The Transformation of European Private International Law

A Genealogy of the Family Anomaly

Alberto Horst Neidhardt

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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European University Institute
Department of Law

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Abstract

This thesis originates in a 'family anomaly' in European private international law. Conflict experts have observed a methodological shift towards regulatory and policy considerations in transnational economic relations. Fears of the dangers of an unregulated market have generated policy-oriented rules and overriding mandatory provisions. Experts are generally supportive of this paradigm shift. They reject the view that conflict of laws consists of a set of 'neutral' techniques designed to protect decisional harmony and parties' expectations, the classical objectives of private international law. Some regard this as evidence of a long-awaited 'European Conflicts Revolution'. A paradigm shift is also occurring in the law governing cross-border family relations. Here, however, changes take the opposite direction as party autonomy and the method of recognition are being progressively constitutionalised. In contrast with cross-border economic matters, policy-oriented rules and mandatory norms evoke the *ancien régime* and the exceptional characterisation of family relations that became dominant in the 19th century. Autonomy and recognition are popular because they come across as technical devices that liberate individuals from conservative social forces. For some, the contemporary turn indicates an evolutionary movement from government control to self-determination, 'from status to contract'. Rather than portraying the family anomaly as part of a methodological revolution or as an evolutionary progress, this study advances a transformative thesis. Contrary to what is assumed, this study shows that private international law does not consist of technical rules and methods that develop in isolation from cultural and political processes. Tracing a genealogy of the law governing cross-border relations from the medieval to the contemporary age indicates that private international law constitutes an *instrumentum regni* which is transformed by dominant 'modes of thought'. Ideas and assumptions which prevail in legal consciousness have shaped the boundaries and functions of conflict of laws. In turn, the law governing cross-border relations has played a crucial role in articulating and consolidating sovereign power. In this light, the thesis shows that the family anomaly reflects the renaissance of ideas dating back to the age of classical legal thought, and most notably the contraposition between the family and the market, and their adaptation to a new cultural and institutional environment. It suggests the rise of a post-national institutional model which is illustrated by the profound redefinition of the way in which individuals form and dissolve civil and political bonds through conflict rules.

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Some years ago, I embarked on a journey into the unknown. Although challenging and frightening at times, undertaking a PhD has been an exhilarating and life-changing adventure. As is with my physical travels, so it has been with my intellectual ones; I would not have reached my destination without the guidance of persons gifted in equal parts with knowledge, patience and kindness. I would like to express my most sincere gratitude to Horatia and Ruth, who encouraged me to never abandon the path that my intuitions and beliefs led me to, but also made sure that the many exciting digressions of my wandering brain did not lead me astray. I would like to thank Michael, for he has equipped me with the necessary mental faculties to be able to complete my journey, the capacity to observe and to reflect, and has taught me the true meaning of the words 'erudition' and 'generosity'. I take full responsibility for the mistakes and inaccuracies that can be found in this bulky work that gives an account of my adventure, including its biblical size, but the good that lies in it would not be there without their advice and unconditional support. I owe my success entirely to them.

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Legge n. 898 del 1 dicembre 1970 (Disciplina dei casi di scioglimento del matrimonio)

Legge n. 151 del 19 maggio 1975 (Riforma del diritto di famiglia)

Legge n. 218 del 31 maggio 1995 (Riforma del sistema italiano di diritto internazionale privato)

Legge n. 76 del 20 maggio 2016 (Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze)

International Conventions

Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version), [1998] OJ C 27, 26.1.1998

Rome Convention on the law applicable to contractual obligations (consolidated version), OJ C 27, 26.01.1998

European Directives (Chronological Order)

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [1995] OJ L 158

Directive 95/46/EC of the European Parliament and of the Council 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ L 158

European Regulations (Chronological Order)

Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings OJ L 160

Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters OJ L 160

Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174/1

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12, 1-23

Council Regulation (EC) No 743/2002 of 25 April 2002 establishing a general Community framework of activities to facilitate the implementation of judicial cooperation in civil matters, OJ L 115/01

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility OJ L 338/01

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations OJ L 199/40

Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation OJ L 324/79

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations OJ L 177/6

Council Regulation (EC) No 4/2009/EC, concerning jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations OJ L 7

Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation OJ L 343

Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European certificate of Succession OJ L 201

Wisława Szymborska, Psalm, 1976

Oh, the leaky boundaries of man-made states!
How many clouds float past them with impunity;
how much desert sand shifts from one and to another;
how many mountain pebbles tumble onto foreign soil in provocative hops!

Need I mention every bird that flies in the face of frontiers
or alights on the roadblock at the border?
A humble robin—still, its tail resides abroad
while its beak stays home. If that weren't enough, it won't stop bobbing!

Among innumerable insects, I'll single out only the ant
between the border guard's left and right boots
blithely ignoring the questions "Where from?" and "Where to?"

Oh, to register in detail, at a glance, the chaos
prevailing on every continent!
Isn't that a privet on the far bank smuggling its hundred-thousandth leaf across the river?
And who but the octopus, with impudent long arms,
would disrupt the sacred bounds of territorial waters?

And how can we talk of order overall?
when the very placement of the stars leaves us doubting just what shines for whom?

Not to speak of the fog's reprehensible drifting!
And dust blowing all over the steppes
as if they hadn't been partitioned!
And the voices coasting on obliging airwaves,
that conspiratorial squeaking, those indecipherable mutters!
Only what is human can truly be foreign.
The rest is mixed vegetation, subversive moles, and wind.[1]

[1] Szymborska, W. View with a Grain of Sand, trans. S. Baranczak and C. Cavanagh, New York, Harcourt, Brace (1995)

Introduction

In a global age characterised by growing exchanges and heightened mobility on the one hand, and by the existence of jurisdictional frontiers and by the resilience of local laws on the other, the risk of legal collisions increases and so does the relevance of private international law. In general, private international law, also known as the conflict of laws, indicates those rules and principles whose purpose is to submit relations and disputes that have a cross-border dimension to a given jurisdiction or to a specific local law.[2] Various other titles have been advanced in the history of the discipline. In this study, I use the two terms, 'conflict of laws' and 'private international law' broadly and interchangeably. I believe that most scholars are so familiar with these two terms that no harm can follow from using either to refer to the subject as a whole.

Although the conflict of laws has varied across time and space, disciplinarily and functionally, in Europe it is most commonly associated with rules governing jurisdictional competence, choice of law and recognition of foreign judgments in international private relations.[3] Because the frequency of such relations continues to increase, there has been a renewal of interest in private international law. Also in consideration of the efforts by the European Union (EU) to remove obstacles to cross-border transactions, experts have looked at and have compared developments taking place at municipal and

[2] For a discussion and critique of the titles Symeonides, S. 'American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons', 82(5) *Tulane Law Review*, 2008

[3] Conflict of laws is generally divided into three topics. If a case containing a 'foreign element' comes before a national court, the court is first to determine if it has jurisdiction or not to adjudicate. According to the classical tripartite division of multilateral private international law, the first branch would consist of rules which determine whether the local forum has jurisdiction to try the dispute in question. Questions of forum, it ought to be noted, are sometimes placed outside the discipline of conflict of laws *sensu strictu*. Once a national court has found it has jurisdiction to adjudicate, a second question arises, concerning the body of rules that the deciding court ought to apply. The second branch of private international law, which is regarded as the characteristic element of the subject, includes the rules that determine the applicable law, the so-called 'choice of law' rules. The second branch therefore concerns questions of *lex*. Various titles are used to indicate the law that applies to a given cross-border scenario. The law which is applied taken *ex nunc* the name of *lex causae*. The law applied does not necessarily correspond to the law of the deciding court, which is referred to as the *lex fori*, but can correspond to the law of the place of contracting, the law of the place of performance, the law of nationality etc. Normally, the specialised literature refers to these laws with Latin titles: *lex loci contractus*, *lex loci solutionis*, *lex patriae* etc. Private international law is also said to include a third branch which is concerned with the recognition, or rejection, and implementation of foreign judgements or measures. Proceedings taking place in a jurisdiction for recognising a foreign judgement go by the name of *exequatur*. Experts sometimes include within the subject of conflict of laws a wider range of matters and topics that may affect the operation of conflict rules. One example is the rules defining the acquisition and loss of nationality. An 'expansive' conception of the subject is more prevalent in certain national traditions (see, for instance, Bureau, Dominique and Muir Watt, Horatia, *Droit international privé*, *Partie générale*. Thémis, Presses Universitaires de France, 2007). In this study, the subject is understood expansively, although the goal of this study is neither to contribute to redefinition of the discipline nor to provide a comprehensive and coherent list of rules and principles which make up the discipline.

supranational levels.[4] They have used unorthodox methods to examine the discipline from new angles.[5] Conflict principles and doctrines are used to advance broader jurisprudential claims regarding the role of law in plural societies.[6] In turn, traditional rules and assumptions have become the subject of comparison, debate and revision.

Most experts agree that private international law makes up a valuable resource for administering concurrent claims over jurisdiction, for settling questions regarding applicable law and for deciding whether to recognise and enforce foreign decisions. Some specialists have nevertheless pointed out that the classical parameters and goals of the conflict of laws, fixed as they were in a different juridical era and political climate, may be inadequate to deal with the complex challenges that contemporary societies face. In a recent article where she has urged legal scholars to take the technical dimensions of law seriously, Annalise Riles remarked that private international law exemplifies 'legal technicalities', as it comes across as an "essentially meaningless" subject which is constituted by "a morass of highly technical … doctrines developed by largely unknown academics in relative isolation from the political process".[7]

This description fits the image projected by specialists. Private international law was and is portrayed by experts and non-experts alike as an overly complex subject and, at the same time, as a neutral and isolated technical tool.[8] In recent years, however, critics have questioned some of the assumptions which characterise the nature and constrain the functions of private international law which stem from

[4] See the Symposium 'The New European Choice-of-Law Revolution: Lessons for the United States?', 82(5) *Tulane Law Review* (2008)
[5] Knop, K., Michaels R. and Riles, A. 'Foreword', 71(3) *Law and Contemporary Problems* (2008)
[6] Knop K., Michaels R. and Riles A., 'From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style', 64 *Stanford Law Review* (2012). See also Knop, K. 'Citizenship, Public and Private', 71(3) *Law and Contemporary Problems* (2008)
[7] Riles, A. 'Taking on the Technicalities. A New Agenda for the Cultural Study of Law, 53 Buffalo Law Review (2005), p. 978. Here, Riles divides between two groups of legal scholars, the 'Culturalists' and the 'Instrumentalists'. Both groups, she argues, have impoverished what defines the specific character of the legal field, the technicalities of legal thought (p. 974). She argues that "To the culturalist, the technical dimensions of law are a mundane and inherently uninteresting dimension of the law, the realm of practice rather than theory." (ibid.) "To the instrumentalist, in contrast, the technical details are interestingly only insofar as they are relevant to what lawyers sometimes term 'building a better mousetrap'" that is, nothing more than an instruction manual for properly operating a machine. (p. 975). Riles therefore argues that the technical dimensions of the law should not be neglected because this would lead to neglecting the core of legal thought, because technicalities often encapsulate politics and, last but not least, because the critical scholarship possess the methodological resources to understand and expose this aspect of law.
[8] Almost two centuries ago, the subject was appropriately described as "the most intricate and perplexed of any that has occupied the attention of lawyers and courts: one on which scarcely any two writers are found to entirely agree, and one which, it is rare to find one consistent with himself throughout." In the case heard by the Louisiana Supreme Court *Saul v. His Creditors*, 5 Mart, (n.s.) 569, 589 (1827) per Judge Porter. It is notorious for being a legal subject where "learned but eccentric professors … theorize about mysterious matters in a strange and incomprehensible jargon." This is the very vivid picture drawn by American Professor William Lloyd Prosser, to which he added that "The ordinary court, or lawyer, is quite lost when entangled in it." Prosser, W. 'Intestate Publication', 51 *Michigan Law Review* (1953), p. 971

the foundational dogmas regarding the discipline.[9] Among them are the myths of 'neutrality' (or 'non-instrumentality') and 'isolation' (also referred to here as 'autonomy'). Although part of the scholarship has rejected them, these two myths are re-surfacing in cross-border family matters.

1.1 Private International Law as Technique: The Dogmas of Neutrality and Isolation

According to the myth of isolation, conflict of laws is a branch of national law and a self-referential discipline made of methods and technical rules which are developed at municipal level in isolation from broader legal and political processes.[10] According to the dogma of neutrality or non-instrumentality, the aim of conflict rules is to facilitate cross-border exchanges, to fulfil the expectations of the parties, to promote conflict-justice or to protect rights acquired abroad. In the contemporary age the dogmas of neutrality and isolation live, although cast in a different vocabulary. The name and content of the objective changes, but the 'coordinating functions' of conflict of laws remain. Private international law is thus still often described as a branch of national law made of technical rules designed to deal with private cases "having a foreign element".[11] Conflict of laws is described as only indirectly and haphazardly influenced by political and legal developments taking place at supranational level.

The resilience of the classical dogma of isolation means that private international law is typically understood, and examined, as a discipline and set of rules which are impermeable to legal and institutional developments taking place outside its alleged natural and permanent borders, in the contemporary age as well as in the past. Developments in the discipline are considered separately from changes in public international law, but also from those occurring in family law, or in the law

[9] See the collection in Muir Watt, Horatia (ed.), *Private International Law and Public law*. Edward Elgar Pub, 2015

[10] The origins of the dogma of autonomy can be traced back to the age of 'classical legal thought', the dominant mentality from the second half of the 18th century to the end of the 19th century. In this period, Joseph Story (1779-1845) coined the term 'private international law'. In one of the most influential works on the subject, he observed that this "branch of public law may … be fitly denominated private international law, since it is chiefly seen and felt in its application to the common business of private persons, and rarely rises to the dignity of national negotiations, or of national controversies." In J. Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in regard to Contracts, Rights, and Remedies, and Especially in regard to Marriages, Divorces, Wills, Successions, and Judgments*, Reprint of the Second Edition of 1841, The Lawbook Exchange, New Jersey (2003), pp. 11-12. On classical legal thought, see Kennedy, Duncan. *The Rise and Fall of Classical Legal Thought*. Beard Books, 2006. Kennedy, D., 'Towards an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought', in Spitzer, Steven (ed.), *Research in Law and Sociology*, Vol. 3 (1980)

[11] Thus, for the leading English textbook: "The branch of English law known as the conflict of laws is that part of the law of England which deals with cases having a foreign element. By a 'foreign element' is meant simply a contact with some system of law other than English law. Such a contact may exist, for example, because a contract was made or to be performed in a foreign country, or because a tort was committed there, or because property was situated there, or because the parties are not English." Collins, Lawrence et al., *Dicey, Morris and Collins on the Conflict of Laws*, Vol. 1, Thomson, Sweet and Maxwell, 2006 (14th edition), p. 3

of the economy, as each of these disciplines would be endowed with a separate set of methodological tools, underlying principles and systemic objectives.[12] Isolation translates in well-established external limits as well as internal structure. The discipline is still generally organised along the conceptual schemes and legal divisions in which 19th century jurists placed those rules (marriage, contract, property etc).

In historical terms, this means that most accounts report the chronological development of conflict doctrines and techniques falling within its boundaries, without attention to institutional and cultural changes occurring in 'the background'.[13] As Alex Mills has pointed out, histories of private international law are "told simply as a historical fact, without significant attention to contextual factors - suggesting the discipline is propelled forwards by internal dynamics."[14] Typical histories thus read like a dry succession of competing paradigms, techniques and methods and, notoriously, as a conflict between the 'unilateral' and 'multilateral methods'.[15] In other words, the "isolation of private international law" is considered the natural end of an historical process, as well as the starting point for future developments in the discipline.[16]

The myth of neutrality is also still entrenched in legal consciousness. Despite the almost pathological diversity of opinions regarding virtually every dimension of the subject - which is exemplified by the eternal struggle between unilateralism and multilateralism - experts typically consider private international law an unbiased procedural mechanism and a value-neutral tool.[17] Aims have changed

[12] See Mills, A. 'The Private History of International Law', 55(1) *The International and Comparative Law Quarterly* (2006) and Mills, Alex. *The confluence of public and private international law: justice, pluralism and subsidiarity in the international constitutional ordering of private law*. Cambridge University Press, 2009. Mills has addressed this issue with respect to the division between public and private international law. His work addresses two 'myths' or 'assumptions': "The first is an assumption of public international law. It is the myth that the history of international law is one of progressive expansion, of increasing concern in public international law with matters traditionally considered private or internal to States, and that this expansion is a relatively recent phenomenon.' The second is an assumption of private international law. It is the myth that private international law is not actually international, as it is essentially and necessarily a part of the domest law of States." Mills, 'The Private History', p. 1. It is here argued that the myth of isolation originates in convictions that are rooted deeper than the public/private, national/international divides.

[13] For instance, see Ancel, Betrand. *Éléments d'histoire du droit international privé*. Université Panthéon Assas. 2017

[14] Mills, 'The Confluence', p. 26

[15] "A typical history of a subject like public or private international law is 'internal' or 'intrinsic', a history of the development of legal doctrine and theory within the discipline. In such a history, theories or approaches are presented chronologically, in a series of 'epochs' or competing 'paradigms'." Mills, 'The Private History', p. 1

[16] Paul, J. R., 'The Isolation of Private International Law', 7 *Wisconsin International Law Journal* (1988)

[17] Although it is generally agreed that private international law is a self-referential discipline made of neutral principles and rules, the paradox is that the specialised scholarship has not generated clear rules and definitive methods to solve legal collisions. The discontent but also fascination with conflict of laws comes from the fact that experts never managed to reach an agreement about principles and methods that could last for longer than a generation of legal scholars. Legal history shows that once an agreement was reached subsequent experts challenged the premises and underlying principles of the method developed by their predecessors. This has given way to a long and unsettled debate regarding the nature of change, revolutionary or evolutionary, of the discipline. Vischer, Frank. 'General course on private international law'. *Recueil des Cours* (1992), p. 21. The endless and arduous discussions about what technical rules ought to be adopted in

across space and time. In the past, specialists referred to 'uniformity of decisions' and 'legal certainty'. Today, they refer to 'substantive neutrality' and 'decisional harmony'.[18] Regardless of textual variation and methodological preferences, neutrality is still at the heart of the discipline. Within the context of debates on multiculturalism, the conflict of laws is thus said to constitute a culture-blind and impartial apparatus that enables courts to protect equality and justice.[19]

Due to recent changes in law and in discourse, the foundations of classical dogmas are being gradually eroded. To think of this discipline as a method and as a meaningless technique isolated from broader political and legal process, it has been argued, ignores how the development of conflict rules and principles relate to the 'big picture' and the deeper effects that changes in private international law have produced, and could generate, socially and institutionally.[20] Accordingly, recent studies have blamed purely methodological reconstructions for being unable to shed full light on the drivers and consequences of recent developments.[21] They have emphasised the influence of ideas originating outside the boundaries of private international law for the development of conflict principles.[22] They have also stressed the existence of common historical developments and shared argumentative structures between conflict of laws and public international law.[23]

each jurisdiction, or about the most appropriate method that local courts should employ to solve cross-border disputes have led some of the most authoritative voices in the discipline to warn that private international law was being turned into a 'mystagogy'. Jünger, F. K. 'General Course on Private International Law', *Recueil des Cours* (1983), p. 131

[18] As Jacco Bomhoff and Anne Meuwese have underlined, "orthodox … aspirations of autonomy and non-instrumentality find their expression in adherence to the ideals of 'substantive neutrality' and 'decisional harmony'." Bomhoff, J. and Meuwese, A. 'The meta-regulation of transnational private regulation', 38(1) *Journal of Law and Society* (2011), p. 151

[19] Knop, Michaels and Riles, 'From Multiculturalism to Technique', p. 641. In their view, the key strength of private international law would lie in its technical nature which provides courts with neutral procedures to reach their decisions in cross-border scenarios. However, it ought to be noticed that it is this very nature of conflicts law which have hidden parochial policies behind a veil of impartiality in the age of nation-states - labelling a set of rules as 'procedural' does not by itself eliminate the normative orientation intrinsic in any rules.

[20] Hatzimihail, N. 'On Mapping the Conceptual Battlefield of Private International Law', 13 *Hague Yearbook of International Law* (2000)

[21] Ibid.

[22] They have pointed out that private and public international law may be converging once again.For a German take on this question, see Michaels, R. 'Public and Private International Law: German views on global issues.', 4(1) *Journal of Private International Law* (2008)

[23] Paul argued that reunification of private and Public International Law could be realised if scholars focused on the common structure of arguments and on common principles, and specifically on those of comity, contract and public policy, more than on common rules. He lamented that the ossification of our understanding of contract, of comity, of public interest led to Private International Law from shying away from the challenges that were dawning in the age of globalisation. As he vividly argued: "Diplomats debate the rules of the arms race without mention of comity; we spend the wealth of an empire on constructing weapons of destruction that would leave no sovereign untouched; we poison the atmosphere, extinguish species and level rain forests all without regard for the fragile web of public and private interests of states and persons in the continuation of human existence; we elevate the rule of contract at the expense of the vast majority of the world's people, who survive under a mounting burden of debpt, while their domestic security is threatened by hunger, authoritarianism and revolution; we celebrate the freedom to choose, while denying the freedom to eat." Paul, 'The Isolation', p. 178. In the final part of the thesis, this study will consider the question of the changing nature, public and private, national or international, which results from the communitarisation of conflict of laws in the EU.

It is not only the dogma of isolation, but also the myth of neutrality which has become the object of an internal critique in recent years. Conflict of laws, experts have argued, could address many challenges that contemporary societies face, including the regulation of global financial markets, the protection of the environment and the lack of accountability of multinational corporations.[24] Private international law could help to increase protection and enforcement of fundamental human rights enshrined in international and regional conventions.[25] Conflict rules could be reconfigured to bring about a more effective and equitable global governance.[26] Private international law could be transformed from a passive onlooker or even participant in economic and social oppression into a regulatory resource for addressing justice concerns at global and local level.[27] In order to set up an effective strategy in an era of globalised private relations, the classical dogma of non-instrumentality must be abandoned and must give way to its unfulfilled regulatory potential.[28]

As far as the regulation of cross-border economic matters is concerned, experts have called into question the origins as well as the desirability of the classical dogmas. They lay emphasis on the harmful results that such myths have generated by separating, artificially and dogmatically, the national from the international sphere, public from private and law from politics.[29] Against a background characterised by the global diffusion of private power, specialists have denounced the classical dogma that has identified regulation with parochialism and has made it possible for non-state actors to escape from public regulation.[30] In a globalised society characterised by greater mobility of persons, capital, goods and services across jurisdictions, conflict principles such as party autonomy - in a nutshell, the capacity of the parties to select the applicable law - and the automatic recognition and enforcement of rights acquired abroad have ended up constituting a safe harbour for regulatory arbitrage and system-shopping.

[24] See PILAGG (Private International Law as Global Governance), research project at Sciences Po.
[25] See Fawcett, James J., Ní Shúilleabháin, Máire and Shah, Sangeeta. *Human Rights and Private International Law*, Oxford University Press, 2016; Kiestra, Louwrens R. *The Impact of the European Convention on Human Rights on Private International Law*, Springer (2014)
[26] See the comprehensive topics covered by the collection of essays in Muir Watt, Horatia and Fernández Arroyo, Diego P. (eds). *Private International Law and Global Governance*, Oxford University Press, 2014
[27] R. Wai, 'Transnational Liftoff and Juridicial Touchdown: The Regulatory Function of Private International Law in an Era of Globalization', 40 *Columbia Journal of Transnational Law* (2001-2002)
[28] Ibid. Wai has examined the de-regulation of global economic activities that has taken place in conformity with the notion that private international law should facilitate business transactions. He has advanced the argument that regulation should not be confused for parochialism. He has proposed a cosmopolitan and regulatory version of private international law of the economy that could help to curb the worst excesses of economic globalisation and could play the role in the constitution of global governance.
[29] Muir Watt, H. 'Private International Law as Global Governance: Beyond the Schism, from Closet to Planet', 2(3) *Transnational Legal Theory* (2011)
[30] Wai, 'Transnational Liftoff and Juridicial Touchdown'

Changes are not only noticeable in discourse, but also in positive law, including in EU law. The so-called processes of 'communitarisation' and 'instrumentalisation' of private international law under the aegis of EU law stand as proof of the gradual decline of the myths of neutrality and isolation.[31] Since the 1970s, rules and principles which were unanimously regarded as part of internal orders of Member-States have been first 'harmonised' along with other private laws and then 'communitarised', i.e. legislated at community level, thus putting into question the dogma of autonomy.[32] Consistent with a transition towards a regulatory paradigm in European private economic law, this process does not limit itself to the objective of removing obstacles to market integration, but has also added a layer of protective measures in favor of specific market participants, such as European workers and consumers.[33]

European private international law, experts have argued, transcends its typical 'coordination' functions and constitutes a powerful regulatory resource for protecting vital public interests and for achieving objectives set at supranational level. Experts have thus observed a paradigm shift towards regulatory and policy considerations in transnational economic relations, in discourse and in the law. Experts are generally supportive of this shift. They reject the view that private international law still consists of a set of neutral techniques exclusively designed to protect decisional harmony and parties' expectations. Fears of the dangers of an unregulated market have generated policy-oriented rules and overriding mandatory provisions. Recent changes thus undermine the dogma of neutrality and the classical conception of conflict of laws as mere technique.[34]

[31] Examined in Chapters 9 and 10

[32] When legal scholars discuss of the process of Europeanisation, they generally refer to positive legal developments which imply the direct and positive approximation of separate bodies of rules under the aegis of EU law. See Zimmermann, R. 'Comparative Law and The Europeanization of Private Law', in Reimann, Mathias and Zimmermann, Reinhard (eds.), *Oxford Handbook of Comparative Law*, Oxford University Press (2006). Europeanisation is thus generally understood as synonymous with the process of top-down harmonisation. Scholars use Europeanisation in this sense when referring to the various legislative measures introduced in EU law with the explicit objective of harmonising the private laws of Member States. However, Europeanisation has been also used in a diffused sense with reference to the activism and role played by the European Court of Justice (now Court of Justice of the European Union) for bringing about greater integration. According to one of the most well-established narratives in the history of the EU which was popularised by Joseph Weiler and Mauro Cappelletti, the ECJ set in motion in the 1960s a process of 'integration through law' in order to make up for an otherwise uncertain political and legislative process. With the lessening of the political impetus, ITL theory claims, the Court of Justice became the most essential actor in the integration. Especially relevant and illustrative were the early cases C-26/62 *Van Gend en Loos* [1963] ECR 13 where the ECJ declared itself a 'new legal order of international law', C-6/64 *Costa v. ENEL* [1964] ECR 585 and the later case C-120/78 *Cassis de Dijon* [1979] ECR 649

[33] Van Den Eeckhout, Veerle. 'The Instrumentalisation of Private International Law: Quo Vadis? Rethinking the 'Neutrality' of Private International Law in an Era of Globalisation and Europeanisation of Private International Law' (2012)

[34] J. Basedow, 'Spécificité et coordination du droit international privé communautaire', in. *Travaux du comité français de droit international privé 2002-2004*, Paris, Pédone (2005)

Experts have also advanced the claim that conflict theories, doctrinal resources and principles could play an important role in the process of social and economic integration of the EU, and that they could help to build a bridge over the current gap between the legal and political spheres of the Community.[35] Private international law could be utilised to construct a mode of governance proper of the EU, reflecting, *inter alia*, the greater inter-dependence between legal orders and the rise of what is referred to as the 'regulatory-state'.[36] Considering recent developments, some experts have advanced the claim that we are currently witnessing a European 'Conflict of Laws Revolution' which is evocative of the American shift that took place in the beginning of the 20th century.[37] Notably, a paradigm shift is also occurring in private international law of the family, although this is usually presented as part of an evolutionary movement from government control to self-determination.[38] In family matters, neutrality and isolation are re-emerging, suggesting the presence of a 'family anomaly'.

1.2 The Family Anomaly: The Renaissance of the Dogmas of Neutrality and Isolation

The anomaly in European private international law is illustrated by the subversion and reversal of traditional assumptions that underpinned the regulation of the international market and of international families. As far as the former is concerned, the communitarisation and instrumentalisation of conflict of laws has resulted in the multiplication of what the scholarship calls 'status-like' protections for the benefit of specific categories of individuals who are exposed to the forces and excesses of the transnational market.[39] Status is a concept that the scholarship has for centuries exclusively associated with personal capacity and the regulation of family relations. This

[35] For instace, Christian Joerges argues in favour of a reconceptualization of Conflict of Laws and of a three-dimensional conflicts law approach with the first dimension "reflecting the inter-dependence of formerly more autonomous jurisdictions, the second responding to the rise of the regulatory state, and the third dimension considering the turn to governance, in particular the inclusion on non-governmental actors in regulatory activities and emergence of para-legal regimes." in C. Joerges, 'The Idea of a Three-Dimensional Conflicts Law as Constitutional Form', *LEQS Paper No. 28* (2010), p. 2. For Christian Jeorges a restated European COL could go as far as constitutionalising a new mode of governance proper of the EU. C. Joerges 'Constitutionalism in Postnational Constellations: Contrasting Social Regulation in the EU and in the WTO', in C. Joerges & E. U. Petersmann, *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Oxford, Hardt (2006)

[36] G. Majone, 'The rise of the regulatory state in Europe', 17 *West European Politics*, 1994. See The Rise of the Regulatory State, Edward L. Glaeser and Andrei Shleifer, Journal of Economic Literature, Vol. XLI (June 2003) pp. 401-425

[37] J. Meeusen, "Instrumentalisation of Private International Law in the European Union: towards a European conflicts revolution?", European journal of migration and law 2007, p. 287-305; A. Mills, "The Identities of Private International Law. Lessons from the US and EU Revolutions", Duke Journal of Comparative and International Law, 2013, p. 445-475. Members of an opposite camp have pointed out that European reforms are a part of a top-down movement and are methodically planned. For these reasons, they believe that the ongoing process of reconfiguration lacks the essential attributes of a revolution and would be part instead of a progressive evolution. See S. Symeonides, 'The American Revolution', 2008. Michaels instead argues that it fully qualifies as revolution in R. Michaels, 'The New European Choice-of-Law Revolution', 82(5) *Tulane Law Review*, 2008

[38] Basedow, J., 'The Law of Open Societies', Recueil des Cours, Académie de Droit International de La Haye. Martinus Nijhoff Collection, 2013; See discussion in the conclusion.

[39] Examined in Chapter 10. See especially Section 1.2

development is also noteworthy because, as far as family relations are concerned, recent changes have brought about a 'constitutionalisation' of party autonomy and of the method of recognition.[40] These principles used to apply to cross-border economic matters, and their expansion into the province of the family indicates *per se* a significant turn.

What is noteworthy is not only that such expansion is being facilitated by the communitarisation of conflict of laws - the same process that has paved way for its instrumentalisation of private international law of the economy - and is widely supported in the doctrine, but also that experts' support is expressed in terms that reflect the classical dogmas.[41] The method of recognition and party autonomy in cross-border economic matters have come under strict scrutiny for their adverse social effects. In cross-border family matters, they are celebrated instead because they are said to generate "legal certainty" and because they protect the "legitimate expectations" of the parties.[42] "Given the longstanding and frustrating deadlock between different legal traditions over the most appropriate connecting factor in family law", scholars have pointed out, "letting the parties choose […] would seem just the necessary dose of flexibility to attain international harmony."[43]

Not only have principles which used to underpin private international law of the economy expanded to the law governing cross-border family matters. The conceptual vocabulary traditionally used by experts in the context of the market to promote classical principles is gradually being transferred to private international law of the family. As far as the regulation of market relations is concerned, experts criticise the lack of concern for substantive and distributive justice inherent in the classical conception. Conversely, in the family field, experts hold that "the reference to substantive justice makes no sense, as it should not involve a determination of whether one legal system gives a more just outcome of the case than another. Instead, [conflict rules] should 'merely' ensure the application of the legal system that is most appropriate to the resolution of the case, which is indicated by the term conflicts justice."[44]

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[40] T. Yetano, 'The Constitutionalisation of Party Autonomy in European Family Law', 6(1) Journal of Private International Law, 2010

[41] See D. Martiny, 'The Objectives and Values of (Private) International Law in Family Law, in J. Meeusen, M. Pertegas, G. Straetmans, F. Swennen (eds.), *International Family Law for the EU*, Antwerpen-Oxford: Intersentia (2007), para. 11

[42] Yetano, Party Autonomy in European Family Law, pp. 184-185

[43] T. Yetano, 'The Constitutionalisation of Party Autonomy in European Family Law', 6(1) *Journal of Private International Law*, 2010, p. 155

[44] And she concludes that "In European Private International Law – an area which includes different jurisdictions with diverging laws – justice thus characterises a legal environment which enables the predictability of which courts will be competent and which law will be applied in a given case." N. A. Baarsma, *The Europeanisation of International Family Law*, Springer (2011), p. 288

The family anomaly is visible in EU law, but also in the renaissance of classical notions and assumptions that specialists have rejected in the economic sphere.[45] Compared to traditional methods and connecting factors that constituted a smokescreen for overriding political interests and for the protection of state interest, party autonomy and the method of recognition are praised as value-neutral devices and appropriate liberal techniques that defend individuals against unwarranted national imperatives and against conservative and protectionist social forces that would otherwise reach out to individuals and families inhabiting the transnational sphere.[46] These are instruments that in the 19th century became associated with the promotion of the free market. Today, they find increasing support among specialists who are fearful of the policy-oriented rules and mandatory norms which evoke the *ancien régime* and the exceptional characterisation of family relations that became dominant in the 19th century.

If the paradigm shift in private international law of the economy is largely a reflection of the awareness of the dangers of an unregulated market, the extension of market-related principles and doctrines to the family sphere is therefore justified by their alleged emancipatory power.[47] European individuals should be able to derogate from the law their country and get married or form family relationships according to their own preferences and desires, without government interference. Conflict of laws would enhance their capacity to make autonomous decisions. We see here evidence of the re-emergence of the dogma of neutrality. Imbued with ideas that traditionally underlay the law governing cross-border economic relations, private international law of the family thus comes across as modern, liberal and inclusive. Significantly, some experts have argued that the recent turn may indicate an evolutionary movement from government control to self-determination, 'from status to contract'.[48]

Although the ongoing paradigm shift seems to undermine the exceptional characterisation of status-based family relations, the paradoxical effect of the anomaly is that, as family relations with a transnational dimension are lifted off from regulatory oversight, the myth of neutrality as well as the dogma of autonomy are being revitalised in legal consciousness, but merely in the family sphere. In

[45] Examined in Chapter 10. See especially Sections 2.1 and 2.2

[46] They regard them as value-neutral devices that help to realise the 'principled imperative' of safeguarding the continuity of status across jurisdictional borders J. Borg-Barthet, 'The Principled Imperative To Recognise Same-Sex Marriages', 8(2) *Journal of Private International Law*, 2012

[47] See Azoulai, 'The European Individual as part of Collective Entities', Azoulai, Loïc, Ségolène Barbou des Places, and Etienne Pataut, eds. Constructing the person in EU law: rights, roles, identities. Bloomsbury Publishing (2016) discussed in Chapter 10, Section 2.2

[48] See A. Briggs, The Conflict of Laws, 3rd Edition, Oxford University Press (2013), pp. 328-329. Discussed in Chapter 10, Section 3.1

cross-border economic matters, experts justify the growth of systematic interventions and *ad hoc* protections through the expansion of competences of European institutions. In this case, the distinction between the national and the international, private and public and law and politics is contested. In contrast, in family matters, autonomy is cherished because it separates individuals from paternalistic public policies, because international law protects individual choices against national control, and because private international law keeps the government and politics off the threshold of the family and of individual decision-making.[49]

How can we explain the family anomaly in European private international law? What is hidden behind the resilient assumptions and powerful impressions that the classical myths of neutrality and isolation hold in legal consciousness? Should the family anomaly be understood as evidence of a methodological revolution? Or should it be taken as a sign of an evolutionary progress? To answer these questions, I draw inspiration from the studies of Duncan Kennedy and Janet Halley on the transformation of western legal thought and on the emergence of American family law.[50] Rather than a revolution or an evolution, this work advances a 'transformative thesis' and argues that the anomaly should be examined as part of a deeper and more complex process of transformation.[51] This study advances the thesis that the law governing cross-border relations constitutes an '*instrumentum regni*' whose nature and functions have been transformed by the reconfiguration of dominant modes of legal thought.[52]

1.3 Private International Law as *Instrumentum Regni*: The Transformative Thesis

Experts and historians of private international law generally agree that a widely-shared set of pre-existing legal convictions constitutes the *conditio sine qua non* for the development and application of common principles to cross-border relations and disputes. As Friedrich Juenger once noted, private international law has flourished in contexts "where law-making power [is] dispersed, and where legal unity is provided by persuasive reason and a shared legal tradition".[53] The 'shared legal tradition' which is considered in this study does not correspond to a conflicts method, a general theory or even

[49] Borg-Barthet, 'The Principled Imperative'
[50] See esp. Kennedy, 'The Rise and Fall'. D. Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000', in D. Trubek and A. Santos (eds.), The New Law and Economic Development. A Critical Appraisal, Cambridge (2006). And J. Halley, 'What is Family Law? A Genealogy. Part I', Yale Journal of Law & the Humanities, Vol. 23, (2013). J. Halley, 'What is Family Law? A Genealogy. Part II', Yale Journal of Law & the Humanities, Vol. 23 (2013)
[51] As noted by Horatia Muir Watt and Diego Fernandez, doctrinal developments in private international law match closely, if not emblematically, the linguistic analytical model of Kennedy. Muir Watt and Arroyo, 'Private International Law', p. 358
[52] See J.R. Paul, 'The Transformation of International Comity', 71 Law and Contemporary Problems (2008) pp. 19-38
[53] Juenger, 'General Course', p. 167

a body of common rules codified at international level, as it is generally conceived in the historiography. It corresponds instead to instances of dominant legal consciousness or modes of thought (see methodology, section 1.2) which can be detected across legal history and, specifically, in 'medieval legal thought', 'classical legal thought', 'social legal thought' and in the rise of a new mentality in the contemporary age.[54]

These modes of thought, and the corresponding intellectual and institutional age in which they prevailed, partly correspond with what Kennedy and Halley have identified as "overlapping periods of legal institutional and conceptual change in the West".[55] In each period, convergence around a set of hegemonic ideas has provided coherence and direction to the constitutive elements of the legal order.[56] The rise of a dominant consciousness, for instance, has led legal scholars to comparable assumptions about what market relations are and where to draw the boundary between the private and the public, the economic and the social. This has made it possible to develop common principles for governing market relations across jurisdictions and for promoting *laissez-faire* in international business relations. Far from being an abstract or inconsequential phenomenon, the emergence of a dominant consciousness becomes a strategic tool for the organisation and operationalisation of a certain legal-institutional arrangement.[57]

Accordingly, this genealogy (see Section 1.3 in methodology) investigates how inputs from the dominant legal thought have had common transformative effects on the boundaries and functions of the law governing cross-border relations and how, in turn, private international law has contributed to the construction and preservation of specific institutional-legal arrangements. As this genealogy unfolds, what is revealed is the transient, contingent and contestable character of private international law on the one hand, and the redefinition of rules, principles and ideas coherently with the rise and

[54] Which partly overlap with the periods identified by Kennedy: Classical Legal Thought dominating between 1850 and 1914; Socially Oriented Legal Thought between 1900 and 1968; and the current period, between 1945 and the early 2000s. See the beginning of each period in the genealogy for a discussion on dates.

[55] Kennedy, 'Three Globalizations', p. 19. These periods share two definitional characteristic: 1) that the reforms of the legal institutional and conceptual framework taking place in each age respond to an economic and social project designed and implemented by those with access to the legal, administrative and judicial processes, which also include legal scholars, 2) that these actors influence legal thought not only throughout the Western world but also beyond it; in Kennedy's words they consist of "processes of diffusion across the world of colonies and recently independent nation states." Id., pp. 19-20

[56] Admittedly, in his work Kennedy looks cursorily at the institutional and state dimensions of the transformation, even though he acknowledges that the triumph of Classical Legal Thought and Social Legal Thought also happened at institutional level. For Kennedy, however, it is too hard to pin down the institutional dimension of the change, and the success of CLT and SLT took as many forms as there were sovereigns. Kennedy, 'Three globalizations', p. 59. For the genealogical method applied to state formation and transformation, See Q. Skinner, 'A genealogy of the modern state', Proceedings of the British Academy 162:325 (2009)

[57] There are some similarities and overlap between the concept of 'historical' or 'historic block' in Gramsci. See Simon, Roger, and Stuart Hall. *Gramsci's political thought*. Lawrence & Wishart, 2002.

decline of dominant mentalities and institutional models on the other. Contrary to the dogma of autonomy, this work will show that the nature, character and functions of conflict of laws have shifted and continue to shift with the ascendancy of specific intellectual vocabularies and with changing institutional models. This study will also show that, contrary to what the myth of neutrality dictates, conflict rules have played a fundamental role in the definition and organisation of power across the centuries.

The thesis advanced in this study that private international law constitutes an *instrumentum regni*, that it is, in other words, an instrument of government. Private international law has conferred, organised and distributed legislative and jurisdictional authority. It has consolidated the jurisdictional and symbolic boundaries of sovereign power. It has also delimited it by allocating power to private actors. It has established, formally and operationally, territorial jurisdiction but also its limits in the transnational arena. Conflict of laws has also forged, and loosened, the bonds between individuals and civil and political communities. It has forced on individuals compelling pictures of sameness, of value, of belonging, but it has also enabled individuals to form new relations and affiliations in accordance with their preferences and interest. It has cemented territorial links and jurisdictional boundaries for certain types of 'public' or 'social' relations and it has removed them for 'private' or 'economic' relations.

The nature of *instrumentum regni* of private international law is especially visible with respect to the distinct rules and principles governing cross-border family relations and those governing private and economic relations that have a transnational dimension. Far from constituting a set of value-neutral and a-political techniques, principles and rules governing cross-border relations have played a fundamental role in consolidating nation-states and in constituting national societies. Far from merely ensuring international harmony and uniformity of decisions, private international law of the economy has played a fundamental role in implementing a specific economic vision. Accordingly, this study will show that private international law was and continues to be a vital technology for the definition and articulation of power. However, it will also show that power itself is undefined. It shifts in time and space. It is subject to constant redefinitions and transformations. As Joel Paul has argued:

> Private international law reflects and shapes the contours of public and private law in ways that demarcate the boundaries of state sovereignty and allocate power among public and private actors…. Private international law functions much like a constitution to empower and delimit authority, and, much like a constitution, the evolution of private

> international law is a story about the shifting historical context in which courts, the sovereign, and private actors play out their relations in market and personal transactions.[58]

Private international law has divided the national from the international, the public from the private, the ruler from the subject, the government from the governed. However, these divisions are not fixed in stone. They have shifted in accordance with the historical context. They have moved, and they have been shaped by changing assumption about what is private and what is public and where boundary between them lies. Put in this perspective, the ongoing paradigm shift in European conflict of laws does not correspond to a mere methodological revolution. It appears to be part of a profound and complex redefinition of dominant ideas that responds to the emergence of a new institutional-intellectual paradigm. The transformation of European conflict principles also indicates a radical redefinition of the way in which individuals who inhabit the transnational environment perceive themselves, their relationship with public institutions and their membership in civil and political communities. It suggests that conflict of laws has a fundamental role to play in the emergence of post-national states and societies.

1.4 Plan of the Thesis: The Transformation in Four Intellectual and Institutional Ages

This thesis traces a genealogy of European private international law across four broadly-defined intellectual and institutional ages - medieval, classical, social and contemporary - each characterised by the ascendancy of a specific consciousness, and a corresponding model of statehood, territorial, national, social and post-national state. For this reason, this study is divided into four parts. To make full sense of the history of the discipline, and of contemporary changes, each part takes into consideration developments which have occurred within but also outside the boundaries of private international law. This requires that the analysis is extended to contributions outside the field of private international law *sensu strictu*. To limit the scope of this endeavour, this work focuses on the transformation of the rules and principles governing household and market relations, taking marriage and contract as illustrations.[59]

[58] Paul, J. R. "The Transformation Of International Comity"

[59] Conflict of Laws is a vehicle for the relation between economic and legal activities studied by Kennedy, since it determines the application of law in space, and a vast part of economic activities occur transnationally. As Kennedy has argued, "Legal institutions and ideas have a dynamic, or dialectical, or constitutive relationship to economic activity." Kennedy, 'Three Globalizations', p. 19. I would argue that Legal institutions have a dialectical relationship with activities related to the economy but also to those occurring within the family. The family dimension, only marginally considered by Kennedy, was examined by Halley with reference to American family law.

The thesis put forward is that an investigation of the rules governing cross-border relations and disputes in these two areas can help us to make sense of past and current transformations of European private international law. The goal, consistent with a genealogical project, is to expose how, in contrast to the dogma of isolation, the convergence around a common set of ideas and assumptions regarding the conceptual boundaries and regulatory functions of conflict of laws in transnational family and economic relations has determined comparable processes of transformation across European (and non-European) jurisdictions. Each part of this study is divided into separate chapters that look at developments which have occurred in seemingly distinct cultural traditions and political environments and, specifically, in English common law and in civil law countries, especially Italian law.[60]

Other than foundational texts in jurisprudence, private and public international law, family law and market law, this thesis also looks at positive rules and judicial decisions, national and - especially in the last part examining the contemporary period – international. Each part examines the effects of the rise of popular conceptual vocabularies and widely-spread assumptions on the development of conflicts rules and principles in different jurisdictions and, at the same time, on conventional understandings of the character and functions of the conflict of laws. In other words, the study investigates doctrinal contributions and positive changes and situates them within the rise and decline of modes of thought and institutional paradigms. In contrast to the neutrality myth, this genealogy also tries to throw light on the links between conflict rules and the emergence of state models. This corresponds to an institutional project.

The genealogy will start with an examination of how the emergence of 'medieval legal thought' resulted in the redefinition of the Roman *jus gentium* into the precursor of conflict of laws.[61] Medieval legal thought did not consist of a set of positive rules and coherent axioms. It consisted of the fuzzy principles and plastic doctrines that medieval jurists artfully crafted on 'rediscovered' Roman law sources to fit the dynamic legal-institutional context in which they lived and operated. Medieval jurists popularised the idea that two separate branches existed, public and private law. They also relied on Roman sources to advance the division between real and personal matters in civil law. Jurists considered these divisions and the principles that governed them as universally-valid and -applicable across legal orders. They therefore used them to develop principles governing the territorial and extra-

[60] In the medieval age, Italian law and English law, strictu sensu, did not exist. What is examined is how a multiplicty of laws, often of non-state origin, governed household relations, within and across territorial borders.
[61] The following paragraphs give a mere overview of the thesis. See in Chapters extensive references.

territorial application of statutory laws across jurisdictions and countries, an approach that came to be known as unilateral or Statutist.

The idea of a grand scheme divided between types of laws and categories of rights was not absent in medieval law. However, part one of this genealogy will also show that the logic of the divisions and sub-divisions and the contents and principles advanced were not methodologically pure, conceptually clear or systematically arranged.[62] Medieval jurists were pragmatists, not conceptualists. Their pragmatism also emerges from the ambiguous and contingent nature of the division between personal and territorial statutes that they advanced. The distinctive feature of medieval consciousness also transpires from the fact that household and commercial matters were governed by comparable considerations and by the same overriding principles, most notably *consensus* and intent, within and across legal orders. Part One will demonstrate that the same concepts and principles can be found in what will become civil law jurisdictions and common law countries. They can also be found in canon sources.

The second part of the genealogy will examine the age of classical legal thought. In contrast to their predecessors, classical jurists regarded law as a body of coherently organised and systematically arranged legal precepts. By reconstructing Roman law divisions and by medieval concepts and ideas, classical legal scholars advanced rigorous taxonomies and drew distinct boundaries between disciplines.[63] In this process of re-organisation, classical legal scholars also developed a radical dichotomy between the law governing economic relations and the law governing domestic relations.[64] Unlike medieval jurists, classical jurists argued that these had separate contents, that they were underpinned by specific logics and that they had distinct purposes. Market law ought to enable individuals to realise their free will.[65] Free will shared significant conceptual and normative ground with intent and *consensus*.

In contrast, classical jurists associated family law with tradition, paternalism and, notably, status. Status became inextricably associated with marriage and the family when Sir Henry Maine used it to distinguish modern from primitive societies. Contrary to the Roman and medieval conception of status, which indicated a temporary condition and variable position of the person, Maine understood status as defining the immutable position and inherent condition of the person within traditional

[62] E. Pound, 'Introduction', in (E. Ehrlich), Fundamental Principles of Sociology Of Law, p. XXIX.
[63] Kennedy, 'Three Globalizations', p. 31
[64] The antithesis between the law of the market and the law of the family was a second defining feature of CLT. Ibid.
[65] Ibid. p. 26

societies. Maine contrasted status to contract and free will, family relations and economic relations. Contract regulated private and economic relationships between free-standing individuals. Status governed instead the relationship between parents and children, and between husband and wife. According to his famous aphorism, civilised societies evolved from 'status to contract' except for family relations.[66]

This idea constituted one of the core elements of law in the classical age. The radical dichotomy between contract and marriage, free will and status and between the law of the market and the law of the family provided arguments and rationales that informed the re-construction of national orders which began in the 18th century. Classical jurists advanced schemes and divisions that contributed to construct national systems. At the same time, they inherited from medieval jurists their universalism, which they transformed into internationalism. The idea of a supranational framework and of a theory of universal applicability was still there. Consequently, classical scholars held that the same principles and rules should govern cross-border matters in all jurisdictions. They therefore developed aprioristic rules to govern legal collisions as part of a general theory, which is referred to as multilateralism or the seat-selecting method.

Although the classical dogma was developed in this period, the genealogy reveals that classical multilateralism was neither autonomous nor neutral. The dichotomy between status and contract - between the market and the family - contributed to the re-organisation of internal legal orders as well as to the definition or rules and principles governing the application and operation of law in space. Classical jurists therefore popularised a *laissez-faire* doctrine in whatever matters they construed in legal consciousness as purely private and economic. *Per contra*, they developed policy-oriented and rules endowed with a mandatory and imperative rationale to what they labelled as social rather than legal matters, political rather than legal, and moral rather than private matters, with the family and marriage as archetypes of such relations.

The third part of this genealogical study will investigate the transformation of conflict of laws in the social age. From the end the 19th century, the legal scholarship embarked on a profound critique of the classical programme and its underlying assumptions. If classical jurists had criticised their predecessors for their lack of conceptual coherence and methodological rigor, social scholars blamed classical scholars for their abuse of deduction and conceptual coherence and for their delusive appetite for scientific objectivity. If classical jurists understood the legal regime as an internally-coherent and

[66] Maine, H. *Ancient Law*, Dorset Press, (1968, 1861) p. 141

logically-organised body of enacted rules, social jurists understood law as a means to social ends.[67] Classical scholars were accused of having disregarded legal reality for their formalist fetishes and abstract concerns. Scholarly, legislative and judicial efforts moved away from theoretical and conceptual concerns. The rise of social legal thought transformed market law and family law, substantive law and the conflict of laws.

The classical approach to legal collisions, overly focused on abstract matters and indifferent to its concrete results, underwent a profound crisis. Classical universalist premises were rejected. Cross-border questions were understood as domestic issues to be dealt with autonomously by sovereign states. Although some experts advocated a return to unilateralism, European systems stuck to multilateralism. Regardless of methodological choices, the paradigm shift generated comparable transformative processes. The new consciousness transformed the character and functions of private international law, but it did not undermine the idea that legal fields had discrete natures and purposes. Although party autonomy became the subject of greater regulatory attention, social jurists still conceived the market as driven by individual interest. Status was still associated with the family. However, it no longer symbolised backwardness but protection. Family law and private international law of the family embodied social law.

The fourth part of this study will examine the contemporary transformation against the emergence of a new dominant consciousness. The contemporary mentality is not dominated by one single integrating concept, as it was in the classical and social ages. Rather, it is split between a variety of considerations which can be traced back to the previous institutional-intellectual ages. Instead of an unambiguous methodological revolution or an evolutionary progression, current developments appear to respond to the uncomfortable co-existence of classical and social axioms. In this light, the anomaly may indicate the renaissance and re-adaption of the classical dichotomy between the family and the market, what Janet Halley and Kerry Rittich have called 'family law exceptionalism'.[68] The contemporary mentality has brought back to life classical ideas, including family law exceptionalism. However, the anomaly also suggests that classical assumptions have been turned on their heads.

[67] Rudolph von Jhering, *Law as a Means to an End*, (Translated from the German by Isaac Husik with an Editorial Preface by Joseph H. Drake and with Introductions by Henry Lamm and W.M. Geldart), Boston: The Boston Book Company, (1913); E.Ehrlich, *Fundamental Principles of the Sociology of Law*, Transaction Publishers, New Brunswick (1913, 2001). Further discussed in Chapter 7

[68] Halley, 'Family Law Part I', p. 3, referring to Janet Halley & Kerry Rittich, Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism, 58 Am. J. Comp. L. 753 (2010)

1.5 Conflict of Laws as *Instrumentum Regni* in European Legal history

This study will examine the transformation of the character, internal boundaries and functions of conflict of laws against the rise and decline of dominant modes of legal thought. At the same time, it will bring to light the links between the exercise of power and the law governing cross-border relations, between conflict principles and the emergence of specific institutional models across European legal history. The hypothesis advanced in this genealogy is that private international law and its predecessors have played the role of *instrumentum regni*, starting with the territorial form of medieval statehood. Contrary to what may be assumed under the classical narrative, medieval scholars did not develop conflict principles in a political vacuum. Consistent with their pragmatism, they drew on ancient Roman sources to advance rules governing cross-border disputes that would fit an institutional-legal reality which saw the acquisition of sovereign power over people and territories by city-states and monarchies.

Medieval jurists strategically embedded conflict of laws in the principles of personality and territoriality, the two basic elements of medieval sovereignty. Medieval private international law was *instrumentum regni*. But the medieval '*regnum*' was an incoherent and disaggregated whole. A vast and complex array of state and quasi-state entities, with varying degrees of legislative and adjudicative independence, cities and the Empire, but also the Church and canon law, guilds and private ordering were part of this whole. Individuals had to comply with the law of the community to which they belonged. Conflict rules facilitated this submission. However, the medieval *jus gentium* did not constitute a mere instrument for enforcing absolute power. It also placed limits on its exercise. Intent enabled individuals to voluntarily subject themselves to foreign authority, thus making their position vis-à-vis the *civitas* contingent and providing an illustration of the social contract theorised in the pre-modern period.

In the Middle Ages, a "link was forged between the exercise of sovereign powers by States in International law and the application of domestic or foreign law."[69] This instrumental role continued across successive ages and, each time, it adapted to new institutional models. Accordingly, in the classical age, private international law helped to re-draw the material and symbolic boundaries of state power, municipally and transnationally, and made space for the rise of the nation-state. Outside

[69] Lipstein, 'General Principles', p. 119. It is telling that he concludes however that "However, the link was more apparent than real, for while the doctrine justified the power of States to legislate with extra-territorial effect, subject only to the right of other States to enact statuta realia which stifled the effect of foreign law, it was unable to explain why one country must apply the extra-territorial legislation of any other country." This is not a correct view. The common law mandated the adoption of this rules, as well as political interest.

the marketplace, classical conflicts experts elaborated principles that helped to establish and enforce a permanent bond between individuals and the civil and political society to which they belonged. Personal laws governing family status played a strategic function in the consolidation of national societies. In contrast, regardless of individual membership in a specific community, private international law of the economy enabled individuals to make autonomous choices in the international market.

The political, social and economic changes taking place between the 19th and the 20th centuries undermined the classical model of national statehood. As the third part of this genealogy will show, social experts blamed 'the crisis of the modern state' on the abstract concerns and theoretical assumptions of their predecessors and, specifically, on their incapacity to prevent and control the proliferation of interest groups and non-state orders. With the decline of classical legal thought and of nation-states, 'social states' emerged as the paradigmatic institutional model. Social states submitted individuals to overriding policy concerns and private law to public law and the enhancement of social welfare. The re-configuration of conflict of laws towards public policy did not respond to a mere methodological shift, but also to the re-organisation of state power and its legal order in accordance with social logics.

Contrary to what is assumed under the influence of the dogma of neutrality, private international law may constitute a vital instrument for the definition and articulation of state power. In the contemporary age, it is not only the legal mentality which is changing but also the dominant form of statehood. This begs the question of how current changes in the discourse and in private international law, especially rules governing household relations, may help us to understand the ongoing redefinition of statehood. There is a strong correlation between the ways in which individuals engage in relationships of care and intimacy, the limits and possibilities provided by the law, and the institutional and socio-economic organisation of the society they inhabit. This was true in decades of limited cross-border exchanges and it must be true in a context where the international dimensions of the family are considerably enlarged.

Considering the features of the current institutional-intellectual period, and the family anomaly, the regulatory state, which many private lawyers regard as the institutional paradigm, may only partly reflect the ongoing institutional transformation.[70] The distinctive characteristics and constitutive objectives of state orders in the classical and social ages - maximising opportunities and choices,

[70] Majone, 'Regulatory state'

extending institutional control and regulatory power over society - re-emerge in the contemporary age. However, the anomaly suggests that such objectives and characteristics are exchanged. Private international law facilitates regulatory controls in the economy and, at the same time, it expands opportunities and choices in cross-border family matters, also implying a radical departure from the way individuals used to form and dissolve their civil and political membership in previous ages. The last part of this study will advance the argument that we may be currently witnessing the rise of a dual regulatory/market-state model.

Methodology

1.1 Comparative Methods and Private International Law

This thesis uses a mixed historical (genealogical) and comparative (non-functional) method. Comparative studies in the conflict of laws are not a novelty. Private international law and comparative law are 'intimately related' subjects because both disciplines address synergies and differences between distinct orders.[71] The application of comparative methods to private international law started when independent legal orders were formed, or when the scholarship assumed that there was sufficient separation to warrant a systematic comparison. Several schools developed from the earliest comparative works, each with its typical set of tools, questions and objectives.[72] Typically, comparativists have employed the 'functional method' to examine national conflict rules and principles. Functionalism in comparative law is nevertheless controversial because of its explicit reformative purposes, which often lead lawyers to advocate unification of laws in a given field.[73]

In those disciplines or matters which come across as political, like the family and family law, comparative lawyers have tried to steer away from the reformative agendas of functionalism and to adopt a critical comparative method. The purpose of critical, non-functional comparative law is to explain rather than solve, to inform rather than to reform. Conversely, those on the critical side of the comparative camp are criticised for their implicit defence of the status quo and for the protection of alleged uniqueness of 'legal cultures and traditions'. The tensions in this debate are clearly visible in the discussion concerning the quest for a uniform family code in Europe, which also provides an example of the ramifications of family law exceptionalism in the contemporary consciousness.[74]

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[71] Comparative methods in private international law date back to the progressive consolidation of national legal orders. See M. Reimann, 'Comparative Law and Private International Law', in M. Reinmann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford: Oxford University Press (2006)

[72] For a classic functional approach: Zweigert, Konrad & Hein Kötz. *Introduction to Comparative Law*, 3rd ed, translated by Tony Weir (New York: Clarendon Press, 1991

[73] Since at least the 1970s, the preferred methodology – but also the bête noire – of comparative law is the 'functional method'. The ultimate goal of the functional method in comparative law is to address specific social problems by singling out or developing 'best practices' on the basis of the similarities and differences which exist between legal systems in their response to such problems. Great methodological issues, however, inevitably follow when trying to discover the best among the various regimes. Ideological conflicts necessarily result from pushing a reform agenda inspired from this scholarly and scientific exercise. See R. Michaels, 'The Functional Method of Comparative Law', in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford: Oxford University Press (2006). Zweigert and Kotz are possibly the most well-known supporters of the functional method. See their ' *An Introduction to Comparative Law*'

[74] Discussed in Chapter 10

Participants in the debate generally take one of two opposite positions. Supporters of the code argue that there is already a high degree of convergence between the laws of member states and their underlying values, arguing that the "infamous diversity of family laws within Europe is mainly a difference in the level of modernity of the family laws in various countries across Europe."[75] Pursuant to the objective of eliminating obstacles to cross-border mobility created by such difference in levels of modernity, and adopting the same functionalist method that has been employed in projects aiming at the harmonisation of European private laws, advocates of the family unification project, among which the most prominent members belong to the Commission on European Family Law, have effectively produced parts of what they argue should become the future European family code.[76]

The uniform code project has been dismissed by those who argue that the convergence thesis is an "oversimplification".[77] Maria Marella has argued that "family law régimes in Europe are too multifaceted and incoherent within themselves to be simply defined as converging or not converging, nor progressive or conservative."[78] Reverting to family law exceptionalism, sceptics have also pointed out that uniformity is unwarranted due to the cultural embeddedness of family laws.[79] They have claimed that "family law is not a *Lex Mercatoria*. It is a body of law made up of flesh and blood. … [F]amily law is characterized by its diversity, deeply rooted in peoples' history, culture, mentalities

[75] M. Antokolskaia, 'The Harmonisation of Family Law: Old and New Dilemmas', *European Review of Private Law*, Vol. 11 (2003), p. 41. Variation in family laws, in her view, can be explained with reference to the inevitable process of modernisation which all member states are going through, though at different pace. Ibid. p. 40-41

[76] By comparing family laws of MS, extracting their shared common core and then selecting the 'better law' among them, CEFL has developed some recommendations on harmonised 'Principles of European Family Law Regarding Divorce and Maintenance between Former Spouses', 'Principles on Parental Responsibilities' and 'Principles on Property Relations between Spouses'. Available at: [http://ceflonline.net/principles/] last accessed: 27-09-2016

[77] D. Bradley, *'A family law for Europe? Sovereignty, political economy and legitimation'.*, *Global Jurist Frontiers*, Vol. 4, Issue 1 (2004), p. 16. As it has been warned by family scholars, laws may be converging superficially – giving the impression that it is possible to identify a common core – but at the same time they could be promoting contradictory policies – making it impossible to standardise criteria of evaluation. See D. Bradley, 'Regulation of Unmarried Cohabitation in West-European Jurisdictions—Determinants of Legal Policy', *International Journal of Law, Policy and the Family*, Vol. 14 (2001). Conversely, seemingly identical policies, of equality for instance, may be moulded into contradictory laws depending on whether these aim for substantial or for formal equality. For a discussion of differences in the approach to equality in Scandinavian countries, see M. R. Marella, 'The Non-Subversive Function of European Family Law: The Case of Harmonisation of Family Law', *European Law Journal*, Vol. 12, No. 1, 2006, pp 88-89. In addition, laws may overlap with respect to the conditions, a case in point could be that of no-fault divorce in favour of which a trend can be noticed among EU countries but may markedly diverge with regard to the legal consequences of divorce itself. Radical differences exist for instance in connection with financial support: in some countries pre-marital agreements are accepted, in some others not. See Marella (2006), pp. 90-91. With respect to enforcement, and for a critique of the selection by CEFL of the Scandinavian model of matrimonial property and post-divorce maintenance based on its supposed progressive nature, and its problematic enforcement in countries where there is no equality of access to the labour market, such as Greece, see Tsoukala, Philomila. "Marrying Family Law to the Nation." The American Journal of Comparative Law 58.4 (2010), pp. 907-908. For a general introduction to the topic of convergence of legal systems in Europe, see P. Legrand, 'European Legal Systems are not Converging', International and Comparative Law Quarterly, Vol. 45, No. 1, 1996

[78] Marella (2006) p. 85

[79] Tsoukala, 'Marring Family Law', p. 874

and values. … There is a need to be aware of this before imposing on peoples the uniformization of their laws in such a sensitive area."[80]

Family lawyers are sceptical of the notion of 'progressiveness' and 'modernity' employed by experts participating in the CEFL project.[81] At the same time, as Marella has also pointed out, the arguments put forward by opponents of the civil code fail to answer "what political philosophy, what cultural constraints would prevent European family legal régimes from converging?"[82] The result of the methodological polarisation is that most comparative lawyers refuse to engage with controversial subjects,[83] and especially with law governing household matters.[84] The starting point for this comparative and historical reconstruction is that disengagement is not the solution but part of the problem. At the same time, comparative law should neither exaggerate diversity nor demonstrate uniformity at all costs.[85] Conscious of the inherent limits of comparative law, this study has adopted a genealogical-comparative method.

Law, this genealogical reconstruction demonstrates, is a unique social institution that evades strictly-defined descriptive and analytical categories.[86] Instead of taking for granted that natural boundaries exist between subjects, we ought therefore to investigate where the 'cultural' and 'public' character or reputation of some disciplines, such as family law, and the 'neutrality' of others, such as the *Lex Mercatoria*, come from. Instead of accepting that permanent divisions exist between disciplines, we ought to examine when and how borders come to be and why they continue to change. To investigate the transformation of the law and discourse across European legal history in relation to the regulation of cross-border relations, this study therefore makes use of the notion of 'modes of legal thought' used by Kennedy and Halley in their respective studies on western legal history and American family law.

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[80] M. T. Moulders Klein, 'Towards European Civil Code on Family Law? Ends and Means', in K. Boele-Woelki (ed.) *Perspectives on the Unification and Harmonisation of Family Law in Europe*, Antwerp: Intersentia (2003), pp. 109-110

[81] For instance, Masha Antokolskaia declares candidly that "The *Principles* of European family law should be progressive and absorb the most modern solution achieved in various European countries … I would be inclined to accept the challenges of the "better law" method and to draft non-binding *Principles* upon the highest standard of modernity". It is not at all clear what she means by 'modernity'. M. Antokolskaia, 'The Better Law Approach and the Harmonisation of Family Law', in K. Boele-Woelki (ed.) *Perspectives on the Unification and Harmonisation of Family Law in Europe*, Antwerp: Intersentia (2003), pp. 181-182

[82] Marella, 'The Non-Subversive', p. 89

[83] See O Kahn-Freund, On Uses and Misuses of Comparative Law, *Modern Law Review* (1974)

[84] See Fernanda Nicola, Family Law Exceptionalism in Comparative Law, 58 *Am. J. Comp. L.* 777 (2010). M. Siems, *Comparative Law*, Cambridge University Press (2014), p. 28. Antokolskaia makes this very point in the European context in M. Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective*, Interesentia (2006), p. 5

[85] A. Peters and H. Schwenke, 'Comparative Law Beyond Post-Modernism', *International and Comparative Law Quarterly*, Vol. 49, N. 4, (2000)

[86] Critical legal scholars study law as a social institution inextricably intertwined with 'culture', 'morality', 'society' and 'politics'. To them, law itself is a manifestation of culture, a social phenomenon. Siems, 'Comparative Law', pp. 97-118

1.2 Modes of Legal Thought and Private International Law

Modes of thought do not correspond to a philosophy or to a political agenda. They do not constitute an active conviction or a belief system. Rather convergence around a mode of legal thought reduces seemingly-irreconcilable convictions to a self-evident truth, to a common consciousness.[87] Within a single consciousness, it is possible to develop different and even conflicting ideological projects. Monologism in law thus corresponds to what in semiotics is described as "the reduction of multiple voices and consciousnesses within a text or a single version of truth imposed by the author. The truths of other ideologies are never treated equally alongside the author's but are reduced to a common denominator."[88] In a similar manner, jurists are prone to internalise popular assumptions and even to combine their ideas with those who do not share the same philosophical or political outlook.

A mode of legal thought, like a multiform consciousness, can consequently spread beyond the confines of specific jurisdictions. Like colonial expansion, it may dominate the consciousness of professionals whose agendas are driven by different partisan goals.[89] Modes of legal thought, however, are not permanent.[90] Traces of a common mentality can be found in different periods of legal history and in jurisdictions and traditions that, historically and culturally, appear to share no ground. Legal mentalities, like language itself, undergo constant transformation. Past certain 'intellectual thresholds', after the mentality and discourse loses touch with the changing intellectual and institutional reality, jurists start disputing inherited assumptions.[91] Gradually, the scholarship converges around a new consciousness. The new mentality displaces previous convictions, doctrinal vocabularies and schemes of reasoning.

[87] Kennedy understands 'consciousness' "as a vocabulary, of concepts and typical arguments, as a *langue*, or language". At the same time, he advances the notion of *parole* to refer "to the specific, positively enacted rules of the various countries to which the *langue* [is] globalized [into] speech." 'Three Globalizations', p. 23. Hence, there can be an infinity of positive instances, *paroles*, taking the form of statutes or juristic writing, that can translate the same langue. See also, D. Kennedy, A Semiotics of Critique, 22 *Cardozo L. Rev*. 1147, 1175 (2001)

[88] Hence, they do not correspond to an ideology, which has been instead described as "a prescriptive doctrine that is not supported by rational argument.", D.D. Raphael, 'Problems of Political Philosophy', Cambridge (1970)

[89] The colonial image is taken from Kennedy, 'Three Globalization', p. 23. As in colonial contexts, it is easier to fall in the trap of assuming that what is imported is the same institution and idea where it originated. Emphasising deeper and broader processes of convergence does not mean neglecting the diversity and complexity of approaches in different jurisdictional and institutional environments, and the particular adoption or internalisation of foreign ideas.

[90] For a critical take on global history, see Duve, Thomas. "European Legal History-Global Perspectives Working Paper for the Colloquium, European Normativity-Global Historical Perspectives'(Max-Planck-Institute for European Legal History, September, 2nd-4th, 2013)

[91] In the Archeology of Knowledge, *L'archéologie du savoir* (Paris: Gallimard, 1969), Foucault repeatedly remarked that 'thresholds' constitute an essential element of his method. For Foucault, a threshold is a point in which a discoursive formation is transformed. In general terms, a threshold corresponds to the emergence and decline of a given discourse. However, threshold do not necessarily correspond to a specific chronology and to a give time.

The processes of diffusion and transformation of mode of thoughts which are examined and told in legal genealogies are neither abstract nor inconsequential phenomena. Displacement of a mode of thought and convergence around a new set of hegemonic ideas provide new directions to the legal-institutional order. A widely adopted monologos can transform law into an 'instrument of apology' or, conversely, into an emancipatory tool.[92] At given intellectual-institutional junctures, modes of thought can be a means of oppression, but also a language of critique and emancipation. Kennedy has thus appropriately defined modes of thought as "politics, by other means".[93] Contrary to what the classical dogma posits, I would argue that private international law constitutes a typical - and perhaps even naturally predisposed - vehicle for the critique, restatement and migration of modes of legal thought.

1.3 The Genealogical Method and Legal History

Trying to move past the recurrent flaws in comparative studies, and to move away from the dogmatic contraposition between traditional and modern law, cultural and neutral norms, family and market law, public and private law, national and international law, this study reconstructs a history of European conflict of laws by integrating the tools of comparative law with a critical historical method grounded in the idea of transformation, rather than in revolution or evolution. There are many synergies between comparative and historical studies, even genealogical ones.[94] This study explores the development of private international law using a narrative and a method which is genealogical in the sense that it traces the different inputs coming from outside what are generally regarded as the natural confines of the discipline in a way analogous to a family tree which has outside elements grafted in each generation. In both cases, the discipline/tree is profoundly transformed, albeit in unpredictable ways.

[92] Discussed by Duncan Kennedy, 'The Structure Of Blackstone's Commentaries', *Buffalo Law Review*, Vol. 28 (1979), p. 210

[93] Duncan Kennedy, "Even in Clausewitz's famous forumulation, war is politics *by other means*, not "just" politics. In Carl Schmitt's flip of Clausewitz, politics is war by other means, but not reducible to war. War as "means" can be an end, or a means to other ends than politics. If law is politics, it is so, again, by other means and there is much to be said, nonreductively, about those means. By analogy with Schmitt, it seems to me also true that politics is law by other means, in the sense that politics flows as much from the unmeetable demand for ethical rationality in the world as from the economic interests or pure power lust with which it is so often discursively associated." Kennedy, 'Three Globalizations', p. 73

[94] Laurence Friedman declared that "the historian is after all a comparatist by nature; her units of comparison are not two or more societies in the present but the "same" society at various points in the past. […] The comparatist wants to measure and explain similarities and differences; the historian wants to measure and to explain continuities and change; the two themes are reducible to each other." L. Friedman, Some Thoughts on Comparative Legal Culture, *American Journal of Comparative Law* (1990), p. 55

The genealogical approach to conflict of laws promises to deliver an informed analysis of processes of regional if not global change. And yet, there are few studies investigating the intellectual history of the discipline.[95] The content of histories of private international law, like histories of public international law, depend on what legal scholars and historians regard as the consolidated chronological and disciplinary limits of the subject under their investigation.[96] As explained above, due to the pervasive influence of the myth of isolation, a typical conflicts history only considers 'internal' theories and places them in epochs which are treated as watertight compartments. Historians generally recognise that methods and doctrines have changed dramatically. However, traditional histories of conflict of laws consider methodological developments occurring within the narrowly constructed boundaries of the discipline. Typical histories thus fall short of a comprehensive analysis of the transformative power that dominant legal ideas have on the development of conflict rules and doctrines.

For the same reason, an orthodox conflicts history also fails to investigate the profound changes generated by ideas and principles developed within the context of this discipline on general jurisprudence. Possibly due to first-hand experience of phenomena which are more readily visible in a transnational setting, possibly because conflict of laws is a discipline that naturally invites critical reflection on jurisprudential matters, jurists who have contributed most to the development of conflict principles have also exerted an extraordinary influence over the definition of modes of thought.[97] What becomes visible with a genealogical reconstruction is also that private international lawyers have contributed on many occasions to the development of the dominant consciousness and, in turn, that conflict of laws is especially exposed to the transformation of dominant legal ideas and to changes in the institutional setting.

[95] Nikitas Hatzimihail has examined the intellectual history of conflict of laws in his *Pre-Classical Conflict of Laws*, Cambridge University Press, 2019 [forthcoming]. Here, Hatzimihail has provided a critical account of the doctrinal and epistemological foundations of the discipline. His project largely overlaps with that of the author. Hatzimihail's work is focused on pre-classical conflict of laws. One could see his contribution as a milestone in the reconstruction of a critical history of the discipline to which the author of this study wishes to participate.

[96] "What we study as history of international law depends on what we think 'international law' is in the first place; it is only once there is no longer any single hegemonic answer to the latter question, that the histories of international law, too, can be expected to depart from their well-worn paths, and open our eyes to experiences of rule that have hitherto remained in the darkness." M. Koskenniemi, 'A History of International Law Histories', B. Fassbender and A. Peters (eds.), The Oxford Handbook of the History of International Law, (2012) p. 970. See also M. Craven, M. Fitzmaurice and M. Vogiatzi (eds) Time, History and International Law (Nijhoff, Leiden, 2007), pp. 1-25 and Hueck, The Discipline of the History of International Law (2001), 3 Journal of the History of International Law (2001) 3 Journal of the History of International Law, pp. 194-217

[97] K. Lipstein, 'The General Principles of Private International Law', 135 Collected Courses 97 (1972-1), p. 106

Rules and principles that regulate social activities are inevitably influenced by the dominant intellectual and cultural frameworks, and thus vary across space and time.[98] Far from being propelled by internal dynamics, these conceptual and intellectual frameworks contribute to redefine legal borders and to re-articulate the functions of law, including the law governing cross-border relations.[99] Legal genealogies aim to unveil the processes whereby the same set of ideas are widely-adopted in seemingly isolated localities and disciplines. As remarked above, private international law flourishes in contexts where a degree of unity is provided not so much by a set of common rules but by a shared legal tradition. Hence, the desire to rid ourselves of the myth of isolation and to shed light on the driver of transformations of private international law makes the genealogical method a very suitable one.

I would argue that, perhaps due to its comparative and international dimensions and due to its technical character, private international law is naturally exposed to ideas that spread outside jurisdictional borders and outside its disciplinary confines. Few other disciplines in the legal landscape are as protected from critical scrutiny and, at the same time, as susceptible to 'political' interests lying outside what is perceived as 'law'. Marred with technicalities, in its purest form, the subject of this inquiry is an esoteric realm of legal mysteries to which only few have access, and whose course of development has been especially influenced by a few scholars. As Kurt Lipstein declared a few decades ago:

> Because it is a technique, Private International Law, more than any other branch of the law, has been particularly susceptible to influence from abroad. Italy in the 12th, 13th and 14th centuries, France in the 14th, 15th and 16th centuries, the Netherlands in the 17th century, the United States in the first half of the 19th and the second half of the 20th century, France, Italy, Germany and England in the second half of the 19th century, have each contributed to the common technique, and it is impossible to ignore the literature and practice of foreign countries. For the same reason, the influence of writers has been more marked in this sphere of law than in any other; indeed it would be possible to identify the various stages in the development of Private International Law with the

[98] Legal history should aim at unravelling intricacies and entanglements between ideas and concepts, rather than 'solving' them. Duve, T. (ed.) *Entanglements in legal history: conceptual approaches*. Epubli (2014)

[99] The transformation of modes of thought is also the result of the work of jurists. As explained by Kennedy, "In struggles over the regime, the institutional and conceptual possibilities of law are at stake, the repertoire of possible policies, as well as large numbers of particular rules that make up contested wholes like laissez-faire or socially oriented law. In these struggles, actors with privileged access to the legal apparatus … have a professionally legitimated role to play …. They change what the public understand about law and its appropriate role as they argue about how to channel or direct economic and social change…." 'Three Globalizations', p. 20

> names of one or a small number of persons and to trace its growth by describing the writings of various authors.[100]

Genealogists do not reconstruct history as a series of events. They see legal history as a dialectic conversation between experts who lived in different ages, in the same way that Lipstein depicted the history of the discipline. At the same time, legal genealogists claim that legal orders and disciplines never evolve according to purely internal factors.[101] They place importance on the migration of legal ideas across disciplines. In some respects, this study tries to do what Lipstein envisaged, but never carried out. In other respects, it looks at 'technical' developments in the law governing cross-border relations but also investigates the transformation of institutional paradigms and dominant ideas outside the narrow boundaries of the discipline. This is necessary, it is argued, to make sense of a history that would otherwise read as a coherent evolutionary progress or as an irrational series of revolutionary changes.[102]

The question arises, of course, of where to look for evidence of the decline and rise of legal consciousnesses. Here, semiotics and linguistics more in general are of great help. Modes of legal thought constitute what in linguistics is known as a monologos: a language consisting of standard organisational schemes, deeply-held ways of reasoning and characteristic arguments.[103] In this genealogical reconstruction, I examine the formation and decline of legal consciousness through legislative and judicial texts, and through the language of jurists and experts. The experts considered do not necessarily come from the two jurisdictions which are more closely examined, England and Italy. They are also not necessarily or not exclusively conflict specialists. But their influence on the redefinition of legal concepts and ideas is examined through the transformation of private international law and its discourse.

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[100] Lipstein, 'Collected Courses', 1972, p. 106: "A different course will be attempted here. The nature and function of Private International Law will be established by analysing the process whereby these rules were obtained over the course of centuries."

[101] A particularistic view that is often ideologically embraced by 'post-modern comparatists' which also has the side-effect of relativizing differences (and devaluing much of their work) and particularly in Private International Law. Similarly, Kennedy, 'Three Globalizations' (2006), p. 25

[102] The triumph of Classical Legal Thought and Social Legal Thought, Kennedy has emphasised, happened at institutional level, although it took as many forms as there were sovereigns. Kennedy, 'Three globalizations', p. 59

[103] 'Monologism', by Phyllis Margaret Paryas, in Encyclopedia of Contemporary Literary Theory: Approaches, Scholars, Terms, Di Irene Rima Makaryk, p. 596. It is for this reason that binary oppositions are among the preferred argumentative tools for the imposition of a monologos, because between the two components of the dyad lies a dividing line which is absolute and incontestable.

The importance of language in conflict of laws is well illustrated by how its technical vocabulary has changed over the centuries in accordance with linguistic formulas and devices.[104] Hence, the use of Latin formulae such as the *lex loci* and the *lex domicilii* is a legacy of the ascendancy of Roman law in medieval legal thought. The widespread use of the concept of personal and family status is also a Roman legacy. When it comes to language, however, genealogists warn that ideas do not retain their logic and that their meaning does not remain the same.[105] As in the case of the ongoing redefinition of status in EU law, the same idea can undergo spectacular and surprising changes in meaning and normative value.[106] The content of juridical ideas and of legal principles is neither self-evident nor stable. It is constructed, deconstructed and re-constructed depending on dominant assumptions and paradigms.[107]

Many of the linguistic devices, technical rules and juridical ideas that we find in the conflicts field, status, but also domicile, universal etc… are polysemic. By "polysemic", I refer to their indeterminate normative value which, at certain times, becomes a unified analytical construct.[108] I believe that it is due to their polysemic content that the same rules, principles and ideas appear to come back again and again in conflicts history and yet, in each intellectual and institutional age, their deeper meaning appears profoundly altered. Concepts, rules and ideas that routinely re-emerge in this history do not maintain the same scope and the same normative value. This is what has occurred in the case of the decline, renaissance and redefinition of the conceptual and normative content of 'status' in each

[104] Latin was the scholarly medium of Medieval scholars, but the same Latin formulae and Roman law principles are used until this day even in jurisdictions which are generally considered to have little to do with Roman law. In more recent times, as the shift towards Italian and German in the Classical and then French and English vocabularies in the post-Classical age demonstrates. German and Italian formulae and corresponding principles (such as 'Gesetzesharmonie', 'Angleichung', or 'Rückverweisung' and 'Weiterverweisung') and and French formulae and principles (such as 'renvoi', 'qualification', and 'ordre public)'and then Anglo-American terminology have entered into the international vocabulary of conflicts in the 19th and 20th century respectively, thus demonstrating the importance of semantics and of semiology for reconstructing a history of private international law.

[105] Foucault argued that "[we cannot assume] that words [keep] their meaning, that desires still point […] in a single direction, and that ideas retain […] their logic." Foucault, M., 'Nietzsche, Genealogy, History', in Rabinow, P. (ed.), The Foucault Reader, New York: Pantheon Books (1984), p. 76

[106] For an early reconstruction of the language of Conflict of Laws in the English common law, see R. H. Graveson, The Special Character of English Private International Law, in R. H. Graveson, Comparative Conflict of Laws, Selected Essays, Volume I, 1977, pp. 1- 13

[107] For Koskenniemi, "A conceptual history would rather take the legal vocabularies and institutions as open-ended platforms on which constrasting meanings are projected at different periods, each complete in themselves, each devised so as to react to some problem in the surrounding world. Its interest lies in meaning formation ('how does a particular concept receive this meaning') rather than the contents of any stable meaning per se." p. 969, Koskenniemi, 'History'

[108] Neither contract is only contract nor status is only status. In Weberian terms, these are 'ideal-types'. Max Weber, The Methodology Of The Social Sciences 90 (Edward A. Shils & Henry A. Finch eds. & trans., Free Press 1997) (1949) ("An ideal type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those onesidedly emphasized viewpoints into a unified analytical construct . . . ."). As such, both contract and status fail to take account of what lies in between the spectrum. In this thesis, I consider the possibility of ridding ourselves of them.

intellectual and institutional age, and what this study tries to show with respect to other ambiguous principles and concepts in conflict of laws.

This genealogy of private international law aims to show that this 'technical' legal field is replete with concepts whose outer shell remains the same but whose deeper meaning constantly changes.[109] This is true with respect to family matters, but also with respect to principles governing economic matters. To track down such changes, we need to trace the transformation of the deeper meaning by using some references in the language used by legal scholars. In this genealogy, I emphasise the importance of 'binary oppositions' in the history of western legal thought and their influence on the development of conflict of laws.[110] Conceptual opposites, like those between public and private international law, private and public law, the law of the market and the law of the family, constitute one of the main semantic vehicles deployed to clarify and define the boundaries, nature and functions of given branches that are part of a legal order, including those of the law governing the application of law in space.[111]

Binary oppositions, however, are not fixed in stone, but are contingent on the resilience, or contestation and decadence of modes of thought.[112] The rise and decline of legal consciousnesses,

[109]Superficially, the outer shell, the 'sign' of many crucial concepts and ideas underlying conflict of laws, such as those of international and national, public and private or market and family, does not change. However, the signified, their deeper meaning does not remain the same across intellectual ages but varies with the prevalent monologos. It seems appropriate to classify the family, but also legal ideas, legal institutes and law as such as 'shell institutions'. Building also on the theories of sociologist Anthony Giddens, the family and law are 'shell-institutions' which do not contain a 'common core' or an essential and incorruptible element which provides for continuity throughout history. Giddens, *The Transformation of the Family*, 1999: "The outer shell remains, but inside they have changed. They are institutions that have become inadequate to the tasks they are called upon to perform.", p. 19

[110] This genealogy draws from the insights of structuralism and post-structuralism in the study of language. According to Saussurean structuralist theory, binary oppositions are an inherent feature of Western linguistic systems. In linguistic systems, words and signs are different from concepts and meaning, as the former is seemingly invariable whilst the latter acquire meaning and attributes by being associated with their opposites (Life/Death, Inside/Outside, Presence/Absence, Man/Woman). For de Saussure, binary oppositions constituted the "means by which the units of language have value or meaning; each unit is defined against what it is not". Saussure, Ferdinand De. "Course in General Linguistics." Ed. Charles Bally and Albert Sechehaye. Trans. Wade Baskin. McGraw-Hill Book, 1966, p. 115

[111] It is significant that Private International Law and Family Law embody many of the crucial binary divisions for the development of western legal thought. Family Law separates the economic from the social, the moral from the political. Private International Law divides the local from the global, the public from the private, the real from the personal, etc....As suggested by Duncan Kennedy, they are, in a sense, 'the same'. As he has argued, "it is hard to define any one of [the components of binary oppositions] without reference to all, or at least many of the others, and that if one understands the common usage of one of them, one understands, pretty much ipso facto (what a fudge!), all the others." D. Kennedy, The Stages Of The Decline of The Public/Private Distinction, *University Of Pennsylvania Law Review*, 1982, p. 1349. See for the question of unresolved political conflict and the "nested" stages of doctrinal elaboration, Duncan Kennedy, A Semiotics of Legal Argument, 42 *Syr. L. Rev. 75* (1991), reprinted in 3 Collected Courses Of The Academy Of European Law, Book 2, Kluwer Academic Publishers, 1994, 357-60

[112] For structuralists like de Saussure, Claude Levi-Strauss and Roland Barthes, elements of binary oppositions do not necessarily carry 'positive' or 'negative' attributes. For structuralists, the deeper meaning of signs never changes. As this work examines the transformation of the normative value of concepts across time and space, structuralism becomes a deficient analytical framework. Along de Saussure, Jacques Derrida also accepted that the meaning of words and concepts in Western linguistic systems is typically structured around binary oppositions. However, Derrida also argued that those

and the consequential redefinition of the boundaries of binary oppositions, this genealogy will show, have contributed to rewrite the nature and functions of legal disciplines, of conflict of laws in general and of private international law of the economy and of the family. Seen from this viewpoint, the history of conflict of laws, like the history of law itself, consists of highly contingent and unpredictable paradigm shifts influenced by polysemic words and binary distinctions, like territoriality and personality, state and society, the individual and the group, contract and status, family and market.[113]

1.4 *Quo Vadis,* Conflict of Laws? Legal Evolutions and Unpredictable Transformations

The constant tensions and the indeterminate character of the boundaries and functions of private international law which this genealogy reveals contribute to make sense of past and current transformations and, at the same time, to escape the evolutionary fallacy. Genealogies invite historians to take a position on contemporary changes, but also to escape the fallacy of understanding history as a coherent series of events in a linear development. They stress that such developments do not necessarily point in one single direction.[114] As modes of thought are always subject to contestation, as discourse is always being transformed and *in fieri*, so is legal history unpredictable and contingent. The history of social institutions, including the history of private international law, is a flux exposed to changes of cultural paradigms and changing institutional models, which make history itself incoherent and unpredictable.[115]

binary oppositions are embedded in 'violent' hierarchies of value. For Derrida, by being associated with their opposites, concepts not only acquire meaning but also acquire positives or negative attributes. Man is – or, better, was – associated to logic and to strength, woman to passion and fragility. These attributes correspond to hierarchies of values which are embedded in social consciousness. In Western legal systems, we also find many examples of binary oppositions, each acquiring negative and opposite attributes. Thus, the market and the family become associated to autonomy and dependence, opportunity and vulnerability, self-interest and altruism. For Derrida binary oppositions are not only embedded in 'violent' hierarchies of value, but that these hierarchies of value also undergo a process of constant transformations. Derrida thus maintained that binary oppositions are not fixed in stone, but are arbitrary and unstable. Jacques Derrida, *Positions*, Boston University Press 1981, 41-43

[113] Kennedy, 'Stages of Decline', p. 1349: "The history of Western legal thought since the turn of the century is the history of the decline of a particular set of distinctions-those that, taken together, constitute the liberal way of thinking about the social world.1 Those distinctions are state/society, public/ private, individual/group, right/power, property/sovereignty, contract/tort, law/policy, legislature/judiciary, objective/subjective, reason/fiat, freedom/coercion, and maybe some more I'm not thinking of."

