts law is definitely over.[24]

In fact, at least as far as the *transatlantic* dimension is concerned, conflicts scholars in the United States today pay *more* attention to comparative perspectives than their European colleagues. This is the result of almost diametrically opposed developments on both sides of the Atlantic over the last two decades. In the 1960s through the 1980s, mainstream American conflicts scholarship was preoccupied with the profound changes occurring on its domestic choice-of-law scene. When the dust of the choice-of-law revolution settled (and the theoretical debates became tiresome) in the 1980s, American conflicts law discovered the challenges of economic globalization. It began to look outward again, especially to Western Europe with its new crop of conflicts legislation, so that today, European conflicts law is frequently discussed, or at least referenced, in the American literature. The European development began from the opposite end. Private international law scholars in the 1970s and early 1980s frequently looked across the Atlantic because they were intrigued by the American choice-of-law revolution and intensely debated its merits and dangers as a potential model for European reform.[25] Over time, however, continental conflicts theory lost interest in American developments for three reasons: what American ideas appeared useful had by and large been absorbed;[26] in many European countries, new conflicts legislation was enacted, and after the legislature had spoken further theoretical debate seemed rather pointless; and, perhaps most importantly, beginning in the late 1980s, European conflicts scholars focused their attention on the new and urgent problems created by the acceleration of European integration. Especially because of these new challenges at

[23] See eg Symeon Symeonides, *Private International Law at the Turn of the Twenty-First Century, Progress or Regress?* (1999); see also Mathias Reimann, *Conflict of Laws in Western Europe, A Guide through the Jungle* (1995).

[24] For a more detailed and nuanced assessment, see Mathias Reimann, 'Parochialism in American Conflicts Law', (2001) 49 *AJCL* 369. Of course, this is not to deny that more can, and should, be done; see Friedrich Juenger, 'The Need for a Comparative Approach to Choice-of-Law Problems', (1999) 73 *Tulane LR* 1309 ff.

[25] See especially Christian Joerges, *Zum Funktionswandel des internationalen Privatrechts* (1971); Friedrich Juenger, *Zum Wandel des internationalen Privatrechts* (1974); Gerhard Kegel, 'Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers', (1979) 27 *AJCL* 615; 'Symposium "The Influence of Modern American Conflicts Theories on European Law" ', (1982) 30 *AJCL* 1.

[26] A prime example is the principle that in tort cases, the law of the parties' common domicile (if any) may trump the law of the place of the wrong. This principle was first openly announced by the New York Court of Appeals in 1963 (*Babcock v Jackson*, 191 NE 2d 279, NY 1963) and has since become widely accepted in Europe and beyond, see Mathias Reimann, 'Codifying Torts Conflicts: The 1999 German Legislation in Comparative Perspective', (2000) 60 *Louisiana LR* 1297.

home, European private international law began to turn inward, and today, continental scholars rarely look beyond the boundaries of the European Union any more.[27] In that sense, European conflicts scholarship is more parochial today than its American counterpart. The Europeans would be well-advised to heed Ulrich Drobnig's recent admonition: 'In our preoccupation with Europe, let us not forget the world'.[28]

In Latin America, the comparative approach to conflicts law has a long tradition.[29] This tradition goes back to the nineteenth century (eg Pimenta Bueno in Brazil), gathered strength in the earlier decades of the twentieth century, especially with the work of A. Sanchez de Bustamante (Cuba). It was continued, *inter alia*, by Quintin Alfonsin (Uruguay) and Jacob Dolinger (Brazil), and it is very much alive today in the work of a younger generation. Here, we also find significant regional studies of the private international law of the Andean countries[30] and of the MERCOSUR members.[31]

In several Asian countries (Japan, Korea, the People's Republic of China, and Taiwan), conflicts scholars have also frequently looked at foreign developments, with Europe and the United States receiving the lion's share of attention. With regard to Europe, this reflects the original reception of continental (especially French and German) conflicts doctrine in many parts of Asia in the nineteenth and twentieth centuries. With respect to the United States, it is a result of the global impact of American law in general as well as of the fascination with the bold innovations generated during the American choice-of-law revolution in particular.

(c) *Fundamental Issues*

Much comparative conflicts law deals with the myriad specific rules governing a huge variety of particular issues. These issues range from the more traditional question of exactly which law applies in transboundary cases in matters of contract, tort, and family law to more recent questions of intellectual property rights, electronic commerce, and the Internet generally. But they also include discussions of diverse international jurisdiction principles and rules, especially in the American-European context. Finally, comparative conflicts law addresses problems

[27] Notable exceptions are Jan Kropholler and Jan von Hein, 'From Approach to Rule-Orientation in American Tort Conflicts?', in James Nafziger and Symeon Symeonides (eds), *Law and Justice in a Multistate World* (2002), 317; Frank Vischer, 'New Tendencies in European Conflict of Laws and the Influence of U.S. Doctrine—A Short Survey', ibid 459.

[28] Ulrich Drobnig, 'Die Geburt der modernen Rechtsvergleichung. Zum 50. Todestag von Ernst Rabel', (2005) *Zeitschrift für europäisches Privatrecht* 821, at 831.

[29] For an overview, see Werner Goldschmidt, 'Droit international privé latino-americain', (1973) 100 *Journal de Droit International* (*Clunet*) 65. More recent contributions are collected in Jan Kleinheisterkamp, Gonzalo Lorenzo Idiarte, *Avances del Derecho Internacional Privado* (2002).

[30] Mario A. Gomez de la Torre, *Sistemas de Derecho Internacional Privado en los Paises del Area Andina* (*Separata No. 1 de la Revista Anuario Ecuatoriano de Derecho Internacional*) (vol IV, 1976–80).

[31] Diego Fernandez-Arroyo, *Derecho internacional privado de los Estados del MERCOSUR* (2003).

of various judgments recognition regimes, most recently with regard to the failed project of a comprehensive Hague Convention on that topic. The comparative conflicts law literature in these and other special areas is so vast that no one can seriously claim to have a complete overview.

Beyond all these specifics, however, lie about half-a-dozen pervasive issues which go to the very heart of choice-of-law theory and practice. While these issues have a long pedigree, they have come to the fore with renewed vigour in the last three decades. They have been put into sharp relief by the clash between two fundamentally different choice-of-law models as the traditional (originally European) model with its essentially multilateralist and territorial rules was challenged, and in part overcome, by the (American) choice-of-law revolution with its preference for more unilateralist and policy-oriented approaches. Since the older tradition is often identified with European conservatism while the newer model resulted from American iconoclasm, the discussion of fundamental choice-of-law issues is often imbedded in a comparison between the respective regimes on both sides of the Atlantic.[32] In other words, the theoretical debate about the most fundamental choice-of-law issues and the actual comparison between the European tradition and the American revolution have often been just different sides of the same coin.[33]

While there are several plausible ways to define and organize these major issues,[34] it may be helpful (albeit somewhat artificial) to put them into two groups. The first group comprises three questions pertaining to the fundamental orientation and goals of the choice-of-law system in general. The second group contains three questions about the character of choice-of-law norms in particular. As the reader will soon notice, these issues overlap in multiple ways.

With regard to the basic orientation and goals of private international law in general, the most fundamental question (logically antecedent to all others) is whether the law applicable in transboundary cases should be selected by choice-of-law rules at all ('selectivism') or whether such cases should rather be governed by a particular set of substantive rules specifically made for such cases ('substantivism'). More recently, the substantivist agenda was espoused by one of the most prominent comparative conflicts scholars, Friedrich Juenger. Juenger engaged in a thorough comparative analysis of the major choice-of-law regimes and found all of them badly wanting, arguing that the choice of one set of laws (over another) is never a truly satisfactory solution to the specific problems of transboundary cases.[35]

[32] See the contributions to the 'Symposium', (1982) 30 *AJCL* 1.

