ПРОБЛЕМА ИДЕНТИФИКАЦИИ УНИВЕРСАЛЬНОГО В НАЦИОНАЛЬНЫХ СИСТЕМАХ МЕЖДУНАРОДНОГО ЧАСТНОГО ПРАВА

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Статья посвящена вопросу определения характерных отличительных черт универсального права в национальных правовых системах международного частного права. Проведен ретроспективный исторический анализ исследований, направленных на определение происхождения универсальных и национальных основ и теорий в праве. Автор обращается к идеям Ф. Ф. Мартенса, в частности к его «идее права». Сосредоточено внимание на различных теориях международного частного права, предложенных в свое время Аккурзием, Карло ди Токко, Бартоло Сассоферрато и другими учеными-юристами.

Автор рассматривает современные проблемы определения универсального в национальных системах международного частного права, используя при этом свой опыт юридического консультирования. Приведены примеры существующих в 45 странах мира моделей юридических союзов, а также проблемы применения норм в отношении однополых союзов. Выделены четыре основные модели юридической формализации однополых отношений: американско-скандинавская модель, двойная модель, смешанная модель и модель, отрицающая однополые браки.

Статья представляет научный интерес для практикующих юристов, ученых, исследователей и специалистов в области международного частного права, зарубежного права, гражданского права. Кроме того, данный материал будет полезен студентам и преподавателям юридических учебных заведений.

Ключевые слова: модернизм, постмодернизм, международное частное право, универсальное право.

THE PROBLEM OF IDENTIFYING THE UNIVERSAL IN NATIONAL SYSTEMS OF PRIVATE INTERNATIONAL LAW

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The article addresses the complexities inherent in identifying the distinctive features of universal law in national legal systems of private international law. The author first makes a historical analysis of studies that considered the issues of the universal origins and the national views of law and then shifts to modern issues with identifying the universal in national private international law systems.

In this context, the author gives an example of existing models of marriage. In this connection, the article reveals four basic trends to the formalization of unions between two persons, including same sex couples; the American-Scandinavian system, the two-track system, the mixed system and the homosexual-hostile system, which denies same-sex legal partnerships.

The article will be of interest for practicing lawyers, scientists, scholars and specialists in private international law, foreign and civil laws as well. The article will also be useful for lecturers and students of legal educational institutions.

Keywords: modernism, postmodernism, private international law, uniform law.

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As soon as I received the invitation to come to attend the VII International Congress of Comparative Law in Moscow, my mind went immediately to F. F. Martens for two reasons. First, because Martens is the author of a clause¹ whose content perfectly illustrates the tension between universal and national views in law:

¹ See: Convention (IV) Respecting the Laws and Customs of War on Land, of 18 October 1907, 8th preambular paragraph: “Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages

when national visions make it impossible to reach an international agreement on a positive rule, basic universal principles come into play. Universal law therefore has a role that is both fundamental and residual.

Second, because Martens (who lived in modern times, somewhere between traditional Roman law and postmodernism) perfectly expressed the other dichotomy mentioned in the title of the Congress.

In the early 1880s, Martens expressed the idea of an international community capable of building, through international treaties, a sort of international administration,

established between civilized nations, from the laws of humanity and the requirements of the public conscience”.

by which States could regulate legally permitted trans-boundary activities².

In Martens' modernist view, "the idea of law" was the foundation of progressive international law. In his view, the importance and number of international rules would grow exponentially, allowing the development of an increasingly detailed set of rules that would benefit if not all citizens of the planet, certainly the citizens of civilised countries.

Today, we have overcome Modernism and its crisis is, in essence, the decline of the idea of "Progress" as a necessary historical process³.

In legal theory, this also means the decline of the idea expressed by Martens that, treaty after treaty, mankind could develop a truly international administration. The European Union is now moving towards such an administration, at least at a regional level, and the future will tell if the dream of making boundaries between these States totally irrelevant will ever become true. For now, the gap between the national and the universal in law is certain and concrete, if unfortunate, and it is interesting to consider and attempt to fix, here with you, honorable colleagues, the possible dividing lines.

As a Private International Lawyer, I am constantly confronted with dilemmas that stem from the complexity of identifying the universal in national legal systems: a fundamental question is which legal principles belong to the very idea of law and cannot depend on a particularistic interpretation? And, conversely, how much and to what extent can a legal system adapt its own legal logics in order to welcome foreign legal rules?