[114] "[I]t is ... wrong to follow the tendency in describing ... history ... in terms of a linear development - reducing its entire history and genesis to an exclusive concern for utility." Foucault, M., 'Nietzsche, Genealogy, History', in Rabinow, P. (ed.), The Foucault Reader, Pantheon Books (1984), p. 76

[115] Margolis, Joseph. *The Flux of History and the Flux of Science.* Berkeley: University of California Press, 1993

On the one hand, the popularity of genealogical studies appears to be part of a larger trend of '*longue durée*' studies.[116] The importance of long-term historical reconstructions of private international law was celebrated decades ago when it was argued that historical developments in the discipline constitute a "compass" which can help to understand past changes and to identify future trends in law and in discourse, even beyond the narrow confines of the discipline.[117] This study accords with the idea that historical reconstructions of private international law can further our understanding of contemporary developments. However, contrary to what *longue durée* studies suggest, it also emphasises that we should not understand ongoing changes either as a revolutionary cycle or as part of an irresistible evolution. This is a fundamental value of genealogy vis-à-vis other methods in legal history.

The myth of the inevitability of progress or of modernisation in private international law has a long history, and it continues to influence the way experts understand developments in the discipline.[118] We cannot assume, as prominent European experts still do, that the historical development of conflict of laws is being driven by an unequivocal and unambiguous process of modernisation, or that private international law is today heading towards a liberal and modern future.[119] These concepts are as empty as it would be to claim that we currently witnessing a return to status without carrying out an examination of the conceptual and normative meaning of status in contemporary society and legal thought. This genealogy will reveal the transient and contestable character of the underlying principles, character and functions of conflict of laws, and therefore its contingent history and its incoherent present.

In European legal history, private international law has left its niche in periods of institutional crisis and jurisprudential uncertainty. I believe that we are currently witnessing such a period. The contemporary legal consciousness is open to criticism and contestation.[120] Hence, the contemporary

[116] See especially Guldi, Jo, and David Armitage. *The history manifesto*. Cambridge University Press, 2014. For further references, see also David Armitage, What's the Big Idea? Intellectual History and the Longue Durée, 38 Hist. Eur. Ideas 493 (2012)

[117] For Gutzwiller, «L'histoire du Droit international privé constitue, pour ceux qui la connaissent ''la boussole'' qui indique l'orientation des idee et leur degre d'importance. Son aiguille montre en meme temps les tendances du developpement futur. M. Gutzwiller, 'Le développement historique du droit international privé', Recueil des Cours, Académie de Droit International de La Haye, (1929), p. 292

[118] Hessel Yntema argued along the same lines in a different age, against seeing the formal principle applying the local law and local considerations as the inevitable future of the discipline. H. Yntema 'The Historic Bases of Private International Law', *American Journal of Comparative* Law (1953)

[119] Basedow, 'The Law of Open Societies'

[120] It has been noted in the literature that the features identified by Kennedy with respect to this third dominant legal thought lack coherence and comes across as vaguely-defined compared to the previous two globalisation. C. P. Wells, 'Thoughts on Duncan Kennedy 's Third Globalization', *Boston College Law School Digital Commons, Boston College Law School Faculty Papers* (2012). The ambiguities undermining Kennedy's analysis, it has been argued, originate in the

paradigm shift in the conflict of laws is still unfolding. This suggests that we are not heading, as sometimes argued by prominent experts, towards a clear destination and to an unambiguous 'liberal' future.[121] For this reason, before embarking on an examination of the tensions between the supposed neutrality of conflict principles and their instrumentalisation in the economic sphere that has followed the communitarisation of private international law, Veerle Van Den Eeckhout has asked the crucial question: 'Quo vadis?'[122] This genealogy aims to provide an answer to this question but, given contemporary cultural and institutional uncertainties, it will necessarily be a tentative one.

paradoxical position of Kennedy's critique, in that that in his project Kennedy is "formulating an internal interpretation of a contemporary legal culture in which he, himself, plays no small role."

[121] Admittedly, the problem with Kennedy's examination of the current dominant mode of legal thought has to do, in general with the fact that legal consciousness is not yet mature, and, specifically, with the difficulty in reducing complexity by identifying one "discernible large integrating concept" that "mediat[es] between normative projects and subsystems of positive law". Kennedy, 'Three Globalizations', p. 63

[122] Van Den Eeckhout, 'The Instrumentalisation of Private International Law - Quo Vadis? Rethinking the "Neutrality" of Private International Law in an Era of Globalisation and Europeanisation of Private International Law' in J. S. Bergé, S. Francq and M. Gardenes Santiago (eds.), *Boundaries of European Private International Law*, Bruxelles, Bruylant (2015)

Part I

The Age of Medieval Legal Thought

Chapter 1

From the Roman *Jus Gentium* to the Medieval *Lex Cunctos Populos*

The first part of this study examines the development of conflict doctrines, methods and rules in the period between the 12th century and the end of the 18th century. The same period saw the decline of the Holy Roman Empire and the fragmentation of the common law in local statutory laws. It also witnessed the emergence of standard organisational schemes, deeply-held ways of reasoning and characteristic arguments which make what I refer to as 'medieval legal thought' or 'pre-classical legal thought'. Although medieval legal thought did not correspond to a set of coherent axioms, it is possible to detect among scholarly writings from the period preceding the classical age the convergence around a common set of assumptions and ideas. Across what can be very broadly defined as the medieval, or pre-classical age, elements in the positive law and in the discourse suggest the development and widespread adoption of common arguments and ideas that carried implications for all legal orders, local and overarching, formal and informal, civil and spiritual.

The origin of many essential components of medieval legal thought can be traced back to Roman law, including the division between branches of the legal order. In the 19th century, classical jurists drew on these divisions to re-organise national legal systems and to theorise the separate existence of family law. However, this chapter will show that Roman law to medieval jurists was not a legal system made of a set of clearly defined and enforceable rules. It consisted of a way of thinking and a common conceptual vocabulary.[1] Medieval legal thought is here understood as the fuzzy principles and plastic doctrines that pre-classical jurists artfully crafted on 'rediscovered' Roman sources to fit the dynamic

[1] I use for guide and as main reference Stein, Peter. *Roman law in European history*. Cambridge University Press, 1999 and Johnston, David. *Roman law in context*. Cambridge University Press, 1999 (2004). For Roman Law in antiquity, Stein, 'Roman Law', Chapter 2, 3-32. Numerous other references are provided in subsequent footnotes. Roman law was never understood simply as a body of coherently and systematically arranged precepts, neither by Roman jurists nor by subsequent scholars. Roman jurists used the term *Lex* to refer to the legal precepts imposed by the legislative authority ("A lex is a general command of the people or of the plebs upon question by the magistrate." Aulus Gellius, Attic Nights, 10.20.2 citing Ateius Capito). However, it is the *Jus*, the aggregate of the precepts recognised the political authority, that they especially identified with law. *Lex* was understood as a single statutory provision, as a "a consciously made law", that could be amended or discarded (Pound, Roscoe. *Jurisprudence*. Vol. 2. The Lawbook Exchange, Ltd., 2000, p. 25). In contrast, the notion of jus was understood as a synonym with 'right' and was preserved accordingly ("When about to study law we ought first to know whence comes the word law (jus). Moreover, it is called law (jus) from justice (justitia), for, as Celsus well defines it, law (jus) is the art of what is right and equitable." Ulpian, Dig. 1.1.1.1) The Roman jura incorporated the variety of provisions enacted by the competent authorities. ("…the laws (jura) of the Roman people consist of statutes (leges), enactments of the plebeians (plebiscite), resolves of the Senate (senatus consulta), enactments of the emperor, edicts of those who have authority to issue them and the answers of those learned in the law." Gaius, Inst. 1.2

legal-institutional context in which they lived. To show how the rise and spread of medieval legal thought borrowed and reconstructed Roman principles, this chapter begins with a brief examination of how Roman jurists regulated marriage and how Roman law conceived and governed household relations (sections 1.1-1.2). Then, it analyses the origins and functions of the *jus gentium*, the precursor of 'modern' private international law (s. 1.4).[2]

This chapter will show that medieval jurists pragmatically reconstructed Roman principles and sources to deal with the unprecedented challenges raised by their institutional and legal environment which saw the rise of territorial powers and the multiplication of statutory laws (ss. 2.1-2.3). Although the very concept of private international law was still a long way in the future, and Roman law did not offer ready-made solutions, the earliest scholars who advanced rules and principles to solve collisions between statutory laws drew on remotely-connected Roman sources to justify their universal adoption. Thanks to their pragmatic approach, they succeeded at developing a set of rules - which came to be known as *the lex cunctos populos* - for dealing with questions concerning the territorial and extra-territorial application of statutory laws (ss. 3.1-3.2).

Due to the authority of Roman law in medieval consciousness, such principles were understood to be part of an overarching framework which imposed obligations on all public authorities and jurisdictions. In this sense, conflict principles reflected the universal natural order which medieval jurists believed to have inherited from the Roman world. All authorities were duty-bound to apply them, regardless of systemic differences and needs. This is best illustrated by the overriding principles of intent and consent. The idea of *consensus*, which stood at the foundation of the canon law of marriage (s. 3.3) was mirrored by the overriding principle of intent, which governed cross-border contractual matters, including questions and disputes related to marriage (s. 3.4).

The first part of this study suggests that conflict of laws flourishes in contexts where lack of legal uniformity is compensated by a shared legal tradition. The shared legal tradition that made it natural for judicial authorities and newly-founded states to follow a common approach to cross-border disputes did not correspond to a coherent method. It consisted of open-ended and flexible principles and rules built on medieval assumptions and ideas. Hence, regardless of conflicting philosophical, political and religious beliefs of jurists, medieval jurists adopted the same approach to solve conflicts between local laws. Even where they nominally rejected the universality of Roman law, pre-classical

[2] For the shape that conflicts of laws took in Antiquity Lewald, Hans. *Conflits de lois dans le monde grec et romain*. J. & P. Zacharopoulos, 1946, pp. 30-77

experts were influenced by the same organisational schemes and conceptual vocabularies. Chapter 2 will therefore examine developments in English law. Chapter 3 will discuss instead the progressive decline of the medieval mentality.

1.1 The Conception and Regulation of Marriage and Household Relations in Roman Law

Roman jurists advanced various divisions and sub-divisions within the law. Roman jurist Ulpianus (c. 170-223 CE) was the first recorded scholar to posit the existence of the '*summa divisio*' between *jus publicum* and *jus privatum*.[3] Neither Ulpian nor his successors used the notion of public law and private law to refer to a separate branch of the law that regulated the state and its administration or to refer to a body of private laws and private rights as they would be understood by classical legal scholars.[4] Unlike what is sometimes argued by legal historians and assumed by family lawyers, there was also no such thing as 'family law' in Roman times.[5] Roman jurists did not have a separate body of rules in mind when they discussed of matters that related to the 'Roman household' that fell within the purview of Roman law.[6]

A variety of sparsely-distributed rules governed the economic and social activities connected with the household.[7] Although some matters, like dowry and tutorage, fell within the scope of the *jus publicum*, other activities and transactions that involved members of the household or those who

[3] For Ulpian, "Public law is concerned with the Roman state, while private law is concerned with the interests of individuals, for some matters are of public and others of private interest. Public law comprises religion, priesthoods, and magistracies". Dig. 1.1.1.2

[4] Ulpian listed three elements of public law, religion, priesthoods, and magistracies. Only the last looks 'public' to modern eyes. The *jus publicum* contained in fact little on the proper organisation of state institutions. In addition, the notion of *jus publicum* was at times used to refer broadly to the legal order of Rome, other times to refer to imperative and mandatory rules - both somehow connected to the idea of public law - other times still to matters which would normally fall within the division of private law, such as dowry or tutorage (see below for the classification of marriage). Many Roman sources discussing *jus publicum* carry a general reference to public interest. See Johnston, David. "The general influence of Roman institutions of state and public law." *The Civilian Tradition and Scots Law. Aberdeen Quincentenary Essay, Schriften zur Europäischen Recht und Verfassungsgeschichte, Duncker & Humblot* (1997), pp. 88-90

[5] Some recent books reproduce the erroneous image that 'family law' existed in ancient Roman law. Frier, Bruce W., and Thomas AJ McGinn. *A casebook on Roman family law*. No. 5. Oxford University Press, 2003. One of the earliest examples of the popular fashion of re-organising Roman law according to modern legal categories is provided by Hunter, William Alexander. *A systematic and historical exposition of Roman law in the order of a code*. Sweet & Maxwell, 1803.

[6] The meaning of the Latin word *familia* is hard to capture and it is much wider than the word family suggests today. The word family originated in the Latin *famulus* which either indicated the servants of a household or the man who acted as their representative. In a broader sense, *familia* was synonymous with the riches and the power of a clan. *Sensu strictu*, *familia* referred to persons: it was also the place where wives, children, slaves and other members of the household came under the authority of the *pater familias*. Ulpianus defined familia as, "a number of persons who, either by nature or by law, are subjected to the power (potestas) of one person: for example, a pater familias." However, he also specified that "[w]e also customarily describe slaves as *familiae*." Ulpian. Dig. 50.16.195.1-5. However, *familia* also referred the estate or property of the household. Thus, Ulpianus added that *familia* "relates both to things and to persons: to things, as, for instance, in the Law of the Twelve Tables in the words 'let the nearest agnate have the household.' The designation of household, however, refers to persons when the law speaks of patron and freedman." Ulpian. Dig. 50.16.195.1-4

[7] See the extensive presentation of all institutions connected to the household in Johnston, 'Roman Law', pp. 30-52

happened to work in it, can be traced back to the *jus civile*.[8] When one looks at the division within the Roman *jus civile*, however, what emerges is that no Roman jurist ever posited the existence of a separate law governing the 'family' in civil law. For instance, in the *Institutiones* (c. 160 CE), Roman jurist Gaius (ca. 130-180 CE) advanced the threefold separation of 'the law of persons' (*jus de personis)*, the 'law of things' (*jus de rebus*) and the 'law of actions' (*jus de actionibus*).[9] When one looks at the contents of each branch with the eye of the classical or the contemporary jurist, the threefold division, like that between public and private law, comes across as unsystematic, incomplete and incoherent.[10]

Within the *jus civile*, most rules connected with the household can be found in the law concerning the person. However, a perusal of its content shows that the *jus de personis* did not contain a distinct and coherent body of rules governing the Roman household.[11] The law of the person cannot be reduced either to a law whose purpose was that of governing 'status and capacity' of the person, as sometimes claimed in the literature. It is sometimes said that Roman philosophers and scholars frequently referred to the idea of 'status' in Roman law, and, more specifically, to the notions of *status libertatis, s. civitatis, s. familiae*. Indeed, Roman jurists used the notion of status to refer to the 'condition' and 'position' that certain persons had within, or outside, the Roman community.[12] Status thus carries a reference to the characteristics of the person and to his position in space which may also explain why status will be used, from classical times on, to indicate the capacity of persons in cross-border matters.[13]

[8] Johnstone, 'The General Influence', p. 89

[9] "All the law which we use concerns either persons or things or actions" Gaius, Dig. 1.5.1

[10] The category of *jus de rebus* contained rules concerning the purchase, acquisition, sale and disposition of property. However, here we also find a sub-division which concerned contractual obligations. Within this class of obligations, Justinian also included a sub-division of contractus, and a category of 'quasi-contracts'. Within the class of *actiones*, there is a sub-division of *in personam* which refers broadly to contractual obligations. However, this was merely a sub-division. The law of actions also included 'procedural laws', it established the office (*de pubblicis judiciis*) and it stipulated the duties of a judge (*de officio judicis*) and other matters that would be today categorised as public law matters.

[11] This does not mean that rules governing household matters did not feature prominently. The *jus de personis* defined the prerogatives of a father over children (*patria potestate*). Within the context of the *jus patriae potestatis*, it also defined the rules governing *nuptias* (often erroneously translated with marriage, see below) and, specifically, the prohibited degrees which made the union between two persons illicit, and children illegitimate. The law of persons also specified the rights and obligations of a person who had authority (*tutela*) over another person ("quae sui vel alieni juris sunt"). However, the contents of the *jus de personis* do not exclusively refer to the Roman familia. In fact, the law of persons mainly divided between slaves and free-men. Gaius thus held that: "The main distinction in the law of persons is that all men are either free or slaves." Gaius. Inst. 1.9. Accordingly, the law of the person included rules that governed the acquisition of 'citizenship' and stipulated which rights (private and public) citizens would acquire. It also contained specific rules that governed the relationship between citizens and slaves. Hence, among the various forms of tutela mentioned in the law of the person, we find that of a free-man over a slave, that of a father over his children, but also that of a husband over his wife (*tutela mulierum*).

[12] Ricciardi, Mario. *Status: genealogia di un concetto giuridico*. Giuffrè Editore, 2008, p. 53-57

[13] In his genealogy of the concept of status, Ricciardi has advanced the hypothesis according to which «Allo stesso modo in cui la posizione nello spazio di un corpo, la condizione in cui si trova, limita la possibilità di moviemnto del corpo in questione, l'essere in uno status stabilisce i confini di ciò che è giuricamente possibile per una persona.» Ibid. p. 53

Despite this quantum of conceptual and historical continuity, the idea of status in Roman law should not be understood as coherent with status as it was used in the following intellectual and institutional ages. Status is not an immutable and inalterable concept. The Roman notion of status should not be confused with the concept of status that prevailed in later epochs of legal history, and to understand the law of the person as '*lex status*' would be an anachronism.[14] Although the often-cited classification of persons in Roman law according to their *status libertatis*, *s. familiae* and *s. civitatis* is commonly assumed to be an organic and complete theory of legal capacity, Roman jurists did not advance a 'theory of status' nor did they use the idea of status in a technical and coherent sense.[15] Roman jurists, some historians have appropriately pointed out, did not advance comprehensive and rigorously defined lists of duties and rights which regulated each person according to his or her status, neither in their discussion of the *jus civile* nor elsewhere.[16] Roman status, they have contended, should thus be understood as an 'argumentative-tool'.[17] In Roman law, there was no such thing as the 'law of status' or 'family law'. There were *ad hoc* rules that governed specific social activities between Roman citizens that were related to the household, as in the case of marriage.

1.2 *Consensus Facit Nuptias*: Consent and Marriage in Roman Law

Roman jurists used schemes and advanced distinctions in their exposition of the Roman law, often starting from a generic concept (*genus*) and proceeding to divide the original concept into multiple and specific sub-concepts (*species*). However, the concept of status, classifications such as that of public and private law or the threefold division of the civil law constituted argumentative devices that were used by legal scholars for explaining complex legal matters and for achieving specific results. It is against this spirit of pragmatism and functionalism that we should also understand the seemingly fragmentary and incomplete rules governing 'marriage' in Roman law and, by analogy, how marriage was conceived and regulated in the Middle Ages. Roman marriage had many purposes. The first

[14] See Orestano, Riccardo. *Il "problema delle persone giuridiche" in diritto romano*. Giappichelli, 1968, pp. 74-78. Riccardo Orestano, "Status libertatis, civitatis, familiae", *Novissimo digesto italiano*, XVIII, Utet (1982), pp. 383-384

[15] Talamanca, Mario. *Istituzioni di diritto romano*. Giuffrè, 1990, pp. 71-77. It ought to be noted, for instance, that 'status libertatis' did not indicate a technical and self-sufficient concept. Status libertatis indicated a pre-condition for acquiring Roman citizenship. See Volterra, Edoardo. *Instituzioni di diritto privato romano*. Edizioni ricerche, 1961 (1988), p. 51

[16] Orestano has criticised the idea that status referred to a technical-juridical concept. See Orestano, 'Status libertatis, civitatis, familiae', pp. 383-385. Although often times Roman law did not specify the exact content of rights and duties (on this, see Ricciardi, 'Status: genealogia', p. 55-56), some historians have argued the opposite: «la nozione di status nel diritto romano vada intesa come la posizione giuridica che un individuo assume di fronte alla comunità organizzata nello Stato romano, cioè il complesso dei diritti e dei doveri, dei quali l'ordinamento giuridico statuale gli riconosce la capacità di essere rispettivamente soggetto attivo e passivo». Volterra, 'Istituzioni', p. 51

[17] Ricciardi, 'Status: genealogia', p. 53-57

objective was to make the offspring of a given union legitimate in the eyes of the Roman community.[18] For this purpose, jurists used the word *matrimonium*.[19]

In contrast, the relationship between husband and wife and the celebration of their union was referred to *sensu strictu* as *nuptias*. Different rules governing *nuptias* existed for patricians and plebeians, slaves and freemen.[20] Rules varied from peoples to peoples and they also changed across Roman legal history.[21] In ancient times, multiple rituals and practices would be performed during the ceremony of *nuptias*.[22] However, the creation of a lawful marriage (*justae nuptiae*) did not depend on the performance of prescribed practices or the observation of solemn formalities.[23] In ancient Rome, the constitutive elements of a valid marriage were two.[24] First, the spouses must have legal capacity to enter in marriage (*conubium*).[25] Second, they must live as husband and wife with the consent of the male authority of the household, the *pater familias*.[26] In ancient Rome, marriage was therefore a factual matter partly governed by norms that had specific social purposes.[27]

Although there are elements of continuity across Roman history, changes in the many rules that governed the *nuptias* and the relationship between husband and wife provide an illustration of how the condition and position of individuals within the household and within Roman society differed in

[18] Gaius, Inst. 1.55-6

[19] Matrimonium referred to the obligations (from manus the suffix -monium) of the mother (mater, genitive matris) towards her own children Berger, Adolf. *Encyclopedic dictionary of Roman law*. Vol. 43. The Lawbook Exchange, Ltd., 2002, p. 543

[20] Until the *Lex Canuleia* (445 B.C.) patricians and plebeians did not have conubium to enter marriage.

[21] «Il matrimonio è di ius gentium nel senso che si riscontra presso tutti i popoli, ma, come istituto del diritto romano, esso si applicava di regola solo ai *cives*, ed è quindi di *ius civile*». Talamanca, Mario, and Luigi Capogrossi Colognesi. *Elementi di diritto privato romano*. Giuffrè Editore, 2013, p. 32.

[22] The forms of marriage before Republican times are generally known as *confarreatio*, *coemptio* and *usus*. Each was established by performing specific rituals or by participating in a more or less codified action. The first manner involved a sort of religious ritual. The second was considered some sort of purchase. The third, *usus*, entailed living as husband and wife for one year. Gaius, Dig. 1.1.10: "Olim itaque tribus modis in manum conveniebant: usu, farreo, coemptione." See, Corbett, Percy Ellwood. *The Roman law of marriage*. Clarendon Press, 1930

[23] Rava, Alfredo. *Il requisito della rinnovazione del consenso nella convalidazione semplice del matrimonio (Can. 1157-2): studio storico-giuridico*. Vol. 49. Gregorian Biblical BookShop, 2001, p. 15. The following notes come from Rava's excellent work. See also Treggiari, Susan. Roman Marriage: *Iusti coniuges from the Time of Cicero to the Time of Ulpian*. Clarendon Press Oxford, 1991 (1993)

[24] In a sense, in pre-classical and classical times, cohabitation demonstrated the existence of consent. However, it was not constitutive of the marriage. Other conditions may have been considered necessary to demonstrate consent and for the subsistence of de facto marriage. Rava, 'Il requisito', p. 17

[25] In Roman law, *conubium* referred to the right to enter a lawful marriage *Conubium* is defined by Ulpian to be "uxoris jure ducendae facultas", or the faculty by which a man may make a woman his lawful wife. The prerequisites included having reached the age of puberty; a subsisting marriage precluded connubium. Johnston, 'Roman Law', pp. 33-35

[26] Volterra, Edoardo. *Matrimonio, diritto romano*. Giuffrè, 1975, p. 732. This also meant that the union would come to an end when the father withdrew his consent. Ulpian Dig. 43.40.1.5

[27] If the parties met the legal conditions for *iustae nuptiae*, factual elements determined the validity and subsistence of the relation. It is now a common understanding among historians that "marriage was to the Romans, as to the other peoples of antiquity, a *de facto* rather than a *de jure* matter, in the sense that two people were held to be married, not because they had gone through any particular ceremony, but because they in fact lived as man (sic.) and wife." Jolowicz, Herbert Felix, and Barry Nicholas. *A Historical Introduction to the Study of Roman Law*. CUP Archive, 1972, p. 113

later times.[28] Marriage in ancient Rome is generally referred to by historians as '*cum manu*'. Before contracting a *cum manu* marriage, women were only considered as daughters and not as legal persons. As such, they were under the full authority, under the *potestas* of their father. After the *cum manu* marriage, they came under the authority and 'protection' of their husbands (*manus*).[29] They were placed under his guardianship (*tutela mulierum*).[30] By Republican times, however, free marriage had replaced marriage *cum manu*, and the rules governing *nuptias* reflected the changed position and condition of women in Roman society.[31]

The validity and effectiveness of marriages *sine manu* essentially depended on the consent of both spouses.[32] In other words, what constituted *nuptias* was neither the performance of specific rituals nor a public act or declaration, but the consent of both male and female spouses, expressed or implicit. This idea was captured in the maxim *'consensus facit nuptias'*.[33] Free marriage could be contracted at will, and it could also be dissolved voluntarily by either spouse.[34] Since the validity and

[28] Ancient Roman law is generally divided in three periods: pre-classical, classical and post-classical Roman law.

[29] She became her own husband's daughter (*in loco filiae*) and she became sister to her own children. In ancient Roman law, a woman was perpetually considered *filia familias*. Like children, married women enjoyed limited if not no rights in most legal transactions. She would also have limited rights in the case of intestate succession. Johnston, 'Roman Law', p. 33-34

[30] It is likely that the role of Roman women was almost exclusively reproductive and educational. Marriage *cum manu* evidently shared many characteristics with potestas and with slavery, which goes a long way in showing the extent to which women were marginalised in ancient Roman society. In Ancient Rome, the position of women in general and of wives and daughters in particular, was one of submission. Fathers' and husbands' power over wives and daughters was almost absolute. See Johnston, 'Roman Law', p. 33-34. Some scholars are thus of the opinion that the legal position of Roman women was characterised by '*infirmitas sexus*' at least until Justinian times, and have argued that women Ancient Roman times were little short than 'chattel'. This is the thesis famously put forward by Jane Gardner in Gardner, Jane F. *Women in Roman law and society*. Routledge, 2008. Conversely, some other scholars have argued that, despite being under the manus of their husbands, *tutela mulierum* nevertheless meant that women enjoyed some rights, especially when it came to commercial exchanges. Wethmar-Lemmer, Marlene M. "The legal position of Roman women: a dissenting perspective." *Fundamina* 12 (2006). It is a debated issue whether women in Roman law enjoyed greater rights than they would in the Middle Ages and in the following centuries. Depending on the class to which they belonged, Roman women probably enjoyed some inheritance and property rights, though these depended on the existence of a subsisting matrimonial or family relationship. See Robinson, Olivia F. "The status of women in Roman private law." *Juridical Review* (1987), pp. 143-162

[31] By the time of Justinian, marriage *sine manu* had become the standard form of marriage, it was the "normal marriage of the developed law". Thomas, Joseph Anthony Charles. *Textbook of Roman law*. North-Holland, 1976, p. 419. It should be noted that the Digest did not even mention marriage *cum manu*.

[32] In pre-classical and classical times, nuptias was described as a social and de facto bond between the families of the husband and wife ("coniuctio maris et feminae et consortium omnis vitae") Modestino, Dig. 23.2.1. In post-classical times, we find a variety of definitions and prescriptions which point to consent as the essential element of the contract of marriage. See Rava, 'Il requisito', p. 20. For instance, "nuptiae consistere non possunt nisi consentiant omnes" Dig. 2.23.2

[33] Ulpianus, "Nuptias non concubitus, sed consensus facit" Dig. 30.50.17

[34] Since the juridical essence of marriage was also its factual existence sanctioned by the will of the parties, once the party ceased to consider the other as the legitimate spouse, the union was dissolved, factually and juridically. The literature thus agrees that divorce, although in itself a different concept compared to contemporary divorce, was fully sanctioned by Roman law; Johnston, 'Roman Law', p. 36. Volterra held that *iustae nuptiae* in classical times necessitated of factual consensus. Thus, divorce was possible when, de facto, parties simply showed that they had withdrawn their consent to the union, without necessarily expressing their opinion. Volterra, p. 738. Wives could also initiate divorce 'proceedings'. Wethmar Lemmer, 'The Legal Position', p. 177 Roman civil law made it in fact illegal to contract agreements which prevented a divorce. Stipulations which levied penalties on the party ending the nuptias were made illicit. Johnston, 'Roman Law', p. 35

continuation of the marriage was premised on the consent of both parties and on its subsistence across time, by analogy, there was no reason why women should be prevented from concluding other legal transactions with full autonomy.[35] Although free marriage did not emancipate women from male authority altogether, the rise of marriage *sine manu* marks the time when Roman women started acquiring legal personality and, with it, greater legal freedoms and duties in Roman society.[36]

The principle of *consensus facit nuptias* plays an important role across the pre-modern period of European legal history. As we shall see in the paragraphs below, throughout the medieval age, this principle was referred to by both civil and canon lawyers to defend the validity of marriages, within and across systems. The consensual approach to marriage of Roman jurists, especially visible in marriage *sine manu* is also important because it evokes the notion, which stood at the foundation of the Roman concept of contract, that the concurrence of the will of the parties was essential for the creation of a binding obligation.[37] The "*matrimonium contractum*" is in fact mentioned in several places in the Justinian Digest.[38] Notably, it is reported that some Roman couples lived as husband and wife after the signature of a formal agreement.[39] These contract-like elements have led some historians to explicitly label the Roman marriage as a type of contract.[40]

1.3 Roman Pragmatism and the Informal and Consensual Conception of *Nuptias*

If there was no such thing as 'Roman law of the family', neither was *nuptias* part of Roman contract law nor did the rules governing the Roman household belong exclusively to the Roman *jus privatum*. Although marriage *sine manu* possessed some contractual elements, *nuptias* cannot be classified as

[35] In stark contrast with marriage *cum manu*, free marriage did not have any effect on the wife's legal personhood and on the assets she owned and managed. She could conclude contracts and perform other valid legal actions autonomously. Corbett, 'The Roman Law of Marriage', p. 113

[36] With the prevalence of marriage *sine manu*, the old notion of *tutela mulierum* gradually lost appeal. Some scholars argue that Roman women "had something close to formal equality in the private law of Justinian." Robinson "The status of women in Roman private law" 1987 *Juridical Review*, p. 162. However, it ought to be specified however that free marriage did not lead to the full emancipation of the woman. She still belonged to her original family and, as a result, she remained under the authority of her father or of the *pater familias*.

[37] Berger, 'Encyclopedic Dictionary', p. 413

[38] For instance, Discussing of gifts, for Scaevola "itaque nisi ante matrimonium contractum, quod consensu intellegitur, donatio facta esset, non valere." Dig. 24.1.66.1

[39] See Corbett. The Roman Law', pp. 90-106, pp. 211-217

[40] In Robleda, O. "La definizione del matrimonio nel Diritto Romano." *La definizione giuridica del matrimonio. Atti del Colloquio romanistico-canonistico* (1980), Robleda argued that «Certo pare ben chiaro che il matrimonio nel tempo postclassico fu inteso dai romani come un patto. A codesto tempo, quindi, il motto ripetuto nei testi: *consensus facit nuptias* implica il senso di un accordo reciproco, di un contratto, dal quale segue un vincolo autonomo al matrimonio in facto, avente come contenuto l'individua consuetudo vitae, il *consortium omnis vitae*…» p. 32. See also Bierkan, Andrew T., Charles P. Sherman, and Emile Stocquart Jur. "Marriage in roman law." *The Yale Law Journal* 16.5 (1907), pp. 303-327 for several scholars, like French jurist Ortolan, who held the view that "Roman marriage ranks amongst the form of 'real contracts'."

contract in Roman law.[41] It ought to be noted that the Roman law of contract underwent a constant process of formalisation.[42] In contrast, there was never an established and formal procedure for determining the existence and subsistence of consent in *nuptias*.[43] Claiming that Roman marriage was *de facto* and *de jure* contract forces *nuptias* into the procrustean bed of formal legal categories.[44] Labelling *nuptias* as a simple contract also ignores that Roman jurists famously held that marriage produced effects that were especially relevant for the commonwealth and for the wider social order, and were for this reason partly regulated by various provisions that can be found in Roman public law.[45]

Conversely, the abundance but also dispersion and variation of rules governing the Roman household cannot be reduced to a coherently-arranged and distinct body of rules that, among other things, regimented how Roman citizens must contract marriage and, with some notable exceptions illustrated by *manus* and *potestas*, what were the enforceable rights and duties of family members.[46] This argument goes both ways. Claiming that *nuptias* and *contractus* were radically opposed, as we might be tempted to argue, would disregard their shared conceptual and normative ground. In fact, the various formulae and ways in which *consent* to nuptias could be expressed are a reminder of the

[41] On the difference between *contractus* and *obligationes*, Berger explains that "Originally limited to obligations recognised by the ius civile, the term contractus even in the classical period acquired a wider sense, embracing obligatory relations recognized by the praerorian law and covering the whole domain of contractual obligations, so that the jurist Paul could say: Every obligation should be considered a contract, so that wherever a person assumes an obligation he is considered to have concluded a contract." (Dig. 5.1.20). Also, for Berger: "The term contractus, although not rare in classical sources, is therefore far less frequent than obligation. The real picture of the Roman concept of contractus was overshadowed by the fact that for some typical contracts specific names were created …" Berger, 'Encyclopedic Dictionary', p. 413

[42] Notably, the practice in contractual matters moved from *contractus verbis* to written promise, the pactum. See Zimmerman, Reinhard. "Roman Law and the Harmonization of Private Law in Europe", in Hartkamp, A., Hesselink, M., Hondius, E., Joustra, C., Du Perron, E., & Veldman, M.*Towards a European civil code*, Kluwer Law International, 2004

[43] This was not merely living together, as sometimes argued. Rasi appropriately argued that no classical jurist would have claimed that 'nuptias non concubitus sed consensus facit'. Rasi, Piero. *Consensus facit nuptias*. A. Giuffrè, 1946, p. 86. The key element is sometimes indicated to be *affectio maritalis*: considering each other as husband and wife.

[44] In the Roman law of the Republic, the basic cornerstones of contract were the stipulation – an oral promise – which was generally applicable but had some formal requirements, and consensual contracts, which were limited in numbers, but were not subject to any formality. Contracts which were not included in this category were known as *pacta* or *nuda pacta*, and were not always enforced. Zimmerman, 'Roman law', p. 36

[45] The household inhabited by persons related by blood or intimacy was for this reason considered 'seminarium rei publicae'. In a much reported, and mistranslated and de-contextualised, passage of the De Officis of Cicero, it is thus said that: "Nam cum sit hoc natura commune animantium, ut habeant libidinem procreandi, prima societas in ipso coniugio est, proxima in liberis, deinde una domus, communia omnia; id autem est principium urbis et quasi seminarium rei publicae. Sequuntur fratrum coniunctiones, post consobrinorum sobrinorumque, qui cum una domo iam capi non possint, in alias domos tamquam in colonias exeunt. Sequuntur conubia et affinitates ex quibus etiam plures propinqui; quae propagatio et suboles origo est rerum publicarum. Sanguinis autem coniunctio et benivolentia devincit homines [et] caritate." In this passage, Cicero stressed the importance of the household as '*seminarium rei publicae*'. However, *coniugo* does not refer to 'marriage', but to the sexual union between man and woman. Brutti, Massimo. *Il diritto privato nell'antica Roma*. G. Giappichelli Editore, 2011, p. 191 et seq.

[46] This still holds true despite the fact *nuptias* in Roman law could not be formed by slaves and free persons, by senators and patricians and women of low rank.

significance of 'naked' will and of performative actions in Roman law.[47] Claiming that marriage was either contract or, in contrast, 'status' also ignores the fact that Roman jurists never committed to a philosophical discussion about their nature and conceptual differences.

This disclaimer applies to all divisions and concepts that were advanced by Roman jurists and can be found, with differences that this genealogy will underline, in following intellectual and institutional ages. In certain respects, interpersonal relations in Roman law were governed by rules that originated in the position and condition that specific individuals had in the household and in the community. But neither the formation of marriage nor its effects were governed by a set of binding and overriding rules and principles formally set by a superior legislative authority. Hence, we could argue that Roman jurists understood 'marriage' as a more or less informal pact, or even as a formless transaction, which was subject to the consent of the parties, and produced specific responsibilities towards the rest of society.[48] Seen from this viewpoint, marriage in Roman law provides an illustration of the typical pragmatism and lack of concern for dogmatic divisions and philosophical reflection of Roman jurists.

The same disclaimer that applies to the anachronistic idea that there was a law and a theory of status and a law and a theory of the family in ancient Roman times thus applies to the idea that there was a distinct and coherent theory and body of rules governing marriage.[49] What is more, the variety of principles, rules and divisions that can be found in Roman law and can be associated with 'marriage' offers a prominent example of how Roman jurists approached complex legal matters functionally and 'pedagogically'. Let us take the *Institutiones* of Gaius as an illustration. As mentioned above, Gaius did not aim at producing a coherent and systematic arrangement of the *jus civile*. Rather, as some experts of Roman law have observed, he was driven by the practical desire to present the subject in a clear way to 'practitioners' and to his 'students'.[50] In the *Institutiones*, experts have underlined:

[47] *Nuptias*, as I undestand it, corresponded to a pact which was contingent on the manifestation of consent. Consent could be expressed and, more often, implicit, thus disclosing the importance of performative actions. As Widar Cesarini Sforza argued with reference to the Roman juridical experience, «Le formule di cui abbondano gli ordinamenti giuridici primitivi non sono tanto proposizioni esprimenti concetti, quanto materia di azioni offerte ai soggetti *affinché le vogliano*. Basta pronunciarle per agire, per impegnare la propria volontà in un dato comportamento: la parola vale come azione.» W. Cesarini Sforza, 'Oggettività e astrattezza nell'esperienza giuridica', in Id. Sforza, Widar Cesarini. *Idee e problemi di filosofia giuridica*. Dott. A. Giuffrè, 1956, p. 53. Cited in Ricciardi, 'Status: genealogia', p. 29

[48] Marriage formed an imaginary bond between individuals and society, between the private and public dimensions of social life, between personal preferences and ethical choices. Talamanca, 'Elementi', p. 32. Cicero famously wrote that "[t[he first bond of society is marriage (*coniugio*); next, children; and then the household (*domus*)" Cicero, De Officiis, bk. I, ch. xvii, at para. 54. Walter Miller, in the most commonly quoted translation, used family to translate domus. Miller, W. *De officiis. With an English translation*. Heinemann, 1913

[49] On Roman definitions of law and on the nature of Roman law, See Pound, 'Jurisprudence, Vol. 2', pp. 25-30

[50] Institutiones were designed for instructing students. Johnstone, 'Roman law', p. 25

> …there is no attempt at explaining the nature of Law and Jurisprudence, no classification of the parts of Law, no aiming at philosophical arrangements and analysis, but a simple declaration of the Roman law as it affects its subjects, men, illustrated of course by historical as well as by technical references. Hence too, we understand why there is nothing in the shape of explanation of the rules relating to marriage…[51]

The frequent and authoritative references by Roman jurists to divisions within the law should not be understood as part of a collective effort to build a self-explanatory and all-encompassing division of legal institutions and legal rules after a strict philosophical and rational reflection. Roman jurists were, first of and foremost, teachers who propounded Roman law and its authority and, secondly, pragmatists interested in developing workable rules with specific goals in mind.[52] The functionalist, pragmatic and informal approach of Roman jurists which emerges from this brief discussion of Roman law will constitute a crucial element of the medieval mentality.[53] Medieval jurists, whether experts of civil law or of canon law, of internal matters or cross-border disputes, also approached questions related to marriage and the household pragmatically and functionally.

1.4 The Origins of the Roman *Jus Gentium*

Although the principle of 'territoriality' of law played a role in the organisation and administration of the Roman justice system, it can be argued that Roman law governed interpersonal relations and exchanges taking place between Roman citizens, regardless of where they resided, traded or contracted marriage.[54] Under the principle of 'personality', all free peoples (*populos liber*) who lived

[51] Abdy, J. T. and Walker B. *The Commentaries of Gaius*, The Law Book Exchange, 1885(2005), Preface, p. x

[52] As declared by David Johnston, "the concerns of the Roman jurists were not philosophical: such material as they absorbed was turned to their own purposes, and was necessarily tempered with grosser unphilosophical considerations about reaching a workable result." Johnston, 'Roman Law', p. 8 Johnstone refers to jurists in Republican times, but his observation also applies to post-classical Roman law scholars.

[53] For Kennedy it is intent. Kennedy, Duncan. *The Rise & Fall of Classical Legal Thought*. Beard Books, 2006, p. 163. What emerges from this work is that consent, like intent, was used broadly, as implied or explicit.

[54] The administration of Roman law functioned according to a mix between the personality and the territoriality principles. The personality and territoriality of the law is never complete. Territoriality played a role in the organisation and administration of the Roman system. Domicile (*domicilium*) and citizenship (*origo*) both carried a reference to territory. Citizenship related to a territory inhabited by a population, as suggested by the Latin word *origo*. The principle of *domicilium* established that a Roman citizen could be sued anywhere within the Imperial territory where he was domiciled. However, the territory where a person resided did not determine his legal obligations and rights. His citizenship did. There were provincial and regional differences in the extent to which Roman law applied to Roman citizens. See Johnston, 'Roman Law', pp. 9-11. A person could possess more than one domicile. Domicile in ancient Rome did not indicate a strong connection between a person and a territory, but mere residence. Berger, 'Encyclopedic Dictionary', p. 441. Inhabitants of the Provinces of the Empire were also subject to some norms that had territorial application. But, more in general, under the principle of personality, all peoples who were free (*populos liber*) could govern themselves and live according to their own law, their '*jus civile*'. Citizenship in Roman law could result from birth (*origo*), adoption, manumission or election. Citizenship in Roman law was layered. A Roman who enjoyed full citizenship was a 'civis optimo iure'. Public prerogatives were denied to both non-citizens and to '*cives non optimo jure*' who were only in

within the Roman Empire could govern themselves according to their own personal laws, in line with their own version of the Roman '*jus civile*'. In ancient times, Roman law did not contain specific rules that magistrates could apply in relations and disputes involving Romans and members of the *populi liberi*.[55] With imperial expansion, greater numbers of foreigners (*peregrines*) were drawn in Roman society. From the 3rd century B.C., a special tribunal was appointed and delegated judicial authority (*imperium*) to try disputes between Romans and non-Romans, the *praetor peregrinus*.[56]

The *praetor peregrinus* did not have to rely on the Roman *jus civile*. By availing himself of multiple sources of law and of the help of jurists, the *praetor peregrinus* was free to find the most appropriate judicial solutions.[57] Over time, the decisions grew into a self-standing and relatively coherent body of laws, what came to be known as the *jus gentium*.[58] The *jus gentium* was not, as sometimes suggested, the commercial law of the Empire.[59] The *jus gentium* enabled tribunals to issue appropriate decisions regardless of the nature of the relation at the centre of the dispute. Its capacity to apply to distinct matters and to adapt to different contexts became its greatest asset. In an expanding Empire where the exchanges between free peoples became more regular but also more complex, the *jus gentium* soon became essential for administering justice. As Aurelius Hermogenianus (245-311) remarked, it was thanks to the *jus gentium* that "… peoples [were] differentiated, kingdoms founded, properties individuated, estate boundaries settled, buildings put up, and commerce established."[60]

possession of 'private rights'. Among public rights, commonly referred to as suffragium at honores, the right to vote in popular assemblies, and right of eligibility in public offices. A full Roman citizen had the right to participate in public life and public offices and he had access to private rights under the *jus civile*. Private rights included conubium, the right to contract a legitimate marriage, and commercium, the right to enter commercial relations and the right to acquire, hold, and dispose of property. Citizenships' rights were in early times denied to all foreigners as well as to women and lower classes. Citizenship and rights conferred by it functioned as an organisation device and a political weapon. They were also the crux of several reforms and the object of many struggles. The *Lex Iulia de civitate latinis et sociis danda* extended citizenship to the Latin people. In 212 CE, Roman citizenship was extended to all free men living within the Empire.

[55] In early times, foreigners were not even allowed in court, even if proceedings concerned their belongings or their actions On the office of the praetor, Stein, 'Roman Law', pp. 8-12

[56] Astin, A. E., Walbank, F. W., Frederiksen, M. W., & Ogilvie, R. M. (1989). Rome and the Mediterranean to 133 BC, Vol. 8. *The Cambridge Ancient History*, p. 438

[57] Rules used for finding judicial solutions could be borrowed from legal sources other than Roman law. Trnavci, Genc. "The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law." *U. Pa. J. Int'l Econ. L.* 26 (2005), p. 200 In this period, we also witness the rise in importance of experts who assisted the praetors. See Johnston, 'Roman Law', p. 4. The jurists played a crucial role in the system. the magistrates and the judges were not experts in the law, which also explains the importance of texts clarifying 'pedagogically' what the law was.

[58] Stein, 'Roman Law', pp. 12-13

[59] The message is often passed that the *jus gentium* had the function of governing only the commercial relationship among the peoples of Europe. See for instance, Ballarino, Tito. *Diritto Internazionale Privato*. Cedam, 1999, p. 14; Other times, the *jus gentium* is mistakenly translated as the law of nations, forgetting that there were no nations to be spoken of in Roman times. For instance, Fassbender, Bardo, et al., eds. *The Oxford handbook of the history of international law*. Oxford University Press, 2012, p. 1016

[60] Hermogenian, Dig. 1.1.5, cited in Lee, Daniel. *Popular Sovereignty in Early Modern Constitutional Thought*. Oxford University Press, 2016, p. 65

As Roman law principles continued to be developed and organised, jurists also differentiated *lex* and *jus*. They understood the former with command and political authority whilst they associated the latter with ethical behaviour and justice. As this process took place, the *jus gentium* also acquired, side by side with its practical value in an expanding Empire, the reputation of a law of higher moral standing compared to each *jus civile* and as an overarching framework that encompassed all mankind.[61] The *jus gentium*, Roman jurists assumed, bound all free peoples without consideration for the specific requirements of particular laws. As we shall see below, medieval jurists, canon lawyers and civil lawyers alike, borrowed from the Roman *jus gentium* the idea of universalism but also the reference to 'higher justice'. Accordingly, in the opening lines of the *Institutiones*, Gaius declared:

> All peoples governed by laws and customs are partly governed by their own law (*partim suo proprio*), partly by the laws common to all mankind (*partim communi omnium hominum iure*). The law which a people gives itself for itself (*jus quod quisque populus ipse sibi constituit*) is called the civil law (*jus civile*), as being the law of that particular people (*quasi ius proprium civitatis*). But the law which natural reason (*naturalis ratio*) makes for all mankind (*omnes homines*) obtains equally among all peoples, and is called the law of the peoples (*jus gentium*), because it is the law of all peoples.[62]

As the Empire conquered more territories and more populations lived under its power as *populos liber*, the *jus gentium* came to be understood as a law of greater symbolic value compared to each *jus proprium*, even greater than the Roman *jus civile*. The *jus gentium* represented the greater legal order within which different people could coexist peacefully and thrive side by side. But the *jus gentium* did not only have symbolic value. Compared to the rigid Roman *jus civile*, this body of rules was so flexible and dynamic that eventually many of the rules developed within its scope were incorporated into Roman civil law. This also meant that, as the Empire continued to conquer new territories and as the relations between citizens and peregrines grew tighter, the boundaries separating the Roman *jus civile* and the *jus gentium* became thinner.[63] This would constitute an important obstacle to the comprehension of the original functions of the *jus gentium* to later jurists.

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[61] On the difference between lex and jus, see footnote 1. The conceptualisation of the *jus gentium* is not clear, and it evades strict categorisation. "It is not clear whether the ius gentium was initially conceived as a natural law system, reflecting the principles of a universal natural legal order described above." Mills, Alex. "The private history of international law." *International & Comparative Law Quarterly* 55.1 (2006), p. 6

[62] Gaius, Dig. 1.1.1

[63] Around the third century A.D., the differences between the *jus gentium* and the *jus civile* were so small, that the two titles started being used interchangeably.

2.1 The Fragmentation of the Empire: From the Personality to the Territoriality Principle

Internal feuds within the Empire and the invasion by German tribes led to the political disintegration of the Western Roman Empire and to the further fragmentation of the 'personal law' system. Langobards, Salics, Ripuarian Franks, Gallo-Romans, Alemans, Bavarians, Burgundians, Visigoths and other barbarian tribes lived side by side, each according to its personal law, with no reference to a law of higher value that was common to all peoples. Although populations were slain in the battle and enslaved after the war, including the Romans, the customs and manners of the invading peoples were not enforced on them. The Roman *jus civile* lost its status of *primus inter pares* and took the form of a tolerated personal law.[64] Members of the Roman *civitas* could therefore carry on living under their own civil law which had in the meantime incorporated parts of the *jus gentium*.

In the wake of the imperial collapse, the regulation and adjudication of inter-personal exchanges and disputes could no longer occur with the assistance of the *jus gentium* as developed and applied by the Roman *praetor peregrinus*. Scholars no longer believed that there still existed rules and principles common to mankind.[65] In a context of great political and legal uncertainty, simpler solutions were preferred.[66] The result was that each people preserved their manners, and the law of different peoples governed almost every aspect of social and economic life, public and private, criminal or civil.[67] As

[64] In exchange, the Roman *civitas* could also carry on living under their own law rather than being forced to observe the law of the barbaric conquerors. Roman law was still perhaps regarded as one of the most important cultural products of the Empire and of the Roman civilisation. By this time Justinian had compiled the corpus juris civile. But Germanic tribes which had invaded the territory of the empire decided not to follow the practical, but also complicated legal science of the romans. Guterman, Simeon L. "The Principle of the Personalty of Law in the Early Middle Ages: A Chapter in the Evolution of Western Legal Institutions and Ideas." *U. Miami L. Rev.* 21 (1966), p. 263

[65] "Tanta diversitas legum quanta non solum in singulis regionibus aut civitatibus, sed etiam in multis domibus habetur. Nam plerumque contingit ut simul eant aut sedeant duinque homines et nullus eorum communem legem cum altero habeat" cited in K. Lipstein, 'The general principles of private international law', Recueil des Cours, 1972, p. 108

[66] When a dispute arose which could be governed by more than one personal law, litigants would solemnly declare that they lived according to the law of the 'tribe': "Qua lege vivis? Ego ille qui professus sum ex natione mea lige vivere illa.". Optio juris constituted an adjudicative device which made it possible to identify the applicable law in consideration of an ancestral or ethnic connection between a person and a group. Professio iuris did not entail absolute freedom to choose the governing law. The contrary opinion is advanced by Lipstein, 'General Principles', p. 108. A person making a professio iuris would indicate the applicable law by virtue of an 'ancestral' connection, Professio juris also did not point to a permanent and irrevocable bond either. Professio juris simply indicated an informal bond to a non-territorial community. It is thus inaccurate and doctrinally preposterous to claim that *professiones* entailed either an absolute free choice of the applicable law or that they would refer to a 'national law' fixed in stone. Guterman: "It has been commonly assumed that this meant that a person was simply bound by whatever law he first professed but that the original profession was made in complete liberty. It is quite clear that the profession had no such meaning or intention. The profession of law is often stated side by side with the nationality of the person. This does not mean that the two ideas of nationality and law are distinct. As already shown, it was only in exceptional cases that the birth law was changed and the use of the two terms side by side was meant to allow for a possible change in a person's legal status 'brought about, for example, by marriage." Guterman, 'The Principle', p. 303

[67] In the period between the fall of the Empire and the early Middle Ages, neither formal divisions between types of laws nor territorial divisions between political entities carried sufficient force for a radical change to take place in the solution to interpersonal disputes, crimes included. The distinction between departments of law did not matter. If Roman law scholars did not do it before, why advancing then a systematic classification of legal institutes? Public law and private

Agobardus (c. 779-840), Archbishop of Lyon, wrote in 817, "it often happens that five men, each under a different law, may be found walking or sitting together."[68]

As historians have pointed out, the political and legal landscape following the imperial disintegration was marked by the existence of 'nations' without territories and of laws without 'states'.[69] All this was to change with the rise of city-states. The principle of personality of the law is generally said to have subsisted until the 12th century.[70] But hundreds of years earlier, in Upper Italy, France, Germany, Spain and the Flanders, the rulers of feuds and small kingdoms started claiming jurisdiction over all the activities taking place on their land.[71] The transition from the ancient to the medieval legal and political world brought about many changes, and the gradual replacement of the personality principle with the principle of territoriality of the law is the most important for the reconstruction of the history of private international law.

Under the territoriality principle, whenever a link existed with the territory, feudal and royal courts applied the 'law of the land'.[72] The same individual whose personal law was previously determined by an ethnic or tribal bond, was now governed by territorial laws. This meant that a different body of rules governed social life and that a different law applied virtually every time a person moved from one place to another.[73] Physical location thus determined both jurisdiction and the operative legal regime. Had he lived a couple of centuries later, Agobar would have thus declared that 'in the same

law were even more "inextricably mingled" than they had been in the earliest period of Roman legal history. As Guterman points out, as late as in the Frankish period, when the principle of territoriality is on its way to affirmation, "public and private law are inextricably mingled, just as they were in the earliest period of Roman history." Guterman, 'The Principle', P. 317

[68] Cited in Juenger, Friedrich K. "General Course on Private International Law", 193 Recueil des cours, 113 (1983), p. 137

[69] Guterman, 'The Principle', p. 261

[70] Lipstein, 'The general principles', p. 108

[71] As the origin of the word feud itself reminds, the legitimacy of the feudal lord, and the wealth of its aristocratic rulers, were founded on the military and legal defence of his territorial property and rested on the assumption that one law applied to all those living, dwelling and working on his land. Under the feudal principles of 'homage' and 'fealty', any tenant or vassal was there justiciable in the court of his lord. Fealty and homage also constituted the legal basis on which the jurisdiction of local courts was imposed. Westlake, John, *A Treatise on Private International Law: With Principal Reference to Its Practice in England*. William Maxwell and Son, 1857, (2nd Edition, 1880), pp. 259-260

[72] However, "It would be wrong to assume that in a feudal society the *lex fori* applied to all cases which came before the local courts. True, in a feudal society the court always applied its own laws, provided that the court had jurisdiction, but the court exercised its jurisdiction only because the case was somehow factually connected with its territory." Lipstein, 'General Principles', p. 110

[73] Since moving from territorial jurisdiction implied submitting to the authority of the territorial ruler, some haver ead the seeds of a consent-based society in the transition to a territorial 'feudalist' society. As H. R. Graveson will put it, "The basis of the feudal community was a relation between lord and man involving services of various kinds by the latter in return for his protection by the former. Thus, behind that relation stands an element of contract-not contract quite as we understand it to-day, but a common under- standing of the assumption of mutual rights and obligations." Graveson, Richard H. "The Movement From Status To Contract" The Modern Law Review 4.4 (1941), p. 263

town five men, each originating in a different country, each belonging to a different people, are found sitting, walking or trading together under the same set of laws.'

Despite its symbolic and material importance, the immediacy and magnitude of this change should not be exaggerated.[74] In the early Middle Ages, not only did the personality principle survive in many parts of Europe, but territoriality itself was also "fluid".[75] Before the modern period, borders were often unmarked. Within the same territory, there existed a variety of 'legal orders', civil, ecclesiastical and imperial, formal and informal, territorial and personal. The rise of territorial laws, in a sense, added a set of norms on top of the legal pluralism that already existed on the ground. Before analysing this pluralism in the context of household relations, it is necessary to examine how institutional and legal changes brought about a set of unprecedented practical problems, including the collisions between territorial laws.

2.2 The *Jus Commune* and the Rise of Territorial Laws

By the 12th century, the residents of urban aggregates, free-towns and *comuni*, most notably but not exclusively in the Italian peninsula, had set up in their partly-enclosed spaces elaborate social and economic activities. The larger communes, such as those of Bologna, Milan or Florence, gave themselves written local laws and a relatively efficient system of courts to administer such activities and settle disputes between residents. The written laws took the name of *statuta* (sing. *statutum*).[76] Greater political stability and flourishing economies increased the demand for technical and specialised education, including legal and notary training. It is in this context that Italian universities were founded, and it is against the greater need for legal education and for appropriate legal and judicial solutions to disputes arising in city-states and *comuni* that the Justinian Digest was 'discovered' between the 11th and the 12th centuries.[77]

[74] Savigny expressed this cautionary warning as follows: "The moderns always assume that the laws to which the individual owes obedience, is that of the country where he lives; and that the property and contracts of every resident are regulated by the law of his domicile. In this theory the distinction between native and foreigner is overlooked and national descent is entirely disregarded. Not so however in the Middle Ages, where, in the same country, and often indeed in the same city, the Lombard lived under the Lombardic and the Roman and the Roman law." von Savigny, Friedrich Carl, and Elias Cathcart. *The History of the Roman Law During the Middle Ages.* Trans. by E. Cathcart, 1829

[75] As explained by Saskia Sassen in Sassen, Saskia. *Territory, authority, rights: From medieval to global assemblages*. Princeton university press, 2008, p. 29

[76] French communes came to regard the coustumes as their own version of the local laws, although they sometimes codified them in written coutumiers.

[77] The Digest contained an incoherent mix of decisions, opinions, rules, commentaries, and excerpts. The Digest has been described as the "gigantic torso of Roman law". Zimmerman, 'Roman law', p. 35

The discovery of the Digest led to what historians have called the 'renaissance'[78] or 'second life' of Roman law.[79] Drawing from fragments of the Digest and adding a wealth of notes to the text, the earliest generation of medieval scholars, known as the Glossators, reconstructed ancient principles and rules and re-arranged them into comprehensive and accessible bodies of laws.[80] Roman sources were a useful administrative tool and could also provide legitimacy for the 'restored' Empire.[81] However, it would be reductive to limit the renaissance of the legal science to the elaboration of Roman rules and principles. The legal curriculum taught in newly-founded universities included Roman Law and Canon Law.[82] What came to be known the *jus commune* formed from these sources.[83] The *jus commune* was not a corpus of unified and coherently arranged laws. However, students learned principles and rules of Roman and Canon law, but also absorbed ideas and techniques, modes of thinking and argumentation.[84]

The *jus commune* could be understood as a legal culture or a scientific approach endowed with a 'universal' vocabulary.[85] In this sense, it constituted the foundations of the first 'mode of thought' in European legal history. Medieval legal (but also political) thought was premised on the assumption of its universal scope and validity, and the spread of the *jus commune* is one of the earliest, if not the earliest, 'globalisations' of legal consciousness. Although its reach was initially limited to the Italian peninsula, students came to learn the *scientia juris* from every corner of Europe, and they then returned to propagate the common mentality beyond the Mediterranean area. Hence, it constituted part of a broader cultural and political upheaval which extended beyond the confines of the ashes of

[78] See Berman, Harold J. *Law and Revolution: the Formation of the Western Legal Tradition*, Harvard University Press, 1983. In Italian, see Cortese, Ennio, *Il Rinascimento giuridico medioevale*, Bulzoni, 1996

[79] Vinogradoff, Paul. *Roman law in mediaeval Europe*. The Lawbook Exchange, Ltd., 1909 (2001), p. 13

[80] Accursius (c.1182-1263) succeeded in a collection of all other glosses, which became the *Glossa ordinaria*, which constitutes the pinnacle but also concluded the work of Glossators. Historians suggest he took inspiration from the same process which occurred with the Gratians's Decretum thanks to Johannes Teutonic us. Heirbaut, D. and Storme, M.E., "The historical evolution of European private law", in Twigg-Flesner, Christian, ed. *The Cambridge companion to European Union private law*. Cambridge University Press, 2010, p. 22

[81] Medieval jurists therefore started using Canon sources to assert the legitimacy of the universal Imperial power The Glossator who commented on the *Decretum Gratiani* Johannes Teutonicus Zemeke (d. 1215) declared in his gloss that that "the Emperor is over all kings … and all nations (sic.) (peoples) are under him … He is the lord of the world … and no king may gain an exemption from his authority, because no prescription can run against him in this case." Pennington, Kenneth. "Law, legislative authority, and theories of government, 1150-1300." *The Cambridge history of medieval political thought* (1988), citing the gloss of Teutonicus to the Decretals of Gregory IX.

[82] Canon law brought the teleological and the ethical within the legal relation and its regulation. By applying Aristotelian logic, canonists developed the scriptures in bodies of laws containing legal precepts in the same manner in which the teachers of the civil lawyers developed the ancient Corpus Juris in a body of laws. This "whole formed an all embracing body of legislation, the legislation of God, of the church, and of the empire." Pound, 'Jurisprudence, Vol. 2', p. 36

[83] This title was used, a posteriori, to distinguish the law which was common to European peoples from the various local customs and statutory laws that applied within the bounds of each territory.

[84] De Nova, Rodolfo. *Historical and comparative introduction to conflict of laws*. Martinus Nijhoff, 1966, p. 9

[85] Heirbaut 'The historical evolution', p. 21

the ancient Empire. Its 'universal reach' was also metaphysical. Medieval jurists inhabited a world which they did not consider 'post-Roman' or 'post-Imperial'. As David Lee has argued:[86]

> For the medieval jurists, the Roman Empire never really ceased to exist but continued, even to their day. This shared sense of Roman-ness, or *Romanitas*, permeated medieval thought, providing an encompassing identity, like the *Christianitas* of the Roman Church, universal in scope. It was an extraordinarily important idea in medieval social and political thought.[87]

Starting from this premise, Glossators drew on Roman sources to vest legislative and political authority in the Emperor of the Holy Roman Empire.[88] The attempts to unify Europe under one law, the *lex regia*, however, ended in failure.[89] Glossators found in Roman sources that the existence of particular laws was not necessarily incompatible with the idea of a universal law. Gaius had already envisaged this possibility, as he held that all peoples are only partly governed by the laws common to mankind and partly by their own laws.[90] Under the *omnes populi* principle, kingdoms and cities were thus delegated competences (*merum imperium*) to introduce laws which had territorial scope (*statuta terrarium*).[91] Many local laws were enacted especially when the universal law was wanting.[92] In some cases, local laws were relied on "to prevent failure of justice."[93] However, self-governing

[86] Pennington, Kenneth. *The Prince and the Law, 1200-1600: Sovereignty and rights in the Western legal tradition*. Univ of California Press, 1993, p. 10
[87] Lee, 'Popular Sovereignty', p. 51
[88] Glossators drew on Roman law sources to produce authoritative rules for governing the Imperial territory. They laid stress on the words of Justinian that, "What has pleased the prince has the force of law" and that "since by the Lex regia passed concerning his command, the people confers all its command and power to him and on him." Dig. 1.4.1 The idea of juridical continuity was also provided by the concept of *translatio imperii* developed by Otto of Freising (c. 1114 – 1158). Jurists thus drew on the idea, inherited from Roman antiquity, that the Empirecould make, amend or withdraw the lex at will. Pound, 'Jurisprudence, Vol. 2', pp. 31-32. Imperial enactments were thus referred to as the *Lex Regia*. In the early Middle Ages, jurists often used the word lex, rather than jus, to refer to (written) law. Azo declared that: "Lex, moreover, is used sometimes strictly, sometimes widely: strictly when it is used for a statute of the Roman people….. Sometimes it is used widely, for every reasonable ordinance." Azo, C.1.14
[89] Most notably that of Charlemagne. The multilingual and multi-ethnic Empire restored by Charlemagne, who had succeeded in bringing under its rule or indirect control large parts of the European continent (including parts of Northern Italy), but had failed to unify the empire under one law, could make use of Roman law to assert its power and increase its legitimacy. The *Lex Regia* is described this as the "fundamental constitutional law of Christendom" by Joseph Canning, in Canning, Joseph. *The political thought of Baldus de Ubaldis*. Vol. 6. Cambridge University Press, 2003, p. 55
[90] Gaius, Dig. 1.1.1
[91] The Glossa Magna reported next to *jus civile*, the words: "statuta terrarium, quae jura municipalia dicuntur." Cited by Woolf, Cecil and N. Sidney. *Bartolus of Sassoferrato: his position in the history of medieval political thought*. Cambridge University Press, 2012, p. 146, Footnote 4
[92] Pound, 'Jurisprudence, Vol. 2', p. 38
[93] Ibid.

bodies started to introduce and to enforce bodies of laws which were consistent with local needs and often in contradiction with the *lex regia*.[94]

The progressive acquisition of legislative and adjudicative functions by smaller territorial entities collided materially and symbolically with the authority of the Roman Emperor as well as with the acquiescent and literal interpretation by the Glossators of Roman sources.[95] The *auctoritas* of medieval jurists depended on their capacity to keep alive the common law which had imperial rule, the *unum imperium*, as its *raison d'être*. Conversely, in a context where self-governing entities had grown more and more powerful, legal scholars risked "the irrelevance of their own profession" if they failed to afford legitimacy to territorial powers.[96] The Glossators failed in this mission because they had posited that, when law and reality are out of line, facts must be adjusted to meet the literal meaning of the law.[97] In this environment, a new group of jurists, the so-called Post-glossators or Commentators, re-imagined ancient Roman law as a source of guidance rather than as body of binding rules.[98]

2.3 Bartolus and the Rise of Territorial States

Bartolus de Saxoferrato (1314-1357) and his disciple Baldus de Ubaldis (1327-1400), by far the most influential among the Commentators and the most authoritative medieval jurists, contributed to shape a new political and legal thought.[99] Coherently with the claim put forward that jurists who have

[94] The peoples of Venice, Milan, Naples, the Sicilians and the French had simply seized power off the hands of the Imperial authority. Time-immemorial customs were being codified. Religious doctrines were being elaborated in the form of canon laws. Mercantile and maritime practices were established. In addition, guilds and professional organisations also started demanding conformance of behaviour. Millner, M. A. "Note on Italian Law." *International & Comparative Law Quarterly* 14.3 (1965)

[95] Early medieval jurists elaborated local statutes assuming historical continuity with the Roman world. Significantly, the jurists called these statutes instead of jus or lex. Jus was a title reserved for the laws of free-peoples who had fully legislative and judicial autonomy. The name lex was reserved for that class of laws which are enacted by the highest authority, and the highest authority was – symbolically more than materially – still exercised by the head of the Roman Empire. Roman law was still the universal law of the Empire, and the statutes of the Italian comuni and customs across the Alps and in the regions of Northern Europe were considered mere by-laws to the *Lex Regia*. See footnote 1 on the meaning of *lex* and *jus*.

[96] Lee, 'Popular Sovereignty', p. 51

[97] Skinner, Quentin. *The Foundations of Modern Political Thought: Volume 1, The Renaissance.* Cambridge University Press, 1978

[98] Post-Glossators made sure they always referred to original Roman sources, but they did not hesitate to depart from the textual reference. Stein, 'Roman law', pp. 45-49

[99] Bartolus studied law in Perugia and Bologna. He was judge in Todi and Pisa. He then moved on to teach at the *studium* of Pisa from 1339. The reputation of Bartolus started growing when he took up teaching in the University of Perugia in 1343. In 1355 he also became ambassador to Charles IV, King of Bohemia and Roman Emperor. This not only ensured that his ideas were widely circulated in Northern Europe, but also afforded him with enough knowledge of government affairs to write a Treatise on politics ('De Tyranno') which will inspire Macchiavelli's Principe (see below). Over the following centuries, no European jurist could do without citing his work: "The reign of Bartolus was long at the bar and in legal science. Some called him the father of law, others the lamp of law. They said that the substance of truth was found

contributed most to the development of conflict principles have also exerted an extraordinary influence over the definition of modes of thought, Bartolus and Baldus could also be considered the forefathers of private international law. As far as their contribution to the advancement of the legal science is concerned, Bartolus and Baldus reversed the cardinal conviction of the Glossators, that the political and social fact must be adapted to the legal ideal. As argued by Quentin Skinner, the essence of the thought of Bartolus can be reduced to the assumption that "where the law and the facts collide, it is the law which must be brought into conformity with the facts".[100]

Bartolus was an expert of Roman law. However, he was also the first jurist to comment on Canon law sources, on customary practices and on various statutes of Italian cities.[101] His decision to rely on statutory laws other than classical Roman texts itself suggests a departure from the method and from the assumptions of his predecessors.[102] In the legal and political thought of Bartolus and Baldus, the Roman Emperor was still, on paper, the *dominus universalis*.[103] Hence, Bartolus honoured the Emperor with nominal authority over the people living within the Empire.[104] Although he attributed to the Emperor universal power in principle, Bartolus did not believe that the Imperial authority and the *lex regia* bound those self-governing entities that refused to obey his decrees.[105]

Even though the lack of compliance with Imperial decree was warranted by the pragmatic approach to claims of political independence of territorial entities, the question arose whether the legislative and judicial authority exercised by city-states and small kingdoms collided with the idea of universal *romanitas* embodied in the common law.[106] Drawing on Gaius' principle of *omnes populi*, Bartolus

in his works and that advocates and judges could do no better than to follow his opinions." Laurent, François. *Droit civil international*. Vol. 6. Bruylant-Christophe & ce, 1881, p. 299, cited in Bartolo (of Sassoferrato) and Joseph Henry Beale. *Bartolus on the Conflict of Laws*, Trans. by Joseph Henry Beale, Harvard University Press, 1914. No one could be a good jurist, the saying goes, unless he was a Bartolist ("*nemo jurista nisi bartolista*"): "No one can be a good jurist unless one is a Bartolist jurist" Cited by Lee, 'Popular Sovereignty', p. 71. See also Gordley, James, and Arthur Taylor Von Mehren. *An introduction to the comparative study of private law: readings, cases, materials*. Cambridge University Press, 2009, p. 44

[100] Cited in Skinner, 'Foundations, Vol. I', p. 9

[101] The Italian jurist commented on a much larger body of sources than just Justinian's Law Books. He drew from Canon Law, from additions to the Corpus Juris dating back to late Roman times (such as the two books of De Feudis) and, notably, from customary practices and from various statutes of Italian cities. Woolf, 'Bartolus of Sassoferrato', p. 147

[102] As it has been remarked, "a random glance at any page of Bartolus would show the large part played by both statute and custom, not merely as illustrations, but in the actual elaboration of a law which, while Roman in basis, was to be practically effectual for the Italy of his day." Ibid.

[103] Ibid.

[104] He posited that "the Emperor is the lord of the entire world in a true sense [but this does not] conflict with this that others are lords in a particular sense, for the world is a sort of universitas. Hence someone can possess the said universitas without owning the particular things within it." Bartolus at Dig. 6.1.1. from Bartolus super prima parte Digesti Veteris (Lyon, 1505), as translated by Ryan, Magnus. "Bartolus of Sassoferrato and free cities." *Transactions of the Royal Historical Society* 10 (2000), pp. 65-89

[105] Cited in Skinner, 'Foundations, I', p. 9

[106] Woolf, 'Bartolus of Sassoferrato', pp. 147-148

replied in the negative. The give-away, however, is not so much in his pragmatic response, but his imaginative solution to transform and adapt the deeper meaning of crucial Roman principles and ideas to the medieval political context, including those advanced by Gaius. In his commentary to *omnes populi*, Bartolus thus held that:

> …in the case of the cities of present-day Italy … where no superior is recognised, I judge that they constitute themselves a free people, and hence possess *merum imperium* in themselves, having as much power over their own populace as the Emperor possesses generally.[107]

Without having to sever the symbolic tie with Roman law, which would have undermined the scientific credentials of his thought, Bartolus transformed the meaning of 'free people' from that of a *civitas* without a territory to a self-contained site of independent authority.[108] In the Middle Ages, *civitas* gradually acquired the meaning of a self-governing territorial entity which, in 14th century Italy, took the form of city-republics and communes.[109] The meaning of personal law also changed from that of the civil law governing a people without a territory to that of a local law which applied in a given jurisdiction to a particular *civitas*.[110] Like *populi liberi* in ancient Roman times, city-republics and *comuni* could now make laws and statutes as it pleased them, declared Bartolus.[111] The legal order no longer drew its validity from a meta-physical connection, but from the immediate and material authority of the local government.

Bartolus did not merely bring about a methodological shift by expanding the resources he used to develop his theory of government, but he also contributed to redefine the legal and the political thought of the time. Baldus developed the ideas advanced by Bartolus further and held that legislative and political autonomy is "innate" and "indigenous" to all peoples.[112] Side by side with *lex*, there also lived on, in the Roman ideal of justice, the notion that it was the consent of the people, and not the imperial power, that legitimated local authority.[113] Hence, in accordance with the maxim '*Rex in*

[107] Vol. 6, p. 159. Cited in Skinner, 'Foundations, Vol. I', p. 10
[108] Bartolus, Comment. On Dig. Vet. Part I. (D.1.1.9), p. 30, Para. 22. See Lee, 'Popular Sovereignty', p. 72
[109] As pointed out by Lee, "[i]n the conventional usage of Trecento Italy, … the term, civitas, [acquired the] more specific meaning and directly referred to the independent self-legislating city-republics or communes, as self-contained units or sites of political authority." Lee, 'Popular Sovereignty', p. 68
[110] Any peoples who could exercise independent iurisdictio could thus give themselves statutes by which the civitas must abide. Bartolus integrated the principle of 'omnes populi' with the argument that 'omnes populi iurisdicionem habentes' Woolf, 'Bartolus of Sassoferrato', p. 153
[111] "…potest facere legem et statutum prout sibi placet". Comment. On. Coex. Tres Libri (X. X. 63. 5), p. 64. 'Nam quidam est populus liber, qui habet omnen juridictionem, et tunc potest facere legem et statutum prout sibi placet.'
[112] Canning, 'Political Thought of Baldus', p. 189, quoting the Commentary of Baldus C.6.26.2 on the Dig. 5.1.76
[113] Pound, 'Jurisprudence, Vol. 2', p. 32

regno suo est imperator', the once-unified imperial *lex regia* fragmented into the local laws of self-governing territorial entities which had, merely by virtue of their political autonomy, acquired full jurisdictional and legislative independence.[114]

It has been argued - correctly in the view of the author - that Bartolus and Baldus took the first steps towards a coherent and convincing articulation of statehood and of the use of power by a 'sovereign' over a people and a territory.[115] Emphatically, Bartolus and Baldus did not have to create new ideas and concepts to afford legitimacy over territorial entities. What they did was redefine the deeper meaning of ancient Roman principles and ideas.[116] Notably, neither Bartolus nor Baldus ever mentioned the word 'sovereignty' in their commentaries. Niccolò Machiavelli (1469-1527), however, wrote '*Il Principe*' to reject the idea of a just government advocated by Bartolus in *De Tyranno*.[117] Indirectly, Bartolus is responsible for the title given by Machiavelli to the sovereign on whom Bartolus and Baldus vested power to legislate and adjudicate: the 'state'.[118] The transformation of the deeper meaning of Roman principles, as in the case of the 'status' of the prince, provides an illustration of the way in which the deconstruction and reconstruction of modes of thought occurs.[119] It also provides an obvious illustration of the fundamental role played by jurists in paving the way for institutional change.

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[114] Mentioned in the Decretal Per Venerabilem of Pope Innocent III, 1202 and, allegedly, used first in a political and legal sense by Marino da Caramanico (m.1288 ca).

[115] Much earlier than the Treaty of Westphalia was signed, through the ingenious deconstruction and reconstruction of legal principles that they found in Roman sources, Bartolus and Baldus developed the first "juristic justification for the legal sovereignty of the independent Italian cities as it actually existed". Canning, 'The Political Thought of Baldus', p. 97. Also for Skinner, 'Foundations, Vol. I', p. 11. It would still take some decades, if not centuries, before the concepts of 'state' and 'sovereignty' entered political and legal debates. Although the birth of the sovereign state, a self-governing political unit with territory and people, is generally traced back to the Peace of Westphalia (1648). See, Sassen, 'Territory, authority', Chapter 2. Sassen similarly locates the emergence of territorial state sovereignty in Europe earlier than Westphalia, and specifically in the thirteenth century. Sassen indicates the rule of the Capetian kings.

[116] As Daniel Lee has put it: "Roman law – the sacred text of medieval priests of justice – had to become elastic in meaning, so as to bridge the growing gap and declining correspondence between Roman law and post-Roman fact. Roman law terms, such as princeps, had to mean something more than simply a Roman Emperor, just as populus had to mean something more than simply the Roman people. Roman law had to become, in other words, not simply a law for the Romans, but a law for all peoples." Lee, 'Popular Sovereignty', p. 52

[117] Bartolus contributed to medieval political thought with treatises admonishing rulers against exercising absolute control over territory and population. He explicitly called for the deposition of the evil tyrant in his *De Tyranno*. With this political treatise, he intended to empower those subjugated by an illegitimate ruler and enable them to free themselves from his tyranny. In the *De Tyranno* Bartolus breaks down the characteristics and modus operandi of an absolute ruler, and proceeds to justify his removal.

[118] Niccolò Machiavelli will make extensive use of the *De Tyranno*, replicating its form and reproducing its content in the Principe (1513), but also turning upside down the core argument of Bartolus. Swiss scholar Innocent Gentillet (1532-1588) was the first to present the two Italian scholars as thesis and anti-thesis. In his words, Machiavelli was "seeking that man should hold it for good, whereas Bartolus speaketh of [power] of a damnable thing, which men ought to repulse and shun with all their power." Machiavelli turned Bartolus' book into a subject worth of scientific investigation and political admiration. He recrafted the great deal of information articulating evil rule contained in the *De Tyranno* into an art of tyranny. Innocent Gentillet, Contre-Machievel, 1576, pp. 251-4, cited in Anglo, Sydney. *Machiavelli-the first century: studies in enthusiasm, hostility, and irrelevance*. Oxford University Press, 2005, p. 312

[119] For an analysis of the political dimension of the redefinition of the deeper meaning, see Skinner, 'A Genealogy'

Baldus and Bartolus maintained the fiction of historical continuity with the Roman legal world but also secured the authority of local authorities in the centuries to come. From the idea that people had an innate prerogative to rule over their territory, a prince could proceed to portray himself as the head of the *corpus politicum*. The defence of the privileged position and condition of the prince, his status, could be described as the defence of public interest itself. The landed property of the sovereign could be fused with public jurisdiction.[120] The law administering his personal property could be transformed in the public law.[121] The skilfully transformative processes set in place by Bartolus provides a glimpse of the creativity and pragmatism typical of medieval scholars. It also constitutes an example of how changes in the legal consciousness can facilitate processes of institutional transformation.

3.1 From the Roman *Jus Gentium* to the Medieval *Lex Cunctos Populos*

The birth of conflict of laws is often traced back to this period of European legal history. The proliferation of local laws and the contemporary growth of commercial exchanges facilitated by the booming economic and social activities taking place in many urban centres posed the problem of determining which territorial by-law should apply in cases concerning objects and persons that could be referred to more than one source. The problem for the earliest scholars confronting questions raised by statutory conflicts (*collisio statutorum*) was that they had no obvious source from which they could extract authoritative principles and rules. The discovery of fragments of the *Corpus Juris Civilis* did not produce any self-evident solution to such scenarios. Strictly speaking, Roman jurists never dealt with conflicts between territorial laws.[122] The *jus gentium* did not contain coherent rules to deal with legal collisions.[123]

Due to the lack of a sources and absent a body of written rules to solve legal collisions, legislators, courts and jurists opted for different solutions, many of which are evocative of approaches chosen in later classical, social and contemporary ages. Some governments decided to sign treaties establishing

[120] Bartolus defined jurisdiction as "the power granted by public law requiring the rendering of judgement according to the law and of laying down equity, as by public person." Bartolus, C. ad D.2.1.3

[121] For an account of how the vague categories of public and private law are merged even further in Medieval Legal Thought, see Kennedy, Duncan. "The structure of Blackstone's Commentaries." *Buff. L. Rev.* 28 (1978), p. 291

[122] Conflict of laws sensu strictu could not come to be because there could be no collisions between territorial laws. For this reason, it is sometimes held in the historiography that "[t]here were no private international law rules in what is now known about Roman law…". Mills. 'The private history', p. 4 However, it would be wrong to hold that in Roman times there were no rules and principles governing the application of foreign laws or that body of laws that governed the legal relationship between citizens and foreigners. For Quadri, "Sono errate le dottrine a termini delle quali importanti periodi storici non avrebbero conosciuto il fenomeno dell'applicazione del diritto dello straniero…" Quadri, Rolando. *Lezioni di Diritto Internazionale Privato*. Liguore Editore, 1969 (Quinta Edizione), p. 33

[123] Trnavci, 'The Meaning and Scope' p. 204. In the eyes of medieval scholars, the *jus gentium* was not a body of precepts, a *lex*, but a law derived from natural reason that contained principles that were common to all peoples. Local and personal laws had grown apart.

reciprocal obligations.[124] In such cases, legal relations only produced effects in those jurisdictions subject to the convention, and the recognition of foreign laws would not occur elsewhere. In other Italian and European jurisdictions, special courts were delegated the authority to design *ad hoc* solutions, which also meant, however, that decisions were inconsistent among themselves.[125] Similarly, the glossator Aldricus (1170-1200), among the earliest scholars discussing legal and judicial questions raised by *collisio statutorum*, argued that courts should apply the law which is 'better and more useful'.[126] Where followed, this proposal also made decisions unpredictable.

In most cases, however, local courts automatically applied their own law, the *lex fori*. [127] Partly because of the lack of binding principles that applied in all places and partly because of the overriding importance of the local law, most courts felt naturally inclined to apply their own law. A local court would only hear disputes which were somehow connected with its territorial jurisdiction, and it would only apply the local law whenever it grabbed jurisdiction.[128] Wronged parties had no other option but to submit to those courts that had competence according to their own law. This meant that certain transactions or awards for compensations for damages could only take place if 'foreigners' fulfilled the jurisdictional requirement of the law of the forum, for instance, if they voluntarily transferred their domicile or paid taxes abroad.[129] It also meant that foreign individuals were made to comply with the *lex fori*, however short their stay or remote the forum was from their residence or origin.[130]

Against this background, when a cross-border dispute gave way to litigation, a substantially different decision would follow depending on where the suit was brought. To make matters worse, there was no guarantee that the rights of a person in one place would be implemented elsewhere. The early

[124] Lipstein, 'General Principles', p. 112. Although most treatises concluded between city-states implied that the dominant power could imposed its law at will, such as in those between Pisa and Amalfi (1126) and that between Naples and Gaeta (1129), there were in some cases also international agreements for the application of reciprocity, such as that between Napoles and Narbonne (1132) according to which a citizen of Naples could ask for redress in Narbonne and vice-verse and the local law would apply. Ancel, Bertrand. *Histoire du droit international privé*. Université Panthéon-Assas, 2008, p. 83

[125] This is the example of the '*giudice del forestier*' in Venice and the '*supraintendente*' in Rome. In other cities, this role fell under the responsibility of consuls.

[126] "Quaeritur si homines diversarum provinciarum quae diversas habent consuetudines sub uno eodemque iudice litigant, utrum earum iudex qui iudicandum suscepit sequi debeat. Respondeo earn quae potior et utilior videtur. Debit enim iudicare secundum quod melius ei visum fuerit. Secundum Aldricum." Cited in Lipstein, 'General Principles', p. 111 This proposal, anticipated by many centuries proposals to the same effects for solving *collisio statutorum* will be used by Leflar to develop his better law in the US.

[127] Lipstein, 'General Principles', pp. 109-112

[128] An Alternative Explanation: it would only hear disputes to which it could apply its own law.