[33] This is not to deny, of course, that much of the debate continues to take place outside that comparative context.

[34] For a somewhat different, though equally plausible, definition and organization, see Symeon Symeonides, 'American Choice of Law at the Dawn of the 21st Century', (2001) 37 *Willamette LR* 1. Despite the differences between his line-up and mine, I draw heavily on Symeonides's analysis throughout this subsection.

[35] Friedrich Juenger, *Choice of Law and Multistate Justice* (orig 1993, special edn 2005; with comments by ten international conflicts scholars).

Despite Juenger's efforts, however, the majority of private international law regimes remain rather firmly committed to choice-of-law rules, albeit perhaps only as a lesser evil.[36]

If choice-of-law norms determine the applicable law, we are immediately faced with a second fundamental issue concerning goals: should such norms aim at 'conflicts justice' or try to do 'material justice'?[37] Is the objective of the choice-of-law process (merely) to decide *which set of domestic rules* has the better claim to application (regardless of their content)? Or should choice-of-law norms directly aim at doing justice *between the parties*? In the former case, choice-of-law is a self-contained enterprise; in the latter, it is merely a way of reaching the desired final result. This is not the place to discuss the deep jurisprudential and philosophical issues underlying this dichotomy. Suffice it to say that the more traditional approach to choice of law, which continues to prevail (though with many modifications) in Europe and most other parts of the world, has been leaning towards the goal of 'conflicts justice' while the more modern approaches, especially in the United States, have put greater emphasis on 'material justice'.

This issue is intimately connected to the third basic problem of orientation, that is, whether choice of law should be 'jurisdiction selecting' or 'law selecting'. Should conflicts norms select just the *state or country* from which the applicable law will then be taken, no matter what that law says? Or should private international law choose *a law* in full view of its substance? The traditional model has mainly been jurisdiction selecting and has permitted a look at the substance of the involved laws only by way of (public policy) exception. The more modern models pushed by the American conflicts revolution provide for a choice in consideration of the content of the laws involved. This is most obvious with regard to the 'better law' approach but also implicit in interest analysis which requires that the policies underlying the respective rules be consulted. While law-selecting notions of better law and interest analysis have recently had some influence outside the United States as well, in most of the world, they have affected the prevailing essentially jurisdiction-selection approach merely at the margin.

When it comes to the more specific issues pertaining to the character of conflicts norms, the threshold question is whether these norms should be 'multilateral' or 'unilateral'. Under a 'multilateralist' paradigm, the applicable law must be determined according to predefined norms which rely on neutral criteria; employing such norms, the judge must make the decision from a perspective external to his or her own state, treating all respective laws as equal candidates

[36] See Mathias Reimann, 'Remarks by an Embarrassed but Unrepentent Multilateralist', ibid (special edn), lxv.

[37] See Kegel and Schurig, above (n 15), 114 ('*materiellprivatrechtliche Gerechtigkeit*' versus '*internationalprivatrechtliche Gerechtigkeit*').

(at least in theory). Under a 'unilateralist' approach, the basic choice-of-law idea is that a law will be applied if it has a proper claim to application (eg according to its underlying policy); such a norm asks the judge to make the decision from an internal point of view, and since he or she will usually consider the applicability of forum law first, this approach tends to be inherently biased in favour of the *lex fori*. Since the work of Friedrich Carl von Savigny in the middle of the nineteenth century,[38] conflicts law has strongly trended towards multilateralism, but during the American choice-of-law revolution, unilateralism experienced a strong comeback. Today, most choice-of-law regimes contain doses of both. Still, it is fair to say that European conflicts law remains more strongly committed to multilateralism while several US-American variants have made (neo-)unilateralism their major paradigm.

The second problem regarding the character of choice-of-law norms is whether they should consist of 'rules' or 'approaches'.[39] A rule provides for an unequivocal result, as in Art 3 s 1 of the Dutch conflicts statute on tort: 'Obligations arising from tort are governed by the law of the state on whose territory the act was committed'.[40] In contrast, an approach does not preordain a definite outcome but only provides decision-making guidelines for the judge, an example being § 145(1) of the Second Restatement of Conflicts (1): 'The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6'.[41] The traditional conflicts model is heavily rule-oriented while many modern choice-of-law regimes tend to prefer 'approaches'. With regard to contracts, there is actually evidence of a worldwide convergence towards somewhat indeterminate norms.[42] Today, many European conflicts regimes are quite open-ended as well.[43] Still, by and large conflicts lawyers in the civil law orbit are more comfortable with rules while their common law colleagues find approaches more easily acceptable.

Finally, and closely related to the issue of 'rules' versus 'approaches', there is the question of what criteria conflicts norms should employ. Should they rely on hard-and-fast reference points such as the geographic location of events or the domicile or nationality of the parties? Or should they rather utilize other, more malleable criteria, such as policy analysis, or even value judgments, such as the choice of the

[38] The foundation of modern multilateralism was laid in Friedrich Carl von Savigny, *System heutigen römischen Rechts* (vol 8, 1849).

[39] See Willis Reese, 'Choice of Law: Rules or Approach', (1972) 57 *Cornell LR* 315.

[40] *Wet conflictenrecht onrechtmatige daad*, of 11 April 2001.

[41] § 145(2) then lists four criteria to be taken into account.

[42] The principle that a contract is governed by the law with which it has the 'closest connection' or most significant relationship' is becoming more and more widely accepted, see Mathias Reimann, 'Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century', (1999) 39 *Virginia Journal of International Law* 571.

[43] See Kropholler and von Hein (n 27).

'better law'?[44] Again, on the whole, civilian conflicts lawyers have by and large opted for more unequivocal factors[45] while their common law brethren have been more accepting of softer criteria.

Ultimately, the desirable character of choice-of-law norms depends on how one weighs certainty and predictability of outcomes against flexibility and justice in the individual case. The more a system is committed to the former values, the more it will rely on hard-and-fast rules employing neutral and unambiguous criteria. The more a system pursues the latter objectives, the more it will prefer broader approaches relying on malleable (perhaps multi-factor) tests. While there are, arguably, overall tendencies of convergence towards a middle ground, the world's choice-of-law regimes continue to present a fairly broad spectrum of varying answers to all of these questions. Thus, they continue to provide fertile ground for comparative studies.

2. Comparative Law as a Foundation: Assisting the Making of Conflicts Law

For the last century or so, the drafting of written conflicts rules has usually been based on the study of already existing models. In this context, comparative conflicts law serves the lawmaker. This is true particularly regarding the efforts at an international unification of conflicts law but it is also the case, albeit perhaps more inconsistently, with respect to national legislation.

(a) The International Unification of Conflicts Law[46]

Efforts at the international unification of conflicts law go back for more than a hundred years. Their most important manifestation are the conferences on private international law regularly held at The Hague since 1893. After World War II, the Hague Conference on Private International Law became a firmly established institution with its own permanent bureau and staff. Beginning as a European club with thirteen members, it has developed into a worldwide organization with

[44] *Conklin v Horner*, 157 NW 2d 579, 586 (Wisc 1968). Another example is the choice of the law of the state whose 'interest would be more impaired if its policy were subordinated to the policy of another state', *Bernhard v Harrah's Club*, 546 P 2d 719 (Cal 1976).

[45] There are, however, notable exceptions, such as the German rule that damage claims based on foreign law cannot 'go significantly further than is necessary for an adequate compensation of the injured party', Art 40 s 3 ss 1, EGBGB.