I wish now to introduce a third dichotomy, another "great divide" between the technical / authoritative nature of law and its ideological/axiological possible essence.

In this respect, Private International Law, provides for a very interesting research field since it has long been considered a neutral field.

Private International Law manuals explain that its role is instrumental to that of substantive rules. According to these views, Private International Law encompasses a set of techniques that are useful for identifying the applicable law when a legal problem appears to be connected with more than one legal system.

Historically, the basic question was formulated by Italian *glossatores*: Accursius set the frame for the issue with the question "If the defendant in Modena is a citizen of Bologna, he shall not be judged according to the law of Modena, since he is not subject to the law of Modena"⁴. It

is very relevant to note that the distance between Modena and Bologna is less than fifty kilometres! At the same time, Carlo di Tocco was stating that "the law only ties *subditos*". The insistence on the geographical scope of application of the laws "statuti" led to the designation of these jurists as "statutari"⁵.

Bartolo of Sassoferrato has written his most famous glossa commenting on the incipit of the Edict of Thessalonika, of 380: where the emperors address themselves to "all the people that our mercy governs". This, according to Bartolus, led to two problems: the first being the application of a national law to non-national subjects; the second being the extraterritoriality⁶.

In contemporary words, Bartolus identifies the problem of circumscribing the "personal field of application" of a law: since no other people but those who are subject to the edict must obey the edict.

Thus, when the person subject to the statutes of Bologna goes to Modena, his statute follows him. There is an expansion of the "territorial field of application" of the law of Bologna. These phenomena postulate a sort of equivalence between the two laws at stake: that of Modena and that of Bologna. In other words, the interchangeability of laws derives from the equal capability of the laws of Modena and Bologna, two cities that are less than fifty kilometres apart, to solve a legal dispute in a just way.

The hidden assumption of this equal capability is the equivalence of solutions, making it somehow irrelevant which statute is applied. The assumption can however be false and lead to a non-application of the "inequivalent" law: this happened notably in all cases of *statuta odiosa*, repugnant foreign laws. Even within the Italian system, based on a strict distribution of jurisdictional power to the single Italian municipalities, there was space for checking the conformity of the content of the foreign law to universal principles of justice⁷.

debet iudicari secundum Statuta Mutinae quibus non subest, cum dicat: quos nostrae clementiae".

⁵ Carolus de Tocco ad C.1.1.1 MS Bibl. nat. 4546 vo clementiae fol. 2a: "Hic nota quod alios noluit ligare nisi subditos imperio suo et est argumentum, infra, de iudiciis l. rem. primo responso (C.3.1.14 vo quum igitur, etc.). Est autem hoc contra consuetudines civitatum que etiam alios constringere volunt cum suis statutis. Et est argumentum si litigat Mutinensis contra Bononiensem in hac civitate, quod statutum non noceat Mutinensi. Sed quidam contra hoc autem dicunt, argumento illo quod Mutinensis hic forum sequitur conveniendo Bononiensem, unde omnes leges illius fori recipiat".

⁶ Bartolus ad. C.1.1.1, nu. 13: "Nunc veniamus ad glossam quae dicit quod si Bononiensis conveniatur Mutinae, non debet iudicari secundum statuta Mutinae, quibus non subest cuis occasione videnda sunt duo et primo utrum statutum porrigat extra territorium ad non subditos, secundo utrum effectus statuti porrigat extra territorium statutentium".

⁷ B. Ancel. *Éléments d'histoire de droit international privé*. Paris, 2017.

² See: F. F. Martens. *On the goals of contemporary international law*. St. Petersburg, 1871 (in Russian); F. F. Martens. *The contemporary international law of civilized nations*. Vol. 1. St. Petersburg, 1882, p. 178 (in Russian).

³ See, *e multis*: Gilles Gagné. Les transformations du droit dans la problématique de la transition à la postmodernité, *Les Cahiers de droit*, vol. 33, no. 3, 1992, p. 701—733.

⁴ Accursius ad C.1.1.1 vo quos (Venice 1488), fol. 4va "Argumentum quod si Bononiensis conveniatur Mutinae non

Contemporary family laws in a nutshell

In my role as legal adviser at the Swiss Institute of Comparative Law, I have had the opportunity to lead a comparative enquiry on the existing models of “legal unions” across 45 States of the world, some of which simultaneously enforce different federal legislation for same-sex couples — such as the United States.