[129] There existed examples of statutes introduced before the 13th century which allowed the acquisition of civil rights in the comune simply by submitting to the local tax system or, alternatively, by transferring one's domicile there. Transferring the domicile, acquiring citizenship or submitting to the fiscal system ensured that commercial interests and rights acquired at marriage would be recognised. Breve del Consiglio di Genova 1143, Statuto di Nizza 1162. See Saredo, Giuseppe. *Saggio sulla storia del diritto internazionale privato*. G. Pellas, 1873, p. 80

[130] Lorenzen, Ernest G. "Huber's De Conflictu Legum." *Ill. LR* 13 (1918), pp- 390-391

approach to legal collisions created all kinds of uncertainties. The arbitrary acceptance of jurisdictional competence and the unsystematic and unpredictable application local laws was bound to create unjust results. It discouraged trade. It damaged the interest of those who developed relations with foreign subjects or in accordance with foreign laws, in commercial and other matters.[131] The same contract, the same purchase, the same marriage produced different results in one jurisdiction and in the neighbouring one.[132] Courts in Modena might regard a contract or a will validly entered in, say, Bologna as null and void.[133]

Azo (c.1150-1225) and his pupil Accursius (c.1182-1263) were the first glossators to delve in a thorough manner into questions raised by *collisio statutorum*.[134] Against a background characterised by a variety of local laws and by the lack of obvious Roman sources, the capacity of medieval jurists to pragmatically adapt Roman principles and doctrines to the unique cultural and political context in which they operated, however remotely connected to the matter at hand, proved essential for elaborating suitable rules for settling collisions in a predictable manner. Accordingly, without specific conflict rules and an understanding of the function of the *jus gentium*, Accursius approached conflicts between statutes by relying on the first sentence of the *De Summa Trinitate*, a part of the Justinian's Code. Specifically, he referred to the Edict of Thessalonica (380 BCE) where the Roman Emperor had ordered all peoples (*cunctos populos*) who were subject to his "merciful sway" to embrace the Christian religion.[135]

Clearly, the opening statement of the Edict did not have any link with *collisio statutorum*.[136] Accursius and later medieval jurists nevertheless read in '*cunctos populos*' an implicit acknowledgement that people who are not subjects of a specific territorial power could go on living in accordance with their own laws. Accursius developed this basic principle in the Gloss '*si*

[131] In this context, the so-called '*borghi franchi*', free towns which anticipated by some centuries the free ports, offered foreigners legal protections and financial incentives – such as immunity granted to foreigners who incurred in debts abroad - in the face of greater barriers to international trade. Saredo, 'Saggio', pp. 79-80

[132] The statute of Modena, for instance, provided that female domiciliaries who got married to foreign men would lose their right to inherit family properties, and would have to give up two thirds of all immobile properties they possessed on the territory of the commune. Statuto di Modena, p. 192

[133] Saredo, 'Saggio', Cited in p. 81

[134] Accursius did so in his Glossa Ordinaria, the most authoritative collection of glosses from the time. Lipstein, Kurt. *Principles of the Conflict of Laws: National and International*. Brill Archive, 1981, p. 5

[135] C.1.1.1 Pr. 380 ad Codex Theodosianus, 16.1.2: "All peoples who are subject to our merciful sway, we desire them to live under that religion which the divide apostle Peter has delivered to the Romans."

[136] Far from advancing a principle of tolerance, the Edict actually established Nicene Christianity as the official religion of the Empire and condemned as 'heretics' all those who did not follow the faith and doctrines of the Church of Rome. Some have in fact argued the Edict did not contain any legal principle at all. See also De Nova, 'Historical Introduction', p. 11

Bononiensis'.[137] Here, he argued that municipal powers had only the capacity to make laws for themselves and for their subjects.[138] In line with this idea, Carolus de Tocco (late 12th to early 13th century) emphasised that the automatic application of the *lex fori*, regardless of the circumstances of the litigants, ran against common practice (*contra consuetudines civitatum*).[139] Even though the territoriality of the law had replaced the principle of personality, inherent in Roman law was the idea that civil laws only applied to members of the *civitas*. Carolus thus posited that only subjects of a given authority were bound to follow its laws ('*statutum non ligat nisi subditos*').[140]

3.2 Medieval Eclecticism: The Vague Division between Personal and Real Statutes

The specific meaning which *cunctos populos* acquired in the context of scholarly discussions of cross-border rights provides another illustration of how the content of Roman principles was de-constructed and re-constructed to match the legal-institutional environment. But the principle of *cunctos populos* merely established that the territorial forum was not entitled to apply its laws to every dispute and relation. The question arose about in what circumstances a court should apply the *lex fori* and in what circumstances it should apply foreign law instead.[141] Even though the Glossators moved the first steps in the elaboration of the *lex cunctos populos*, it was once again the Commentators, and once again Bartolus and Baldus, who made the first attempt to develop comprehensive rules for administering conflicting laws.

A defining feature of the medieval approach to *collisio statutorum* - which is known as 'Statutism' - was to look at the object of regulation of statutory provisions to determine their territorial or extra-territorial scope. Accordingly, Jean de Révigny (c.1230-1296) and Pierre de Belleperche (c.1250-d.1308) argued that the spatial reach of statutory laws depended on their 'real' or 'personal' nature.[142] Personal statutes (*statuta personalia*) bound individuals everywhere, territorially and extra-territorially. In contrast, real laws (*statuta realia*) applied to all disputes that concerned immobile

[137] "Argument that if a Bolognese is sued in Mantua he ought not be judged according to the statutes of Mantua to which he is not subject, because [the Edict] says: subject to our merciful sway". Accursius, C.1.1.1

[138] "Now—so went at the time the theoretical explanation of the political developments that had brought about the autonomy of the new municipalities—the Emperor had granted the communes the authority to make their own laws, but, at least in matters touching upon private interests, those laws should not have been applied in a way leading to contradictory results and final uncertainty, confusion, and injustice." De Nova, 'Historical Introduction', p. 10

[139] "Est autem hoc contra consuetudines civitatum quae etiam alios constringere volunt suis statutis. Et est argumentum si litigai Mutinensis contra Bononiensem in hac civitate quod statutum non noceat Mutinensi. Sed quidam contra hoc autem dicunt argumento ilio quod Mutinensis hic forum sequitur conveniendo Bononiensem unde omnes leges illius fori recipiat." Cited in Lipstein, 'General Principles', p. 111

[140] ""Hic nota quod alios noluit ligare nisi subditos imperio suo et est argumentum…" C.3.1.14. Lipstein, 'General Principles', p. 111

[141] De Nova, 'Historical Introduction', p. 10

[142] De Nova, 'Historical Introduction', p. 12

objects, regardless of the persons concerned.[143] This division shows that the idea of a scheme dividing between types of laws was not absent in medieval legal thought. However, it also shows that divisions and sub-divisions advanced were not methodologically pure, conceptually clear or systematically arranged.

This is what emerges from Bartolus' work on *collisio statutorum*. Bartolus further elaborated the division between personal and real statutes as part of his contribution to the theorisation of *lex cunctos populos*.[144] He used the notion that *statutum non ligat nisi subditos* to argue that governments could not automatically apply the *lex fori*.[145] Unlike his predecessors, however, Bartolus did not merely reject absolute territoriality. In his Commentary to the Gloss '*si Bononiensis*' of Accursius, he developed a series of rules indicating what law courts should apply in various cross-border scenarios and when they should recognise foreign decisions.[146] In this way, he developed "the equivalent of modern conflicts rules" in the Middle Ages.[147]

In elaborating such rules, Bartolus also started from personal and real matters.[148] But the structure and contents of the *Commentary* show that the distinction is far less obvious than it is normally assumed.[149] Bartolus divided the *Commentary* in two parts. In the first one, he examined in what cases a territorial statute maintained its force over non-subjects.[150] Specifically, he examined this question

[143] Jean de Révigny held that "Dominus meus dicit: semper est inspicienda loci consuetudo in quo res sunt". His disciple Pierre de Belleperche qualified it by holding that local statutes apply "si consuetudo est realis". Lipstein, 'General Principles', p. 114

[144] Bartolus ad C.1.1.1 (Venice 1602). Bartolus also treated conflicts issues in his commentary on the lex de quibus The Commentary C.1.1.1 was translated by Clarence-Smith, J. A. "*Bartolo on the Conflict of Laws*." Vol. XIV The Am. Jo. of Legal History 157 (1970), Dig. 1.3.32. The most widely available transition of Bartolus is that of Joseph Henry Beale. Beale did not possess sufficient qualifications as a translator of medieval Latin. His transition of the original is rather liberal. Beale's translation was criticised by Ehrenzweig, Albert A. "Beale's Translation of Bartolus." *The American Journal of Comparative Law* 12.3 (1963). This is not an unique case (see next Chapter on Huber)

[145] "Civitas non potest facere statuta de his qui suae juridictionis non sunt." Comment. On Codex. 3.13.2

[146] The following discussion does not treat the question of effects and of enforcement in detail, although it does take a prominent place in the writings of both Bartolus and Baldus. In general, the Italian scholars argued that the duty to recognise and enforce foreign judgements issued by competent courts, like the application of foreign laws in specific cases, was imposed by justice and natural reason. However, neither Bartolus nor Baldus argued that *civitates* were compelled to recognise and enforce all laws in all cases, no matter their effects. Bartolus argued that the statutes of independent city-states were legitimate insofar as they did not explicitly violate the common law to all mankind, *the jus commune*. According to Bartolus, could legitimately restrict the application of a statute which they found to be a "s*tatuta odiosa*" or "*consuetudo odiosa*". Baldus also divided between "*statuta odiosa*" and "*statuta favorabilis*" and held that the former run against nature and against 'natural law' ("contra natural vel rationem naturalem"). Baldus C.1.1.1.1.91 "quidquid disponitur contra naturam rel (sic.) rationem naturalem illum odiosum appellabitur."

[147] K. Lipstein, 'General Principles'. p. 116

[148] Hatzimihail, Nikitas E. "Bartolus and the Conflict of Laws." *RHDI* 60 (2007), pp. 33-35

[149] Clarence-Smith, 'Bartolo', p. 154. Also pp. 174-83, 257-75, See Ikitas E. Hatzimihail, Bartolus and the Conflict Of Laws, 60 Rev Hellenique De International 11 (2007)

[150] "primo utrum statutum porrigat […] ad non subditos" Bartolus ad. C.1.1.1, nu. 13. Starting from the oldest copy from 1471, printed versions of the text generally include "*extra territorium*" within the first question, which I have omitted. The reference 'outside the territory' in the first question neither makes sense nor does it appear in manuscripts of the Commentary. See Hatzimihail, 'Bartolus', p. 18

with respect to international contracts[151], delicts[152], testaments[153] and property.[154] In the second part, sub-divided into a further five sections, he considered when the effects of a statute extended extra-territorially.[155] Although Bartolus placed some importance on the distinction between personal and real statutes - as it might be expected given the importance of the division between actions *in rem* and actions *in personam* - he only explicitly mentioned it in the sixth section, half-way through the *Commentary*.

Even more significant is that Bartolus did not provide a clear explanation of how to determine the real or personal character of statutes. Particularly problematic was ascertaining what law governed succession.[156] Bartolus opted not to choose, as he posited that the spatial reach of succession laws depended on the specific wording and grammatical construction of the enactment.[157] Since statutes sometimes defined immovables as the object of regulation, and at other times the person, the determination of the applicable law was left to contingency.[158] This solution also increased the chances that rulers could change the wording of the statute with an explicit regulatory aim in mind, which would imply what contemporary scholars refer to as a unilateralist approach. The question and treatment of succession and the lack of clarity in the division of real and personal statutes is one - but by far not the only - example of what comes across as a surprising degree of incoherence and sophistry compared to Bartolist standards.[159]

The logics of the division and sub-divisions within the *Commentary* but also the contents and principles advanced in each part are neither conceptually clear nor systematically arranged. As

[151] Bartolus ad. C.1.1.1, nos. 13-19
[152] Ibid. no. 20
[153] Ibid. nos. 21-26
[154] Ibid. no. 27
[155] Ibid. nos. 27-51
[156] Succession is a legal institute which displays a due and contradictory, real and personal nature. One group of medieval scholars, mostly based in France, argued that succession was real, and it was thus governed by as many statutes as the jurisdictions where the assets are physically distributed. Another group disagreed, held that succession feel within the scope of personal statutes and, as such, it was governed by one law, wherever the assets were situated. The problem for Bartolus arose with the English rule of primogeniture, according to which all property was inherited by the first-born son. Examined by Bartolus in his rubric on Permissive Statutes statuta permissoria (nos. 34-43), and specifically in Statutes Facilitating Permissible Acts.
[157] Scholars thought that a statute, by providing that "the first born son shall succeed to the property" should be considered 'personal' because it referred to the person first and to property after. Conversely, if it provided that "the property should be inherited by the first-born son" would be considered 'real'.
[158] As seen, Statutists failed to reach an agreement as to whether immobile property should be governed by real or personal statutes. Some Medieval jurists argued that an ad hoc marriage contract could govern matrimonial property. But the same scholars also disagreed whether the *lex situs* or the *lex domicilii* should apply in cases where the spouses did not enter in a formal agreement. Lorenzen, 'Huber', p. 386
[159] D'Argentré attacked and labelled Bartolus and his method as "childish" and "sophistry". Also in modern times, As argued by Kurt Lipstein, "[n]o distinction could be more fortuitous, no result could be more arbitrary." Lipstein, 'General Principles', p. 118

mentioned above, Bartolus divided the *Commentary* into two parts. The first part appears to be sub-divided between personal obligations and property. But questions relating to landed property are of marginal importance. In fact, Bartolus did not even define property.[160] He referred instead in very broad strokes to "things that are neither contracts nor delicts nor testaments."[161] In contrast, Bartolus discussed at length questions regarding international contracts.[162] Yet Bartolus understood contracts so broadly that its extent may surprise the modern reader. In his analysis of extra-territorial contractual obligations, he chose marital property as an illustration. At the same time, he did not consider the question if certain matters connected to the household should be subject to a special regime.[163]

How can we make sense of this lack of systematic and conceptual clarity? And what does it tell us about the thesis advanced in this work that the conflict of laws, including its medieval precursors, is shaped by the dominant mentality and plays a fundamental role for the definition and organisation of power? Bartolus is often labelled as the scholar who introduced the unilateral method.[164] However, experts often forget that he also provided what might appear as multilateral solutions to legal collisions, or ideas from which multilateral principles could also be extracted. In the first part of the *Commentary*, Bartolus listed various hypothetical cases which appear to be divided by subject-matter. Here, he advanced what come across as 'aprioristic' rules for various conflict scenarios.[165] The second part is sub-divided instead according to the type of statute claiming extra-territorial application:

[160] Bartolus neither referred to a Justinian category of '*jus rerum*'

[161] Bartolus ad. C.1.1.1, no. 27

[162] Also advancing divisions which some might anachronistically read in modern terms as form, procedure, and substance of contract: The word '*forma'*, which appears in nos 26, 47, 49 and 50, is used as a synonym for *solemnitas*. The meaning of the two terms appears much broader than the modern understanding of 'form'. In fact, forma is used in no. 42 in matters of succession to refer to the character, nature or even substance of the things inherited: "certa forma est data bonis ibi positis". Conversely, Bartolus incuded 'procedural' matter within the category of substance. Bartolus ad C.1.1.1, nos. 13-15. Medieval scholars could not have understood the difference between 'form' and 'substance' which Classical Legal Scholars advanced. See the benchmark study, Kennedy, Duncan. "Form and substance in private law adjudication." *Harv. l. rev.* 89 (1975). See also Gordley, James. *The philosophical origins of modern contract doctrine*. Clarendon Press, 1993. Gordley's work on early modern private law indicates that philosophical precepts and characterisations about the nature or essence of a particular type of agreement have used for imposing personal rights and obligations. See especially Chapters 4-5

[163] Although marital property is discussed under the heading of contract, Bartolus did not discuss household matters, for instance the validity of marriage, thus suggesting (see below) that local statutes did not often regulate marriage. In turn, the Commentary does not mention the difference between private and public law and does not discuss its importance in cross-border litigation.

[164] Hatzimihail, 'Bartolus', p. 42

[165] The law of the place of contract, the *lex loci contractus*, governed the form of the contract (its "solemnitas") whilst the law of the place of performance governed rights and obligations arising out of a contract and the suit itself (on contracts, nos. 13-19). The *lex rei sitae* applies on the whole of rights and obligations concerning real property (no. 7). see Lipstein, 'General Principles', p. 116; De Nova, 'Historical Introduction', p. 9. Hatzimihail, 'Bartolus', p. 43

permissive, prohibitive and punitive. Contrary to what is sometimes argued, the second section does not contain unilateral rules, nor does it correspond to a sort of multi-state 'law of personal status'.[166]

Bartolus upheld the general division between real and personal statutes. But he never drew a clear line between them. He went closer than anyone before him to propose aprioristic rules. And yet, he did not develop a fully-fledged multilateral approach. Bartolus was familiar with the many territorial laws whose extra-territorial application was premised on unilateral principles, as demonstrated by the questions raised by succession. In a sense, he accepted their rationale. But Bartolus did not make a good unilateralist either, as he subjected their operation to the *jus commune*.[167] Outside the medieval context, his approach to questions raised by *collisio statutorum* appears incoherent to the point of being "ludicrous".[168] Seen against the rise of medieval legal thought, however, Bartolus may have approached legal collisions in an 'eclectic way' because this was consistent with the pragmatic and informal medieval mentality of which he was the chief architect.

Medieval legal thought did not correspond to a coherent set of axioms. The idea of a grand scheme which would logically and strictly divide between rights and relations was not the main driver of the legal endeavour. The legal thought of medieval scholars was premised on the idea that when law and social reality collide, legal principles must adapt. To draw permanent divisions, to advance definitive solutions and a rigid 'method' to cross-border disputes would have defeated the purpose of the *scientia juris*. Bartolus deliberately avoided the elaboration of inflexible rules because he was trying to develop universal solutions for a dynamic and complex political and legal landscape. This landscape included universal legal frameworks and territorial laws. It comprised civil laws originating in Roman law, but it also encompassed canon law. Individuals were subject to territorial laws. At the same time, they were subject to a variety of laws, universal and local, formal and informal, secular and spiritual.

[166] Hatzimihail, 'Bartolus', p. 47 and p. 53. There, Hatzimihail argued that "the second part of the repetitio (lecture) deals with the matters of personal status and personal capacity." Although the analysis of Hatzimihail is among the most profound and accurate, from the viewpoint of the author, status is a word which does not have the connotation which Hatzimihail suggests here. In fact, Hatzimihail admits that only "with some stretching" these matters could be placed under the category of law of persons (p. 47)
[167] Hatzimihail, 'Bartolus', p. 44
[168] Talking about the ambiguities of the division between personal and real statutes, Juenger held that "[i]n hindsight, much of what the glossators and commentators wrote may indeed appear ludicrous." Juenger, 'General Course', p. 143

3.3 From the 'Roman Household' to Canon Law: Marriage as an Informal Covenant

The lack of systematic coherence and logical arrangement typical of medieval legal thought reflected the high degree of legal pluralism and the political complexity on the ground. It is nevertheless possible to detect in the work of medieval jurists - among both civil lawyers and canon lawyers - the presence of standard organisational schemes, deeply-held ways of reasoning and characteristic arguments cutting across sources and legal orders. As far as civil law and canon law are concerned, some historians have underlined how the secular order of medieval states and the 'spiritual order' of the church influenced one another at administrative level.[169] But the existence of a common mentality also transpires at the deeper level of the legal mentality. This is what emerges from an examination of the conceptualisation of marriage by canon law authorities and by the approach of medieval civil lawyers to questions raised by cross-border marital matters in the early Middle Ages.

As seen above, Bartolus did not specifically discuss household matters in the *Commentary*. Although he included marital property under the heading of contract, he did not consider questions concerning the validity of marriage across borders. This is because, in the early Middle Ages, local powers seldom regulated marriage and its dissolution by statute. In general, the creation and dissolution of marriage was governed by canon law, which, in principle, had universal scope and validity. Bartolus was also one of the main contributors to the debate on the legitimacy of the canon law.[170] The claim of the Church to universal authority, like that of the Empire, potentially clashed with the legislative and adjudicative independence of local governments and *civitates*. Bartolus did not take a doctrinal stance against the pope and against the jurisdictional claims advanced by ecclesiastical authorities, also in the case of marriage. He argued instead that canon law could coexist with other legal orders.

In the Middle Ages, however, neither state orders and nor church authorities wielded complete authority over all subjects and over all persons. Marriage as well as household relations in general were subject to a variety of norms, secular and spiritual, territorial and personal, formal and informal. In the historiography it is instead often assumed that the same set of canon laws uniformly and systematically applied throughout the Christian world.[171] It is also claimed that, throughout the

[169] Canon law and Roman law both went through a process of systematisation in the following centuries. The church, in a sense, as the most advanced administrative structure, inspired the state model. The church of Rome has a central dministration. The Church had also given itself written legislation, with the codification of the Decretum Gratiani. In addition, there were administrative acts, admonition by letters etc. However, Boniface VIII (1235-1303) in his Bulla Unam Sanctam Ecclesiam, 1302, declared the supremacy over the mundane, secular power.
[170] See on Bartolus and this question, Ryan, 'Bartolus', pp. 65-89
[171] Hatzimihail, 'Bartolus', p. 52; in general, see Heirbaut 'The historical evolution', pp. 24-25

Middle Ages, ecclesiastical authorities possessed exclusive jurisdiction over 'family matters', and most notably over marriage and its dissolution. Several critical historical studies show that the jurisdictional competence and the legislative autonomy of the Church of Rome were not absolute.[172] Although local governments seldom questioned the authority of the church in marriage matters, medieval jurists sometimes affirmed the jurisdiction of civil authorities over marriage and its dissolution.[173] In addition, as in Roman times, there was no such thing as 'family law' or a 'marriage law' in the Middle Ages.

In the medieval age, a variety of rules of different origins governed household relations, and especially marriage, in a spirit of pragmatism. In general, it is true that civil lawyers accepted ecclesiastical authority. It must be noted that, in turn, canon lawyers drew on Roman law to conceptualise and regulate household matters that fell within the subject-matter jurisdiction of ecclesiastical courts. The influence of Roman law on canon law authorities - and on medieval theologians - is especially visible in the case of marriage.[174] The same consensual and informal logics that governed *nuptias* in Roman law re-emerged in the pre-classical period.[175] Indeed, some early Christian theologians had emphasised the sacramental aspects of the marriage bond.[176] However, from the earliest centuries of the Christian era, ecclesiastical authorities themselves expressed the view that the consent of the parties was the constitutive element of marriage.[177] We thus have sufficient evidence to be able to claim that the Roman conception of marriage was as influential on civil lawyers as it was on canon law authorities.

Even though early canon sources do not specifically refer to the 'contract' of marriage, theologians and canonists started referring to marriage with the closely-related terms of *pacta* and *foedus* from the 10th and 11th centuries.[178] The conceptualisation of marriage as an informal and consensual union

[172] Boswell, John. *Same-sex unions in premodern Europe*. Vintage, 1995, Chapter 4, View of the New Religion in Premodern Europe, explores the theme of church involvement in marriage.
[173] Marsilius of Padua famously argued in his De Matrimmonio Tractatus de iurisdictione imperatoris in causis matrimonialibus from the mid-14th century that the Emperor and civil authorities had jurisdiciton over the dissolution of marriage and questions regarding consaguineity. The treatises vindicated the decision of Louis IV of Bavaria (1287-1347) to dissolve the marriage between Margaret Maultasch (1318-69), countess of Tyrol, and John Henry of Luxembourg (1322-75), and to recognise the effects of a marriage contracted by Margaret and his son Luis V, Duke of Bavaria (1315-1361), two acts which were opposed by the Papal authority.
[174] On the influence of the contractualistic view of Roman marriage on customary practices, see Rava, 'Il requisito', pp. 23-28. See also Navarrete, U. "Influsso del diritto romano sul diritto matrimoniale canonico." *Apollinaris Roma* 51.3-4 (1978)
[175] Kennedy, 'The Rise' p. 163. In contrast, Classical contract will be founded on tightly-defined spheres of personal autonomy.
[176] St Augustin (354-430) was the first proponent of the sacramental nature of marriage.
[177] For instance, St. Amborose (c. 333-397) argued that marriage was in principle indissoluble, but also held that the consent and not the consummation of marriage was constitutive of the marriage.
[178] Rava, 'Il requisito', p. 29

was formalised by Peter Lombard (1096-1160) who famously held that the mere exchange of the words *de praesenti* sufficed to constitute a valid marriage.[179] Significantly, early medieval canon lawyers borrowed from Roman law the maxim *consensus facit nuptias*.[180] As in Roman law, so in medieval canon law, marriage was not created by the performance of specific rituals or by a public act, but by the consent of the spouses. From the early Middle Ages until the pre-modern period, marriages were thus regularly contracted *verborum obligation*, without witnesses and, in the case of minors, also without parental blessing.[181] What is more, marriage was also for long regarded as dissolvable in Christian kingdoms and empires.[182] Even when and where the dissolution of the marriage bond was officially prohibited, sanctions were light and punishment infrequent.[183]

Neither ecclesiastical authorities nor Christian rulers establish strict conditions for contracting marriage or invested resources for enforcing official norms. The lack of enforcing capacity led to the proliferation of informal unions, 'marriages' entered to by the parties outside the reach of civil laws or official canon doctrines. The strength of private ordering in marriage and household matters in the pre-modern period was not always tolerated by public powers. Informal unions were sometimes brought to trial because cohabitation (and bigamy) constituted a threat to the ideal of marriage as a sacred bond which required fidelity to produce legitimate progeny.[184] In some cases, Christian kings and emperors also criminalised and punished dissolution by agreement and remarriage after divorce.[185] However, for most jurists and ecclesiastical authorities, the performance of solemn rites in a public place was not required for concluding a valid marriage. If the spouses had consented to the union, explicitly or tacitly, 'illicit marriages' were regarded as valid.[186] Some theologians claimed in fact that cohabitation and consummation without verbal consent sufficed to create a valid marriage.[187]

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[179] Book IV of Lombardus's Setences. Rava, 'Il requisito', p. 37. Unlike the *sponsalia*, 'parola de future', which merely constituted a promise of marriage.

[180] Which is in fact often erroneously attributed to canon law sources. Rava, 'Il requisito', pp. 22-23

[181] Rava, 'Il requisito', p. 38

[182] See Noonan, John T. "Novel 22", in Bassett, William W., ed. *The bond of marriage: an ecumenical and interdisciplinary study*. University of Notre Dame Press, 1968, pp. 44-46

[183] For Noonan, the prohibitions of divorce under the rule of Roman Christian emperors "lacked teeth", ibid. p. 53 Sanctions were often property-related. Their effects were limited to the most affluent classes.

[184] The Augustinian view of marriage can be considered as the most authorities view in this respect. In The Good of Marriage (404 a.C.), Augustine held that "male and female were from the creation made both to desire one another and to live in friendship and physical intimacy." Although marriage was merely legitimate whereas celibacy was seen as perfect, marriage for Augustine was good because it produced "progeny, fidelity and a sacred bond." Olsen, Glenn W. "Progeny, Faithfulness, Sacred Bond: Marriage in the Age of Augustine."." *Christian marriage: A historical study* (2001), p. 109

[185] It is significant that Justinian, although established penalties for divorce by mutual consent and by repudiation, also declared that "of those things that occur among men, whatever is bound is soluble." Ibid. p. 57

[186] Rava, 'Il requisito', p. 19

[187] Those engaged in a relationships *sine verbis* could validating their marriage simply on the basis of an equivalence between consent and consummation (*copula*). Initially, there was no consensus among canonists regarding when the

Hence, in the medieval age, the legality of marriage was based on the intent of the spouses, which could also be expressed in tacit form. The regulation - but also dissolution - of marriage in the Middle Ages was premised in many if not most European jurisdictions on the same informal and consensual premises that we have found in ancient Roman sources.[188] Throughout the Christian world and up until the classical age, private and informal ordering more than official laws and doctrines, *favor matrimonii* more than criminalisation and punishment, governed the creation of marriage, its dissolution, but also the marriageable age, the choice of partner and, as we shall see below, even property and other effects and incidents of marriage.[189] However, the message is often passed out that in the Middle Ages as in the Early Modern Period and in the 18th and 19th centuries, the Church always exercised a strict monopoly over household matters, and that marriage was governed by a special set of rules.

The Fourth Lateran Council, convened in 1213 by Pope Innocent III (1198-1216), may have contributed to popularise this inaccurate view. Ecclesiastical authorities had become increasingly aware that the frequent solemnisation of illicit, but valid, marital unions and the systematic violation of church doctrines and canon laws brought discredit to the church and undermined its authority. The Council addressed the question of legitimate impediments in marriage. It established for the first time uniform procedures which all ecclesiastical authorities should follow and that all Christian couples should observe when getting married.[190] Canon 52 introduced formalities as well as penalties. The Council gave ecclesiastical authorities the mandate to ensure that marriages were effectively contracted by parties without coercion or deception. Courts could nullify marriages that did not conform to official doctrines. They could also declare them *void ab initio* in case of impotence or insanity.[191]

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marriage was constituted. Whether with the consent or after consummation, as proclaimed by St. Crisostomo and Gratian, who, it is noteworthy, used the word 'contractus' to refer to marriage. Their views were adopted by the school of Bologna. Rava, 'Il requisito', pp. 29-36

[188] For an account of the tolerance displayed by church authorities to practices of divorce in France, in Germany, in England, see Brissaud, Jean. "A History of French Private Law", Trans. Rapelje Howell, South Hackensack, Rothman Reprients, 1878(1968), pp. 143-144; Hubner, Rudolph, "A History of Germanic Private Law", South Hackensack, Rothman Reprients, 1918(1968), pp. 614; Pollock, F. and Maitland, F. W. "*The History of English Law Before the Time of Edward I: In Two Volumes*", Vol. 2, Liberty Fund, 1895(2010), pp. 392-393

[189] Including questions regarding the legitimacy of the offspring See Glendon, Mary Ann. *The transformation of family law: State, law, and family in the United States and Western Europe*. University of Chicago Press, 1989, pp. 19-34.

[190] Canons 50-52 decreed in 1215 that when a marriage was to be "contracted" (sic.), the names of the spouses had to be publicly announced to the parish by the clergy. In addition, it stipulated that a suitable time had to be fixed for a public ceremony to take place. After the publication of the banns of marriage, anyone who wished to show that a lawful impediment to the marriage existed, could do so at will.

[191] The greater rigidity of rules on dissolution was somehow mitigated by the contemporary relaxation of rules under which marriages could be nullified. A variety of grounds were included in canon law for which a marriage could be annulled, among which impotence, insanity, and blood-relation. The proliferation of grounds for annulment could be explained by "the theory of marriage" but also as "related to money and power in the sense that annulments gave the Church a source of revenue and a certain amount of control over families; a human response to the desires of some

If one only looks at the objective of the Council and at the letter of the law, one is driven to assume that couples from the 13th century conformed to official procedures or that, for a marriage to be considered valid, it had to be celebrated in compliance of such procedures. However, Canon law 52 itself demanded the recognition of marriages which violated the law "…for it is preferable to leave alone some people who have been united contrary to human decrees than to separate, contrary to the Lord's decrees, persons who have been joined together legitimately." After the Fourth Lateran Council, the mere exchange of vows 'in the present tense' did not give rise to automatic rights, whether in civil or ecclesiastical courts.[192] However, there remained a strong presumption in favor of marriage validity. This made the formal requirements introduced by the Fourth Lateran Council optional rather than mandatory. Pope Innocent III himself expressed the view that consent sufficed to create a valid union.[193]

From the early centuries of the new millennium, more people started to exchange their promises off church premises to give their marriages sacramental validity. However, informal marriages were considered as valid as those that followed the official procedures. The prevalent opinion among canon lawyers remained that no specific form existed for contracting a valid marriage. In accord with the maxim that *consensus facit nuptias*, the spouses' consent alone was required to constitute a marriage under canon law.[194] In the following centuries, ecclesiastical authorities only intervened in marriage matters at the request of the couples.[195] Most proceedings were started at the request by the spouses for the nullification of marriage, nullification offering some form of relief to parties who were trapped in unwanted unions. Church authorities would not take the initiative to annul a marriage to which the parties consented, even if carried out in violation of the official procedures.[196]

individuals to escape from intolerable situations and to remarry; and a "safety valve," substituting for the necessary but missing institution of divorce." Glendon, 'The Transformation', p. 27

[192] See Probert, Rebecca, "The Misunderstood Contract Per Verba De Praesenti", *Warwick School of Law Researc*h, (2009) and Probert, Rebecca. *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment*. Cambridge University Press, 2009, Chapter 2

[193] In a private letter exchanged with the Bishop of Brescia. Rava, 'Il requisito', p. 41

[194] Richard Helmholz and others pointed out that consummation was required. See Helmholz, Richard H. "Recurrent Patterns of Family Law." *Harv. JL & Pub. Pol'y* 8 (1985)

[195] Brundage, James A. *Law, sex, and Christian society in medieval Europe*. University of Chicago Press, 1987 (2009) pp. 501-502, 514-516; Witte, John. "The Reformation of Marriage Law in Martin Luther's Germany: Its Significance Then and Now." *Journal of Law and Religion* 4.2 (1986), pp. 293-294

[196] In many circumstances, even the unions of co-habiting couples was recognised as valid. The legitimacy of children was at stake. Church authorities were aware that unscrupulous persons might be tempted to raise suspicion about the parties' capacity to marry, to raise a claim for a bigger share of the property of a deceased to which they would otherwise be entitled. As Canon 51 of the Fourth Lateran Council proclaimed, "Anybody who maliciously proposes an impediment, to prevent a legitimate marriage, will not escape the church's vengeance."

The Fourth Lateran Council therefore reveals what was to become a common pattern in the following centuries, the withdrawal of marriage "from the private or semi-private spheres of home, domestic rite, or unwitnessed promise and [the effort by the authorities] to bring it into the public space".[197] At the same time, canon lawyers after the Council did not think of matrimony as a special institution whose validity was contingent on the fulfilment of specific procedures, but, *simpliciter*, an informal covenant.[198] In the following centuries, canon lawyers and ecclesiastical authorities held on to this informal and consensual view.[199] Among them was Pope Gregory IX (1227-1241) who is known for his attempt to homogenise the variety of practices that existed in the Christian world.[200] Consistently with the 'traditional' view, the *Decretales* of Gregory maintained that simple and free consent constituted marriage. Despite some efforts to bring marriage under public control, the 'traditional' view remained prevalent.

3.4 Consent: Civil lawyers and the Regulation of Marriage Within and Across Borders

Before the Council of Trent, "the institution of matrimony was still relegated to the margins of what was considered sacred".[201] Marriage and household relations were governed by informal and consensual logics. It is thus significant that, until the 16th century, canon lawyers used the specific word '*contractus*' to refer to marriage.[202] We can find the same consent-based and pragmatic

[197] Olsen, Glenn W. "Marriage in Barbarian Kingdom and Christian Court: Fifth through Eleventh Centuries."." *Christian marriage: A historical study* (2001), p. 172

[198] The contrary argument is often put forward. Witte, John. *From sacrament to contract: Marriage, religion, and law in the Western tradition*. Presbyterian Publishing Corp, 2012

[199] d'Avray, David. *Medieval marriage: symbolism and society*. Oxford University Press, 2005. p. 65

[200] Gregory IX was responsible for the codification of the *Decretales*, the second book or so-called *Liber Extra* of the body of canon law, the *Corpus Juris Canonici*. Since the Corpus iuris failed to take account of the problems faced by canonists, canon lawyers started creating their own body of laws from the twelfth and thirteenth centuries. The first book was called the *Decretum*, although it consisted of a scholarly work and not a piece of legislation. The *Dectretum* was a collection of dispersed and conflicting sources of Church law codified by Gratian in the mid-twelfth century. From the mid-12th century the *Decretum* started being used as the most authoritative source of canon law in the Italian peninsula, in France and in the Anglo-Norman contexts. It also acted as a new impulse for the scientific systemization of canon law. Duve, Corpus Juris Canonici, p. 219. However, the *Dectrum* did not solve all legal problems and made the adoption of the Liber Extra necessary. The *Decretales* consisted of influential judgments and authoritative opinions which Gregory collected and distributed in 1234 to European universities to homogenise the variety of practices that existed in the Christian world. The material was divided between *iudex*, judge, *iudicium*, procedure, *clerus*, clergy, *sponsalia*, marriage, and *crimen*, crime. Gilchrist, John, "Canon Law" in Mantello, Frank Anthony Carl, and Arthur George Rigg, eds. *Medieval Latin: an introduction and bibliographical guide*. CUA Press, 1996., pp. 241-240. Gregory's effort represented the aspiration by the Church of Rome to organise 'formally and rationally' canon law after the manner of medieval Roman law experts. Unsurprisingly, the conceptualisation of marriage put forward in the *Liber Extra* (The Liber Extra contained the judgements of Pope Alexander III (c.1105-1181) who had been professor of Canon law) did not depart from that of his predecessors and from the prevalent position among civilians. In agreement with '*consensus facit nuptias*', the *Decretales* maintained that the validity of marriage became binding with the consent of the spouses. In fact, the principle *pacta sunt servanda*, which will have crucial importance for the development of pubic international law, was codified in Lib. I, Tit. XXXC, Cap. I

[201] Duby, Georges. *The knight, the lady and the priest: the making of modern marriage in medieval France*. University of Chicago Press, 1993, p. 35

[202] Rava, 'Il requisito', p. 42

approach to marriage evocative of the Roman tradition also among civil law authorities. The earliest civil law experts who engaged with questions concerning its constitutive elements that the consent of the parties sufficed to create a valid marriage. Although they did not consider it a *contractus rerum*, some glossators explicitly included marriage within the category of contracts.[203] Cino da Pistoia (1270-1336), the master of Bartolus, maintained that marriage is like any other contract. The only difference, he argued, is that 'things' (*rerum*) are sold or exchanged in standard contracts, whereas when they contract marriage, the spouses become themselves the object of the exchange.[204]

The pragmatic and informal approach which led canon lawyers to consider marriage a consensual covenant which results from an explicit or tacit agreement between the spouses appears an essential element of the medieval approach to household matters.[205] The overriding importance of consent that can be observed in the conceptualisation of marriage by canon law authorities can also be detected in the approach to disputes concerning the relations between the spouses *sensu latu*. The dominant consensual and informal approach is especially visible in questions regarding the cross-border effects of marriage settlements. Although the universal outreach of canon law meant that the validity of marriages was not debated in civil courts or by civil lawyers, the regulation of other aspects of household relations by local law did give way *collisio statutorum*, as cross-border disputes typically concerned matrimonial property.

Medieval jurists who discussed marriage settlements chose to include marriage within matters regulated by personal statutes and limited the application of the *lex fori* to exceptional cases. Accordingly, Bartolus used the example of matrimonial property to illustrate his approach to questions raised by cross-border contractual obligations.[206] He argued in his *Commentary* to the Gloss '*si Bononiensis*' that the validity of a marriage contract and its effects were to be judged in accordance with the personal law of the parties.[207] Adopting what was to become the basic rule governing international contracts, he posited that a contract of marriage which was good by the personal law of

[203] Rasi, '*Il diritto matrimoniale nei glossatori*. Giuffre, 1939, pp. 128-158
[204] Rava, 'Il requisito', p. 51, See also Vaccari, P. *La formazione del diritto romano e la sua espansione*, Viscontea, 1960, pp. 151-160 for more details on Commentators.
[205] One should not underestimate the 'social' and 'informal' elements of the origin of contract. One could draw on the argument of Émile Durkheim about the extra-contractual foundations of contract. For instance Émile Durkheim, *The Division Of Labor In Society*, George Simpson trans., Free Press 1893(1964) where he declared that "everything in the contract is not contractual… . [A] contract is not sufficient unto itself, but is possible only thanks to a regulation of the contract which is originally social."
[206] Given the wide conceptualisation of contract in pre-Classical legal thought, it is quite natural that questions of marital property would fall within the scope of the category of contract. Hatzimihail, 'Bartolus', p. 52
[207] Even when they concerned property. The rule advanced by Bartolus is nevertheless far from straightforward. He may have also argued that marriage contracts concerning matrimonial property should be governed by the law of the husband's domicile. For Lorenzen, 'Huber', p. 385. However, this view originates in the ambiguities which I underline below.

the parties should be regarded as good everywhere and, in addition, that its effects should be recognised and enforced everywhere, even if the terms of the contract violated the *lex fori*.[208]

By default, canon law regarded consent, formal or tacit, as the constitutive element of marriage. Since canon law considered marriage a consensual agreement, Bartolus did not have to engage with complex juridical and philosophical questions regarding the nature of marriage. He simply included marriage settlements within matters regulated by *statuta personalia*, thus ensuring their extra-territorial application. Starting from the overriding importance of the agreement of the parties, medieval jurists could therefore leave to the parties the question of what law should govern the substance of marriage contracts, i.e. how the terms of contracts, including those governing property, were to be construed. An illustrious example of a decision subscribing to this view can be found in the collection of judicial opinions of Alfonso X el Sabio (1221-1284), *Siete Partidas*. Concerning the marriage of 'El Cid', the Spanish King held:

> It happens frequently that, when a husband and wife marry, they agree in what way they may hold the property which they gained together; and, after they are married, they go to dwell in some other country, where a custom, opposed to said agreement or contract which they have entered into, is practice …. We decree that the contract which they made with one another shall be valid in the way which they agree upon, before or at the time when they married, and shall not be interfered with, by any contrary custom existing in the country where they went to reside.[209]

What is of interest in the passage above is not so much the specific rule upheld by Alfonso X.[210] What matters for this genealogical reconstruction is that the words used by the Spanish king suggest a similar conceptualisation of marriage among civil law and canon law authorities, among Italian and Spanish jurists. In agreement with the medieval characterisation of marriage as a consensual agreement, Alfonso assumed that the spouses must be free to stipulate contractual obligations regarding their property, that their intent was decisive for determining what law governed the

[208] "There is a statute at Assisi, where a *contract* of dowry and marriage is celebrated, that if the wife dies without children, the man shall enjoy the third part of the dowry. But in this city of Perugia, from which the husband comes, there is a statute that the husband shall enjoy half. Which governs? Certainly the statute of the husband's domicile." (para. 19). Here, the law of the domicile governs since it is assumed, in agreement with the custom, that the wife would follow the husband.

[209] Partida IV, tit. 11, ley 24. Juenger, Friedrich K. "Marital Property and the Conflict of Laws: A Tale of Two Countries." *Colum. L. Rev.* 81 (1981), p. 1065

[210] In fact, like Dumoulin's judicial opinion in the Consilium, examined below, the meaning of this passage may be construed to indicate that the law of the first matrimonial domicile applies. But also, it could be used to refer to the *lex loci*. But also, that of a free choice among several laws.

"contract of marriage" and the extent to which the law of other countries could stand in the way of the recognition of the validity and effects of a valid marriage contract. The courts of countries where the parties would move must take in consideration the intent of the parties to voluntarily subject to a specific law. If the marriage contract was valid according to such law, such contract would have to be regarded as good everywhere.

This approach, which reveals the prevalent consensual conception of marriage and the fundamental importance of intent in medieval legal thought, can be found in the opinion of legal scholars writing from different European jurisdictions, and even among jurists who rejected some aspects Bartolist thought.[211] Among them was Charles Dumoulin (Molinaeus, 1501-1566).[212] Dumoulin famously developed the principle of 'tacit agreement' in his judicial opinion contained in the *Consilium* 53 of 1524. Dumoulin advanced this principle to solve a dispute which was centred around the question of which regime should regulate the real property of a couple who had relevant legal ties in several French regions, each governed by a different law.[213] In accordance with the division between real and personal laws, the real law, i.e. the law of the place where the property was located, should have applied to all disputes and relationships that concerned immobile objects.

Dumoulin posited instead that "[i]t is not inappropriate that the [personal law] should thereby, indirectly, have a ubiquitous effect, even with respect to goods and property that have a situs outside the territory … of the parties' domicile." Of course, as with the opinion expressed by Alfonso X el Sabio seen above, there is room for interpretation as to what specific rule Dumoulin wanted to

[211] Dumoulin also subscribed to the division between real and personal laws. iii, § 2 and 3, cited in Ancel, Bertrand. "Les conclusions sur les status et coutumes locaux de Du Moulin, traduites en français." *Revue critique de droit international privé* 100.1 (2011). However, for Dumoulin solution to collisions between customary laws could not be the same as in the Roman *jus commune*. For Dumoulin as for most French jurists, the abstract and vague division between personal and real matters foreseen by Bartolus could provide definitive answers to collisions between French customary laws. Bartolus strived to impose checks and balances to the exercise of power by the sovereign by specifying the limits of territorial and personal competence. For Dumoulin, the solution could not rest on the object of statutes, since customs and statutes had an altogether different nature. Bartolist ideas regarding the common law of the former Roman Empire and its influence on the solution to *collisio statutorum* might have worked for Italy, or some other European polities, but their application to the customary regions of France did not make sense. Thireau, Jean-Louis. *Charles du Moulin: Étude sur les sources, la méthode, les idées politiques et économiques d'un juriste de la Renaissance*. Diss. Droz, 1980, p. 95

[212] Dumoulin was known for his excellent Romanist erudition, and he wrote on legal collisions by way of a commentary to the De Summa Trinitate. Dumoulin, "In codicem Justiniani," I, 1, "conclusiones de statutis aut consuetudinibus localibus;" "Opera," III, 554, ed. 1681. A translation together with a short introduction is available in Ancel, 'Les Conclusions'

[213] This famous judicial opinion concerned a conflict between the laws, customary and written, of two French provinces, Paris and Lyon. Litigation was started by the heirs of one married couple, the de Ganey. The couple had contracted a marriage in Paris, where they were also domiciled. After the marriage, Mr. de Ganey acquired real property in Lyon. Two distinct set of laws claimed to govern matrimonial property, and each contained substantially different provisions. The droit écrit of Lyon, the *lex loci situs*, followed the Romanist principle, and provided for separate property. The customary law of Paris, the *lex domicilii*, provided instead for community of property.

advance.[214] What can be safely argued is that the essence of Dumoulin's claim in the *Consilium* 53 is that the force of an agreement between the parties enabled them to select a specific matrimonial property regime which may or may not correspond to the law of the territory in which the property was located. When confronted with a dispute concerning matrimonial property, courts ought to give primary importance to the agreement between the spouses, even when the agreement did not take the form of a written contract, hence the notion of 'tacit' or 'informal' agreement.

Recent scholarship has noted that the greatest potential innovation by Dumoulin lay not so much in the notion of tacit agreement, but in the fact that he did not depart from the object of the statutes in making his case, but from the specific juridical relation at the centre of the dispute, which suggests that Dumoulin, like Bartolus, 'anticipated' the aprioristic method.[215] Others have read in the principle of tacit agreement the first instance in which a jurist claimed that parties should be free to select a specific legal regime for establishing personal rights *latu sensu*.[216] Some have gone as far as claiming that Dumoulin actually upheld for the first time the principle of party autonomy.[217] Although it is possible to interpret Dumoulin's contribution in different ways, it could be argued that the French scholar, like many of his contemporaries, resorted to the overriding importance of the intent of the parties to provide authority and legitimacy to his legal opinion.

Medieval jurists who wished to justify a rule of law almost systematically referred to the intent of the parties.[218] The notion of tacit agreement is consistent with the principle of implied consent, one of the main features of pre-classical legal thought according to Duncan Kennedy.[219] Medieval jurists thus assumed that 'household' and 'commercial matters' were governed by the same logics and rationales.

[214] From the circumstances that led to the dispute, Dumoulin inferred and argued that the parties had entered into a 'tacit agreement' which established that all their property, including the real estate assets located outside Paris, were to be governed by the Parisian coutume. In fact, it is also possible that Dumoulin simply intended to give substance to his opinion that the *lex domicilii* should also apply to immovable property located outside the forum's jurisdiction. The 'tacit agreement', which referred to the law of the husband's domicile in the case of the de Ganey, would have provided a convenient device to support this reasoning. Juenger, 'A Tale', p. 1062

[215] Dumoulin considered the question at the centre of the Consilium 53 a simple case of contract of marriage governing property. Part of the literature has thus pointed out that Dumoulin's approach anticipates the methodological revolution brought about by the 'multilateral method' in the 19th century. Bureau, Dominique and Muir-Watt, Horatia, *Droit international privé*, Partie générale, *Thémis*, 2007, p. 342

[216] See, e.g., Batiffol, Henri, and Paul Lagarde. *Traité de droit international privé*. Vol. 1. LGDJ, 1993, p. 259 and Cheshire, G. and North, P., Private International Law, Oxford, 1979(10th ed.), p. 21

[217] Basedow, Jürgen. *The Law of Open Societies: Private Ordering and Public Regulation of International Relations: General Course on Private International Law*. Martinus Nijhoff, 2013, p. 236. recently Ancel. 'Les Conclusions'; earlier Juenger, 'A Tale'; Lipstein, 'General Principles', p. 120; Meijers goes even further back attributed to the first use of party autonomy to Butrigari. In fact, if it is taken as the bare choice by the parties to indicate the applicable law, then optio juris of 6th century might be the precursor of party autonomy. This view is, however, not shared by the author. Meijers, Eduard Maurits. *L'histoire des principes fondamentaux du droit international privé à partir du Moyen Age, spécialement dans l'Europe occidentale*. Martinus Nijhoff, 1934, p. 610

[218] Kennedy, 'The Rise', p. 163

[219] Kennedy, 'The Rise', esp. Chapter IV, 'Pre-Classical Private Law: The transformation of Contract'

In fact, the example of matrimonial property demonstrated that, starting from marriage contracts, jurists could extract simple and effective principles for the regulation of contractual relations in general. The example of marriage contracts showed that the validity of a transaction as well as its effects, within and across borders, could be reduced to a verification of the intention of the parties. Regardless of their nature, interpersonal relations would acquire legal force by the force of consent of the parties. As Alfonso X put it, a contract agreed upon by the parties "shall not be interfered with".

4. The Governance Function of the *Lex Cunctos Populos*

The development of conflict principles by medieval jurists must be placed within the universal order in which they operated. Medieval legal scholars generally agreed that no human decree should stand in the way of the recognition of a validly-consented marriage. If it is valid in the jurisdiction where it was made, a contract of marriage, like any other contract, and the rights and obligations produced by it must be recognised in all jurisdictions that fell within the scope of the *jus commune*. The *jus commune* corresponded to one version of the widely shared legal view that granted a degree of unity in the pre-modern period despite legal fragmentation. Bartolus thus embedded the law governing cross-border disputes in the idea of the *jus commune*.[220] But the jus commune was merely one dimension of the shared tradition. Hence, Bartolus considered the *jus commune* to be part of the *jus gentium*, what he regarded as a form of natural law.[221]

In the *Siete Partidas*, Alfonso also held that *jus gentium* was the law common to mankind and the law natural which applies to all men.[222] Alfonso's view is consistent with that of Thomas Aquinas (1225-1274) who maintained that the *jus gentium* consisted in the sum of the legal principles that all peoples have in common.[223] For Aquinas, Bartolus and Alfonso, self-governing bodies may have emancipated themselves from the control of the empire, but remained subject to a legal framework that was common to all people and drew its force from natural reason.[224] Although the original function of the *jus gentium* was forgotten, its character of overarching framework of higher moral value that bound

[220] With reason, it has been said that Bartolus "lives and breathes" the *jus commune*. Hatzimihail, 'Bartolus', p. 68
[221] Hatzimihail, 'Bartolus', p. 66
[222] Law Second of Book I
[223] Aquinas also added that *jus gentium* and *jus civile* both derived their authority from natural law "by way of conclusions from the premises" and "by way of determinations of certain generalities." Trnavci, 'The Meaning and Scope', pp. 204-206. "In his view, the jus gentium consisted of conclusions drawn from the first principles of natural law, whilst the jus civile was made of positive and general prescriptions tailored to contingent circumstances "determinations of means in a general way by reference to the generality of contingent circumstances."
[224] Those enactments which conflicted with the overarching framework had neither moral nor legal force Pound, 'Jurisprudence, Vol. 2', p. 40

particular laws re-emerged and was interlinked with the idea of the *jus commune*.[225] Hence, the territorial or extra-territorial effect of laws was to be determined in agreement with principles, divisions and ideas that applied to all legal orders.[226] In other words, questions raised by *collisio statutorum* were to be solved in accordance with ideas and principles which made up medieval legal thought.

The first chapter of this genealogy of European private international law suggests that the dominant mentality among medieval scholars made it possible to develop universally valid principles of the *lex cunctos populos*. Does it also provide sufficient evidence to indicate that the law governing cross-border relations constituted across legal history an *instrumentum regni* since the Middle Ages? As the above discussion shows, among the most important divisions in the medieval legal world was that between personal and territorial matters. Through this division, I would argue that *lex cunctos populos* consolidated the two constitutive elements of medieval sovereignty, the territorial and the personal.[227] On the former, the rule upheld by medieval jurists that real statutes always governed immobile property guaranteed direct 'public and political' control over 'things' located within a sovereign territory.[228] On the latter, the law governing cross-border interpersonal relations merged the person with territory and strengthened the correspondence between territorial jurisdiction and civil membership.

The rise of the territorial order spearheaded a change of enormous material and symbolic value in European legal and political history, and it provided further impetus to the ascendancy of the principle of territoriality. The territoriality of laws immobilised persons to jurisdictions and *civitates*. Law, in a sense, came to be possessed by territory. The person became an appendix to territorial orders within self-contained legal and political entities. The personal law system which had the person and the group at its centre progressively lost in importance and made room for territorial laws which applied to those who worked or resided on the territorial jurisdiction, whether they 'belonged' to the civil

[225] The *jus naturale* and the *jus gentium* bound all peoples, Roman emperors and independent cities, Christians and foreign people ('*populi extranei'*), Bartolus held in the Gloss on Dig. 49.15.24. There, he divided humankind into five genera gentium. Bartolus, however, also specified that there are two main groups: *populus Romanus* and *populi extranei*.
[226] As argued by Alex Mills: "The Statutist approach addressed the conflict between legal systems, between foreign and local law, by attempting to develop a principled, analytical, 'natural' law way of determining which laws had extraterritorial effect (and in which circumstances), and which laws were territorial in their operation. It is worth emphasizing again that this is a conception of private international law as part of a universal and international system of law – the division between types of laws is intended to reflect a natural division which operates in all legal systems." Mills. 'The private history', p. 12
[227] As argued by Schmitt, the state is necessarily grounded in the territory, byt must also have a personal element. Schmitt, Carl. *Der Nomos der Erde im Völkerrecht des jus publicum Europaeum*. Duncker & Humblot, 1997
[228] The cogency of this rule rested entirely on the territorial dimension of the state which was in the making. State interest equalled the patrimonial interest of the sovereign. Jurisdiction corresponded with the extension of the sovereign estate.

community or not. Through the *lex cunctos populos*, Statutists consolidated and articulated the independence of territorial powers.[229] The *lex cunctos populos* contributed to relocate the space of the government, and it reshaped the relationship between government and governed.

And yet, despite its importance, the magnitude of the change should not be exaggerated. In the early Middle Ages, territoriality itself was also 'fluid'. Within the same territory, there existed a variety of orders, civil and spiritual, formal and informal. In principle, an individual had to comply with the law of the *civitas* to which he belonged, irrespective of personal circumstances. But same person could also subject himself temporarily to a foreign law, thus making his position contingent vis-à-vis the *civitas*. In this sense, territorial laws 'debordered' personal divisions.[230] At the same time, jurisdiction was territorial. Local powers imposed the *lex fori* over non-subjects. However, personal laws intersected territories. And there existed jurisdictional gaps within the loose texture of civil jurisdiction which were virtually inaccessible to state authorities.

An extraordinary variety of legal orders, formal and informal, civil and ecclesiastical undercut personal and territorial elements of medieval sovereignty. It is in the context of these irresolvable tensions that we can understand the pragmatism of medieval jurists to the regulation of marriage, within and across borders, and the eclectic approach of Bartolus to *collisio statutorum* as well as the many ambiguities that underpin the theories advanced by his contemporaries and later scholars. Only by taking in consideration the broader political and cultural setting can we make sense of the blurred distinction between personal and real statutes, but also the popularity of principles such as tacit agreement' and *consensus facit nuptias* that allowed jurists to solve questions raised by disputes that intersected with multiple orders.[231]

The inconsistencies of the Statutist approach did not originate in hermeneutical liberties. They originated in the troublesome task of balancing in a pragmatic way the incomplete and conflicting elements of territorial sovereignty and the variety of components and interests that determined the legal-institutional environment of the Middle Ages. The *lex cunctos populos* was *instrumentum regni* because it facilitated the consolidation of territorial powers. However, the medieval '*regnum*' was an

[229] For Juenger, Statutists "achieved a dual objective: to legitimize the existing diversity of laws in Northern Italy, and to make the conflict of laws a subject worthy of academic pursuit." Juenger, 'General Course', p. 141
[230] Sassen, Saskia. "When territory deborders territoriality" *Territory, Politics, Governance* 1.1 (2013), pp. 21-45
[231] The tensions played out also in conflict of laws. In fact, Bartolus anticipates the tensions between those scholars like Huber who will approach collisions starting from abstract criteria regarding the nature of the statutes based on the object they regulated, and those 'positivist' who looked at the intention or interest of the law-maker instead – like the Voets, or D'Argentré.

incoherent and disaggregated whole.[232] In this sense, I would agree with those who have argued that it played a 'governance role' in the disorderly medieval political and legal context.[233] A vast and complex array of state and quasi-state entities, with varying degrees of legislative and adjudicative independence, cities, kingdoms and the Empire, but also the Church and canon law, guilds and private ordering were part of the medieval *regnum*. As we shall see in Chapters 2 and 3, the medieval 'order' reached out to virtually all European territories. At the same time, it was also precarious and subject to change and abuse.

[232] There were territorial and personal divisions, but also informal and formal divisions, 'spiritual' and 'secular' etc. Discussed by Mills, 'The private history', p. 12
[233] As also argued by Nicholas Hatzimihail. See, Hatzimihail, 'Bartolus', p. 61

Chapter 2

The Decline of the *Jus Commune* and the Rise of the Law of Nations

Chapter 2 investigates the migration of principles and ideas, which the previous chapter has identified as characteristic of the medieval mentality, to French, Dutch and especially English law and, in turn, the mutual exchanges between jurists from these localities. Medieval jurists approached collisions between local laws in remarkably similar ways. They made use of similar rhetorical devices to justify the application of English law or the recognition of foreign rights. They relied on foreign doctrines to advance their approach to legal collisions. Even if English scholars, like French and Dutch ones, rejected the universality of Roman law and of the catholic church, they were influenced by the same organisational schemes and conceptual vocabularies. Regardless of local idiosyncrasies and pre-existing political and legal beliefs, jurists placed conflict of laws in the same overarching natural order. Pre-classical jurists adopted the same pragmatic and eclectic approach to solve conflicts between local laws, and employed the law governing cross-border collisions as a governance tool in the dynamic and disaggregated order that characterised the pre-modern era.

Chapter 2 begins with a discussion of the political, religious and legal fragmentation of the medieval Roman-Christian world (section 1.1). It then discusses the incomplete shift to public regulation of marriage that followed the Protestant Reformation (s. 1.2). In that period, Europe saw the rise of territorial powers that were more heavily involved in the regulation of social and economic activities taking place in their jurisdictions. In catholic as well as in protestant countries, sovereigns were drawn to the regulation of marriage and household relations. Despite the greater regulatory involvement of public authorities, the authoritative and widespread idea that there existed a natural framework to which all sovereigns were subject led jurists to argue that persons had a 'natural right' to contract marriage without interference from local powers (s. 2.1). Under the influence of the consensual conception of marriage, jurists placed emphasis on the overriding principle of intent for establishing rights and obligations in cross-border marriage and contractual relations (ss. 2.2-2.3).

Principles and ideas that were developed in Northern Europe, and especially in the Netherlands in the 17th century spread across Europe. Conflict of laws in English law did not develop in isolation from continental doctrines (ss. 3.1-3.2). On the contrary, English courts especially relied on Dutch doctrines when faced with collisions between local laws that originated in the separate legal systems

of England, Scotland and Ireland (s. 3.2). English courts were especially responsive to the notion that the validity of marriage contracts was to be judged in accordance with rules that are part of the *jus gentium* (s. 3.4). From the second half of the 18th century, however, it is possible to observe the beginning of the decline of medieval consciousness. Marriage, until then a consensual pact, is reconceptualised as a civil contract (ss. 4.1-4.3). This reconceptualization enables local powers to set conditions and procedures for getting married (s. 4.4). In this context, courts applied the traditional rules to the regulation of cross-border marriages. However, rules were no longer said to originate in a universal framework (s. 5.)

1.1 Further Disorder: Absolute Monarchies and the Protestant Reformation

Bartolus and Baldus drew on Roman law ideas and principles to guarantee an unprecedented degree of independence and legitimacy to territorial powers. In accordance with the maxim '*Rex in regno suo est imperator*', the paradigm shift in political and legal assumptions resulted in the geographical division of the universal law of the former Roman empire into the laws of a variety of self-governing territorial entities. As Kenneth Pennington has remarked, "by the end of the fourteenth century, no academic jurist denied that a king had the same authority as the Emperor."[1] The medieval world thus saw the irresistible rise of local legal precepts and, accordingly, the gradual replacement of the *jus*, the universal law, by the *lex*, the local command.[2] In parts of Europe, another process also started. Monarchies started absorbing smaller territorial units under their rule, under their *lex regia*. Although it is possible to find continuity at the level of organisational schemes and conceptual vocabularies of medieval and pre-modern scholars, the opened-end meaning of medieval legal ideas was often used to pursue a different set of objectives consistently with a dynamic institutional environment.

An example of how medieval ideas could be adapted to the specific cultural and institutional context in which jurists operated is provided by the work of Charles Dumoulin who, I have mentioned above, advanced principles in line with dominant schemes of reasoning but also rejected several elements of Bartolist thought.[3] Like Bartolus and Afonso, Dumoulin also believed that there existed a *jus commune* that kept together peoples and laws and against which the regulation of cross-border matters

[1] Pennington, Kenneth. *The Prince and the Law, 1200-1600: Sovereignty and rights in the Western legal tradition*. Univ of California Press, 1993, p. 105

[2] Between the middle ages and the early-modern period, *jus* and *lex* still co-existed, although *lex* gradually took over. Medieval jurists trained in local law, not in the universal jus. The growth in importance of *lex* did not only happen with respect to civil law. Canon lawyers started referring to *lex naturalis*, not *jus naturalis*. For instance, see Aquinas, Summa Theologica, I-II, QQ. 92-95

[3] See chapter 1, footnote n. 211

should occur. However, Dumoulin also argued that the Roman *jus commune* could not have any imperative force on French peoples.[4] Never did Justinian or his successors rule over Gaulle and other parts of France, he observed.[5] Hence, he pointed out that Roman *jus commune* did not bind French people and French regions. And yet, although he rejected the idea that French law was subject to Roman law, that the *lex* had to submit to the Roman *jus* (and 'Christian' - see below), Dumoulin adopted and adapted the idea of the *jus commune* to the French political and legal context.

French regions were then governed by a mix of written laws and customary practices.[6] Dumoulin popularised the idea that the French peoples had their own version of the common law, and that this did not correspond to the *jus commune* that Bartolus and Baldus had in mind. The common law, Dumoulin held, corresponded to the French *droit coutumier*.[7] Dumoulin considered French customary law the expression of the uniqueness of the French people and of their relative political and cultural homogeneity.[8] His was not merely a sociological statement, an acknowledgement of the reality in society. Rather, he used the idea of the French common law to advance his support for the project of the unification of the country under monarchical rule, a project that largely depended on the capacity of the French crown to defend its independence, militarily but also symbolically, from the universal claims of the Roman (German) Emperor.[9]

The 16th century saw a shift in the scholarly debate from the legitimacy of self-governing entities, discussed by Bartolus, to the best form of government, a topic discussed first in Italy by Machiavelli and especially in France by exponents of the Humanist school.[10] In a context of political uncertainty,

[4] Consilium Paris, I, Epitome, n. 106: "…jus illud commune Romanorum, quod vulgo vocatur jus scriptum, non est jus commune nostrum, quia subditi non sumus juri Romano sive scripto." Cited in Thireau, 'Charles du Moulin', p. 96
[5] De dignitatitubus, n. 143 ; De Usuris, n. 234.
[6] In the 16th century, the French juridical landscape was virtually split between two regions, the Northern part where *coustumes* held sway, and the Southern one, where the *droit écrit* controlled instead.
[7] Cons. Paris, I, Epitome, n. 107: "Franci et Galli semper habuerunt consuetudines quasdam generales et communes…" Dumoulin's most celebrated work was his commentary to the customary practices of Paris. *Coutumes du pays et duché de Nivernais, avec les annotations et commentaires de M. Gui Coquille* (Paris, 1605)
[8] Thireau, 'Charles du Moulin', p. 98
[9] This idea proved convincing. Guy de Coquille (1523-1603), a celebrated French jurist of the time, provided further impetus to the decline of the Roman *jus commune*. As Coquille enthusiastically declared: «Nos coutumes sont nostre vray droit civil.» Guy Coquille, Institution au droit des Français, 1607
[10] The '*humanisme juridique'*, or m*os gallicus*, contributed to undermining the prestige of the medieval predecessors. The so-called mos Gallicus had also exposed many of the methodological flaws and historical inaccuracies of early medieval scholars. Budé listed many of many inaccuracies and imperfections of the Commentators in Annotationes in XXIV libros Pandectarum (1508). More than just a 'legal method', legal humanism turned the legal science in a political instrument. The term legal humanism, also referred to as '*jurisprudentia elegantior*', refers to a particular method in the study of Roman law. Although its origins can be traced back to Italy, legal humanism flourished in France, in the city of Bourges. The method was known as mos gallicus in contrast to the mos italicus. It proposed to go back to the original and basic sources of Roman law, and to do so using a philological and historical method. Although it is often associated with Protestantism and with Northern Europe, legal humanism found its greatest expression in 17th century in Spain, at the University of Salamanca.

the idea that the French people had their own unique characteristics which were also represented by law served the purpose of strengthening the French monarchical rule.[11] Jean Bodin (1529-1596) was with Dumoulin the greatest exponent of '*humanisme juridique'*. Religious and political tensions constituted the background his masterpiece: '*Les Six Livres de la République*' (1576). Bodin opened the *Six Books* with a definition of the *République* where he drew a connection between the state and the household. According to the definition he provided, the commonwealth was the lawful union of many households under a powerful sovereign ("*puissance souveraine*").[12]

Bodin argued that it was not merely the territory or the inhabitants that made the state, as Bartolus and Baldus had argued, but their union under a powerful ruler.[13] He coined the term "*souveraineté*" to refer to the authority of the head of state. Bodin conceded that a self-governing *civitas* could also exercise sovereign power. However, he expressed a strong preference for monarchical rule.[14] He was convinced that a strong monarchy afforded greater capacity to resist internal strife and external interference. If Bartolus and other medieval jurists had reconstructed the terms free peoples and *civitas* to mean something different from their meaning in Roman times, why could not legal and political authority be embodied in the person of an absolute monarch?[15] If the idea of the *jus commune* signified that there existed an overarching legal framework and particular laws, why could the former not correspond to French law and the latter to local variations thereof?

The gradual replacement by local (French) precepts at the cost of the Roman *jus commune* also carried implications for the regulation of cross-border disputes. We saw before in the previous chapter that, a valid contract of marriage or for the sale of goods which is good by the law where it is made must be regarded as good in any jurisdiction and by any law that fall within the scope of the *jus commune*. With the ongoing adaptation of the medieval mentality, this begs the question of how far did the boundaries of the *jus commune* extend? Although still subscribing to the Statutist 'method', although paying heed to the idea that there existed real and personal laws and a *jus commune*, the French

[11] Notably, the idea contains the seeds of the historicist claims advanced in the classical age. France had been then fighting a war with the Habsburgs, who were the nominal successors of the Roman Emperor. Since French jurists did not consider French peoples to be subjects of the Emperor, the decline of the idea of a universal *jus commune* was fed by the military and political conflict, and vice-versa. Dumoulin was an open supporter of the monarchic system and of French independence. Le Observations sur l'édit de Henri II relatif aux petites dates, 1551

[12] « République est un droit gouvernement de plusieurs ménages, et de ce qui leur est commun, avec puissance souveraine. » Bodin, Les Six Livres de la République', 1576, Book 1, Chap. I., Quelle Est La Fin Principale De La République Bien Ordonnée.

[13] Bodin, 'Les Six Livres'., Book 1, Chap. II-V

[14] Bodin thus advanced the argument that the best possible 'state' ("état") was one based on the monarchical rule because a strong sovereign was the one better equipped to ensure the welfare of his peoples. See Skinner, 'Foundations, Vol. I', p. 329

[15] As the iconic sentence generally attributed to Louis XIV went, « L'État c'est moi! ».

scholarship took what is generally referred to as a 'territorialist' turn to questions raised by *collisio statutorum*. This is especially visible in the work of Bertrand d'Argentré (Argentraeus, 1519-1590), a contemporary of Dumoulin and Bodin.

d'Argentré nominally subscribed to the division between real and personal laws.[16] Unlike Dumoulin - who understood the reach of personal statutes extensively - d'Argentré advocated the application of territorial law in all but a few exceptional circumstances.[17] Significantly, considering that Bartolus failed to provide a definitive answer, he used the example of legitimacy and succession to illustrate his theory.[18] d'Argentré posited that territorial (real) statutes applied *ex proprio vigore* even if they directly or indirectly also concerned persons.[19] The axiom proclaiming the default territoriality of laws constituted a simple and yet devastating attack to the principle that *statutum non ligat nisi subditos*. If it is a reduction of complexity to claim that Bartolus was a unilateralist, so it is a reduction of complexity to say that d'Argentré was a Statutist.[20] And yet d'Argentré believed that the same principles and divisions between types of laws underlying the Bartolist approach reflected a 'natural' organisation of all legal orders. The *lex cunctos populos* was shaped by the medieval mentality everywhere, but its transformation also responded to institutional transformations.[21]

1.2 The Council of Trent and the Regulation of Marriage before and after the Reformation

The inward and territorialist turn taken by the scholarship with d'Argentré reflected the gradual fragmentation of the idea of a unified *Romanitas* and the changing political context. In the 16th

[16] B. Argentraeus, *Commentarii in patrias Britonum leges*, Anterpiae, 1664, Art. 218, Glosse 6, No. 47. He also advanced a third category of '*statuta mixta*' for statutes that concerned both persons and things.Like other conflicts scholars before him, he held that foreign judgements concerning personal matters (*in personam*) were to be recognised and enforced everywhere. *Res judicata* for what concerned to actions *in rem*, conversely, could only be rendered by court of the situs.
[17] Lipstein, 'General Principles', p. 120. See Lorenzen, Lorenzen, 'Huber', p. 376 et seq.
[18] He argued that the laws governing the legitimacy of a person did not belong to the category of personal statutes, but to that of statuta realia, because the legitimate son automatically acquired the right to succession to paternal property. Hence, even those statutes governing what may have come across as personal matters, like legitimacy, had a strictly territorial extension. It may be argued that Dumoulin had upheld the application of the *lex domicilii* to matrimonial property matters. D'Argentré held instead that the law of a domicile of a person or a marriage settlement providing otherwise could never affect the immobile property which was necessarily regulated by the *lex situs*. D'Argentré, 'Commentarii', Art. 218, Glosse 6, Nos. 28-33
[19] D'Argentre, 'Commentarii' Art. 218, Glosse 6, No. 47
[20] Significantly, d'Argentré did not discuss the subject in a commentary to the *De Summa Trinitate* as his predecessors did. He chose instead to advance his ideas concerning legal collisions in a commentary to the customary practices of Brittany. D'Argentré was from Brittany, a region where the legacy of the Roman *jus commune* was regarded as marginal. As for Bartolus, who had commented over a greater body of laws than the mere *Corpus Juris Civilis* as the Glossators, this cannot be reduced to a stylistic choice or to methodological change.
[21] What drove Dumoulin and D'Argentré to turn upside-down previous convictions was not the resilient influence of "feudal ideas", as the literature in the past claimed. Lipstein, 'General Principles', p. 120. Rather, they were driven by fundamental changes in the political landscape.

century, doctrinal contentions and wars of religion put in question the idea of a unified *Christianitas*.[22] The Reformation thus undermined the sense of meta-physical historical and geographical unity that medieval jurists associated to the idea of the *jus commune*. But the implications of the Protestant Reformation reached to the legal sphere also in a more concrete sense. Until the 16th century, ecclesiastical courts had virtually applied one version of canon law across Christian countries.[23] In the wake of the Reformation movements, protestant authorities started to claim jurisdictional and legislative competence over matters which had been subject to the authority of the Church of Rome. In many places, ecclesiastical courts ceased to operate as officers of Papal authority and started responding to the heads of each confessional church.[24] In turn, confessional divisions led to local variations of the original canon law.

The Council of Trent (1545-1563) aimed at re-asserting the authority of the Church of Rome over the fragmented *Christianitas* and at clarifying official doctrines, including unresolved questions regarding the constitutive elements of marriage and the procedures for contracting a valid marriage. Church records ahead of the Tridentine Council reveal that marriage continued to be conceived as a private and informal matter.[25] Even if the Fourth Lateran Council set some basic requirements and gave ecclesiastical authorities an official mandate to oversee the fulfilment of procedures, informal marriages continued to be recognised because marriage was understood as a consensual agreement between the spouses, consistently with the idea that *consensus facit nuptias*. Although the Council had recommended couples to "solemnify their union with the blessing of the priest, to invite witnesses to the marriage, and to comply with the marital customs of their domicile", many if not most couples therefore continued to marry outside official procedures.[26]

[22] Notably, Dumoulin, who had in the meantime embraced Calvinism, had publicly contested the authority of the Church of Rome and challenged the legitimacy of the Council in his Conseil sur le Concilio di Trento (1564). Because of this, he was first imprisoned and then eventually expelled from France.

[23] A high degree of uniformity between the rules applied was also ensured by a common procedure of appeal to the Pope. Jurisdiction of ecclesiastical courts, unlike that of civil courts, had nothing to do with domicile or nationality. One was subject to their jurisdiction merely by having been baptised. Consistory courts exercised jurisdiction over persons residing in their diocese similarly to Roman times, when there existed courts of domicile which applied the *jus civile* everywhere. Thus, if a Frenchman came to reside in an English diocese, it is the consistory court that exercised jurisdiction. Although the jurisdiction of ecclesiastic courts was very wide, the main marriage-related type of litigation in were petitions for divorce *a mensa et thoro* (divorce from bed-and-board). Canon law had prohibited divorce '*a vinculo*', officially, in the 10th century. According to a divorce *a mensa et thoro*, husband and wife separated, but their union did not terminate. Conversely, the contract of marriage could be rescinded on the ground that it was void from the start. For a discussion on jurisdiction, see below on England

[24] In England, for instance, the procedure for appeal in divorce cases ended in front of the Crown and divorces started being issued by act of Parliament.

[25] See Donahue Jr, Charles. "The canon law on the formation of marriage and social practice in the later middle ages." *Journal of family history* 8.2 (1983)

[26] Witte, 'The Reformation', p. 302

The lack of enforcement of official doctrines led to greater social tensions and fed religious and political conflicts. In many cases, under-age persons kept their intention to marry secret explicitly to avoid having to ask for parental permission.[27] What came to be known derogatorily as clandestine marriages (*clandestine matrimonia*) were abhorred by wealthy families because they often resulted in the dispersal of family assets.[28] In addition, the prevailing informalism in marriage facilitated concubinage, famously also among heads of state and government officials.[29] In some publicised instances, members of the clergy itself was denounced for having contracted marriage.[30] The question of marriage validity and regulation was no longer a mere a doctrinal and legal issue. The frequency of clandestine marriages and the frequency of clerical marriage demonstrated the "sporadic, ineffective and often corrupt" enforcement of canon law by church authorities.[31]

Protestant scholars explicitly modelled their ideal government on the family.[32] French humanists placed great emphasis on the political and moral dimension of marriage and of family. Jean Bodin famously argued that "the well-ordered family is a true image of the commonwealth, and domestic comparable with sovereign authority."[33] Marriage therefore symbolised the stability and virtue of the family and of the commonwealth but also, by analogy, the instability and corruption of the government and of society.[34] In the eyes of Protestant leaders, the gap between reality and doctrinal

[27] d'Avray, 'Medieval Marriage', p. 65. For a description of the Council and of its results see d'Avray, 'Medieval Marriage', Chapter 2. As seen before some informal marriages were held valid merely by the verbal and expressed consent - *per verba de praesenti* - of the spouses. In the case of couples who simply started cohabitating, ecclesiastical authorities held that marriages *sine verbis* became valid and binding after the consummation (*copula*).

[28] Glendon, 'The Transformation', p. 28

[29] It is often reported that Charlemagne contracted five marriages and had, at the same time, six concubines, Olsen, 'Marriage in Barbarian Kingdom', p. 164

[30] Multiple ordinances had prohibited this practice. For instance, the First Lateran Council (1123), adopted the following canons: Canon 3: "We absolutely forbid priests, deacons, and subdeacons to associate with concubines and women, or to live with women other than such as the Nicene Council (canon 3) for reasons of necessity permitted, namely, the mother, sister, or aunt, or any such person concerning whom no suspicion could arise."; Canon 21: "We absolutely forbid priests, deacons, subdeacons, and monks to have concubines or to contract marriage. We decree in accordance with the definitions of the sacred canons, that marriages already contracted by such persons must be dissolved, and that the persons be condemned to do penance." And yet, as it has been argued, "Despite six hundred years of decrees, canons, and increasingly harsh penalties, the Latin clergy still did, more or less illegally, what their Greek counterparts were encouraged to do by law—they lived with their wives and raised families. In practice, ordination was not an impediment to marriage; therefore some priests did marry even after ordination." Barstow, Anne Llewellyn. *Married Priests and the Reforming Papacy*. Edwin Mellen Press, 1982, p. 45

[31] Critics regarded canon law as "confusing, inequitable, impractical, arbitrary, and easily abused." Harrington, Joel F., *Reordering marriage and society in Reformation Germany*. Cambridge University Press, 1995. p. 28; See also Witte, 'The Reformation'.

[32] For Bodin, the children appoint the father as their ruler. Chapters II-V open with the statement: "A family may be defined as the right ordering of a group of persons owing obedience to a head of a household, and of those interests which are his proper concern."

[33] « Tout ainsi donc que la famille bien conduit, est la vraye image de la République, et la puissance domestique semble à la puissance souveraine ; aussi est le droit gouvernement de la maison, le vray modelle du gouvernament de la République. » Book I, Chap. II

[34] For protestant reformers, the family constituted "the cradle of citizenship" and marriage "stabilized both individuals and society as a whole." Ozment, Steven. *When fathers ruled: Family life in reformation Europe*. Harvard University Press, 2009. pp. 8-9

ideal in household matters, and especially the question of celibacy of the clergy symbolised the moral decline and endemic corruption of the Catholic Church. They also provided a simple metaphor but effective argument for undermining the authority of the Church of Rome.

Before the Council of Trent, various governments in protestant countries therefore banned or tried to discourage informal marriages. In France, a royal edict from 1556 enabled parents to disinherit children who married against their wishes.[35] In the municipality of Wurttemberg in 1553 and in the County Palatinate of the Rhine in 1563, the law made a minister's presence a requirement for marriage validity.[36] The above thus explains why, with the Counter-reformation, the seemingly mundane but politically-loaded question regarding what constituted a marriage and to what extent and at what cost church authorities should enforce the law was placed on top of the agenda of the Council of Trent.[37] In 1563, the Council issued the Tametsi Decree ('*Decretum de Reformatio Matrimonii*') which made *matrimonium* one of the sacraments of the catholic church. The Decree re-asserted the formalities established in the Canons 50-52 of the Fourth Lateran Council. Unlike previous canons, the Decree threatened to nullify marriages that had been contracted without complying with official procedures.[38]

Although on the face of it the Tametsi Decree and the Canons 50-52 appear antithetical, the reform to canon law enacted by the Tridentine Council should be understood as part of the effort by the Church of Rome to make marriage 'public', a process which had started with the Fourth Lateran Council.[39] Despite the continuation of this process in the 16th century, which also indicated the gradual consolidation of the administrative power of public institutions, the 'traditional' informal and consensual approach to marriage was not without supporters in Rome and among Catholic authorities. The validity of putative and informal marriages was strenuously defended by 'theological purists' who pitted the 'spiritual liberty' of couples to marry against private and public interference.[40] Hence, the time-honoured pragmatic idea that *consensus facit nuptias* came to symbolise the protection of personal freedom from interference by heads of families and public authorities.

[35] Glendon, 'The Transformation', p. 29
[36] Ibid.
[37] Although the first discussions regarding the (sacramental) nature and regulation of marriage began in 1547, the questions raised were so contentious that a consensus could not be immediately found. Harrington, Joel F. *Reordering marriage and society in Reformation Germany*. Cambridge University Press, 1995, pp. 93-94
[38] It is thus generally assumed that, after the Tametsi, the "formal regulations of Lateran IV [i.e. the publications of banns and the presence of two witnesses at the ceremony celebrated by the priest] [had been made] necessary for the validity of a marriage." Ibid. p. 96
[39] Until the Council of Trent, "[t]here seems to have been no general rule about a religious ceremony in canon law – a fact often missed in the past by good scholars". d'Avray, 'Medieval Marriage', p. 65
[40] Glendon, 'The Transformation', p. 29

Members of the Council were not indifferent to such arguments. On the one hand, the Council stipulated the fulfilment of canonical formalities was required to give the marriage sacramental value.[41] The change was not without significance. On the second hand, a solemn declaration of marriage, celebrated in accordance with the formalities set in canon law, and thus made with the approval of the head of the family was set as the ideal goal. However, it was not a legal requirement.[42] In other words, an illicit marriage was not necessarily an invalid marriage. The Decree reiterated that marriages freely "contracted" by the parties (*libero contrahentium consensus facta*) were true and valid, even if celebrated against official procedures and against the wishes of their families.[43] The threat of nullification included in the Tametsi Decree therefore lacked teeth. In effect, the Council of Trent did not alter the prevalent informal and pragmatic approach.

Official procedures were 'softly mandatory'. Penalties were hardly ever levied. As reported by studies on various 'catholic' jurisdictions, the 16th and 17th centuries, couples continued to contract marriages informally in great numbers.[44] Canon lawyers continued to regard the consent of the parties *per verba de praesenti* as sufficient to constitute a valid marriage. Despite a gradual clericalisation of marriage procedures, the marital union was still regarded as an agreement constituted by consent, tacit or expressed, in line with the overriding importance of consent in medieval legal thought. 'Secular' civil lawyers, similarly influenced by the dominant mentality, also continued to understand consent extensively and to subscribe to the view that the consent of the parties *per verba de praesenti* sufficed to constitute a valid marriage.[45] At the same time, the decline of the *jus commune* and the introduction of local laws threatened to undermine the consensual and informal approach, and with it also the 'natural' right to contract marriage.

[41] Marriages *sine verbis* might have been considered valid in a legal sense. However, after the Council of Trent, couples who simply cohabited, although regarded as married, continued to live, religiously, in sin. To marry 'again' following the canonical form, which also required the call of the banns, would have risked exposing the sacramental irregularity of their union. Thus, in 1741 Pope Benedict XIV (1675-1758) created the specific canonical institute of *matrimonium conscientiae* to balance out the 'public interest' to have the authority of the Tridentine form preserved with the private interest of couples who did not want to have their marriage publicly known. Marriages *sine verbis* will only be officially outlawed in the end of the 19th century.

[42] It ought to be noted that not only did the Tridentine precepts not apply in the numerous places where priests could not perform the established procedures, as this would cause "grave inconvenience" but also that the provisions of the Tametsi decree did not apply to the numerous unbaptised persons. Coriden, James A. *The code of canon law: A text and commentary*. Paulist Pr, 1985, Canon 1116

[43] Dubitandum non est, clandestine matrimonia, libero contrahentium consensus facta, rata et vera esse matrimonia. Council of Trent, Sess. 24, De Ref. Matr. C.1

[44] For instance, Marongiu, A., "Matrimoni e convivenze *'more uxorio*' in Sardegna prima e dopo il Concilio di Trento", in *Studi in onore di Ugo Gualazzini*, Giuffré, 1981, pp. 313-325. Id. "Matrimoni e convivenze 'more uxorio' in Sardegna prima e dopo il Concilio di Trento", Rivista di storia del diritto italiano, LII (1979), p. 5-17

[45] Rava, 'Il requisito', p. 59

2.1 Hugo Grotius, the Natural Right to Marriage and the Formation of the *Civitas*

The work of Huig de Groot (Grotius, 1583-1645) is often taken as representing a new period in European legal and political history.[46] Grotius wrote the '*De Juris Belli Ac Pacis*' (1625) in the aftermath of the creation of the Dutch Republic and in the middle of the Thirty Years War.[47] In 1579 seven separate territorial entities formed the Republic of the Dutch Provinces (*Verenigde Provinciën*). The Thirty Years War had broken out in 1618. The War was concluded by the Treaty of Westphalia (1648) which sanctioned the independence of the Dutch Provinces from the Holy Roman Empire and from the Spanish Empire.[48] Famously, in '*Of the Law of War and Peace*' Grotius tried to develop a legal framework which would regulate the conduct of war between independent powers.[49] Grotius borrowed extensively from his predecessors to describe his ideal of a society of peoples held together by a universal framework, which also carried implications for the way each territorial power regulated interpersonal relations.[50] In his masterpiece, Grotius thus also discussed questions regarding private rights, including their regulation in cross-border scenarios.[51]

At a moment in history when the growth of the local *lex* and the decline of the *jus commune* was being fed by religious and military conflicts, Grotius restored faith in the notion that there existed an

[46] Pound, 'Jurisprudence, Vol. 2', p. 43: "It is true he did little more than give currency to what the expositors of natural law had already worked out, but the result of his book was to complete the emancipation of jurisprudence from theology, to put natural law wholly on a rational instead of a theological basis."

[47] Convinced that there is a common law among nations valid in times of war and peace, he famously wrote it in the hope of restraining conflicts between nations such as those he had witnessed during his lifetime. *De jure belli ac pacis* had been translated in French, English, German and Italian, and, by the end of the 17th century, several editions had been pubslied in Germany, Holland, Italy and Switzerland. Zimmerman, 'Roman law', p. 33

[48] The Peace of Munster and of Westphalia are generally identified as the birth of (public)international law and sovereign states, a reconstruction which only finds partial correspondence in the genealogy traced in this study. According to the traditional view, after Westphalia the Treaty of Westphalia was sign, sovereign states recognised each other the right of imposing their own law over the national territory. As discussed by Koskenniemi, the influential view of Georg Friedrich von Martens was that the peace of Westphalia and that of Utrecht had started "a new and memorable epoch of positive law of nations" cited and discussed by Koskenniemi, Martti. "A history of international law histories." *The Oxford Handbook of the History of International Law*, 2012, p. 950-951. I would argue, along with Sassen, that the emergence of territorial state sovereignty in Europe occurred earlier, in the thirteenth century. Sassen, 'Territory, authority', Chapter 2. See Supiot, Alain. "L'inscription territoriale des lois." *Esprit* 11 (2008)

[49] Of the Law of War and Peace is generally regarded as the foundational text of public international law and Grotius himself as its father. The legal framework that Grotius had in mind while writing the *De Juris Belli Ac Pacis* did not only consist of a law governing the peaceful and violent intercourse between states.