[46] A related, but different, matter is the international unification of substantive law, for example, of the law of commercial contracts in general and of sales law in particular; see below,

delegates from currently sixty-five countries.[47] Given both its composition and its mission, it goes without saying that the Hague Conference is the veritable embodiment of comparative conflicts law. The Conference has so far generated thirty-nine Hague Conventions on a large variety of issues, ranging from choice of law to jurisdiction and from civil procedure to judgments recognition.[48] In terms of ratification by states, some of these conventions have been more successful than others but even where countries did not outright adopt a particular convention, they often followed it as a model.

Beyond the Hague Conference, various other organizations draft and publish international conventions dealing with conflicts issues. Some of them aim at worldwide unification, such as the United Nations Commission on International Trade Law (UNCITRAL). Other projects have a regional character, such as the series of private international law conferences held in Latin America (with the participation of the United States) since the late nineteenth century. They produced, *inter alia*, the *Bustamante Code*, a uniform codification of conflicts law adopted by a sizeable group of Latin American countries in the Convention on Private International Law in 1928 in Havana.[49] Today, the Interamerican Specialized Conference on Private International Law continues to promote the integration of conflicts law in that region.[50] In the post-World War II era, regional unification of conflicts law also became a major European agenda under the auspices of the Council of Europe and of the European Community. Needless to say, their projects are based on comparative studies as well. Take, for example, the (European Community) Convention on the Law Applicable to Contractual Obligations of 1980 (Rome Convention) which now provides uniform choice-of-law rules in contracts cases throughout the European Union. Its drafting team not only consulted the laws of the various EC member states but also considered a variety of international conventions both in force and at the drafting stage.[51]

As a result of these comparative law-based efforts, conflicts law has undergone

[47] Kurt Lipstein, 'One Hundred Years of Hague Conferences on Private International Law', (1993) 42 *ICLQ* 553; 'Symposium: The Hague Conference on Private International Law', (1994) 57 *Law and Contemporary Problems* 1.

[48] Hague Conference on Private International Law, Collection of Conventions 1893–2003 (2004). The latest product is the Hague Convention on Choice of Forum Agreements (2005).

[49] League of Nations Treaty Series LXXXVI No. 1950 (1929). The Code entered into force in 1935; about a dozen Latin American countries are members. For an overview in English, see Ernest Lorenzen, 'The Pan-American Code of Private International Law', (1930) 4 *Tulane LR* 499.

[50] In 1994, it adopted an Inter-American Convention on the Law Applicable to International Contracts (Mexico City Convention), see Friedrich Juenger, 'The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons', (1994) 42 *AJCL* 381; on the developments since then, see Diego Fernandez-Arroyo and Jan Kleinheisterkamp, 'The VIth Inter-American Specialized Conference on Private International Law (CIDIP VI): A New Step Towards Interamerican Legal Integration', (2002) 4 *Yearbook of Private International Law* 237.

[51] Mario Guiliano and Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations*, *Official Journal* C 282 (31 October

more unification on a regional or even worldwide level than most other areas of law. Of course, substantial differences remain. But the trend towards convergence is strong and persistent, particularly among the members of the Hague Conference and within the European Union.[52] The more a country resists this trend, as is often the case with the United States, the more it tends to become an outlier.

(b) Modern Conflicts Legislation

In the last thirty years, and especially since the 1990s, there has been an almost worldwide wave of national conflicts legislation. The trend originated in continental Europe and then spread to many other parts of the globe, including some common law jurisdictions. By now, dozens of states have updated or reformed their private international law by enacting new conflicts statutes, and the trend appears to continue unabated.[53] Some of these reforms were driven by the adoption of international conventions, others resulted from purely domestic initiatives. Yet, on the whole, it is fair to see this wave of conflicts legislation as a response to the globalization of the economy and the increased mobility of people. These phenomena have led to a surge in transboundary transactions and disputes, creating an urgent need for modern, functional, conflicts rules.

The nature and scope of the various statutes differs considerably. In most cases, such legislation either updates or supersedes older (usually more fragmentary) statutes (as in Germany, Japan, and Liechtenstein), in a few others, it codifies choice-of-law rules for the first time (as in Belgium,[54] the United Kingdom, or Oregon). Some statutes encompass private international law as a whole, that is, including jurisdiction, judgments recognition, and perhaps other topics (as in Italy, Switzerland, or Slovenia); others focus just on choice of law (as in Austria, the Netherlands, or Quebec). Some are integrated into larger (civil or procedural) codes (as in Bulgaria, Louisiana, or Russia); many are free-standing acts (as in Poland, Turkey, or Venezuela).[55]

While it is hard to gauge, exactly, how much comparative work went into the preparation of each and every new conflicts statute, in most cases, drafting experts or teams looked at the conflicts rules of other countries as well as at the pertinent international conventions. This is especially true where the principal draftsperson was an academic. Take, for example, the making of the Swiss Federal Act on Private

[52] On the Europeanization of international private law, see below, Section III.1.

[53] A major exception is France. This is somewhat ironic since, in general, the French legal tradition is, in a sense, the very symbol of codification.

[54] It is true that Belgium had had some conflicts provisions in its civil code but these provisions were so rudimentary that they did not constitute anything like a codification of private international law.

International Law of 1987[56] which was largely the work of a professor of private international law at the University of Basle, Frank Vischer. Vischer, who commands a broad and deep knowledge of comparative conflicts law,[57] drew not only on the national regimes of many countries in Europe and beyond, he also considered several international conventions (some still at the draft stage) as well as the writings of conflicts scholars especially in Europe and the United States.[58] Another vivid example is the Louisiana codification of choice-of-law rules of 1992. Its principal draftsman, Symeon Symeonides, then a professor of private international law at Louisiana State University, is perhaps the world's leading expert on comparative conflicts law today. Working on the Louisiana rules, he looked way beyond American cases to the conflicts law of, *inter alia*, Austria, (the former) East and West Germany, Hungary, Poland, Portugal, Spain, Switzerland, and the (draft) project for Puerto Rico as well as the pertinent international (Hague) conventions.[59]

Since even national conflicts legislation thus normally builds on comparative foundations, the individual statutes tend to be but variations on a common set of themes. It remains true that some continue to rely on nationality as the crucial connection between a person and a state while others look to domicile or habitual residence; that some happily embrace the doctrine of *renvoi* while others by and large reject it; and that some display more rigid reliance on territorial factors while others take a more flexible stance. Yet, despite these and other differences, the particular statutes all tackle universal problems by drawing on a globally shared fund of possible solutions.

3. Comparative Law as a Tool: Operating Conflicts Norms

As a tool in the hands of a private international lawyer, comparative law serves a primarily practical goal: it assists in the operation of existing conflicts norms and thus helps to resolve actual transboundary issues. Here, it addresses itself mainly to the judge. In this context, it performs several distinct functions.

[56] *Bundesgesetz über das internationale Privatrecht vom 18. Dezember 1987*; for an English translation see Jean-Claude Cornu, Stéphane Hankins, and Symeon Symeonides, 'Swiss Federal Statute on Private International Law of December 18, 1987', (1989) 37 *AJCL* 187.

[57] See Frank Vischer, 'General Course on Private International Law', (1992-I) 232 *Recueil des cours* 21.

[58] Frank Vischer, 'Drafting National Legislation on Conflict of Laws: The Swiss Experience', (1977) 41 *Law and Contemporary Problems* 131; Frank Vischer, 'Das Problem der Kodifikation des schweizerischen internationalen Privatrechts', (1971) *Zeitschrift für Schweizerisches Recht* 1.