In total, the research analysed sixty-four different regulations for couples and also considered the importability to Switzerland of such “legal unions”.

The study emphasized the existence of four main trends in the formalization of same-sex relationships. The most liberal one seems to be American-Scandinavian. In that geographical area, traditional marriage has been transmuted into a marriage between two neutral beings. These systems have thus one and only one form of legal union, irrespective of the sex of the parties involved.

Here we find a group of States, led by Denmark, that after creating a registered partnership in the eighties/nineties has erased all registered partnership legislations in the last decade, in order to have only one model of formalizing affective relations: the civil marriage. Denmark introduced partnerships in 1989 and abolished it in 2012; Norway and Sweden followed shortly: 1993 and 1994 were the years of its introduction and 2009 that of its suppression; with a slight delay Iceland and a more important one Finland, having introduced registered partnerships respectively in 1996 and 2001 and abolishing the legislation in 2010 and 2017. An identical trend is visible in many US States, as we are about to see, and in Mexico. Another trend favors a twin-track system, maintaining a clear distinction between husband and wife relations and same-sex relations, whether the latter flow between two men or between two women. This twin-track system exists in many Christian Western States, such as Catholic Italy and Austria and the Christian Switzerland, but also Andorra, Slovenia, Hungary. These countries seem to favor a fully-fledged equalization of the respective rights and duties of the partners of a union, be it a traditional marriage or a same-sex partnership. However, they maintain the right of children to have one mother and one father, whenever it is possible. Germany seems to be transitioning from this original dualistic trend to the American-Scandinavian one. France, Spain, and several other states of the European Union (Portugal, Ireland, Belgium, Luxembourg, the Netherlands, Denmark and Iceland) as well as Argentina, Colombia, Uruguay and New Zealand have a mixed system, where registered partnerships are available as an alternative to marriage, however — for historic reasons — sometimes only to same-sex couples.

States that are hostile to the formalization of homosexual relationships characterized by long-lasting cohabitation are: Israel, Turkey and other Sharia influenced countries and Eastern States as Poland, Slovakia, Croatia, Serbia, Montenegro, Macedonia, the Baltic States (Estonia, Latvia, and Lithuania). The Catholic Republic of San Marino also belongs to this group of countries.

In this context, Private International Law offers the possibility of using the law developed by other States to constitute legal situations that do not exist in the forum. In doing so, Private International Law allows the application of standards that have not (or not yet) been approved by the national parliament following the procedure laid down by the national Constitution, with the only limit offered by the possibility of establishing international internal public order as a barrier to the introduction of these foreign standards.

However, here the apparently equal capability of the laws of one country or another to solve the legal problem of a mixed couple is not fulfilled, as a consequence of the profound differences and radical contradictions between the relevant laws.

The Pluralist Axiologic Foundations of Private International Law vs. Uniform Laws

There are countries where it is contrary to public order to prohibit same-sex marriages and, in stark contrast, countries where same-sex marriages are contrary to *ordre public* and even subject to criminal sanctions.

This is due to profound and deeply rooted differences in the legal culture of the countries involved.

The increasing production of laws at the European level seems to have a “proselytistic” tendency, aimed at creating an increasingly “uniform” legal system. A superior set of rights whose monopoly lies within supranational bodies, such as the International Court of Justice and the European Court of Human Rights.

In this context, the comparison of national rules with foreign rules in order to establish generalizable or generally enforceable solutions risks having to cling to *nomina nuda*, as happens when the principle of formal equality is invoked in order to found new subjective rights that positive law does not know.

The law seems to want to fulfill, with norms of universal scope, the intimate space and the freedom of action of individuals previously subject to the empire of religion and its precepts. A sufficient proof of this is the increase on the number of rules and rulings on the legitimacy of people’s sexual lives. Let me take two examples: the European Court of Human Rights has issued decisions on the conformity of criminal sanctions for sadomasochist practices with the European Charter of Human rights (a Belgian case)⁸. The Italian Supreme Court has considered that the religious and cultural justification for marital rape, within a Muslim couple, provided for a reduction of the sanction, since the crime falls within the bulk of culturally oriented crimes whose number is increasing because of the migration movement⁹.

⁸ AFFAIRE K. A. ET A. D. c. BELGIQUE, Requêtes nos 42758/98 et 45558/99, 17 février 2005.