[50] Notably Grotius was inspired by the Spanish Scholastics. Francisco Suarez (1548-1617) who had been greatly influenced by Francisco de Vitoria (see footnote below) had advanced the argument that there existed a society of peoples (*societas gentium*), an argument that influenced Grotius. See Kennedy, David. "Primitive legal scholarship." *Harv. Int'l. LJ* 27 (1986)

[51] Indirectly, Grotius was also influenced by Francisco de Vitoria (1486-1546) who had introduced for the first time the distinction between *jus intra gentes* and *jus inter gentes*. The *jus gentium* was properly so called because it governed exchanges happening between (intra) different peoples which went beyond the territorial borders of particular states. *Jus inter gentes* governed instead relationship among people. Thus, *jus gentium* governs intra-personal relationship based on principles of law which common to all civitates. Trnavci, 'The Meaning and Scope', p. 207. It is erroneously reported that Grotious did not address questions of collisions between civil laws. Mills. 'The private history', p. 23

overarching framework that could ensure the peaceful co-existence between people. In agreement with the idea that there were natural and universal principles and divisions in all orders, Grotius committed to identify such principles and divisions. In *Of the Law of War and Peace*, he therefore divided between natural law and voluntary law.[52] He thought of the former as the result of natural reason rather as the enactments of a supernatural legislator.[53] He divided the latter into divine and human law. Within human law he placed the *jus civile* on one side and the *jus gentium* on the other.[54] As for his predecessors, these divisions were not strict and rigid.[55] Grotius did not believe that there existed profound boundaries between natural and voluntary law, between universal and local law. On the contrary, there should be the widest possible overlap between them.

Municipal authorities possessed legislative autonomy in conformity with their political independence. However, for Grotius, civil laws could not violate principles of natural reasons. They could also not violate rights that originated in the *jus naturalis* and in the *jus gentium*. There existed certain 'things', Grotius argued, that belong to humanity "either by a right common to us as men (*communi hominum jure*), or [are] acquired by us in our individual capacity."[56] Among the natural rights, Grotius included the right to marry. Against a background characterised by greater legislative independence as well as by religious intolerance, with local authorities taking a stricter stance against marriages celebrated against local provisions and requirements, Grotius was aware that the protection and recognition of personal rights arising in marriage, also in cross-border scenarios, was under threat. He argued in response that no human law could not set up procedures or conditions that, if violated, would lead to the nullification of a marriage consented to by the parties.[57] For the Dutch jurist, in the case of:

[52] Book I, Chapter I

[53] Grotius did not find natural law on divine authority, but on natural reason. Pound, 'Jurisprudence, Vol. 2', p. 45

[54] The *jus gentium* was part of the voluntary law. Grotius (1625) Prolegomena para. 17 and 40. Grotius also claimed that the *jus gentium* 'must have its origin in the free will of man', Grotius (1625) Prolegomena. On the face of it, this suggests that natural law and *jus gentium* have nothing to do with each other. However, this does not take account that *jus gentium* and *jus naturale* both originate in *ratio naturalis*. For the Dutch scholar, natural law is the dictate of human reason, not of God's will Id. Book. I, Ch. I, § X, Para. 1

[55] Although Grotius Divided Between voluntary law and natural law, and thus civil law from natural law, thus also being called 'the father of international law', the clear distinction between natural law and positivist approaches only properly only rose in the later 'traditional' period of international law, between the classical and post-classical. This will become a fundamental distinction in the positivist doctrine. See Kennedy, 'Primitive'.

[56] Book II, Chapter II, § I, from Campbell, A. C., *The Rights of War and Peace*, Translated from the Original Latin of Grotius, M. Walter Dunne, 1901. Some chapters are not available in Campbell. Where necessary, I have used the translation of Tuck, R. (ed.), Hugo Grotius, *The Rights of War and Peace*, Liberty Fund, 2005. Where deemed appropriate, I have also included the original translation in parenthesis, amending the text.

[57] In agreement with his civilian and canonist predecessors, Grotius argued that the law of nature and the law divine only required mere cohabitation (*cohabitationem maris cum femina*) to constitute a marriage (*conjugium*). Book II, Chapter V, § VIII; Chapter V, § IX

> a merely human law [that] prohibits the contracting of Marriages between some particular persons, it will not … follow that such a marriage, if it be actually contracted, is void.[58]

We see here the re-affirmation of the principle that it is preferable to leave alone people who have been united contrary to human decrees than to separate, contrary to natural law, persons who have been joined together legitimately. The right to contract marriage is a natural right of all men. Hence, all human beings enjoyed an innate right and a natural liberty to contract marriage which did not depend on and could not be alienated by human decrees.[59] As the right to contract marriage is a natural right common to all people, no civil law could interfere with the formation of marriage by placing additional conditions, for instance, for individuals who belonged to a specific civil or religious community. The right to contract marriage is a right that belongs to men as men, not only to those persons who belong to a given civil community, to a religious group or to a class of persons.

For Grotius the 'status of a person' - a concept he did not mention in - could not impair the natural right to contract marriage. Neither a marriage contracted by a man and a (female) servant, nor those between a freeman and a (female) slave and between a citizen and foreigner could be made invalid, Grotius argued, because so provided by local enactments.[60] However, the Dutch scholar was also aware that in a context of greater intolerance the right to contract marriage, especially by those belonging to distinct groups in society, and most notably foreigners and those belonging to religious minorities, would either by prohibited or annulled by human laws. Grotius rebutted that, except for extraordinary reasons, no civil law should deny to specific classes of individuals the right to marry:

> By Supposition there is a common Right (*jus commune*) to all those Actions which any [people] (*populos*) is supposed to allow to all Strangers indifferently; for then it would be an Injustice to exclude any People: For if it be allowed that Foreigners may anywhere hunt, fish, fowl, gather Pearls, inherit by Will, sell their Goods, and even, where there is no Scarcity of Women contract Marriages, the same cannot be refused to any particular People.[61]

[58] Book II, Chapter V, § XVI. Tuck trans.
[59] He declared that the right to marriage "is to be understood of such Acts as are allowed, as it were, by Vertue of natural Liberty". Chapter II, § xxiii. Tuck trans.
[60] Book II, Chapter V, § X, i, and Chapter V, § XV, II.
[61] Book II, Chapter II, § xxii. Tuck trans.

Marriage was a natural right which fell within the scope of the law common to mankind. Hence, it was enjoyed by all people, foreigners and natives alike. "I am of Opinion", Grotius remarked, "that in the Right I just now spoke of, is also included, a Liberty to contract (*contrahendi*) Matrimony amongst neighbouring [peoples] (*gentes*)."[62] The right and liberty to contract marriage fell within the scope of natural law. Even though it was not contained in a body of codified precepts and enforceable commands - in other words, even if it was not codified in what will be conceived as an 'international law' in the following centuries - governments in all countries were under an obligation to recognise the validity and effects of a consensual marriage, regardless of where it had been contracted and of the people to which the parties belonged. This was a moral as well as a legal obligation.[63] This meant that local laws could not deny to specific persons a right that belonged to them as men. However, it also meant that a degree of variation between territorial laws was acceptable. When contracting a marriage, as in the case of any other contract, parties must respect the local law:

> if a foreigner enter (sic.) into an agreement with a citizen or subject of any other country; he will be bound by the laws of that country, to which, during his residence therein, he owes temporary obedience.[64]

From the restored idea of a *jus gentium* that comprehended all peoples, whatever their religious affiliation, also followed that, if a marriage was good by the laws of the country where it was entered, it must be good in all jurisdictions that were subject to the *jus gentium*. Provided the parties complied with the law of the place of contract, the recognition of the validity and effects of a contract entered abroad should recognised all the world over. In the Netherlands as in France and in other jurisdictions, local governments placed limits to the capacity of the parties to contract marriage and added specific requirements for their celebration. This might result in the lack of recognition within and across jurisdictions.[65] But for Grotius all that mattered to make a marriage valid was what rendered any other human action legally meaningful, that is the capacity of producing a right joined with a sufficient

[62] Book II, Chapter II, § xxi. Tuck trans.
[63] As Roscoe Pound explained: "In the Grotian formula the significant words are "obliging to that which is right." The rule does not command. It obliges. It is not law and is not obligatory because of any physical authority behind it, but because it coincides, and to the extent that it coincides, with the principle of natural law of which it purports to be an ascertainment. But that principle is one of right and justice ascertainable through reason. Hence, the authority of legal precepts rests on inherent reasonableness. The obligation of a legal precept and the obligation of a moral precept, in this view, are the same. In each case there is an obligation resting upon reason in that reason shows us the dictates of right and justice." Pound, 'Jurisprudence, Vol. 2', p. 46
[64] Book II, Chapter XI, section V., p. 136. Campbell Trans.
[65] As noted by David Hunt, in this period of European history there was a persistent "conflict between public regulation on the one hand and generally accepted popular custom on the other. The edicts and ordinances clearly show that legists recognized the strength of the tradition they were trying to uproot: the continuing belief that cohabitation, simple mutual consent, made a marriage." Hunt, D. *Parents and Children in History: The Psychology of Family Life in Early Modern France*, Basic Books, 1970, cited in Glendon, 'The Transformation', p. 30

will.[66] Governments might set some conditions in local law but must nevertheless respect rights acquired by means of a consensual agreement.

Grotius argued that the rights created on marriage belong to that class of rights which persons acquire over the actions of other human beings.[67] Grotius argued that there are three ways in which a man can acquire a right over another person: by Generation, by Consent, or by some form of Crime.[68] Of all associations formed by consent, Grotius pointed out that marriage was in fact the most 'natural'.[69] Although enriched by the notion of natural rights, this conception of marriage as a voluntary agreement is consistent with the approach taken by Grotius' predecessors. It is also a conception which was embraced by his Dutch and foreign contemporaries. In his '*De Jure Naturae et Gentium*' (1688), for instance, Samuel Freiherr von Pufendorf (1632-1694) declared that 'Matrimony' constituted a private although solemn agreement between the spouses.[70] If canonists in the early Middle Ages referred to marriage as pactum, and Grotius referred to the action of entering marriage as contracting, Pufendorf used the words '*vinculo*' and '*pactum*' to refer to marriage.[71]

As in ancient Roman law, so in the medieval age, the consensual conception of marriage did not mean that marriage and contract were one and the same.[72] Although contractual agreements also had moral worth and social value, marriage had a community dimension and created specific social

[66] Book II, Chapter V, § X, i.
[67] Book II, Chapter V. Of the Original Acquisition of a Right over Persons; where also it treated of the Right of Parents: Of Marriages: Of Societies: Of the Right over Subjects: Over Slaves. Tuck trans.
[68] Book II, Chapter II, § I As he specified in the same chapter, an acquisition of this right might follow from a consensual association, such as that of husbands and wives, but also from the subjection by master of a slaves. I will return to the meaning of this choice in Blackstone below. Grotius posited that humans can acquire a right to perform or to demand certain actions to be performed by others.
[69] Book II, Chapter V, § VIII
[70] S. Pufendorf, *De Jure Naturae et Gentium Libri Octo*, 1744, See especially Book VI
[71] Grotius, like his medieval predecessors and his contemporaries, grounded the legality and force of legal acts in consent, which could be tacit or explicit, formal or formless. Accordingly, Grotius argued that consent made agreements. However, Grotius did not think that a marriage could be dissolved when consent is withdrawn. See Chapter V, § IX, para. II. In contrast, Pufendorf argued that marriage, like any other pact, created a bond which could be dissolved. As to the permissibility of divorce according to natural law, he maintained in Book VI, Ch. I, §20 that, although the question was being "vigorously discussed", "every pact implies that one party cannot depart from it but with the consent of the other, or if the other has violated it" and that, as a result, "it will be repugnant to natural law if one of the married pair leaves the other against his will" (S. Pufendorf, De Jure Naturae et Gentium Libri Octo, Translated by C. H Oldfather and W. A. Oldfather, Translation of the Edition of 1688, Oxford, Clarendon Press, 1934, p. 875), he went on to "inquire, further, whether what is common to all other pacts also holds true of marriage, namely, that when the primary articles, at least, of the pact have been violated by one of the parties the other secures thereby the power to withdraw from the marriage. It appears that this can safely be answered in the affirmative in the case of the principal articles." (Ibid. p. 877). Hence, he concluded that there should be reasonable cause for the dissolution of the marriage pact: "although marriages may be dissolved by mutual consent without any very serious cause, that is both unbecoming and menacing, since both families and the general propriety of states cannot avoid being seriously injured by the licence of such divorces." (Ibid. p. 876). As to the property of the wife and of the couple, Pufendorf held in Book VI, Ch. I that "How much power belongs to the husband over his wife's money, will likewise depend upon an agreement between the two, or upon civil laws. For these engagements must be strictly lived up to, whatever agreement the two may have reached". Ibid. p. 861
[72] Although Grotius included marriage within the category of actions, he did not include it in the Chapter on Contracts.

responsibilities.[73] In a context where jurists referred to marriage both as a symbol of social stability and moral rectitude, but also of personal freedom against unjust interference, Grotius attempted to find a common ground among the various conceptions which prevailed in various parts of Europe.[74] In this way, he elevated the symbolic value of his conception of marriage, and of the overriding importance of consent in medieval legal thought, beyond the bounds of the household. In the Grotian scheme, consent had overriding importance for the organisation and regulation of interpersonal relations in multiple spheres of life, not merely those of the household, but also that of the *civitas*.

Grotius thought that the contract of marriage constituted the most natural of all societies, the family.[75] Starting from marriage, he could therefore proceed to argue that the union (*consociatio*) of families into one people formed the *civitas*, the most perfect of all societies.[76] Drawing on the family-state metaphor, which had been somehow anticipated by Bodin and will become a central theme in the following centuries, Grotius applied to the formation of the *civitas* the same consensual and contractual logic that he applied to marriage. Like in marriage, where two persons decide to bind themselves, Grotius argued that the union of the *civitas* also originated in a contract between members of the same society.[77] As men enjoy an inalienable right to contract marriage, individuals also have a natural right to form themselves into *civitates*, or else, to bind themselves to another society, without suffering persecution or without interference from human laws.

2.2 The Dutch Golden Age: Territorialism, *Comitas* and Ulrich Huber

The Dutch Golden Age is the period of cultural renaissance and economic growth in the Verenigde Provinciën in the 17th century. During this period, the Netherlands became the home to leading scholars dealing with questions raised by *collisio statutorum*. After the creation of the Dutch Republic and the entry in force of the Treaty of Westphalia, proximity between provinces and greater political stability led to the intensification of commercial exchanges between Dutch cities and regions. Each

[73] In this regard, the importance of *pacta sunt servanda*. That *pacta sunt servanda* could be explained because God himself would act against nature, should he not keep his word. *De Jure ac pacis libri tres* (Amsterdami, 1631) Lib II, Cap. IV, para. 2

[74] See Witte, John, 'Hugo Grotius and the Natural Law of Marriage: A Case Study of Harmonizing Confessional Differences in Early Modern Europe', Troy L. Harris, ed., *Studies in Canon Law and Common Law*, in Honor of R.H. Helmholz, The Robbins Collection, 2015

[75] Both public and private societies exist which had this in common: "the whole body (universitas), or the major part in the name of the whole body, oblige all and every the particular Members of the Society." Chapter V, § XVII, p. 545

[76] Book II, Chapter V, § XVII

[77] The influence of Grotius on Jean-Jacques Rousseau is illustrated by Rouseeau's memory described in his 'Discourse on the Origin of Inequality to the Republic of Geneva' of his father reading the work of Grotius. For contemporaries of Rousseau, Grotius' masterpiece had acquired the status of a classical book. Russeaou described Grotius in Emile as "the master of all the savants" in political theory. Editor's Introduction to Grotius, The Rights of War and Peace, edited and with an Introduction by Richard Tuck, from the Edition by Jean Barbeyrac (Indianapolis: Liberty Fund, 2005). Vol. 1

province of the Republic claimed sovereignty and legislative autonomy. Since each province was governed by separate laws, collisions between territorial laws were inevitable.[78] Due to a gradual change of political and legal convictions within the medieval standard, Dutch jurists drifted towards more local protectionism. Paulus Voet (Voetius, 1618-1677) famously posited that foreign laws did not apply *ex proprio vigore* extra-territorially, but that they may be recognised *ex comitas*.[79]

The principle of *comitas gentium* first proposed by Paulus Voet was also endorsed by his son, Johannes Voet (Voetius, 1647-1714).[80] According a restrictive understanding of *comitas,* in this sense translated as 'courtesy', sovereign states had the power to accept, but also to reject, the extraterritorial reach of foreign laws purely based on 'utilitarian' considerations. Although sovereigns were encouraged to show reciprocal 'courtesy', inherent in the Voets' conception of comity, there seemed to be the idea that courts were not under a legal obligation to apply foreign laws. Notably, however, the Voets did not conceive comity as a rule of domestic law. They did not regard collisions between statutes as a municipal concern, but as a question to be solved within the context of a general theory that had general validity and should lead to the formulation of universally valid rules.[81]

As it has been argued, in the medieval age, in Italy as in the Netherlands, law "was [never] conceived [as] a system of rules enacted for, and exclusively applicable in, a specific territory". On the contrary, "it was recognized and applied on a transnational scale."[82] Even the Voets understood comity as part of this universal order, as part of the fundamental principles and divisions that should regulate legal relations and disputes in all orders. In this sense, despite the turn towards greater protections for local prerogatives, these two important scholars, like also their French predecessors, were under the influence of medieval convictions. However, as in the case of d'Argentré, the Voets adapted the medieval approach to questions raised by cross-border relations adapted to the institutional context. Although Verenigde Provinciën had formed a confederation, each of the provinces considered itself a sovereign entity and in each "there existed an intense jealousy of their local rights."[83]

[78] E.M. Meijers, 'L'histoire des principes fondamentaux du droit international privé à partir du Moyen-Âge', 111 *Recueil des Cours* (1934).
[79] P. Voet, *De statutis eorumque concursu* Utrecht (1661), s.4, c.2, nos. 6,7. Juenger, 'General Course', 148
[80] For Johannes Voet, the sovereign could accept that the court of another province had jurisdiction to adjudicate. Courts could also decide to apply foreign statutory laws instead of the *lex fori*. They may even enforce foreign decisions. However, like his father before, Johannes Voet embraced the notion that territorial powers were under no obligation to take account of foreign proceedings, to apply foreign law, or to recognize and enforce foreign judgments. J. Voet, *Commentarius ad Pandectas*, Utrecht (1698) 1, Tit. 4, Pt. 2, No. 5 et seq.
[81] De Nova, 'Historical Introduction', p.16
[82] Zimmerman, Zimmerman, 'Roman law', p. 33
[83] Lorenzen, 'Huber', p. 377 (Emphasis Added)

Against this background, it was somehow inevitable that Dutch scholars started looking at ways to reconcile conflict rules and principles to the Dutch context. This, however, does not mean that they took leave from the medieval approach. This is what the theory of conflict of laws developed by Ulrich Huber (Ulricus, 1636-1694) clearly indicates.[84] Huber was the most authoritative jurist of the Dutch Golden Age along with Grotius. Huber advanced his doctrines in the extraordinarily influential *'De Conflictu Legum Diversarum in Diversis Imperiis*', published in 1689.[85] Here, Huber dismissed the distinction between personal and real statutes advanced by his predecessors. Notably, *De Conflictu Legum* was written as a short treatise, not in the format of a commentary.[86] As with Bartolus (and d'Argentré) - who had also selected different sources and formats compared to their predecessors - this was not merely a stylistic choice. The changing political landscape compelled scholars to look for new ways and new sources for solving questions raised by legal collisions.[87]

Instead of elaborating a long and complex commentary, Huber's treatise advanced three straightforward tenets.[88] The first maxim posited that the laws of any sovereign (*imperium*) bind all

[84] Joel Paul argued that "In the seventeenth century the emergence of nation-states challenged the statutists to explain why sovereign states should sometimes apply foreign law in their courts. The newly independent Dutch Republic felt this conflict acutely… Dutch publicists attempted to explain and to limit the application of foreign law in their courts by using the theory of acquired or vested rights. The Dutch based this theory of conflicts on the notion of territoriality. This theory constituted a radical departure whose theory assumed that there was a higher natural order which imposed a universal system of all states." Paul, Joel R. "The isolation of private international law." *Wis. Int'l LJ 7* (1988), p. 157. A first reason for being cautious of such view, something that Paul also recognises, is that the Dutch did not apparently differentiate between 'public' and 'private' international law. Notably, Paul referred to the writings of Paulus Voet and to Huber, but only by means of Lorenzen, 'Huber'. This text however is co-responsible for many of the inaccuracies that led to a misconception of comity and of the Dutch position. The responsibility is shared by Joseph Story (on Story see Chapter 4). Ironically, Story greatly contributed to Huber's fame by misrepresenting his theory. See Watson, Alan. *Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws*. University of Georgia Press, 1992 and, from the same author, See "An Essay on Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws" 38 *McGill LJ* 454 (1993)

[85] *De Conflictu Legum Diversarum in Diversis Imperiis*' is the title of one part of his '*Prelectiones Iuris Civilis*' of 1689. It is generally agreed that the title of 'conflictus legum' derives from the work of Christian Rodenburg (1618-1668). Rodenburg's best-known work is '*De Jure Quod Oritur Ex Statutorum Vel Consuetudinum Discrepantium Conflictu*' which can be translated as On the Law which Arises from the Conflict between Differing Statutory and Customary Law. Cited in Juenger, 'General Course', p.146 and p. 326

[86]As it has been remarked, "[i]n the whole history of law there are probably no five pages which have been so often quoted, and possibly so much read. They are distinguished by clearness, practical judgment and a total absence of pedantry." Harrison, Frederic, and Augustus Henry Frazer Lefroy. *On jurisprudence and the conflict of laws*. Vol. 99. Oxford: Clarendon Press, 1919. cited by Juenger, 'General Course', p. 149

[87] John Westlake noted that: "This change in literary form was due … partly also … to the changed aspect which the subject bore in consequence of the more independent footing which nations had obtained with reference to each other. No living imperial will could any longer be regarded as maintaining a common law for Western Christendom, and permitting exceptions by way of statute or custumal. There were manifestly autonomous legislators side by side; it was necessary to ascertain not merely the expression of their will, but the limits of their respective authority …. and for this, a gloss [or comment] on any expression of the will of one of them was scarcely the fitting occasion." Westlake, 'A Treatise, 2nd edition', pp. 17-18

[88] *Praelectiones*, II. 1.3.2; Lorenzen, 'Huber' provides the original version of the *Praelectiones* and their translation. In places, I have replaced his translation with my own, or specified the original word, where the meaning associated to it could not correspond to Huber's intended meaning. Lorenzen translated '*populos*', '*civitas*' and '*imperium*' with nation and state. On the one hand, this indicates that Huber was better acquainted with the Dutch scholarship and more interested in Roman law than in recent developments in British and French juridical sciences which started making widespread use

those within the reach of its powers, but only have force within the limits of its government's action.[89] Implicitly, the first maxim held that territorial laws (whether real or personal) carry no force *ex proprio vigore* beyond the limits of the enacting state. In this sense, the first maxim conforms to the principle that *statutum non ligat nisi subditos*. However, Huber's second maxim specified that all persons who reside within the territorial boundaries of an *imperium*, whether permanently or temporarily, are considered their subjects, and must abide by its laws.[90] Finally, from the first two maxims, Huber extracted the principle which stands at the centre of his theory, that of 'vested rights' or 'acquired rights'. According to this principle:

> Personal qualities impressed upon a person by the law of a particular place surround and accompany him everywhere with this effect, that everywhere persons enjoy and are subject to the law which persons of the same class enjoy and are subject to in that other place.[91]

Huber identified rights acquired in accordance with a foreign law to a personal attribute which no law should, in principle, refuse to acknowledge. Drawing on the ideas advanced by the Voets, he also specified in the third maxim rule that sovereigns (*Rectores imperiorum*) will act out by way of comity (*id comiter*) to ensure that rights acquired within the boundaries of a foreign government's action retain their force and validity elsewhere.[92] At first sight, the third maxim reads as if the recognition of rights acquired abroad was merely a concession on the part of the sovereign which he might make in consideration of material utility and not, as it could be argued under Grotian influence, in accordance with a moral and legal obligation.[93] But Huber himself acknowledged that an

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of '*état*', and 'state' to refer to sovereign. On the second one, it also indicates that Lorenzen's popular translation gave way to many misunderstandings regarding the deeper meaning ascribed by Huber to his text.

[89] Dig, 2.1.20

[90] Dig, 48.22.7 §10

[91] Praelect. pt.2, bk.1, tit. 3, no. 12. Trans. from Lorenzen, 'Huber', p. 380

[92] Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects."

[93] As argued by Lorenzen, 'Huber', p. 377. According to this traditional view, unless a State specified in which circumstances it would concede the application of foreign law in agreement with its domestic interest, its fora were not bound to apply it and recognise rights established abroad. Foreign laws had *ipso jure* no extra-territorial applicability. The recognition of foreign laws could happen, but their operation will always rest upon *comitas*. See Yntema, Hessel E. "The comity doctrine." *Mich. L. Rev*. 65 (1966). Indeed, in his wide production, Huber was consistent in holding that sovereigns must 'offer one another a helping hand', that they 'mutually indulge each other', and that they 'act out of comity' *Praelectiones*: '*comiter agunt*'. Despite the argument sometimes advanced in the literature that rights vested by foreign law depended on courtesy, as I show below, Huber did not submit the recognition of rights acquired in a foreign jurisdiction to the whimsical and absolute arbitrary will of the ruler. Huber saw 'acquired rights' as an instrument which should have ensured the consistent application of foreign law and harmony of decisions. See Lipstein, 'General Principles', pp. 124-125

understanding of comity in the sense of mere courtesy would hamper cross-border exchanges and undermine justice.[94] He therefore argued that:

> Although the laws of one [people] (*leges alternius populi*) can have no force directly with another, yet nothing could be more inconvenient to commerce and to [the usage of people] (*ita commerciis et usu gentium*) than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law.[95]

Far from granting to local governments the arbitrary power to recognise or to deny rights acquired abroad, comity expressed a legal duty and a binding principle of international law.[96] Huber thus posited that "the solution of the problem must be derived not exclusively from the civil law (that is, the internal law)" but he also added that it must be derived "from convenience and the tacit consent of [the peoples] (*populorum consensu*)."[97] This last passage seems to imply that questions raised by conflict of laws ought to be solved by an international law which is the result of the consent of governments. However, Huber did not consider comity, as sometimes claimed, "as an expression of the division between internal and external matters as part of the positivist account of international law".[98] Huber, comity was part of a natural, rather than positivist *jus gentium*. Huber did not understand the *jus gentium* as a "distinct, voluntarist system of law" which was "separate from the political questions which concerned matters internal to each State", as the historiography still assumes.[99] In a passage which is worth quoting in full, Huber pointed out that:

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[94] Joseph Story will declare: 'The true foundation, on which the administration of justice must rest, is that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of *moral necessity* to do justice, in order that justice may be done to us in return.' Story, Joseph. *Commentaries on the Conflict of Laws*. Keip, 1834, p. 34 (Emphasis Added). Story referring to Livermore, Samuel. *Dissertations on the Questions which Arise from the Contrariety of the Positive Laws of Different States and Nations*. B. Levy, 1828. p. 28. For Story, comity did not give rise to a legal obligation to give effect to foreign law and to recognise foreign rights. Citing the work of Boullenois, Rodenburg, Paulus Voet and Huber, Story was led to the conclusion that Huber's "doctrine owes its origin and authority to the voluntary adoption and consent of nations. It is therefore in the strictest sense a matter of the comity of nations, not of absolute paramount obligation, superseding all discretion on the subject…" to apply foreign law. Story, [p. 34]. However, this influential opinion, that Huber merely implied self-restraint with his theory of comity has been the subject of an illuminating critique by Watson. Watson declared: "One purpose of this book is to show that Story misunderstood the views of Huber on comity; that earlier cases in England and the United States had already accepted Huber; and that subsequent important cases based on Story would have been decided differently if Huber had been followed. Indeed, on Huber's theory the Dred Scott case, with all its consequences, could not have arisen." Watson, 'Joseph Story', p. viii: See also Watson, 'An Essay'. As shown below, I would also submit that Huber had a proper obligation in mind, rather than mere courtesy.

[95] Trans. from Lorenzen, 'Huber', p. 403. Replaced 'nation' with 'people'.

[96] "It is clear, however, that his third axiom is meant to express a principle of international law: sovereign states have a legal duty to accept the authority of foreign law insofar as it already applied to those subject to it." De Boer, Th M. "Living apart together: the relationship between public and private international law." *Netherlands International Law Review* 57.2 (2010) Law Review, p. 5. See Watson, Watson, 'Joseph Story' and Watson, 'An Essay'.

[97] Ibid.

[98] Mills. 'The private history', p. 26

[99] Ibid. p. 25

> It often happens that transactions entered into in one place (*in uno loco contracta*) have force and effect in a different country (*diversi locis imperii*) or are judicially decided upon in another place. It is well known, furthermore, that with the fragmentation of the laws and statutes of each people (*leges et statuta singulorum populorum multis partibus discrepare*), with the breaking up of the provinces of the Roman Empire, and with the division of the Christian world into almost innumerable peoples (*in populos ferme innumeros*), without being subject one to the other's rule (*sibi mutuo non subjectos*), the laws of the different peoples disagree in many respect. There is nothing in the Roman law (*jure Romano*) on the subject since the Roman dominion, covering as it did all parts of the globe and ruling the same with a uniform law (*aequabili jure*), could not give rise to a conflict of different laws (*conflicti diversarum Legum non aeque potuerit esse subjectum*). The fundamental rules according to which this question should be decided must be found, however, in the Roman law itself (*jure Rom*). Although the matter belongs to the law of the peoples (*jus Gentium*) more than to the civil law, it is manifest that what the different people observe among themselves belongs to the *jus gentium* (*ad juris Gentium rationes pertinere*).[100]

It appears that, like Italian and French jurists in the 12th and 13th centuries, Huber's theory was forced between opposing institutional forces. On the one hand, he could not but take account of the factual power of the local *imperium*, i.e. the Dutch provinces in which, notably, he acted as a judge. On the other, it was still assumed, especially after Grotius, that sovereigns were not free to deny certain rights acquired in accordance with local laws (and in accordance with the *jus gentium*) and could not determine the outcome of *conflictus legum* merely on the ground of the contents of domestic law, or purely based on material considerations, as would suggest a an in-ward oriented interpretation of comity. The elusiveness of the notion of *comitas* - like the blurred division between personal and real statutes - and the popularity of the universalist theories advanced by Grotius gave Huber an opportunity to reconstruct its meaning as a binding principle of the *jus gentium* without however disregarding to the specific institutional environment of the Dutch Republic.

[100] Trans. from Lorenzen, 'Huber', p. 402. Where the translation of this important passage was lacking in accuracy or, it may be reasonably argued, did not respect the meaning intended by Huber, the author has modified certain words, always indicating the original Latin word to their side.

2.3 International Marriage Contracts: *Consensus* and Intent

It is often said that Huber determined the end of the Statutist method. When we look at the actual solutions proposed to solve *conflictus legum*, however, we find that he also believed that the law where the property was located governed real matters.[101] In contractual matters, he also defended the *lex loci* rule whereby the validity and effects of marriage contracts are either governed by the place of contracting or by the place of fulfilment.[102] Like his predecessors, he also understood contractual obligations expansively.[103] For indicating the common elements with the work of his predecessors, what is also noteworthy is that, in line with the overriding importance of consent in medieval legal thought, Huber maintained that the same rules and principles that governed international contracts must also apply to marriage relations.[104] Huber dedicated the greater part of his treatise to *conflictus legum* in marriage matters, suggesting that cross-border marriages must have been regularly contracted, but also that civil laws were more inclined to regulate or even invalidate them.[105]

As territorial laws either incorporated, and modified, the original body of canon laws or introduced new rules altogether, conflicts between laws over the validity and effects of cross-border marriages arose with greater frequency.[106] In accordance with the approach taken by his medieval predecessors, however, Huber argued that the *lex loci* rule also governed marriage contracts.[107] Instead of setting sovereigns free to recognise or deny personal rights in marriage relations according to their material interest - as a superficial reading of comity would suggest - Huber re-affirmed the 'traditional rule' and posited that "if lawful in the place where it is contracted and celebrated (*ubi contractum et celebratum*) [a marriage] is valid and effectual everywhere" even in those places where the civil law regarded such contracts as invalid.[108]

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[101] Huber applied this doctrine both to movables and immovables. Johannes Voet held instead that in the case of actions in rem affecting immovables the jurisdiction ley exclusively in the situs. J. Voet, "*Ad pandectas*" bk. 5, tit. 1, no. 7

[102] He divided between aspects regulated by the place of contracting and by the place of fulfilment. *Praelect*, pt. 2, bk. 5, tit. 1, nos. 53, 54

[103] Some scholars have criticized Huber for having expressed himself vaguely about the question of immobile property. They have disputed whether or not the same liberty also applied to immobile and mobile property. When it came to the capacity to dispose and transfer the ownership of immovable property, John Voet and Paul Voet had argued instead that the law of the situs should always govern. Lorenzen, 'Huber', p. 380. However, Huber acknowledged that "there was a controversy among experts of customary law (*consuetudinarios Doctores*) whether immovables situated in another country were to be affected in like manner". bk.1, tit.3, n.9 And he responded that "affirmative answer must be given" to this question. Thus, he argued that "Frisian spouses will remain the separate owners of their property even if it is situated in Holland." Ibid.

[104] "Matrimonium pertinet etiam ad has regulas." bk.1, tit.3, n.8

[105] De Nova, 'Historical Introduction', p. 40

[106] Protestantism rejected the idea that marriage was a sacrament. However, all the reformers took for granted that the regulation of marriage should conform to Christian doctrines and should continue in accordance with the pre-existing canon law. For an account of the relation between Lutheran reforms and marriage law, see Witte, 'The Reformation'

[107] Lorenzen, Huber, p. 385

[108] Huber, *De Conflictu Legum*, Bk.1, tit.3, n.8

Validity and rights are to be determined by the law where the marriage is contracted, i.e. by the *lex loci contractus*, but not in all cases. So persuasive was the force of consent in the medieval consciousness that Huber also added that the *lex loci* rule had to be interpreted in the broadest possible sense to enable courts to take account of the preferences of the parties. Hence, the *lex loci* did not necessarily correspond to the law of the place where the parties entered in the marriage contract and may have gone through a ceremony of marriage, but could be equivalent to the law of the country where the contracting parties intended to live.[109] Citing the *Digest,* and implicitly referring to Alfonso and Dumoulin, Huber gave parties freedom to select the law of a place different from the *lex loci contractus* as the law governing their rights and obligations.[110] As he put it:

> The place, however, where a contract is entered into is not to be considered absolutely; for if the parties had in mind the law of another place at the time of contracting the latter will control.[111]

This meant that the validity and the effects of a marriage contracted within a given jurisdiction might be governed by a law which was not the *lex loci contractus*, provided the parties intended another law to govern. Even in the absence of an express contractual clause, if such implied intention could be proven or ascertained, the foreign law intended by the parties should govern the acquisition of rights upon marriage.[112] Although Huber chose to approach questions of legal collisions differently from his predecessors, his consensual conception of marriage and of marriage rights shows remarkable affinities with his medieval predecessors. Accordingly, Huber also held that marriages contracted informally are valid and give rise to rights and obligations everywhere, provided they are valid under by the *lex loci*:

> In Frisia it is a valid marriage if a male and female agree to marry and recognize each other as husband and wife, although no religious ceremony was performed. In Holland it would not constitute a marriage. The Frisian spouses will enjoy nevertheless in Holland, without doubt, the rights of husband and wife as regards marriage settlements and the rights of children to inherit the property of their parents, etc.

[109] Ibid. Bk.1, tit.3, n.10: "It happens every day that men in Frisia, natives as well as residents, marry wives in Holland whom they immediately bring into Frisia." Like in the case of Dumoulin, it has been suggested in fact that Huber meant in fact that the *lex domicilii* to questions of capacity. Lorenzen, 'Huber', p. 381
[110] "Everyone is deemed to have contracted in that place, in which he is bound to perform" Dig. 44.7.21
[111] Bk.1, tit.3, n.10
[112] Ibid.

Since in pre-modern Europe, the production of rights which governed the conduct of family life was largely left to private ordering and to the parties themselves, their recognition and enforcement of marriage and household relations had cross-border dimensions would be endangered if the conditions and requirements set by the local laws had the effect of undermining the *favor matrimonii* upheld by canon lawyers as by civil lawyers alike. As in Grotius so in Huber, the simplicity of this approach, based on the medieval premises that *consensus facit nuptias* and that a contract (of marriage) good by the law where it was made was to be recognised as good and binding everywhere, were driven by the desire to ensure that rights and effects of legal transactions would be recognised across territorial and jurisdictional borders. Accordingly, Huber argued that:

> not only are the marriage contracts themselves, duly entered into in a certain place *(certis locis rite celebratae*), to be regarded as binding and valid everywhere, but [so are] the rights and consequences (*etiam jura et effecta*) also attached thereto by the law of the place where they were acquired (*obtinebunt*).[113]

The overriding persuasive force of intent in medieval thought led Huber to argue that, regardless of the content of the *lex fori* and of the personal circumstances of the contracting partners, courts were everywhere under an obligation to give effect to the rights vested in persons by foreign laws.[114] Under the theory of vested rights, the symbolic value of the acquisition of rights voluntarily created by a person under the civil law of a given country is so strong that Huber used the metaphor of temporary but also indispensable 'qualities' of the person that, similarly to a physical attribute or to the deepest character of the person, must 'surround and accompany him everywhere'. Voluntarily acquired rights must therefore be protected and given effect in all jurisdictions. What followed is that, when confronted with a cross-border dispute, all that local courts ought to do is to ascertain where those rights were acquired.

This is the fundamental question which would torment supporters of the theory of acquired rights in the following centuries and a question which, supposedly, Huber never provided a clear answer to. However, it appears self-evident that to indicate what law ought to apply was precisely the object of the law governing cross-border relations, and Huber also provided some principles and rules,

[113] Bk.1, tit.3, n.9

[114] Huber also thought that the spouses were free to select the law applicable to their matrimonial property regime. He held that parties who have married in Holland have by default a community of all property unless they have stipulated otherwise in the marriage contract, whether tacit or explicit. Bk.1, tit.3, n.9 Conversely, the matrimonial property of Frisian natives who marry in Holland with no intention of staying there is governed by a no community of property regime in the absence of a marriage contract that provides otherwise. Bk.1, tit.3, n.10

consistently with those advanced by his predecessors, to answer this question. Huber's treatise illustrated how to settle choice of law questions, as demonstrated by his discussion of marriage disputes, and he indicated that the law under which rights in cross-border marriages could be acquired was either the *lex loci contractus* or the law that the parties had in mind. In line with common practice and the dominant assumption, the answer provided by Huber referred to the intention and the expectations of the parties, to their consent. This answer applied to marriage as to any other contract. Huber therefore maintained that the acquisition of rights:

> … is not so much by force of law as by the consent of the parties (*non tantum hanc esse vim legis, sed etiam consensum partium*) reciprocally communicating their property rights to each other, by which means a change of property may be effected, no less from matrimony than from other contracts (*per matrimonium quam per alios contractus fieri potest*).[115]

It appears that Italian and Spanish jurists in the 14th and 15th centuries, French scholars in the 16th century, and Dutch jurists in the 17th century shared the same consensual and informal conception of marriage.[116] Hence, they argued that capacity to contract a lawful marriage and the acquisition of rights on marriage were governed by the same rules and principles governing all other interpersonal contractual relations.[117] As we will see in the next paragraphs, the affinities between Huber's emphasis on intent - visible especially as far as recognition of cross-border marriages, constituted by the parties' consent, producing rights domestically and across legal orders, incapable of being nullified by human decrees - and its coherence with the pragmatic and informal medieval approach made the theory of comity and acquired rights immensely popular in the Netherlands and abroad.

Although Huber placed paramount importance to intent, this did not imply an absolute freedom of the parties to elevate themselves above local law. Contracts must be duly entered in and they cannot prejudice others.[118] Huber also specified that marriages, like all contracts, which are valid by the *lex loci* might not be recognised if the *lex fori* contained a prohibitive provision or if they resulted from wilful evasion.[119] And yet, although he argued that "[o]ur magistrates are not bound therefore by the

[115] Bk.1, tit.3, n.10
[116] See Lorenzen, 'Huber', p. 385
[117] In later times, P. Voet, 'De statutis' s.9, c.2, n.9; J. Voet, 'Ad pandectas' bk.23, tit.2, n.4
[118] And that marriage contracts were like any other contract in this regard as well, since a contract which is valid and effectual in the country where is made is valid everywhere with the reservation that it must not prejudice others ("sub eadem exceptione, praejudicii aliis non creandi"). Huber, 'Praelect' pt.2, bk. 1, tit.3, n.12. See Lorenzen, 'Huber', pp. 379
[119] For Huber, the question arose, for instance, if the marriage was incestuous: Huber acknowledged that: "It often happens that young people under guardianship, desiring to unite their secret desires through the bonds of matrimony, go to eastern

jus gentium to recognize and give effect to marriages of this kind", Huber nevertheless demanded the widest possible protection of rights acquired abroad, even in the case of marriages contracted by under-age persons or by spouses within the prohibited degrees, what were to become the bone of contention between local laws governing marriages and their nullification in the centuries to come, and also in the classical and social ages.

3.1 English Law, Special Courts and the *Communis Opinion Doctorum*

From the previous account, elements of continuity emerge with the approach to cross-border disputes examined in the previous chapter. Huber, like Bartolus and D'Argentré, provided persuasive ideas that guaranteed a degree of independence to territorial powers. Rules and ideas governing cross-border relations implicitly justified the separate existence of territorial laws and, at the same time, constituted a valuable instrument for ordering space and persons. Huber advanced his theory of acquired rights to satisfy the increasing appetite of the Leviathan but also the existence of natural limits to the exercise of the local *Imperium*.[120] The vague notion and content of comity made it possible to balance the defence of the prerogatives of the sovereign and the protection of 'natural rights' as well as the satisfaction of the expectations of individuals. Accordingly, the recognition of acquired rights was not subject to the arbitrary whims of the sovereign. It was demanded by an overarching framework which is reminiscent of the *jus commune* of Bartolus and Aquinas.

Frisia or to some other place where the consent of their guardian is not necessary to marriage, according to the provisions of the Roman law, which has been abrogated with us on this point. They celebrate their marriage there and presently return home." Huber considered this "a manifest evasion of our law (*eversionem juris nostri*)." Huber, 'Praelect'. bk.1, tit.3, n.8. Johannes Voet had also expressed the view that an international marriage contract could be invalidated if statutory law banned certain parties from forming a marital union (J. Voet, 'Ad pandectas' bk.23, tit.2, n.4) or prohibited evasion of the personal law (J. Voet, 'Ad pandectas' bk.1, tit.4, pt.2, n.14). The problem of clandestine marriages and marriages within the prohibited degrees had become more acute in the face of greater diversity between territorial (and ecclesiastical) laws."

[120] This appropriate metaphor is taken from Juenger, 'General Course', p. 148. Hobbes' Leviathan had been published a few decades earlier than the publication of Huber's pamphlet, in 1651. In the Leviathan, 1651, Thomas Hobbes (1588-1679) appears to receive some of the natural law ideas that dominated the European scholarship. In his theory of ethical law, he conceived of rights, law and state to originate in society and its needs. At the same time, he argued that there could be no other authority but the state which could determine the validity of all laws. The Leviathan therefore provides yet another paradigm shift in the theory of the state after that generated by Bartolus, Bodin and Grotius. For Hobbes, the natural condition of mankind is one which contradict the idea that the power always rested in the body of the people, as claimed by Bodin. In Chapter 13, Hobbes draw a vivid picture of the state of nature as one characterised by the nastiness, selfishness, brutality and indifference of men towards other men that also put in question the naïve assumptions of Grotius. In the state of nature, every person is dissociated from everyone else. What Hobbes foresees is not a *perfectissima societas*, but a multitude of interests which makes "every man an enemy to every man." The solution to the state of nature is, however, not that different from that advanced by Grotius. For Hobbes, the peoples are not to passively obey absolutist powers. In Chapters 16 and 17 he held instead that, in this state of nature, individuals give their consent to the holders of sovereign power. The status of the person who embodies the sovereign power is not higher than that of the people. In this manner, both the sovereign acting as representative, and the multitude whom he represents which now acts as a person with a single will, are constituted. Thus, he argued that "The multitude so united in one person is called a common-wealth", "Civitas" or "State".

For Huber, but also for the Voets, the rules and principles governing *conflictus legum* were part of an overarching framework determined by natural reason which was obligatory on all people (*Jus gentium est, quod ex voluntate popularum, recta ratione utentium vim obligandi accepit*).[121] Dutch scholars, like their predecessors and contemporaries, provided rules within the *conflictus legum* that enabled the articulation and operation of territorial laws, but also placed them within a greater order, a greater whole which was underpinned by ideas, principles and divisions that applied across all orders.[122] In other words, questions raised by *conflictus legum* were not understood as domestic problems to be solved by municipal laws as a matter of courtesy and in accordance with purely material and internal concerns, but by rules developed in the context of a unified juridical consciousness that carried implications for all rights and laws, secular and civil, local and universal.[123]

This legal order did not consist of a body of coherently arranged and clearly-spelled rules. Rather, it was constituted by common ideas, principles and assumptions, widely-shared schemes of reasoning and standard argumentative devices that 'natural reason', i.e. the legal science, had made for governing every dimension of life, local and global, secular and spiritual. It did not matter whether you were a theologian from Italy or a civil law expert from the Netherlands. Still, you were part of a common juridical order. It is for this reason that Grotius, the Voets and Huber drew extensively on old and contemporary Italian, Spanish, French and German scholarship.[124] It was this '*communis opinion doctorum*' that made up it possible to develop *conflictus legum* and made up for the decline of the idea of the jus commune and for the absence of a written pan-European law, in continental Europe but also overseas, including in English (common) law.[125]

The formation of English common law resulted from the cross-fertilisation between pre-existing Anglo-Saxon customary traditions, Roman Law and Canon law, and, on top, contributions and

[121] '*Praelectiones*' Pars I, Liber I, Titulus II, no. 1

[122] Whilst they referred to jus as law in a general sense, they referred to lex in the sense of the civil laws of each state. Pufendorf therefore argued that lex "is an enactment by which a superior obliges one subject to him to direct his actions according to the command of the former." Pufendorf, *Elementa jurisprudentiae universalis* (1672), def. 13

[123] Only if Dutch scholars had such a 'universalistic' vision of conflict of laws we can explain why to none of legislators ever occurred that each power could in fact give itself a distinct set of written rules in line with its own particular version of *comitas* for governing conflict of laws.

[124] Zimmerman, 'Roman law', p. 33. Zimmermann, Reinhard. "Roman-Dutch Jurisprudence and its Contribution to European Private Law" *Tulane Law Review* 66 (1992). The 'perigrinatio academica' which had started in Italian and French universities continued in the pre-modern period. The most famous case that of Grotius himself.

[125] See Gorla, Gino. "La Communis Opinio Totius Orbis et la Réception Jurisprudentielle du Droit au cours des XVIe, XVIIe, et XVIIIe Siècles dans la « Civil Law » e la « Common Law »" in Cappelletti, Mauro *New Perspectives for a Common Law of Europe*, LeMonnier (1978). It has been noted that the Voets continued in many respects the legal and political integration started by Bartolus and Baldus. Johannes' Commentary to the Digest is among the most prominent examples of the adaptation of Roman law to the value-system and political system of his days in the Netherlands Zimmerman, 'Roman Law', p. 35

innovations brought by the Normans.[126] Despite the numerous influences, the isolation of English law from continental developments has been for long adamantly expressed by civil lawyers[127] and common lawyers alike.[128] This would be especially true with respect to conflict of laws.[129] What this genealogy shows is that development of the law in England did not take place in isolation from the legal culture, from the *communis opinion doctorum* that spread in the rest of Europe from the Middle Ages onwards.[130] Multiple were the contact points for the migration of legal ideas. Consistory Courts, a type of ecclesiastical court, were leading actors in the reception of canon law and of Roman law principles.[131]

Until the Reformation, ecclesiastical courts responded to the authority of the Church of Rome, therefore playing a crucial role in the importation of 'foreign', i.e. 'civil law' ideas and doctrines. With the Protestant Reformation, Consistory Courts were placed under the authority of the Crown. However, this did not alter or diminished the jurisdiction of Consistory Courts, which continued to operate as before and largely under jurisdictional principles derived from Roman and canon law. The Reformation also did not obliterate the ideas and principles which had been imported in previous centuries.[132] Consistory Courts exercised jurisdiction over a variety of matters. Their subject-matter jurisdiction included marriage and succession but also extended to breach of contract. The reception of ideas and principles from continental Europe thus did not concern marginal spiritual matters but extended to a range of questions that went from household to commercial matters.

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[126] After the Conquest (11th century), the Normans did not impose 'French law' on everyone who lived on the territories that they had occupied. The Normans in fact "were mainly concerned with establishing a strong administration and safeguarding the royal revenues, and it was through machinery devised for these purposes that the common law developed." Martin, Elizabeth A. *Oxford dictionary of law*, Oxford University Press, 2003, p. 93

[127] Thomas J. Hogg famously affirmed that "What have we here? Who is that savage? 'a foreign jurist would ask, with no small wonder, if the writings of Sir Edward Cokem for example, were laid before him.' Whence comes this wild man; naked, tattooed, painted…, with rings and fantastic toys in his ears and nostrils, - from what island of the South Sea, or from what trackless forest? It cannot be that he was the Attorney-General of the King of England in the age of refinement – the contemporary of Cujacius…"' Hogg, T. J. *An Introductory Lecture on the Study of the Civil Law* (1813), Cited in Zimmerman, 'Roman law', p. 42

[128] In the third edition of one of the leading textbooks on English legal history it is said that "English law flourished in noble isolation from Europe." Baker, J. H. An Introduction to English Legal History, Butterworth, 1990 (3rd edition), p. 35

[129] For the early history of conflict of laws in England, See the classic text Sack, A. N. "Conflicts of Laws in the History of the English Law" in *Law, a Century of Progress, 1835-1935*, Vol. III, 1937, pp. 342-454.

[130] The most evident example of cross-fertilisation is equity.

[131] See Helmholz, Richard H. *Roman canon law in Reformation England*. Cambridge University Press, 1990(2004) and , Helmholz, Richard H. "Canon Law As A Means Of Legal Integration In The Development Of English Law" In Scholler, Heinrich ed. *Die Bedeutung Des Kanonischen Rechts Fur Die Entwicklung Heitlicher Rechtsprinzipien*, 1996. A significant migration of a legal principle is that, through the canon law, common law courts adopted the notion that nuda pacta sunt servanda. Helmholz, Richard H. *Canon law and the law of England*, 1987, Chapter on Assumpsit and fidei laesio, p. 270 et seq.

[132] See Bursell, Rupert and Kaye, Roger. *Halsbury's Laws of England*. Volume 34. Butterworths, 2011(5th edition), pp. 854-855

England and English law were anything but isolated from the reach of ideas, principles and doctrines that developed overseas. The *jus commune* was taught all over Europe, including England. In English universities, professorships and chairs were assigned to 'foreign' jurists, including experts of civil law.[133] Again, the influence did not only occur at the level of positive norms, but also at the deeper level of consciousness. Similar developments and comparable transformations thus took place in Europe and in England. We have seen that in France legal scholars identified local customary practices with jus commune, although their predecessors referred the jus commune to a pan-European Roman and Christian inheritance. Similarly, in England the 'common law' came to designate the general law and to distinguish it from local variations, therefore reflecting the same transformative process that altered the meaning of *jus commune* in the Continent.[134]

3.2 Conflictus Legum in England before the Acts of the Union

Echoing the assumption that English law developed in relative isolation, it is also often claimed that, compared to the earliest glosses and commentaries to the *cunctos populos*, conflict of laws in England is of much more recent origin.[135] Legal historians generally date the origins of English conflict of laws to the earliest decisions by common law courts after the split between English and Scottish law, in the early 18th century.[136] But cross-border disputes arose long before the earliest conflict rules were systematically developed.[137] With the growth of international trade in the 16th and 17th centuries and the decline of feudalism, exchanges between foreign merchants and Englishmen grew, also increasing the chances of litigation and of *conflictus legum*. Initially, when a dispute arose which had evident cross-border elements, English courts merely applied local law.

The automatic application of the local law could be compared to early practices in continental Europe. There, we have seen that, partly because of the lack of principles that applied in all places and partly because of the overriding importance of the local law, most courts systematically applied the *lex fori*.

[133] The case of Alberico Gentili at Oxford who played a role in the spreading of common law in the UK is a prominent example.
[134] For France, see before, footnote 7. Regarding the development and character of English common law, Pollock and Maitland famously described it as follows: "A century later, in Edward I.'s days, we frequently find it, though lex communis (commune lei), has by this time become the more usual phrase. The common law can then be contrasted with statute law; still more often it is contrasted with Royal Prerogative; it can also be contrasted with local custom: in short it may be contrasted with whatever is particular, extraordinary, special, with 'specialty'." Pollock, F. and Maitland, F. W. *The History of English Law Before the Time of Edward I*, Vol. 1, Liberty Fund, 1895(2010), p. 188
[135] With respect to both jurisprudence, legislation and the doctrinal interest by jurists on the subject. For instance, see Lord Collins, Briggs, A., Harris, J., McClean, J. *et al.* (eds). *Dicey, Morris and Collins: The Conflict of Laws*, 14th Edition, Sweet & Maxwell, 2006, p. 9
[136] Ibid.
[137] R. Quadri, «Una osa è dire che il d.i. privato non suscitò interesse nella dottrina britannica fino all'incirca al secolo XVIII, altra cosa è dire che esso non esisteva prima di questo periodo.» In Quadri, 'Lezioni', p. 61

The difference is that, in England, early cases of legal collisions did not draw the attention of legal scholars. With greater frequency, however, Englishmen were travelling abroad and were concluding contracts overseas and with foreign domiciliaries; they bought property in foreign countries; they suffered injuries abroad; and they also entered relationships of intimacy with foreign nationals. Cross-border aspects could no longer be ignored. Adopting a solution also comparable to some attempts in civil law jurisdictions, special courts were delegated authority to try disputes with foreign elements.[138]

The jurisdiction of such special courts, called of Piedpowder and Staple, was however rather limited. When English domiciliaries were involved in litigation, courts would simply dismiss the action and urge them to seek redress abroad. Given structural and procedural limitations, the Court of Admiralty was also created with mandate to deal with cross-border disputes.[139] The Court of Admiralty exercised jurisdiction over cases arising on the high seas and those originating in overseas territories. The Court operated in a manner which is reminiscent of the *praetor peregrinus*. Admiralty judges, applied what some historians have (erroneously) argued corresponded to a local variation of the *lex mercatoria*.[140] In fact, judges of the Court of Admiralty extracted from the 'law merchants' and other sources principles and ideas to find appropriate solutions to a wider class of disputes.[141]

Until the reforms of the 19th century, the Admiralty Court also adjudicated cases that did not possess, strictly speaking, a maritime nature, including household disputes. Notably, the Court also exercised jurisdiction over divorce cases, thus illustrating the typical lack of strict boundaries between commercial and household matters in the medieval age.[142] The existence, adoption and reconstruction of bodies of rules that had universal scope and applied to all persons in the case of specific transactions, which is exemplified by the *lex mercatoria*, not only demonstrates symbolically the fiction of isolation of English law. The *lex mercatoria* actually contributed to the integration of

[138] The courts of Piedpowder and of Staple were purposefully set up to try 'mercantile disputes'. Juenger, 'General Course', pp. 150-151

[139] North, Sir Peter, Fawcett, James J. *Private International Law*. Oxford University Press, 2004 (13th edition), p. 16

[140] North, 'Private International Law', p. 16. The 'law merchant' comprised flexible rules of customary origin developed and applied since the Middle Ages among merchants to facilitate trade. Its clear purpose and simple architecture supplanted the technicalities and slow responsiveness of civil law and civil courts – which could not speedily dispose of disputes – which had both proved unable to deal with greater commercial exchanges. See Juenger, Friedrich K. "The lex mercatoria and private international law." *La. L. Rev*. 60 (1999)

[140] Juenger, 'General Course', p. 151

[141] Juenger, 'General Course', p. 151

[142] It is significant that, after the introduction of the Supreme Court of Judicature Act of 1873, the High Court of Admiralty was absorbed into the Division 'Probate, Divorce and Admiralty' of the High Court. As it was argued in the Report of the Royal Commission on the Despatch of Business at Common Law, 1934-1936, 1936, Cmd. 5065, para. 169, there was no apparent "likeness between … a collision at sea or a salvage operation … and a petition for the severance of the marriage tie." The amalgamation of these three dispersed subject-matters, although in continuity with the history of the *jus gentium*, created clashed with the conceptual aspirations of classical scholars.

English law with 'European law' at substantial and also at discursive and conceptual level.[143] It is significant in this regard that English judges referred to the *lex mercatoria* as the law merchants but also as the *jus gentium*.[144]

Despite the flexibility provided by the creation of special courts, this arrangement could not provide consistent solutions. Interactions with overseas societies had become more frequent but also more complex. Consistory Courts first and then Common law courts after claimed jurisdiction over disputes which had foreign elements. Without consolidated scholarly or judicial doctrines, however, courts contented themselves with reaching equitable solutions.[145] Before the 17th century, judges dealing with cross-border disputes showed little knowledge of principles of *conflictus legum*. They pragmatically resorted to creative legal fictions and *ad hoc* solution to justify the application of English law and to reach what they regarded as the most appropriate solutions to cross-border litigation.[146] In a sense, the "triumph of pragmatism over logic" in this formative period shows a degree of cultural affinity with medieval jurists.[147] However, it was clear that "[t]he early judges worked on virgin soil, and their decisions were necessarily hesitating and tentative."[148]

[143] Zimmerman, 'Roman Law', p. 46

[144] *Mogadara v. Holt* (1691) 89 Eng. Rep. 597, 598 (K.B. 317): The law of nations "is no more than the law of merchants, and that is the jus gentium, and we are to take notice of it." Cited by Waldron, Jeremy. "Partly Laws Common to All Mankind". *Foreign Law in American Courts*. Yale University Press, 2012, p. 234

[145] First, common law courts extended their jurisdiction to mixed cases which were connected to both English and foreign jurisdictions. Then, they also heard cases which were exclusively connected to a foreign jurisdiction. North, 'Private International Law', p. 17

[146] The ingenious measures on which courts relied provide a glimpse of medieval legal thought. One such legal fiction was to pretend in tort cases that the foreign place of an injury, say Hamburg or Brussels, was in fact located somewhere in the proximity of an Englishtown, for instance in the suburbia of London. « [N]ous doiomus entend Hamburgh d'estre diens London, p. mainteyn l'action, quia aliter serroit hors de nostre jurisdict. Et si en verity nous sciamus le date d'estre al Hamburgh ouster le mere, vnc come Judges ne prisamus notice q est ouster le mere." Ward's Case, 82 Eng. Rep. 245, 246 (K.B. 1625). Also cited in Juenger, 'General Course', p. 120 who translates it with: "[W]e shall take it that Hamburg is in London in order to maintain the action which otherwise would be outside our jurisdiction. And while in truth we know the date to be at Hamburg beyond the sea, as judges we do not take notice that it is beyond the sea." In *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021, 1022 (K.B. 177) where the plaintiff alleged that he had been falsely imprisoned on the island of Minorca, "at London. in the parish of St. Mary le Bow." When the defendant dared object to this geographical folly, Lord Mansfield observed that he "was embarrassed a great deal while to find out whether the counsel for the plaintiff meant to make a question of it", and pointed out that "the law has. invented a fiction. for the furtherance of justice; and. a fiction of law shall never be contradicted". However contrived this solution was, it spared the common law courts from having to apply foreign law. Juenger, 'General Course', p. 150. This course of action was not the result of theoretical reflection, i.e. an expression of territorial bias. The automatic application of the *lex fori* was moved by practical expediency and by the desire for immediate solutions to unprecedented litigation. If there existed an actual jurisdictional link or not, it did not matter. Whenever they grabbed jurisdiction, courts simply applied the *lex fori*. Local judges resisted the idea that local courts should apply any law which was not the local law. Sack, 'Conflict of Laws', p. 342 et following.

[147] Graveson, R. H. 'The Special Character of English Private International Law.' 19(1) *Netherlands International Law Review* (1972), p. 4. The article as been reprinted in Graveson, 'Philosophical Aspects of Conflict of Laws', in in R. H. Graveson, *Comparative Conflict of Laws, Selected Essays*, Volume I (1977)

[148] Anton, A. E. "The Introduction into English Practice of Continental Theories on the Conflict of Laws." International & Comparative Law Quarterly 5.4 (1956), p. 540

3.3 The Acts of the Union and Two Separate Jurisdictions, English and Scottish

Without guidance provided by doctrines or principles, tentative decisions resulted in inconsistency and produced an overall uncertainty which damaged the growing commercial interests of English companies and of English subjects. However, the interest in conflictus legum in England waited until the creation of two separate jurisdictions and laws in the Kingdom.[149] In 1707 the Acts of the Union united the Kingdom and, in exchange, preserved the Scottish jurisdiction.[150] Although local laws had many common elements, Scottish and English law progressively drifted apart, formally and substantively. England vested great power in the courts. Scotland opted instead for a statutory 'civilian' system.[151] Substantial differences between English law and Scottish law also arose from the process of 'municipalisation' of 'universal laws', as in the case of the *lex mercatoria*, whereby each country adopted local variations of the original model.[152]

Scottish and English law also started diverging also because England and Scotland had chosen separate confessions.[153] After the schism from the Papacy (1534), Consistory Courts started performing judicial services in the name of the Church of England. Until the 15th century and later, ecclesiastical judges in England continued referring to sources other than English canon law, including principles derived from Roman civil law.[154] In 1604, however, the Convocation of Canterbury approved the Book of Canons which became the main body of English canon law.[155] Among other things, English canon law prescribed specific forms and conditions for the solemnisation of marriages, and also provided specific rules for their dissolution. These rules inevitably conflicted with the law governing marriage and household relations in other jurisdictions.

[149] Scholars usually indicate the date of the accession of James I to the Crown, which took place in 1603, as general reference point. After 1603, Scottish law was already accorded a degree of recognition in the Kingdom. In the Calvin's Case (1608) 7 Rep. 2a, an exception was made in favour of Scottish law.
[150] The British Parliament could still amend some sectors of Scottish law. However, this power was restricted to the laws governing trade and customs. See MacQueen, Hector L. "Regiam Majestatem, Scots Law, and National Identity." *Scottish Historical Review* 74.1 (1995)
[151] Halley, 'Family Law, Part I', p. 30
[152] The Law Merchant was incorporated in the common law especially thanks to the efforts of Sir John Holt (Chief Justice between 1689 and 1710) and Lord Mansfield (Chief Justice between 1756 and 1788). See for Scotland, Cairns, John W., "Scottish Law, Scottish Lawyers and the Status of the Union", in John Robertson, ed., *A Union For Empire: Political Thought And The British Union of 1707*, Cambridge University Press 1995(2006)
[153] Scotland was mainly Presbyterian and England Anglican.
[154] Duve, Thomas, "Corpus Juris Canonici", in Katz. Stanley N., *Oxford International Encyclopaedia of Legal History*. Vol. 2, Oxford University Press, 2009, pp. 218-225
[155] See Seipp, David J, "The Reception of Canon Law and Civil Law in the Common Law Courts Before 1600", *Oxford Journal of Legal Studies* Vol. 13, No. 3 (1993)

The risks of legal collisions were especially concrete with respect to Scottish law, due to the geographical proximity and because of the different substantive provisions that applied in each jurisdiction. Even before the Acts of the Union were passed, the dis-establishment of the Episcopal Church in Scotland (1689) had transferred the jurisdiction of Consistory Courts to Scottish courts. Scottish judges acquired jurisdiction over property matters, defamation and libel, and over various 'household matters', such as marriage, restitution of conjugal rights and divorce.[156] The Scottish Court of Session became the highest court competent to hear disputes concerning marriage dissolution, including those that had a cross-border dimension.[157] More and more frequently, Scottish courts applied rules, as in the case of divorce, which conflicted with English law.[158]

From the early 18th century, English courts also found themselves regularly confronted with disputes with relevant cross-border elements. Disputes especially concerned the recognition of marriages, since local laws had by this time also set different conditions for their celebration. Against a context characterised by greater legal pluralism and cross-border mobility, English couples may deliberately seek to celebrate or dissolve their marriages in accordance with foreign laws. Before the 18th century, owing to the special features of the common law, neither scholars nor the judiciary had considered the application of foreign law in place of English law and the discussion largely revolved around questions of jurisdiction.[159] Decisions from this period are given marginal attention, although they are not without worth since they provide evidence of common argumentative schemes and ideas with medieval scholars whose work has been examined in the previous paragraphs.[160]

[156] Other than defamation and libel, legitimacy and bastardy, confirmation of executors and testamentary causes. Halley, 'Family Law, Part I', pp. 27-28

[157] Litigants in divorce cases adjudicated by the Court of Session would neither appeal to the Pope, nor to the House of Lords. The creation and acquisition of competence by the Court of Session acquired material as well as symbolic value in the process of legal independence of Scotland.

[158] Canon law did not regulate divorce any longer. Scottish law thus permitted divorces a vinculo on various grounds. Scottish law permitted divorce a vinculo on a variety of grounds, including adultery by both parties, whereas English law did not. See Part II, Chapter 5, Section 1.2

[159] North, 'Private international Law', p. 16. Joseph Story remarked in 1841 that "[t]he subject has never been systematically treated by the writers on the common law of England; and, indeed, seems to be of very modern growth in that kingdom; and can hardly, as yet, be deemed to be there cultivated, as a science, built up and defined with entire accuracy and precision of principles. More has been done to give it form and symmetry within the last fifty years, than in all preceding time. But much yet remains to be done, to make it what it ought to be, in a country of such vast extent in its commerce, and such universal reach in its intercourse and polity." Story, '*Commentaries* (first edition)', p. 9

[160] Lord Collins, 'The Conflict of Laws', p. 9

3.4 Scrimshire v. Scrimshire: The Law of Nations and Marriage Contracts

The case of *Scrimshire v. Scrimshire*[161] offers a valuable insight into the influence of medieval thought on the conception and development of the law governing cross-border disputes in England. The decision dates to 1752-1753, an historic and fateful year for English law. The judgment was delivered a few months before William Blackstone gave his famous lectures in Oxford and it was reached about a year before Parliament introduced the first statutory reform of the law governing marriage.[162] The Marriage Act 1753 had the objective of ending the widespread practice of clandestine marriages which was also the cause of action in *Scrimshire v. Scrimshire*. As declared by Sir Edward Simpson in that case, the proceedings and the decision were therefore of great importance not only for the parties, "but to the public in general".[163] In *Scrimshire v. Scrimshire*, the petitioner started proceedings with the Consistory Court for restitution of conjugal rights. Both petitioner and defendant were British subjects, but their marriage had been contracted in France.

The Consistory Court claimed jurisdiction over the case involving British subjects. As to the marriage, the Court found that the parties had "mutually, freely, and voluntarily" contracted the marriage.[164] Consistently with a consensual understanding of marriage, their union should have been considered valid. However, the parties had contracted marriage without parental consent and in violation of the local law. Before 1753 clandestine marriages were irregular but valid in English law, void *ab initio* under French law as a result of the reforms taking place since the Protestant Reformation.[165] The question followed if English judges should apply English law and recognise the marriage in accordance with previous practice or if they should apply French law instead.[166] Sir Edward Simpson applied French law, the *lex loci contractus* as:

[161] *Scrimshire v. Scrimshire* (1752) 2 Hag Con 395, 161 E.R. 782
[162] With the 1688 revolution, the British Parliament became supreme. According to Blackstone, the absolute power of the Parliament went as far as doing whatever was not physically impossible. Commentaries, bk 1, 160-161. The absolute binding force of the enactments of the Parliament could not be questioned by courts.
[163] Opening statement, para. 395. Ahead of *Scrimshire v. Scrimshire*, the validity of a marriage from which children were born and lasting 30 years was successfully challenged by a woman claiming that she had undergone a secret marriage union decades before, in *Cocgrane v. Campbell* (1753) 1 Paton's Cases 519. Sir Edward was aware of the consequences for the public if the Court was to follow *Cocgrane v. Campbell*.
[164] The Court found that the parties had wilfully contracted an informal marriage in accordance with 'Popish law', the Canon law of the Church of Rome: "…on the whole evidence taken together, there seems to be full proof of affection, courtship, recognition, and a fact of marriage, by the intervention of a priest, without which undoubtedly by our law it could only be a contract." Para. 405
[165] Para. 395
[166] Paras. 407-408: "The question being in substance this, whether, by the law of this country, marriage contracts are not to be deemed good or bad, according to the laws of the country in which they are formed"

> … both parties in the cause had obtained a forum in France, where the marriage contract was entered into; and by marrying there had subjected themselves to be punished by the laws of the country for a clandestine marriage; and had also subjected the validity of the contract to be tried by the laws of that country; as the contract itself, or the marriage, being according to the form of that country, was meant to be a marriage, or not, according to the laws of that country.[167]

Consistent with medieval conceptualisation of marriage as a consensual relation, Sir Edward approximated the cross-border recognition of marriages and the enforcement of their effects to those of all other contractual relations.[168] As Grotius had also argued a century before, a person owes obedience to the laws of the country in which he enters into a contract, regardless of the temporary or permanent character of the link with the jurisdiction. Following the *lex loci* rule according to which a marriage was good, or void, by the law where was made it should be regarded as good, or void, all the world over, the Court simply held that marriages are governed by the law of the place in which they are contracted. As the Court put it:

> This doctrine of trying contracts, *especially those of marriage*, according to the laws of the country where they were made, is conformable to what is laid down in our books, and what is practised in all civilized countries, and what is agreeable to the law of nations, which is the law of every particular country, and taken notice of as such.[169]

The words of Sir Edward and the conceptual framework within which he placed the lack of recognition of the cross-border marriage in *Scrimshire v. Scrimshire* reveal arguments and organisational schemes which are common to those used by medieval and pre-modern jurists in other jurisdictions. At the same time, in applying French law to the validity and incidents of the marriage contract, the Court held that it was following the law common to all 'civilised nations'. Nations had never been mentioned before. Other than the *jus gentium*, the Court thus also referred to an overarching framework with the formula 'the law of nations'. The change of title did not affect the substance of the decision. As Sir Edward proceeded to the fundamental question if it ought to apply or not foreign law, he responded:

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[167] Para. 411

[168] Para. 412 Although the *lex loci* rule had been interpreted broadly by Huber, also in the case of marriage contracts, for the court, the parties may change the forum or intended a different law, but the applicable law remains the same. In this sense, the English court shows as much awareness as ignorance of developments occurring abroad.

[169] Ibid. (Emphasis Added)

> Why may not this Court then take notice of foreign laws, there being nothing illegal in doing it? From the doctrine laid down in our books - the practice of nations - and the mischief and confusion that would arise to the subjects of every country, from a contrary doctrine, I may infer that it is the consent of all nations that it is the jus gentium, that the solemnities of the different nations with respect to marriages should be observed, and that contracts of this kind are to be determined by the laws of the country where they are made.[170]

Despite the proliferation of local laws and greater emphasis on local prerogatives, the resilient and influential universalist idea embodied in the *jus gentium* demand the application of the *lex loci* in conformity with past traditions regardless of the parties' domicile, their religious affiliation and their condition of English subjects. In line with what had been argued by Grotius, in the next paragraph, Sir Edward added that marriage contracts were "juris gentium" and that "all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made."[171] Here the terminology used is as important as the *ratio decidendi*. Despite suggesting that the *lex loci contractus* ought to be applied out of courtesy or material interest, Sir Edward specified:

> In commercial affairs under the law merchant, which is the law of nations, there are instances where sentences for or against contracts abroad have been given, and received here on trials […]. By the mutual consent of all nations they take notice of one another's sentences, and give mutual faith to their proceedings. […] [A]s the law of England takes notice of the law of nations in commercial and maritime affairs […] and as all countries are equally interested to have matrimonial questions determined by the laws of the country where they are had […], I am of opinion that this is the jus gentium of which this and all courts are to take notice.

Although, after the Reformation, Europe saw the "breakdown of the academic theory of the empire" and the progressive decline of the idea that there was a body of principles and rules that applied to all jurisdictions, English courts and European jurists persisted in referring to the idea of the *jus gentium* to justify the application of the (foreign) *lex loci contractus* in cross-border disputes, marriage cases included.[172] The words used by Sir Edward in *Scrimshire* therefore show that courts did not have in

[170] Para. 416 (Emphasis Added)
[171] Para. 417
[172] Pound, 'Jurisprudence, Vol. 2', p. 49

mind a separate department of English law when they resorted to solutions also adopted elsewhere in addressing cases with foreign elements. If English law was ever isolated from continental developments - something which is here rejected - this not translate into less, but into greater, receptiveness to foreign doctrines and juristic authorities.[173]

At the same time, the words used by Sir Edward are also relevant because of their reference to 'the law of nations'. In the 18th century, "national law was more and more an obvious fact."[174] It is therefore significant that, against the contemporary existence of 'national laws' and 'universal principles' Sir Edward referred to the *jus gentium*, 'law merchant' and the law of nations interchangeably. The employment of the last formula, as it has been appropriately pointed out, "reveals a remarkable change not only in language, but in legal theory" because it suggests that, between the 17th and the 18th centuries, nation and state started replacing the *civitas* of Bartolus and the *imperium* of Huber as the fundamental unit of the universal and natural order.[175]

The transition from the universalism of medieval scholars to 'internationalism' - which will become more obvious in the classical age – however, did not impede the migration of legal ideas across national boundaries.[176] On the contrary, *Scrimshire* was decided in the period when English courts threw their doors open to foreign doctrines, and especially Dutch ones, a trend which was to continue steadily in the following years. Accordingly, in 1760, Lord Mansfield delivered his landmark opinion *Robinson v. Bland* which set, with *Scrimshire*, the doctrine and the rules governing international contracts in English law in the following decades.[177] In this ruling, Lord Mansfield cited and endorsed Huber's view that contracts could either be governed by the law where the contract is made, or by the law which the parties had contemplated at the time of entering the contract.[178] As he put it:

> The general rule, established *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding

[173] Quadri, 'Lezioni', p. 60
[174] Pound, 'Jurisprudence, Vol. 2', p. 49
[175] Juenger, 'General Course', 152
[176] The development of conflict of laws in the common law must be understood against common body of norms: "Two features of [the] academic theory of the later Middle Ages have had a lasting effect upon the science of law, namely, the idea of universality and the idea of authority and of logical development of authoritative texts. The universal civil law, the universal canon law, the universal law merchant, and the universal sea law have given us a general doctrine of conflict of laws, whereby we are saved from a conflict of law, a general doctrine as to marriage, to be compared with the hopeless diversity of statutory law as to divorce, a general mercantile law, and a world-wide law of maritime matters as universal as water borne commerce. Likewise, the idea of authority has maintained itself as the logical development of authoritative texts, as the medieval layers worked it out, has endured as part of the legal equipment of the modern world." Pound, "Jurisprudence, Vol. 2", pp. 36-37
[177] *Robinson v. Bland* (1760) 2 Burr 1077; 96 E.R. 129
[178] Citing Huber, bk.1, tit.3, s.10

> and enforcing the contract. But this rule admits of an exception when the parties at the time of making the contract had a view to a different kingdom.[179]

If this principle - which Huber had advanced in the context of his discussion concerning international marriage - had been known to Sir Edward Simpson, it might have led to different decision in *Scrimshire*.[180] The decision by Lord Mansfield in *Robinson v. Bland* is therefore relevant because it shows the persistent, but not necessarily consistent and systematic, desire of English judges to look overseas for the development of appropriate rules and principles for settling in international cases, and because, together with rules and principles part of the *jus gentium*, legal authorities would also absorb common conceptual vocabularies and an embedded way of conceiving of legal relations.[181]

The *jus gentium*, or what courts started referring to as the law of nations, was a fundamental tool of integration between English law and the rest of Europe at the level of principles and rules, and also at the deeper level of conceptual assumptions, widely-shared schemes of reasoning and common principles.[182] In the 18th century, we can therefore detect traces of medieval mentality although national laws had started diverging, as we can infer from the different provisions of French and English law regarding the celebration of marriage without parental consent. But local principles governing marriages were not a unique case. In fact, trade also generated intense conflicts. Here, specifically in cases concerning the recognition and enforcement of contracts selling slaves, we can also find evidence of common elements and principles. We saw that, for Huber, courts should not recognise contracts in the presence of a prohibitive provision or if they resulted from wilful evasion. 'International comity' also justified the refusal to recognise slavery, even if legal in some places.[183]

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[179] Paras. 142-142 in E.R.; Notably, Lord Mansfield confirmed his remark as he added that "The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed." Para. 1078. See North, 'Private International Law', p. 18

[180] The Court might as well have argued, considering the circumstances and background of both parties, that they had in fact a different law in mind when they contracted the marriage. Sir Simpson also did not refer to comity, had by then become a popular doctrine in civil law countries, including Scotland. In this respect, the Court showed itself severed from developments in conflictus legum which had occurred a century before, to the effect that the decision in Scrimshire might have been different. Sir Simpson did, however, cited Johannes Voet several times when arguing in favour of the application of the *lex loci celebrationis* to the question of international validity of contract of marriages.

[181] See Davies, D. J. "The Influence of Huber's De Conflictu Legum on English Private International Law." *Brit. YB Int'l L.* 18 (1937) esp. pp. 52-55

[182] As he declared some years after Robinson, "The law of nations … [in] its full extent [is] part of the law of England, … [and is] to be collected from the practice of different nations, and the authority of writers". *Triquet v. Bath* (1764) 3 burrow's reports, 1478, 166 et seq. Lord Mansfield studied Roman law at Oxford and continued to cite extensively from continental scholarship and legislation. He played a major role in bringing English law closer to continental developments.

[183] Instead of giving effect to agreements validly contracted abroad under the *lex loci contractus*, English courts would thus refuse to recognise contracts selling slaves, slavery being in the end of the 18th century legal in specific jurisdictions, but "morally" and "politically" unjustifiable to English judges. In *Somerset v. Stewart* (1772) 98 ER 499, p. 510 Lord Mansfield famously held that: "The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law [statute], which preserves its force long after the reasons, occasions, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support

4.1 William Blackstone and the Law of Nations between the Medieval and the Classical Age

By the end of the 18th century, English courts had received most Dutch doctrines.[184] The migration of conflict rules and principles happened mostly through the medium of Scottish sources.[185] Due to the predominantly civil character of the Scottish legal system, Scottish lawyers had long been familiar with civil law scholars, and Dutch jurists in particular.[186] And yet, although English law developed conflict rules and principles in concert with ideas and theories put forward in the continent, in the mid-18th century, the subject was relatively unknown among common lawyers, as the lack of attention paid by William Blackstone (1723-1780) demonstrates. Blackstone is especially known for the 'Commentaries on the Law of England'.[187] The *Commentaries* contain the notes of a course Blackstone gave at the University of Oxford in 1752-1753, the same year *Scrimshire* was decided and the Marriage Act was introduced.[188]

It may surprise that Blackstone did not consider questions raised by collisions between local laws especially because he played a crucial role in the reception of continental doctrines in the common law world.[189] It is thanks to Blackstone that the theory of natural law of Grotius spread to England.[190]

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it, but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged." The decision meant that a person could not be removed against his or her will from England and Wales, regardless of his slave or free status under the positive law of a country. See Paul, 'The Isolation' on the influence of comity on decisions on slavery.

[184] See Anton, 'The Introduction'

[185] Whereas it "failed to gain adherents in continental Europe", explained Lipstein, "[i]t could gain an easy foothold in England because the specific problems of Private International Law which had exercised the minds of lawyers in continental Europe for the last 500 years had not attracted much attention in England and because, when they did present themselves, English courts could approach them in accordance with the most recent Dutch technique, unfettered by the ballast of statutist learning which hindered progress abroad." Lipstein, 'General Principles', p. 126

[186] A Scottish judge, Henry Home (Lord Kames), had written in 1767 the first book published in English on conflictus legum. H. Kames, *Principles of Equity* 345-374, 1760(1767). Notably, he did so adopting a Statutist method and relying on foreign doctrines. Lord Kames wrote the context of an international case from the The Court Of Demerara and where he touched on questions of differences between "Personal and Real Statutes" and their effects on "Foreign Judgements and Contracts, Marriage and Wills.". The first work written by an Englishman on the subject was written by Jabex Henry and it was titled '*The Judgement of the Court of Demerara, in the case of Odwin v. Forbes*', Sweet and Chancery-Lane, 1823

[187] The treatise concerned the common law and its history. It was published in four books between 1765 and 1769. It has been described by Duncan Kennedy as a "legal treatise that all legal scholars have heard of but practically no one knows anything about." Kennedy, Duncan. "The Structure of Blackstone's Commentaries", *Buffalo Law Review*, Vol. 28 (1979), p. 209

[188] Blackstone was the first to teach common law at Oxford as the first Vinerean Professor. Only after the 1820s will courses on English law start again in the University of London.

[189] The role played by Blackstone could be compared to that of Bracton in the thirteen century, who had contributed to adapt continental ideas to the British environment. See Cairns, John W., "Blackstone, An English Institutist: Legal Literature and the Rise of The Nation-State", *Oxford Journal Of Legal Studies*, 318 (1984). See Watson, Alan, 'The impact of Justinian's Institutes on Academic Treatises: Blackstone's Commentaries', in *Roman Law and Comparative Law*, University of Georgia Press, 1991

[190] Pound, 'Jurisprudence, Vol. 2', p. 47. Natural law theories were there before, of course. Hence, Sir Henry Finch, Attorney General to James I, declared, "Therefore lawes positive which are directly contrary to [the law of reason] lose their force and are no lowes at all. As those which are contrary to the law of nature." Finch, Henry, and Danby Pickering. *Law, Or, a Discourse Thereof* (1759), bk. i, chap. 6

Blackstone argued that there existed an overarching legal framework governing exchanges taking place between distinct states and societies. In agreement with Grotian theory and consistently with the opinion of von Pufendorf and Emer de Vattel (1714-1767), Blackstone believed that a contemporary version of the Roman *jus gentium* could be deduced from natural reason.[191] The overarching legal framework concerned and governed relationships not only between sovereigns but also those taking place between individuals. For Blackstone, the overarching framework included the law merchant, and even a great deal of private law.[192]

Although there are common elements between the assumptions and schemes emerging from the *Commentaries* and medieval legal thought, other elements suggest a departure from traditional schemes. The intermediary position occupied by Blackstone can be grasped from a variety of elements, including the definition of the overarching framework governing international exchanges. Unlike his medieval predecessors, Blackstone did not have in mind the *jus commune* of Bartolus or the *jus naturae* of Grotius. Blackstone, like Sir Edward, intended national entities to be the fundamental unit of the contemporary overarching framework, neither the *civitates* nor the *populi* spoken of by medieval jurists.[193] Accordingly, Blackstone did not refer to this 'universal law' as the *jus gentium*, but as the 'Law of Nations' which he described as:

> a system of rules, deductible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.[194]

The gradual transformation of the *jus gentium* in the law of nations did not only occur in the common law world. From the late 18th century, European jurists started referring to the *jus gentium* as the law of nations in their own languages as the '*droit des gens*', '*diritto delle genti*', '*Volkerrecht*' etc.[195]

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[191] Pufendorf's *De Jure natura et gentium*, by 1730, had already been published in four editions in English. Grotius' *De jure belli ac pacis* by 1750 had been already been published in six editions. The wide and quick availability of pritned books indicates that there could be productive exchanges. See Zimmerman, 'Roman law', p. 44

[192] Blackstone, William. *Commentaries on the Law of England*, Oxford, Clarendon Press, 1st Edition, (1658), Book IV, p. 67: "But, though in civil transactions and questions of property between the subjects of different states, the law of nations has much scope and extent, as adopted by the law of England"

[193] Blackstone, 'Commentaries', Book III, p. 66

[194] …which he gave in Chapter 3 of Book IV ('Of Offences Against the Law of Nations')

[195] Bentham popularised the term 'international law' in his *Principles of Morals and Legislation*. See below, Chapter 5, Section 1.1.). Bentham translated the first recorded instance of its usage from D'Aguesseau who had used it as 'droit des gens' with reference to the idea of jus inter gentes as it had been understood by Grotius.

The difference was not merely stylistic. It suggested that the law of nations was a system of rules which derives its force from the consent and participation of civilised nations, not exclusively from a claim of superior moral value.[196] Although the reference to natural reason and natural justice is preserved, according to the new conception, the old *jus gentium* is transformed in a law that exists between states and not above them. It is voluntary and not obligatory. In Blackstone's words:

> as none of these states will acknowledge a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules result from those principles of natural justice, in which all the learned of every nation agree, or they depend upon mutual compacts or treaties between the respective communities.[197]

This voluntarist turn in the conception of the overarching framework was absent in Grotius but can be found in the jurisprudence of several late 18th century continental scholars.[198] Accordingly, although he took inspiration from Grotius, Blackstone did not identify it with a bundle of vaguely defined norms. Blackstone understood law as a "a rule of conduct" and the legal order as a "system of rules" which, in the case of the law of nations, could be codified in treaties between nations.[199] Hence, Blackstone advanced principles and ideas that would prove essential for Jeremy Bentham (1748-1832) to posit the existence of public international law.[200] The rise of the law of nations thus paved the way for the gradual division between the *jus inter gentes*, corresponding to the law of nations, and the *jus intra gentes*, corresponding to conflict of laws.