[59] Symeon Symeonides, 'Problems and Dilemmas in Codifying Choice of Law for Torts: The Louisiana Experience in Comparative Perspective', (1990) 38 *AJCL* 421.

(a) *Information about Foreign Law*

On the most basic level, comparative law simply provides the information about foreign law that private international law requires. Of course, as has often been pointed out, simple information about foreign law is not comparative law in the proper sense of the term—since nothing is being compared, it is merely a matter of knowledge of foreign law (in German: *Auslandsrechtskunde*). Still, providing foreign law information does belong to the discipline of comparative law for two reasons. First, supplying such information is much of what comparative lawyers actually do in their scholarship and practical work, simply because they are typically experts in more than one legal system. Second, while it is true that, in principle, any foreign lawyer could provide information about his or her home country, often only a comparatist can make that information intelligible to someone from another country. That typically requires acts of (linguistic, conceptual, cultural, etc) translation which can only be performed by someone who is at home in both systems. Thus, when attorneys or judges handling a transboundary case under private international law need information about foreign law, they like to turn to someone who understands both the domestic and the foreign regimes governing the respective subject-matter, that is, to a comparatist.

The need for information about foreign law arises in many contexts. It is most obvious when a private international law rule calls for the application of foreign law in a transboundary case. For example, the most basic choice-of-law principle in tort cases is that torts are subject to the law of the place where the wrong occurred (*lex loci delicti*).[60] Thus if a court in the People's Republic of China finds that a tort was committed in Korea, it may have to apply Korean law[61] and in order to do so, it must find out what that law says. A comparative lawyer (specializing in Korean law) can provide that information and make it intelligible to the Chinese lawyer or judge. In this scenario, private international law and comparative law work hand-in-hand: the former decides what law applies and the latter tells us what that law says.[62]

[60] This rule quickly loses its simplicity, of course, if, for example, the act constituting the tort occurs in one jurisdiction while the damage ensues in another. In addition, in many, if not most, jurisdictions today, this rule is subject to various qualifications and exceptions, most prominently the principle that the law of the common domicile (or habitual residence) of the parties (if any) may displace the law of the place of the wrong; see Mathias Reimann, 'Codifying Torts Conflicts: The 1999 German Legislation in Comparative Perspective', (2000) 60 *Louisiana LR* 1297 ff.

[61] See Art 146 of the Common Principles of Private Law; for an English translation and an explanation, see Tung-Pi Chen, 'Private International Law of the People's Republic of China: An Overview', (1987) 35 *AJCL* 445, at 468.

[62] There can also be a need to learn about foreign private international law rules. This is most obviously the case where domestic conflicts provisions refer to these rules. Choice-of-law norms often provide that if foreign conflicts provisions refer the case back to forum law, such a reference back shall be accepted so that forum law applies. This doctrine of *renvoi* is fairly common in many legal systems, see eg Art 4 § 1 of the Polish private international law statute (*Prawo prywatne miedzynarodowe*) of 1965.

Yet, even the application of private international law norms themselves may require knowledge of foreign law (ie regardless of whether or not foreign law is ultimately found applicable). In that case, comparative law is a tool for the operation of the private international law machine. This is frequently the case in all three major areas of private international law. A choice-of-law example is a dispute in which an Italian court has to judge the formal validity of a testament made by a Finnish citizen resident in Sweden while vacationing in Morocco. According to Art 48 of the Italian private international law statute, a testament is valid if it complies with the form of the state either where it was made or of which the testator was a national or in which he resided.[63] Thus the Italian court will have to check the laws of Finland, Sweden, and Morocco. A jurisdictional illustration derives from the English principle of *forum conveniens*: an English court with proper jurisdiction under domestic law may still decline to hear the case, say against a South African defendant, if there is a more convenient forum elsewhere. This, of course, requires that a court in another country have proper jurisdiction.[64] The English judge must therefore assure himself of jurisdiction under foreign, for example, South African, law. Finally, a Swiss court asked to recognize a foreign judgment can do so only 'if the judgment is no longer subject to ordinary recourse or if it is a final judgment'.[65] Whether these conditions are fulfilled depends, of course, entirely on foreign law.

While private international law is thus often highly dependent on the information services of comparative law, these services are not fundamentally different from those rendered by comparative law in many other international contexts. When a Greek lawyer advises his client about Canadian immigration rules, applies for an Australian business licence, or evaluates the effect of a Lebanese arrest warrant, he or she also has to obtain the requisite information about Canadian, Australian, and Lebanese law respectively and will often turn to the expertise of a comparative law specialist for that purpose. Yet, handling transboundary cases often requires more than simple information: it frequently calls for a proper comparison of domestic and foreign law.

(b) Specific Comparative Analysis

As a service provider to private international law, comparative law really comes into its own where it delivers a specific comparative analysis of the domestic and foreign law involved in an international case. Here, the relationship between the two fields is most intimate because both cooperate very closely in resolving specific issues.

Often, private international law norms clearly require a comparative analysis of

[63] Legge 31 maggio 1995, No. 218.

[64] *Spiliada Maritime Corp v Consulex Ltd* [1986] 3 All ER 843; see Lawrence Collins (ed), *Dicey and Morris on the Conflict of Laws* (vol I, 13th edn, 2000), 385 ff.

[65] See Cornu *et al*, (1989) 37 *AJCL* 193 ff, at 201.

domestic and foreign (substantive or procedural) laws. This is most frequent in the choice-of-law context. Some choice-of-law rules are explicit in that regard. An example is Art 22 of the Austrian Federal Statute of 15 June 1978 on International Private Law.[66] It provides that the prerequisites for the legitimation of illegitimate children through the parents' subsequent marriage depend on the law governing the personal status of the parents; if, however, the parents are subject to different personal status laws, the court must apply the law which is more favourable to the legitimation of the child. Obviously, the judge must compare the status laws involved in order to decide which is more favourable. Another, similar, example is the 'better law' approach embraced by several US-American states in tort disputes.[67] It requires, at least *inter alia*, that among the potentially applicable laws, the court pick the 'better' one. Here, the rule calls for a comparative evaluation of the laws' respective merits, whatever the criteria may be.[68]

In the jurisdictional context, such comparative exercises are much rarer, simply because the competence of courts is usually judged (only) by the *lex fori*. Still, comparison may be required here as well, though the requirement is usually more implicit than explicit. For instance, before a United States federal court with proper jurisdiction can dismiss a case under the doctrine of *forum non conveniens*, it must assure itself that the alternative (foreign) country provides a fair system of justice and that the plaintiff has at minimum a fighting chance. This almost inevitably leads to a comparison between the respective procedural regimes, as well as between the generally available remedies, in the United States court versus the foreign forum.[69]

Decisions about the recognition of foreign judgments can also require comparative analysis. Probably the most obvious trigger is the virtually ubiquitous rule that a foreign judgment cannot be recognized if it violates the recognition state's public policy (*ordre public*). Whether that is the case can be properly determined only by comparing the foreign judgment with its hypothetical domestic counterpart. Take, for example, the German Supreme Court's decision whether a judgment rendered by a California court violated German public policy because it granted not only very substantial compensatory but also punitive damages. The court engaged in a lengthy and thorough comparative discussion which remained admirably conscious of the overall context of the case. This resulted in the recognition of the

[66] *Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht.*

[67] They include Arkansas, New Hampshire, Rhode Island, and Wisconsin; whether Minnesota still belongs in this group is questionable; see the overview in Eugene F. Scoles, Peter Hay, Patrick Borchers, and Symeon Symeonides, *Conflict of Laws* (4th edn, 2004), 85 ff. The approach is based on Robert Leflar, 'Choice-Influencing Considerations in Conflicts Law', (1966) *New York University LR* 41, 267 ff.