⁹ On “culturally oriented crimes” in Italy see: Fabio Basile. *Immigrazione e reati culturalmente motivati. Il diritto penale nelle società multiculturali*. Milano, 2010; Alessandro Bernardi. *Il ‘fattore culturale’ nel sistema penale*. Torino, 2010; Cristina de

Nowadays, the lives of individuals are inspected more and more under the magnifying glass of jurists, without this “legal voyeurism” being perceived or fought. It rather looks like a diffuse and soft invasion.

The European Union is experiencing certain difficulties in coordinating the outcomes of intra-European litigation in the family law field, despite the existence of an increasingly developed system of self-executing regulations, directly applicable and enforceable simultaneously in the 28 European States.

The solution can rather be found through the various mechanisms of Private International Law, as a technical tool should be used in order to provide at least a “geographical justice.”

At the national level, the need to govern society often provokes recourse to mandatory norms and nationalisations. Thus, Italy has recently enacted Private International Law rules that ensure that a foreign same-sex marriage between Italian citizens cannot be “imported” as such to Italy, *i.e.* it will be re-characterised as a civil union and it will produce only the effects that a civil union will have in Italy. This approach is based on a distinction between reciprocal rights and duties of adult partners — which should apply irrespective of the sexual orientation of the partners and the way they organize their life — and the right of children to have a mother and a father, whenever *force majeure* doesn’t hinder the enjoyment of their right. The Italian Private International Law Statute n. 218/1995 seeks to enforce this conception of justice for families.

At the Regional level, however, freedom of movement justifies the adoption of solutions based on geographical justice: thus the European Union may impose on Member States a prohibition on changing the personal status of European citizens, despite the important gaps in Member States’ legislation. In this system, a child raised by a same-sex couple must be able to travel within the European Area of Freedom, Justice and Security, without his family being challenged or, worse, disrupted, by Member States’ national legislation.

Maglie. I reati culturalmente motivati. Ideologie e modelli penali. Pisa, 2010.

REFERENCES

- Bertrand Ancel. *Éléments d'histoire du droit international privé*, Paris, 2017.
- Friedrich Fromhold Martens. *On the goals of contemporary international law*. St. Petersburg, 1871 (in Russian).
- Friedrich Fromhold Martens. *The contemporary international law of civilized nations*. Vol. 1. St. Petersburg, 1882 (in Russian).
- Fabio Basile. *Immigrazione e reati culturalmente motivati. Il diritto penale nelle società multiculturali*, Milano, 2010.
- Alessandro Bernardi. *Il ‘fattore culturale’ nel sistema penale*. Torino, 2010.
- Cristina de Maglie. *I reati culturalmente motivati. Ideologie e modelli penali*. Pisa, 2010.
- Gilles Gagné. *Les transformations du droit dans la problématique de la transition à la postmodernité*. *Les Cahiers de droit*, vol. 33, no. 3, 1992.

Private International Law serves to guarantee social peace with the specificity that it serves the interests of a transnational community, a community of people that enjoys its freedom of movement and needs judicial protection.

Regionalisation and globalization inevitably point to a progressive harmonization of the law of this society but, as we see, this is an historical phenomenon. Will the recorded trends progressively converge to one and only one model of marriage, that would include same-sex marriage?

Uniformity and international harmony of solutions are the recurrent dream of Private International lawyers: our *cupio dissolvi*.

In our times, Private International Law remains of paramount importance and the oscillations between universalist aspirations and national legal cultures will allow solutions to be tailored to the circumstances of the case. Its’ axiological foundations are based on the respect of pluralism on the regional level, and on a system of values, at the national one.

Continental lawyers are hostile to this *Gestaltungscharakter* of PIL, because it is at odds with predictability, however, in light of the present state of legislative development, it does not seem that solutions anchored in universal law premises — such as that of human rights — find a *consensus* in the international community, at least when it comes to non-basic human rights. In this respect, the gap between basic human rights as the right to live — on the one hand — and the right to access traditional marriage and form a family — on the other hand, seems very wide.

In the legal regulation of long-standing cohabitations, the gaps between different national legislation are indeed many and important, even within the European Area of Freedom, Justice and Security.

The increased specialisation of Private International Law rules, with the increasing recourse to *dépeçage* techniques, can give lawyers useful instruments to explain the probable outcome of an existing or future legal problem. However, it doesn’t yet guarantee the same predictability to parties entering in a long-life cohabitation, in an impulse of love.