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[196] See Cairns, 'Blackstone'

[197] Blackstone, 'Commentaries', Book III, p. 66-67

[198] As Vattel put it in *Le Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (1758), at p. 138, "the public ownership possessed by the Nation is full and absolute, since there is no authority on earth which can impose limitations upon it." According to Vattel's characterisation, each nation has a particular will, which is not bound by the law of the international society. Each sovereign nation was equal in front of 'International Law'. Each sovereign also had equal obligations. Hence, Vattel declared, at p. 137: "nature has established a perfect equality of rights among independent Nations. In consequence, no one of them may justly claim to be superior to the others. All the attributes which one possesses in virtue of its freedom and independence are possessed equally by the others." Accordingly, there may be duties in international law, however, "Nations are free, independent, and equal, and since each has the right to decide in its conscience what it must do to fulfil its duties." (p. 7). What is clear is Vattel departed from a natural law-based conception of international law which had prevailed until then, even in Blackstone's conception. Note that despite Vattel's voluntary idea of international law, he maintained, relying on a strongly territorial theory of sovereignty, a mandatory theory of the enforcement of judgments, but also mutual obligation of enforcement, arguing that "It is the part of the Nation . . . to enforce justice throughout the territory subject to it, to take cognizance of crimes committed therein, and *of the differences arising between the citizens* ... when once a case in which foreigners are involved has been decided in due form, the sovereign of the litigants may not review the decision."

[199] He defined law as "A rule of civil conduct, prescribed by the supreme power in a state, commending what is right and prohibiting what is wrong", Commentaries, Book 1, p. 44. This definition shows the intermediary position of Blackstone. Hence, Pound asked "A question arises at once on Blackstone's formula. Would he say that what is commanded is right because it is commanded and that what is wrong because it is prohibited or did he meant that it Is prescribed because it is right and prohibited because it is wrong…? Pound, 'Jurisprudence, Vol. 2', p. 52. Blackstone never tried to answer to this question which captures well two of the main jurisprudential question that were current in his time.

[200] See Chapter 5, Section 1

4.2 The Structure of Blackstone's Commentaries and the Regulation of Marriage Relations

Although he inaugurated a new conception, nation-based and voluntary, of the *jus gentium*, Blackstone's goal was not to list the rules governing the relations between nations and their inhabitants. The *Commentaries* constitute instead an unprecedented effort to present the common law in a systematic and coherent fashion. Accordingly, Blackstone divided between matters concerning 'rights', personal and real, and 'wrongs', public and private[201] Blackstone's arrangement of the common law sprung from his innovative intuition that law could be built as a system of precepts. The organisation of the Commentaries therefore anticipated the 'modern' idea of separate departments of law and of distinct categories of rules which would be embraced later by classical jurists.[202] Hence, Kennedy has described the *Commentaries* as an attempt to bridge the gaps between pre-classical legal thought and the upcoming consciousness.[203]

Although Blackstone's arrangement reveals a degree of systematism, an investigation in the contents of each divisions and subdivisions reveals what might come across as overlaps and contradictions that were typical of medieval scholars. To take an example, Blackstone assumed that contractual matters partly fell in the law of things and partly in the law of persons.[204] The most striking illustration

[201] He organised the Commentaries starting from the division between matters pertaining to 'rights' (Books I and II) and those pertaining 'wrongs' (Books III and IV). He sub-divided the latter into public (Book III) and private wrongs (Book IV), and the former one into rights of persons (examined in Book I) and rights of things (Book II). On the face of it, Books I and II appear to reflect the Medieval distinction between real and personal matters. In Medieval Legal Thought, the law of property basically corresponded to the rules governing public institutions; whilst the residual category of personal laws concerned persons and their actions. Thus, in Blackstone, we would expect to find rules concerning the administration of public affairs in Book II, and those concerning private and personal relations in Book I. But the category of the law of things, which Blackstone made the subject of his Book II, did not concern matters of public interest at all. It listed rules governing inter-personal relations, such as contractual rights. The English scholar relegated rules concerning the government and its administration to Book I. But for Blackstone, once the individual submits to the proper laws of the community, his absolute rights to life, liberty and property must be protected in return, which becomes a constitutional requirement for the state ([1-140-44]). Thus, Blackstone inserted a definition of these three primary rights in Book I along with clearly-established limits to the power of Kings and of the Parliament. Conversely, the law of things is no longer the prerogative of the Prince, but it governs the relations of individuals with other individuals. It concerns private, not public relations. Thus, the second volume of the Commentaries rules governing property, tort and contract, and partly overlaps with private law. Considering the above, confirming what Blackstone's conceptualisation of the *jus gentium* already suggested, the Commentaries appear to constitute an attempt to bridge the gap between the Medieval mentality and its categories, with the ideas and assumptions which were emerging as part of a 'modern' legal rationality. Other than the above, Kennedy has argued that the distinction between right and wrong constituted a bridge between the Medieval legal mentality, and the modern common law mentality based on the idea of remedies derived from rights. Kennedy, 'The Structure', p. 286

[202] Kennedy, 'The Structure', p. 22

[203] Ibid.

[204] Much of the rules which concerned the organisation and the administration of the government and of the institutions was in the book concerning rights, but others in the law of wrongs. Famously, John Austin accused Blackstone of analytical incompetence for the overlaps and contradictions in his classification, other than for the lack of a clear division between public and private law, of civil and criminal matters, substantive rules and procedural remedies Austin, J. *The province of jurisprudence determined*, 1873(4th ed.), pp. 69-74. Kennedy suggests the centrality of the idea of 'social role' to explain why Blackstone mixed master and servant, husband and wife, but also clergymen, sailors, soldiers, attorneys and members of Parliament. Kennedy, 'The Rise', p. 191

of the ambiguities which followed from division come from the fact that the first book of the *Commentaries*, which essentially contained and discussed 'real' laws governing the public administration, also included the right to private property, and also rules governing economic relations and various relations connected to the household.[205] In Book I, Blackstone explained that his 'method' had naturally led him to this odd arrangement:

> Having thus commented on the rights and duties of persons, as standing in the *public relations of magistrates and people*, the method I have marked out now leads me to consider their rights and duties in *private oeconomical relations*. The three great relations in private life are, 1. That of master and servant […]. 2. That of husband and wife; which is founded in nature, but modified by civil society. 3. That of parent and child.[206]

Blackstone's classification of marriage along with other types of relations connected to the household relations, including that between master and servants, was coherent with the typical medieval understanding of relationships connected with the household which is reminiscent of the extensive conception of the Roman household. And so it was the conception of the relation between husband and wife and that between parents and children as 'private' and 'economic'.[207] However, Book I essentially included rules concerning the government and its administration. One may thus wonder what Blackstone's motives for were placing marriage within the scope of the administration of public institutions. The question also arises about whether this arrangement is coherent with the medieval mentality or if suggests instead the continuation of the process noted above of gradual 'publication' of marriage and household relations. For Kennedy, the answer is that:

> Blackstone was primarily interested in presenting English society as a set of hierarchies of persons. Each hierarchy had a function, and each was composed of complex social roles heavily regulated by common law and statute. Two of the hierarchies - that of Parliament and that of the Crown and its officers - had the function of exercising the powers of the state, and Blackstone identified them as public. At the other extreme, there were the "domestic" or "economical" hierarchies of employment and family. As with the state hierarchies, Blackstone described these in terms of clusters of legal rules all related to the functions and ranks of the people involved ….[208]

[205] Kennedy, 'The Structure', p. 285
[206] Blackstone, 'Commentaries', Book I, p. 422 (Emphasis Added)
[207] It also implies that the household, which is the space of biological reproduction as much as it is a space for material production, for the consumption of goods, as well as for the production of wealth. See Halley, 'Family, Part I', p. 8
[208] Kennedy, 'The Structure', pp. 288-289

One can understand the inclusion of 'private and economic relations' within the first book of the *Commentaries* in different ways. We may understand the development of rules defining obligations and functions of specific individuals in accordance with their position, in the household and in the public administration as a *bona fide* acknowledgement of power-asymmetries. In this first sense, Blackstone developed 'mediating' provisions for protecting individuals from the risk of abuse by the persons who occupied a superior position (governors, masters and husbands). However, this acknowledgment did not imply that the law must get rid of social hierarchies. After all, the Parliament is supreme. So long as the law mediates between government and governed, master and servant, husband and wife, subjectivity, slavery and domestic servitude could subsist.[209] This second reading is suggested by the 'mediating rule' envisaged protecting the wife, 'coverture' or 'unity':

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated …into that of the husband … under whose wing, protection, and cover, she performs every thing. … Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. … For this reason, *a man cannot grant any thing to his wife, or enter into covenant with her*: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that *all compacts made between husband and wife, when single, are voided by the intermarriage*. …

Only half a century has passed between the publication of Huber's *De Conflicu Legum* and Blackstone's *Commentaries*, but we notice here a sea of difference in their conception of marriage relations. For Huber, but also for Pufendorf, Grotius, Bartolus and other medieval jurists, marriage was an informal pact founded on consent of both parties. Spouses were free to alter the provisions of the marriage contract by means of consent. The consent of each party was sufficient to give legal force and to modify rights and obligations in marriage no more and no less than in any other private and economic relations. As the relationship between husband and wife is 'mediated', the spouses lose

[209] Blackstone advanced a fundamental distinction between 'absolute rights' and 'relative rights' in the first volume of the Commentaries where he discussed his version of social contract theory. For Blackstone, law is a neutral mechanism for mediating between the uncontrollable forces that characterise societies in the state of nature on the one hand, but also the arbitrariness of absolute state power on the other. As Blackstone put it: "And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied... namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole, or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community." [1-47-48] Law is thus conceived a mechanism sanctioned by reason which can mediate between right-bearing individuals and power-wielding officials.

their capacity to define reciprocal rights and obligations. Per contra, the law of coverture, which was not sanctioned by natural law, is included in civil law.[210] All covenants between husband and wife are invalidated as a result. Husband and wife no longer have separate existence. 'Coverture' (which derived from the Latin *femina viro coperta*) reminds of *tutela mulierum* in ancient Roman law:

> The husband is bound to provide his wife with necessaries by law, as much as himself; and, if she contracts debts for them, he is obliged to pay them; … If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together. If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own …. And therefore all deeds executed, and acts done, by her, during her coverture, are void; These are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities which the wife lies under are for the most part intended for her protection and benefit: *so great a favourite is the female sex of the laws of England*.[211]

The doctrine of coverture robbed women of their legal personality.[212] Married women became 'civilly dead'.[213] And yet Blackstone and his contemporaries assumed that the fact that under the civil law "husband and wife become one: *him*" was for her own protection.[214] So dear were they to English society that married women could not own property as this was to be vested in their husbands. They could neither sue in their own name nor could they enter in enforceable contracts with other persons. They had a duty to perform domestic tasks and to obey their husbands. Husbands had to pay for the debts of their wives, if any. In return, they acquired a unilateral right to make use of their savings and of their bodies.[215] If the reminds coverture evokes *tutela mulierum*, Blackstone's conception of

[210] As to the question whether the husband enjoyed an 'dominium' over his wife, Pufendorf acknowledged in Book VI, Ch. I, §11 the increasing presence of public laws. However, he also rejected the idea that the power of the husband over the wife was either sanctioned by natural law. He also acknowledged that there was nothing repugnant to natural law in the "wife being subject to the actual sovereignty of the husband." However, Pufendorf maintained that "although in matters peculiar to marriage the wife is obligated to adapt herself to the will of the husband, yet it does not at once follow that he necessarily has power over her in other acts as well." Pufendorf, S., *De Jure Naturae et Gentium Libri Octo*, Translated by C. H Oldfather and W. A. Oldfather, Translation of the Edition of 1688, Oxford, Clarendon Press, 1934, pp. 859-860

[211] Blackstone, 'Commentaries', Book I, pp. 442-443

[212] Cretney declared that "it is no great exaggeration to say that the common law robbed the married woman of full human personality." Cretney, Stephen Michael. *Family law in the twentieth century: A history*. Oxford University Press, 2003, p. 91

[213] Zaher, Claudia. "When a woman's marital status determined her legal status: a research guide on the common law doctrine of coverture", *Law Libr. J. 94* (2002), p. 460

[214] Zaher, 'Woman's Status', p. 461

[215] Cretney, 'Family law', p. 91

marital relations was thus more reminiscent of the Roman marriage *cum manu* than of that of his medieval predecessors.

4.3 The Redefinition of Marriage: From Consensual Agreement to Civil Contract

Starting from the above definition of the relation between husband and wife as private and economic, one could draw that Blackstone still considered marriage a consensual pact between the parties. For Blackstone, marriage was no doubt a contract.[216] In consideration of the influence of Roman law on the conceptualisation of marriage in the English common law, one could also assume that Blackstone subscribed to the Romanist notion that *consensus facit nuptias*.[217] In fact, when he discussed questions relating to legal capacity, Blackstone expressed the view that the legal impediments to marriage are the same impediments that stand in the way of any other lawfully contracted civil agreement. Hence, he pointed out that

> [T]he law treats [marriage] as it does all other contracts: allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, willing to contract; secondly, able to contract; and, lastly, actually did contract, in the proper forms and solemnities required by law.[218]

The above statement superficially suggests that Blackstone also understood consent as the constitutive element of marriage. However, Blackstone did not regard marriage as a simple transaction between two autonomous individuals that acquires legal validity by force of their will power. For Blackstone, marriage is not an informal and private agreement. It is a civil contract. By including the relation between husband and wife in Book I of the *Commentaries*, which concerned the public functions of the law, and by subjecting it to the 'mediating' provisions of the civil law, Blackstone implied that marriage does not amount to a pact between husband and wife that is valid upon the expression of consent, whether tacit or implicit:

[216] Nowhere did Blackstone suggest that marriage creates a special 'status'. A word he never uses in the Commentaroes.
[217] As argued by in his 'Principles of Roman Law and Their Relation to Modern Law': "The Roman law of marriage has influenced the marriage law not only of modern Civil Law countries but also of those where the English Law obtains. […] The mutual present assent to immediate marriage by persons capable of assuming that relation constituted a marriage at the Roman Law and likewise constitutes a marriage at our Common law.", William Livesey Burdick, The Principles of Roman Law and Their Relation to Modern Law, The Lawbook Exchange, (1938/2004) p. 227,
[218] Blackstone, 'Commentaries, Book I', P. 433

> Our law considers marriage in no other light than as a civil contract. The holiness of the matrimonial state is left entirely to the ecclesiastical law: the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience.[219]

The reconceptualization of marriage shows that an important change was gradually making its way into juridical conscience in the late 18th century. Marriage was no longer considered an informal agreement between the spouses as it had been considered throughout the Middle Ages. Consent was no longer the essence of marriage. Marriage acquired validity and legality by the force of civil law. The civil nature of the marriage contract envisaged by Blackstone thus entailed that the state could regulate its formation and dissolution, but also its content, i.e. the relationship between husband and wife, by means of 'mediating provisions'.[220] The reconceptualization of marriage is especially noteworthy because the same year when Blackstone was delivering the lectures which would become the *Commentaries*, British Parliament was discussing the introduction of the Marriage Act, the first ever law regulating civil marriage with the objective of restraining clandestine marriages.

4.4 From *Consensus Facit Nuptias* to Marriage Act *Facit Nuptias*

To understand the radical change that followed from the reconceptualization of marriage as a civil contract and from the introduction of the first civil 'national' law specifically regulating it, it is important to bear in mind the influence of Roman and canon law on the pre-existing understanding of marriage. As mentioned above, after the schism from the papacy, the Book of Canons of 1604 introduced the first local rules governing marriage. The Book of Canons present striking similarities to the requirements contained in the Tametsi Decree.[221] Like the Council of Trent, the Convocation laid down rules establishing how marriages should be solemnised, where their celebration should take place, and how disputes were to be settled. However, the Book of Canons, like the Tametsi Decree, issued guidance rather than prescription. It was directory rather than mandatory. It indicated "reluctant imposition" rather than strict regulation.[222]

Accordingly, English ecclesiastical authorities considered marriages celebrated in violation of the official procedures valid.[223] Informal marriages 'by habit and repute' also continued to be held valid

[219] Blackstone, 'Commentaries', Book I, p. 432
[220] Glendon, 'The Transformation', p. 32
[221] See Seipp, 'The Reception'
[222] In this sense, the "reluctant imposition of human regulations on marriage [by the Council] spoke much louder than all of its sacramental decrees." Harrington, 'Reordering Marriage', p. 97
[223] Gillis, John R. *For better, for worse: British marriages, 1600 to the present*. Oxford University Press, 1985

in the United Kingdom.[224] Provided the parties had willed or demonstrated to have taken each other as husband and wife, informal and putative marriages continued to be regarded as valid.[225] After 1604, co-habiting couples were sometimes prosecuted for fornication.[226] Great numbers of couples nonetheless contracted marriage by mutual consent, without the involvement of public or religious authorities, without the observation of formalities and often without parental consent.[227] In line with the ancient Roman saying, consent continued to make made marriage. Eloping couples who contracted a clandestine marriage were generally not persecuted.[228]

The prevalent consensual understanding of marriage that is visible in the Book of Canons and in Tametsi Decree suggests the existence of a common conceptual ground in the law of protestant and catholic countries which also reflected in a similar approach to questions raised by informal and clandestine marriages. [229] Notably, the Council of Trent had also shown that regulation of marriage was gradually drifting under public control. As in other European jurisdictions, so in England, informal marriages came to be regarded as a threat to the legitimacy of public authority. In the same year Blackstone gave his lectures in Oxford, Lord Chancellor Hardwicke took it upon himself to have a reform passed by Parliament which would put an end to clandestine marriages, something that church authorities had systematically tried but failed to achieve in previous centuries.[230]

In 1753, the Parliament passed the 'Act for the Better Preventing of Clandestine Marriage'. The Marriage Act provided that a marriage may be entered to either after the publication of banns or by license.[231] In the case of marriage by license, it specified that the minimum age for 'free marriage' - contracted without parental consent or of third parties - was 21.[232] In contrast with the previously

[224] Other than doctrinal reasons, there were material 'public' reasons which led to consider informal marriages valid in the eye of the law and to embrace a policy of *favor matrimonii*. Systematically invalidating informal marriages would have put unscrupulous parties in a position to be able to dupe the weaker 'spouse', who may have thought to be married, but was actually not, without legal consequences. Outhwaite, Richard B. *Clandestine marriage in England*, 1500-1850. A&C Black, 1995

[225] Even irregular marriages would be considered valid. This reconstruction has been rejected by Probert, 'The Misunderstood'
where she has argued that an exchange of this kind only created a binding contract to marry, and not a marriage in itself.

[226] Probert, Rebecca. *The Legal Regulation of Cohabitation, 1600–2010: From Fornicators to Family*. Cambridge University Press, 2012. See especially Chapter 2

[227] Cretney, 'Family Law', p. 4. Although the State had an interest in keeping a reliable record of the marriages being celebrated, legislation ensuring this did not produce the desired outcome.

[228] Ibid.

[229] Significantly, Canons of 1604 still referred to marriage as 'contractu vel matrimonio'. CII; and also XCIX; C; CVII.

[230] Significantly, a cross-border marriage contracted in secrecy in Scotland is what precipitated the Act. Leneman, Leah. "The Scottish case that led to Hardwicke's Marriage Act." *Law and History Review* 17.1 (1999)

[231] Section 1: Before the marriage could take place, the banns had to be called on three consecutive Sundays; Section 6 and Section 15: The marriage could only be celebrated in a Church in the presence of two or more trustworthy witnesses; Section 4: Minors under the age of 21 had to obtain parental consent.

[232] Clandestine Marriages Act 1753, S. 3

applicable dispositions and with the approach to clandestine and informal marriages contracted according to canon law, the Act made marriages solemnised in violation of the statutory provisions invalid. [233] A profound break with the past thus came in the penalty of nullification which ecclesiastical authorities threatened, but never enforced, in previous centuries.[234]

Although Blackstone himself was in two minds about the Marriage Act, its provisions realised the reconceptualization of marriage as a civil contract which acquires validity when contracted in conformity with civil law.[235] Blackstone's dualistic conception of a marriage as, on the one hand, a civil contract and, on the second one, an ecclesiastical and spiritual issue - a sacramental matter, Catholics might say - implied that some church ministers might continue to see marriage as a simple covenant between husband and wife. Some may even regard an informal union celebrated against the letter of the civil law as merely sinful. But after 1753, a marriage would not produce any effects in civil law unless the spouses complied with the forms and procedures established by statutory law. The introduction of the Marriage Act was thus important because it paved the way for the 'mediation' by the civil law of other household relations.

The Marriage Act of 1753 began what was to become in the following years a process of 'juridification' of family life which, in English law, would occur especially through judicial precedent.[236] However, the 1753 Act also inaugurated a process of centralisation of 'civil' jurisdiction over marriage and household matters. The reform thus also carried systemic value. Before the 19th century, jurisdiction was fragmented: ecclesiastical courts had jurisdiction over marriage validity;

[233] A child could be made a ward of court to enforce the provisions. See Cretney, 'Family Law', p. 63

[234] Even it resulted from the negligence on the part of the Church authorities. For instance, had the parties' names wrongly inserted in the banns, *R. Inhabitants of Tibshelf* (1830) 1 B&Ad 190

[235] In the Commentaries Blackstone declared: "Much may be, and much has been, said both for and against this innovation upon our ancient laws and constitution. On the one hand, it prevents the clandestine marriages of minors, which are often a terrible inconvenience to those private families wherein they happen. On the other hand, restraints upon marriages, especially among the lower class, are evidently detrimental to the public, by hindering the increase of the people; and to religion and morality, by encouraging licentiousness and debauchery among the single of both sexes; and thereby destroying one end of society and government, which isconcubitu prohibere vago. And of this last inconvenience the Roman laws were so sensible, that at the same time that they forbade marriage without the consent of parents or guardians, they were less rigorous upon that very account with regard to other restraints: for, if a parent did not provide a husband for his daughter, by the time she arrived at the age of twenty-five, and she afterwards made a slip in her conduct, he was not allowed to disinherit her upon that account: "quia non sua culpa, sed parentum, id commisisse cognoscitur." Blackstone, 'Commentaries', Book I, p. 438

[236] The reformed law delegated to the Church of England responsibility over the solemnisation of marriage. However, it would be inaccurate to claim that the state merely enforced the views of the church. This erroneous view is often put forward: "after the sacralisation of marriage vows throughout Europe, the state began to enforce the views of the Church" Stevens, Jacqueline. *Reproducing the state*. Princeton University Press, 1999, p. 124. The jurisdiction of ecclesiastical courts was formal, not substantial. In this regard, it is significant that members of the clergy themselves, when they did not abide by the provisions of the Marriage Act, were convicted to serve a sentence of up to 14 years. It was Canon law which came to support the extension of the jurisdiction of temporal courts and control by the civil law. See Chapter 6 on the continuation of this process in the 19th century.

Chancery over custody of children; royal courts over marital property; Parliament over divorce. The Act suggested that subject-matter jurisdiction could be delegated to common law courts, or that ecclesiastical courts could act and decide as representative of the state by applying the law included in the Acts of Parliament, not in the Books of Canons.[237]

5. *Dalrymple v. Dalrymple* and the Rise of National Law

The Marriage Act virtually eliminated the celebration of clandestine marriages in the English jurisdiction. However, pursuant to the traditional *lex loci* rule applied in *Scrimshire v. Scrimshire*, couples could still contract a valid marriage without having to obtain parental consent outside the English jurisdiction, if foreign law did not require it. Lord Hardwick's Act did not apply to "Marriages solemnized beyond the Seas".[238] The Acts of Union of 1707 also meant that the Marriage Act did not apply to Scotland where the local civil law continued to consider marriages celebrated without parental consent and marriages by "habit and repute" as valid. After 1753, due to the proximity of the Scottish border, eloping couples often headed to Scottish villages to get married. These unions were named 'Gretna Green' marriages after a town located on the border with Scotland.

The lack of consideration for the cross-border dimensions of the law governing marriage illustrates how Parliament had acted on the assumption that they had no power to declare marriages celebrated abroad as invalid, even if they involved English subjects. However, so many were the English couples who deliberately contracted marriages in Scotland to evade English law that eventually, in 1755, Parliament issued a request to the Lords of Council and Session, an organ comprising the most senior members of the Scottish judiciary, that they ban informal marriages between English subjects. This request ran in the face of the independence guaranteed by the 1707 Acts of the Union, and Parliament was forced to give it up.[239] After the introduction of the Marriage Act, it was not clear if marriages contracted abroad against its provisions should be recognised as valid or not.[240]

[237] See Parker, Stephen. "The Marriage Act 1753: A Case Study in Family Law-Making." *International Journal of Law, Policy and the Family* 1.1 (1987)
[238] Section 18 provided "that nothing in this Act contained shall extend to that Part of Great Britain called Scotland, nor to any Marriages amongst the People called Quakers, or amongst the Persons professing the Jewish Religion, where both the Parties to any such Marriage shall be of the People called Quakers, or Persons professing the Jewish Religion respectively, nor to any Marriages solemnized beyond the Seas."
[239] See Smout, T. C., Scottish Marriage, Regular and Irregular 1500-1940, in Elliott, Vivien Brodsky, and Richard B. Outhwaite ed. *Marriage And Society: Studies In The Social History Of Marriag*e. Europa, 1981, pp. 207-210
[240] See Probert, Rebecca. 'The Judicial Interpretation of Lord Hardwicke's Act 1753' Journal of Legal History 23.2 (2002)

In accord with previous decisions, English courts judged the validity and the effects of Gretna Green marriages according to the local law. The Act was understood to have set additional requirements for the celebration of marriages in England, but not to have set limits to the capacity of English domiciliaries to contract marriage abroad. To hold otherwise would run in the face of medieval conventions and would be contrary to divisions and principles upheld as part of the medieval *jus gentium* which, despite the indifference of Blackstone, continued to govern cross-border matters. Hence, in *Compton v. Bearcroft*, the court rejected an expansive notion of *fraude à la loi* and upheld the validity of a runaway marriage deliberately entered to evade English law. In that case, Lord Campbell said with respect to the 1753 Act:

> It does not touch the essentials of the contract or prohibit any marriage which was before lawful, or render any marriage lawful which was before prohibited, and the whole frame of it shows that it was only territorial.[241]

The Consistory Court did not construe the meaning of the Act to extend to English subjects outside the territorial jurisdiction of English law. In agreement with medieval conflicts theory, the capacity of English domiciliaries to contract the marriage and the rights that they acquired abroad were to be judged under the law were the marriage had been contracted by the parties. English courts could therefore not invalidate 'foreign' marriages even if the parties deliberately went to Scotland with the object of avoiding the requirements set by English law. Even if the 1753 Act suggested that a profound change in conceptualisation and regulation of marriage and household relations was in its way, still, consistently with the medieval conception, decades after the entry in force of Lord Hardwick's Act, English judges continued to regard marriage as:

> …a contract according to the law of nature, antecedent to civil institution…which may take place to all intents and purposes, wherever two persons of different sexes engage, by mutual contracts to live together… .[242]

Although courts consistently upheld the validity of marriages contracted abroad in violation of the provisions of the 1753 Act in other cases after *Compton v. Bearcroft* [243], the issue of cross-border validity contracted without parental consent remained unsettled until *Dalrymple v. Dalrymple*.[244] In

[241] *Compton v. Bearcroft* (1769), 2 Hag. Cons. 444 N. cited in *Harford v. Morris* (1776) 2 Hag. Cons. 423
[242] *Lindo v. Belisario* (1795) 1 Hag Con 216, 230-231 per Sir William Stowell.
[243] For instance, in *Grierson v. Grierson* (1781) 2 Hagg. Cons. 86
[244] (1811) 2 Hag Con 54

that case, the Court was to judge on the validity of an informal marriage contracted in Scotland between two eloping English minors who went to Scotland deliberately to evade the parental consent requirement under English law.[245] Seemingly following the medieval approach, and holding that marriages contracted in a foreign jurisdiction and rights acquired in accordance with the *lex loci* were susceptible of being recognised in England, the Consistory Court declared the marriage valid, despite it being in violation of the *lex fori*:

> [T]he only principle applicable to such a case *by the law of England* is, that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country, where, if they exist all, they had their origin. Having furnished this principle, the law of England withdraws altogether and leaves the legal question to the exclusive judgment of the law of Scotland.[246]

The Court found that the contract between the parties had been validly entered under Scottish law. In accordance with the medieval maxim, a contract of marriage good by the law where it is made is good everywhere, regardless of the wilful evasion of English law by the parties.[247] Accordingly, Mr and Mrs Dalrymple were legally bound in marriage in Scottish law as well as in English law.[248] The Court not only recognised the cross-border validity of their marriage, but also the effects of the marriage. Following the doctrine advanced by Huber, the rights the couple acquired in Scotland had been 'impressed' upon the two parties. These qualities could not be dispensed with without violating the general rule applicable to cross-border contracts. These qualities must be recognised everywhere, the Court held in *Dalrymple v. Dalrymple*.[249]

Although the ruling of the Consistory Court in *Dalrymple v. Dalrymple* was coherent with the vested rights doctrine and it was also consistent with past judgements, the reasoning that led the Court to reach its conclusion was not. Unlike Sir Edward who had maintained that questions arising in legal

[245] In *Dalrymple v. Dalrymple* Ms. Gordon started proceedings for restitution of conjugal rights against Mr Dalrymple with whom she had contracted an informal marriage in Scotland. The marriage was the result of a private transaction, contracted without religious celebration, made in a foreign jurisdiction, and it involved two minors who had not received parental consent. The validity of the Scottish marriage was denied by Mr. Dalrymple. Mr. Dalrymple was a descendant of a Scottish noble family, was brought up in Scotland and, the court found, was domiciled there. Matters were further complicated because Mr. Dalrymple had subsequently contracted another marriage in England, duly celebrated following the prescriptions of the Marriage Act

[246] At p. 58 and p. 59

[247] In cases which followed *Dalrymple v. Dalrymple*, English Courts continued to recognise illicit runaway marriages. *Jones v Robinson* (1815) 2 Phill. 285; *Simonin v Mallac* (1860) 2 Sw. & Tr. 67

[248] At p. 103; As a result, the second marriage of Mr Dalrymple was held to be null and void. At p. 137

[249] This case is therefore cited among the clearest examples of Huber's theory of acquired rights in English law Cheshire, G. C. Private International Law. Clarendon Press, 1923(1943, 2nd edition), p. 160

collisions and concerning foreign marriages must be dealt with in consideration of the *jus gentium*, Sir William Scott (Lord Scott) held that this case had to be adjudicated on principles of the law of England. Although the Consistory Court applied the traditional lex loci rule and Huber's theory of acquired rights, it must be noted that it did not do so based on the law of nations or on the *jus gentium*, whose existence Sir William never once mentioned in his decision, but on English law.[250]

Although consistent with the decisions of Sir Edward in *Scrimshire v. Scrimshire*, the reference to the law of England and the metamorphosis of the *jus gentium* in the law of nations suggest that a paradigm shift was taking place not only at the level of positive rules but also at the level of underlying assumptions and mental schemes followed by the judiciary, legislature and by legal scholars. On the one hand, reforms in civil law carried the potential of brining more matters under the jurisdiction of English courts.[251] On the second one, the idea of an overarching framework based on natural reason started fading away. Some scholars still subscribed to it as late at the 1800s.[252] Disillusioned with the approach of their predecessors, however, the scholarship gradually dropped its interest in the medieval conception of *conflictus legum*.[253] Courts also continued to adjudicate disputes that had an extra-territorial dimension but decisions became inconsistent with previous practices.

[250] Similar to Lord Mansfield in *Holman vs. Johnson* (1775) 1 Cowp 341 where he held that "Every action here must be tried by the law of England, but the law of England says that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern."

[251] Not only household matters. One prominent case of a statutory reforms with extra-territorial dimensions was the Act for the Abolition of the Slave Trade, 1807. The Act prohibited the slave trade in the Empire. Many English slave-traders resorted to various stratagems for continuing their trade, including transferring their vessels to nominal owners from foreign countries. Sir William was involved in a prominent case concerning this practice. In 1809, in the *Donna Marianna* case, 1 Dodson's R. 91, he declared the Portuguese act of property a fraud, that the vessel was actually British, and that the Slave Trade Act of 1807 had been violated. Compare this decision from the one made by Lord Mansfield in 1772 and, later, with *Santos v. Illidge*, 1860, 8 C. B. N. s. 861 ; 29 L. J. C. P. 348

[252] For instance, the book by Lord Kames, see before, footnote n. 186

[253] In this context, the English scholarship failed to develop substantial methodological novelties. Lipstein, 'General Principles', p. 129. This does not mean that books and treatise did not continue to be written. Burge, William. *Commentaries on colonial and foreign laws generally, and in their conflict with each other and the law of England*. Saunders and Benning, 1838. See Chapter 4, Section 3.1

Chapter 3

The Fall of Medieval Legal Thought and the Rejection of Statutism

The gradual decline of medieval assumptions and ideas, including the notion of universal order and the consensual and informal conception of marriage, can be observed in protestant as well as well as in catholic countries, in common law and civil law jurisdictions in the transition between the pre-classical and the classical period. The last chapter of the first part of this study shows that pre-classical thought and the medieval approach to legal collisions could not be reconciled with the changes brought about by the cultural and political events that took place in Europe between the end of 18th and the beginning of the 19th century. An examination of changes in law and in discourse in this period reveals a profound revision of intellectual assumptions and institutional paradigms. This chapter looks at developments taking place in Italy and in France. There, the process of administrative reform and legal centralisation brought social and economic activities, household relations included, under state control (ss. 1.1-1-2).

The regulation of household matters acquired great symbolic and practical value in a context where states were trying to replace the informalism that characterised the pre-modern era with an efficient system of legal and judicial administration. It was especially useful since they were attempting to impose uniform laws and values in place of the pre-existing pluralism and disaggregated order. The regulation of marriage offered an opportunity to displace competing authorities and normative orders as well as to establish a powerful symbolic connection between individuals, families and the nation-state (s. 1.3). The French Civil Code is exemplary because it made it possible to regulate marriage and household relations within borders in accordance with state prerogatives. In contrast with the intent-based and informal medieval approach, it also enabled states to regulate the personal status and family relations of French citizens across borders, wherever they might be (s. 1.4).

The technological and legal innovations embodied in the *Code Civil* were adopted in various European jurisdictions which were under Napoleonic influence or French control, Italian states included. Despite the rejection of French political and cultural influence, restored Italian governments not only retained the code, but also incorporated most of its principles and divisions in new legal enactments. Among these principles was the idea of a permanent personal status regulated by national law domestically and abroad (s. 2.1). Against the intellectual and institutional paradigm shift taking

place in the background, Italian jurists voiced their discontent with the medieval approach to cross-border relations. They demanded that attention was paid to the growing patriotic sentiment. They pointed to the role that conflict of laws should play in the constitution of national polities and civil communities. They lamented that medieval conflict of laws had not performed this role (s. 2.1).

1.1 The Changing Conception of Marriage and the Regulation of Household Matters

Before the 19th century, the Italian legal landscape was highly fragmented.[1] The class-ridden, linguistically-diverse, and politically-split societies inhabiting the Italian peninsula were subject to overlapping orders of different nature: statutory laws (especially in the Northern part) and customary traditions (especially in Southern regions), supranational laws (such as *lex mercatoria* and canon law) and private ordering. The contemporary existence of normative systems of different nature and origin that had applied for centuries after the decline of *jus commune* meant that public power, whether civil or ecclesiastical, played a marginal role in the maintenance of social order.[2] Limited enforcement capacity facilitated the evasion of official laws. Where public power failed to command obedience, private ordering prevailed. Where states were weak, private institutions and organisations grew stronger, households included. [3]

Before the administrative and legal reforms that took place with the rise of nation-states, informalism and private ordering governed over household matters, also when it came to the formation, regulation and dissolution of marriage unions. Although great variation existed, which depended on personal as well as on territorial elements, from the class to which the spouses belonged to the region in which marriages were constituted and dissolved, multiple practices attest the medieval conception of marriage as an informal and consensual pact.[4] There is evidence of a significant degree of liberty

[1] See in general, Livingston, Michael A., Pier Giuseppe Monateri, and Francesco Parisi. *The Italian Legal System: An Introduction*. Stanford University Press, 2015. For changes in family law, see Ungari, Paolo. *Storia del diritto di famiglia in Italia: 1796-1942*. Il mulino, 1974

[2] For an account of the household matters ahead of the period considered in this chapter, see Ungari, 'Diritto di Famiglia', pp. 39-84

[3] The wealthiest families, in some instances, functioned like 'corporations' and 'banking institutes' which functioned like international holdings and quasi-banking institutes Take for instance the example of 'Monti di Pegno e Credito'. See on this Armando Sapori, "Dalla compagnia alla 'holding'", in *Studi di storia economica, Vol. III*, Sansoni, *1967*. Private ordering helped to pave the way for class domination and the marginalisation of vulnerable individuals and groups Ungari, «In altri termini, la debolezza dello Stato e degli ordinamenti pubblici rendeva possibile il sistematico schiacciamento dei contraenti più deboli, e in questo caso delle figlie di famiglia, promesse o sposate in età giovanissima, inesperti di leggi, desiderose di entrare nel mondo lasciandosi alle spalle il tempo della custodia familiare o monacale e prematuramente ossessionate dal zitellaggio.» Ungari, 'Diritto di Famiglia', p. 55

[4] Paradoxically, however, it could also happen that well-off or financially comfortable female peasants enjoyed greater rights than rich and noble women, although these rights could conflict with inheritance law Ungari, 'Diritto di Famiglia', p. 65

which the spouses enjoyed for stipulating specific arrangements during marriage.[5] Hence, even though the legal landscape was fragmented and incoherent, the medieval conception of law still prevailed. In the second half of the 18th century, it is possible to observe the dawn of a different conception of law, and the proliferation of written enactments, including in household matters.

From the second half of the 18th century, jurisdictional competence and legal uniformity in household matters became a key part of the reformative political agenda of Italian states. Local ordinances proliferated in accordance with the view that law was nothing but a "rule prescribed by the sovereign of a society to his subjects."[6] Accordingly, while the Marriage Act of 1753 was being introduced, in the Kingdom of the Two Sicilies, Piedmont, Venice and other Italian states, public institutions also launched legislative and jurisdictional claims over marriage validity and annulment, conjugal separation, and over registration of birth and filiation.[7] Like in England and in other European countries, legislators on the Italian peninsula focused on the regulation of marriage. Mandatory procedures for contracting marriage were introduced in Lombardy, then an Austrian dominion, in 1784.[8] Before the turn of the century, Naples, Lombardy, Tuscany and Sardinia also established rigorous procedures for entering marriage, and criminal and civil penalties for those violating them.[9]

[5] Ungari the practice of including in the contracts of marriage provisions on the company of 'cicisbei', especially in certain regions of the Italian peninsula which: «Il costume poteva naturalmente limitare in vario modo gli schemi legali ricevuti dalla tradizione, e perfino smentirli. Negli strati superiori della società, e specialmente nel centro-nord, alla pratica dei matrimoni di convenienza o imposti dalle famiglie faceva poi riscontro la vera e propria istituzione sociale dei cavalier serventi, come li si chiamava a Genova e altrove, o 'cicisbei' o 'patiti', come erano detti più spesso in Lombardia o in Veneto: un diritto alla douceur de vivre che non di rado si vedeva stipolato ed espressamente regolato nei contratti nuziali.» Ungari, 'Diritto di Famiglia', p. 61. And he adds, "…a parte l'eventualità di documentare patti sul cicisbeo in contratti nuziali, che sono da più parti attestati, è comunque interessante e documentabilissima la serie di stipulazioni accessorie …, tutte trasparentemente preordinate ad una vita mondana e sentimentale indipendente di quest'ultima." Ibid. p. 79

[6] This is the influential definition provided by Burlamqui in *Principes de droit naturel*, 1747, Chapter 8, Section 3 as translated by Sheppard, J and by Cecil, G. (1769). Burlamqui's definition drew on Pufendorf and it influenced the view of Blackstone. «Je definis la Loi une Régle prescrite par le souverain d'une Sociétè à ses Sujets ; soit pour leur imposer l'obligation de faire ou de ne pas faire ou de ne pas faire certain choses, sous la menace de quelque peine ; soit pout leur laisser la liverté d'agir ou de ne pas agir en d'autres choses, comme ils le trouveront à propos, et leuur assurer une pleine joussance de leurs Droits à cet egard. »

[7] Ungari, 'Diritto di Famiglia', p. 45

[8] In the normatively and politically fragmented Italian territory, the room for the legislative agenda of a 'foreign' power was doomed to conflict with ecclesiastical authorities. Austrian law and canon law met half way, and the reform provided that the exchange of promises by the spouses had to occur in the presence of a priest, as also established in the Marriage Act of 1753

[9] In some cases providing penal sanctions and even imprisonment for the transgressors Ungari: «A tale scopo, era posta in essere una molteplice varietà di mezzi e sanzioni, civili e penali: diseredazione del figlio sposato senza consenso; reclusone della sposa in un chiostro; avvio al chiostro delle ragazze indotate; comminatoria di carcere al parroco celebrante; necessità dell'autorizzazione sovrana per i matrimoni dei nobili; controllo sugli sponsali, per sbarrare la via alle nozze morganatiche o con persone disonorevoli e in genere alle mesalliances.» Ungari, 'Diritto di Famiglia', p. 46

In some places, additional conditions were placed in relation to capacity. In some cases, the reforms explicitly banned marriage between individuals belonging to different classes.[10] After the reforms, as in some protestant jurisdictions, families of runaway couples could disinherit children and nephews *si nubat indigne*. The content and the speed of the reforms are striking when placed in comparison with the legislative immobilism of previous centuries. But it is the fact that legislators occupied a territory previously inaccessible to civil law and to state courts that draws the attention. How could this jurisdictional and legislative move be justified? Around the same time when Blackstone affirmed the civil nature of the marriage contract, we find evidence of strikingly similar ideas among Italian jurists, for example Diego Gatta (1729-1804). Gatta had been asked by the Secretary of State of the Kingdom of the Two Sicilies to carry out a monumental systematisation of the law. In 1775, about a decade after Blackstone's Commentaries were published, Gatta held that:

> The nature of marriage is in itself contractual, incidentally it is a sacrament. As far as its contractual implications are concerned, the jurisdiction belongs to the civil magistrate; as far as its sacramental quality is concerned, it pertains to the ecclesiastical authority.[11]

Consistently with this idea, legal scholar and church minister Gatta claimed that civil courts ("*magistrati laici*") had jurisdiction over criminal matters connected to the household, as in the case of bigamy[12] as well as over civil matters, such as the dissolution of the marriage.[13] The common conceptual ground between Gatta's view of marriage and Blackstone's is remarkable and not accidental. Based on the civil nature of the marriage contract, public powers in Naples, Venice, Genova, and also in revolutionary France, could assert state jurisdiction over marriage and other household matters, and could reform the law according to state prerogatives.[14] Although public powers often delegated to Church ministers the responsibility to carry out ceremonial duties and proclaimed ecclesiastical competence over the sacramental validity of marital unions, they also made

[10] As established in the 'Constitutions' of Modena introduced in 1771. See Ungari, 'Diritto di Famiglia', p. 45
[11] Gatta, Diego, *Regali Dispacci nelle quali si contengono le Sovrane Determinazioni de' Punti Generali.*, 1°, suppl. 1°, tomo III, Napoli, 1775, p. 238 (Trans. A.)
[12] Ibid. p. 229
[13] "Le cause di divorzio fono di privativa cognizione de' Magistrati Laici", Ibid. p. 238
[14] According to Article 7 of the Declaration of the Constituent Assembly of 1791, marriage is defined as a civil contract. The Law of 20 September of 1792 in France secularised the rules governing the solemnisation of marriage, but also birth and death, and held that "La constitution appelle le mariage un contrat civil…et ses bases tiennent uniquement au droit civil et naturel et il faut bien se garder de confondre le contrat et le sacrement. Le mariage n'est pas donc qu'un contrat civil, et, si c'est contrat, c'est à la puissance séculière d'en régler les formes." Revamping the Romanist idea of the household as *seminarium rei publicae*, the law regarded marriage as a contract which is essential "pour la formation de la République don't il est le seminaire."

illegal any Church interference over matters which were under state jurisdiction.[15] In this way, civil law could organise and regiment family life according to the will and the desires of the sovereign.[16]

1.2 Reforms in Household Matters and Juridification of Social Life under the French Civil Code

The gradual occupation of legal territories previously inaccessible to state institutions and to civil laws continued even after the revolts and changes of regime taking place towards the end of the century, although under the influence of new social and political ideals. After the French Revolution, the Italian *Republiques Soeurs* thus introduced various reforms inspired by the enlightened ideals of rationality, dignity and individualism.[17] Piedmont introduced for the first time the possibility of divorce for Catholics.[18] The Constitution of Liguria banned discriminatory inheritance laws in 1797.[19] Other 'liberal' reforms can be found in other Italian jurisdictions. What these examples of reforms show is that, despite the regime change brought about by revolutionary movements, it was clear that republican states would not go back to the status quo ante and relinquish sovereign prerogatives over the person and over household matters that monarchical states had acquired in the previous decades.

[15] The procedures for separation of Catholics and those for dissolution in the cases of non-Catholics, as for instance, now fell under the exclusive jurisdiction of state tribunals. By involving church authorities in the celebration and registration of marriage, church ministers became the officials and the sacred hand of the state, rather than the other way around «Ma le procedure di separazione, ed il contenzioso matrimoniale, erano poi richiamati dalla competenza ecclesiastica a quella dei tribunali statali, sulla base dell'asserita natura di contratto civile del matrimonio che il parroco interveniva da un lato a santificare, dall'altro a certificare, quasi assumendo veste di pubblico ufficiale.» Ungari, 'Diritto di Famiglia', p. 43

[16] In Italy, the notorious practices of 'manomorta' - which prevented civil authorities to tax land and immoveable property that belonged to so-called 'perpetual institutions', such as ecclesiastical powers, and also allowed them to inherit servants along with the land - the 'maggiorasco' - that assigned exclusive inheritance rights to the first-born men in the succession line - and the 'fedecommesso' - a testamentary institute inherited from Roman law, known as *fideicommissum*, which prevented female members in the succession line from inheriting the family property - all derogated from official succession laws. It is apparent that these institutes damaged individuals and groups already placed at the bottom of the socio-economic hierarchy, women, young men and servants. All these institutes survived through the centuries thanks to the force of private orders and the connivance of civil authorities. The institutes of primogeniture, which were already known in Roman law, hold a symbolic place in any history of family law and of discrimination through family laws, in Italy and in Europe.

[17] Thus, the law establishing in 1796 'Forma di Governo Repubblicano Provvisorio per il Piemonte' established that marriage was free between persons of any background and that competent persons could get married without parental consent. Article 53: «Matrimoni. Li genitori non potranno ricusare il consenso al matrimonio de' loro figliuoli giunti all'età di venticinque anni compiti, o la dote alle figlie che vorranno maritarsi compiti che avranno gli anni ventuno.» Article 54: «Il matrimonio è libero fra tutte le persone poste ne' gradi non proibiti secondo la computazione civile, mediante la pubblicazione e d'affissione precedente di giorni quindici nel modo, e forma prescritti per gli altri atti civili soggetti a tale solennità, e la registrazione *del contratto* nei registri della Comunità per mezzo degli ufficiali aciò deputati come nell'art.23, dopo che le parti avranno in pieno Consiglio dichiarata la loro volontà di unirsi in matrimonio, e dil Sindaco avrà formalmente prononciata a nome della legge la loro unione.»

[18] Article 56: «Cause matrimoniali. Le cause di matrimonio, o di divorzio saranno portate avanti il Prefetto della provincia, il quale procederà in tali cause con tutta la gravità, e decenza propri a del suo ministero, e prononcierà la sentenza sempre coll'assistenza di due assessori come ne' giudici di appello.»

[19] Article 258 abolished the 'fedecommesso', whatever its kind and purpose. Article 261 of the new Constitution also abolished any discrimination on the ground of sex in inheritance law.

Notably, political as well as legal changes occurred in this period. Ad hoc enactments and ordinances had given way to a fully-fledged process of 'codification'. The reforms introduced in France and then in the *Republiques Soeurs* were regarded as bodies of laws that were applicable to all men, in all places, under all circumstances. As in the case of natural law theories, the movement for codification was underlay by the belief that a body of universal rules governing every aspect of social life could be 'discovered' by human reason and posited in the form of a code of written rules. In this sense, the codification movement is generally regarded springing in the natural law theories advanced by Grotius and others in the 17th century.[20] With the growth and centralisation of state power, the universalist conception had moved from juristic writing to legislation. In principle, codification therefore represented the triumph of enlightenment and rationality.[21]

Seen from the opposite viewpoint, however, codification, and the process of 'juridification' of social life that it enabled, granted near-absolute power to the law-giver to regiment spheres of life that were previously inaccessible to public power. This was an antithetical shift if put in comparison with the attempt by Grotius and other pre-modern jurists to place a hold and limits on public power. Codified law, in this sense, carried the potential of obliterating enlightened aspirations of tolerance and liberty.[22] The codification and juridification thus undermined the very values and aspirations that the reforms nominally pursued because they enabled the sovereign to command and control society in accordance with its own wish. The ambivalence of this process, theoretically affirming the superiority of free will but practically submitting private initiative to the control of public authorities, reached its zenith with the Napoleonic *Code Civil*.[23]

Instead of setting individuals free to pursue their own goals, the French Civil Code pursued the governmental goal of national unification and institutional consolidation. Instead of placing limits against public authority to protect the dignity and freedoms of the person, the Code 'panjuridify' social life. Accordingly, Article 6 of the preliminary title of the Code submitted private power to public order and interest.[24] Article 7 repealed all pre-existing laws, general and particular, customary

[20] Pound, 'Jurisprudence, Vol. 2', pp. 47-48
[21] If in previous centuries natural law was 'natural', between the 18th and the early 19th century, natural law became 'positive'. See Pound, R. "The Revival of Natural Law". 17 *Notre Dame Lawyer* (1942), pp. 303-306
[22] See Heirbaut 'The historical evolution'
[23] The Code of Civil Procedure, entered into force in France in 1807, the Code of Commerce in 1808 and the Penal Code in 1810 followed suit. See Gordley, James, "Myths of the French Civil Code", *American Journal of Comparative Law* 42 (1994).
[24] Article 6 of the Preliminary title held that private agreements must never contravene the laws which concern public order and good morals

and written.[25] This process meant that the civil law was "to be everywhere, to envelop everthing, and, like God, to hold up the entire inhabited world."[26] The vocation of the civil law for occupying the whole of social life was confirmed by Jean Étienne Marie Portalis (1746-1807), who remarked in the travaux preparatoires that "no particular power exists which cannot be submitted to the power of public authorities" («*il n'y a aucun pouvoir particulier qui ne soit soumis à la puissance publique*»).[27]

1.3 The Individualist Turn and *Puissance Publique*: The Birth of the National Family

The French Code famously borrowed the threefold division of persons, goods and actions from the Justinian Code. The Code, however, did not merely replicate the organisation and did not simply copy the content of the divisions advanced by Gaius in Roman times. Although the French Civil Code the followed tripartite organisation, it radically changed its contents. This was not unprecedented. There are various examples of legal scholars who had modified the contents and re-arranged the Justinian Code, adding legal institutions and rules which did not exist in Roman times or removing them to fit their assumptions and needs.[28] The French Code also forced the ambiguities and redundancies of Roman civil law into a neat division into three books, also leading to further confusion. Subsequently, legal scholars would criticise the inconsistent organisation of the Civil Code and would argue that, in Western legal history, its lack of coherence was only comparable to that of the Justinian code itself.[29]

The lack of conceptual coherence and historical accuracy of the French legislator, however, was motivated by its desire for pervasive juridification and efficient administration. This is visible in the distribution of the rules within the three departments, and in the multiplication of binding norms. Contracts and obligations were made to fit into the book of actions, whereas the law on marriage and

[25] 'Sur la Réunion des Lois Civiles en un seul corps, sous le titre de Code Civil des Français' (Art. 7) : « A Compter du jour où ces lois sont exécutoires, les lois romaines, les ordonnances, les coutumes générales ou locales, les statuts, les règlements, cessent d'avoir force de loi générale ou particulière dans les matières qui son l'objet desdites lois composant le présent Code. »

[26] Panjurism as expressed by Carbonnier, Jean. *Flexible droit.* Librairie générale de droit et de jurisprudence, 1969 (1983 2nd Ed.), p. 24, cited by Glendon, 'The Transformation', p. 33

[27] *Code civil français: Discours et exposé des motifs, qui ont déterminé la rédaction et l'adoption de chaque partie de ce Code, par les autorités qui ont concouru à sa formation; précédés d'un prologue historique sur les variations de la législation francaise, depuis 1787*, Volume 1, Huyghe, G, 1803, p. 171. Notably, Portalis was speaking of 'marital authorisation' (Art. 218 and art. 219 of C.C.) «L'autorité maritale est un droit de protection et non de despotisme.» During the following age, with the redefinition of the boundaries between state and family, intervention would only occur in the most intolerable scenarios.

[28] This had occurred already in the 17th century, for instance, with James, Viscount of Stair. *Institutions of the Law of Scotland* (1681) for having departed heavily from the original Roman scheme, if, indeed, we can speak of an original Roman scheme. See Campbell, Archibald Hunter. *The Structure of Stair's Institutions*. Jackson, 1954. Notably, in Stair's *Institutions* (footnote n. 28), marriage was considered contract and was included elsewhere than in the book of persons. Peter Birks has criticised Stair for this inclusion. Birks, Peter. *The Roman law of obligations*. Oxford University Press, 2014

[29] Pound, Roscoe 'Classification of law', *Harvard Law Review* 37.8 (1924), p. 939

divorce was included in the book concerning persons.[30] In line with previous reforms, the 'law of persons' stipulated rigorous conditions and strict procedures for getting married.[31] The registration of civil marriage was made mandatory. Consensus by the parties no longer made *nuptias*: the declaration by the state official as part of the civil celebration did.[32] Marriages not conducted according to state-sanctioned form were declared invalid.[33] What an examination of its provisions, especially those concerning household relations, shows is that the Civil Code did the opposite of empowering individuals, although the Code is often associated to an 'individualist turn'.[34]

This is visible in the laws governing marriage as well as those governing the relation between husband and wife. Contrary to the liberties granted on couples by the previous conception that grounded marriage validity in the consent of the spouses, the Code established that parental consent had to be obtained, on pain of nullity, by women under the age of 21 and by men up to age 25 who wanted to get married.[35] The Civil Code scrapped unilateral divorce, which had been introduced after the Revolution, from the law book.[36] The Code therefore brought the family and its members under state control and, at the same time, it restored and codified many of the norms that governed the household during the *ancien régime*, a policy which is perfectly illustrated by the rehabilitation of the doctrine of *femina viro coperta* (in French, '*femme covert*'). Accordingly, the Civil Code established a comprehensive set of norms that governed the 'Rights and Respective Duties of Husband and Wife'.[37]

[30] Regarding the debate if marriage was a civil contract or a religious sacrament, a mixed act or something else, Portalis declared: « On ignorait ce que c'est que le mariage en soi, ce que les lois civiles ont ajouté aux lois naturelles, ce que les lois religieuses ont ajouté aux lois civiles, et jusqu'où peut s'étendre l'autorité de ces diverses espèces de lois. » Portalis, J.E.M, *Discours préliminaire du premier projet de Code civil* (1801). And, submitting its regulation to the *raison d'état*, he also declared: « Le mariage est alors régi par quelques lois politiques, plutôt que par des lois civiles et par les lois naturelles. »

[31] Book I, Title V, Chapter I established specific conditions and qualities required to enter a valid marriage.

[32] As it is clear from his *Discours préliminaire*, for Portalis, marriage, unlike other contrats, was necessary. Marriage is not only for the parties. It is for the family and for the state. For Portalis, marriage was a contract *sui generis*. In contrast, a few years earlier, the contractual character of marriage had been discussed by Pothier, Robert Joseph. *Traité du contrat de mariage*. 1771. According to Pothier, marriage constituted the most illustrious and the oldest example of all contracts. (p. 317)

[33] Book I, Title V, Chapter II established the formalities. Book I, Title II, Chapter III contained the procedures for entering marriage. Notably, ecclesiastical authorities were replaced by civil officers.

[34] Solimano, Stefano. "L'edificazione del diritto privato italiano dalla Restaurazione all'Unità." In *Il Bicentenario del codice napoleonico*. Bardi editore, 2006, § 6

[35] Notably, even after passing the age of requirement, spouses had to solicit the consent of their parents through formal procedures called '*actes respecteux*'. Carbonnier, 'Flexible droit', pp. 60-61

[36] Unlike the revolutionary laws passed in France in 1792, the Napoleonic *Code Civil* did not provide for unilateral divorce. It thus attracted the criticism of the most vocal revolutionary groups, and of most feminists, who saw in many of its provisions a compromise with conservative forces rather than an individualist turn. See also Ungari, 'Diritto di Famiglia', p. 93. In his *Discours préliminaire*, Portalis dedicated great attention to the question of divorce. In the context of his defence of the indissolubility of marriage, he declared that: « Le mariage n'est point une situation, mais un état. Il ne doit point ressembler à ces unions passagères et fugitives que le plaisir forme, qui finissent avec le plaisir, et qui ont été réprouvées par les lois de tous les peuples policés.»

[37] Book I, Title V, Chapter V and VI. Husband and wife owed each other fidelity and assistance. Articles 212-214

The Code established that the husband owed protection to his wife, and the wife obedience to her husband in exchange for her 'protection'.[38] The wife was bound to live with her husband, and to follow him wherever he might dwell, therefore making it possible for him to control her movements as well as legal residence. The wife could not act without the permission of the husband. She relinquished to him control of her property and, as '*chef de la communauté*', he acted as its only owner. In return, the husband was to furnish her with everything necessary for life.[39] The Civil Code (re-)introduced obligations which essentially mirrored the law of coverture in English law. The logics of this arrangement originated in a patriarchal vision of society which in fact underpins all the provisions regulating household relations, not only those between husband and wife. The Code thus brought children under the guardianship and control of the male head of the family.[40] As in England, so in France, the household became the inviolable space where the husband-father ruled as sovereign.

The Code placed family unity at the centre of national unification. The pedagogical functions of the family were tied to national symbolism and then embodied in the authority of fathers-husbands. As declared by Portalis, "[g]ood fathers, good husbands, and good sons make good citizens."[41] What drove the codification process was not the enlightened protection of the individual, but pure *raison d'état* and, specifically, national consolidation and legal centralisation. National laws did what medieval civil laws and canon laws could not do: they regimented the conduct of family life to the detriment of women and children who came to depend on the supposed generosity and benevolence of the breadwinner for their survival. At the same time, all citizens were to conform to the will of the state. The Civil Code enforced *puissance publique* over non-state orders and enabled state institutions

[38] As part of the ceremony, the couple would hear that "the husband owes protection to his wife, the wife obedience to the husband". It appears that this formula was included in the very formal civil ceremony of marriage under the insistence of Napoleon himself. See Glendon, 'The Transformation', pp. 71-72

[39] The laws applicable in revolutionary France which preceded the Civil Code had provided for the default application of the regime of community of property between spouses. They had established equal parental responsibilities for women and men alike. It is significant, but often overlooked, that the Code abandoned the progressive line taken with these provisions. Though the Code allowed husband and wife to freely choose the matrimonial property regime of their preference, the husband nevertheless managed the communal property as '*chef de la communauté*' and acted *de jure* as its only owner. Ungari, 'Diritto di Famiglia', p. 93

[40] After the Code, the father is once again at freedom to institute the primogeniture which pre-*Code Civil* revolutionary laws had formally abolished. The pater familias could obtain the submission of his children thanks to the now codified prerogatives which put under his exclusive power the inheritance of family assets. The power of the pater familias is also re-established thanks to the requirement of his consent to the marriage of 'underage' children – a requirement which the contractualistic maxim *consensus facit nuptias* had excluded. The Code went as far as establishing that children disobeying the wishes of their fathers could be imprisoned. The laws applicable in revolutionary France had abolished the legal distinction between legitimate children and children born out of wedlock. The Code provided that natural children 'born out of wedlock' were recognised, but Napoleon himself famously and held that «la société n'a pas intérêt à ce que des bâtards soient reconnus".» Locré, Jean Guillaume. *Législation civile, commerciale et criminelle ou commentaire et complément des codes français*. 1836, p. 57

[41] Portalis, 'Discours préliminaire' : « Les vertus privées peuvent seules garantir les vertus publiques ; et c'est par la petite patrie, qui est la famille, que l'on s'attache à la grande ; ce sont les bons pères, les bons maris, les bons fils qui font les bons citoyens. »

to place society under its control. Significantly, the Civil Code also instituted a comprehensive system of civil registries whereby the civil status of each Citizen was recorded.

1.4 The French Civil Code and the Redefinition of Personal Status in Cross-Border Matters

The French Civil Code submitted 'private and economic relations' to state prerogatives and public power. This process was especially visible in household matters. In domestic matters, the French Civil Code also promoted a 'protectionist' and 'conservative' policy. Hence, the Code pursued new purposes and was grounded in new logics as far as household matters were concerned. And yet the Civil Code did not envisage the creation of a separate department of the *jus civile* governing family relations. In the Napoleonic codification experience nowhere was the existence of 'family law' ever mentioned. Although the Code followed new logics, introduced new administrative technologies and explored new legislative techniques, the Civil Code did so in an incoherent and haphazard manner. This is also visible with respect to relationships having a cross-border dimensions. The Code did not introduce rules governing international relations in a systematic way. The *Code Napoléon* nevertheless established a general rule governing the status and capacity of French citizens.[42]

According to Article 3 of the Code, French law must apply to French citizens wherever they may be in matters concerning the '*état et la capacité des personnes*'.[43] The automatic application of the law of the nation - the *lex patriae*, using the classical Latin formula to personal matters - meant that French civil law would bind French nationals anywhere they lived, traded, resided or get married. Neither personal circumstances nor preferences should matter when it came to status and capacity.[44] The idea that the national law would govern the capacity of persons across all jurisdictions was unheard of. Although medieval jurists had also expressed the opinion that one law would always govern the capacity of persons, this law generally coincided with the law of the domicile. The application of the

[42] It is debated issue whether the French Civil Code of 1804 followed the early Statutists approach or whether it adopted the Dutch theories advanced by Huber. Lipstein, 'General Principles', p. 132. I believe the novelty lies not in the method, but in the different spirit, assumptions and ideas regarding the role of the state in society, a role that Article 3 indicates.

[43] "The laws of police and public security bind all the inhabitants of the territory. Immoveable property, although in possession of foreigners, is governed by the French law. The laws relating to the condition and privileges of persons govern Frenchmen, although residing in a foreign country." This translation is one of earliest ones that the author could find in the English language. It comes from "The Code Napoleon or, The French Civil Code, literally translated from the original and official edition, published at Paris, in 1804" and it was printed in 1827. Notably, instead of status, which is the formula universally used in subsequent years, it translated it with "condition and privileges of persons" which comes closer to the Latin original. The author of the translation, a barrister, felt the need to translate a term that appeared to him as foreign.

[44] Noteworthy in this regard is that contractual matters were excluded from the application of Article 3.

lex domicilii made capacity contingent on cross-border movements. On top of that, this general rule was also subject to numerous exceptions and qualifications.[45]

Some of the exceptions have emerged from the analysis in the previous chapters. Accordingly, for Grotius, the domicile rule was subject to the exception that an individual was able to voluntary subject himself to a certain local law and, in such case, the *lex loci contractus* would govern not only the validity of the transaction but also the capacity of the parties. Article 3 of the French Civil Code ruled out the possibility of a voluntary subjection. Capacity was always governed by national law. But the novelties did not end with capacity. Nowhere did we find the old Roman law notion of 'status' in the medieval age in the context of conflict of laws. Medieval jurists did not use status in their contributions to the debates on *collisio statutorum* and *conflictus legum*, although Huber had talked of 'personal qualities' being impressed on persons when he spoke of the acquisition of rights.

The seeds of the notion of '*état et la capacité'* which was codified in 1804 may be traced back to the influential work of Louis Boullenois (1680-1762) and to his discussion on marriage contracts and matrimonial property. French scholars had not been unanimously convinced by the theory advanced by Dumoulin. d'Argentré, for instance, had criticised Dumoulin because he believed that the determination of the extra-territorial effects of a contract of marriage should not be left to a tacit agreement between the parties. Boullenois was also of the opinion that the *lex loci contractus* should not govern property in cross-border scenarios. He thought that the law of the domicile of the parties should govern instead.[46] What is relevant here is not so much the rule - the *lex domicilii* rather than the *lex loci contractus*, a permanent rule or one that was subject to the intention of the parties - that Boullenois advanced, but his justification for his proposal.

According to Boullenois, the law governing the possession and disposition of property did not merely concern rights and effects, but the 'status and the actual condition' (*l'état et la condition actuelle*) of a person.[47] Recalling the 'personal quality' of Huber, consistently throughout his work, Boullenois referred to the idea that, in cross-border scenarios, the application of a given law resulted in a change of "a status and a pure condition" of a person («*lois qui affectent un etàt et une condition pure*

[45] The law governing competence corresponded to the *lex domicilii*, but in marriage matters the *lex loci* prevailed. See for instance Lorenzen, 'Huber', p. 387

[46] As reported by Story, 'Commentaries (2nd)', p. 254

[47] Boullenois, Louis. *Traité de la personnalité, et de la réalité des loix, coutumes, ou statuts, par forme d'observations: auquel on a ajouté l'ouvrage Latin de Rodenburgh, intitulé, de jure quod oritur è statutorum diversitate*. Tome Second. G. Desprez, 1766, obs. 32, p. 13

personnelle»).[48] Like Huber, Boullenois also referred to a personal condition, although he used the Roman idea of status instead of quality. It ought to be born in mind that, as historians have emphasised, Roman jurists had not used status in a technical-legal sense. The use of status to refer to the individual and his vested rights in a transnational setting, however, is probably not accidental, and can be explained by the deeper meaning ascribed to status by Roman as well as medieval scholars.

Prominent medieval philosophers - among whom Thomas Aquinas - used status to refer to the stable position and the variable condition of the individual within an organised community. Depending on his status in Roman society, a person may or may have not acquired specific responsibilities.[49] Boullenois may have started from the same idea to develop the idea that the application of the law of the domicile not only corresponded to the position of an individual in space but also impressed a condition on him. The French legislator may have also started from the same premises, although it replaced the *lex domicilii* with the *lex patriae*. Since Roman times, the notion of status thus carries a reference to both the spatial position and the personal condition that an individual has with respect to an organised community of which he is a member. In this sense, there is some continuity between the notion of status used in the French Civil Code and the medieval conception of status.

However, the use of status by the French legislator in the context of the Civil Code also reveals some striking differences from the Roman and medieval conception of status. In the medieval conception of status, the position and condition of a person were contingent, not permanent. Late medieval scholars, among whom Pufendorf, explicitly referred to status as a temporary condition and position of the person within a community.[50] Medieval jurists argued that status varies from place to place, from community to community, from time to time. It is stable, but not permanent. It is subject, to a certain extent, to the will of the person. What is more, consistently with the Roman conception, medieval scholars did not advance an organic and complete theory of legal capacity. They did not advance a 'theory of status' nor did they use the idea of status in a technical and coherent sense.

[48] Boullenois, 'Traité' : « Je ne sais si, pour echapper a tous les cris de M. d'Argentre centre Me. Charles du Molin, il n'eut pas ete plus court et plus convenable, sans recourir a la presomption d'une convention et d'une soumission, dont il ne paroit aucune trace, de regarder les statuts de la communaute et de la non- communaute, comme des Loix qui affectent les conjoints d'un etat et d'une condition pure personnelle. » Obs. 28, p. 300

[49] Aquinas, T. *Summa Theologica* (1485), II-II, q. 183 a.1. For Aquinas, status corresponded not simply to specific rights and responsibilities, but to a permanent position (*ex aliquo permanente*). Notably, Aquinas regarded status as that of either free or enslaved men (*libertatis vel servitutis*). The capacity, rights and obligations of a person coincided with his free or enslaved standing. See Ricciardi, 'Status. Genealogia', p. 62

[50] Although Pufendorf went in great detail in expounding his conception of the 'moral entity' and made extensive use of the idea of status of moral person, he did not use status to refer to the 'contract' and 'pact' of marriage. Pufendorf divided between a natural state and a superadded or adventitious status (status adventitious). The latter is not gained by all human beings. It is bestowed on them by human institutions. Unlike what has been argued in the Classical and Social ages, Pufendorf did not discuss of 'family status'. Pufendorf, S. *De Jure Naturae et Gentium Libri Octo* (1688) Trans. by Oldfather, C. H, and Oldfather, W. A. Oxford, Clarendon Press, 1934, p. 20

Boullenois also regarded the acquisition of rights and duties as contingent - although, strictly speaking, not in accordance with a voluntary subjection, it could be argued that domicile also changes with personal intent other than with physical movement - on the spatial location of the person. For Boullenois, a change of domicile and the application of different laws in space changed the status of a person.[51] The physical movement from jurisdiction to jurisdiction modified not only the position of a person in society, but also his personal condition. Status was thus determined by physical movement. Status was determined by the capacity to acquire rights. In contrast, the French Civil Code established that physical movement did not change the status of a person. Status was neither spatially-contingent nor subject to personal preferences. Since membership to the nation was permanent, the application of law in space no longer depended on a voluntary subjugation or personal position. National law governed the capacity and the rights of the person wherever he or she may be.[52]

The status referred to in the civil code also implied a theory of capacity. It assumed that capacity always depended on status, and that capacity was the same regardless of the circumstances of the parties or of the specific transaction in which they entered. Status determined the legal capacity a French citizen everywhere. There are therefore some elements of continuity between status as understood by Boullenois, Pufendorf and medieval jurists and status as regulated by the Civil Code, but there are also fundamental differences. The French legislator borrowed the idea of status as a a personal condition and, at the same time, reversed the argument whereby capacity and status vary in space in accordance with personal circumstances and actions. Status becomes a condition which is not contingent, but inherent in the person. This condition determined - rather than was determined by - capacity and incapacity, rights and duties.[53]

[51] Boullenois, 'Traité', obs. 32, p. 13

[52] The literature has emphasised the historical and conceptual link between the emergence of the 'individualist' ideas of equality and liberty and the rise of the personal dimension of status. In this sense, historians and civilians have argued that it was only natural that a conceptual change would occur with the French Revolution that would unearth a subjective and individual dimension together its its community aspects which we have traced back until Roman law. In Italian literature, see Prosperi, Frencesco. "Rilevanza della persona e nozione di status." *Civilistica.com* (1997), p. 26, who also cites various French authors affirming the same. However, once again, the individualist dimension of the French revolution should not be exaggerated. If anything, the conceptual transformation of status strengthened the community dimension, as shown by the various references to society, to the state, to the bond between the family and the nation affirmed by Portalis.

[53] Rights and obligations thus followed from French nationality. As to the 'formal validity' of 'foreign' marriages, Article 170 of the Civil Code stipulated that "A marriage contracted in a foreign country between natives of France, and between a native of France and a foreigner, shall be valid, if celebrated according to the forms used in that country", provided it had been preceded by the publications, the parties had reached the age of consent and were not within prohibited degrees.

2.1 Reception of the Napoleonic Code in Italy and the Dawn of the Classical Age

The reconceptualization of status, its use in the context of cross-border relations as well as the juridification of the household took place in other European jurisdictions because of the migration of the French Civil Code and, more in general, through the exportation of this legislative technology. For some years, an adaptation of the Napoleonic Civil was in force in the Republic of Genova, in Piedmont, and in other states directly or indirectly under French control.[54] Eventually, the Congress of Vienna (1814-1815) restored the political status quo ante in the Italian peninsula.[55] Notably, soon after the restoration, each government introduced a version of the civil code.[56] Restored governments had understood that there was as much to fear from revolutionary ideas as there was to learn from the technologies which had been used for remaking the state, the law and society. After they took their power back, sovereigns did not discard the unprecedented *puissance publique* that the technology of the code placed in their hands. Rather, they turned it their advantage. The illusion of the enlightened code thus came to an end. As Carlo Alberto of Savoy (1798-1849) remarked:

> [The codification process is] not to flatter the spirit of the moment, not to support (the numerous works of) witty persons and (of) modern philosophers, but rather to elevate a dam against the invasion of subversive ideas; and to elevate on the debris of Thrones which are crumbling on all sides, weakened by the incompetence of governments, a purely Religious and Monarchical code.[57]

[54] Except for Reign of Sardinia (Piedmont), for instance in Sicily and in the Republic of San Marino. Solimano, 'L'edificazione', § 17 who also provides a list of various contributions in Italian literature.

[55] Thus, on the 4th May 1814, the Government of Geneva – which will eventually become part of the territory of the Reign of Sardinia - issued the following decree: "The Code Napoleon is abolished for what concerns the civil status records, the celebrations of marriage, divorce, the community of property between husband and wife, intestate succession […]. As for these matters, the ancient laws of the Republic which were in force […] before […] the Civil Code are restored." (Trans. A.) It added that «…a contare dal giorno 21 aprile 1814 sono ripristinate per questi oggetti le leggi della Repubblica che erano in vigore tanto nell'anno 177 che nell'anno 1805.» Cited in *Giurisprudenza dell'ecc.mo R. Senato di Genova, ossia collezione delle sentenze pronunciate dal R. Senato di Genova sovra i punti piu importanti di diritto civile e commerciale, e di procedura e criminale, compilata dall'avvocato Niccolò Gervasoni*, Luca Carniglia, Vol. 5, 1829, p. 81-82

[56] In the Reign of Sardinia and Piedmont, Carlo Alberto had a civil code adopted in 1838, the 'Codice Albertino'. In the Reign of the Two Sicilies, a civil code had been already introduced in 1819. The Duchy of Parma and Piacenza introduced one in 1820, and the Duchy of Modena and Reggio did so in 1851. Schioppa, Antonio Padoa. *Italia ed Europa nella storia del diritto*. Il mulino, 2003, esp. 'Dal codice napoleonico al codice civile del 1942' pp. 495-532

[57] «…nous avons fixé des points d'une importance, qui rendront notre code, si toutes les monarchies ne seront point renversées, un travail non seulement sage et durable, mais même glorieux. Cette législation nous faisons, non pour flatter l'esprit du moment, pour seconder les nombreux écrits de beaux esprits et philosophes modernes, mais au contraire, pour elever une digue contre l'envahissement des idées subversives ; et pour élever sur les débris des Trônes qui croulent de toutes parts par la faiblesse et l'impéritie des Gouvernements, un Code purement Religieux et Monarchique». Cited in Monti, A. "Lettere inedite di Carlo Alberto al maresciallo Vittorio Sallier de la Tour sulla riforma dei codici e la polemica sui princìpi liberali", in *Rendiconti del Reale Istituto Lombardo di Scienze e Lettere* LXXIV (1941-1942), pp. 75-76

Accordingly, in line with the new legal conception, the new laws extended the commanding power and regulatory outreach of civil laws.[58] They brought back to life some of the most vicious patriarchal and discriminatory practices that existed before or during the *ancien régime*.[59] Inter-religious marriages were abolished.[60] Discriminatory succession laws ('*fedecommesso*' and '*maggiorasco*') were re-introduced. *Patria potestas* was strengthened.[61] Default community of property was scraped off the books.[62] Women were banned from entering in contractual agreements without the prior authorisation of their husbands and fathers.[63] What transpires from the provisions included in these codes is the desire to maintain a patriarchal society. What emerges from the spread of the codification technique is that the process of juridification which was explicitly driven by the goal of expanding public power, an objective which is especially visible with respect to marriage and household matters.

Before the turn of the 19th century, household matters were outside the reach of state authorities and civil law, in Italy as in France and in England and other European jurisdictions, a situation clearly exemplified by dominance of marriages that did not follow the official procedures set by canon and civil laws. Authorities as well as scholars took a pragmatic approach to questions raised by informal marriages. In line with an idea that was affirmed in all jurisdictions, marriage was therefore unanimously considered a consensual relation between two parties. Informal marriages were generally considered valid pursuant to a policy of *favor matrimonii*. The process of institutional modernisation and legal centralisation that started around the turn of the century brought about a

[58] Ungari, 'Diritto di Famiglia', p. 65

[59] For Ungari: "Si può parlare nel complesso, tolto il codice austriaco, di un generale ritorno al principio della famiglia agnatizia, della quale appare evidente il collegamento con il regime politico-sociale tradizionale." Ungari, 'Diritto di Famiglia', p. 128

[60] In Sardinia and Piedmont (Art. 108, Codice Civile per gli Stati di S.M. il Re di Sardegna) but also in Sicily and Naples, in Modena as well as in Parma, civil laws referred to canon law as the applicable law as to capacity to marry, validity of marriage, and its annulment. The counter-reforms took a confessional direction in Tuscany and Veneto as well. Ungari, 'Diritto di Famiglia', p. 139. For instance, the Code of the Reign of Sardinia and that of the Duchy of Modena did not establish rules for non-Catholics and Jews whose civil and political rights are regulated by special laws.

[61] In Parma and Modena, this means that where the father himself is not fully emancipated, the authority over minors falls under the power of the oldest direct ascendant in the father's line. See Articles 82-82 of the Code of 1820 of Parma. Art. 120 of the Code of Modena: "… qualora il padre sia egli stesso soggetto alla patria podestà, o sia morto non emancipato, i di lui figli sono sotto la podestà dell'avo paterno." Conversely, mothers and even widowers lost their right to equal parental authority. Ungari, 'Diritto di Famiglia', p. 128

[62] The Neapolitan Code, the Code of Parma and the 'Codice Albertino' also abolished the default communion of property between spouses with the consensus of notable jurists. Solimano, 'L'edificazione', § 3. The doctrine aligned itself against the communion of property between spouses and against the equalisation of women's rights in succession law. Francesco Forti, an illustrious jurist from the Grand Duchy of Tuscany, remarked that "[a]ll in all, the property of women must be presumed to have been acquired with the capital of her husband in order to dissipate the suspicion that she may have earned it by trading with her body." (Trans. A.) Forti, *Trattato della dote, nei postumi Trattati inediti di giurisprudenza*, Firenze, 1864, p. 456-458. Gian Domenico Romagnosi (1761-1835), one of the most influential Italian jurists and philosophers of the early 19th century, opposed equality between men and women. He defended the preservation of the 'natural superior position' ('preminenza naturale') of the husband. Romagnosi thus argued in 1789 that it would be "[f]atal gift, I shall repeat, indeed masked savagery, […] to equalise in all respects the economic freedom of the wives to that of their husbands." (Trans. A.)

[63] Ungari, 'Diritto di Famiglia', pp. 121-128

radical revision of these ideas. Marriage was brought under public control. It was transformed into a civil contract, in the law as well as in the legal consciousness, as it is clear from the opinion of Gatta cited above and from the work of other influential jurists of the time.[64]

Accordingly, the consent of the parties was no longer sufficient to create a valid marriage.[65] The validity of contracts of marriage became contingent on compliance with the law of the state of the spouses. The Roman maxim that *consensus facit nuptias* symbolised pre-modern logics. Informalism and private ordering were considered incompatible with the rise of strong national societies and powerful nation-states. The family became synonymous with the protection of national values and national traditions. Accordingly, marriage and household relations were turned into a permanent bond which, like membership to the political community, could not be dissolved at will.[66] The state was still composed of the union of families, as in Bodin and Grotius had argued but the civil bond which united the individual to the household and the household to the nation was no longer subject to a voluntary submission and no longer dependent on peoples' consent.

With the process of formalisation of marriage contracting and juridification of its effects, the regulation of household relations shifted from the informal to the formal level, from the local to the national level, from the private to the public one.[67] This gradual shift was "a crucial step in of the process of nation-building, jurisdictionally, substantively, and symbolically."[68] The process of juridification of marriage and of the household which started near the turn of the century anticipates some of the tendencies which were to reach their full maturity in the following legal-institutional age. In fact, the migration, and rejection, of specific principles and ideas that had been exported by the French Civil Code in Italian jurisdiction also anticipates another crucial element of classical legal

[64] The transition is well illustrated the remarks made by Romagnosi in 1806, when he declared that: "Regardless of the positive institutions, the status derived from marriage is exclusively conventional, originating from a contract proper, in which it is assumed that men and women must contribute to the due services and care owed to the family, so that, should not these conditions be met, the contract is breached, the parties have the right to return to their original liberty, save for the compensation for damages and interests […]." Romagnosi, Gian Domenico. *Introduzione allo studio del diritto pubblico universale*. (1834), p. 276 (Trans. A.)

[65] Restored powers introduced civil law impediments to marriage evocative of pre-revolutionary times, but also stipulated stricter procedures and penalties for the transgressors. Parental consent was turned into an essential requirement for entering a valid civil marriage. Ungari, 'Diritto di Famiglia', p. 126

[66] In the Duchy of Parma and Piacenza and in the Reign of Two Sicilies and in that of Sardinia the new codified law also abolished divorce. The Reign of Sardinia even banned consensual judicial separation (divorce *a mensa et thoro*) between spouses unless explicitly authorised by an ecclesiastical court. Ungari, 'Diritto di Famiglia', p. 128

[67] In this regard, it is noteworthy that already at the turn of the 18th century it was not uncommon for civil marriages to be celebrated publicly in squares. What else could the unity between the spouses represent if not that between the spouses and the nation? According to a fashionable way to celebrate their marriage, the couple would walk around a tree, representing unity, and would then parade across the streets being followed by a 'patriotic procession', an act representing commitment to society rather than to one another. Ungari, 'Diritto di Famiglia', pp. 85-86

[68] Tsoukala, Philomila. "Marrying Family Law to the Nation." *The American Journal of Comparative Law* 58.4 (2010), p. 873

thought, the division between the 'market law' and 'family' although, of course, these two departments did not yet exist in law and in the discourse. As noted by Italian historian Paolo Ungari:

> The Codice Albertino in the 1830s and the Code of Modena in the 1850s, by replacing the provisions in the restored Constitution of Piedmont of 1770 and that of Modena of 1771, present themselves as an additional proof of the policy which can be summarised, schematically, in the general preservation of the 'law of the market' ('*diritto dell'economia*') from Napoleonic times …, and in the rigorous defence of the 'political' civil institutes: those concerning the person, the family, and succession.[69]

Whilst the Restoration virtually turned the clock back with respect to marriage and household relations, the threefold division of the French Civil Code allowed restored governments in Italy to preserve almost in their entirety the reforms on goods and property and on obligations and contracts that had been introduced after the French Revolution. This preservation of 'liberal elements' in economic matters and the restoration of conservative elements in family matters and succession came to be known as the '*politica dell'amalgama*'. This policy gave a forecast of what was going to become a fundamental trait of the systematisation of national legal orders in the classical age. Unlike classical family exceptionalism, however, the *politica dell'amalgama* found no explicit theorisation in the legal scholarship and was dictated purely by political and economic expediency. At the turn of the 19th century, however, the legal mentality was at the verge of a new intellectual and legal age.

2.2 Giacomo Giovannetti: Conflict of Laws in Italy between Statutism and Patriotism

Evidence of the decline of the medieval mentality is also indicated by the growing dissatisfaction of legal scholars with the ways legal collisions were being addressed. The political fragmentation of the Italian landscape and the contemporary process of codification and juridification increased chances of conflicts between local laws. Many codes adopted clauses inspired by Article 3 of the French Code.[70] Absent a profound revision, courts continued to follow the 'Statutist approach' to settle cross-

[69] Ungari, 'Diritto di Famiglia', pp. 122-123 (Trans. A.) Ungari also remarked that: «La politica legislativa delle Restaurazioni italiane ha questo di caratteristicamente comune: che anche là dove si accettò in parte l'eredità della codificazione napoleonica, o anche a distanza di decenni se ne riprese la via, il regime della proprietà, dei contratti, delle ipoteche e in generale il diritto della produzione e degli scambi (il Code de Commerce, in particolare, fu spesso mantenuto senz'altro) vennero recepiti in misura ben più larga e con difficoltà senza paragone minore che non il diritto della famiglia e gli istituti successori con esso intimamente collegati.» Ibid. p. 121

[70] Notably, Article 6 of the Civil Laws of the Reign of the Two Sicilies, clearly evocative of the language of the French civil code, stipulated that: "The citizens ('nazionali') of the Reign of the Two Sicily, although resident in a foreign country, are subject to the [national] laws which pertain to the status ('stato') and capacity of the person."

border disputes. Some prominent jurists complained that this approach no longer fitted the institutional and cultural context. In his commentary of the '*Degli Statuti Novaresi*' (1830), Giacomo Giovannetti (1787-1849) also warned that it had become too troublesome to indicate with an acceptable degree of certainty in which class a statutory provision fell, personal and real (or mixed).[71] In his view, 'Statutists' had failed to make order out of an overly complex discipline which could not live up to its aspirations. Statutism, Giovannetti held, reflected the inadequacy of the *scientia juris* to deal with legal collisions that frequently arose in Italy and Europe:

> Legal scholars have written extensively on the question of how to determine the (geographical) limits of the authority of the statutes. Each doctor exposing his own opinion, and his theory, citing each other and mutually discrediting one another, they have provided a wealth of material for those who want to get trapped in this labyrinth brought about by the collision between the various statutes in force in a State, and between the different laws which govern the various nations of the civilised world. To unravel this mishmash, I do not believe sufficient the ingeniousness, and the patience, of one single man. Even less so would I trust upon myself such task.[72]

Giovannetti's remark reflected a general dissatisfaction with the lack of systematism of medieval *conflictus legum*. The extraordinary degree of confusion in the discipline and the incapacity of medieval jurists to come up with a coherent theory and consistent method was being condemned in remarkably similar terms in other European jurisdictions, and even in the United States.[73] Admittedly, the elaboration of a new approach was beyond Giovannetti's means. He therefore contented himself with placing the old doctrines within the threefold classification system of the Civil Code in law of persons, goods and actions, itself a simple and yet significant turn.[74] Italian courts then still applied the *lex loci* rule in disputes concerning international marriages.[75] Accordingly, Giovannetti rejected the old rule in matters concerning the status and capacity of persons ('*lo stato, e le capacità delle*

[71] Giovannetti, G. *Degli statuti novaresi, Commentario*, Torino, 1830, p. 66. Giovannetti - whose work formed the fundamental basis of several civil and constitutional reforms in the Kingdom of Sardinia.
[72] Giovannetti, 'Degli statuti novaresi', p. 65 (Trans. A.)
[73] Judge Porter of the Louisiana Supreme Court described Conflict of Laws as "a subject, the most intricate and perplexed of any that has occupied the attention of lawyers and courts: one on which scarcely any two writers are found to entirely agree, and on which, it is rare to find one consistent with himself throughout. We know of no matter in jurisprudence so unsettled, or none that should more teach men distrust for their own opinions, and charity for those of others." *Saul v. His Creditors*, (1827) 5 Mart 569, 589
[74] In very neat fashion, Giovannetti divided between real statutes, which concerned 'things', and mixed statutes, which are those concerning 'obligations' unrelated to real property (a class of statutes which regulated the equivalent of 'actions' in the Code). Giovannetti, 'Degli statuti novaresi', p. 65-66
[75] Decis. 9 settemb. 1734 ref. Giusiana in causa Levron contro De-Corderiis and ecisione 13 settembre 1764 ref. De-Oresticis in causa Blacas contro Durazzo, e Lascaris

persone').[76] Besides this innovation, what is remarkable in Giovannetti's account is his conviction that the Statutist method was out of line with changing social, legal and political convictions:

> Yet another sentiment has taken hold of the popular conscience. It is the need that the subjects of the same State possess a defined physiognomy, that their interests are subjected to one unique bond, so that from these reciprocal benefits, effortless communication, and that order of general interests which stand at the foundations of nationality would necessarily follow. … Conversely, municipal statutes make us strangers in our own land; we are subject to the same Sovereign and yet we belong to different homelands; moving from city to city, we hardly ever know how our rights over our own property change….[77]

There existed a symbiotic relation between conflict doctrines and rules on the one hand and political and juridical convictions on the other. Giovannetti expressed the view that the Statutist method conflicted with the specific form of statehood and with the political and legal convictions that had arisen between the 18th and 19th centuries. Giovannetti, like other contemporaries, was dissatisfied with the premises and consequences of the old assumptions and the old approach to cross-border relations and disputes. He complained that capacity and rights vested in persons changed from place to place. Giovannetti's remarks point towards the growing importance and the convergence between national and political communities. His work suggests that conflict of laws had a role to play in the construction of national consciousness and national bonds. The Statutist approach, embedded as it was in medieval consciousness and medieval sovereignty, could not fulfil this role.