[68] A well-known example is *Conklin v Horner*, 157 NW 2d 579 (Wisc 1968).

[69] A vivid example is *In Re Union Carbide Corp*, 809 F 2d 195 (1987). Note, however, that the United States Supreme Court has held that the foreign remedies do not have to be equivalent to the domestic ones so that an elaborate comparison between the substantive laws of the countries involved is not required, *Piper Aircraft Company v Reyno*, 454 US 235 (1981).

compensatory damage award but in the rejection of the punitive damages because the former were sufficiently comparable to German remedies while the latter were incompatible with basic tenets of the German legal system.[70]

In all of these contexts and instances, the need for a comparative analysis is fairly obvious, generally accepted in theory, and widely fulfilled in practice. Beyond this area of easy agreement, however, lies a much more complicated and contested question.

(c) The Construction of Routine Conflicts Norms

Simply put, the question is this: must courts engage in comparative analysis even when applying private international law norms which do *not* expressly require, or at least more or less openly invite, such an approach? In other words, should the comparative method pervade (at least most of) private international law in action?

The most prominent manifestation of that question is the problem of 'qualification'.[71] The problem appears under various names: 'qualification' in French and German ('Qualifikation'), 'classification' in British English, 'characterization' in American English, and so on, and we will use these terms interchangeably here. Even though we can address it here only on a very simple level, it is not free from difficulty. Still, it is worth discussing because it illustrates how intricately interrelated private international law and comparative law are.

The matter is best grasped by way of an example, and the time-honoured question how to treat statutes of limitation provides a good one. Assume that a plaintiff from Mexico City sues a defendant from Detroit, Michigan. The suit is brought in Mexico City but is based on an accident in Detroit. Before the Mexican court, the Michigan defendant invokes the statute of limitations because the accident occurred two and a half years ago. Under Mexican law, the basic limitation period for torts is two years, in Michigan it is three. Is the action time-barred? That, of course, depends on which statute of limitations applies. As mentioned, the basic choice-of-law rule for torts is that the law of the place of the wrong (*lex loci delicti*) governs; this would be Michigan law with its three-year limitation period so that the action could proceed. But is the statute of limitations really a matter of 'tort', that is, part of substantive law (because it determines for how long one has a right)? Or is it rather a matter of procedure (because it determines how long one can sue)? If the latter, the general choice-of-law rule is a very different one: matters of procedure are subject to the law of the forum (*lex fori*); that would be Mexican law

[70] BGH judgment of 4 June 1992, *Entscheidungen des Bundesgerichtshofs in Zivilsachen* 118, 312 ff. For an analysis see Joachim Zekoll, 'The Enforceability of American Money Judgments Abroad: A Landmark Decision by the German Federal Court of Justice', (1992) 30 *Columbia Journal of International Law* 30, 64 ff.

[71] The question can arise in other contexts as well; for an overview, see Jan Kropholler, 'Die vergleichende Methode und das internationale Privatrecht', (1978) 77 *Zeitschrift für vergleichende Rechtswissenschaft* 8 ff.

with its two-year limitation period so that the case would have to be dismissed. In other words, the outcome depends on whether the Mexican judge 'qualifies' the statute of limitations as 'substantive' or 'procedural'.

We can see here that 'qualification' is essentially a matter of interpreting conflicts rules: what exactly do 'tort' or 'procedure' mean in the respective norms? Note that similar issues will arise all the time. Especially in choice of law, most core provisions operate with concepts requiring such interpretation. When they point to a certain law for issues of a 'person', 'marriage', 'child support, 'contract', 'delict', and so on, they always require a decision as to what exactly is covered by these terms. To make matters worse, similar issues will also arise with regard to jurisdiction[72] and judgments recognition.[73] In short, the problem of 'qualification' is pervasive in private international law.

Since the issue was first discovered towards the end of the nineteenth century, scholars (and sometimes courts) have spilled enormous amounts of ink over the question how best to approach it. There are essentially three options. First, a court can simply classify the respective phenomenon according to the *lex fori*, that is, its own conceptions. In our example, the Mexican judge would then classify statutes of limitations in conflicts cases just as in purely domestic cases under Mexican law. The problem is, of course, that that may not really do justice to the international nature of the case, not to mention that it might lead to undesirable differences in outcome in different fora. Second, a court can qualify according to the law governing the substance of the case (*lex causae*). The Mexican court would thus adopt the characterization of statutes of limitations in Michigan; yet, that can lead to circular reasoning: after all whether Michigan law counts depends on which conflicts rules apply (tort or procedure) and that, in turn, depends on the qualification issue itself. Third, a court can refuse to be bound by either the *lex fori* or the *lex causae* and instead construe the conflicts norm in light of both its own *and* the potentially applicable foreign law(s), that is, through a comparative analysis.

The latter, comparative, approach was propagated in a famous essay published in 1931 by Ernst Rabel.[74] Rabel's main argument was that in order to fulfil its function as a link (or switch) between several legal orders, a conflicts law norm cannot be

[72] For example, Romanian courts will exercise (personal) jurisdiction over defendants in contract disputes if (at least part of) the contractual obligation must be fulfilled in Romania, see Art 149 of the Romanian Statute No. 105 on the Regulation of Legal Relationships in Private International Law (*Legea nr. 105 din 22 septemrie 1992 cu privire le reglementarea reporturilor de drept international privat*). Is the pre-contractual duty to negotiate in good faith, as recognized under German law (see § 311 s 2 BGB), a contractual obligation?

[73] For instance, Art 34 of the Turkish Law No. 2675 on International Private and Procedural Law (*Milletlerarasi Özel Hukuk ve Usul Hukuku Hakkinda Kanun*) provides for the recognition of foreign private law judgments. Is a US-American judgment for punitive damages a matter of private law as envisaged by this provision?

[74] Ernst Rabel, 'Das Problem der Qualifikation', (1931) 5 *RabelsZ* 241 ff. For an English account of his views, see Ernst Rabel, *The Conflict of Laws: A Comparative Study* (vol I, 1945), 49 ff. Rabel was Austrian by birth but held most of his appointments in German universities and research institutions.

understood solely in light of one or the other. Certainly, it cannot be interpreted exclusively from the perspective of forum law. Instead, private international law 'must . . . make use of comparative law'.[75] Although it is somewhat of an over-simplification, it is fair to say that according to Rabel, the comparative method must therefore pervade private international law.

The fight between the advocates of the *lex fori*, the *lex causae*, and the comparative methods raged for decades.[76] In particular, Rabel's comparative approach was hotly debated by scholars in many legal systems. Now that the dust has settled, one can see that, by and large, Rabel has lost the battle but won the war.

Rabel has lost the battle because his claim that a comparative analysis must be the basic approach to the 'qualification' problem did not prevail. Quite aside from its own theoretical problems, his postulate is simply too demanding in practice, at least for national courts. After all, it would require almost every judge deciding a private international law dispute to become a full-fledged comparative lawyer. This is not only unrealistic in terms of the routinely available time and resources, it is also fraught with error in understanding foreign, indeed often completely alien, law. Comparative analysis is not something that a non-specialist can easily do on the side—and well. Thus today, most scholars as well as most courts support the much more user-friendly basic rule that qualification is essentially governed by the *lex fori*.[77]

Still, Rabel won the war because it soon became understood that even under this basic rule, comparative analysis is virtually inevitable.[78] It is not hard to see why. A court applying a conflicts norm cannot avoid deciding whether the foreign phenomenon at issue falls under that norm, and that cannot be done without some (perhaps barely conscious) comparative considerations.[79] Imagine a judge in Montreal who must determine which law governs the rights between a Saudi Arabian couple before him. At the very outset, he will have to decide whether the Saudi Arabian union between the man and the woman is a 'marriage' in the sense of his domestic conflicts norms (Arts 3088–9 of the Quebec Civil Code). In order to do so, however, he must perform at least a casual comparison between the Saudi Arabian and the Quebecois notions of 'marriage'. The need for a comparative analysis is even more obvious in cases in which a foreign phenomenon is

[75] Ibid 287.