[76] Giovannetti, 'Degli statuti novaresi', p. 65-66
[77] Giovannetti, 'Degli statuti novaresi', p. 67 (Trans. A.)

Part II

The Age of Classical Legal Thought

Chapter 4

Savigny and the Rise of Classical Conflict of Laws

The second part of this study narrates the story of private international law during the classical age which, according to this reconstruction, starts around the beginning of the 19th century and extends to the early decades of the 20th century.[1] This period saw the decline of medieval assumptions and schemes and the consolidation of a new model of statehood whose features had already emerged in the pre-modern period. Medieval scholars were accused by classical jurists of having polluted the law and legal science with hermeneutical liberties and unnecessary sophistry. Against a background characterised by competing institutional and normative actors, and, at the same time, by a process of modernisation of state apparatuses and administrative machineries, sovereign states could not do without a rigorous process of re-organisation of the legal order. At the dawn of the 19th century, legal consciousness experienced a profound re-orientation.[2] Convergence of a new set of ideas and assumptions provided coherence and direction to the constitutive elements of the national legal order.

In contrast with law in the middle ages, law in the age of classical legal thought became universally conceived as a coherent order and as a systematically arranged body of legal precepts. As Duncan Kennedy has argued, the dominant elements of classical consciousness are the distinction between private and public law, the emphasis placed on 'individualism' and the widespread commitment to legal formalism.[3] The process of systematisation of national legal orders was conducted by drawing on Roman sources, by reconstructing divisions which had also been adopted by medieval jurists albeit in vague terms starting from the *summa divisio* between private and public law, and, at the same time, by advancing principles within divisions and their subdivisions that were consistent with the dominant assumptions and ideas. The characteristic elements of classical consciousness found expression in the idealisation of 'free will' in contractual and economic matters and in the contraposition between market law and family law, where free will came to an end.[4]

[1] For Kennedy, the globalisation of classical legal thought "occurred during the second half of the nineteenth century and was over by WWII". Kennedy, 'Three Globalizations', p. 25. Hence, there is a slight difference in chronology.
[2] The rise of a widely-shared conception of law despite the great variety of philosophical approaches was first noted at the turn of the 20th century. Pound, Roscoe. "End of Law as Developed in Jursitic Thought." *Harv. L. Rev.* 30 (1916), pp. 201, 202, 223-225. See other works of Pound indicated in this chapter. Many of the features of classical legal thought were noted by scholars whose works are examined in the third part of this genealogy.
[3] See Kennedy, D. "Towards an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought", 3 *Res. In Law and Soc*. (1980), pp. 3-24
[4] D. Kennedy, 'Three Globalizations', p. 26, 32-34

During the process of re-organisation of national orders, each legal field acquired specific boundaries and functions, conflict of laws included. The second part of this genealogy aims to shed light first on comparable processes of change that took place as classical schemes and assumptions took hold of European legal consciousness, and then on their fundamental importance for the redefinition of the underlying principles, disciplinary boundaries and functions of conflict of laws in the modern era. Friedrich Carl von Savigny (1779-1861) is almost universally regarded as the founding father of modern private international law. His *Treatise on the Conflict of Laws*, published in 1849, became an instant best seller, determining a profound revision of the standard approach to legal collisions. Accordingly, this chapter investigates Savigny's conception of conflict of laws. Savigny not only contributed fundamentally to the redefinition of the boundaries, principles and functions of the law governing cross-border relations. He himself contributed to the construction of classical ideas.

As pointed out by Kennedy, the "hero figure of [classical legal thought] was the law professor … and the great and inspiring precursor initiator was the founder of the historical school, Friedrich Carl von Savigny".[5] The main contribution of Savigny to legal thought and jurisprudence is contained in the '*System des heutigen Römischen Rechts*' ('System of the Modern Roman Law'), published between 1840 and 1849. The *System* constitutes an impressive exposition of the Historicist and Pandectist ideas of which Savigny was the main advocate in his lifetime.[6] But the *System of Modern Roman Law*, as argued by Kennedy, has in fact a "place in the transnational development of legal thought over the whole modern period."[7] The *Treatise on the Conflict of Laws* constituted the last volume of this manifesto of classical legal thought. It is therefore in the context of ideas and principles advanced in the *System* and against a background characterised by a transitional redefinition of the dominant mode of legal thought that the emergence of 'modern' private international law should be examined.

Chapter 4 begins with laying out the most important elements of the German legal and political landscape when Savigny wrote the *System* (section 1.1). It proceeds with an examination of the fundamental traits of Savigny's conception of private international law (sections 1.2 and 1.3). After

[5] Ibid. p.27

[6] Savigny was the main advocate of the Historical School of Jurisprudence, founded by Gustav Hugo (1764-1844), and the head of the Pandectist movement. The Pandectists made Roman law into a model for *Konstruktionsjurisprudenz* (conceptual jurisprudence) and for the development of modern legal systems. Savigny turned conceptual jurisprudence and the Historical approach into a pan-European legal science. Historicists famously divided between Romanists, led by Savigny, who thought that German law must be grounded in Roman law, and Germanists, among whom Otto von Gierke, who thought instead that it should be based in customary traditions. For Savigny, the living law of Germany originated in Roman law. Friedrich Carl von Savigny, *System Des Heutigen Römischen Rechts*, Vol. 1 Berlin Veit (1840), p. 1

[7] Kennedy, D. "Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought", *American Journal of Comparative Law* 58.4 (2010), p. 812

examining the so-called 'seat-selecting' or 'multilateral method' developed by Savigny, this chapter draws the attention to fundamental classical ideas and argumentative devices put forward in the first volume of the *System* (s. 2.1), and especially the contraposition between the family and the market (s. 2.2), and the boundaries, principles and functions underlying the seat-selecting method (ss. 3 and ff.). Especially visible are the antithetical principles and rationales of the law governing cross-border commercial contracts and marriage relations which served the purposes of removing obstacles to *laissez-faire* in the case of the former, and of consolidating the bond between individuals and the nation in the case of the latter.

This first chapter of the second part of this genealogy shows that, in redeveloping the internal and external boundaries of conflict of laws and in rewriting its underlying principles and functions, Savigny relied as much on his own erudition and intuitions as on arguments that were spreading across jurisdictions and legal systems. This is especially visible with the reconceptualization of marriage that took place in Scottish law and American law (s. 3.2). Classical legal thought spread from civil countries to the common law world and back again. As a result, subsequent chapters of this genealogy aim to throw light on how the popularisation of classical assumptions, schemes and arguments shaped the transformation of the law governing cross-border relations in English law (Chapter 5) and in Italian law (Chapter 6).

1.1 Friedrich Carl von Savigny: Law and the Consciousness of the People

Savigny fundamentally contributed to reshape the legal mentality in the 19th century, and, at the same time, he redefined the nature and functions of private international law by embedding the law governing cross-border relations in classical legal thought. Savigny discussed the subject in the eighth and last volume of volume of the *System of the Modern Roman Law*, published in 1849. The book was soon after translated and published in a variety of languages, including in English with the title '*A Treatise on the Conflict of Laws and the Limits of their Operation in Respect of Place and Time*'.[8] The political and legal context in which Savigny wrote the *System* is crucial to understand his late interest in the subject of collisions between local territorial laws. The Congress of Vienna (1814-1815) had recognised more than forty distinct political entities in the German territory, each with its own body of laws, thus leading to greater chances of legal collisions.

[8] von Savigny, Friedrich Karl, *Private International Law, A Treatise on the Conflict of Laws and the Limits of their Operation in Respect of Place and Time*. Translated by William Guthrie, Stevens & Sons. 1869. Reported as Guthrie, 'Private International Law'.

The frequent cross-border exchanges taking between the jurisdictionally divided German territory increased the risks of conflicts between local laws. A proposal was advanced which would have prevented collisions from taking place. Anton Friedrich Justus Thibaut (1772-1840) proposed to codify a uniform civil code applying throughout Germany. In doing so, he drew inspiration from the codification process that had taken place in the beginning of the century in France. Paradoxically, his proposal came right after German states had set themselves free from the Napoleonic yoke. In his pamphlet 'On the vocation of our age for legislation and jurisprudence', Savigny replied that the risks of absolutism, arbitrariness and injustice outweighed by far the undeniable advantages of codification.[9] In his response to Thibaut, Savigny famously placed the origin of Law ('*Recht*') in the consciousness of the people, not in the will of the sovereign.[10] Every people ('*Volk*'), he argued, is characterised by a unique spirit, the *Volksgeist*, which determines its attributes and its law:

> In the general consciousness of a people lives positive law and hence we have to call it peoples' law. It is by no means to be thought that it was the particular members of the people by whose arbitrary will, law was brought forth […]. Rather is it the spirit of a people living and working in common in all the individuals, which gives birth to positive law, which therefore is to the consciousness of each individual not accidentally but necessarily one and the same.[11]

According to Savigny, each national legal system must reflect its underlying normative order. Positive law should neither reflect the unfathomable will of God, nor the will of the Sovereign, which was as likely to be enlightened as irrational, but the characteristics and history of the *Volksgeist* and the will of the people, the *Volkswille*.[12] In other words, for Savigny, the legitimacy and strength of

[9] Berkowitz, Roger, and Roger Stuart Berkowitz. *The gift of science: Leibniz and the modern legal tradition*. Harvard University Press, 2009, p. 112

[10] Law is "developed first by custom and belief of the people, then by legal science everywhere, therefore, by internal, silently operating powers, not by the arbitrary will of the legislator." Von Savigny, Friedrich Carl. *Vom beruf unsrer zeit für gesetzgebung und rechtswissenschaft*. Mohr, 1828. Abraham Hayward trans. (1975) The notion of volksgeist was famously popularised by German literary critic and philosopher Johann von Herder (1744-1803). Von Herder claimed that nations are animated by their volksgeist, the spirit of an individual group. Georg Friederich Puchta (1797-1846) is the first to use in law the concept of Volksgeist. In his early writings, Savigny talked extensively about 'the nation', of national conscience, of popular sentiment, even though he never explicitly mentioned *volksgeist* until he published the *System of the Modern Roman Law*. He used the notion of 'Volk' in different context: as Volksgeist, but also *Volksbewußtsein* (consciousness of a people), *gemeinsame Überzeugung des volkes* (the common conviction of the people). Berkovitz, 'The Gift of Science', p. 113

[11] von Savigny, Carl Friedrich, *System of the Modern Roman Law, Vol. 1*. William Holloway, Translated from the German of Higginbotham Pub, 1867, p. 12, reported as Holloway, 'Savigny'

[12] The consciousness, or the will of the people, is according to Savigny historically determined. In the will of the volks ('Volkswille') lies the principle from which to organise the legal architecture of national law, neither in the will of God nor in the sovereign will. Law cannot be the product of reason. Rudolf von Jhering describes Savigny's theory along these terms: Laws "are not made, but become, they come forth like language and customs from out of the innermost of the life of the Volk and the life of thought, without the mediation of calculation and consciousness, [so] that not legislation, but

national legal orders did not depend on conformity with the allegedly enlightened but effectively capricious desires of the sovereign. They depended on its coherence with the history and spirit of the people in question. Savigny did not think that law cannot be posited and organised. However, he believed that jurists were the only ones who had a scientific and moral mandate to elaborate legal precepts and organise them coherently. [13] Jurists are the only true representative of the law in the people. They possess the resources to protect but also to elevate the force and spirit of the people.[14]

Unlike what is often assumed in the historiography, Savigny did not believe that legal entities must be preserved in an unchanged form or that the same rules must be retained, no matter what their content, merely because in continuity with a distant and romanticised past.[15] Savigny did not understand the *Volk* as an abstract idea, but as a common history as well as a shared aspiration.[16] For Savigny, the agent who is entitled to give shape to this aspiration is once again not the enlightened law-giver but the jurist. As it has been argued, in the classical age, "the ultimate ground and reason of *Recht* comes to be the will of the jurists."[17] In the classical age, the will of the jurists took the centre stage in the law-making process. Given these premises and the immense influence of Savigny on the European legal scholarship, we can understand why his conception of law as well as his approach to conflict of laws also reached out beyond the German confines.

rather customary law, is the original source of law." R. von Jhering, 'Friedrich Karl von Savigny' Gesammelte Aufsätze 2 (1981), pp. 364-365. Cited in Berkovitz, 'The Gift of Science', p. 115

[13] Berkovitz, 'The Gift of Science', p. 117. According to the scheme and aspirations drawn by Savigny, jurists themselves emerge as the most important actors in the defence of the true spirit of the Volk. As Berkowitz pointed out, "[j]urists, by whom Savigny meant legal scientists, emerge as the last bastion defending the living and spiritual law from its descent into the deadening existence of abstract rules." Ibid, p. 117

[14] German historian Franz Wieacker, speaking of Savigny: "the jurist is the exclusive representative of law in the people. Although law had originally evolved in the people as a whole, possibly through the medium of priests and judges, a class of learned jurists then arose, and it is they who now have the sole control on the development of the law." Wieacker, Franz. *A history of private law in Europe with particular reference to Germany*, translated by Tony Weir, Clarendon Press, 1995, p. 311

[15] Rather, he posited that there exists a vital connection between the past, the present and the future of legal entities. For Savigny, the historical approach "is completely misunderstood and distorted, if it is often presumed that the legal entities emanating from the past are posited as something which is in the highest degree exemplary and which has to retain its rule, in an unchanged form, over both the present and the future. On the contrary, the essence of the historical approach consists in the dispassionate recognition of the value and individuality of every age. What that approach, however, emphatically insists upon, is recognition of the vital connection that ties the present to the past. For without such recognition we shall only be able to observe the outward form of our legal condition, not to grasp its inner substance." Savigny, 'System, Vol. 1 (Holloway trans.)', p. xiv et seq.

[16] Koskenniemi, Martti. *The gentle civilizer of nations: the rise and fall of international law 1870–1960*. Cambridge University Press, 2001, p. 44

[17] As seen above (footnote n. 15), in the grand scheme conceived by Savigny, jurists did not have a passive or protectionist role. Savigny had in fact led the 'Romanist' branch of the historical school against 'Germanists' like Otto von Gierke (1841-1821), who thought instead that German law should be based in its time-immemorial and indigenous customary traditions. "If, in the United States, historical jurisprudence is considered to be dead, it is because it has been caricatured to death by its opponents. Savigny's true followers endorsed historicity not historicism, tradition not traditionalism." Koskenniemi, 'The Gentle Civilizer', p. 44

1.2 The common aspiration of European jurists: the *völkerrechtliche Gemeinschaft*

The co-existence of different peoples, each endowed with distinct cultural traits and each governed by distinct laws, led as in the medieval and pre-modern age to the vexed question of how to square political sovereignty and legal independence with the application of foreign laws and the recognition of foreign rights. This is the question that Savigny addressed in the eighth and last volume of the *System*, in his *Treatise on the Conflict of Laws*, which was published in 1849.[18] His compatriot, Carl Georg von Wächter (1797-1880), then the most influential experts of legal collisions, had argued a few years before that the law of the forum should apply whenever municipal law did not explicitly provide otherwise.[19] In claiming so, Wächter did not have Germany in mind, but he advanced a general territorialist and particularist conception that applied across all states. Given the dominant nationalist spirit, one might have expected Savigny to embrace territorialism. Instead he argued that:

> The more multifarious and active the intercourse between different nations, the more will men be persuaded that it is not expedient to adhere to such a stringent rule (of territorialism), but rather to substitute for it the opposite principle. This has resulted from that reciprocity in dealing with cases which is so desirable, and the consequent equality in judging between natives and foreigners, which, on the whole, is dictated by the common interest of nations and of individuals.[20]

Although Savigny rejected the notion of a religiously-informed natural law embraced by his medieval predecessors, he nevertheless shared their universalist ambitions.[21] The founding principles of *conflictus legum* might have been outdated, but some of their underlying ideas were of crucial importance for the protection of private rights in a world of increasing jealousy of sovereign prerogatives.[22] In line with this notion, Savigny pointed out that, among these principles, especially relevant were the equality between foreigners and natives and uniformity of results. Accordingly, Savigny built his theory of conflict of laws on the assumption – also embodied in the medieval idea that a contract valid for the *lex loci* was valid everywhere - that the same dispute ought to produce

[18] Juenger,'General Principles', p. 158
[19] Von Wächter, C. G., "Über die Collision der Privatrechtsgesetze verschiedener Staaten", 24 *Archiv für. die Civilistische Praxis, Heidelberg* (1841), pp. 230-311
[20] Guthrie, 'Private International Law', p. 27
[21] Ibid. pp. 161-163
[22] By the end of the 18th century, when the influence of Statutists started fading in Europe, German scholars had adopted it and German courts applied it. Unlike Dutch and French jurists, German jurists did not until then substantially contribute to the development of Statutist doctrines originally elaborated by Italian scholars. German scholars in the XVII and XVIII centuries had adhered to the French system elaborated by d'Argentré. See esp. Hertius, *Commentationes atque opuscula de selectis et rarioribus argumentis*. Francfort, 1700

the same result "whether the judgement be pronounced in this state or that", regardless of the origins and domicile of the parties to the dispute.[23]

Savigny agreed with his medieval predecessors in one additional respect. He believed that a 'community of the law of the people' (*völkerrechtliche Gemeinschaft*) had been created out of the ashes of the Roman Empire and of the medieval common law experience.[24] In this community of people, he argued, the same relations must be governed by a common law. Consistently with his understanding that the development and application of legal principles does not happen in a historical and normative vacuum, the *völkerrechtliche Gemeinschaft* constituted the greater whole in which cross-border disputes should be solved, in Germany and abroad.[25] Fearful of the implications of pan-European codification, the common law that Savigny had in mind was not (necessarily) a body of written rules. Savigny regarded the common law as the legal science itself. In the *Treatise*, he thus referred to the construction of a "community of legal feeling" as the ultimate object of his theory:[26]

> it is not merely the spectacle of the development and formation of the juridical theory that is here so attractive and so stimulating: it is still more the noble prospect of a community of legal convictions and legal life, working out a universal practice.[27]

Savigny did not understand the law governing exchanges taking place across different jurisdiction as a mere theory, but as powerful instrument which could be used as a vector for the construction and popularisation of a common spirit and identity among peoples governed by distinct laws. The *Volksrecht* of members of the *völkerrechtliche Gemeinschaft* corresponded on the one hand to what medieval jurists called the *jure propria*, the civil law of independent *civitates* which had been bequeathed to national communities and came to be embodied in national law. On the second one, each national law consisted of an individual manifestation of general principles.[28]The implications of this was that single members of the *Völkerrechtliche Gemeinschaft* must apply the same principles to disputes that are 'wholly internal' and to those which have an international dimension instead, i.e. that are connected to foreign people and foreign orders.[29]

[23] Ibid.
[24] Guthrie, 'Private International Law', pp. 27, 29, 128
[25] Translated by Guthrie as 'international common law' Ibid. p. 27
[26] Ibid. 30
[27] Guthrie, 'Private International Law', preface, 44
[28] "What lives in a single people is only the general human nature that expresses itself in an individual way", Holloway, 'System', p. 21
[29] Ibid. p. 27

Savigny did not consider equal treatment and uniformity of results a moral aspiration or a friendly concession by independent states. The development of a universal practice and the recognition of equal treatment could not be subject to the "arbitrary will" and "generosity" of a government.[30] Since it would increase chances that the legal rights of aliens are denied, Savigny rejected the principle of 'independent sovereignty'.[31] As with medieval cities and self-governing entities which were subject to the common law, the prerogatives of sovereigns did not justify the systematic application of the *lex fori*. The appropriate recognition of foreign laws and foreign rights was for Savigny and classical scholars a 'categorical imperative'.[32] The blind application of the *lex fori* was anathema to the universal justice cherished by the 19th century European jurists, whatever their political beliefs.

The categorical imperative was to be implemented by national courts in every country, and, despite his resistance to codes, Savigny even acknowledged that common rules might even be codified in international legislation.[33] However, he specific only jurists could elaborate a body of appropriate norms applicable to cross-border relations. For Savigny, the common law was thus contained in a general theory that was of universal application. The constantly progressing concurrence of writers and judicial decisions brought about a common conscience which led to the harmonious elaboration of legal principles which were obligatory in every jurisdiction within the reach within the *völkerrechtliche Gemeinschaft.*[34] Hence, single contributions to the general theory were part of the "proper and progressive development of law" and carried value beyond national boundaries.[35]

1.3 The Copernican Revolution of the Seat-selecting Principle

Savigny considered equal treatment and uniformity of results in international disputes a categorical imperative to be pursued by jurists and particular laws who, taken separately, reflected the historical origins and particular traits of each *Volksrecht*, but whose collective conscience and underlying convictions were dominated by the same cosmopolitan vision and juridical mission. Regrettably, as Savigny acknowledged, the "legal equality of persons does not at all determine the question of collision between native and foreign laws."[36] Starting from a likewise universalist perspective,

[30] Ibid. p. 28
[31] "To carry out the principle of the independent sovereignty of the state to the utmost possible extent with regard to aliens, would lead to their complete exclusion from legal rights." Guthrie, 'Private International Law', p. 26
[32] Juenger elaborated the Kantian analogy in his Juenger, Friedrich K. *Choice of law and multistate justice*. M. Nijhoff, 1993 p. 39
[33] See Chapter 6, Section 1.3
[34] Guthrie, 'Private International Law', p. 29
[35] Ibid. p. 28
[36] Guthrie, 'Private International Law', p. 26 It is a necessary consequence of this equality, he posited, that the law of any particular state treats the foreigner no worse than the native and that, in cases of conflict of laws, the same cases must expect the same decision, whether the judgment be pronounced in one state or in another. Ibid.', p. 27

medieval Statutists had tried to settle legal collisions according to the nature of statutory laws, an approach that had been followed by German courts.[37] Savigny was of the opinion that the vagueness of medieval doctrines made the violation of the principle of equal treatment more likely, and thus rejected the medieval approach as incapable of living up to its universalist ambition.

Instead of ascertaining the in-built quality of statutory laws, which was variable and arbitrary, Savigny argued that *conflictus legum* could be solved by investigating the nature of the legal relation connected to the dispute. [38] According to Savigny, all legal relations possess one 'seat'. They are governed by one territorial law connected to the dispute by means of a seat which is inherent in the nature of that relation.[39] For each seat, he argued, there could only be a corresponding law.[40] Faced with a cross-border dispute, courts would simply have to investigate and determine the nature of the legal relation, and then identify and apply the law of the place where the seat of that type of relation was located.[41] Since the nature and the seat of each given legal relation did not change either in time or in space, and they could be objectively ascertained, he believed that this method would minimise the risk of legal arbitrariness, and would enable conflict of laws to achieve its universalist goal.

Although the laws of each people change, the nature of legal relations does not, Savigny argued. Intuitively, jurists could accept that a contract is a contract everywhere, and so is a marriage. Consistently with the objective of equal treatment and harmony of decisions, they could also accept that the law which would apply for each type of relation should depend on an objective and just localisation of its seat. Accordingly, every dispute and international matter was to be governed universally by the same legal regime which would be ascertained through universally valid conflict laws and principles. For instance, capacity should be governed everywhere by the *lex domicilii*. The law of the place where immobile property is located, the *lex rei sitae,* should be applied by courts everywhere.[42] In contract matters, the seat would correspond to the *lex loci contractus,*[43] etc.[44]

According to this seat-selecting method, the function of conflict principles and rules would therefore be that of indicating the competent law. Pursuant to the objective of international harmony and equal

[37] Ibid. p. 26
[38] Savigny argued that legal collisions ought to be settled by asking "Which of the different local laws with which the legal relation in dispute in any way comes in contact, is to be applied in the decision of the question?" Ibid. pp. 17-18
[39] Ibid. pp. 14-15
[40] Ibid. pp. 28, 32, 108.
[41] Ibid. pp. 1-3
[42] Ibid. p. 95
[43] Ibid. pp. 100-101
[44] At times, depending on the nature of the jural relation, the connecting factor would demand the application of the law of the *lex fori*. Ibid. pp. 120-121

treatment, courts should apply the law localised through universally valid conflict principles. If followed by all courts, Savigny believed that the seat-selecting method could fulfil the universalist objectives that medieval scholars failed to achieve. Since the legal relation would be governed everywhere by the same law in accordance with its nature and seat, regardless of where the dispute arose, courts should reach the same conclusion.[45] A judge who was confronted with a cross-border case, he argued, "has to apply that local law to which the legal relationship belongs, and it makes no difference whether such local law is the judge's own law or the law of a foreign state."[46]

Technical differences between what came to be known as the Statutists' or unilateral method and the multilateral or aprioristic approach developed by Savigny are many and manifest, beginning with the fact that the former started from the in-built characteristic of statutory laws whilst the latter from the universal nature of legal relations. For this reason, the theory advanced by Savigny was hailed as a "Copernican revolution".[47] However, it must be noted that although Savigny chose distinct starting points from medieval jurists for solving conflicts, his theory and that of his predecessors represented different ways of looking at the same problem.[48] Statutists had already enumerated various connecting factors that Savigny used in his theory. As seen, Bartolus and Dumoulin had possibly already developed the aprioristic rules to solve collisions. Medieval scholars also aspired to develop a general theory to prevent the systematic application of the *lex fori*.

Although there are many technical and methodological differences between medieval unilateralism and the seat-selecting approach, it is here submitted that the real paradigm shift between the medieval approach and the classical approach lies not in rules and techniques, but in the transformation of

[45] Ibid. pp. 128-129

[46] Ibid. p. 32. According to the classical method developed by Savigny, the contents of the law of the deciding court should not matter, unless the law connected corresponded to the *lex fori*. Placed within this international framework of general application, international disputes would no longer gave way to conflict between territorial laws.

[47] Neuhaus, Paul Heinrich. "Abschied von Savigny?" Rabels Zeitschrift für ausländisches und internationales Privatrecht. (1982), p. 94. Savigny's theory was so influential that, even though he vehemently argued against codification, indirectly, Savigny also contributed to the positive reform of German private international law, as his followers succeeded in introducing multilateral conflict rules in the German Civil Code. "In the nineteenth century, some German courts let Savigny's views prevail over statutory provisions and in this century the teachings of Savigny and his followers helped transform the unilateral conflicts provisions found in the Introductory Act to the German Civil Code into a system of multilateral rules." Juenger, 'General Principles', p. 163

[48] "What, then, was Savigny's outstanding contribution to the conflict of laws? Apart from organizing the ideas he had gleaned from others in a tidy fashion, he managed to elucidate a principle that had merely been implicit in Story's treatise, namely that choice-of-law rules should serve the objective of guaranteeing uniform results. It is much to Savigny's credit that he advanced this pragmatic consideration, rather than some artificial doctrine such as the vested rights theory, in support of multilateralism. Again, he did not invent the notion of "decisional harmony", as civilians often call it. Medieval maxims already propounded that different fora should not apply different laws to the same transaction, and Huber had made the same point. Nor did the multilateralist approach to choice-of-law originate with Savigny. Multilateral rules had existed since the Middle Ages, and Huber's comity theory gave expression to the multilateralist idea. Story had already linked broad categories of legal transactions with a given territory by means of connecting factors and, to that end, classified legal relationships in a systematic and comprehensive fashion." Juenger, 'General Principles', pp. 162-163

conceptual assumptions and argumentative schemes. For Savigny, the solution to cross-border cases, and to internal disputes, depended on the development of a conceptually coherent and universally valid classificatory scheme. As Savigny argued, courts ought "to ascertain for every legal relation (case) that law to which, in its proper nature, it belongs or is subject."[49] Since the identification of the law to be applied to cross-border disputes depended on nature of the relation, the universalist aspiration of equality of treatment and uniformity of result came to depend on the construction of an internally coherent, universally valid and gapless classification of legal relations.

The Copernican revolution promoted by Savigny ought not to be looked for in technical conflict rules or in the 'multilateral method'. It ought to be looked for in the general classificatory scheme that he used to develop those rules, a classificatory scheme that sprung and depended on the assumptions and ideas that were spreading throughout the world. The pragmatism typical of medieval jurists meant that medieval scholars failed to produce a coherent and systematic division of laws and legal relations. Although he could use technical rules developed by medieval experts, Savigny could not place the seat-selection approach in the conceptual eclecticism, vague divisions and incoherent schemes advanced by his predecessors in the context of the medieval *scientia juris*. Savigny must develop a new conceptual and systematic method that could reveal "the organic connection, or relationship, by which the particular legal conceptions and rules of law are united into one great whole."[50]

In cross-border matters, all that courts had to do, was to identify the seat of all legal relations which placed them in connection with the organic whole. The answer to questions raised by collisions was to be found in the systematically organised legal order to which persons and relations are naturally connected in accordance to their essential characteristics. Savigny had dedicated the first book of the *System of the Modern Roman Law* to the ambitious endeavour of constructing a historically and conceptually consistent system of laws and relations.[51] Accordingly, he made placed his seat-selecting approach within the legal order he built in the *System* consistently with classical assumptions and schemes. To fully appreciate the theoretical foundations and practical implications of his contribution

[49] Guthrie, 'Private International Law', p. 27

[50] Savigny, 'Vom Beruf' p. xxiv. According to Pound, the reference to the 'organic whole' and the idea of organization of legal order can be traced back to Karl Christian Friedrich Krause (1781-1932) who spoke about"The organic whole of the external conditions of life measured by reason." In Abriss des Systemes der Philosophie des Rechtes (1828), p. 209. Cited by Pound, 'Jurisprudence, Vol. 2', p. 60

[51] [A]ll legal relations form one organic whole; but in order successively to apprehend them with our mind's eye, and to communicate them to others, we are compelled to separate them into their various elements. Hence the order in which we place them can be fixed only by that affinity which we regard as the most important, and every other relationship which exists in reality can only be noticed by way of separate or collateral exposition. Here a degree of forbearance is required, and even some scope for the writer's subjective line of thought…Holloway, 'System', p. xxv

to the subject, one must therefore look at the organisation of the legal order advanced in the first book of the System which, as we shall see, will be replicated in its essential components by all legal orders.

2.1 The Systematic Organisation of the National Legal Order

One cannot fully understand Savigny's approach to cross-border disputes developed in the eighth volume without considering the classificatory scheme that he advanced in the first book of the *System*. Here, he achieved 'absolute mechanical exactness' in the conceptual organisation of the legal order the legal system by applying a 'scientific and theoretical method' that embodied the juridical convictions of classical legal scholars.[52] This method was especially based on 'logical principle of dichotomy' which, in the classical age, all scholars employed to achieve coherence and systematism.[53] Accordingly, Savigny advanced a classificatory scheme first dividing between legal relations and legal institutes according to their nature, and then by combining them into an organic system of binary oppositions according to their differences and affinities.[54]

Blackstone and other pre-classical scholars had also used binary divisions, but failed to organise them hierarchically and mechanically to eliminate ambiguities.[55]Savigny created vertical and horizontal coherence by shaping the system in the form of a pyramid where the top is connected to the bottom by means of 'nested oppositions'.[56] He thus started from the top of the legal pyramid, which no longer consisted of natural and human law, or real or personal laws, but from what classical jurists believed to be the *summa divisio* of all legal systems, the division between public and private law. Savigny acknowledged that there might be overlaps between private and public law.[57] But, following his scientific and theoretical method, he got rid of overlaps by excluding all institutions that did not perfectly match what he regarded as the essential characteristics of each law and binary division.[58]

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[52] Pound, 'Classification', p. 932

[53] Ibid.

[54] "…there exists this natural distinction that we first perceive the institutes of law separately and afterwards combine them by an effort of the will and that on the contrary the jural relation is given to use by the events of life and immediately appears in its concrete combination and complexity. On further examination however we perceive that all the institutions of law are bound up in a system and that they can only be completely conceived in the entire connexion of this system in which again the same organic nature appears." Holloway, 'System', p. 9

[55] Savigny performed this operation exhaustively and mechanically. He followed a rigorous order where a genus A is divided into a dyad composed of B and its opposite (non-B). The same logic would then apply to B, dividing between C and non-C, and so on and so forth. Pound, 'Classification', p. 934

[56] Balkin, Jack M. *Nested Oppositions*. Princeton University Press, 1989

[57] In civil procedure, for instance, he conceded that "more over the activity of the state, is so interwoven with the rights of the individual, that a complete separation is not practically attainable." Holloway, 'System', pp. 21-22 He also admitted that the existence of private law partly depends on the state, as an individual can only obtain real personality as a consequence of the recognition of his capacity to act, which necessarily derives from the state. Ibid. p. 19

[58] Duncan Kennedy describes the contraposition between private and public law in this paradigmatic way: "[p]ublic law was the law of the state: criminal law, administrative law […], and constitutional law. Public law differed from private law because it was less scientific and more political than private law. It was more political because criminal law directly

Private law constituted the core of classical legal thought. Hence, Savigny only took public law in consideration insofar it helped him to elaborate a coherent organisation of private law, that he called the 'law of potentialities'.[59] For Savigny, private law governed inter-personal relations.[60] In contrast, public law had for object the state and the public administration.[61] In public law the whole appears as the end and the individual as subordinate. In contrast, in the law of potentialities, the individual is an end on his own account. "[E]ach single jural relation ('*Rechtsverhältnis*')[62] appears to us as a relation between person and person", not as a relation between the person and the organic whole, Savigny argued.[63] In this grand scheme, public law derived its force from public will. Private Law was underpinned by personal will, as each jural relation acquired force only by reference to individual desires.[64] Public law absorbs individual will.[65] Private law must instead realise individual potential.

Since private law constituted the main interest and focus of Savigny and his contemporaries, in the first volume of the System, he proceeded to organise private law relations - which he also considered

reflected the normative order of the common people; administrative law was the law of the sovereign, whose legal autonomy was, arguably, inherently unlimited; and constitutional law was created by the people, or by the constituent orders of civil society, in their capacity as ultimate legal authors.", Kennedy, 'Three Globalizations', p. 31

[59] "Private law and not public law belongs to our undertaking: consequently, that part of law which the Romans denote by *jus civile* in one of the many acceptations of that term." Holloway, 'System', p. 2

[60] Holloway, 'System', p. 18

[61] In his words: "[T]he inner nature of these doctrines of law here expressed cannot on that account be changed. In order to afford recognition on the one hand to the essence of the thing and on the other to its more practical bearings it seems desirable to employ, as is not uncommon, with the name state's-law the more general name of public law under which are embraced civil procedure and criminal law. This expression shall henceforth be employed." Ibid. p. 22

[62] The term jural relation, as distinguished from legal relation, derives from the German word '*recht*', which carries with it a more complex meaning that simply 'law'. It ought to be noted that jural relations indicate that a right exists which is also backed by law. It is therefore thought as more than simply a legal relation. The term '*Rechtsverhältnis*' was translated with 'jural relation' by Holloway. For Holloway, "The description given of a jural relation in this and other places whill show how inadequate the term is to the denoting of the very complex conception. The literal meaning of the German word is relation of right or law. That word no more than the English by its etymology expresses the conception. It is therefore a technical phrase of this work…" Ibid. p. 6

[63] Notably, he continued: "This determination by a rule of law consists in the assignment to the individual will of a province in which it is to rule independently of every foreign (*volks*) will." Ibid. 271 For Savigny: "Man stands in the midst of the outer world, and the most important element, to him in this surrounding of his, is the contact with those who are like him, by their nature and destination. If now in such contact free natures are to subsist beside one another mutually assisting, not hindering themselves, this is possible only through the recognition of an invisible boundary within which the existence and activity of each individual gains a secure, free space. The rule, by which those boundaries and that free space are determined, is the law...." Ibid. p. 269

[64] Ibid. p. 18. If 'Volks theory' legitimated the people's law and defined the disciplinary boundaries and functions of public law, 'will theory' defined the nature and functions of private law. In general terms, the 'will theory' posits that governments should minimize their interference with social behavior. Governments should only restrain individuals as far as this restriction allows others to exercise their rights and realizing their will, in whatever way they deem fit and whatever the goal of their actions is, and as long as it is needed to ensure legal certainty and the rule of law. See Kennedy, Duncan. "From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Form'". *Columbia Law Review* (2000)

[65] "Law has its being in the common intellect of the people, therefore in their united will which thus restricted is also the will of each individual; but the individual can by force of his freedom, in consequence of what he individually wills resist that which he thinks and wills as a member of the whole body. This contradiction is wrong or the violation of law, which must be annihilated if law is to subsist and rule. If this annihilation is to be independent of accident and maintain a regular certainty, this is only possible in the state; for in the state alone the rule of law can stand as an external and objective matter, face to face with the individual, and in this new connexion the individual capacity of freedom of wrong, appears restrained by the aggregation of wills and absorbed in them." Holloway, 'System', pp. 19-20

the subject of legal collisions - following the same method, i.e. by looking at the essence of each private law relation, and by associating each relation to a legal institution and sub-division.[66]As with the dichotomy between private and public law, he eliminated ambiguities by excluding all those relations that did not fit the definition. Savigny regarded the "independent mastery of the individual will" as the essence of private relations.[67] Accordingly, only those relations that make one person "subject to the independent mastery of the individual will" of another person could be included within the scope of private law.[68] In this respect, Savigny distinguished between three cases:

> Relations of men which entirely, others which do not at all, others again which only partially belong to the province of law or are governed by the rules of law. Property may serve as an example of the first class, friendship of the second, marriage of the third, *for marriage partially falls within the province of law (that is private law), partially lies outside of it.*[69]

Following his classical scientific and theoretical method, Savigny reached the conclusion that the 'law of potentialities' included patrimonial law[70] and the law of obligations which, in turn, included contract and tort law. However, it did not fully include marriage.[71] This is paradoxical because free will shared a significant amount of philosophical, conceptual and normative value with intent and consent, the foundational principles of marriage regulation in the medieval age. In the classical age, however, the clear demarcation between legal and non-legal, between private and public, between morality and law, leads to the formal exclusion of household relations from private law. Marriage came to exemplify the exceptional character of relations which did not fully qualify as legal, as private, as contractual, although as late as the 18th century legal scholars classified the relationship between husband and wife as private and economic.

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[66] Ibid. p. 9. He called matters falling within the scope of the law of potentialities 'jural relations'. "The nature of those (jural relations) … which belong to private law, is now to be more fully unfolded; these alone appertain to our undertaking and hence they will from this time be designated, without any addition by way of limitation, as jural relations." Ibid. p. 269

[67] "The essence of the jural relation has been defined as a province of the independent mastery of the individual will. Ibid. p. 271

[68] Ibid. p. 275 "It is our first business therefore to search out the object-matters upon which the will can possibly exercise influence and thus extend its mastery; hence a summary of the different sorts of possible jural relations will of itself result." Ibid. pp. 271-272

[69] Ibid. 272. (Emphasis Added)

[70] Savigny groups with obligations property because "though the most numerous and most important obligations being directed to no other end than by the acquisition of property or the temporary enjoyment of it." Ibid. p. 276

[71] Ibid. 276

2.2 The Construction of Family Law and the Redefinition of Marriage as Status

As the legal consciousness moved from medieval pragmatism and informalism to classical theoretical and conceptual concerns, household relations were gradually separated from economic relations. The formers were categorised as exceptional, partly legal and partly social. They are made subject to a distinct body of rules, hitherto unseen in legal history: family law. Although the French Civil Code promoted a conservative policy in domestic matters, nowhere in the Napoleonic codification experience was the existence of a separate department of the *jus civile* governing family relations ever mentioned. Although Savigny developed his legal system starting from Roman categories and divisions, as in the case of the distinction between public and private law, family law could also not be traced back to Roman law: Savigny acknowledged (though in a footnote!) that his "terminology was not taken from the Roman law" and that he was taking leave from Roman classifications.[72]

Where did the idea of the existence of 'family law' originate? The idea of a separate body of rules governing family relations had made its first appearance in the '*Institutionen des heutigen Romischen Rechts*' published in 1789 and written by Gustav Hugo (1764-1844), the founder of the Historical School later headed by Savigny himself. It is on his predecessor's terminology that Savigny drew for defining what he had come to consider as a separate department of law, the law governing family relations.[73] Notably, Savigny did not accept Hugo's definition altogether. Hugo had included family laws within the scope of private law.[74] Taking marriage as the genus of the family and the epitome of its exceptional nature - partly in, partly out of private law, partly legal and partly social - Savigny excluded family laws from the logics governing the law of potentialities. Instead, he constructed "the family and its law [as] distinctive, special, other, exceptional", a conception which was absent in the medieval consciousness.[75]

[72]"It must as to this be expressly remarked that this terminology is not taken from the Roman law. Among the Romans the expression familia has various meanings; the most important and the most technical, is that in which it denotes the aggregate of the agnates, therefore a part only of the relation which I comprehend within it." Ibid. 278

[73] Although Hugo had dropped the idea of 'family law', his colleague in the University of Göttingen Georg Arnold Heise (1778-1851) used it in the 'Outline of a System of the General Civil Law', the basis of his Pandectist Lectures. Savigny knew Heise and was familiar with his work. It is thanks to Heise that Savigny came to know about Hugo's taxonomy. See Müller-Freienfels, Wolfram. "The emergence of Droit de famille and Familienrecht in continental Europe and the introduction of family law in England." 28 J. *Fam. Hist* (2003)

[74] Hugo, Gustav. *Institutionen des heutigen römischen Rechts*. Mylius, 1789. In the Institutionen, Hugo divided private law into five topics: real rights, personal obligations, family laws, inheritance laws, and legal procedure. Notably, he gave up this innovative taxonomy in the second edition, reverting to the tripartite division of Justinian's Institutes which is also adopted in the French code. Notably, he gave up this innovative taxonomy in the second edition of his Institutionen, reverting to the tripartite division of Justinian's Institutes which is also adopted in the French code

[75] Halley, 'Family Law, Part I', p. 3. Similarly, Miller-Freienfels has argued that Savigny's conception of family law went beyond classificatory schemes, and reached into the question of the right way to place it in a complete legal order: "In his [System, Savigny]... upgraded the scheme, and with it, the independent 'Family Law' from a simple 'external systematization' to a truly 'intrinsic systematization." Starting from an external classificatory scheme, Savigny moved on

Family law exceptionalism became the cornerstone of what was to become the new dominant consciousness and one of the cornerstones of the re-organisation of legal orders, in Europe and elsewhere.[76] Savigny showed in the *System* that jurists and reformers could start from family law exceptionalism to build a hierarchical system of binary oppositions and a conceptually coherent legal order. These oppositions were public vs. private, social vs. legal, mandatory vs. voluntary, status vs. contract, moral law vs. neutral. Savigny placed family law and marriage especially in between these divisions. He therefore described private law as 'voluntary'.[77] Voluntary law served the purpose of giving "the necessary definiteness to the jural relation where that will has failed to exercise its power".[78] In contrast, 'absolute' and 'mandatory' laws were those that restricted free will.

As far as private relations are concerned, persons can make or unmake relationships according to their wishes. Voluntary law translated the idealistic freedoms ascribed to the force of the individual will which had been put forward by Immanuel Kant (1724-1804). In contrast, family relations and marriage were not governed by individual will and by rules securing liberties, but by imperative rules demanding compliance with a certain conduct.[79] For Savigny, the imperative character of laws could be grounded in public interest,[80] in the desire to secure the administration of justice,[81] but also in the broader category of 'ethical' and 'moral considerations'.[82] In line with the ideas of Georg Wilhelm Friedrich Hegel (1770-1831), Savigny held that marriage and family relations were in part governed by the (absolute) laws of the state that draw their mandatory force from morality.[83] Savigny held:

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to define what was the appropriate "inner order of the Law" made up of sets of leading principles. Miller-Freienfels. 'The Emergence', p. 38

[76] See Janet Halley & Kerry Rittich, "Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism", 58 *Am. J. Comp. L*. 753 (2010)

[77] Savigny divided private law in 'dispositive', 'permissive', or 'suppletory' laws. ('vermittelnde') 'Savigny, System', p. 57 (§16)

[78] Holloway, 'System', p. 46

[79] In this sense, also Important comment (n. 1) by Guthrie, 'Private International Law', at p. 34

[80] Among these, Savigny also infamously included laws which restricted the acquisition of immoveable property by Jews. Guthrie, 'Private International Law', p. 35. "I do not wish to enter into the debate on the racism of Savigny. It seems to me, however, that his was a descriptive exercise first and foremost. In fact, he also declared that Even if allowed by the law of his country, he will not be allowed to enter into an agreement as to the selling of landed property. *On the contrary, a jew to whom the laws of Germany apply can buy property on foreign land, if the absolute law of the foreign land so allows…*" See last section of Chapter 5

[81] "One class of absolute laws has no other reason and end than to secure the administration of justice by certain fixed rules, so that they are enacted merely for the sake of persons who are the possessors of rights. Among these are laws which limit the capacity to act on account of age, sex, etc.; also those as to the transference of property (by mere contract or by tradition). In respect of all such statutes, there is no reason for including them among the exceptional cases. The conflicts occurring in regard to them can be better adjusted on the principle of the freest community of law; for every state can unquestionably allow foreign laws of this description to have effect within its bounds." Guthrie, 'Private International Law', p. 78

[82] For Savigny, the grounds on which the necessity to restrict individual power lies in "either in the very nature of the organism of law as it shows itself in positive law or in political and politico-economical views or immediately in ethical considerations." Holloway, 'System', p. 46

[83] Savigny and Hegel did not agree on every level. It is often said that the influence of Hegel on Savignian thought is limited to Hegel's philosophy of history (see Pound, 'Jurisprudence, Vol. 2', p. 63). Savigny rejected a command conception of law, and codification and legislation as a result, which Hegel instead embraced. However, it ought to be

> family relations […] belong especially to the jus publicum i.e. to the absolute law. … Hence also each family relation of a man is called especially a *status* of that man, that is to say, his place or his existence in relation to other men determined.[84]

Within the grand conceptual scheme of the *System*, family law is especially, although not completely, public and mandatory. For Savigny, the voluntary law of obligations should facilitate the formation of relationships between individuals who are freestanding individuals. When it came to marriage and family relations, as for relations in the civil and political society, Savigny argued instead that the individual does not subsist for himself. Rather he or she is as "a member of the organic whole" and, within this whole, he has a specific status. The status conceived by Savigny is not spatially-variable, subject to personal preferences or contingent on temporary circumstances. It is permanent and outside the scope of free will. Status cannot be created by a voluntary subjugation. Status determines rights and obligations in accordance with 'absolute' public law that governs a national community.

As it had been argued by Hegel, marriage was not contract, or at least not a contract in the same way a commercial contract could be made and unmade in accordance with free will.[85] Marriage corresponded to a status, a status different from the medieval conception. Since marriage did not correspond to a typical contractual relation, since it partly fell within the province of private law and partially outside of it, Savigny posited that absolute laws can and should destine family relations for an enduring existence. In family law relations as well as in public law relations, individuals did not have a separate existence. For Savigny, wedlock made men and women complementary, and incomplete if taken separately. Accordingly, he argued that husband and wife, but also parents and children are united by a binding and everlasting knot outside the reach of free will.[86]

Savigny's reconceptualization of marriage from consent-based to status-conferring was not only an implicit endorsement of the prohibition of divorce, but also carried political significance for the

noted that the command conception remains strong insofar as family relations were concerned. Hence, it is incorrect to claim that the imperative element plays no part in the formulas of (Savigny's) school." Ibid.

[84] Holloway, 'System', p. 284, footnote (e)

[85] For Heger, marriage was no contract "perchè esso è anzi precisamente un uscire dal punto di vista contrattuale, proprio della personalità autonoma nella sua individualità, per annullarla". Hegel, G.G.F, *Lineamenti Di Filosofia Del Diritto Ossia Diritto Naturale e Scienza Dello Stato in Compendio*, trad. Messineo, Trad. Messineo F., Laterza, 1954, § 75, 163, p. 78, p. 158

[86] In order to ensure the historical continuity to the organic whole, men therefore need women as much as children need paternal care, and vice-versa In regarding them as completions of the individuality which would otherwise be incomplete, woman without man, children without parents, "Hence their proper nature consists in the place which the individual obtains in these relations, in his being not merely man in general but specially husband, father, son, therefore in a life-form firmly determined, independent of the individual will, grounded in a large natural coherence." Holloway, 'System', p. 284

constitution and representation of individual membership in a community of belonging.[87] Until the early-modern period, the voluntary subjugation to territorial laws and to state authority through consent-based marriage illustrated what the scholarship considered the 'social-contract' that kept together individuals, families and the *civitas*. For Savigny, this symbolic dimension is still there. However, in the family as well as in the state, the individual is not an "independent whole", but "an incomplete being needing its complement in a large natural coherence."[88] Hence, in the family as in the state, the individual submits to a superior will. As Savigny remarked:

> The family has in its enduring membership as also in the relation of government and obedience an unmistakeable analogy to the state: and in like manner communities which are real parts of the state, almost step into the situation of individuals.[89]

The symbolic bond that makes husband, wife and children perpetual members of the family also makes them perpetual members of the 'organic whole', the state. If biological membership implied unconditional obedience to the head of the family, political membership meant to 18th and 19th century jurists and philosophers unconditional obedience to the state and to its government. Hence, for Savigny, what constituted marriage and family relations and, by analogy, the state, was not the consent of the contracting parties or their satisfaction with the arrangement. It was not a voluntary subjugation which would be expressed through voluntary laws. On the contrary, it was the enforcement of a sacred and perpetual bond by means of mandatory laws, a condition and position determined within and by the community, and idea enshrined in the notion of status.[90]

Status, as reconceptualised by Savigny, indicated a permanent condition and position within the family and within the necessary community. Family status and civil status were two sides of the same coin. In the classical age, the continuation of personal and family status across time becomes a fundamental objective of public law and, as we shall see, also a constitutive element of conflict of laws. If men and women could not freely give up their status as family members, neither could they give up membership to their political community.[91] Vice-versa, if individuals were members of a civil

[87] As noted by Duncan Kennedy: "[t]o a modern ear, considerable legal substance is being smuggled in to what passes as mere description here. That the family relation is "destined for an enduring existence" is an implicit endorsement of what Savigny sees as an important accomplishment of modern law, namely the prohibition of divorce (which was freely available in Rome), through the reception of Christian doctrine." Kennedy, 'Family/Patrimony', p. 815

[88] Holloway, 'System', p. 277

[89] Ibid. p. 18

[90] Ibid. pp. 277-278

[91] "It is however to be thoroughly rejected, and it is of importance to the correct insight into the nature of the family that it should be given up as erroneous. Those essential difference hence require to be stated in this place reserving the bringing to view … of the peculiar, completely distinctive, nature of the family. The obligation has for its object-matter a single

and political community, they were always subject to the same rules governing family relations, regardless of their circumstances and preferences. Through the unmistakable analogy with the state, marriage and family relations came to embrace three complementary dimensions: the natural, the moral and the political.[92] In contrast, for Savigny, the law of potentialities is value-neutral:

> If we sum this up, a pervading contrast to family law here shows itself. In the two parts of potentiality's law, the matter does not, as in the family, consist in a natural-moral relation; those parts have therefore no mixed nature but are rather *pure mere legal* relations; they belong not to the *jus naturale* and the recognition of their existence appears less necessary, more arbitrary and positive, than in the institutions of family-law.[93]

What emerges from this reading of the first volume of the System is that the conceptual organisation of the legal order by means of binary oppositions was as informative and consequential for the regulation of family relations as it was for the law governing private and economic relations. For Savigny, family relations were only partly legal. Hence, did not necessarily translate in prescriptive rule of behaviour. This conception of family law thus removed the idea of sanction in family law relations.[94] With only a few exceptions, family rights did not correspond to justiciable obligations, but to moral duties that family members owed to one another. Family relations were governed by partly legal, partly moral and partly political considerations. In contrast, private and economic relations were legal and more positive. The laws and the principles governing private and economy relations need not pursue political or moral objectives:

> To the assertion made here made that the potentiality's law does not, like family-law, include in it a moral element, it might be objected that the moral is to rule over every kind of human action and that therefore the relations of potentialities also must have a moral foundation. … [However, the] distinction lies therefore in the family-relation being only incompletely governed by the institutions of law so that a large part of it is abandoned exclusively to moral influences. On the contrary in the potentiality's

act, the family relation the person as a whole in so far as he is a member of the organic coherence of collective humanity." Ibid. p. 279

[92] Ibid. pp. 281-282

[93] Ibid. p. 301

[94] Only with regard to the sanction, and not with regard to the imperative rule of conduct is it true that "In Savigny's definition there is not a suggestion of imperative. Rules of law are thought of as a result of experience, not as a product of the will or force of the state. He thought of them as like rules of language. In each case, he would say, we practice them rather than enforce them." Pound, 'Jurisprudence, Vol. 2', p. 64

> relations the mastery of legal institutions is completely accomplished and that without reference to the moral or immoral exercise of a right.[95]

With the re-orientation of legal thought towards classical formalism, the economic and private dimensions of the household faded away. The relationships between husband and wife, parents and children were neither private, nor economic, nor legal, but natural and moral. The family came to be conceived as the inviolable sanctuary of solidarity and protection, where good citizens of tomorrow were born and raised, not as a site of economic productivity.[96] To the romantic ideal of family relations, Savigny contraposed the rationality and neutrality of private and economic relations. Unlike family law, the law of the market governs the temporary relations between free-standing individuals who can acquire reciprocal rights and obligations.[97] Hence, Savigny argued that both medieval jurists and Hugo erred in grouping together property, contracts and marriage, family and economic relations.[98]

Of course, Savigny was aware that a miscellany of rules dispersed across the *jus publicum* and the *jus civile* governed household relations in Roman law. He was conscious that the Roman household played a moral as well as an economic role. He was mindful that consent, and not mandatory laws, constituted marriage. Nevertheless, he claimed that a public, mandatory, status-based and moral family law, a separate division that did not exist in Roman law, was in conformity with the spirit and intentions of Roman jurists. The division between family and market, contract and marriage, was neither a well-founded historicist claim nor a sociological statement. What Savigny tried to pass as mere description carried serious consequences for the definition of the boundaries and the functions of the law in different spheres of social life, in the family as well as in the market.

The market and its governing law emerged as a counter-ethic and normative counter-ideal to the family and the law governing its relations. In contrast with the moral laws of the family which were grounded in a spirit of solidarity, classical mentality conceived the market as a social field governed by the universal logics of self-interest. Private economic law was facilitative and arbitrary. It did not play either moral or redistributive functions. Hence, Savigny declared that "that no moral constituent is ascribable to potentiality's law, as an institution of private law." Hence, he pointed out, "the rich

[95] Holloway, 'System', pp. 301-302
[96] As Duncan Kennedy, in classical times, the "family played the role of the heart or soul of the nation precisely because it was traditional rather than modern. The whole nation was a family, for example, and the authoritarian leader was a father." Kennedy, 'Three Globalizations', p. 53
[97] Kennedy, 'Family/Patrimony', p. 814. Holloway, 'System', p. 279: "The obligation is as a rule of a transitory nature, the family relation is destined for an enduring existence."
[98] Holloway, 'System', p. 276

man can allow the poor one to perish either through the denial of assistance or the harsh exercise of the right of a creditor."[99] If the family and family law should always stand between the state and the incomplete individual, nothing should ever stand between autonomous individuals and the market.

The complexity of social relations and the law governing them, their ambiguous nature and pragmatic functions which drove medieval legal science had to make space for separate legal departments, each endowed with natural boundaries and specific functions.[100] Carrying out the mechanical subdivision of the legal order, Savigny showed his contemporaries that it was possible to promote a conservative and protectionist policy in matters which were framed as social rather than economic, and public rather than private, with the family as the archetype of such relations. Conversely, they could popularise a *laissez-faire* doctrine across jurisdictions in whatever matters could be construed as private and economic. In the classical age, liberalism was no longer a political agenda or an economic ideology as in the '*politica dell'amalgama*'. It was an in-built quality of the law.[101] Family law is necessarily moral and national.[102] Market law is necessarily neutral and universal.[103]

3.1 The Classical Organisation of Conflict of Laws: Contract vs. Marriage

In his *Treatise on the Conflict of Laws*, Savigny advanced a general theory that he believed applied to all members of the *völkerrechtliche Gemeinschaft*. The 'formal principle' guiding courts and experts in their search for a universal solution to all possible legal collisions corresponded to the

[99] Ibid. p. 302

[100] He claimed that "[i]f we regard more closely … what is in fact found in the first book of [Gaius] Institutes, it is almost precisely the same that I have above pointed out as family law." Ibid. 325

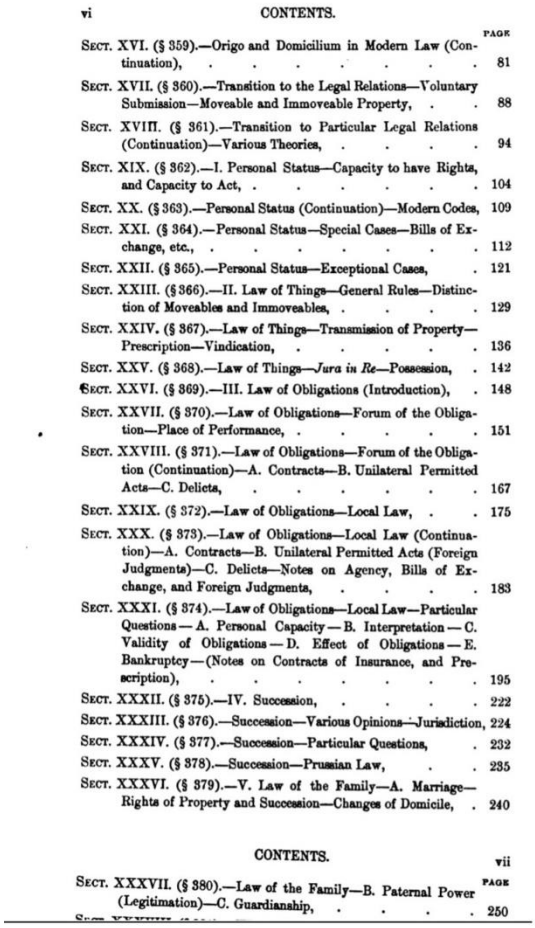
[101] The recognition of autonomy in international commercial matters - and, in municipal law, of freedom of contract – fitted well the ideas of Immanuel Kant (and, abroad, of Jean-Jacque Rousseau and Adam Smith) which had taken hold in the legal consciousness of the time alongside those of Hegel, which seemed to apply to the family instead. Legal scholars dug a profound hole between the free space of the individual where the theory of free will could be fully implemented on the one hand, and the sacred and public space of the state where Volkswille rules instead.

[102] Thus also providing a perfect syncretism for the contraposing tendencies of Enlightenment and Romanticism. "Come per ciò che riguarda i singoli il romanticismo attribuisce valore a tutto quello che ne determina, al di sotto dell'elemento comune e generale della ragione, l'individualità – sentimenti, passioni, fedi – così per ciò che riguarda I popoli esso è attento a quanto determina la personalità, l'individualità di ciascuno di essi col dargli coscienza della propria singolarità, costituendolo come nazione: le manifestazioni irrazionali e spontanee, la religione, il linguaggio, la poesia, le tradizione. Ed anche in ciò esso si pone contro la mentalità dell'illuminismo, il cui ideale era, giusnaturalisticamente, il cosmopolitismo: che ai romantici appare invece un'astrazione intellettualistica." Fassò. Guido, *Storia della filosofia del diritto: L'età moderna* (Vol II), Il Mulino, 1968 p. 54 The division between the market and the family is also a division of scope of the influence of these theories: the family is historical, the market is a-temporal. The family is traditional. The market is enlightened.

[103] Kennedy, 'Family/Patrimony', p. 819. The contraposition between the family and the market also carries consequences at international level and for comparative and reformative purposes. Since the regulation of marriage and family relations is embedded in the moral, religious and cultural matrix of national societies, the specific rules that govern the cannot be used as carbon-copy for other jurisdictions. Since private law does not have a moral and political dimension, the same legal rules and the same principles could be adopted and applied in any jurisdiction and country, independently of local traditions and prevailing ideologies. The laws governing economic transactions could also be reformed following the same model.

identification of the true seat of every legal relation.[104] Savigny considered the nature of legal relations, and their seat, universal. What followed was that the same principles that would indicate the applicable law in domestic conflicts in accordance with the nature of the relation and dispute should also govern the collision between territorial laws. Savigny thus took the systematic arrangement of legal institutions and departments which he had advanced in the first volume of the *System* and developed rules and principles for solving legal collisions in conformity with it.

Below, the contents of book 8 of the System in Guthrie's Translation (1869) and original one (1849)



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From this division, one of the distinctive features of the Copernican Revolution is already clear: cross-border marriages are treated separately from international contracts and fall within the topic of 'family law', itself governed by distinct principles. The law of obligations (§369-374) is separate from Law of the Family (§379) (*Familienrecht*)

Savigny divided the *Treatise* into chapters that closely matched the formal classification of the first book of the *System*: I. Condition of the Person; II. Property Law; III. Law of Obligations; IV; Inheritance Law; V. Family Law; A. Marriage; B. Paternal Power; C. Guardianship etc. Having distinguished between different types of relations, Savigny proceeded to associate a different 'seat'

[104] "Attempts have been made at different times to find a material principle for the determination of all possible questions of collision. I will here compare the most important efforts of this kind. The test of each will be, whether it corresponds with the formal principle before laid down; that is to say, whether, in fact, the true seat of every legal relation can be certainly discovered by means of it." Guthrie, 'Private International Law', p. 96

and a corresponding territorial law for each relation falling within the above chapters, according to its peculiar nature. In cross-border matters, all that courts had to do, was to identify the seat of legal relations in accordance with the organic connection that existed between each relation and the great whole. This great whole corresponded to the legal system described in the first book and organised into different chapters in the *Treatise*. It also corresponded to the state itself:

> In order to discover the connection by which a person is attached to a particular positive law by subjection to it, we must remember that the positive law itself has its seat in the people as a great natural whole, or in an ethnical (*volksmassig*) subdivision of this whole. It is only another expression of the same truth, when we say that law has its seat in the state, or in a particular organic part of the state, because, as it is only in the state that the will of individuals is developed into a common will, it is there only that the nation has a realized existence.[105]

Towards the end of the medieval period, jurists lamented that capacity and rights vested in persons changed from place to place. They remarked that a new national and patriotic sentiment had been growing. They emphasised that national communities felt that they were subject to one unique bond, physical and legal. The also pointed out that the law governing cross-border relations failed to take that bond into account. For Savigny, the seat of legal relations and the solution to legal collisions was to be found in order the organic whole, i.e. in the national order, Savigny therefore responded indirectly to the diffused perception, also pointed out by Giovannetti, that the nation and the state, the national order and the legal order were one and the same, and that conflict of laws must be based on the links that existed between individuals and the nation-state order.

There exists a symbiotic relation between conflict rules on the one hand and the political and juridical convictions on the other one, as we have seen in the first part of this genealogy. Savigny built a systematic approach to legal collisions that was coherent with the growing desire scholars for conceptual coherence. At the same time, his seat selecting approach was mindful of the fact that national orders had replaced the medieval conception of statehood. In the 19th century, when Savigny wrote the *System of the Modern Roman Law*, the dominant institutional model was no longer the territorial state whose power and sovereignty Statutists had contributed to consolidate, but the efficiently organised and legally ordered nation-state that reflected the common will and cultural boundaries of each national people.[106]

[105] Guthrie, 'Private International Law', p. 15
[106] Holloway, 'System', pp. 17-18

The rise of a new institutional model and the emergence of new juridical convictions meant that the selection of the competent forum and applicable law no longer depended on medieval divisions and principles, but on the systematic division of national orders and on the theoretical principles elaborated by classical jurists and, *primus inter pares*, by Savigny himself. Accordingly, Savigny separated family law and the law of potentialities, marriage and contract. With respect to the latter, German doctrine and jurisprudence had until then upheld the *lex loci contractus*. For the German scholar, the medieval doctrine oversimplified matters since contractual obligations were intangible transactions, and this made it difficult to identify the place of contracting.[107] Obligations concerned two (or more) parties, and any of their laws might apply. Given the difficulties occasioned by the reality of world trade, and in consideration of the peculiar nature of economic and private relations, Savigny argued that parties should be able to voluntarily subject themselves to a legal regime:

> The particular jurisdiction, as well as the local law of obligations, depends on a voluntary subjection, which in most cases is not expressly declared, but is only to be inferred from circumstances, and for that reason is excluded by an express declaration to the contrary. The circumstances, therefore, under which an obligation arises may often excite in others a definite and well-founded expectation, and in such a case this expectation is not to be disappointed. That is the point of view from which not only the forum of obligations, but the local law governing them, must be considered.[108]

We see here the residual influence of the notion of intent, tacit or expressed, which, notably, had been advanced by medieval and pre-modern scholars in the context of matrimonial matters. Notably, this rule was not spelled out in Roman law, given that Roman law did not deal, strictu sensu, with collisions between territorial laws. The rule had been instead developed by medieval scholars in conformity with their eclectic interpretative method and their pragmatic spirit. This posed a problem to Savigny - as he had to face a problem in the case of 'family law' - because the German jurist wanted to articulate a modern version of Roman law applicable throughout states that were member of the *völkerrechtliche Gemeinschaft*. Although this rule could not be found in Roman sources, Savigny claimed that Roman sources did not explicitly exclude voluntary submission either.[109]

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[107] In addition, the action of contracting and the performance may also have different seats. "According to which of these closely connected yet different relations are we to fix the seat of the obligation?" Guthrie, 'Private International Law', p. 149 Savigny only accepted that the formal validity of a contractual obligation should rest with the positive law of the place where the obligation had originated. Savigny also discusses at some length the question of validity in cases where the contract is not entered in a personal meeting, but by means of an epistolary exchange or proxy. Ibid. pp. 168-170

[108] Ibid. P. 150

[109] "This principle is nowhere expressly enunciated in the Roman law; but all the particular decisions of the Roman jurists admit, without any forced construction, of being referred to it, and only to it; and it also stands in unmistakable connection with the voluntary submission which, in all this doctrine, is everywhere regard as decisive." Ibid. pp. 156-157

Respect for parties' expectations did not originate in the practical difficulties which arose in transnational commerce either.[110] Any interpersonal relation which has cross-border dimensions has, by definition, multiple links with a variety of jurisdictions. And yet only in the case of private and economic relations were individuals free to voluntary submit to a given law. In addition, individuals might fail to select an applicable law by express choice. However, for Savigny, a choice by the parties, of either express or tacit form, must always be presumed to have been made, and the positive law must respect the expectations of the parties, independently of the content of the law chosen.[111] To establish otherwise would be unjust.[112] Competent forum and applicable law could not depend on "fortuitous circumstances" but must be subject to the "unilateral choice" by the parties.[113]

Rather than subjecting to a pure multilateral system, which would imply the coherent and consistent application of the same law to the same relation, Savigny adapted the seat-selecting approach to the systematic and conceptual division that he had advanced in the first volume of the System. There, Savigny had classified commercial relations as intrinsically private and value-neutral, and he had therefore submitted them to the overriding principle of free will, what in domestic contract law will take the name of 'private autonomy'. It followed from the universal validity of free will that the law governing contracts across borders must also be governed by the same principle, which in private international law will be known as 'party autonomy'. What also followed was that, in cross-border market relations, individuals should decide, with no interference by states, the governing law.

[110] Yntema explained that the practical difficulties of implementing the mechanical functioning of the seat-selecting method "explain the wide influence of doctrines emphasizing intent" and he mentions those of Dumoulin, other than that of Savigny as far as Continental Europe is concerned, and those of Lord Mansfield, and, indirectly, of Huber in Anglo-American Law. Yntema, Hessel E. "Autonomy in Choice of Law", *The American Journal of Comparative Law*, Vol. 1, No. 4 (1952), p. 342 Hence, the fact that "within varying limits, the law governing a contractual obligation should be determined in accordance with the expectations of the parties" could be traced back all the way to intent in medieval law. This is what I have argued in Chapters 1 and 2. What ought to be noted it that, with the exception of Lord Mansfield and Savigny, medieval and pre-classical scholars discussed intent in the context of marriage relations.

[111] Guthrie, 'Private International Law', p. 154. Savigny thus proceeded with his analysis to lay some ground rules for ascertaining the applicable law where the agreement was not expressed or where it was not manifest. The choice is, according to Savigny, between the place where the obligation has originated and that of the place where it is to be fulfilled and, between them, Savigny preferred the latter. The fulfilment is the essence of the obligation and is tied, according to Savigny, to the expectations of the parties. If for Dumoulin the tacit agreement boiled down to the domicile of the parties, it is fair to claim that for Savigny is simply directed to the place of performance. See Ibid. pp. 151-153. Savigny thought the place of performance was the most likely jurisdiction where the parties would fix the obligation. Ibid. pp. 153-154

[112] Ibid. p. 149

[113] Savigny pointed out that "[i]n many conflicts cases there is concurrent jurisdiction in different places, so that in a particular case the plaintiff is free to choose the forum. Accordingly, if that principle should control, the local law applicable in each case depends not only on fortuitous circumstances, but on a litigant's unilateral choice." Ibid. p. 129

3.2 Richard Story and the Conceptualisation and Regulation of Marriage Across Borders

As far as economic and private relations were concerned, Savigny placed free will above all other considerations. Although the concept of intent had been elaborated by medieval jurists in the context of what Savigny himself would have described as family relations, the voluntary subjection was limited to those relations that he construed as private and economic in accordance with concepts, principles and divisions he had advanced in the first volume. In this sense, Savigny's qualified support for the voluntary subjection is to be read in the context of the radical contraposition between market law and family law, between contract and marriage, free will and status. The problem for Savigny was that the most important contribution to *conflictus legum* came from medieval jurists who, due to what Savigny regarded as a regrettable lack of conceptual coherence, had posited that the same principles governed both cross-border contractual and marriage relations.

If in the case of the separate classification of family law Savigny had found a helping hand in Hugo's Institutions of Modern Roman Law, Savigny found a fundamental resource for reframing conflict of laws on the conception of marriage as status in Richard Story (1779-1845).[114] Story, a Justice of the U.S. Supreme Court and law professor at Harvard, had written in 1834 the highly influential '*Commentaries on the Conflict of Laws, Foreign and Domestic, in regard to Contracts, Rights, and Remedies, and Especially in regard to Marriages, Divorces, Wills, Successions, and Judgments*'.[115] Breaking with his predecessors' tradition, Story examined not only Continental literature, but also about 500 American, English and Scottish cases. Savigny drew extensively from the *Commentaries* of Story who, he said, had traced a "remarkable picture of this imperfect but hopeful state of things" and whose "excellent work" provided "a rich collection of materials, for every inquirer."[116]

The value of the *Commentaries* for Savigny - as for other jurists and courts, especially in the common law, that relied on it - did not merely lie in rules and doctrines that Story reported, but especially in the ideas and assumptions underlying his examination. Story's exposition corresponded to a restatement of medieval doctrines in light of the ongoing transformation of institutional and

[114] See Kegel, Gerhard. "Story and Savigny." *The American journal of comparative law* 37.1 (1989)

[115] Story's work became widely known soon after its publication. It was highly praised both among continental and common lawyers. For Harrison, speaking of Story's 'Commentaries', a "new era in the History of Private International Law may be traced from it". Harrison, Frederic, On Jurisprudence and the Conflict of Laws, Clarendon Press. 1919, p. 119. For Martin Wolff, Story was the "the secret teacher of the world" in *Internationales Privatrecht*, (2d ed. 1949), p. 23

[116] Guthrie, 'Private International Law', pp. 43-44. Savigny thought that Story's contribution to the discipline had exceeded the boundaries of Conflict of Laws: "he has brought the greatest honour to his double fatherland, America and Jurisprudence." Savigny, letter in French dated Berlin, November 28, 1941, to Theodore S. Fay, U.S. Secretary of Legation at Berlin, thanking Story for the second edition to the Commentaries, which was printed in 2 W. Story, Life and Letters of Joseph Story, 169, (1857), cited in Paul, 'The Isolation', p. 160

intellectual paradigms.[117] In line with classical thinking, Story provided a classification of legal relations in a "systematic and comprehensive fashion", by which he linked legal relations and transactions to specific territories.[118] The formal classification of legal relations revealed the progressive alignment of private international law and discourse to classical legal thought. But it was Story's characterisation of marriage as different from contract which vindicated Savigny's conceptual classification of legal relations.

Story did not conceive of marriage and contract as distinct until later in his judicial and scholarly career. In the late 1810s, already acting as a judge of the Supreme Court, Story held in fact that marriage, like any other contract, made states responsible for granting remedies for breach of their terms.[119] However, by the time of the first edition of his *Commentaries*, published in 1834, Story had changed his mind. Discussing the matter in the context of a case for cross-border recognition of divorce, Story expressed the view that "[m]arriage is not treated as a mere contract between the parties, subject, as to its continuance, dissolution, and effects, to their mere pleasures and intentions. But it is treated as a civil institution, the most interesting and important in its nature of any in society."[120] Nominally, marriage is still a contract.[121] But marriage appeared to Story "to be something more than a mere contract: it is rather to be deemed an institution of society."[122]

According to Janet Halley, Story did not change his mind after a personal philosophical reflection, but after being exposed to two influential sources which, indirectly, also had great repercussions for

[117] As argued also by Lipstein, Story restated but also adapted to his contemporary reality the doctrines advanced by Huber. Lipstein, 'General Principles', pp. 129-133. Story had emphasised territorial sovereignty and had argued that "it would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation, that other nations should be at liberty to regulate either persons or things within its territories" (p. 171) and, in consideration of this, "whatever force and obligation the laws of one country have in other, depends solely upon ... [the latter's] own express or tacit consent" Story, 'Commentaries'. As some have argued that he misunderstood Huber (see Chapter 2, footnotes 84 and 96). Story may have been especially interested in the Dutch Golden Age because, like the Netherlands in Huber's times, the U.S. had also recently achieved independence. Perhaps, the fact that the Netherlands had won its independence from a colonial power also played a role. Most important it may have been that the Netherlands was configured in seven provinces, an important point in common with the federal structure of the U.S. See 'Paul, The isolation, p. 160', footnote n. 43 on this. Notably, in his famous opinion in *Swift v. Tyson*, Story speculated on the possibility of having an American federal common law akin to the *jus gentium*, which, in his mind, would control both interstate and international cases. As we shall see, Story did not fail to use the title of *jus gentium* alongside with those of private international law and conflict of laws to describe the discipline.

[118] Juenger, 'General Principles', pp. 162-163

[119] *Darmouth College V. Woodward* 17 U.S. 518 (1819). Marriage is contract, and thus divorce constitutes breach of contract. While sitting in the Court, Story held that "A general law, regulating divorces from the contract of marriage, like a law regulating remedies in other cases of breaches of contracts, is not necessarily a law impairing the obligation of such a contract. It may be the only effectual mode of enforcing the obligations of the contract on both sides." (at 697-698).

[120] Story, 'Commentaries, 1st ed.', p. 168

[121] In the second edition of his 'Commentaries', published in 1841, he upheld the view that "I have throughout treated marriage as a contract in the common sense of the word, because this is the light in which it is ordinarily viewed by Jurists, domestic as well as foreign".

[122] Story, 'Commentaries, 2nd ed.', p. 170, footnote n.3

the transformation of European conflict of laws.[123] Story encountered the first source whilst reviewing Scottish decisions ahead of the publication of the *Commentaries*, and specifically in a prominent case of the Court of Sessions concerning an international divorce, *Duntze v. Levett*.[124] Story found in the "remarks on this subject made by a distinguished Scottish judge" a precious guide and "so striking, that they deserved to be quoted at large."[125] The Scottish judge was Lord Robertson who, in deciding whether to apply English law following the *lex loci* rule or Scottish law instead, had declared, in antithesis with the medieval conception followed in the U.K. in the 19th century, that:

> The *status* of marriage is *juris gentium*, and the foundation of it, like that of all other contracts, rests on the consent of the parties. But it differs from other contracts in this, that the rights, obligations, or duties, arising from it, are not left entirely to be regulated by the agreements of the parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control, by any declaration of their will.[126]

We have seen that for Romanist and Canonist authorities in the medieval age, in the common law as well as in civil law jurisdictions, in Catholic as well as in Protestant countries, marriage acquired legal force merely by the consent of the parties. This view had been most clearly expressed by Huber. Accordingly, parties could subject themselves 'temporarily' to a foreign legal order. Parties could also establish autonomously rights and obligations in the marriage contract. This view had also been embraced by English judges, notably under the influence of Scottish authorities and, through them, of Dutch doctrines, including those advanced by Huber. In contrast, Lord Robertson pointed out, echoing a conceptualisation later also put forward by Savigny, that:

> marriage is a contract *sui generis*, and the rights, duties, and obligations, which arise out of it, are matters of so much importance to the well-being of the State, that they are regulated, not by the private contract, but by the public laws of the State …[127]

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[123] See also Halley, 'Family law, Part I', pp. 22-23.

[124] Among these cases, there was the final opinion of the Court of Sessions in *Duntze v. Levett*. The parties had married in England. Their residence was also in England. Mr. Levett spent time in Scotland with a lover. Mrs. Levett sued him in Scotland, where divorce was available on the ground of adultery, whilst it was not in England. Mr Levett objected that the Scottish law governed the marriage. The Court of Session held that it had jurisdiction to try the case, and to apply the *lex fori*, because Mr. Levett resided in Scotland at the time of the proceedings.

[125] Story, 'Commentaries, 1st ed.', p. 101. The cases examined by Lord Robertson's cases were published in James Fergusson, *Reports of Some Recent Decisions by the Consistorial Court of Scotland in Actions of Divorce, Concluding for The Dissolution of Marriages Celebrated Under The English Law*, Archibald Constable and Company, 1817

[126] Story, 'Commentaries, 1st ed.', pp. 101-02 (emphasis in original, showing that status was still considered a foreign concept)

[127] Para. 111 in *Duntze v. Levett*

As marriage becomes conceptualised as more than a consensual contract, or as a special type of contract, its validity across borders, and the rights and obligations attached to it, could no longer be governed by the traditional *lex loci* rule or by a voluntary subjection. For Lord Robertson, the rights, duties and obligations which arise in marriage are governed by public law domestically, and by the *lex domicilii* transnationally, in all circumstances, no matter what the desires of the parties were or where a contract of marriage is entered.[128] What the content of the decision, but also the context in which it was issued, suggest is that the reorganisation of the law governing cross-border relations responded to the re-orientation of legal consciousness as well as to political concerns. Should it have conceived of marriage as contract, and followed the old rule, English law would have applied.[129]

Lord Robertson considered English law 'barbarous' in respect of the treatment of married women. Drawing on the conception of marriage as a special type of contract, the Court of Session could apply Scottish law. Accordingly, Lord Robertson rejected the view of marriage as a simple contract.[130] This enabled the Court not only to reach what it considered a more just solution. Given the growing differences between Scottish and English law of husband and wife (see next Chapter, sections 3.1 and 3.3 especially) and the memory of past attempts and requests that the Lords of Council and Session modify Scottish law to take into account the substantive provisions of English law, the application of Scottish law in the prominent case of *Duntze v. Levett* strengthened the feeling of legal independence of the Scottish law and of the Scottish judiciary.[131]

The second source that probably influenced Story's conceptualisation of marriage, and in turn substantiated Savigny's distinct approach to cross-border marriage and family matters, was William Burge's '*Commentaries on Colonial and Foreign Laws Generally, and in their Conflict with Each Other, and with the Law of England*', published in 1838.[132] Burge's handbook on colonial and foreign laws was widely known in the common law world. Other than various decisions of the supreme appellate tribunal of the British Colonial Empire, the handbook contained a variety of references to

[128] Ibid. Paras 110-111

[129] As Halley has observed, "[t]he claim that marriage was contract formed a doctrinal impediment to Lord Robertson's assertion of Scottish legal independence." Halley, 'Family Law, Part I', p. 23

[130] If the Court of Session followed the old rule of *lex loci*, grounded in the equivalence marriage-contract, the Court of Session would have to apply English law to any marriage contracted on English soil, whatever the personal circumstances of litigants. For instance, it did not make a difference if they were domiciled in in Scotland. This would have prevented applications for divorce on the ground of adultery or domestic violence. A choice of law rule determining the application of Scottish law was necessary to protect Scotland 'from the barbarities of English law': "If a man in this country were to confine his wife in an iron cage, or to beat her with a rod the thickness of the Judge's finger, would it be a justification in any court, to allege, that these were powers, which the law of England conferred on a husband, and that he was entitled to the exercise of them, because his marriage had been celebrated in that country?" Story, 'Commentaries, 1st ed.', pp. 102-03

[131] See Chapter 2, Section 5

[132] See Halley, part I, pp-38-40; Graveson, Philosophical Aspects of Conflict of Laws, in in R. H. Graveson, Comparative Conflict of Laws, Selected Essays, Volume I, 1977, pp. 17-18

civilian systems, and to Dutch, Spanish and French law in particular, and listed the principles of that "branch of jurisprudence" there developed to deal with conflicts between local laws.[133] Article 3 of the French Civil Code constituted the most relevant amongst the various principles.

In the first edition of his *Commentaries*, Story cited and commented on the general rule contained in Article 3 according to which the capacity and status of French citizens was governed by French law wherever they may be.[134] Notably, Burge thought of status not as a foreign concept or as a principle of Roman law which had no space in the common law juridical culture, but, rather, as a universally-valid principle which ought to be used for solving transnational disputes connected to the person and the family.[135] Accordingly, Story incorporated into the *Commentaries* the notion that marriage is not like any other contract, as he had argued in the early years of the 19th century, but rather a special type relation which creates a permanent status. As such, international marriages were no longer governed by the traditional *lex loci* rule, but by the law which binds the person to the state and legal system.

Story thus held that, whereas other contracts are "entirely regulated by the agreement between the parties", the "status of marriage" and the rights, obligations, or duties arising from it "are matters of municipal regulation, over which the parties have no control, by any declaration of their will."[136] As Lord Robertson had put it, there was no room for "discretion or caprice" in cross-border marriage and family matters.[137] In contrast with the positive rule established in the French Civil Code, but consistently with its premises and logics, Story concluded that the law of the domicile determined the status and the capacity of the person regardless of his or her circumstances and desires.[138] Faced with a with cross-border family dispute, all that deciding courts should do was to determine which law corresponded to the *lex domicilii* and either recognise or not the rights and duties that followed from the status, subject however to the additional limit of the public order.[139]

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[133] In the Dedication of the book, Burge declared: "There is a great conflict between the several codes of jurisprudence which this work comprises, in their manner of dealing with these various subjects. It frequently becomes essential to the justice of the judicial decision, that it should be founded on a selection of one of these conflicting laws. The principles on which the selection should be made constitute an important branch of jurisprudence. It forms a part of this work. A statement of those principles follows the summary of the laws, whenever an occasion for their application is afforded either by a discrepancy in those laws, or by the nature of the subject on which there exists the discrepancy." Dedication, Vol. 1, p. vi

[134] Story, 'Commentaries, 1st ed.', p. 67. Interestingly, Halley notices that Story had italicized status in the first edition of his work when he quoted Lord Robertson. However, by the third edition, Story treated 'status' as an English term. Halley, 'Family Law, Part I', P. 25

[135] Burge, 'Commentaries', Vol. 1, pp. 57-58

[136] Story, 'Commentaries, 1st ed.', p. 101

[137] Story, 'Commentaries, 1st ed.', p. 102

[138] According to Story, "a married woman, a prodigal, or a spendthrift, … or any other person who is deemed incapable of transacting business in the place of his or her domicil, will be deemed incapable everywhere, not only as to transactions in the place of his or her domicil, but as to transactions in every other place." Story, 'Commentaries, 1st ed.', p. 64

[139] Unlike private and economic relations, where the recognition of acquired rights was obligatory, an exception could be made in favour of the *lex fori* in the case of laws that violated fundamental legal and moral principles of the receiving

3.3 The Rejection of Intent: Marrying Families and Nations

Consistently with the divisions between economic law and family law and between marriage and contract that he had advanced in the first volume of the System, incorporating Story's conception of the status of marriage and, finally, rejecting the pre-classical approach to cross-border marriage questions that were solved starting from the assumption that marriage constituted an informal and private agreement, Savigny held that the rights and obligations arising in marriage are not governed by the traditional *lex loci* rule, or by the voluntary submission of the parties. In contrast with the pragmatic medieval approach that focused on ascertaining parties' intent and factual circumstances, but in line with the imperative conception of the law governing family relations, Savigny submitted competence, validity and consequences of marriages to the husband's *lex domicilii*:

> There is no doubt as to the true seat of the marriage relation; it must be presumed to be at the domicile of the husband, who, according to the laws of all nations and of all times, must be recognised as the head of the family. For this reason, too, the territorial law of every marriage must be fixed according to it; and the place away from the domicile where the marriage may be celebrated, is quite immaterial. Many doubt this last proposition, because they regard marriage as an obligatory contract, but are accustomed in such contracts to regard the place where they are made as determining the local law. The first of these two views is false, because marriage has nothing in common with the obligatory contracts. If, however, it were true, it would not lead us to the place where the marriage originated as the criterion of the local law, but rather to the place of performance. But assuredly it is only the domicile of the husband that can be the place of the performance of the duties arising from marriage.[140]

For Savigny marriage and contract had nothing in common. The place where the marriage had been celebrated, or where the parties intended to move, was irrelevant for the determination of parties' competence, for establishing the validity of the marriage and for ascertaining rights and obligations of the spouses.[141] It was the domicile of the husband that determined the applicable law in all cases

order. For this purpose, Story revived the notion of *statuta odiosa*, first advanced by Bartolus and Baldus, and re-classified as public order. Public order became an essential component of classical Private International Law. See Story, 'Commentaries, 2nd edition', pp. 147 et seq. ; 327 et seq. ; 475 et seq. Although Story was a natural lawyer who did not consider conflict of laws a neutral and apolitical discipline, and he also included among the exceptions contracts that would require the performance of immoral actions or a purchase that offended the local conscience, the public order exception especially applied to marriage and family matters. See also Chapter 5, Section.