[76] For an overview, see Dicey and Morris (n 64), at 33 ff; from a German point of view, see Kegel and Schurig (n 15), 276 ff (providing an extensive bibliography). The French perspective is summarized by Henri Batiffol and Paul Lagarde, *Droit international privé* (8th edn, 1993), 474–90.

[77] For an overview of the approaches in France, Germany, and Great Britain, see Veronique Allarousse, 'A Comparative Approach to the Conflict of Characterization in Private International Law', (1991) *Case Western Reserve International LR* 23, 479 ff. In some instances, this is legislatively mandated, see eg § 3 of the Hungarian Law on Private International law (1979. *évi 12, törvényereju rendelet a nemzetközi maganjogrol*). See also § 7(3) of the Restatement (Second) Conflict of Laws (1971).

[78] See A. N. Makarov, *Internationales Privatrecht und Rechtsvergleichung* (1949), 26 ff.

[79] Kropholler (n 7).

completely unknown in the forum. A famous example is the Anglo-American trust, which has no direct equivalent in most civil law countries. Qualification purely according to the *lex fori* is simply not possible since the trust does not comfortably fit any of the Roman-law-based notions of property prevailing in continental Europe. Only a comparison between the trust and its closest equivalents in the forum state can help. Another, even more striking, example, is the Islamic *mahr*—a gift the husband is obligated to make to the wife on the occasion of marriage. Such an institution does not exist in most Western legal systems. Should a judge in, say, Germany, consider it a matter of marital property law (subject to the law of the spouses' common nationality, if any, Art 14, 15 EGBGB), of spousal support (subject to the law of the creditor's habitual residence, Art 17 EGBGB) or, perhaps, simply as a gift (subject, as essentially a contract, probably to the law of the donor's habitual residence, Art 28 EGBGB)? The judge can only make that decision by comparing the *mahr* to its closest German equivalent(s).

As a result, in many legal systems today, scholars and courts refine and supplement the interpretation of conflicts norms according to the *lex fori* by looking at the purpose and function of both the private international law norm to be applied and the substantive laws involved.[80] The qualification of a trust may thus vary with its concrete purpose, for example whether it was to benefit a charitable institution or to leave money to the donor's surviving children. Such an approach, however, is basically a variation on the functional method in comparative law which asks what problem the respective rules were meant to solve. This approach was famously propagated by Rabel himself and has prevailed in comparative law for the last two generations.[81] Thus it is widely acknowledged today, especially in Europe, that private international law is highly dependent on the comparative method even with regard to the routine interpretation and application of standard conflicts norms.

(d) The Interpretation of International Conventions

In our time, an increasing number of private international law norms originate not in a particular domestic order but rather stem from international conventions adopted by a growing number of states.[82] This is especially true among the member countries of the Hague Conference on Private International Law. The construction of norms in, or those based on, such conventions poses particular challenges and is especially dependent on a comparative approach.

This is mainly because the very purpose of such conventions is the (worldwide

[80] For England, see Dicey and Morris (n 64), 36 ff; for France, Battifol and Lagarde (n 76), 474 ff; for Germany, Bernd von Hoffmann and Karsten Thorn, *Internationales Privatrecht* (8th edn, 2005), 231 ff.

[81] See Ralf Michaels, 'The Functional Method of Comparative Law', Chapter 10 of the present *Handbook*.

[82] Normally, such conventions themselves are the product of comparative studies, see above, Section II.2(a).

or regional) unification of private international law rules. Obviously, courts would defeat that purpose if they were to interpret convention rules in different ways, for example, by looking only to their respective forum laws for purposes of qualification. It is therefore widely recognized that conventions must be interpreted on their own terms ('autonomously') and that guidance must be sought by looking to the other signatory states' substantive laws and practices.[83]

The most impressive manifestation of this approach is the rich case-law of the European Court of Justice pertaining to the so-called Brussels Convention.[84] Here, one can see private international law and comparative law go hand-in-glove in the routine practice of an international tribunal. Today, such a comparative approach is also embraced by many national courts, especially in Europe. The track record of American courts is decidedly mixed in that regard. In two major decisions interpreting private international law conventions, the United States Supreme Court duly looked at the negotiation history of the respective conventions and at the foreign law background but made no visible effort to consider whether foreign courts had faced the same, or similar, issues and how they had decided them.[85] Lower courts, however, have occasionally considered foreign decisions and strived to construe international conventions from an international, rather than a domestic, point of view.[86]

III. The Emergence and Impact of Supra-national Legal Orders

For many decades, the traditional interactions between comparative law and conflicts law have, on the whole, been both stable and harmonious. Since the late twentieth century, however, there has been trouble in paradise as the two

[83] Thus, Art 18 of the 1980 Convention on the Law Applicable to Contractual Obligations (Rome Convention) among the members of the EU, 1980 OJ L266, provides: 'In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application'.

[84] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1989 OJ L285/1. As we will see below, the Convention is now superseded by the Council Regulation No. 44/2001 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 2001 OJ L12/1.

[85] See *Société Industrielle Aerospatiale v United States District Court*, 482 US 522 (1987) (construing the Hague Evidence Convention); *Volkswagenwerk AG v Schlunk*, 486 US 694 (1988) (construing the Hague Service Convention).

[86] For references, see Reimann (n 24), 378–9.

disciplines—and thus their relationship—have been affected by the emergence of supra- or international legal orders.[87] The most visible manifestation of this phenomenon is the Europeanization of private international law (subsection 1). A more diffuse, and as of yet more uncertain, development is the growing influence of fundamental rights (subsection 2). These, and similar, developments are beginning to change the interaction between private international law and comparative law.[88]

1. The Europeanization of Private International Law

(a) *From Cooperation to Command*

'Europeanization' can signify (at least) two very different things. First, it can mean an academic and educational agenda aiming at the gradual harmonization of law among the countries of Europe (with legislation perhaps following suit); this process works by and large from the bottom up.[89] Second, Europeanization can mean that national law is being prescribed, or even displaced, by European Union law; this essentially works from the top down. With regard to private international law, we have recently witnessed a transition from the first to the second kind of Europeanization.

Private international law has long been in the process of Europeanization in the first sense. Conflicts scholarship has drawn on all-European ideas for decades (if not centuries), and conflicts scholars have seen themselves as members of a community of colleagues at home in all of Europe (if not the world). If anything is new here, it is the explicit academic search for a body of common principles for all of European conflicts law.[90] At least for the time being, this kind of Europeanization

[87] This Section draws on, but also goes beyond, three articles with overlapping coverage: Bénédicte Fauvarque-Cosson, 'Droit comparé et droit international privé: la confrontation de deux logiques à travers l'exemple des droits fondamentaux', (2000) *Revue international de droit comparé* 797; Bénédicte Fauvarque-Cosson, 'Comparative Law and Conflict of Laws: Allies or Enemies? New Perspectives on an Old Couple', (2001) 49 *AJCL* 407 (especially 417–26); and Mathias Reimann, 'Beyond National Systems: A Comparative Law for the International Age', (2001) 75 *Tulane LR* 1103.