[140] Guthrie, 'Private International Law', pp. 240-241

[141] Ibid. 240. Savigny conceded that the law of the place celebration of marriage governs the formalities of marriage, in line with the principle locus regit actum. Ibid. p. 241

because, he assumed, that the husband was universally regarded as the leader of the family. Contrary to his claim that the husband's *lex domicilii* had always governed questions arising in cross-border marriages, the bride's membership in a specific *civitas* as well as her own *voluntas* would be taken in consideration for determining the validity and effects of a marriage contract in the medieval age. However, Savigny was convinced that:

> …the hindrances to marriage which are recognised in the domicile of the husband are absolutely binding, without respect to the differences which may exist at the home of the wife, or at the place where the marriage is celebrated.[142]

The seat of the marriage relation was presumed to be the domicile of the husband in all cases, irrespective of the preferences of the parties and regardless of the prohibitions set in place by the law of the place of celebration, the *lex loci celebrationis*.[143] In marriage and divorce, in matrimonial property and succession, the desires and personal circumstances of the spouses were of no consequence.[144] In contrast with the medieval approach, Savigny held that the *lex domicilii* of the husband, which indicated a bond between the spouses, the family and the state, governed these matters in all cases. Since family and marriage have moral, public and mandatory dimensions, the family laws of the country of the community to which one is bound are absolutely binding.[145] This also meant that 'coercitive norms' systematically apply in this field. Within and across jurisdictions:

> Rights arising from the family relations are most nearly akin to personal status … and are essentially distinct from the patrimonial relations by which a person is brought into connection with external and arbitrarily chosen objects. On the other side, considerations, partly moral and religious and partly political, have great influence upon

[142] Ibid. p. 241

[143] "It is …. my opinion, that every one is to be judged as to his personal status always by the law of his domicile, whether the judgement is at home or abroad, and whether the personal quality itself, or its legal effects, be the object of the judgement." Ibid. p. 108

[144] It is thus true, as the literature often points out, that, on paper, Savigny accepted a degree of flexibility in matrimonial property by means of a voluntary submission by the parties. Ibid. p. 242 However, this flexibility did not imply a free choice among several laws. It was only meant to maintain legal certainty in those situations where the domicile of the husband had mutated. A tacit choice could not be made in place of the original domicile, and party autonomy by means of a physical movement is not accepted once the matrimonial domicile has been established. Even after a change of domicile, the matrimonial property is still governed by the original *lex domicilii*. Whether or not the property is situated abroad, and whether it is in movable or immovable, the *lex domicilii* always governs. As Savigny pointed out, "the local law of the earliest domicile remains decisive at all periods, and cannot therefore be changed by the election of a new domicile." Ibid. p. 243

[145] The laws that govern personal status which came in operation in the international context were for the German scholar "have a strictly positive nature" because they "rest on moral considerations" Ibid. p. 241

it, for which reason statutes of a coercitive and strictly positive nature most frequently occur in this department.[146]

As Savigny subjected international relations to the same principles that governed intra-national conflicts, the public, political and moral dimensions of family law re-emerged into the transnational sphere. The boundaries and functions which govern family conflicts domestically were reflected in the spirit and in the logics of the law governing cross-border disputes. Here, unlike in cross border economic matters, statutes of a coercitive and strictly positive nature are tolerated. Unlike commercial relations, family relations - which are also connected to several territorial laws, also intangible, that also involve more than one party - are reduced to one unique and overriding bond, the personal status that determines rights and duties according to national prerogatives, within and across borders, independently of one's preferences.[147] Notably, Savigny also employed the term *Heimath* to indicate this bond, for the term indicated a perpetual relation between an individual and his community.

4. Classical Private International Law, Free Trade and Nation States

The reconstruction carried out in this chapter shows that the so-called aprioristic and multilateral approach developed by Savigny took shape and meaning in accordance with ideas that were spreading among 19th century lawyers and judges. Far from corresponding to mere techniques and consisting of a coherent method developed by jurists in isolation from the political process, the law governing cross-border relations constituted an *instrumentum regni* that was redefined by the decline of medieval assumptions and by the rise of a new consciousness and a new institutional model. Savigny himself pinned down the essential elements of classical legal thought in his *System of the Modern Roman Law*. Rules advanced in the *Treatise*, which were to influence developments in conflict of laws in civil law countries as well as in the common law world, embodied and operationalised the classical conception, and contributed to popularise classical ideas throughout the Western legal world.[148]

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[146] Ibid. p. 240

[147] In support of the domiciliary principle's universality Savigny cites Story. Guthrie, 'Private International Law', p. 100. By selecting the *lex domicilii* as the most appropriate law to govern a person's legal capacity, Savigny also implicitly rejected the application of the *lex patriae* that had been codified in the French Civil Code, which he regarded a dangerous and arbitrary political instrument. Considering the role that Savigny played in constructing German law, it may surprise that he chose the *lex domicilii* instead of the *lex patriae* as law governing of status and capacity. Although it would be a mistake to neglect the intrinsic and historical differences between domicile or nationality, we cannot ignore their common ground either. Although he discussed at length differences between 'origo' and 'domicilium'. Savigny dismissed nationality as a vanishing concept. Savigny found a strict correlation between territory and domicile and between nationality and race. Unity in a community could be constituted by each, he admitted. Nationality – or, better, origo – may have been appropriate for Roman times, but had lost in usefulness and credibility the moment persons started moving from territory to territory with greater regularity.

[148] And beyond it, see Kennedy, 'Family/Patrimony'

Replicating the strict and dogmatic dichotomy between the purely private and value-neutral law governing the market, and the partly private and partly public, partly legal and partly moral law governing the family, Savigny endowed conflict rules governing cross-border commercial relations and family relations with antithetical rationales and logics, although, nominally, he placed both within his aprioristic method. Consistently with the hypothesis advanced in this study, the re-orientation of marriage and of family regulation towards coercitive and mandatory logics responded to the need of consolidating the power and the legitimacy of the nation-state. Conflict of laws could contribute to this objective by dismissing jurisdictional and regulatory claims advanced by competing institutional players at local and supranational level by means of the strategic preference for specific connecting factors, as in the case of domicile, and thanks to laws 'of a strictly coercitive and positive nature'.[149]

In contrast with the medieval approach - whereby the consensual conception of marriage provided an illustration of how the formation of the *civitas* originated in a voluntary subjection of various households - Savigny argued that family members are always subject to the overriding political will of the nation-state. With the shift of regulation of marriage and family relations from the private to the public level, from the local to the national level, conflict rules and principles thus became a powerful device that helped to construct and solidify the permanent bond, embodied in the notion of status, between individuals, families and nation-states.[150] At a symbolic level, the redefinition of the logics of the rules governing cross-border family relations aimed at shaping and producing national identities and culturally homogenous societies.[151] The cross-border regulation of family status could help to forge new and stronger bonds between individuals and national communities.

Private international law continued to constitute a vital technology for the definition, allocation and operation of power. However, the transition from the medieval to the classical period shows that power is undefined and is subject to constant crises and redefinitions. This chapter demonstrates that the link which was forged in the middle ages between the exercise of sovereign powers by territorial states and the application of domestic or foreign law survived into the classical age. But the constitutive characteristics of sovereignty changed. The separate personal and territorial elements of

[149] "The institutional stakes of consolidating family regulation at the national level were very high since they were related to consolidating the nation-state as an authority against competing institutional players, such as religious and local authorities" explains Philomila Tsoukala. Tsoukala, 'Marrying Family', p. 876. I would also add other nation-states that also laid claims over the regulation of individuals and families.

[150] With the emergence of the nation-state, territory acquires far greater importance. Sassen, 'Territory deborders', p. 23

[151] "At the symbolic level, debates for and against the nationalization of family law were aimed at shaping and producing a certain form of homogeneous identity, even though arguments back and forth were often exchanged as if national identities were already in place and commanding the choice of one rule (national and 'modern') over another (local and 'traditional')." Tsoukala, 'Marrying Family', p. 876

sovereignty were fused together in the nation-state.[152] Conflict of laws played and was to play a crucial role in the process of nation-building, jurisdictionally, substantively, and symbolically. Conflict rules applicable to the family cemented links between individuals, territories and nations.

Hidden behind the egalitarian and value-neutral aspirations of the multilateral approach to legal collisions, classical conflict of laws functioned as a territorialising device, but also a de-territorialising one.[153] In contrast with the approach to cross-border marriage and family matters, the law governing international economic relations dissolved jurisdictional borders.[154] By construing the law governing the market as value-neutral, both in its internal and international dimensions, conflict rules and principles implemented and popularised a *laissez-faire* policy across polities and jurisdictions, regardless of their cultural and social structures, pursuant to the universal logics of free will. The construction of antithetical rationales of the law of the family and the law of the market therefore enabled two fundamental objectives in the economic and political context of mid-19th century Europe, opening internal markets to free trade and consolidating nation-states and national legal order, two goals that were also embraced by English common lawyers.[155]

[152] For instance, that territory can only be exist between a state and a nation: "This awesome power [of the modern state] has been made possible by a fundamental territorial link that exists between state and nation. All social institutions exist concretely in some section of space but state and nation are both peculiar in having a special relation with a specific place. A given state does not just exist in space, it has sovereign power in a particular territory. Similarly, a nation is not an arbitrary spatial given, it has meaning only for a particular place, its homeland. It is this basic community of state and nation as both being constituted through place that has enabled them to be linked together as nationstate. The domination of political practice in the world by territoriality is a consequence of this territorial link between sovereign territory and national homeland." See Taylor, Peter J. "The State as Container: Territoriality in the Modern World-System", in Brenner, Neil, et al., eds. *State/space: a reader*. John Wiley & Sons, 2008, p. 101

[153] See Sassen, 'Territory deborders'

[154] As noted by Janet Halley, in the Classical age, the law of contract "dissolved interjurisdictional boundaries while marriage cemented them." Halley, 'Behind the Law', p. 5

[155] Koskenniemi, 'The Gentle Civilizer', p. 45-47 for the place of English law in the development of law and international law especially in this period.

Chapter 5

The Transformation of English Conflict of Laws in the Classical Age

The previous chapter has shed light on the widespread exchanges taking place between experts from distinct traditions. It has pointed to the fundamental role played by such exchanges on the development of the general theory of conflict of laws advanced by Savigny. Such exchanges also occurred between common law and civil law experts. However, the myth that each national order followed a distinct method and that experts from distinct legal traditions embraced different legal approaches is especially voiced with respect to common law jurisdictions. Joseph Story may have unwillingly contributed to popularise this idea by advancing in the *Commentaries* the title 'private international law' to describe the subject of his inquiry.[1] The consolidated opinion is also that, at least since the decline of the medieval *jus commune*, legal collisions in the English common law have been solved in accordance with different techniques and principles, in isolation from doctrinal developments taking place in the rest of Europe.

Although the reference to the 'international' was part of the general conception of the discipline dealing with legal collisions, jurists and courts in the 19th century developed rules and principles of private international law with local problems in mind. Local courts no longer referred to a universal and natural framework, but to principles codified or elaborated in national law. Hence, the view is often expressed that each national system of conflict rules developed separately from foreign ones. This chapter engages and disproves this claim by examining developments taking place in English law in the classical age. The chapter begins with an examination of the origin of the claim that English conflict of laws took a different course from developments in other European jurisdictions, and from the general theory of private international law. It then examines the position on this matter expressed by John Westlake, the father of English private international law (section 1.1).

The analysis will show that the development of English 'indigenous' doctrines did not occur in isolation from continental developments. On the contrary, classical ideas and assumptions can be detected in every line of Westlake' contribution to private international law, and especially in new conceptual divisions and principles adopted for dealing with cross-border relations and disputes, in

[1] "This branch of public law", he remarked, "may be fitly denominated private international law, since it is chiefly seen and felt in its application to the common business of private persons, and rarely rises to the dignity of international negotiations, or of international controversies." Story, 'Commentaries, 2nd Edition', pp. 11-12

household matters and in commercial disputes. Chapter 5 will show that the chaotic state of English conflict of laws and conflict doctrines (s. 1.2), the confusion concerning the territorial and extra-territorial effects of the law governing marriage and divorce and, at the same time, the cosmopolitan aspirations embraced by Westlake naturally led him to Savigny's formal method (ss. 2.1 and 2.2). The liberal approach to cross-border commercial matters and regulatory promises of the approach to cross-border marriage and family matters demonstrate the migration of classical schemes in English conflict of laws (s. 2.3 and s. 3.1).

It is in the context of the classical revision of pre-existing ideas and concepts that English jurists associated marriage and family relations with status, tradition and national values and, in contrast, that they associated private and economic relations with modernity and freedom. Under the influence of Sir Henry Maine, contract and contractual relations were believed to be governed by free will (s. 3.2). In contrast, status was redefined as a permanent condition. This redefinition also carried important implications for the way in which cross-border family relations were governed. When it came to relationships that affected status, and marriage in particular, individuals were no longer able to voluntarily submit to a foreign order. Their status was regulated by the law of the national civil community to which they belonged, regardless of their preferences and circumstances (s. 3.3). The redefinition of the underlying principles and functions of the law governing the cross-border relations thus helped to realise free trade on the one hand, and, on the other to consolidate the cultural and jurisdictional boundaries of English and European society (s. 3.4 and 4.).

1.1 Story, Bentham and the Isolation of English Private International Law

Private international law, Story suggested in his definition, was not only a branch of national orders. Story conveyed the idea that international law (*jus inter gentes*) and the law that regulated the cross-border relations between individuals (*jus intra gentes*), once unified under the broad scope of the *jus gentium*, had parted ways. This is quite ironical given that Story was amongst the most prominent natural lawyers of North America in the 19th century and that he never failed to point out, both in his scholarly contributions and in his decisions as judge of the Supreme Court that conflict of laws must pursue the objective of international justice in conformity with natural law.[2] Although it was soon

[2] Story contributed to popularise the natural theories of Grotius in American law. See Pound, 'Jurisprudence, Vol. 2', pp. 45-46. Contrary to what is sometimes assumed in the historiography (Mills. 'Private History', pp. 26-28), the views of Story and of other American international lawyers, like Henry Wheaton, were heavily influenced by those of Pufendorf, who had borrowed a great deal from Grotius in the elaboration of his system of universal law. Story laid out his natural law philosophy most clearly in his (anonymous) article entitled 'Natural law' in Francis Lieber's Encyclopaedia Americana (Carey, Lea & Carey Philadelphia 1836). See Paul, 'The Isolation' on Story and natural law. Story also did not believe that 'private international law' merely constituted domestic law. On the contrary, he believed that conflict of laws was an integral part of international law. His contributions as Supreme Court Justice to American common law bear

labelled a "barbarous compound" and "wholly indefensible", the new title for the discipline coined by Story succeeded to the extent that the legal literature in the common law world first and in the civil law world then came to accept that private and public international law were distinct disciplines.[3]

In the common law world, the notion of complete separation had been advanced by Jeremy Bentham (1748-1832). Inspired by the ideas of Blackstone, Bentham posited that the vague *jus gentium* could not capture the complexity and the nature of the growing body of positive law that underpinned the intercourse between sovereign nations. He thus replaced it with 'international law.[4] International law was understood by Bentham as a product of the exercise of power by sovereign states.[5] This voluntary characterisation gradually replaced the definition of the *jus gentium* founded on natural law theories.[6] Although, in a sense, it was Story who certified the division, Bentham was the first to popularise the idea that the law governing cross-border relations was not part of international law.[7] In his '*Introduction to the Principles of Morals and Legislation*' (1789), Bentham remarked that two separate disciplines existed, one concerned with exchanges between states, which was properly international and public, the other exclusively concerned with the rights of foreigners:

> Now as to any transactions which may take place between individuals who are subjects of different states, these are regulated by the internal laws, and decided upon by the internal tribunals, of the one or the other of these states.... There remain then the mutual transactions between sovereigns as such, for the subject of that branch of jurisprudence which may be properly and exclusively termed international.[8]

Due to Bentham's influence, the notion that public and private international law were distinct disciplines, and that the latter belonged to domestic law, became especially popular among common lawyers. As a result, an opinion is widely diffused in the historiography that, in contrast to the exchanges which took place in previous centuries, the common law became in the classical age

witness to his conviction that conflict of laws must pursue the objective of international justice in conformity with the aspirations of a universal law.

[3] For an early discussion of the use and misuses of the titles, see Thomas E. Holland, 'The Elements of Jurisprudence', Second Edition, Oxford, Clarendon Press, 1882(2nd ed.), pp. 367-372 As to the name 'private international law', Holland described it as "wholly indefensible". Ibid. p. 371 and he added, "It is most important, for the clear understanding of the real character of the topic which for the last forty years has been misdescribed as 'Private International law,' that this barbarous compound should no longer be employed." Ibid. p. 372

[4] Trnavci, 'The Meaning and Scope', p. 206

[5] Mills. 'Private History', p. 17

[6] See Bentham J. *A Fragment on Government*, Cambridge University Press. 1776(1988). See footnote 195, Chapter 2

[7] Bentham, J. "Principles of International Law", in Bowring, Sir John ed., *The Works of Jeremy Bentham*, W. Tait, 1838(1962), 537-40, in which Bentham explains his theory of international law also by advancing the distinction between public and private.

[8] Bentham, J. *An Introduction to The Principles of Morals and Legislation*, J.H. Burns & H.L.A. Hart eds., (1970, 1789), p. 296

impermeable to overseas doctrines. Accordingly, it is often pointed out that the influence of Savigny and of continental scholars on English law in the 19th century was "skindeep, soon to be forgotten under the steady growth of indigenous judicial precedents and their illustration by learned writers such as Bürge, Phillimore, Westlake, and Dicey."[9] Other than Bentham's ideas, the isolationist thesis is thus based on the ambivalent approach of John Westlake (1828-1913), the 'founding father' of English conflict of laws.[10] Westlake dedicated the first treatise to the subject.[11] His choice not to write it in the style of a commentary highlighted the growing discontent with medieval assumptions:

> There cannot well be a better example of the strength and weakness of medieval habits of thought than is afforded by the commentaries on this law. The subtlety wasted in endless subdivisions, the earnestness worthy of a better cause, and the confusion which ultimately reigns in spite of the acuteness displayed, forcibly exemplify the disadvantages of the commentatorial method as compared with that of original treatises.[12]

Medieval scholars had advanced numerous divisions and subdivisions in law but, due to their pragmatism, they never aspired to provide a conceptually coherent approach to questions raised by *collisio statutorum*. The gap between modern assumptions and the pre-classical mentality continued to grow everywhere. The lack of conceptual coherence and systematism led 19th century jurists to blame medieval scholars for the mishmash of rules that governed legal collisions. Westlake was the first English scholar who attempted to move English law past 'medieval habits of thought' and to

[9] De Nova, 'Introduction', p. 471

[10] Mills, for instance "The influence of positivist international law theory on private international law was carried further by Westlake." Mills. 'Private History', p. 29

[11] Westlake, John. *A Treatise on Private International Law, or the Conflict of Laws, With Principal Reference to its Practice in the English and Other Cognate Systems of Jurisprudence*. Hodges, Smith and Co. (1858). Westlake's first edition of the Treatise, published 1858, echoed the popularity of the classical vocabulary. It is worth noting, however, that Westlake's Treatise was published in several editions, spanning the period which goes from second half of the 19th century and the early decades of the 20th century. The second edition already differed in many respects from the one published in 1858, not least because courts had by then the chance to introduce principles and rules where appropriate, or by calling the attention of the legislator and of the scholarship where gaps could not be filled by judicial precedent. The various versions of Westlake's work bear witness to the rise of classical ideas in the common law and in the conscience of English scholars, and their progressive dying out and replacement by a new mentality. The last edition of Westlake's Treatise appeared in 1912, when the dominant legal mentality had already entered the age of social-oriented legal thought. A superficial reading – or one that only concentrates on the latest editions of the Treatise – might thus suggest that the spirit which informs Westlake's Treatise is at odds or even in antithesis with the classical mentality. The historiography often overlooks that fundamental differences existed between the first and the last version of the Treatise, thus mistaking ideas advanced in the last edition for Westlake's general conception of conflict of laws and, vice-versa, erroneously taking the original ideas advanced in the 1858 as immutable and subject to no internal criticism. The editions of Westlake's Treatise examined in the following pages are the first one and the second one, which was published in 1880, both illustrating the extent to which Classical ideas had reached English common lawyers and the common law. However, this choice does not want to deliberately omit that Westlake's later works showed the early signs of the emergence of social-oriented legal thought.

[12] Westlake, 'Treatise on Private International Law, 2nd edition', p. 15

systematise the discipline starting from judicial precedents. The title of his main work, '*A Treatise on Private International Law, or the Conflict of Laws, With Principal Reference to its Practice in the English and Other Cognate Systems of Jurisprudence*' suggests that Westlake was mainly concerned with English law. Westlake corroborated this idea by pointing out that:

> Private international law *is that department of national law* which arises from the fact that there are in the world different territorial jurisdictions possessing different laws.[13]

Unlike jurists and courts in previous centuries, Westlake believed conflict of laws was a separate division of municipal law. By conceptualising conflict of laws as part of the law of the land, it ought to be noted, he protected it from the accusation moved by John Austin (1790-1859) that international law was no real law.[14] The popularity of the division between public and private international law advanced by Bentham and then incorporated by Story ended up being mixed with Austinian's logical positivism. This mix, it has been argued, "left no room for frontier zones, in which one kind or branch of law merges gradually into another."[15] Accordingly, contrary to his medieval predecessors, Westlake argued that principles governing the application of territorial law in cross-border disputes could not be found in the shared ground between local law and universal law. He thus remarked that private international law was not a contemporary reinterpretation of the *jus commune*. As he put it:

> …the place of private international law is in the division of national law. Private international law is administered by national courts, and generally to subjects, though, when states submit themselves to national courts, its doctrines are applied to them as well as those of any other department of national law.[16]

Westlake argued that English decisions, and not the opinions of foreign jurists, constituted the bedrock of English conflict of laws.[17] The European scholarship might have produced a wealth of principles which had been received by English courts in previous centuries. However, private international law was undoubtedly "a department of English law".[18] As such, national rules were to

[13] Ibid.
[14] On Austin, see Chapter 8, footnote 20. Westlake considered private international law real law. He nevertheless acknowledged that "theories of natural law, or of a law of nature, have been so mixed up with international law that justice can hardly be done to our present subject without noticing every sense in which the word law is used." Westlake, 'Treatise on Private International Law, 2nd edition', p. 1
[15] Graveson, 'Philosophical Aspects', p. 16
[16] Westlake, 'Treatise on Private International Law, 2nd edition', p. 4
[17] Foreign jurists are to be relegated to a subordinate position, Westlake argued. Westlake, 'Treatise on Private International Law, 1st edition', p. iii
[18] Ibid.

be applied by local courts even if they conflicted with the "general theory", regardless of the influence that such theory exerted on English and foreign authorities in the past.[19] However, the 'general theory' in the 19th century consisted of medieval doctrines which were being discarded everywhere. Considering this and the fact that the consolidation of national law was a fundamental component of the classical programme, the question arises if we should not regard the rejection of medieval habits of thought as a point of convergence, rather than divergence, with continental developments.

1.2 The Chaotic State of English Conflict of Laws in the Victorian Era

Contrary to what may be assumed under the influence of the myth of isolation, Westlake's focus on English law was not dictated by an ideological antagonism to foreign doctrines. It is here submitted that his attention for English law originated in the chaotic state of the discipline. The need to re-organise conflict of laws was particularly compelling in the mid-19th century and especially in English law since, as shown in the end of Chapter 2, the decline and rejection of medieval theories had led to legal uncertainty and contradictory precedents in cross-border matters. The lack of systematism in the discipline was particularly visible in cross-border family relations. The process of nationalisation of the law governing marriage and family relations and its submission to public logics and state prerogatives that had begun in the second half of the 18th century had continued in the following decades and gained force during Westlake's lifetime, leading to unprecedented challenges.

Notably, Westlake wrote his *Treatise* during the reign (1837-1901) of Queen Victoria.[20] This is no small detail. As Stephen Cretney has pointed out, there is one aspect of the Victorian era which is generally overlooked in legal histories: "Eleven days after the young Queen came to the throne, legislation ended the long-standing monopoly of the Church over marriage, and paved the way for the secularisation of the marriage rite. At the same time, the State, by creating a system for the compulsory registration of marriages (as well as birth and deaths) and scrutinising the qualifications of those who wanted to marry, assumed an important role in seeking to control marriage and indeed family life."[21] Continuing the process started with the Marriage Act of 1753, the Marriage Act of 1836, also known as Lord Lyndhurst's Act, established stricter procedures for entering marriage with which all English subjects, irrespective of their faith, had to comply.[22]

[19] Ibid. p. 128

[20] The Victorian era is generally remembered for the colonial expansion and for the industrial revolution. Notably, the effect of Classical Legal Thought was that colonial powers showed qualified respect for the law of domestic relationships in light of its grounding in religious laws and, at the same time, a strongly interventionist policy in the law of the market. See Kennedy, 'Family/Patrimony', pp. 836-841

[21] Cretney, 'Family Law', p. 3

[22] Lyndhurst's (Lord) Act, Statute (5 & 6 Wm. IV. c. 54) 1835. The 1836 Marriage Act required that the ceremony was celebrated in a registered place of religious worship, thus increasing enormously the capacity of the state to oversee

The Marriage Act, 1836 was the most conspicuous part of the effort to centralise law and consolidate state jurisdiction in the 19th century.[23] Although different forms were preserved for distinct religious communities, the celebration of marriage was firmly placed in the hands of state institutions.[24] The procedures partly varied from one community to another, but there was only one contract of marriage regulated by English statutory law.[25] The 1836 Act also set stricter conditions for capacity that applied to all individuals, regardless of their faith, making marriages within prohibited degrees null and void.[26] In 1856, two years before Westlake's s Treatise was published, another reform to English law governing marriage toughened up sanctions for violating established procedures.[27] English statutory law not only determined the form and conditions for marriage, and the penalties for not complying with the established procedures but also, through coverture, the rights and duties attached to it.[28]

In previous centuries, the precedence of the stipulation of the marriage contract over the actual ceremony offered a representation of the dominant consensual view. From the classical age, respect for state-mandated procedures acquired overriding importance in the case of marriages celebrated in England.[29] However, statutory amendments were completely oblivious of the regulation of marriages

confessional matters and the celebration of marriages. Cretney, 'Family Law', p. 9, The Church of England maintained the fiction of its virtual monopoly over marriage matters by being entrusted with the celebration of the wedding ceremony. However, common law deepened the authority of the State over matters which the ecclesiastical courts could have claimed to govern in the past. Notably, the 1836 Act did not erase legal diversity. It preserved the right for Quakers and Jews to have a marriage celebrated according to their own preferences. This 'procedural diversity' may come across as incompatible with the narrative of state centralisation that runs throughout the Victorian era. However, this diversity was only skin-deep. Even taking account of such flexibility, it must be underlined that formalities had to be respected nonetheless. Prior notice had to be delivered to the Superintendent Registrar.

[23] The same year, in 1836, Parliament also passed the Births, Deaths and Marriages Registration Act which set up the office of the Registrar-General. Previously, information on persons and subjects – on a variety of issues, such as death and marriage. After 1836, the modern state machinery had access to a wealth of reliable personal data. The two Acts, which became binding soon after the new Queen took power, are a striking illustration of the attempt by the nation state to assert its bio-political authority over matters which were previously subject to a multiplicity of local regulations, church canon laws, customary practices, on top of common law. Cretney, 'Family Law', p. 8

[24] Parties had to notify the Superintendent Registrar of the district of residence of their intention to get married beforehand. Before the marriage could take place, the notice should be in the books for a period of 21 days during which public authorities had full access to the information provided by the couple. Section 7 of the Marriage Act 1836. After the celebration, the marriage had to be registered and the official documentation was to be sent to the General Register Office. Roman Catholic priests and Nonconformist ministers had to comply with the additional requirement that a Registrar is present at the wedding ceremony, and that a fee is paid for his services, because of fears that the clergymen would not be able to carry out the procedures in a correct and adequate manner. The Marriage and Registration Acts Amendment Act 1856 maintained the requirement that marriage notices be displayed in the Register Office. Cretney, 'Family Law', p. 11

[25] As Cretney submitted: "Certainly English marriage law allowed for a considerable diversity of forms; but although the procedure by which marriage can be created vary widely, the result is in all cases the same. To the law, there is only one contract of marriage." Cretney, 'Family Law', p. 12

[26] Lord Lyndhurst's Act, for instance, stipulated that all future marriages within the prohibited degrees, such as those involving a deceased wife's sister, were ipso facto void, and not merely voidable. An Act to render certain Marriages valid and, to alter the Law with respect to certain voidable Marriages

[27] In 1856, the Marriage and Registration Acts Amendment modified some of older provisions and established criminal sanctions for marriages solemnised without parental consent. However, confusion remained as the 1856 Act generally referred to English marriages, and it did not stipulate specific provisions on the application of English law to international marriages. Such as failing to make a declaration or deliberately making a false one as to the fact that the couple were within the prohibited degrees or that they were already married (Section 2).

[28] Halley, 'Family Law, Part I', p. 73

[29] Sykes, Edward I. "The Essential Validity of Marriage." *International & Comparative Law Quarterly* 4.2 (1955)

celebrated abroad. Although the reforms to the law of marriage that took place in the previous century had already demonstrated that the enforcement of statutory provisions could be entirely frustrated by the lack of a corresponding regulatory paradigm, neither the Marriage Act of 1836, nor the amendments of 1856 specified if the new laws applied to English subjects everywhere or merely to marriages celebrated in England. Members of Parliament were convinced that marriages taking place abroad would "certainly not be numerous".[30] But the proximity of the Scottish border, and the virtual lack of conditions and formalities set by Scottish law, led thousands to evade English law.[31]

The deliberate evasion of English law by English subjects in the context of changing intellectual and institutional assumptions led to unprecedented legal challenges. As shown by the *Duntze v. Levett* case, legal collisions often arose in cross-border family cases, and also in proceedings for divorce. In 1857, a year before the *Treatise* was published, Parliament also introduced the Matrimonial Causes Act, which made it possible for spouses to petition for divorce *a vinculo matrimonii*.[32] Some marriages had been dissolved already after the Reformation.[33] However, Parliament, and not courts of law, had issued the few decrees of divorce. The dissolution of marriage amounted to an *ad hoc* piece of legislation.[34] The 1857 Act made it less costly and complicated to obtain a divorce.[35]

[30] Lord John Russel, Hansard's Parliamentary Debates (3rd Series) 12 Feb 1836, vol. 31, col. 377, cited in Cretney, 'Family Law', p. 11

[31] In five districts in England, there were 1,364 unions reported within the prohibited degrees between 1835 and 1848, and of these ninety percent were between a man and his deceased wife's sister, Report of Commissioners, Report of the Commissioners Appointed to Inquire into the State and Operation of the Law of Marriage, as Relating to the Prohibited Degrees of Affinity, and to Marriages Solemnized Abroad or in the British Colonies; with Minutes of Evidence, Appendix and Index in Parliamentary Papers, 1847-8

[32] St. 20 & 21Vict., c. 85. The structure of the Matrimonial Causes Act corresponds to the basis for the English law on divorce for the following eighty or so years, although amendments were introduced in the three following years. Significantly, the reformative zeal focused on minimising the risks of collusions between the parties. Until Parliament introduced the Matrimonial Causes Act in 1937, the law did not consider additional grounds for marital dissolution. Desertion, cruelty and other grounds were added. See Stone, Lawrence. *Road to divorce: England 1530-1987*. Oxford University Press, 1990

[33] Although "it is not true that there was no divorce in England before the [Matrimonial Causes] Act came into force on 1 January 1858", the procedures were however prolonged and costly. Cretney, 'Family Law', p. 161. A man could have the marriage dissolved if he could prove that his wife had committed adultery and that he had not done so himself. Cretney, 'Family Law', p. 161. Married women could also petition for partial divorce, but, unlike their husbands, they had to prove the existence of aggravating circumstances. Contrary to total divorce, in the latter case of divorce *a mensa et thoro* the union would not be totally unmade because, as Blackstone put it, "the Canon law, which the common law follows in this case, deems so highly and with such mysterious reverence of the nuptial tie, that it will not allow it to be unloosed for any cause whatsoever after the union is made." Blackstone, Book I, p. 441 Noteworthy, cruelty, adultery, bigamy, desertion, drunkenness, if proven by applying wives, could only grant a divorce *a mensa et thoro*.

[34] Such procedure was lengthy and costly. After obtaining a divorce *a mensa et thoro*, the applicant had to obtain a judgment from a common law court. Finally, he or she needed to secure a private Act of the Parliament dissolving the marriage. Cretney, 'Family Law', p. 161. Unsurprisingly, it was mostly married women and individuals from lower classes who lacked sufficient means and personal resources. Historical evidence shows that prior to the introduction of the Matrimonial Clauses Act in 1857, the Parliament only granted divorce to four English women, and it did so on the aggravated grounds of incestuous adultery and bigamous adultery. Danaya C. Wright. "Untying the Knot: An Analysis of the English Divorce and Matrimonial Causes Court Records, 1858-1866" *U. Rich. L. Rev.* 38 (2003), p. 906

[35] The Matrimonial Causes Act instituted a specific tribunal, which oversaw matters of divorce and petitions for restitution of conjugal rights, and it established new procedural rules. Rather than giving couples the opportunity to opt out of marriage, the introduction of the 1857 Act must be read within the context of the process of state centralisation and institutional modernisation started some two decades before with the beginning of the Victorian era. With the 1857 Act

However, as in the case of the Marriage Act of 1836, the motives for its adoption lay not in growing concerns for justice - nor in a conception of marriage as a consent-based and dissolvable relation - but rather in the pressing need to get rid of the competing jurisdiction of ecclesiastical courts.[36]

To mollify ecclesiastical authorities, the provisions of the 1857 Act directed the Divorce Court to "proceed and act and give relief on principles and rules which … shall be as nearly as may be conformable to the principles on which the Ecclesiastical Courts have heretofore acted and given relief".[37] Although the Act made it possible for aggrieved parties to start proceedings in secular courts, absolute divorce was thus only contemplated for the most extreme situations.[38] In addition, the law did not provide for divorce by mutual consent.[39] Finally, in contrast with Scottish law, the grounds for divorce were different for men and women.[40] Scottish law continued to offer more effective remedies against domestic abuse, especially to women, and for ending marriages which had broken down irretrievably. Given the proximity of the Scottish border, chances of legal collisions increased rather than diminished after 1857.[41]

And yet, like the Marriage Act of 1836 and the reform of 1856, the Matrimonial Causes Act of 1857 did not establish conditions for acquisition of jurisdiction by common law courts and it did not specify what law English judges should apply in international litigation for separation and divorce.[42] It became a matter of scholarly debate and judicial controversy whether residence of the petitioner,[43]

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jurisdiction over matrimonial matters was transferred from ecclesiastical courts to common law courts. After 1857, appellate jurisdiction was exercised by the House of Lords: the 56th sect. of 20 & 21 Vict. c. 85. Notably, there was overlap. The newly created Court for Divorce and Matrimonial Causes distanced itself from the simple 'accusatorial role' of common law courts, which were to make decisions merely on the basis of evidence presented and adopted over time a role closer to the previous 'inquisitorial powers' of Ecclesiastical tribunals, specifically examining the nuptial circumstances and personal motivations for going to court. Cretney, 'Family Law', pp. 177-178

[36] Cretney, 'Family Law', p. 162. The Royal Commission appointed by the Government to review the law, "simply wanted a modernised secular procedure to provide more efficiently the results which had been available for more than 200 years to those with sufficient means and motivation. … True this would increase the role of the State at the expense of the Church but this was the price to be paid for increasing the efficiency of the court system." Cretney, 'Family Law', p. 163

[37] Matrimonial Causes Act 1857, Ss. 2.22

[38] The Act also considered rape, sodomy and bestiality as evidence of depravity and sufficient grounds for divorce. See Probert, R. "The double standard of morality in the Divorce and Matrimonial Causes Act 1857", 28 *Anglo American Law Review* 73 (1999)

[39] To avoid the 'horrifying risk' that couples might get a divorce by agreement, judges would not satisfy themselves with an examination of the material evidence put before them confirming the veracity of the facts alleged in the petition. Cretney, 'Family Law', p. 178 The court would always have to satisfy itself that the petitioner had, during the marriage, "been accessory to or conniving at the adultery, or [had] condoned the same." (Section 29.)

[40] Sections 27 and 31 of the Matrimonial Causes Act of 1857 established that only duly proven cases of adultery could lead to divorce. Contrary to their husbands, married wives were not entitled to divorce unless the adulterous actions of the husband were also incestuous, or that the husband was guilty of bigamy, or that he had deserted the wife for at least two years, or that he was also responsible for cruel acts towards her.

[41] Leneman, Leah. "English Marriages and Scottish Divorces in the Early Nineteenth Century, 17 *Journal of Legal History*. (1996), pp. 225, 234, 241

[42] Westlake, 'Treatise on Private International Law, 1st edition', p. 22. The standard practice was to apply the *lex fori*.

[43] *Brodie v. Brodie* (1861) 2 Sw. & Tr. 259

residence of the respondent,[44] nationality of the spouses,[45] place of the adultery,[46] or place of celebration of marriage[47] constituted sufficient ground for an English court to claim jurisdiction. This uncertainty, rather than time-immemorial insularity of the common law, explains why in his *Treatise*, Westlake focused on English law. His concern for domestic law did not lead him to ignore foreign influences. On the contrary, the chaotic state of the discipline that led him to wrote the *Treatise* was also lamented by foreign scholars and had also led Savigny to develop a new theory, a theory which, contrary to what is often assumed, also profoundly influenced Westlake and English conflict of laws.

2.1 The New Legal Science and the Influence of Savigny on English Conflict of Laws

As late as the 1840s, English judges declared that legal collisions "may not be improperly be said to concern the law of nations".[48] Contrary to this view, and those expressed by Lord Mansfield and Sir Simpson in the pre-modern period, Westlake believed conflict of laws to be part of domestic law.[49] From this, and from the rejection of 'medieval habits of thought', however, did not necessarily follow unconditional support for the automatic application of the *lex fori*, or the repudiation of the universalist aspirations of his predecessors. In fact, Westlake argued that territorialism and parochialism "would have led to practical results so shocking that [this radical approach] has never been drawn" in the history of private international law.[50] And although Westlake conceived conflict of laws as a branch of national law that shared no common ground with international law, he did not argue that legal collisions were to be settled by utilitarian logics or purely internal considerations.

Westlake upheld instead the higher principle of comity as the basic source of international obligations in international private relations. The comity he had in mind did not consist of the aggregate material interests and whimsical desires of sovereigns. Instead, domestic courts were under an obligation to enforce foreign laws and judgements, as "rights which have once well accrued by the appropriate law are, by comity, if you please, though it is a comity almost *demanded by a sentiment of justice, treated as valid everywhere*."[51] As Westlake acknowledged, the problem was that "comity might be a reason

[44] *Niboyet v. Niboyet* (1878) LR 4 PD 1
[45] *Deck v. Deck* (1860) 2 Sw. & Tr. 90
[46] *Callwell v. Callwell* (1860) 3 Se. & Tr. 259
[47] *Jack v. Jack* (1863) 24 D. 467
[48] *Brown v. Brown* (1844) (citing Lord Mansfield)
[49] However, he did not reduce his role to a positive ascertainment of those cases in which the sovereign "has the power to command duty" "Following this command conception of law, Westlake argued that private international law disputes should be resolved simply by determining which sovereign has the power to command the duty which is correlative to the disputed right". Mills, 'Private History', p. 30
[50] Westlake, 'Treatise on Private International Law, 1st edition', p. 7
[51] Westlake, 'Treatise on Private International Law, 2nd edition', p. 154

for receiving any rules on this subject but could hardly point out which to receive".[52] Westlake rejected the medieval theory because he thought that the demands of universal justice could not be met in an international society of nation-states by "the sway of a vague law natural, which can amount in practice to little else than the judge's private opinion of what is equitable".[53]

In English law, chances that decisions could lead to violations of comity were higher because, as seen in the previous section, Parliament had not introduced conflict rules but courts were nonetheless bound to follow the unsystematic judicial precedents of the 18th and 19th century.[54] In this context, the general theory elaborated by medieval scholars increased, rather than reduce, the risks faced by individuals involved cross-border relations. Westlake thus dismissed doctrines and decisions trapped in the "old war of real and personal statutes".[55] The numerous gaps in English law and the inadequacy of the medieval approach made it unlikely that courts would ever decide disputes in a predictable manner. It also made it more urgent to develop an approach that could satisfy that sentiment of universal justice and that could give systematic answers to legal collisions.[56] The need to re-organise English conflict of laws did not isolate English law from classical ideas and schemes. On the contrary, it pushed Westlake and other jurists towards the scientific and conceptual method of Savigny.[57]

Far from leading English law astray, the need to deal effectively with increasing cross-border exchanges without violating the sentiments of international justice and, at the same time, to organise systematically and logically English law, drove Westlake to take account of the "most widely received rules" in foreign systems.[58] The reception of foreign doctrines was not an unprecedented phenomenon in common law. English law had already incorporated medieval principles due to the "deference to [the] science of law".[59] Regrettably, the medieval *scientia juris* had brought national laws into the despicable situation in which they were in the 19th century.[60] By this time, however, a

[52] Westlake, 'Treatise on Private International Law, 1st edition', p. 149
[53] Ibid.
[54] Dicey, A. "His Book and His Character", in Williams, John Fischer (ed.), *Memories of John Westlake*. Elder & Company (1914), p. 18
[55] Westlake, 'Treatise on Private International Law, 1st edition', p. 149
[56] I thus disagree with the argument advanced by Mills that the few references to foreign law and foreign decisions in the Treatise can be explained by the "the increasing 'completeness' of the English legal system, removing the need for references to foreign legal jurisprudence in the development of the English law." Mills, 'The Confluence', p. 51, footnote 144
[57] On the influence of Savigny on the common law, see Roger, Cotterrell. *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*. Butterworth, 1989, p. 47 The monumental task of bringing about coherence and completeness in English Private International Law, and the advancement of an effective theory for settling cross-border disputes, could not be entrusted to 'medieval habits of thought' nor could the solution to questions arising in international private disputes be found in medieval doctrines. Westlake, 'Treatise on Private International Law, 2nd edition', p. 15
[58] Ibid. p. 23
[59] Ibid.
[60] Also echoing the claim that conflict of laws in English law is of much more recent origin than in the continent, Geoffrey Cheshire referred to decisions being made in the 19th century. Hence, he argued: "The early judges worked on virgin soil,

new 'science of law' was developing. Accordingly, Westlake sought to bring clarity in English conflict of laws by drawing on new dominant rules and principles and he pointed out that, of all the theories and methods recently advanced "the most remarkable of these efforts" was that of Savigny.[61]

Savigny was also dissatisfied with the general medieval theory that had been until then applied by German courts. For this reason, in volume eight of the System of Modern Roman Law, he developed a new approach to legal collisions, simplistically referred to as multilateralism, which drew on what were in the process of becoming the fundamental assumptions in the legal disciplines, such as the deductive and aprioristic method and the logical division between legal relations. The aim of Savigny was also to bring conceptual clarity and logical systematism where there was none. As well as being an expert in international law, Westlake had studied Roman law. Well before the first translation of the eighth volume became available in English, Westlake was aware of the fundamental contribution by Savigny to the subject. This made it possible for him to draw from the ideas that underlay Savigny's method to carry out a systematic reorganisation of English conflict of laws.[62]

Being there nothing wrong in deferring to legal science, Westlake argued that even courts and legislators ought to foreign methods and ideas. He thus held that, when reforming conflict rules and principles, English courts and British Parliament must consider "that science of law to the ideas of which no legislator intends to run counter."[63] Of course, Westlake was also aware of the general distrust, especially in English law, of foreign authorities and doctrines.[64] In the classical age, law, private international law included, was meant to consolidate, and not undermine, national orders. Notably, he was not the only scholar facing this troublesome scenario.[65] In the classical age, legal scientists devoted themselves to bring about coherence and systematism in domestic law without disrespecting the unique spirit of the local law.[66] As Albert Dicey explained, Westlake's aim:

> was to induce English Courts to consider new solutions by Continental thinkers, and especially by Savigny, of the problems both old and new presented by the conflict of laws. This effort would, as he knew, necessarily be futile unless, while bringing

and their decisions were necessarily hesitating and tentative. Circumstances have necessitated a process of trial and error, and unless it is realized that the early decisions frequently represent the halting steps of pioneers it will be long before this branch of law attains a state of elegant cohesion." Cheshire, 'Private International Law, 2nd ed.', p. 21

[61] Westlake, 'Treatise on Private International Law, 1st edition', p. 149

[62] Dicey, 'His Book', p. 24.

[63] Westlake, 'Treatise on Private International Law, 1st edition', p. 128

[64] See Westlake, 'Treatise on Private International Law, 1st edition', p. iv

[65] As Kennedy explains, this is a task faced by all 19th century 'legal scientists', as "order is coherent or tends toward coherence on the basis of the spirit and history of the people in question." Kennedy, 'Three Globalizations', p. 26

[66] See Wieacker, 'A History', p.311

> Savigny's principles to the knowledge of English lawyers, he could also convince English judges that the principles accepted by Continental thinkers could be applied to the solution of our difficulties without contravening the general spirit of English law…[67]

In the classical age, private international law went through a renovation which is clearly visible in scholarly writing, in codified law and in judicial decisions. Westlake's *Treatise* is, in this respect, no exception as "[i]n every line of the first edition of Westlake's 'Private International Law' you can trace the influence of Savigny."[68] Unlike what has become a diffused opinion in the historiography, classical ideas encapsulated in the theory of Savigny drove the systematisation and restatement of the discipline everywhere, including in English common law. Historians thus miss the tree for the woods as the renovation of private international law facilitated the reception of classical ideas which, notably, also included respect for the uniqueness of national orders. Hence, Westlake relied on foreign ideas, but he never forgot to mention that the origins of English law were in the 'national conscience':

> …legislation never commenced the juristic history of any people. … The historical origin of law must always have been a national persuasion or conscience of that which is jurally right, that is, not only morally right, for no people has aimed at the authoritative suppression of all which is morally wrong, but also proper to be enforced by man on his fellows. This persuasion varies from people to people…[69]

As he proceeded to systematise conflict of laws in accordance with classical ideas, and the historical and conceptualist approach of Savigny in particular, Westlake never overlooked that he was "writing for the instruction of English barristers and English Courts, and therefore bound to accept the fundamental and established principles of the law of England."[70] He therefore included a disclaimer that he was adapting 'foreign' rules to the "common classification of English law".[71] Ironically, his contribution to the discipline, and the incorporation of dominant doctrines and ideas, ended up hidden by the very same phenomenon that had occurred in previous centuries, i.e. the reception of foreign principles by means of judicial precedent. Hence, the influence of 'foreign' ideas would be erroneously dismissed as 'skindeep', forgotten under the growth of 'indigenous judicial precedents'.

[67] Dicey, 'His Book', p. 26
[68] Dicey, 'His Book', p. 26
[69] Westlake, 'Treatise on Private International Law, 1st edition', p. 133
[70] Ibid. p. 26
[71] Hence, his confession that he was trying to adapt rules and principles to "the common classifications of English law". Ibid. p. iv

2.2 The Logical Principle of Dichotomy and the Re-Organisation of Conflict of Laws

Westlake was not the only English international lawyer influenced by classical ideas and by the scientific method elaborated by Savigny in his *System of Modern Roman Law*. A striking illustration of the widely-shared ambition to re-organise national laws in the form of a system is provided by the work of Thomas Erskine Holland (1835-1926).[72] Holland was among the several illustrious contemporaries of Westlake who lamented that jurists from both civil and common law countries had not shown sufficient attention to formal divisions and conceptual classifications.[73] In particular, he complained that "[n]ot one shows any conception of the mutual relations of the great departments of law; not one is governed by the *logical principle of dichotomy*, which … should underlie and determine the main features of every system of classification."[74]

The fault for the despicable state of English law, rules governing cross-border disputes included, could be ascribed to the lack of interest of medieval scholars for scientific and logical principles. However, Holland noted that "[t]here have been of late years signs of a change in the mental habit of English lawyers. Distaste for comprehensive views, and indifference to foreign modes of thought, can no longer be said to be national characteristics.[75] As he wrote his '*Elements of Jurisprudence*' with the intention of being free from this particular flaw, Holland drew inspiration from the works where "the Germans have set forth the Roman law … with a view to modern convenience. Foremost among these must be mentioned von Savigny's 'System des heutigen Romischen Rechts.'"[76]

The transformation of English legal consciousness from medieval habits of mind to the new dominant ideas and assumptions underlie the process of re-organisation of the common law.[77] Against this background, the thesis according to which English common law and English conflict of laws developed in isolation from continental developments becomes untenable. The influence of the classification method advanced by Savigny is visible throughout Holland's work, not least in his examination and organisation of principles and rules governing what he called, in opposition to the

[72] See Hoeflich, Michael H. "Savigny and his Anglo-American disciples", *American Journal of Comparative Law*, 37 (1989)
[73] In England, some attempt to re-organise the common law had been made by Blackstone and by John Austin. Holland recognised their achievements but argued that "works upon legal system by English writers have hitherto been singularly unsystematic." Holland, 'Elements', p. VII
[74] Holland, Thomas Erskine. *Essays upon the Form of the Law*. Butterworths, 1870, p. 19
[75] Holland, 'Elements', p. vi
[76] Ibid. p. viii
[77] Stein, Peter. "Continental Influences on English Legal Tought, 1600-1900" in id. *Character and influence of the Civil Law*. Bambeldon Press (1988), pp. 224 et eq. See also Graziadei, Michele. "'Changing Images of the Law in XIX Century English Legal Thought (The Continental Impulse)" in Mathias Reimann, ed., *The Reception of Continental Ideas in the Common Law World*, 1820–1920, Berlin, 1993

term coined by Story, the 'extra-territorial recognition of rights'.[78] For this reason, in Holland's *Elements of Jurisprudence* but also in every edition of Westlake's *Treatise* we not only find evidence of the incorporation of foreign principles and rules, but also a turn towards historicism and conceptualism and a growing concern for systematic divisions and formal classifications.

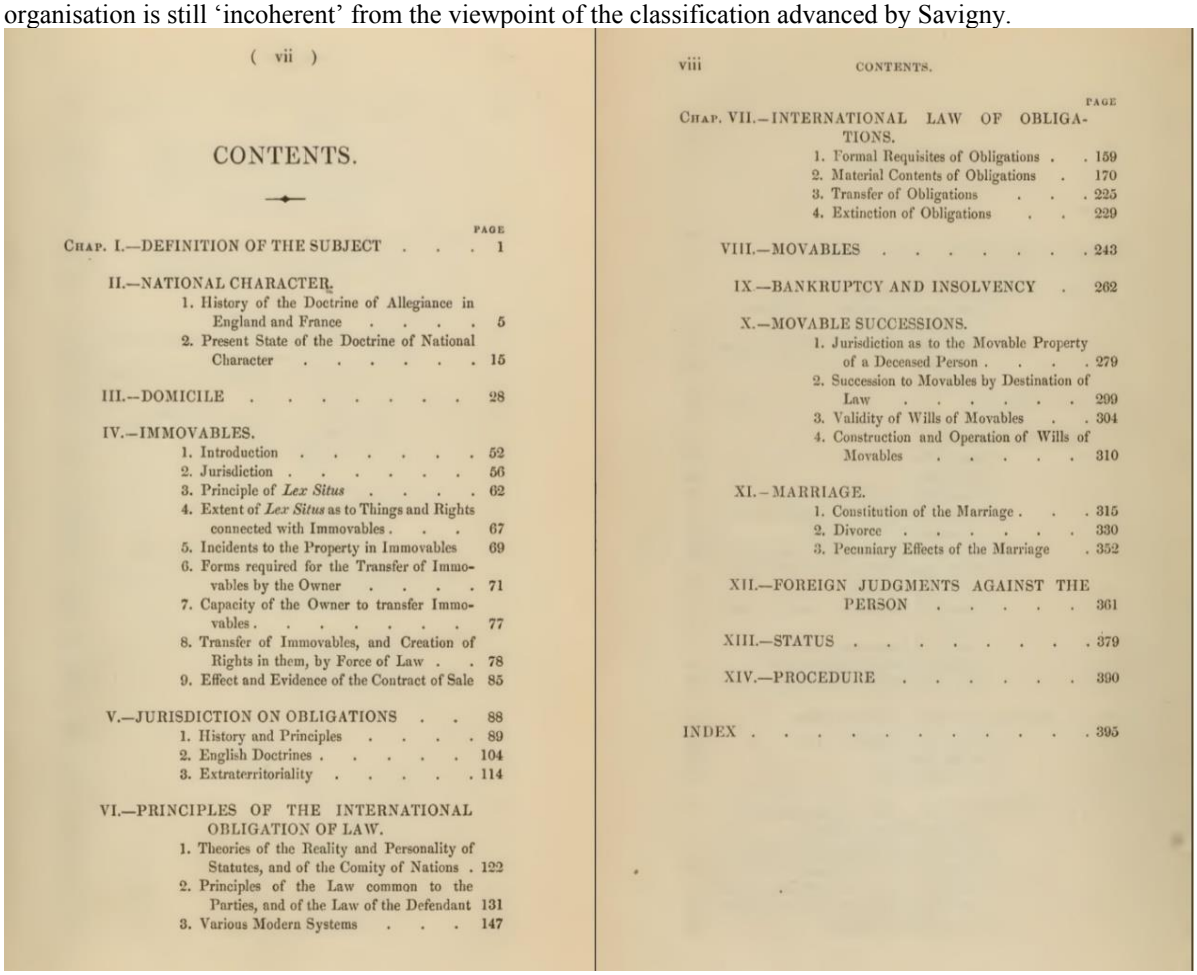
Consistent with the scientific method developed by Savigny and classical jurists, in his *Treatise on Private International Law* Westlake divided legal institutes horizontally, according to the specific relations that they controlled, but also hierarchically, in a pyramidal structure. He differentiated between human and natural law, and he placed national and international law within the former.[79] He rejected the medieval idea that the law governing cross-border disputes belonged to natural law. Evoking the new title coined by Story, he argued instead that "the department which treats of the selection to be made in each action between various national jurisdictions and laws will not unreasonably be called international law, distinguished by the epithet private from the international law which prevails between states, and which may be distinguished as public."[80]

[78] Holland argued that the division between public and private law "is of such capital importance (for the whole field of law) that we have no hesitation in adopting the division of rights out of which it springs as the radical division of them." Holland, 'Elements', p. 92 Holland placed ecclesiastical, criminal and administrative law within the scope of public law. He placed the law of contracts, of real and personal property, of wills and successions, and of torts, in that of private law. Notably, family rights and family law also played a strategic importance for separating between legal departments and for bringing about 'inner order' in English law. Holland used the category of 'ex lege rights' to justify the use of the mandatory law in domestic relations on the one hand, and the separate category of rights arising 'ex contractu' to prevent state authorities from intervening in economic relations. Ibid. pp. 182-183. A translation of the chapter included in the first edition of Elements of Jurisprudence dealing with questions concerning with the extra-territorial application of law appeared under the title 'De l'Application de la Loi' in *Revue de Droit International* in 1880. For a discussion on Holland and conflict of laws, see Chapter 7, Section 1

[79] "National and international laws may be accepted as divisions of the field of human law." Westlake, 'Treatise on Private International Law, 2nd edition', p. 4

[80] Westlake, 'Treatise on Private International Law, 1st edition', p. v

Below, the table of contents of the first edition of the Treatise (1856): Marriage and Obligations are separate, but organisation is still 'incoherent' from the viewpoint of the classification advanced by Savigny.



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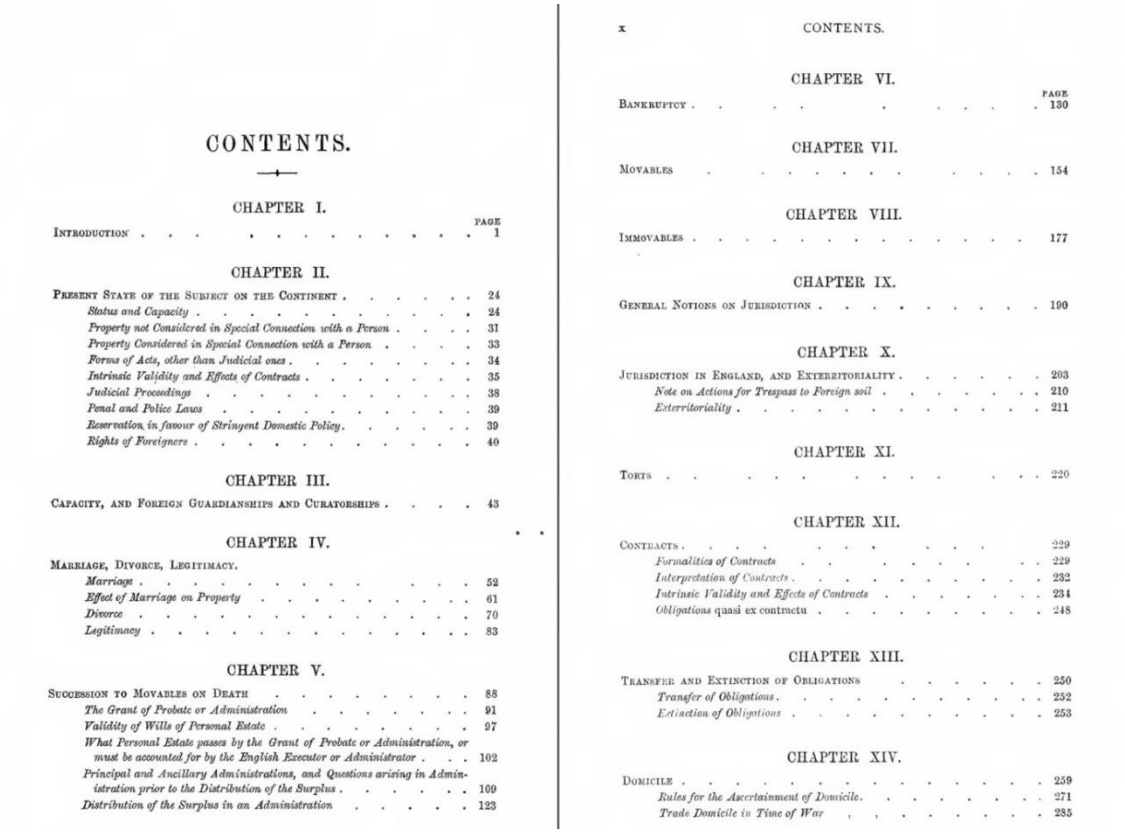
The desire for conceptual clarity is very visible in the *Treatise*. Westlake thus pointed out, with respect to the 'private' in private international law, that "the force of the term … is independent of any classification of national law into public and private."[81] In general, the source of conflict rules was public authority, not the force of private will. As we shall see, this general statement was only partially true, since it did not apply to commercial contracts. In every respect, it was clear that the objective of conflict of laws was the regulation of cross-border legal relations which had a private dimension. Westlake thus proceeded to organise the subject according to the characteristics of each private relation, therefore showing the widespread popularity of classical conceptual classifications.

The Treatise was published in four editions stretching over a period of five decades, from 1856 to 1912. The transformation of the rules governing marriage, divorce and other cross-border relations stand as a testament of the redefinition of the legal mentality towards classical formalism. Below, the contents of the second edition (1880). Marriage and incidents are separated from contractual obligations. The separation of the law of the family (capacity and guardianship, marriage, divorce, legitimacy and succession) and law of the market (bankrupty, movables and immovables, contracts…) is complete.

[81] Ibid.



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Westlake did not bring together conflict rules governing marriage, divorce, legitimacy, succession under the heading of 'family'. However, the transformation of the organisation of the Treatise over the years of publication shows the gradual unification of matters related to status, personal capacity and family matters in the same class of conflicts, and the separation of marriage from contract.

First, Westlake elaborated different rules according to the characteristic of the disputes, then by 'subject-matter', i.e. formulating the threefold division of jurisdiction, applicable law and 'class of judgements' for each type of dispute.[82] Taking in consideration different classes of private legal relations, and drawing inspiration from principles advanced by continental scholars, Westlake advanced a series of straightforward propositions and coherently-arranged rules for each conflict scenario that he could foresee.[83] Rules for determining the competent forum and applicable law in the case of disputes concerning real estates were relatively uncontroversial. He therefore focused on the rules governing relations which once fell within the general division of personal statutes.[84]

[82] "It appears to me necessary to examine first the rules of private international jurisdiction, before coming to the choice of the municipal law by which the merits of each cause must be decided…" p. 55, first edition.
[83] Westlake, 'Treatise on Private International Law, 2nd edition', p. v
[84] It is worth noting that, as with the seat-selection approach of Savigny, the rules proposed by Westlake did not necessarily produce different results compared to the Statutist approach. With respect to questions raised by 'property in the soil', Westlake agreed with medieval scholars that jurisdiction should rest with the courts of the situs and that the applicable law should correspond to lex sitae. Westlake, 'Treatise on Private International Law, 1st edition', pp- 55-62 As with Savigny, the redefinition of the nature and functions of Conflict of Laws did not simply correspond to a methodological revolution. Rather, it reflected a deeper transformation of the dominant juridical mentality and of institutional paradigms. Westlake hinted at this as he emphasised that competence and applicable law in property matters were not grounded in convergence between past and present doctrines, but "depend entirely on the territorial aspect of the idea of a modern state." Ibid. p. 55

2.3 The Proper Law of Contract: Free Will and Market Relations

Setting aside for now the question of capacity - an important element of the classical approach to legal collisions which will be rejected in the following century - when it came to questions concerning the applicable law in cross-border contractual relations, two schools of thought existed in the 19th century. The first one affirmed, consistently with the medieval conception, that the *lex loci contractus* always governed.[85] A second proposal, supported by Savigny, placed wider but not limitless importance on the will of the parties, and gave them freedom to choose the applicable law, either by explicit selection or by tacit submission.[86] Westlake agreed with Savigny that the governing law was not necessarily the law where the parties found themselves at the time of the transaction, since the acquisition of rights could happen under a national law without considerations of place:

> Now when rights are considered as proceeding from an external enactment by sovereign authority, the necessity that in a very artificial state of society each such authority should have definite geographical limits assigned to its activity, leads to the conception of private rights as dependent on the law of the place where they originate, since at that place the local sovereign alone can issue the commands which are requisite to create them. But the idea which lies historically at the root of private rights, namely, that *they are sufficiently created by a common conviction* in any organized body of men of that which ought to be law, does not limit the application of a national law by any considerations of place.[87]

Private rights are created by a common conviction, Westlake argued, and not by a public authority.[88] He therefore believed that conflict rules must take account of the nature of private rights and of their source which, it was assumed, consisted of private will. In addition, as it had also been remarked by Savigny, in the commercial reality of the 19th century, and especially in the context of the British Empire, contracting parties were seldom in the same place at the time of the transaction. The place of contracting was seldom the place of performance etc.[89] Westlake therefore agreed with Savigny

[85] Although there had been some exceptions, judicial precedents generally applied this principle. However, some prominent English judges had abstained from giving blind and absolute support to the place of contract as precedents, on paper, demanded. Westlake, 'Treatise on Private International Law, 2nd edition', p. 235

[86] , from the various laws connected to the relation: the law of the place of contracting, the law of the place of performance, the law of the place of property being exchanged etc…. "The application of Savigny's principle rests on a very wide, but not unlimited, admission of the will of the parties as decisive; which will may be expressed by a tacit submission, as in cases of contract to the law of the place of fulfilment, and in the acquisition of immovable property to that of its situation." Westlake, 'Treatise on Private International Law, 2nd edition', p. 152

[87] Ibid. p. 134

[88] Gordley, 'The philosophical origins', p. 134 et seq.

[89] Westlake, 'Treatise on Private International Law, 1st edition', p. 149

that the old rule, which required the systematic application of the law of the place of transaction irrespective of personal circumstances and regardless of the preferences of the parties was inadequate for 19th century commercial life:[90]

> It was impossible that this system could become practical … because, even in the cases which it submits to positive law, it dismisses all considerations of national character, domicile, place of execution of contract, and situation of thing dealt with, each of which is often made, by a common jural sense of mankind, to override that single point of the actual place of contracting to which exclusive weight is attributed by Grotius … [91]

Unlike medieval scholars who applied the traditional *lex loci* test to establish what law governed the acquisition of rights in contractual relations, Westlake proposed to apply what it became known as the 'proper law' to determine the 'intrinsic validity' of commercial contracts.[92] Unlike Savigny, Westlake did not reduce choice of law - and questions relating to jurisdictional competence (until the nineteenth century the idea of proper law was hardly distinguished from that of the proper jurisdiction) - to a mere voluntary subjection by the parties to a specific legal regime. Reading in various authoritative precedents of English courts, including that of *Robinson v. Bland*, a subjective submission in the presence of a pre-existing objective connection, Westlake advanced the opinion that English courts applied, and should apply, the law most closely connected with the dispute:

> …it may probably be said with truth that the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the transaction has the most real connection, and not to the law of the place of contract as such.[93]

Whether Westlake's reading of judicial precedents corresponded to the test actually applied in previous centuries is disputed.[94] Either way, because of his authority, in decisions issued following

[90] Ibid.
[91] Ibid.
[92] Westlake drew a line between the law affecting the form of acts and the law which determined their substance. Westlake, 'Treatise on Private International Law, 2nd edition', p. 34. For the English scholar, the *lex loci contractus* should govern the external solemnities. Notably, unlike foreign scholars who provided for some flexibility, for Westlake, the law of the place where the contract is entered cannot be waived by referring to more favourable laws, in order to hold a contract valid as far as its formal essence was concerned. Ibid. pp. 229-232 Westlake thought that the effects of contractual obligations are a matter altogether different from formal validity. Ibid. p. 234
[93] Ibid. p. 237
[94] "Although one may, perhaps, see in the judgment of Lord Mansfield in *Robinson v. Bland* an early acceptance of the principle of 'proper law' in its modern sense, the other judgments in the case do not support the view. The general presumption of English courts in the seventeenth and eighteenth centuries was that á plaintiff must, ipso facto, intend English law to apply, by bringing his action in England. The questions of choice of law and the choice of jurisdiction

the publication of the *Treatise*, some English judges placed equal or even greater importance on substantial considerations as they placed on the abstract principle of voluntary submission.[95] As it has been argued, such decisions show is that "common law judges felt bound to give expression to the general feeling of their age in favour of complete contractual autonomy, while remaining, at the same time, bound by the ties of precedent running back over a century to support as a controlling law one that had a real connection with the contract."[96] Accordingly, cases decided in the 19th century always contained references to the intention of the parties, but also frequently identified the proper law with the legal regime which also had a substantial connection with the contract or the parties.

Contrary what Westlake had hoped, and in line with the overriding importance of contractual autonomy, in most of cases decided in the classical age - and with increasing frequency after the first edition of the *Treatise* - courts contented themselves with sought with identifying what the parties' intent was, without entering the more complicated question of ascertaining the actual circumstances of each case.[97] Or else, absent a deliberate choice by the parties, they looked at substantial circumstances but merely to gather from them what law it could be reasonably presumed that the parties had voluntarily submitted to. This was perhaps inevitable since even in Westlake's theory the creation of private rights did not depend on an express public acknowledgement or enactment by the sovereign authority, but on a 'common conviction'.

The classical mentality, to which Westlake was also subject, was generally indifferent to 'substantial considerations' and demanded the widest possible recognition of autonomy in commercial relations.[98] A contract valid by the law chosen by the party was therefore considered valid all the world over, regardless of substantial considerations or connections with other jurisdictions and laws. Notably, even in the classical age there was some space for traditional principles, including the medieval *lex loci rule*. However, the division between 'formal validity' - requiring that contracts are entered in accordance with the formal requirements of the country where the law is made, the *lex loci contractus*

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were confused." Graveson. Ronald Harry. *Conflict of Laws: Private International Law*. Sweet & Maxwell, 1948 (1974 7th ed), p. 407

[95] See *Jacobs v. Credit Lyonnais* (1883) 12 Q. B. D. 589. See Westlake. John. *A treatise on Private International Law, or the Conflict of Laws*. 1912, 5th edition, pp. 305-306. See also the discussion in Chapter 8 on Dicey and the proper law.

[96] Graveson, 'Conflict of Laws', p. 406

[97] Courts held that the substance of the contract is governed by the parties' intent. If performance was in one country, then they would presume the law of that country should govern. But if parties had a different law in view, then that law will govern. *Hamlyn v. Talisker* (1894) A.C. 202 in which an express reference for the application of Scottish law was held to regulate an agreement made in England and to be performed in England. Following these decisions, the application of the 'most real connection test' became so inconsistent that, in the last edition of the Treatise (1912), Westlake complained that judicial practice was too "difficult to reconcile with the logical order" which he had in mind when he advanced the proper law. Westlake. 'Private International Law, 5th edition', p. 305

[98] See Simpson, AW Brian. "Innovation in Nineteenth-Century Contract Law." *Law Quarterly Review* (1975). Hamburger, Philip A. "The development of the nineteenth-century consensus theory of contract." *Law and History Review* (1989)

- and 'substantial validity' - submitting the acquisition of rights to the law chosen by the parties - expanded the scope of free will beyond the bounds of medieval intent.

The reconceptualization of intent into free will side by side with the ascendancy of free trade made it possible to carry out transactions that were previously regarded as unlawful, including the selling of slaves, under the assumption that the material validity of contracts should always corresponded to the law that contracting parties had in mind, regardless of the nature of the contract or the substantial connection between the parties and jurisdictions prohibiting slavery or the trading of slavery. The perception was that commercial transactions containing a foreign element constituted a less serious threat to municipal institutions than purely local transactions. Hence, a contract for the sale of slaves governed by a foreign law chosen by the parties was recognised by English courts contrary to the official policy of English law was the prohibition of slavery.[99]

3.1 Changing Judicial Perceptions and the Regulation of Cross-Border Family Relations

Westlake also divided questions of validity of international marriages in formal and substantial. As in the case of international commercial contracts, the traditional *lex loci contractus* rule, reconceptualised as the law of the place of celebration, the *lex loci celebrationis*, was to govern the formalities of international marriages. As far as the substantial validity of marriage contracts, instead of letting the most closely related law govern cross-border marriage contracts and instead of arguing that the acquisition of marriage rights should also not be limited by any considerations of place, Westlake submitted capacity, validity and effects to the husband's law of domicile. Consistently with the dividing line between marriage and contract also traced by Savigny, Westlake excluded marriage from his discussion of the 'proper law' test in contractual matters.

As part one, Bartolus and Huber had posited instead that the *lex loci* rule applied to any type of contract and that consideration of parties' intent was especially important in contracts of marriage. This principle had been consistently followed throughout the medieval age. However, as he compiled and reviewed decisions concerning international disputes concerning marriage and its effects ahead of the publication of the *Treatise*, Westlake became aware that, in several prominent cases English courts had only reluctantly applied the *lex loci*. With the rise of separate national jurisdictions and the multiplication of civil laws, English judges showed more and more uneasiness in applying the old

[99] In *Santos v. Illidge*, 1860, 8 C. B. N. s. 861; 29 L. J. C. P. 348, the contract entered by a British subject who was domiciled in England and a Brazilian domiciled in Brazil for the sale of slaves was held to be lawful and valid because the law governing the material validity of the contract was Brazil. See last section discussing slavery and the status of slave.

rule. One prominent example of the growing anxiety was *Warrender v. Warrender*, a high-profile dispute concerning the validity of a divorce granted by the Scottish Court of Session. [100]

Warrender v. Warrender, which displayed factual circumstances comparable to those of *Duntze v. Levett*, presented the House of Lords with an opportunity to discontinue the application of the old rule as previously done also by the Court of Session. The marriage leading to the disputed divorce had been contracted in England by a Scotsman and an Englishwoman. The wife challenged the Scottish decision because, she claimed, the validity and effects of marriage contract are to be construed exclusively according to the *lex loci*, in this case English law. At the time of the court's proceedings, the 1830s, English law did not permit divorce.[101] The House of Lords recognised that, in accordance with the general principle, the law of the country where the contract was made should govern both the formalities and the incidents of all contracts, including marriage contracts.[102] However, Lord Brougham acting for the Court also had reservations about this rule:

> The lex loci contractus cannot prevail…for if the forum of the contract were to prevail against the forum, of the real domicile, a contract entered, into in a foreign country, during one day's visit, would be governed by the laws of that country, and not by those of the country of the parties' birth and permanent residence; which would be too absurd.[103]

In line with the traditional rule, in previous decisions, embodied in Sir Simpson's ruling in *Scrimshire v. Scrimshire*, English courts would uphold the validity of a marriage contract celebrated in Scotland even after a one day's visit. In *Warrender v. Warrender*, the Lords accepted that in international contracts in general "much depends upon the parties having regard to the country where it is to be acted under, and to receive its execution; upon their making the contract, with a view to its execution in that country."[104] But, in the eyes of the deciding judges, unlike formal aspects, the incidents of the contract of marriage should not be governed by the *lex loci* or by the law that the parties had in mind at the time of the marriage, but, rather, by the law of that country where the family home is. This new approach would be for the House of Lords justified since, in consideration of the:

[100] *Warrender v. Warrender* (1835) 2 CI. & F. 531, 9 Bl. N. R. 112. Warrender is among the earliest instances where a court suggested that a fundamental difference between the law governing the form and the law governing the essence of a marriage contract.
[101] The House of Lords was to decide on the question "whether or not a Scotch divorce can dissolve a marriage contracted by a domiciled Scotchman in England, the parties to that marriage being bond fide and not collusively for the purposes of the suit, domiciled in Scotland" Para. 529
[102] Para. 529
[103] Para. 516
[104] Para. 535

> connexion formed for cohabitation, for mutual comfort, protection and endearment, [the marriage] appears to be a contract having a most peculiar reference to the contemplated residence of the wedded pair; the home where they are to fulfil their mutual promises, and perform those duties which were the objects of the union; in a word, their domicile.[105]

In *Warrender v. Warrender*, the conjugal residence of the married pair was in Scotland, and the House of Lords unanimously held that Scottish law applied to the marriage and to the divorce. This decision was therefore consistent with the case of *Duntze v. Levett* which had provided Story and Savigny sufficient material to advance the argument that marriages were contracts *sui generis*, and thus governed by distinct conflict rules.[106] However, unlike the Scottish Court of Session, the Lords did not overrule the general approach. They expanded instead the traditional *lex loci* to cover also the law of the place of performance and redefined the matrimonial domicile as the place of performance.[107] Besides this meaningful technical details - which also demonstrated the willingness of English courts to submit cases of divorce to foreign laws - *Warrender* nevertheless suggested to Westlake that courts were far from enthusiastic in applying the old rule in cases concerning marriage and its dissolution.

As Westlake published the first edition of the *Treatise*, a second high-profile litigation, *Brook v. Brook*, was making its way to the House of Lords.[108] The dispute concerned the recognition of the effects of a marriage contracted in Denmark by an Englishman and his deceased wife's sister. The marriage was valid according to Danish law but fell within the prohibited degrees of affinity codified by Lord Lyndhurt's Act.[109] If the validity of the marriage was to be construed in accordance with English law, then the marriage would have never come to be. Following the old rule, the marriage and its effects should be determined by Danish law. However, citing *Warrender v. Warrender*, Lord Chancellor Campbell differentiated between the form and the substance of marriage and held that:

> There can be no doubt of the general rule, that "a foreign marriage, valid according to the law of a country where it is celebrated is good everywhere." But while the forms of entering into the contract of marriage are to be regulated by the lex loci contractus, the law of the country in which it is celebrated, the essentials of the contract depend upon the

[105] Para. 537
[106] Cited by the House of Lords as *Levett v. Levett*. Fergusson, 'Consistorial Reports', pp. 68, 168
[107] "This marriage, on the authority of the civilians and of the cases cited, must be dealt with as a Scotch contract, and its obligations construed and enforced by the laws of Scotland, where they were intended to be performed." Para. 517. Speaking of matrimonial domicile, the Lords held that this law, must be the law of the country where the parties live, where they intend to live, "where the contract is to be carried into execution." Para. 533
[108] *Brook v. Brook* (1858) 65 ER 746
[109] And thus, void ab initio under English law See Cretney, 'Family Law', pp. 41-45 on the specific issue of marriages within prohibited degrees and marriage eligibility.

> lex domicilii, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated.[110]

By the time *Brook v. Brook* was decided, domicile as understood in *Warrender v. Warrender* no longer corresponded to the place of performance. It corresponded instead to a self-standing connecting factor governing the incidents of marriage in all cases, regardless of the circumstances and desires of the parties. Accordingly, in *Brook v. Brook* the Lords held that even if a contract of marriage was considered valid in the place where it was contracted, it will only produce effects if its essence is not contrary to the law of matrimonial domicile.[111] For the Lords, the marriage between a man and the sister of his deceased wife may be regarded as valid everywhere, but only if it is contracted by Danish subjects domiciled in Denmark. In contrast, Grotius had argued that a merely human law prohibiting marriages between particular persons was not without legal consequences. In reaching its decision, the Lords pointed out instead that:

> …no civilised state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions.[112]

The spouses in *Brook v. Brook* were English domiciliaries and bound therefore by the provisions of Lord Lyndhurst's Act 'wherever they may be', even if the Act had not specified its territorial or extra-territorial reach, because this was in conformity with the principles followed in all civilised nations. In the various editions of the *Treatise*, Westlake made systematic references, and he discussed at length the landmark decisions reached by the House of Lords in *Warrender v. Warrender* as well as *Brook v. Brook*. The cases were relevant because they pointed to a combined institutional-juridical development which Westlake considered fundamental for modern conflict of laws: the rise of a stronger bond between individuals, families and nation-states and the emergence of status.

3.2 The Movement from Status to Contract, and the Exception of Family Matters

In *Warrender v. Warrender* the House of Lords mentioned status in relation to the contested divorce. However, the Lords did not rely on the notion of status to take leave from the application of the *lex*

[110] Paras. 206-207
[111] Para. 208. According to the Court, the *lex domicilii* might be changed by the legislature, but Lord Chancellor Campbell concluded that the marriage was invalid by the then existing law of England, para. 253
[112] Para. 212

loci contractus and to advance the argument that, due to its moral and public dimensions, the rules that applied in contractual relations did not apply to marriage relations.[113] In the early 19th century, marriage was not status. Status was still considered, in line with the medieval conception, a temporary and permanent condition which varied from place to place. Notably, in his decision in *Warrender*, Lord Brougham lamented this situation, as the application of the *lex loci* rule led to "the greatest embarrassment … for what can be more embarrassing than that a person's status should be involved in uncertainty, and should … change its nature as he goes from place to place[?]."[114]

Up to *Warrender v. Warrender*, status was understood as a condition and position of the person that originated - rather than being the source of - in the capacity, rights and obligations of the person. As conflict rules subjected relations to different local laws, and the parties could also submit to different substantive rules, status was local, uncertain and contingent. As suggested in the previous chapter, a fundamental redefinition of status was taking place, in civil law jurisdictions as well as in the common law. Westlake wrote the *Treatise* in the theories advanced by John Austin and Sir Henry Sumner Maine (1822–1888).[115] Austin described the medieval conception of status as a "complex whole", a temporary condition of the person determined by his rights or duties, capacities or incapacities.[116] He labelled the medieval conception as "jargon about occult qualities".[117] Austin redefined status as an inherent condition of the person; as the origin rather than the result of rights and obligations:

> [A]ccording to the definition which I am now considering, the rights or duties, capacities or incapacities, are not themselves the status: but the status is a quality that lies or inheres in the given person, and of which the rights and duties, capacities or incapacities, are merely products or consequences.[118]

The reconceptualization of status by Austin corresponded to both an expansion and a reduction of status. As far as the latter is concerned, status did not arise in all cases in which individuals were the subjects of rights and duties. In other words, a person who entered in a commercial contract did not acquire a status corresponding to his rights and obligations. The redefinition of status in this sense

[113] "[I]n all questions of status or personal obligation, the constitution of the contract is governed by the lex loci contractus" Para. 515
[114] Para. 549
[115] For his 'normative individualism', Kennedy has declared that Austin and his lectures on Jurisprudence, written in 1831-1932 and published in 1863, constitute "the manifesto of CLT for the common law world." 'Three Globalizations', p. 27
[116] Cited in Kennedy, 'The Rise', p. 194
[117] J. Austin, *Lectures on Jurisprudence*, Vol. II, John Murray, London, 1885, pp. 683-744. This was the conception of status envisaged by Jeremy Bentham. See Hicks, J. C. 'Jargon and Occult Qualities.' *The Modern Law Review* (1956)
[118] Cited in Kennedy, p. 194

made it possible to detach private law relations from questions concerning the "particular classes or persons" who engaged in them and, at the same time, to elaborate universally valid private law principles "with no peculiarities of status".[119] If status started moving from the centre to the periphery of contractual relations, and was thus reduced, simultaneously, it also expanded from the periphery to the centre of the law governing marriage and family relations.

For this transition to be complete, however, status had to acquire symbolic and moral value, whilst the principles standing underneath the law governing 'purely economic' and 'purely private' relations must lose it. If this fundamental paradigm shift was pinned down in Savigny's System in civil law countries, Henry Maine paved the way for the same shift in the common law. Maine was Whewell Professor of International Law in the University of Cambridge until the mid-1880s.[120] Notably, upon Maine's death, the person inheriting the Professorship was Westlake himself. Westlake was thus familiar with Maine's hugely popular theory - possibly inspired by Adam Smith (1723-1790) and by Charles Darwin (1809-1882) - of legal evolution.[121] In his *Ancient Law*, Maine adopted a historical approach to discussions and argued that societies progressed from less to more sophisticated stages of development. The central claim of his theory was, as his famous aphorism went, that "the movement of the progressive societies has hitherto been a movement *from Status to Contract*."[122]

According to Maine's historical reconstruction, primitive societies were collectivist. They were formed by "an aggregation of families" and not by "a collection of individuals".[123] In antiquity, he argued, rights and duties sprang from the permanent status that an individual possessed within his or

[119] Kennedy, 'The Rise', pp. 195-196

[120] Although the famous evolutionary theory of legal history came from research on Hindu law, Maine showed a general interest for the institutions of Roman law. Maine had inaugurated the Whewell Chair by giving a lecture where he developed a theory of international law as springing directly from Roman law. Maine, H. S. *International Law. A Series of Lectures Delivered before the University of Cambridge*, 1887 (1915 2nd Edition). Maine regarded international law as a product of Roman law. As it has been said, it is paradoxical given his influence on the development of English law, that "his writings always convey a feeling of remoteness form the Common law." (Graveson, 'The Movement', p. 261). In fact, he considered acceptance of Roman law as a stage in the development of legal history (Maine, 'International Law', p. 16, Cited in Koskenniemi, 'A History', p. 956). For Maine, as not all nations had accepted Roman law, only those Christian nations were subject to the international law and could aspire to form a community of nations undergoing an evolutionary development. Christian nations had abandoned many ancient and barbarous practices and were now regulated by legally sanctioned relations.

[121] Contained in Maine, Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas*. John Murray, 1861. Feaver, George. "The Victorian Values of Sir Henry Maine", in Diamond, A. ed. *The Victorian Achievements of Sir Henry Maine*. Cambridge University Press, 1991. Who argued that Maine's main work "epitomized the spirit of an age", p. 28. The theory resonated with the four stages theory about the development of all societies of Adam Smith, who predicted that all societies would evolve from the first stage of hunter-gatherers to the last one, where the world would be inhabited by merchants living in peaceful coexistence in their mutual interest. The 'Origin of Species' of Darwin was published two years before Maine's work by the same publisher. However, for Hovenkamp "Maine had probably not read Darwin." Hovenkamp, Herbert. The opening of American law: Neoclassical legal thought, 1870-1970. Oxford University Press, 2015, pp. 25-26

[122] Maine, 'Ancient Law', p. 170 (Emphasis Original)

[123] Maine, 'Ancient Law', p. 126

her family, tribe and kinship. As far as primitive relations were concerned, he argued, rights and duties were determined by the status, powerful or powerless, of family members, not from transactions between equal parties.[124] According to Maine, over centuries of legal evolution, 'family dependency' and responsibilities had been replaced by individual obligations.[125] Status, intended *à la* Austin, as a source of material power as well as of legal privileges had progressively disappeared, he argued, making private relations independent of one's personal characteristics or position within the community. Maine noted, for instance, that the relationship between slave and owner had been superseded by the contractual relation between servant and master.[126] From this, he concluded that:

> The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil society takes account.... Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract.[127]

According to Maine, societies followed a progressive and linear evolution from status to contract, from collectivist to individualist ethos, in all respects but with one exception. That exception was constituted by the family itself, whose underlying logics had been left untouched by legal evolution. In his comparative review of primitive and modern societies, Maine therefore emphasised the contrast between the principles underpinning the law governing property, will and contract on the one hand, and the law governing the family on the other. Status still determined the totality of personal rights and duties as far the latter was concerned:

> All the forms of Status taken notice of in the Law of persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we then employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been *from Status to Contract*.[128]

[124] For Maine, the family, and not the individual, was the basic unit of primitive society. Accordingly, status in ancient societies reflected the naturally-hierarchical and immutably-structured relationships which existed between individuals in the family. High status translated into power and privileges, whereas low status corresponded to dependency. In these circumstances, simple intercourse between equal individuals could not occur.
[125] Ibid. pp. 167-170. See also 133-147
[126] Ibid. p. 169
[127] Ibid. pp. 168-69
[128] Maine, 'Ancient Law', p. 170 (Emphasis Original)

Maine's evolutionary reconstruction of legal history was, of course, a fictitious allegory which disregarded many contradictory elements of legal history, starting from the contractual basis of feudalism, and the fact that contractual relations in feudal societies were also held to give way to a status.[129] Maine's theory also overlooked the peculiar characteristics of 'status' in Roman law, which was not considered a technical and legal, but merely argumentative device. It especially ignored the fact that marriage, the origin of the family, was founded on consent and had been governed, at least until the 18th century, by the same consensual and informal rules that governed any other contract.[130] Maine's theory ignored the fact that many of the ideas that underpinned the post-Roman law of contract had reached the modern age through the law of marriage.