[88] A similar development is the emergence of an internationally uniform law of contracts—on a global level, see the 1980 UN Convention on the International Sale of Goods (CISG) and, in unofficial form, the Unidroit Principles of International Commercial Contracts (3rd edn, 2005). On the European level, see Ole Lando and Hugh Beale (eds), *Principles of European Contract Law*, Parts I and II (1999), and Ole Lando, Eric Clive, André Prüm, and Reinhard Zimmermann (eds), *Principles of European Contract Law*, Part III (2003). On these developments, see Chapter 29 of the present *Handbook*.

[89] This meaning prevails in the private law discussion where Europeanization signifies mainly the emergence of an all-European approach to scholarship and teaching with the long-term goal of an all-European body of law. On this aspect, see Chapter 16 of the present *Handbook*.

[90] See Thomas Kadner Graziano, *Gemeineuropäisches internationales Privatrecht* (2002).

does not seriously change the traditional interplay between the two disciplines; instead, it rather confirms it in the form of comparative conflicts law.

Europeanization in the second sense, however, is a more recent, as well as more dramatic, phenomenon.[91] Beginning in the 1980s, more and more conflicts law has been taken over by the European Community with the result that national law has been displaced.[92] At first, this happened in a piecemeal fashion. The EC Council began to promulgate directives on private law, many of which contained conflicts rules in their respective, highly specific, contexts. Since these rules were apparently enacted without regard to, if not in sheer ignorance of, the pertinent national provisions, they often caused confusion and consternation among conflicts experts and courts. Still, up to that point, EC conflicts law was no more than an occasional interference with national regimes. Around the turn of the last century, however, EC institutions began to enact comprehensive conflicts legislation, making law for whole, core, areas of the field.[93] The most dramatic takeover to date occurred in the area of jurisdiction and judgments recognition when the Brussels Convention, a treaty concluded among the member states in 1968, was superseded by an EC Council regulation, a legislative act with direct effect in the member states, in 2002.[94] These kinds of takeovers are now on the horizon for choice of law as well: after they had adopted the so-called Rome Convention governing choice of law in contracts cases in 1980, the EC member states had begun to work towards a complementary agreement on non-contractual obligations ('Rome II'). In the meantime, however, the EU institutions have taken control of the project and published a draft regulation on that very topic.[95] Thus, if Europe arrives at uniform choice of law rules for torts as well, it will not happen through a treaty but by

[91] This process has been chronicled by Erik Jayme and Christian Kohler in a series of detailed and critical articles since the late 1980s, published in the *Praxis des internationalen Privat- und Verfahrensrechts* (*IPRax*), see ibid 9, 337 (1989); 10, 353 (1990); 11, 361 (1991); 12, 346 (1992); 13, 357 (1993); 14, 405 (1994); 15, 343 (1995); 16, 377 (1996); 17, 385 (1997); 18, 417 (1998); 19, 412 (1999); 20, 454 (2000); 21, 501 (2001); 22, 461 (2002); 23, 485 (2003); 24, 481 (2004); 25, 481 (2005). See also Barbara Dauner-Lieb (ed), *Systemwechsel im europäischen Kollisionsrecht* (2002).

[92] The Treaty of Amsterdam (1999) amended the original EC Treaty and gave the European Community broad competence to legislate in the area of conflicts law, see Treaty Establishing the European Community (as amended by the Treaty of Nice 2003), Arts 61 and 65; for an analysis, see Jürgen Basedow, 'The Communitarization of the Conflict of Laws under the Treaty of Amsterdam', (2000) 37 *Common Market LR* 687.

[93] Under the supremacy doctrine established by the ECJ in *Costa v ENEL*, Case 6/64, [1964] ECR I–585, European Community law trumps the national laws of the member states. For a recent overview, see Peter Stone, *EU Private International Law* (2006).

[94] Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ L012, 0001–0023 (16 January 2001). Other Council Regulations overtook various international conventions (which had not yet entered into force) regarding international insolvency proceedings, jurisdiction and judgments recognition in family law matters, and transboundary service of process; see Council Regulations 1346/2000, 1347/2000, and 1348/2000 (all of 29 May 2000).

[95] Proposal of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ('Rome II'), 22 July 2003, COM (2003) 427 final.

legislation from above. It is probably just a matter of time before we see even the original Rome Convention on contract conflicts displaced by EC legislation as well.

Even though the takeover by the EC institutions has, so far, not entailed massive substantive changes, the overall effect of these developments is of enormous importance: private international law is decreasingly left to the individual member states as co-equal sovereigns, that is, less and less a matter of national legislation or voluntary international cooperation through convention-making. Instead, conflicts law is increasingly turned over to central institutions wielding superior legislative authority, that is, made by command from above.

(b) The Changing Role of Comparative Law

The impact of this process on the relationship between conflicts law and comparative law is complex and ambiguous. While comparative law tends to lose conflicts law as an object of study, it continues to matter for the making of European private international law and, once such law is in place, becomes more important than ever as an interpretive tool for operating the respective provisions.

On the one hand, the Europeanization of private international law tends to deprive comparative law of a time-honoured subject. The reason is quite simple: to the extent that conflicts law is made at the European level, it becomes an internationally uniform regime superseding the various national systems. Yet, without a variety of such national systems, there is nothing to compare, at least not within Europe. To be sure, scholars can then compare the European regime with other parts of the world, but once the former is cast in stone by legislation, the incentives to do so are much diminished.

On the other hand, comparative law should remain important as a foundation, that is, for the very making of European private international law. This, of course, presupposes that the European institutions do not simply act by fiat but take account of the member states' conflicts laws. At least with regard to the more ambitious projects, such as the 'Rome II' regulation, there are some indications that comparative law will continue to matter.[96] Still, one wonders whether with regard to comparative preparatory work, bureaucrats in Brussels have the same motivation (not to mention expertise) as the scholars and other experts representing their countries in international convention making, such as in the Hague.

Finally, while one may suspect that help from comparative law is no longer needed once the uniform regime is in place, the discipline continues to be important even then, namely as a tool for operating the European rules. Such rules make sense only if they are applied in a manner that ensures, or at least promotes, uniformity of outcomes. Consequently, judges interpreting European conflicts rules must free themselves from their national predilections and consider what

[96] See Guiliano and Lagarde (n 51), at 4–6.

their colleagues elsewhere have done or are likely do to, in similar cases. The necessary comparative approach is not entirely new because it has been considered indispensable with regard to international conventions for some time.[97] But such an approach becomes even more essential with regard to European conflicts law because its very point is to reach maximum uniformity throughout the whole European Community.

2. The Emergence of Fundamental Rights

(a) The Impact of Universal Rights Norms

It has been widely accepted (in the United States for much longer than in Europe[98]) that even conflicts law must not violate fundamental rights. But as long as those rights stemmed only from the various domestic constitutions, this remained a purely domestic affair. As such, it did not seriously affect the international variety of conflicts law. In the last two-and-a-half decades, however, international rights have entered the picture. This is visible in several contexts. In Europe, such rights have mainly been invoked to *limit* what states can do in private international law. The European Court of Justice, for example, has repeatedly invoked the European Union Treaty, especially the four freedoms (movement of goods, people, services, and capital) and the non-discrimination principle, for that purpose.[99] At least on one occasion, the Court has also relied on the European Convention on Human Rights.[100] In a similar vein, French courts have rejected the application of foreign law and refused the recognition of foreign judgments because of violations of the same

[97] See above, Section II.3(d).

[98] The United States Supreme Court has subjected personal jurisdiction to the limits of the due process clause of the fourteenth amendment since *Pennoyer v Neff*, 95 US 714 (1877) and began checking choice-of-law decisions under the same provision in *New York Life Insurance Co v Dodge*, 246 US 357 (1918). For later developments, see Scoles *et al*, above (n 67), at 149–77, 288–320. In Europe, the idea first came to the fore in the German Constitutional Court's famous '*Spanierentscheidung*' of 4 May 1971, *Entscheidungen des Bundesverfassungsgerichts* 31, 78. Italy followed suit in 1987, *Corte costituzionale* 5 marzo 1987, n 71, *Foro italiano* 1987, I, 2316; *Corte costituzionale* 10 dicembre 1987, n 477, *Foro italiano* 1987, I, 1456.

[99] For example, the traditional rule, long prevailing in many continental European countries, that corporations are subject to the law of the place of their seat cannot be invoked to deny a business incorporated in one member state the right to establish itself (and to be recognized, etc) in another; see *Centros v Erhvervs-og Selskabsstryrelsen*, Case C–212/97, [1999] ECR-I, 1459. The impact of this case, and of several subsequent decisions of the ECJ, on the 'seat theory' of private international law continues to be debated. See also Luca Radicati di Brozolo, 'L'influence sur les conflits des lois des principes de droit communitaire en materière de liberté de circulation', (1993) 82 *Revue critique de droit international privé* 401.

[100] The scope of the public policy exception to the duty to recognize other member states' civil judgments must be construed with due regard to the European Convention on Human Rights, *Krombach v Bamberski*, Case C–7/98, [2000] ECR I–1935.

Convention.[101] On the other side of the Atlantic, international human rights have mainly been used to *expand* what courts can do in transboundary private disputes. The primary example here is the case-law under the Alien Tort Claims Act.[102] That statute provides for federal jurisdiction 'of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.[103] Since 1980, this act has spawned a wave of claims seeking compensation for human rights violations through civil litigation. The alleged wrongs were almost invariably committed outside the United States. Since neither the Alien Tort Claims Act itself nor the invoked human rights norms as such provide a cause of action, these cases raise the classic conflicts question which substantive law applies.

(b) The Coordination of Multiple Legal Orders

Again, the impact of these developments on private international law, comparative law, and their interaction is not uniform.

From one point of view, the impact of fundamental rights threatens to make conflicts law, as well as its need for comparative law, (partially) obsolete. Where international fundamental rights norms dictate the outcome of transboundary issues, they pre-empt, so to speak, the field, forcing all countries and courts respecting those norms to reach the same result. If, for example, a binding norm of international human rights law dictates that forced labour is a form of slavery and thus strictly prohibited,[104] a state is not allowed to consider such a practice legal, regardless of what its internal law says (and perhaps even regardless of what its law said at some earlier time, as in the case of Germany during World War II). The universality of the higher norm entails uniformity, and uniformity is the death of conflicts law. And if conflicts law is dead, comparative law can neither study it nor be of any use to it.

Viewed from another angle, however, both conflicts law and comparative law become perhaps more important than ever where human (or other fundamental) rights begin to affect transboundary issues. The reason is that such rights can in fact complicate, rather than eliminate, the potential conflicts among competing legal regimes. This is because international human (and other) rights add a layer of norms on top of the coexisting national regimes. This, in turn, creates the need

[101] See Fauvarque-Cosson, Comparative Law and Conflict of Laws (n 87), 422–3.

[102] The seminal case is *Filartiga v Pena-Irala*, 630 F 2d 876 (2d Cir 1980); recently, the United Supreme Court has limited the scope of the Alien Tort Claims Act in *Sosa v Alvarez-Machain*, 124 S Ct 2739 (2004). In the meantime, other countries have had their share of similar problems, such as Germany facing compensation claims by foreigners for being forced into labour during World War II, see eg Decision of the German Constitutional Court of 13 May 1996; *Entscheidungen des Bundesverfassungsgerichts* 94, 315.

[103] 28 United States Code § 1350.

[104] See eg *Doe v Unocal Corp*, 395 F 3d 932 (2002).

to regulate the interplay between several levels of law. As a result, conflicts questions become, in a sense, multidimensional: they must deal both with the relationship between the international and the domestic level norms and with the variety of the laws of the involved nation states. Take, for example, a typical case brought under the Alien Tort Claims Act[105] for violation of human rights in a foreign country. Is such a case governed by the norms of international law allegedly violated (although these norms contain no explicit private cause of action?), by the law of place of the wrong (although it may not provide adequate remedies precisely because individual rights are not respected there?), by the *lex fori* (although neither the parties nor the events are really connected with the forum state?), or by a combination of all of the above?[106] Does, perhaps, the law of the place of the wrong provide the basic cause of action, international law the standard of wrongfulness, and forum law the remedies?

This essay is not the place to pursue these questions, especially since they are far from being resolved.[107] Asking them, however, suggests that answering them requires not only new conflicts rules going beyond traditional private international law but also a comparative understanding of all the legal regimes involved—national as well as supra- or international. Note that the emergence of a multilayered legal universe is of course not limited to the rise of fundamental rights. To the extent that other international regimes mature into legal orders directly affecting the law of their member states, we will face the same, or similar, complexities. This is already beginning to happen with regard to international trade regimes, such as NAFTA. In all these contexts, we will be able fully to understand and effectively to resolve the respective conflicts only on the basis of a comparative analysis that tells us to what extent the various legal orders involved are similar or different, compatible or incompatible, fulfilling the same or diverse functions. In sum, comparative law must help conflicts law to perform the 'task of coordination' among multiple legal regimes operating on different levels.[108]

[105] Above (n 103).

[106] In *Doe v Unocal Corp* (n 104), the United States Court of Appeals for the Ninth Circuit discussed the choice of law question under the Alien Tort Claims Act and decided to apply international law, rather than the law of the place of the alleged wrong (Myanmar), to crucial aspects of the case.

[107] For a discussion, see Axel Halfmeier, 'Menschenrechte und Internationales Privatrecht im Kontext der Globalisierung', (2004) 68 *RabelsZ* 653 at 671–80.

[108] The concept is borrowed from Richard Buxbaum, 'Die Rechtsvergleichung zwischen nationalem Staat und internationaler Wirtschaft', (1996) 60 *RabelsZ* 201.

IV. Concluding Remarks

Three decades ago, Arthur von Mehren, one of the leading experts in both fields, concluded that 'no system of private international law can escape involvement with the discipline of comparative law'.[109] Fortunately, conflicts lawyers and comparatists have often worked closely together for well over a century. In the relatively simple world consisting only of co-equal (nation) states with their domestic legal systems, this cooperation took place in the resolution of conflicts on the horizontal level, so to speak. To be sure, since nation states and their legal systems will continue to coexist for the foreseeable future, the work on that level also needs to continue. But the challenge common to both disciplines today is also to handle the problems resulting from the emergence of multiple and overlapping legal orders on various levels in the world. The disciplines will thus have to cooperate in resolving conflicts arising in the vertical dimension as well.

Meeting this challenge will require increasing amounts of teamwork not only between private international lawyers and comparative lawyers but with other specialists as well. As mentioned, handling the multiplicity of legal orders today entails an understanding of various inter- or even supra-national regimes and their interplay with national systems. At minimum, these regimes include several branches of public international law, European Union law, and international trade, not to mention various forms of regional integration in Latin America, Asia, and perhaps even Africa. To make matters worse, all these areas are undergoing constant growth and rapid change. As a result, individual conflicts or comparative law scholars can no longer hope to master the resulting complexities single-handedly—even if they were of the calibre of Ernst Rabel.

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[109] Arthur von Mehren, 'The Contribution of Comparative Law to the Theory and Practice of Private International Law', (1977–8) 26 *AJCL* 32, 33. See also Arthur von Mehren, 'Choice-of-Law and the Comparative-Law Problem', (1975) 23 *AJCL* 751.