However, Maine dressed up the division between contract and status as the product of historical research and scientific investigation. Until the early nineteenth century, the law governed interpersonal relations mixing contractual and status-based logics. By the second half of the 19th century, the notion that status governed family relations and that economic relations were governed by antithetical logics - self-reliance, rational, variable the former, dependence, emotional and permanent the latter - were embedded in the legal science itself.[131] As status took centre-stage in the law governing family relations, the status dimensions of contract were dropped. In turn, the contractual dimensions of marriage were also dropped. If civilised societies evolved from status to contract, marriage must then evolve in the opposite direction, from contract to status.

Although the claim that family relations were always governed by status, dependence and solidarity is as fictional and allegorical as Maine's description of the evolution of non-family relations, this reconceptualization, which is coherent with Savigny's own account, goes a long way in showing the extent to which the law governing marriage family relations took a radical turn in the opposite direction of contract in the transition from the medieval to the classical age. Maine's conception was immensely influential and consequential, as shown by the progressive separation between marriage and contract in legal consciousness. What followed from this separation was, *inter alia*, that contracts

[129] As Graveson put it: "This contractual basis of feudalism led indirectly, through the doctrine of estates and tenure, to the creation of definite classes, or status, identified by the possession of generalised rights and obligations, originally contractual but becoming upon the grant of the estate static. Incidents of contract through the granting of an estate thus became incidents of status. The movement was not from status to con- tract, but from contract to status." Graveson, 'The Movement', p. 263

[130] As Maine excluded from the scope of his generalisation those personal conditions which resulted from agreement, it has been argued that also marriage and the resulting status were excluded. Graveson, 'The Movement', p. 262. Not only was it clear that family was progressively excluded from contractual rationales, but as noted by the critique, it was evident that, in the case of marriage, "it is not the agreement itself which secures the status, but the State alone when the agreement has been both made and performed according to its terms." Ibid.

[131]? On the hybrid nature of interpersonal relations, see Schmidt, Katharina Isabel. "Henry Maine's "Modern Law": From Status to Contract and Back Again?" The American Journal of Comparative Law (2017)

generate rights and obligations, whereas status confers duties which are governed by public laws. Accordingly, in *Elements of Jurisprudence*, published a few years after *Ancient Law*, Holland held:

> The contract of marriage, giving rise, as it does, to a status, must obviously be governed by rules varying somewhat from those governing contracts generally.[132]

The abstract and fictitious reconstruction of a legal evolution was not merely descriptive but also prescriptive. It demanded that the law governing family relations is endowed with antithetical logics compared to those governing contractual economic relations. Hence, status did not correspond to rights and obligations determined by individuals, but to a set of pre-established duties determined by the laws of each nation. Rights and duties were determined by law and not voluntarily by the spouses by means of a consensual agreement. Holland acknowledged the symbolic value of "mutual and voluntary conveyance" in marriage.[133] However, he supported the idea that in modern societies, private and economic relations and social and family relations were governed by distinct principles:

> It may appear questionable whether the rights of husband and wife can be reckoned among those which arise by operation of law rather than out of contract. It is however submitted that this is the true view. The matrimonial status is indeed entered upon, in modern times, in pursuance of an agreement between the parties, accompanied by certain religious or civil formalities; but its personal incidents are wholly attached to it by uniform rules of law, in no sense depending on the agreement of the parties, either at the time of the marriage or subsequently.[134]

The consensual and informal conception of marriage and of family relations was virtually abandoned in 1753, when the Marriage Act submitted the creation and validity of marriage to rules and procedures established by the civil law. In the same year, Blackstone had posited the essential elements of the law of coverture. The consequences of the reconceptualization of status were far from negligible as the jurisdictional and normative space occupied by state law was further expanded. Accordingly, it was state law that granted husbands control over the body and mind of women and other family dependants.[135] At the same time, what also followed from the distinction between the

[132] Thomas Erskine Holland, 'The Elements of Jurisprudence', 1910 (11th Edition), Oxford University Press, New Yok, London, p. 173

[133] As he held that "[t]he still more modern form of marriage, possible only when the individuality of the woman has received recognition, is that of a mutual and voluntary conveyance, or dedication, of the one to the other." Holland, 'Elements' p. 130

[134] Holland, 'Elements' p. 245

[135] Holland also used the sub-category of 'family' rights 'in rem' and those 'in personam' to clarify the content and boundaries within each category. Holland sub-divided rights in rem in the categories of 'marital', 'parental', 'tutelary'

rights arising in commercial contracts and 'family rights', was that family duties could also only be enforced "to a limited extent".[136] Accordingly, the 'patriarch' would only be pursued if "he went beyond the bounds of culturally sanctioned physical abuse or denial of necessaries".[137]

The notion that marriage and family relations did not create rights *ex contractu* which could be enforced - and idea first rejected and then embraced by Story in American law - implied that family law encouraged reconciliation and altruism.[138] In contrast, in private and economic relations, the law may not encourage, but did not prevent litigation and judicial intervention. The idea of a historical progression from status to contract in all social fields but the family expanded the moral and ethical elements in the law governing family relations, but also reduced them in the law governing private and economic relations. Autonomy and individualism in market law and altruism and solidarity in family law became inherent characteristics of modern law, and the inevitable destiny of all societies that called themselves liberal and civilised. Hence, as Kennedy has argued:

> Maine's law of progress became a slogan of laissez-faire. The important thing was not the opposition of the law of person to abstract contract law, but that of legal relations [that] the state treated in a regulatory, paternalistic, communal and informal manner. Once the situation was described and understood in these terms, it followed as a matter of course, unless one was a socialist, that the category of pure contract, ruled by ideals of facilitation, self-determination, autonomy and formality, was the norm, and the end of historical development.[139]

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and 'dominical' rights and he argued that these class of rights give "control" (sic.) to husbands, over other members of the family. For Holland, marital rights give a husband the right not to be deprived, either "by force or persuasion", of his wife's society and to be "criminally intimate with her". The control over the wife's liberty and body by the husband is total. This meant that, until *Regina v. Jackson* [1891] All ER Rep 61, 1 QB 67 was decided, husbands were free to restrain the liberty of their wives by law. Holland, 'Elements', pp. 131-133

[136] Domestic rights are not only 'in rem', but also 'in personam'. However, unlike private relations which arise ex contractu, for Holland the law in "advanced systems" only enforces rights of this kind "to a limited extent". Holland discusses 'domestic' rights 'in personam' ex lege in Holland, 'Elements', pp. 184-185. An interesting question regarded damages for committing adultery. The Matrimonial Causes Act had established that a Court could order payment of a compensatory sum from any person who had committed adultery with the wife. Courts developed over time principles for assessing the damage caused by the loss of the wife, which included her assets, her assistance to the husband, her housekeeping capacities etc…Over time, however, the notion that the value of the wife, or of the husband, could be measured in monetary terms became "repugnant to modern and sensible ideas", as per Diplock LJ in *Pritchard v. Pritchard and Sims* [1967] p. 19. Eventually, in 1970, the Law Reform (Miscellaneous Provisions) Act abolished the right to claim damages for adultery.

[137] Kennedy, 'Three Globalizations', p. 33

[138] "Nonintervention was rationalized on the [classical] ground that the "sphere" of the family, based on the principle of egalitarian altruism, would be corrupted or destroyed by judicial intervention that would have to use legal tools closely associated with the conflictual individualist ethos of [contract] law." Kennedy, 'Three Globalizations', p. 34

[139] Kennedy, 'The Rise', pp. 199-200

The contraposition between marriage and family on the one hand, and contract and market on the second one made it virtually compulsory to expand personal will in contractual relations. Although Maine's aphorism that societies evolved from status to contract was historically fallacious, and in fact looked at past developments rather than predicting future ones, by the end of the 19th century, the law governing interpersonal economic relations was everywhere underpinned by an individualist ethos and contract-based principles. In contrast, the moral, political, community elements of marriage were strengthened whilst the symbolic and material importance of consent in family relations was minimised. The contraposition not only determined a paradigm shift in the law governing family and economic relations within borders, but also across borders.

3.3 The *Lex Status* of International Marriage and Divorce

The reconceptualization of status and marriage also resulted in a paradigm shift in the regulation cross-border marriage and family relations. In the pre-classical age, the *lex loci* rule and contractual principles governed personal capacity and validity, in English law as well as in European continental jurisdictions.[140] Hence, the *jus gentium* demanded that courts recognise the effects of a valid marriage contract because, following the old rule, a marriage good by the *lex loci* was good and valid everywhere. Before the classical age, English courts generally recognised the validity of marriages contracted by English domiciles abroad and the rights acquired there, even when the transaction was performed abroad deliberately with the aim in mind of bypassing the requirements and conditions set by the local law.[141] Westlake acknowledged that English law had:

> …assimilate[d] marriage to those contracts causing obligations of which an immediate performance can be demanded anywhere: and for these there was no doubt, wherever the forum contractus, with the principle of the lex loci contractus, was received, that both the form and the legality, the extrinsic and intrinsic validity, depended on the lex loci ….[142]

Over decades of application, the *lex loci* rule, which was expression of the medieval conceptualisation of marriage, had grown into what Westlake defined as the "English law of marriage for English

[140] While discussing whether marriage belonged to personal or real statutes, the English scholar admitted that although "…the fact of marriage, as one relating to status, would in the strict theory of statutes be referred to the law of the domicile, as the personal law: but it was always referred in England to the *lex loci contractus*, not only for the form of the ceremony, but also for the capacity of the parties or guardians required, in accordance with a practice of the canonists …." Westlake, 'Private International Law, 1st edition', p. 130

[141] Fraus legis (fraude à la loi) did not apply Westlake, 'Private International Law, 1st edition', p. 326

[142] Westlake, 'Private International Law, 1st edition', p. 318

persons married abroad".[143] However, when he wrote the *Treatise*, the legal consciousness had changed, and so had the conceptualisation of marriage. In line with the ongoing reconceptualization in common law and in civil law jurisdictions, Westlake declared that "marriage is status".[144] As argued by Savigny and by classical jurists everywhere, status was conferred and governed by mandatory laws. It was no constituted by a voluntary act. Since status was inherent in the person, neither personal desires nor physical movement could change it. In private international law terms, this meant that status was governed by the same 'personal law' everywhere without consideration for the circumstances and preference of the parties.

Departing from past doctrines and precedents, Westlake rejected the general *lex loci* rule.[145] Drawing on *Warrender* and *Brooks*, he advanced the division between 'formal' and 'substantial' validity of marriage, and he posited that, whilst the former could be governed by the law of the place of celebration, the latter must be without exception governed by the law of the matrimonial domicile, that is, by the law of the husband's domicile.[146] Admittedly, this rule ran against binding precedents.[147] Westlake nevertheless dismissed precedents where courts had submitted the validity of contracts, especially those of marriage, to the traditional rule.[148] For Westlake as for Story and Savigny, marriage was not like any other contract. Universal jurisprudence may have regarded it so until a few decades before, but mistakenly, confused by medieval habits of mind. Westlake held that:

> Representing marriage as a contract made at a given place, with contemplated performance in the matrimonial domicile, it may be said that the substance of the marriage, including the causes of its possible dissolution, must be affected by the place

[143] Westlake, 'Private International Law, 2nd edition', p. 53, referring, among others, to *Harford v. Morris* (1776), 2 Hagg. Cons. 423 and *Middleton v. Janverin* (1802), 2 Hagg. Cons. 437

[144] Westlake, 'Private International Law, 1st edition', p. 316. Also adding, showing the transition from the pre-classical to the classical age, that "Marriage is a status, but it is constituted by a consensual contract, and to the force of the consent, nay, to its existence, a certain ripeness of judgment is necessary, not by any positive law, but by the nature of consent itself, which universal jurisprudence merely recognises. Ibid. Notably, In the first edition, the thought of Westlake is between the pre-Classical conception and the Classical. In his words, marriage: "is, by its very nature, a contract the parties to which intend that the status produced by it shall arise immediately, as in fact it does, without reference to their possibly being (sic) from home at the time: and they farther intend that the continuance of that status, as resulting from the contract, shall be independent of any subsequent change in their domicile, and of all place whatever, so that if they at any time seek to dissolve it, and have recourse to some territorial law for that purpose, the operation of that law shall in no way flow from their contract." Ibid p. 318

[145] He accused it of amounting "to the statement that no marriage rights can be valid unless they are valid by the law of the country where, if they exist at all, they had their origin". Westlake, 'Treatise on Private International Law, 2nd edition', p. 54

[146] Lord Collins *et al.*, *The Conflict of Laws* (2013), p. 918. See Davie, Michael. "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws." *Anglo-Am. L. Rev.* 23 (1994)

[147] "[i]t is certain however that the British courts have not hitherto adopted this view, but have persevered in maintaining that no other consents than those which the lex loci contractus [requires]" Ibid. 326

[148] Here, he argued that judges had contented themselves with ascertaining the law of the place of contracting. Westlake, 'Treatise on Private International Law, 2nd edition', p. 54

> of contemplated performance to the same extent to which that place affects the operation of the marriage, or of any contract collateral to it, on property. The answer is that the substance of the marriage is not left to the choice of the parties, like its operation on their property. They are free to contract the marriage, but not to modify its substance. The existence of the marriage is an effect of contract, but its terms are not. The parties contract a mutual relation on some of the particulars of which different views are held in different countries, but as to which all nations agree in thinking it to be of the utmost social importance that all its particulars shall be determined by law.[149]

Marriage is not simply a contract. Marriage confers and corresponds to a status. Rights and duties do not derive from an agreement between the parties, but from the law of the national order that governs that status. The 'rights' and duties corresponding to the status, that is, its incidents and effects, may vary from nation to nation. But all civilised nations recognised the exceptional nature of marriage and that it its 'particulars' must be governed 'by law', and not 'by contract'.[150] Westlake thus derided courts for having recognised the substantial validity of marriages celebrated abroad based on the traditional rule "on the almost incomprehensible ground that there existed a *jus gentium* on the subject of marriage."[151] Capacity and essential validity were not governed by the *lex loci* but by what could be called the *lex status* which, in the common law, corresponded to the law of domicile.

Accordingly, the capacity to get married was governed by the *lex domicilii* of each spouse. What followed is that couples whose personal domicile was in England could no longer travel to Scotland or France and get married to evade the strict impositions of English law, for instance, on prohibited degrees or parental consent, to then return to England and have the marriage recognised under *the jus gentium*.[152] Only the formal validity of marriage was governed by the law of the country where the "tie begins to exist".[153] In contrast, the substantial validity of marriage, Westlake posited, was

[149] In the first edition: Westlake, 'Treatise on Private International Law, 1st edition', p. 328 Westlake, 'Treatise, 2nd Edition', p. 80

[150] Hence, in other Western legal systems jurists and courts reconceptualised marriage as status and used remarkably similar terms to describe the effects of this transformation in domestic law. A few years after Westlake published the first version of the Treatise, Appleton CJ laid down the 'status doctrine' in American law: "When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties and obligations of which rest, not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law, not of contract. It was of contract tha the relation should be established, but, being established, the power of the parties, as to its extent or duration, is at an end, their rights under it are determined by the will of the sovereign as evidenced by law. They can neither be modified nor changed by any agreement of parties… . The reciprocal rights arising from this relation, as long as it continues, are such s the law determines from time to time, and none other." *Adams v. Palmer* (1863) 51 Maine 480, 483

[151] Westlake, 'Treatise on Private International Law, 2nd edition', p. 53

[152] In *Mette v. Mette* (1859) 1 Sw & Tr 416 the Court invalidated the marriage between a man domiciled in England who had married his deceased wife's sister in Germany.

[153] Westlake, 'Treatise on Private International Law, 2nd edition', p. 52. Hence, when courts decided on the formal validity of a cross-border marriage, they verified that its solemnisation was carried out in conformity with the

regulated by the law of the country in "which the permanent relations of the parties destine it to continue."[154] As it has been held by the Lords in *Warrender v. Warrender*, the law governing the marital status of the spouses was the law of their matrimonial domicile, 'the home where they are to fulfil their mutual promises, and perform those duties which were the objects of the union'.

But what did the House of Lords mean by matrimonial home? Where was it located? For Westlake, it was clear that in a cross-border marriage and cases, the identification of the matrimonial home and the law governing family status must not be left to the parties but must be determined by the court.[155] Contrary to the localisation of the proper law in cross-border commercial disputes, in marriage and family relations the identification of the governing law did not require significant effort. As agreed upon by Savigny and by the virtual totality of legal scholars and courts, the matrimonial home essentially corresponded to the husband's domicile. For classical lawyers and judges, the domicile of the wife necessarily corresponded to the family home, the place where she naturally belonged and where, under the law of coverture, she must remain.[156] As the House of Lords had put it in *Warrender*:

> By entering into the marriage contract, the wife leaves her own family, and comes under the obligation to follow the fortunes of her husband, in whom the law vests a curatorial power over her: by the marriage her separate interests merge in those of the husband; her separate character is lost in his, and she is no longer capable of retaining the domicile which she had before the marriage, or of acquiring any other separate from that of her husband.[157]

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requirements of the law of the place of celebration, the *lex loci celebrationis*. This principle was not in conflict with the jurisprudence of English courts that, as far of the formal acts, judge it in accordance with the *lex loci actus*.

[154] Westlake, 'Treatise on Private International Law, 2nd edition', p. 52

[155] Westlake, 'Treatise on Private International Law, 1st edition', p. 29

[156] As seen above, the status of marriage and the doctrine of unity made it possible for husbands to restrain the liberty of their wives by law. With the transition to the classical age, what was not clear is the extent to which these rights could be enforced in court. After 1857, the Court for Divorce and Matrimonial Causes mostly heard petitions for divorce. However, the Court also entertained petitions for nullity, judicial separation and restitution of conjugal rights. Before the classical age, the enforcement of conjugal rights, which could include forcing husbands and wives to live together, was frequently ordered by ecclesiastical courts based on the contractual terms of the marriage. Failure to comply led to excommunication until the Ecclesiastical Courts Act of 1813 replaced excommunication with imprisonment which could continue for several years. But with the rise of family law exceptionalism, and the transition of marriage to status, the enforcement of conjugal rights was put in question. The Matrimonial Causes Act 1884 removed the sanction of imprisonment from the law books and substituted it with a financial order. However, refusal to comply was made into a ground for divorce. The idea that there existed legally enforceable family rights was buried by the notorious case of *Regina v. Jackson* [1891] 1 QB 671, where a deserted husband took it upon himself to enforce the "general dominion" over the wife by abducting and imprisoning her. Given the changing cultural climate, the deciding Court refused to enforce and sanction conjugal rights (Not least because they would allow the husband to act partly as judge and parley as executioner. Per Fry LJ, at p. 686 of the judgement.) It therefore constituted a landmark decision in family law because it "recognises that the 'rights' which exist between husband and wife are of a different order than (say) the rights of the parties to a commercial contract." (Cretney, 'Family Law', p. 147) However, neither the decision nor statutory law clarified what this separation meant in practice. The question of matrimonial domicile continued to raise questions, including in cross-border matters where the application of personal law rested on the idea of a common matrimonial domicile.

[157] Para. 508; Similarly, para. 526

The rule subjugating the law governing the status of the wife to the husband's *lex domicilii* after the marriage took place was of some consequence for determining the 'rights' in marriage - whose enforcement, however, was prejudiced by the rise of the classical mentality - and of great practical consequence as far as the dissolution of the marriage was concerned. With the redefinition of the logics governing family relations towards an imperative, regulatory and national paradigm, courts and scholars dealing with unresolved question concerning jurisdiction in divorce proceedings was solved in favor of the matrimonial domicile. Marriage was not an ordinary contract which parties could do and undo at will, either within the same jurisdiction, or across them, but "the basis upon which the framework of civilised society is built", as declared by the leading judge of the time, Lord Penzance.[158] Hence, as Lord Penzance declared afterwards in the case of *Wilson v. Wilson*:

> … the only fair and satisfactory rule [governing jurisdiction and, by extension, applicable law in divorce proceedings] is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws.[159]

Although the Matrimonial Causes Act had introduced simpler procedures for obtaining a divorce, marriages could only be undone exceptionally, within and across borders. Divorce by mutual consent or by private initiative was especially not acceptable.[160] This meant that special agreements concerning the dissolution of international marriages and establishing contractually rights of after marriage were declared invalid.[161] In this context, several couples and many women petitioned for

[158] Lord Penzance in *Mordaunt v. Mordaunt* (1870) LR 2P&D 103, "But is true that marriage is an ordinary contract? Surely it is something more.... Marriage is an institution. It confers a status on the parties to it, and upon the children that issue from it. Though entered into by individuals it had a public character. It is the basis upon which the framework of civilized society is built; and, as such, is subject in all countries to general laws which dictate and control its obligations and incidents, independently of the volition of those who enter upon it." (at p. 126)

[159] *Wilson v. Wilson* (1872) L.R. 2P. &M, para. 435. In *Wilson v. Wilson*, the marriage had been contracted abroad as well as the adultery had been committed abroad. The case was also remarkable because the husband, who was the petitioner, had acquired an English domicile only after the adultery. Further, the wife had never been in England.

[160] Marital rights and obligations were not contractual rights, and in principle "inalienable, and incapable of waiver." Holland, 'Elements', p. 131

[161] Mixed couples, even those who got married and continued to reside abroad, could not enter in a contract in a foreign jurisdiction that established that one of the parties should facilitate proceedings for divorce and, in return, he or she would retain the custody of the children and receive a consistent annual allowance. In principle, such contract may be valid under the *lex loci contractus*, where the couple may even be regarded as divorced, but could never be valid and generate rights and obligations capable of recognition and enforcement in English law if the matrimonial domicile had remained in England. In *Hope v. Hope* (1858) 164 ER 644, a suit for restetution of cojugal rights, an Englishman who resided had made a contract governing divorce, custody and alimony with his French wife. Even if the contract were valid under

divorce abroad, as foreign law often offered 'more liberal' grounds compared to English law and because, in some cases, it gave married women a chance to start proceedings outside the jurisdiction of the husband's domicile. Following Lord Penzance's authoritative opinion, however, case law eventually settled in 1895 that matrimonial domicile was the essential ground for jurisdiction.[162] English courts would refuse to recognise a foreign divorce on a different jurisdictional rule.[163]

Westlake was not unaware of the unintended consequences for deserted wives who would be unable to sue but in the jurisdiction of their husbands' domicile.[164] Westlake was also aware of another undesirable consequence of the new rule, the proliferation of 'limping situations'. The application of a law other than the *lex loci* and the election of a different personal law by each national order meant that an individual who was regarded as lawfully divorced and re-married in country A could be regarded as still married and, if married again, guilty of bigamy - a criminal offence - in country B. Westlake was mindful of the harmful results that resulted from the superimposition of domicile in complicated cross-border scenarios. One might be tempted to declare that the uncertainty created was as immoral and as absurd as the evasions permitted by the traditional rule.[165]

However, injustice resulting from the systematic application of the *lex domicilii* to marriage and family relations regardless of the circumstances of the parties and of their personal desires should be forgone because, in Westlake's view, "the purpose of such laws [is] protecting the morals of the inhabitants."[166] A blind refusal to recognise consensual relations was less immoral than a wilful and lawful evasion of the personal law under the traditional rules contained in the *jus gentium*. It was obvious that serious harm might follow from the blind application of the abstract rules developed by courts in combination with scholarly opinion. However, the exclusive competence of the courts of

French law, the law governing the capacity of the parties and the substantial validity of the contract was English law. Should it be tested by English law, as in *Hope v. Hope*, the contract was to be considered illegal.

[162] Le *Mesurier v. Le Mesurier* [1895] AC 517 (see Chapter 7). The matrimonial domicile also determined the competent forum in divorce proceedings. Westlake, 'Treatise, 2nd Edition', p. 80. The *lex fori*, English law, would always apply to divorce proceedings, 'independently of the volition of those who entered in marriage'.

[163] In the classical age, comity demanded that rights acquired abroad were recognised and enforced everywhere. In contrast with the general theory applicable to international contracts, but consistent with the 'status doctrine' of marriage, Westlake argued that the incidents of a status in property matters, divorce, custody etc… should not be regarded as valid everywhere, and should not always be enforced by English courts. Westlake, 'Treatise on Private International Law, 2nd edition', p. 54

[164] "The [status] doctrine would of course receive the assent of all those who make the jurisdiction for divorce depend on domicile…. But can it be pressed so far as to say that a wife deserted by her husband, or whose husband has so conducted himself that she is justified in living apart from him, and who up to the time when she was deserted or began to be so justified was domiciled or resident with her husband in England, can nevertheless not sue him in England for a divorce, she alone being any longer resident in this country?" Westlake, 'Treatise, 2nd Edition', p. 76

[165] Westlake declared: "…it is not without grave hesitation that the certainty, which was the great advantage of the old rule of the lex loci contractus can, on a matter where uncertainty is more immoral and of more dangerous example than marriage with a deceased wife's sister, be exchanged for even that degree of doubt which always attends the determination of domicile". Westlake, 'Treatise on Private International Law, 1st edition', p. 323

[166] Westlake, 'Treatise on Private International Law, 1st edition', p. 323

the husband's domicile and the systematic application of his *lex domicilii* to questions concerning family status were justified because they guaranteed the moral standards of the particular civil community to which the parties belonged and consolidated its jurisdictional and cultural boundaries.

3.4 Conflict of Laws and the Civil and Political Boundaries of National Societies

Westlake held that the law governing personal status was meant to apply to domiciled subjects only and that jurisdiction over status matters was also limited to domiciliaries.[167] The reformulation of jurisdictional rules and choice of law principles demanded that the definition and procedures for identification of domicile be clarified. In the most authoritative work on the subject, Lord Phillimore (1810-1885) had defined domicile as "a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." [168] Following Phillimore, Westlake defined domicile as the place where a person 'acquires some habits of mind'. For Westlake domicile is a condition of the mind, rather than a physical condition. Although a person could change his physical location, domicile would not change because, Westlake held, "[n]either the traveller, nor even the merchant who resides abroad, … acquires foreign habits of mind, or loses those which birth and education have instilled into him."[169]

In a contexts where individuals moved more frequently and "the tendency of the educated and leisured classes is to become cosmopolitan", domicile was to be constructed narrowly, in the sense of a permanent bond, the House of Lords pointed out.[170] Despite such qualification, Westlake conceded that the identification of domicile could never be certain.[171] Drawing on case law and general principles, however, he also proposed techniques that were key to helping courts to localise with

[167] "The provisions of a law on personal status are made for its domiciled subjects, and the exercise of jurisdiction on such status is also limited to domiciled subjects". Westlake, 'Treatise on Private International Law, 1st edition', p. 380
[168] Phillimore, Robert. *The Law of Domicil*. T. & JW Johnson, 1847, p. 13.
[169] Westlake, 'Treatise on Private International Law, 1st edition', p. 29 However, domicile could also be deliberately acquired, by showing that there is a perpetual affirmation of a new bond with a civil society. It is in this sense that we must understand Westlake's remark that a "person sui juris can change his domicile, or the civil society of which he is a member, by establishing his residence, with a sufficient character of permanence, in the territory of that civil society of which he desires to become a member, or, in the east, in the territory on which that civil society exists." Westlake, 'Treatise on Private International Law, 2nd edition', p. 265
[170] As remarked Lord Cranworth in *Whicker v. Hume* (1858) 7 H.L.C. 124, 160: "…in these days, when the tendency of the educated and leisured classes is to become cosmopolitan – if I may use the word – you must look very narrowly into the nature of the residence suggested as a domicil of choice before you deprive a private man of his native domicil." And he added, "By domicile, we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it."
[171] "…because domicile is not inferred solely from the circumstances which surround the person at the moment, but, as we shall see, the law presumes a domicile of origin, and is occupied with the changes to which that, or any other subsequently acquired, is subject." Westlake, 'Treatise on Private International Law, 1st edition', p. 31

greater certainty a person domicile.[172] In following cases, English courts further developed procedural rules for ascertaining domicile and the House of Lords laid down in *Udny v. Udny* the basic principle that civil status "is governed universally by a one single principle, namely that of domicil.[173] Accordingly, Westlake argued that, since the *lex domicilii* governed all dimensions of civil status and status was an inherent condition of the person universally valid, the law governing status also must govern capacity, in marriage contracts and in commercial transactions.[174]

The Lords, like Westlake himself, were convinced that the law of domicile was "common to the jurisprudence of all civilised nations."[175] In compiling rules for the ascertainment of domicile, Westlake in the *Treatise* and the Lords in *Udny v. Udny* thus remarked that they were respecting 'international law' and that this was derived in great measure from Roman law.[176] Of course, Westlake and English courts were aware that several legislators had chosen to replace domicile with nationality, as we saw in Chapter 3 with respect to the French Civil Code and we shall see in the next chapter on Italian private international law. And yet they maintained that the law governing capacity and substantial validity was a universal principle of jurisprudence which was not undermined by the fact that some countries opted for the *lex patriae* instead. The two connections referred to two different aspects of membership in national communities:

> The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions: one by virtue of which he becomes the subject of some particular country, binding him by the tie of national allegiance, and which may be called his political status; another by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political

[172] For instance, the necessary existence of one and only one 'domicile' at all times, the requisite of animus manendi, the physical act of moving, and a variety of other practical maxims for determining domicile which, in light of the purpose of this genealogy, it is here not necessary to review in full. Westlake, 'Treatise on Private International Law, 1st edition', p. 33-51

[173] "It is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend." In *Udny v. Udny* (1869) L.R. 1 H.L. (Sc. & D.) 441, p. 457

[174] Hence, he rejected that capacity may be governed by the *lex situs*, or by the *lex loci actus aut contractus*. Westlake, 'Treatise on Private International Law, 1st edition', p. 382. Confirmed by Courts: Capacity is governed by the law of the domicile, like for all other contracts. Held by Cotton, in *Sottomayor v. De Barros*, 1877, L. R., 3 P. D. 5. See the discussion in Chapter 8, Section 1.4. This view, which was regarded as raising an obstacle to cross-border matters, was discarded in the social age.

[175] As per Lord Westbury, ibid. p. 457

[176] In *Udny v. Udny* (1869) L.R. 1 H.L. (Sc. & D.) 441, p. 452, the Lord Chancellor, Lord Hatherley significantly held that: "I have stated my opinion more at length than I should have done were it not of great importance that some fixed common principles should guide the courts in every country on international questions. In questions of international law we should not depart from any settled decisions, nor lay down any doctrine inconsistent with it."

> status. The political status may depend on different laws in different countries; whereas the civil status is governed universally by one single principle, namely, that of domicil.[177]

The division between nationality and domicile, and between political and civil law, suggested that the *lex domicilii*, and rules of conflict of laws in general, were somehow an a-political tool. And yet the law of domicile was an essential tool for the maintenance of the national legal order. Irrespective of personal desires or temporary circumstances, domicile made the individual a permanent member of a national-civil community governed by "one body of civil law".[178] Domicile regulated personal status, "the legal position of the individual in or with regard to the rest of the community."[179] Hence, the idea of a law governing a personal status based on domicile was never in question because it afforded on states an unprecedented power to exercise power over subjects connected with the territory and with the civil society. If a link could be found between the person and the civil community, however arbitrary and weak, the application of the law of domicile was justified.[180]

As Westlake acknowledged, there might be cases where the maintenance of legal order did not require the superimposition of national laws. In the case of economic relations, the parties could themselves establish the governing law.[181] In the case of family relations, however, jurisdiction and applicable law depended on the "peculiar connection" and the "permanent tie" that bound the person to his civil community.[182] Like the *Heimath* of Savigny, domicile is to Westlake more than a connecting factor. Although Westlake dismissed the adoption of the *lex patriae* as an attempt to excite national identities "with somewhat fantastic theories as to the influence of race on national life", domicile and

[177] Lord Westbury in *Udny v. Udny*, p. 457
[178] Westlake argued: "Every person is … treated as a member of some one civil society, governed by one body of civil law, which is adopted when a law having reference to his person is sought. … And the tie by which a person is attached to a civil society is or includes domicile." Westlake, 'Treatise on Private International Law, 2nd edition', pp. 262-263
[179] *Niboyet v. Niboyet* (1878) L.R. 4 P.D. 1 C.A. per Brett L.J. at p. 11
[180] Westlake, 'Treatise on Private International Law, 1st edition', p. 28
[181] In principle, capacity in economic transactions still determined by domicile. As affirmed by Cotton L.J. who delivered the judgement of the Court of Appeal in *Sottomayor v. De Barros* (no. 1) (1877) L. R., 3 P. D. 5., p. 5: "It is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of the domicile. However, the case concerned a contract of marriage. The decision will be therefore criticised by other courts, including in *Sottomayor v. De Barros* (no. 2) (1879), L.R. 5 P.D. 04. In *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67 Sir Creswell argued instead that "In general the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract is made."
[182] "For while the maintenance of order compels in a thousand cases the exercise of jurisdiction over persons who are not generally the subjects of the sovereign before whose courts they are cited, […] there are many other purposes, having a peculiar connection with the person, for which jurisdiction cannot properly be exercised but in a place with which the person has some permanent ties, and which yet cannot without an equal inconvenience be reserved for the tribunals of his own sovereign.". Westlake, 'Treatise on Private International Law, 1st edition', p. 29

nationality therefore constituted two sides of the same coin: the legal unity between individuals, families and the people.[183] The analogy between family and state was thus revived and redefined.

The modern nation-state and its system, regardless of the technical rule chosen for governing civil status, could not do without a tool that so effectively connected individuals, the civil society and the national order. Compared to nationality, domicile may even be more effective in consolidating the nation-state order. Domicile represented the shared ground between territorial and personal elements of sovereignty that medieval consciousness and *conflictus legum* had failed to reconcile.[184] In the Middle Ages sovereignty was disaggregated. In the modern age, Westlake argued, "the state must indispensably be grounded in both personal and territorial arrangements".[185] If grounded in the territorial idea of connection, the law of governing personal status could bridge the gap between personal and territorial elements. As Westlake put it, "[t]he separate relations of the state to the soil and to persons have their meeting-point in the idea of domicile or home."[186]

4. Private International Law and the Cultural Boundary of European Society

In the classical age, private international law solidified cemented legal, jurisdictional and cultural boundaries between civil societies.[187] At the same time, a system of conflict of laws could only function against a background of common value and ideals. Although English law courts and scholars were hostile to the idea of a *jus commune*, Westlake argued that only foreign laws and rights which are part of the law of all civilised nations could also be recognised and given effect by English courts. Private international jurisprudence only demanded the recognition of laws and rights "between nations which possess common ideas on all the topics with which law is conversant."[188] Savigny had also constructed a system of conflict rules that only applied to members of 'community of the law of the people'. Accordingly, while discussing international marriage, Westlake pointed out that a common juridical conscience was still necessary, although the *jus commune* was no more:

> [A universalist] conception indeed can only become the basis of a system of private international jurisprudence, on the supposition that none of the territorial laws which it considers differs so widely from the others of them, as to shock the conscience of any of the nations to whose members the system may cause it to be applied. In other words,

[183] Westlake, 'Treatise on Private International Law, 2nd edition', p. 31
[184] Westlake, 'Treatise on Private International Law, 1st edition', p. 28
[185] Ibid.
[186] Ibid. 29
[187] Halley, 'Family Law, Part I', p. 32
[188] Ibid. p. 181

> the extraterritorial acceptance of rights founded on territorial laws can only exist as between countries which resemble each other in the leading characters of their civilization, and none of which departs in any considerable degree from the average standard of those characters.[189]

For European classical jurists, at the root of European civilisation was Christianity and Christian morality. Westlake thus specified that in "eastern countries … the views and ways of the people are so different from ours that the general rules of private international law could not be applied to them".[190] As marriage was no longer conceived as a consensual agreement but as a status which indicated the permanent membership to a civil community delimited by a common culture, and as classical jurists emphasised the moral dimensions of the law governing family relations, the division between Christian civilised nations and eastern barbarous people could not but reflect especially on the regulation of cross-border family matters, and on marriage in particular. As Lord Penzance held in the landmark case of *Hyde v. Hyde*, which set the model of marriage for the decades to come:

> Marriage has been well said to be something more than a contract, either religious or civil – to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of "husband" and "wife" is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite lights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must … have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.[191]

In accordance with *Hyde v. Hyde*, for a status of marriage to be recognised, the union must be permanent, it must be between one man and one woman, and it must be monogamous, regardless of the personal law of the parties and of the legal order in which it was formed. Westlake similarly argued, before *Hyde v. Hyde*, that the 'status of marriage' could be recognised throughout

[189] Westlake, 'Treatise on Private International Law, 1st edition', pp. 143-144
[190] Westlake, 'Treatise, 2nd Edition', p. 59
[191] *Hyde v. Hyde* (1866) L. R., P. & D. 130, Para. 133

Christendom, in whatever jurisdiction the parties might go, "unless some strong motive be shown."[192] In contrast, he pointed out, "rights flowing from the Mahomedan law of marriage could never be enforced in a Christian country."[193] As it had also been argued by Joseph Story, despite their validity by the *lex loci celebrationis* and by the *lex domicilii*, and even if monogamous *de facto*, marriages celebrated in jurisdictions allowing polygamy were not entitled to universal recognition because in violation of the general definition and imperative characterisation of marriage in Christendom.[194]

Savigny had maintained the same. Although he despised the application of absolute and imperative laws in international cases because they prejudiced international harmony and equality of treatment, Savigny also specified that courts could refuse to apply foreign laws in the case of practices which were incompatible with the conscience of civilised Christian societies, as in the case of polygamous marriages.[195] A 'community of independent nations' had been created out of the ashes of the Roman Empire and of the *Christianitas*.[196] Hence, only Christian states were sufficiently civilised to be members of the *völkerrechtliche Gemeinschaft*.[197] This idea was as important for conflict of laws as it was for international law. For Savigny, Westlake, Maine and other prominent international lawyers, both private international law and public international law were based on a Christian ethos of civilised nations.[198] As noted by Kennedy, Savigny and, by extension, all classical jurists regarded:

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[192] "Into whatever jurisdiction they afterwards come, the status being recognised as identical throughout Christendom, it will be accepted, unless some strong motive be shown for looking behind it to the contract on which it was created. Westlake, 'Treatise, 1st Edition', p. 324

[193] Westlake, 'Treatise, 1st Edition', p. 181

[194] Story, 'Commentaries, 1st edition, pp. 103-104. Even if the spouses had capacity to get married in accordance with the *lex domicilii*, polygamous marriages would produce no effect except for a criminal charge. The dictum of Lush L.J. in *Harvey v. Farnie* that "if one of the numerous wives of a Mohammedan was to come to this country, and marry in this country, she could not be indicted for bigamy, because our laws do not recognise a marriage solemnised in that country, a union falsely called marriage, as a marriage to be recognised in our Christian country". (1880) 6 P.D. 35, at p. 53 Not only the validity of the 'Mohammedan marriage' would be denied, but also the wife would be prosecuted. Since the only possible form of marriage was the union of one man and one woman to the exclusion of all others, even a marriage which was 'potentially polygamous', i.e. involving parties whose personal law allowed polygamy, but in a monogamous union, would not produce no effect if celebrated in England

[195] Savigny rejected the application of absolute and imperative laws ('absolute', 'gebietende') because they defeated international uniformity and equality of treatment, except in two cases. Guthrie, 'Private International Law', pp. 122-123 Savigny argued that strictly mandatory laws could prohibit legal transactions involving specific peoples and that courts could refuse to apply foreign laws in the case of specific practices which were incompatible with the conscience of civilised Christian societies. the acquisition of immoveable property by Jews. The forum would have to take the Jewish faith of an individual before recognising a contract of purchase by a foreign national, independently of his national law or of his law of domicile. Guthrie, 'Private International Law', p. 35. Notably, however, for Savigny Jews to whom Prussian laws applied could purchase property abroad, if the absolute laws of that country so allowed…. Thus, a local court could refuse recognition of a polygamous marriage even if the *lex domicilii* of the husband considered it valid and binding. Guthrie, 'Private International Law', p. 236

[196] See footnote 119

[197] From the above, it becomes clear that Savigny's international common law is limited to those countries in which commercial and other forms of intercourse take place and are held together by a common Christian morality. Guthrie, 'Private International Law', p. 27

[198] See Nys, Ernest. "La science de droit des gens" in Memories of John Westlake, in Williams, John Fischer (ed.), *Memories of John Westlake*. Elder & Company (1914)

> …the highest form of family law [as] Christian, with the embrace of monogamy and the prohibition of divorce. Polygamy in Muslim lands is to be sure a genuine legal regime, reflecting the spirit of the peoples in question, but it is at a lower "stage" of development. The legal family is the analogue, within private law, of the state within public law. […] At the national level, the purpose of all "people's law" is the propagation of Christian morality. At the next level, the coherent whole constituted by Christian Europe, which is the basis of international law, has Christian states as its building blocks.[199]

As with Savigny, so with Westlake, what was so attractive was not merely the formation of a new general theory, but the prospect of a community of legal convictions working out a universal practice. However, the universal practice had clear geographical and cultural borders. Conflict of laws could strengthen jurisdictional and cultural borders between national communities and, at the same time, by dividing between the core and periphery of civilisation, it could also reinforce the common boundaries of Christian nations.[200] These boundaries, however, were also subject to of classical ideas. The division between core and periphery of civilisation meant that, in principle, English courts should refuse to recognise any right and status that violated the Christian ethos. They thus refused to recognise the status of polygamous marriages.[201] And yet they did recognise a foreign contract for the sale of persons, even if English law prohibited slavery.[202] As far as commercial matters, conflict of laws facilitated free trade and cross-border exchanges. In contrast, marriage and family matters were embedded in Christian morality. Through international law, public and private, Europe could thus try to make the whole world resemble "Europe's idealized image of itself."[203]

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[199] Kennedy, 'Family/Patrimony', p. 825

[200] For this purpose, Westlake dedicated himself to the promotion of a rational and universal legal science that would facilitate the cooperation between civilised societies. Throughout his life, he helped to set up a variety of platforms for promoting the legal science and private and public international law among civilised nations. See Nys, 'La science'

[201] courts did not recognise a marital status created in a country allowing polygamy, even if merely 'potentially polygamous', because it did not consider polygamous unions marriages at all. English courts therefore refused to recognise the validity and consequences of 'actually polygamous' unions but even those of marriages which were 'potentially polygamous' under the law of the place of celebration. Accordingly, the 'spouses' would not be recognised any of the rights, duties and reliefs that were granted to parties to a Christian marriage. See Cretney, p. 72. English law also created the offence of bigamy for those cases that lacked those "exotic associations traditionally associated with polygamy". Ibid. p. 73 Under the Offences against the Person Act 1861, S. 57, bigamy became punishable by imprisonment for up to seven years. There existed statutory defences. If the spouse had been absent for seven years, he or she would be presumed dead, and the accused would be excused.

[202] So tolerant was English law to the practices of other civilised nations that English courts even recognised the status of slavery and gave effect to a contract for the sale of slaves made by English subjects valid by the *lex loci contractus*, although English law prohibited slavery. *Santos v. Illidge* (1859) 8 C.B.(N.s.) 861. The enslaved status was obviously the most extreme example of a status that did not exist in England. English law treated slaves from other colonies as free men, but also recognised the consequences of the enslaved status arising or continuing abroad. Compare to *Somerset v. Stewart* (1772) discussed in Chapter 2.

[203] Skouteris, Thomas. *The notion of progress in international law discourse*. TMC Asser Press, 2010 cited by Koskenniemi, 'A History', p. 944, Westlake founded in 1862 the 'Association Internationale Pour Le Progrès des Sciences Sociales' through which he championed free trade and freedom of opinion across all countries and jurisdictions. The Association the British organization 'National Association for the Promotion of Social Science' set up by Gladstone, Stuart Mill and others in 1857. While acting as the English representative for *Association Internationale Pour Le Progrès*

des Sciences Sociales, Westlake became acquainted with Alphonse Rivier (1835-1898) and Tobias Asser (1838–1913). Westlake helped Rolin and Asser to publish the first journal on international law, the *Revue de droit international et de législation comparée* in 1868 (see Chapter 6, section?). The Revue advocated the abolition of slavery and capital punishment and the adoption of binding rules on the conduct of warfare. The abolition of capital punishment and that of slavery as well as of servitude, the promotion of freedom of association, and the advocacy in favor of just laws on war and on the conduct of warfare and of arbitration. Koskenniemi, 'The Gentle Civilizer', pp. 15-16

Chapter 6

Classical Legal Thought and Italian Private International Law

The rise of classical consciousness generated profound changes in international law and in internal orders, in civil law and in common law jurisdictions. Regardless of local circumstances and legal tradition, its migration from jurisdiction to jurisdiction engendered comparable processes of transformation. This is what has transpired from the previous two chapters. This is also what the final chapter of the second part of this genealogy indicates. Chapter 6 examines the reconfiguration of Italian law that resulted from the irresistible ascendancy of classical consciousness and from the dominance of the national model. In the 19th century, Italian governments resumed the process of modernisation and centralisation started in the second half of the previous century. Reforms implementing the classical intellectual and institutional programme took the form of codification. The confidence in reason "generated a belief that in order to be modern a nation must organize its whole legal life in a codified rational plan."[1]

Italian governments were aware that legal uniformity constituted a formidable instrument of government. Rulers of Italian states were also conscious that legal unity by means of codification would be instrumental for bringing a sense of cultural unity where there was none. It is against a background characterised by legal, cultural and political fragmentation that, following the political unification of Italy, the first uniform civil code was swiftly introduced (section 1.1). Given the urgency of modernising and uniforming the law across Italian regions, the drafters of the first Italian civil code did not pay close attention to questions concerning the code's organisation and structure. The dispositions of the code nevertheless reveal remarkable similarities with principles and conceptual divisions being adopted abroad, and most notably the classical contraposition between the law of the market and the law of the family.

The contraposition between the family and family and the market and its governing law was a crucial part of the classical program and of its reformative agenda, although Italian historians and lawyers often consider this a peculiar Italian development. The radical dichotomy between the principles and ideas governing market and family relations, and its employment by Italian jurists, was as important

[1] Wieacker, 'A History', p. 364.

for reforming the law governing relations which were 'wholly internal' as it was for redefinition of the character, boundaries and functions of the law governing cross-border disputes. Italian private international law, like English and German law, has its own classical hero figure. If the leaders of the German and English legal renovation were Savigny and Westlake, the indisputable hero of Italian law in the 19th century was Pasquale Stanislao Mancini (s. 1.2).

The theory of private international law elaborated by Mancini reveals that European jurists in the 19th century may have put forward different rules and methods for dealing with cross-border disputes but, at the same time, that they were under the influence of the same legal consciousness. Mancini established himself as the main advocate of the principle of nationality. Although he campaigned for the principle of nationality, in contrast to domicile which had been supported by Savigny, Mancini was a classical cosmopolitan (s. 2.1). Like his counterparts in Germany and England, he defended the principle of equality between nationals and foreigners (s. 2.2). Mancini based his system on the conceptual division between mandatory and voluntary law, the former governed by the principle of nationality, the latter by that of freedom (ss. 3.1-3.2). This division, Chapter 6 will show, was nothing but a distinct manifestation of the contraposition between the laws governing market and family relations.

Although the dichotomy between the family and the market was dressed up in different forms, methods and rules in distinct jurisdictions, what the second part of this genealogy demonstrates is that it responded everywhere to one fundamental objective of the classical intellectual and institutional program. The transformation of Italian private international law served the dual purpose of cementing the cultural and jurisdictional boundaries of national society and, at the same time, of erasing jurisdictional obstacles to cross-border market transactions (s. 4.). This chapter will conclude by showing that, by the end of the 19th century, classical consciousness had lost its traction. Anticipating what would constitute one fundamental critique of social jurists, Mancini was celebrated for his intellectual achievements and erudition. However, he was also blamed for having replaced the law with a theory and for having prioritised abstract concerns and theoretical divisions over concrete problems.

1.1 Constitution by Codification: Constructing Italian Society with Family Law

With the popularisation of classical beliefs across Europe, the dominant assumption among legal scholars, regardless of their philosophical beliefs and legal tradition, was that the origins of law were to be found in national conscience. By analogy, legal scholars came to embrace everywhere the idea

that legal unification, whatever its form, could place in the national conscience a sense of popular and cultural unity other than a feeling of territorial and jurisdictional boundedness, especially where there was none. It is in this climate that, with the unification of the various territorial entities under the Italian monarchical state (1861), legal codification became the most pressing item on the agenda. Italian jurists posited that the state must eliminate parallel orders and competing sources which stood in the way of national unification.[2] Italian lawyers in the second half of the 19th century shared the view that:

> It is beyond doubt that civil law, and its legal science, are among the most profoundly affected elements of national life and national thought that will benefit from the positive effects of the new national destiny. The law is, similarly to language, immediate expression, and powerful guarantee of the character of nations; Italian law is inseparable from the Italian nation.[3]

Accordingly, in 1865, the first Italian government introduced the *Codice Civile*, the so-called Pisanelli Code. Although some jurists argued that the code should have followed the conceptual division elaborated by the Pandectists,[4] the first post-unity Italian code did not change the structure in three books of the French Civil Code.[5] Structural and organisational reforms were not as urgent as national unification by law. Hence, the Pisanelli Code maintained the pre-unification structure, but extended its reach to the whole Italian territory. Although it did not follow the organisation proposed by the Pandectist school headed by Savigny, the contraposition between family logics and market logics which was spreading across European jurisdictions, constitutes one of the fundamental division in the Pisanelli Code.

The combination of this fundamental element of classical legal thought and the consolidation of the national order is especially visible in law of marriage and divorce. The provisions of the book on the

[2] De Nova, 'Introduction', p. 541

[3] «Non v'ha dubbio che anche il diritto civile, e la sua scienza, siano fra quei lati della vita e del pensiero nazionale, che primi e più profondamente subiranno il benefico effetto dei nuovi destini della nazione. Il diritto è, al pari della lingua, immediata espressione, e potentissima guarentigia del carattere delle nazioni; un diritto italiano è inseparabile dalla nazione italiana.» Gazzetta dei Tribunali di Milano nel 1859, nn. 1 e 2, p. 4. Cited in Solimano, 'L'edificazione'.

[4] Carlo Francesco Gabba (1835-1920), for instance, in 'Studi di legislazione comparata in servizio della nuova codificazione italiana, Milano 1862, pp.12-17, had denounced the lack of organic coherence in the classification of the French code, and he proposed to follow instead the system and classification advanced by Savigny.

[5] The Code was divided between three books, titled "Delle persone", "Dei beni, della proprietà e delle sue modificazioni", "Dei modi di acquistare e di trasmettere la proprietà e gli altri diritti sulle cose.". The vice-president Pisanelli had in mind a different organisation for the Code, and possibly a different system altogether. However, to him a radical break from the past was "cosa prematura, e pericolosa" and thus did not dare to discuss "un'opera pià profonda e radicale di quella più modesta e più ristretta che era consentita dalle circostanze". He therefore preferred not to take leave from 'tradition', even though that tradition was, by and large, invented. Citations from Ungari, 'Storia', pp. 176-177

person essentially incorporated ecclesiastical laws in the 'secular law' of the Italian state, making them applicable to Catholics as well as to atheists, to Jews, and to Protestants.[6] The Code therefore established one uniform civil marriage for all persons, regardless of personal faith and geographical residence.[7] Although the 1865 Code referred to the 'contract of marriage', marriage corresponded to a personal status which produced uniform rights and obligations, irrespective of personal preferences.[8] The drafters of the Code felt the need to differentiate the contract of marriage from other contracts. Hence, the Minister of Justice, Giuseppe Pisanelli (1812-1879) – after whom the Code was named – declared:

> It has been declared that the matrimony be contract; if what it is meant with this proposition is that, in the marriage, there exist certain conditions, which also occur in other contracts, the truth has been declared: but it is a mistake to intend with this proposition that marriage is nothing but a contract. In the conscience of all men, they have been and will be forever distinguished those two [legal] actions, the selling of property and the matrimony.[9]

The law of marriage was regarded as a valuable instrument for nation-making purposes.[10] Accordingly, the 1865 specified the procedures for entering marriage as well as the effects of the marriage status. Almost as a corollary of the redefinition of marriage as a contract *sui generis*, Italian jurists and the drafters of the Civil Code agreed that the possibility of divorce and re-marriage should be ruled out, no matter what the circumstances of the parties or their wishes.[11] Article 148 therefore established that the marital tie is inherently undissovable, and that only death could put spouses

[6] Similar to the English law, although the celebration could take the shape preferred by each confessional group, Title 5 imposed in fact uniform rules and the same law to Italian citizens of all backgrounds and faiths. Ungari, 'Storia', p. 159

[7] One option was to follow a federal model and to let the pre-unification civil laws regulate marriage in different ways in each jurisdiction. A second option was to adopt provisions along the lines of the Neapolitan pre-unification code of 1819 that guaranteed to the Catholic church a virtual jurisdictional monopoly over marriage matters. A third option, not incompatible with the second one, was to allow non-Catholics to contract a civil marriage. Title 5 of the Civil Code of 1865 eventually established a 'Contratto di Matrimonio' for all. Ungari, 'Storia', p. 158. The provisions introducing civil marriage were approved in the Senate with a margin of one vote only, despite the protests of increasingly more vocal Catholic groups.

[8] Title 5

[9] The Minister of Justice Pisanelli thus declared that «Si è detto che il matrimonio sia un contratto; e se con questa proposizione si è voluto dire che nel matrimonio vi siano alcune condizioni, le quali si verificano pure in altri contratti, si è detto il vero: ma si cade in errore quando quella proposizione si voglia intendere che il matrimonio non sia altra cosa che un contratto. Nella coscienza di tutti gli uomini sono stati e saranno essenzialmente distinti questi due fatti, la vendita di un podere e il matrimonio.» Raccolta di lavori parlamentari, Vol. 1, p. 8, and p. 36

[10] See Chapter 1 in Seymour, Mark. Debating divorce in Italy: marriage and the making of modern Italians, 1860-1974. Springer, 2006

[1111] Pisanelli declared «quando una legge collocasse sulla soglia del matrimonio e nel suo seno l'idea del divorzio, essa avvenelerebbe la santità delle nozze, ne deturperebbe l'onestà, perché quella idea si muterbbe nelle mura domestiche in un perenne ed amaro sospetto.» Cited in one of the most important conflict of laws cases concerning recognition of divorce, trated in the next part, and in 'Regime matrimoniale, Doc III, p. 107

asunder. As in all other jurisdictions, the law governing marriage and divorce, and more in general family law, was embedded in moral and religious beliefs. Catholicism considered divorce a sin. Hence, the Code made divorce impossible.[12]

As in other European jurisdictions, the law governing marriage and the family came to represent the national spirit and unity. To dissolve a marriage meant to dissolve the nation. To permit divorce was to generate selfishness and chaos. When divorce was put on the table, proposals for its introduction were invariably rejected. This was what took place in 1849, some years before the unification and the introduction of the Codice Pisanelli, when a special legislative commission started working on some reforms for the Reign of Sardinia which became known as the '*Progetto Boncompagni*'.[13] The commission proposed to reform the law of inheritance,[14] and to introduce divorce for members of specific religious communities.[15] After protests broke out in civil society, and the greater part of the Parliament and of the scholarship dissented, the proposals were abandoned.[16]

In the second half of the 19th century, several further unsuccessful attempts were made to introduce divorce legislation in Italy.[17] The reformer and deputy who was most committed to reforming family law was Salvatore Morelli (1824-1880). Morelli's proposals were met with disdain and failed to be converted in law.[18] The widely-shared desire not to undermine the unique national character,

[12] Bonfield, Lloyd. "European family law." The History of the European Family: Family Life in the Long Nineteenth Century, 1789-1913 (2001), pp. 109-54

[13] Notably, among the members of the commission was also Pasquale Stanislao Mancini. Erik Jayme, Pasquale Stanislao Mancini (1817-1888) L'Attualità del suo Pensiero, Atti Acc. Rov. Agiati, a. 237 (1987), s. VI, v. 27(a), 1989

[14] Some proposals were made with the goal of improving women's access to inheritance – most notably, daughters who had benefitted from dowry and had lost their succession right – and the general circumstances of younger family members by placing some restrictions over the powers deriving from patria potestas. Although the legislative proposals on parental authority and on inheritance rights received the approval of the Parliament, they were eventually abandoned and never became law. Ungari, 'Storia', p. 137

[15] Notably, divorce was only possible for non-Catholics, whereas civil marriage should have been the same for all, independently of faith. Ungari, 'Storia', pp. 137-138. Vitale, Eligio. Il tentativo di introdurre il matrimonio civile in Piemonte, 1850-1852. Edizioni dell'Ateneo, 195, pp. 107-122

[16] «Le petizioni che piovvero, lungo l'iter del progetto Boncompagni, sulla Camera subalpina e poi sul Senato già annunziavano i milioni di firme che verso la fine del secolo e nel primo '900 figureranno quelle antidivorziste." e "Ma anche in questi termini il progetto sollevò una violentissima opposizione sia in parlamento, sia nella magistratura e in larghi strati della popolazione ai vari livelli della scala sociale.» Ungari, 'Storia', p. 138

[17] See Chapter 2 in M. Seymour, 'Debating Divorce'.

[18] In 1867, the earliest reform proposal introduced by Morelli 'Abolizione della Schiavitù domestica con la reintegrazione giuridica della donna, accorando alla donna diritti civili e politici' recognised women full legal personality, but also introduced 'free' divorce (Art. 2) and recognised legitimacy of all children born from Italian women, independently of their marital status (Art. 5, interestingly also providing that their surname should correspond to that of the mother). A second legislative proposal, introduced by Morelly in 1874, understood marriage in a contractual sense, and provided that the parties should simply register their marriage in the civil registrar, that they ought to be free to stipulate contractual rights and obligations (Art. 1), and that parties should also be free to choose either of their surnames (Art. 3). Unlike the previous two, a third proposal, giving women the opportunity to testify in court, was made into law (Law n. 4167 of 9 Dic. 1877). This constituted the only reform of statutory civil law prior to first world war.

embodied in marriage and in family law, constituted a fundamental obstacle to proposed reforms.[19] In the classical age, the law governing family relations was conceived everywhere as special, traditional and political, and Italy was in this respect no exception. Hence, Pisanelli remarked that the first book of the code that concerned family law was "a branch of special laws, occupying some intermediate ground between the civil code and the Statute [Albertino]", the basic law of the Italian Kingdom.[20]

Classical consciousness carried forward the idea that the family was entrenched in the moral matrix of each national society. At the same time, it also popularised the notion that the market was free of moral and political considerations. Hence, as to contract law and the law of the economy, which were modelled on the Napoleonic provisions, the Codice Pisanelli was "geared to the proper functioning of trade."[21] In fact, compared to the French experience, the Pisanelli Code celebrated contractual freedom and free will even more radically.[22] It created unprecedented opportunities for private economic initiative. It democratised contractual capacity and freedoms - with the exclusion of women - with no consideration of the specific conditions in which contracting parties found themselves.[23]

The 1865 Code therefore ignored pre-existing structural and substantial inequalities in private and economic relations. The provisions of the 1865 Code also points at the pervasiveness of the category of contract and contract law in the classical age. Contract was regarded as the most suitable and ideal instrument for most interpersonal relations: for creating and enforcing obligations; for transferring property; for dealing with labour rights and working conditions in the industrial and commercial society of the 19th century; etc.[24] Regardless of the nature of the contract in question, the Code ignored

[19] For instance, V. Polacco, *La nuova legge sui probiviri, con particolare riguardo alla capacità giuridica delle donne e dei minorenni,* in «MT», XXIV (1893), pp. 721-724 who warned that "straordinaria prudenza" ought to be used with respect to family laws and succession laws "ove più si rispecchia il genio nazionale ed il costume paesano."

[20] «…l'idea fondamentale del codice civile è quella della proprietà, e tutte le sue disposizioni si aggirano intorno ai beni. Il primo libro del codice concerne invece i diritti di famigli, per modo che a me è sempre paruto che questo primo libro sia una branca di leggi speciali, ed intermedie tra il Codice Civile e lo Statuto […] Il codice civile riguarda l'individuo; il primo libro del codice civile la società di famiglia; lo Statuto la società politica.» Cited in Ungari, 'Storia', p. 163. Pisanelli thus emphasised that the civil code as a whole concerned the individual, but "the first book … concerns the social family [and] the Statute concerns the political body".

[21] Wieacker, 'A history', p. 366. Its second and third books did not amend the pre-unification provisions inspired by the Code Napoleon. Eventually, in 1866, the Reign of Italy also promulgated its own Code of Commerce. The two subjects were therefore kept separately.

[22] As seen before, the French Civil Code submitted personal freedom to the puissance public of the state. On this aspect, see Cavanna, Adriano. 'Storia del diritto moderno in Europa, II, Le fonti ed il pensiero giuridico.' 2005, pp. 577-579

[23] This trend, as emphasized here, can be generalised to Western Europe. As far as Italy is concerned, Grossi, Paolo. *La cultura del civilista italiano: un profilo storico*. Giuffrè, 2002. ibid. Grossi, Paolo. *Introduzione al Novecento giuridico*. Gius. Laterza & Figli Spa, 2012

[24] G. Chiodi, La funzione sociale del contratto: riflessioni di uno storico del diritto, in F. Macario e M. N. Miletti, La Funzione Sociale nel Diritto Privato tra XX e XXI Secolo, 2017, p. 152

the circumstances of the parties also when it came to its enforcement.[25] Italian law thus governed non-marital transactions starting from the assumption that individuals are equal and freestanding members of the civil and political society who are bound to their choices.[26] Hence, in the travaux préparatoires, it was held that:

> …the principle that informs this part of the Code is that of liberty [which is granted] to the contracting parties [who are free] to regulate mutual obligations in the most suitable fashion they reckon, without giving courts the chance to modify them according to equity.[27]

In the classical age, the law governing market relations was reconceptualised everywhere as devoid of moral and social implications. Market relations were governed in accordance with the principle of free will. The liberal and modern logics of the market were universal.[28] Hence, rules and principles governing market relations in one place could be imported and exported everywhere.[29] Local provisions could be modernised taking inspiration from foreign developments.[30] In contrast, the rise of classical legal thought brought to the extreme the community logics of family law. The family was the site of tradition. Its dimensions must be necessarily national and local. Not long after the Code was adopted, a commission, headed by the Neapolitan jurist Pasquale Stanislao Mancini (1817-1888), was put in charge of drafting some 'liberal' amendments in family matters. Its proposals, however, were dropped.[31]

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[25] But the heinous implications of violating the terms of the contract did not bind only the parties in all cases and circumstances, no matter to what misery its respect might lead. Article 1126 established that the debtor was responsible for violation of the contractual terms even in the case of unforeseeable circumstances or force majeure.

[26] The Code therefore reiterated the maxim that 'pacta sunt servanda' (Art. 1123)

[27] Come afferma la Relazione Governativa, «il principio che informa in questa parte il Codice è quello della libertà lasciata ai contraenti di regolare le loro obbligazioni nel modo che meglio avviseranno, senza dare facoltà al Giudice di modificarle a sua volta sotto l'aspetto dell'equità» (Relazione sul Progetto del terzo libro del Codice Civile presentato in iniziativa al Senato dal Ministro Guardasigilli (Pisanelli) nella tornata del 26 novembre 1863, n. 45 cited in Chiodi, 'La Funzione Sociale', p. 152. Similarly, the Relazione della Commissione del Senato sul progetto del Codice Civile del Regno d'Italia, presentato dal Ministro Guardasigilli (Pisanelli) nelle tornate del 15 luglio e 26 novembre 1863, n. 45bis, ivi, n. 237, at p. 311, held that: « … ci è grato ravvisare nel progetto più fermamente e schiettamente applicato il principio della libertà piena delle convenzioni e dei patti, che costituiscono legge tra i contraenti, né consentono al magistrato facoltà di variare o modificarne i termini e gli effetti giuridici». Cited in ibid.

[28] Halley, 'Family Law, Part I', p. 95. Although the historiography has noted the individual and liberal elements governing contract on the one hand, and the community and moral elements governing marriage and family relations, the two developments have not been examined together.

[29] The Italian code of commerce was amended in 1882 inspired by reforms which had been introduced in Germany. A. Padoa Schioppa, La genesi del codice di commercio del 1882, in Saggi di storia del diritto commerciale, 1992, p. 157 et seq. Another version in Padoa Schioppa, A. "La genesi del Codice di commercio del 1882, in 1882–1982." *Cento anni dal codice di commercio.* Giuffrè, 1984

[30] As in other European states, the Pisanelli Code was the result of a compromise between national and bourgeois interests. Wieacker, Private law, p. 365 discussing the German BGB, the Italian civil code of 1865 and the Swiss Law of Obligations of 1884

[31] Among the proposals was among which was the division of property between spouses. It is significant that Mancini, one of the drafters of the Code, was inspired by the liberal and patriotic ideas of Vincenzo Gioberti (1801-1852), with whom Mancini had entertained an epistolary exchange while drafting the Codice Pisanelli. Gioberti had proclaimed the

1.2 Pasquale Stanislao Mancini: The Principle of Nationality and the *Jus Gentium*

From the viewpoint of this genealogical reconstruction, the greatest novelty introduced by the Codice Pisanelli did not originate in its substantial provisions. Rather, it was contained in the '*Questioni Preliminari*'. This introductory part of the Code enshrined the first codification of rules and principles governing legal collisions. As seen in Chapter 3, a mix between local practices and Statutist ideas had until then applied in cross-border disputes. The vagueness of the principles produced contradictory results and a situation of uncertainty that had led Giovannetti to lament that the law made Italians strangers in their homeland.[32] Pursuant to the general objective of national unification, the 1865 Code introduced uniform conflict rules and principles. It did so under the guidance of the Neapolitan émigré Mancini.[33]

Italian developments in the field of Private International Law which occurred in the 19th century, both in theory and positive law, can only be understood by considering the contribution of Mancini to the so-called Italian or Neo-Latin school and his symbiotic relation with the transformation of the dominant mentality in Western Europe.[34] Mancini had left Naples for Turin, the future capital of the unified Italian state, to teach international law.[35] Mancini was well known to his European colleagues, Westlake included.

Westlake had helped Alphonse Rolin (1835-1898) and Tobias Asser (1838-1913) to publish the first journal on international law, the *Revue de droit international et de législation comparée* in 1868. For

primacy and richness of Italian juridical ideas, but, at the same time, he also supported the idea that nations ought to progress and civilise in conformity with a common enlightened and liberal spirit. Carteggi di Vincenzo Gioberti, Lettere di illustri italiani a Vincenzo Gioberti, pubblicate con un proemio a cura di L. Madaro, Roma 1937. Cited by Solimano, 'L'edificazione', footnote 63

[32] Ballarino, 'Diritto Internazionale', p. 57

[33] It has been for long debated whether Mancini already had in mind what would become his private international law theory at the time of the drafting of the Pisanelli Code. Following the argument of Nolde, Boris, La Codification du Droit International Prive, Martinus Nijhoff, 1936, p. 55, (which was not substantiated by concrete evidence) the historiography for long believed that Mancini did not. However, recent research by Nishitani (esp. 'Mancini e l'autonomia della volontà nel diritto internazionale privato', *Rivista di diritto internazionale privato e processuale*, (2001)) as well as the extensive bibliography of Erik Jayme, point out that the most important architectural elements of what was to become his theory of private international law were already in Mancini's mind when the Questioni Preliminary of the Code were drafted. In his lecture of 1854/1855, Mancini examined several theories of private international law. Without going as far as that, I believe it would be sufficient to detect that the code of 1865 incorporated the three foundational ideas of the theory advanced by the Italian jurist, the notion of 'ordre public', the principle of 'party autonomy' in voluntary matters, and that of 'nationality' in mandatory matters.

[34] For an early account, see Fusinato, il principio della scuola italiana neldiritto internazionale privato, Archivio giuridico, 542 (1885); Diena, La conception du droit international privé d'après la doctrine et la pratique en Italie, 17 Academie de Droit Itnernational, Recueil des Cours, 347 (1927). See also, De Nova, Rodolfo. "New Trends in Italian Private International Law." *Law and Contemporary Problems* 28.4 (1963)

[35] The neapolitan lawyer Mancini was exiled from his place of birth in 1848. He was invited to teach at the University of Turin where the chair of 'International law' had been set up for him. For a biographical note, see Erik Jayme, Pasquale Stanislao Mancini (1817-1888) L'Attualità del suo Pensiero, Atti Acc. Rov. Agiati, a. 237 (1987), s. VI, v. 27(a), 1989

this purpose, the group also consulted Mancini who supported the project enthusiastically and asked the founders to treat international law as a subject proper.[36] Mancini was, like Westlake, an expert of both private and public international law. He believed that the two disciplines were sides of the same coin, the *jus gentium*.[37] Public and private international law, he argued, were underpinned by the same universal principles. Mancini famously argued that the principle of nationality stood at the foundation of the *jus gentium* and of he ratin[38]

Making the principle of nationality the core of his international law theory, Mancini paid tribute to the Savignian idea that nations possessed different spirits and histories.[39] In the 19th century, historians, philosophers and jurists examined the national question from a variety of viewpoints and its many implications for the formation of states and societies, including the legal one.[40] The Italian school enthusiastically embraced the idea that law, and private law in particular, constituted the core of national life.[41] Hence, private law ought to govern the life of citizens within the jurisdiction of their countries, but also outside their territory. In personal matters especially, the law of nation-states must command them and direct their interactions.

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[36] Rodolfo di Nova, 'Pasquale Stanislao Mancini' in Institut de droit international, Livre de centenaire: évolution et perspectives du droit international, Basle, Karger, 1973, p. 5. Asser will found The Hague Conference together with Gustave Rolin-Jaequemyns (1835–1902).

[37] Throughout his works, published in Italian as well as in other European languages, Mancini did not hesitate to call private international law the 'jus gentium', or 'droit des gens', or 'diritto delle genti'.

[38]At his inaugural lecture in Turin in January 1851, Here, he argued that "in the genesis of international laws, the Nation and not the State represent the basic unit, the rational monad of science" in *Della Nazionalità come fondamento del Diritto delle Genti*. *Prelazione al corso di Diritto internazionale e marittimo pronunziata nella R. Univeristà di Torino dal Professore Pasquale Stanislao Mancini nel dì 22 gennaio 1851*, Botta, 1851, pp. 46-47 (Trans. A.)

[39] On the face of it, Mancini took an antithetical approach compared to Savigny with respect to historicism and codification, at least from a superficial reading of his essay – obviously written after one of the most famous works of Savigny – ('Mancini, Pasquale Stanislao. *Della vocazione del nostro secolo per la riforma e la codificazione del diritto delle genti e per l'ordinamento di una giustizia internazionale: discorso per la inaugurazione degli studi nella R. Università di Roma*. Stabilimento Civelli, 1874.). Although he professed himself an admirer of the erudition of Savigny on multiple occasions, the Neapolitan jurist warned about the risks following from a want of enlightenment, humanism and reformism. He argued that for the Historical School, "rational Law, as it was conceived by Kantian philosophy and French legal thought in the 18th century, and as the liberal revolutions of England and of France have applied it, with errors and excesses, it does not exist, or it is dead letter: there is no other real and living law but the Law which is the fruit of customary practices, and which develops as a result of its natural and, so to say, fateful course. Any piece of legislation which comes from other sources is artificial and sterile. In this system, it makes no sense to speak of the influence of reason and of institutional justice; the advancement of the law is as spontaneous as that of the language; this development is only possible for a kind of natural growth similar to that of a plant. This School then, rigorously confined within its borders, not enlivened by any beam of rational light, affirms the brutal fact at the expense of the real power of the Law and of that of unending justice; it takes away from the free agency of men who question the precepts of reason any effective action and influence on the progress of written laws and of civil institutions: these jurists, sectarians of fate who declare that philosophy, which is the free cultivation of reason, is unable to do any good, place a veil over the greatness of the idea of Law, the might of human freedom, and over the creative activities and achievements of the genius which we find in the great reformers of human societies." Ibid. P. 34-35. Translation by the author. However, Mancini also argued that the "Italian School of International Law rests on an intimate alliance between rational and philosophical principles of Law with conclusions drawn by the learned and meticulous research of the Historical and Experimental School." Mancini, 'Della Vocazione', p. 36 (Trans. A.)

[40] Renan, Ernest. *Qu'est-ce qu'une nation?*. République des Lettres, 2012 (reprinted)

[41] De Nova, 'New Trends', p. 808

However, like Savigny, Mancini also feared the consequences of irrational nationalism, and rejected the territorialism and those set of principles and rules that facilitated its actualisation in the international sphere. In Naples, Mancini had been influenced by the ideas of Giambattista Vico (1668-1744). Particularly significant for the development of Mancini's political and legal thought was Vico's enlightened vision of a community of civilised and independent nations governed by law.[42] For Mancini, the *jus gentium* must incorporate the seed of nationality to protect the distinct nature and separate history of the European nations, but must also include other principles to protect individual freedoms and the coexistence between different people.

The Civil Code of 1865 therefore incorporated the principle of nationality. However, it also enshrined rules and principles consistent with classical cosmopolitanism that was believed to the foundation of the law of nations in the classical age. The civilising mission of the new *jus gentium* and of the Code was also at the heart of the project of the *Institut de Droit International* which had been founded by Alphonse Rivier with the help of Westlake and other internationalists, including Mancini. The legal civilizing mission imagined by Savigny and shared by classical jurists was the constitutive ambition of the Institute. The founders of the *Institut* adopted a constitution - drafted by a student of Savigny - which declared that their goal was 'to promote the progress of international law, by applying itself to becoming a medium of the legal conscience of the civilized world'.[43]

The inaugural lecture of the *Institut de Droit International* was delivered in 1873 by Mancini. The theme of the lecture was the supranational codification of private international law.[44] In the classical age, jurists supported the nationality principle and, at the same time, universalism, but they were wary of the risks of absolutism, arbitrariness and ultimately injustice that would follow from either an abuse

[42] For Mancini, the independence of nations and the coexistence between them constituted the ultimate goals of international law. Erik, Jayme, 'L'Attualità', p. 27

[43] Article 1 of the Institute's Constitution: 'Il a pour but de favoriser le progrès du droit international, en s'efforçant de devenir l'organe de la conscience juridique du monde civilisé.' There is no specific reference to private international law in the Constitution, or in the report on the founding session in Ghent in 1873 (*Annuaire de l'Institut de Droit International* (1877) p. 11. Yet, as it has been pointed out, considering the background of some of the Institute's founding fathers (notably Asser and Mancini), there can be no doubt that private international law was included in the general term 'international law'. De Boer, 'Living Apart Together', p. 9. The wording used in the Statute were clearly evocative of Savigny's. The statute had been drafted by Johann Caspar Bluntschli, who was Professor of Political Science at the University of Heidelberg and a student of Savigny in Berlin between 1827 and 1828.

[44] The lecture was later published in the form of an essay under the evocative title of *Utilità di rendere obbligatorie per tutti gli stati sotto la forma di uno o più trattati internazionali alcune regole generali del diritto internazionale privato per assicurare la decisione uniforme tra le differenti legislazioni civili e criminali*. In his lifetime, it was published in *Journal de droit international privé*. 5 (1874), pp. 45-96. The lecture was reprinted in the 100th anniversary under the title of 'Le Système de Droit International Privé de Pasquale Stanislao Mancini', Società Italiana per l'Organizzazione Internazionale, 1973. See Koskenniemi, 'The Gentle Civilizer', p. 62

of the nationality principle or from supranational codification.[45] Mindful of the dangers and divisive effects of the pan-European legislative mission of Napoleonic France, in his opening speech Mancini argued that a uniform European code should not be introduced at the cost of the unique histories of each European people.[46] This also meant that distinct civil laws should not be obliterated, since the unique psychological and physical traits of each peoples had also resulted in different national constitutions and laws.

Like Savigny, Mancini did not deny the theoretical possibility as well as the practical advantages of the code, including a civil code common to all peoples.[47] However, he argued that a top-down codification would actually create an impediment to collective progress. He speculated that European peoples would never submit to a uniform code without universal consensus. Given this fundamental reservation, a uniform law governing all exchanges occurring between European individuals would neither be possible nor desirable. Notably, he argued that there was, in theory, one exception: economic and commercial matters.[48] A process of 'legal assimilation' and substantial supranational codification might be possible:

> …at most, in particular matters, such as trade and maritime issues, mainly in light of their nature and character which is essentially international and universal, it could also bring about uniformity even as far as to include peripheral issues; it may even be the case that at one point in the future we will adopt a universal Code of Commercial Law and a universal Maritime Code.[49]

Consistent with the classical conceptualisation of market relations as neutral and governed by the same principles everywhere, Mancini argued that supranational unification could only be pursued in commercial matters but not in those legal relations and legal institutions where cultural differences between the people were more pronounced.[50] The universality and neutrality of the law governing the economy, and the uniqueness of national family laws was firmly embedded in European legal consciousness. Mancini therefore argued that especially 'the organisation of the family' fell within

[45] Savigny argued that even the enlightened legislator is victim of his arbitrary will. F. C. Von Savigny, Vom Beruf, p. 81. For classical jurists, the role of the lawgiver should thus be limited. All that the legislator should do is to reduce or remove legal uncertainty and to bring to light the real law that originates in the history of the people, the Volksrecht.
[46] Mancini, 'Système', p. 8
[47] Ibid. p. 6
[48] Ibid. pp. 6-7
[49] Ibid. p. 9 (Trans. A.)
[50] According to classical legal thought, "The law of contract, on the other hand, was or should be internationally uniform: whether by choice of *lex loci contractus*, by the establishment of free-trade zones like Great Britain, by outright imperial domination, or by the ultimate harmonization of the law merchant, contact dissolved interjurisdictional boundaries while marriage cemented them" Halley, 'Behind the Law', p. 5

that category of 'national traits' which could never be made subject of a supranational reform or regulated by means of a universal code.[51]

2.1 The Advantages and Perils of Supranational Codification

In the classical age, the source of laws governing the family had to be the history, traditions and culture of each nation, in family matters in general, in family relations in particular. Against this background, setting aside market relations, Mancini emphasised that a hypothetical European legislator could never hope to achieve complete uniformity in substantive law. He labelled the idea of the uniform civil code a "*exagération d'une verité limitée*" that hid a dangerous illusion.[52] Due to the lack of a common law and more frequent interactions between individuals belonging to different nation-states governed by separate laws, the question of how to properly settle legal collisions had become a reason of concern for legal scientists. [53] It is in this context that the international codification of conflict rules was discussed at the *Institut*.

Mancini argued that every nation, every civil and political community, had an innate right to set and design its laws at will, consistent with its history and unique features. Nation-states could establish that, in specific circumstances, nationals abroad and foreigners within their territory, be subject to their civil laws.[54] However, every sovereign was also bound by the 'universal law of mankind' to respect the natural rights of foreigners within the jurisdiction and the rights acquired abroad by its nationals. Nation-states should not enforce their laws arbitrarily, violating the natural rights and liberties of individuals, natives or foreigners alike. The same idea had been expressed by Savigny in 1849. The same concept that Mancini expressed in 1873, he had already expressed in 1853, when he declared that:

> The laws and the codes, which are fallible products and expression of a relative truth, as it is understood by State legislators, are not the source of the rights and of the liberties of men; on the contrary, they carry an obligation to secure individual rights and liberties, including those of foreigners, in an equitable and proportionate manner. If they do not,

[51] Ibid. p. 7
[52] Ibid.
[53] The lecture elucidating Mancini's theory of international law based on the principle of nationality was only going to be published some two decades after, in 1873 in Naples, but Mancini's disciples ensured that his ideas would be given wide exposure well before the year of printed publication. Italian conflicts scholars thus applied the theory in their own writings even before the printed version was made available to the public. Among Mancini's were Pescatore, Pierantoni, Esperson, Fiore, Lomonaco, but also Dutch like Asser Josephus, French scholars like Weiss, Despagnet, Valeéry, Zitelmann and von Bar in Germany, and Belgians like Laurent and Rolin. Ballarino, 'Diritto Internazionale', p. 31
[54] Mills, 'The private history', p. 22

> they violate the basic principles of justice, and at the same time they violate the rights of men ("*droit des gens*"), because each State has every interest to ensure the legitimate rights and liberties of its members, and also to have them respected and recognised (abroad) by other peoples.[55]

Mancini, like Westlake and Savigny, strived for national independence. However, sovereign independence did not warrant the arbitrary rejection of foreign laws and of rights acquired abroad by persons, be they citizens or not.[56] As a member of its drafting commission, Mancini ensured that the Codice Pisanelli included an equal protection clause for foreigners.[57] But the protection of this 'true and perfect right' was to be fulfilled by states not only as an obligation towards its citizens, but towards mankind in general. Lack of fulfilment constituted a violation of the *jus gentium*.[58] Of course, as a jurist and statesman, Mancini was aware that the capricious and whimsical desires of sovereigns might lead nation-states to violate the *jus gentium* and:

> …the only way to stop, or at least to reduce as much as possible the chaos and risks that follow from a state of affairs so extra-ordinary is the stipulation, among different States, of one or more international Treaties in order to establish some conventional (universally applicable) rules and to make them mandatory in cases of conflicts between state laws, whether relating to the person, to things, or to actions.[59]

The combined effect of national codification and incompatible conflict rules threatened to undermine international private rights. Sovereign states might legitimately refuse a "single cosmopolitan Code" consisting of substantive laws applicable to every individual, but they should nevertheless adopt multilateral conventions which include uniform conflict rules ("*égale et identique*") to ensure the protection of private rights across space.[60] Without such conventions, municipal conflict of laws would inevitably drift apart, also resulting in systematic violations of international law.[61] Hence,

[55] Mancini, 'Système', p. 14 (Trans. A.)
[56] Ibid. p. 11
[57] Starting from Article 3 of the Civil Code. Dispozioni Preliminari: "Foreigners are admitted to the enjoyment of the same civil rights as citizens".
[58] Mancini, 'System', p. 13. As he put it, «L'Etat, expression de la volonté et des intérêts communs, faillirait à son but et à sa raison d'être, si, au lieu de reconnaitre, de respecter et de garantir les droits et les libertés inoffensives des individus, il les méconnaissait ou les limitait. Or, de même que l'individu a le droit d'exercer sa liberté tant qu'elle ne blesse pas la liberté des autres, on reconnaît que c'est un droit vrai et parfait, non-seule vis-à-vis du reste du genre humain, parce que la conservation et la garantie des libertés de chaque homme ne peut avoir d'autre limite rationnelle que cette même protection et garantie des libertés juridiques accordées à tous les autres.» Ibid.
[59] Ibid. p. 18 (Trans. A.)
[60] Ibid. p. 15
[61] Ibid. p. 19

jurists must participate in the definition and codification of "universal rules of justice which are necessarily common to all peoples".[62]

Mancini advocated the harmonisation of conflict rules at international level.[63] This goal might be a hard task to achieve for European jurists since the belief in the *jus commune* had long faded. However, like the virtual totality of his contemporaries, Mancini was convinced that without common principles governing cross-border disputes the advance of the community of civilised nations would become impossible.[64] Other than Westlake's vision, Mancini's proposal for a codification of private international law is also consistent with Savigny's 'categorical imperative'.[65] It is too often forgotten that the German scholar had also argued that so despicable was unpredictability and injustice at international level that uniformity of treatment in conflicts between laws:

> … might be brought about by means of juridical science, and the practice of the tribunals guided by it. It could also be effected by a positive law, agreed to and enacted by all states, with respect to the collision of territorial laws. I do not say that this is likely, or even that it would be more convenient and salutary than mere scientific agreement; but the notion of such a law may serve as a standard to test every rule that we shall lay down as to collision. We have always to ask ourselves whether such a rule would be well adapted for reception into that common statute law of all nations.'[66]

The idea of an international law containing the general theory against which municipal conflict rules can be evaluated, rejected or reformed was widely supported by classical conflict experts. Savigny believed in fact that the general theory at its adoption at national and international level was in the process of becoming a sort of binding international customary law.[67] Mancini also thought of his theory of private international law as part of a collective effort to define a greater supranational legal framework which should govern legal collisions everywhere, what he referred to as the *jus gentium*.[68] In common with all classical conflict experts, Mancini did not act as a specialist who was searching

[62] Ibid. p. 9 (Trans. A.)
[63] Westlake not only envisaged the possibility, as Savigny also did, but confidently hoped that the time was ripe for bringing about uniformity in Conflict of Laws. He thought that "neither the parliament nor the government of this country will hesitate to cooperate towards so desirable an end." Notably, added in the second edition of 1880 which was published after many international projects had been set up. Westlake, 'A Treatise', p. 46
[64] Mancini, 'Système', p. 18
[65] "The Kantian analogy was noted by F.K. Juenger, '*Choice of Law'*, p. 39, with references to R. de Nova, 'Introduction, pp. 435 et seq and p. 463, and Neuhaus, Paul Heinrich. *Die Grundbegriffe des internationalen Privatrechts*. Vol. 30. Mohr Siebeck, 1976, pp. 54-55
[66] Guthrie 'Private international law', pp. 92-93
[67] Ibid. pp. 25-33
[68] Mancini and Savigny helped to popularise CLT as far as India and Latin-America. De Nova, 'Introduction', p. 494

for solutions to legal collisions which would only work for the Italian context.[69] Like medieval jurists, he was looking for universal principles.

2.2 Italian Private International Law and its Place in Classical Legal Thought

As a representative of the Italian government, Mancini pursued the adoption of multilateral conflicts treaties.[70] As one of the most influential international lawyers of his time, as member of the *Institut de Droit International* and in his capacity as international lawyer, Mancini participated in the collective elaboration of common principles of general validity and he tried to persuade governments everywhere to enter multilateral conventions. Whether codified in treaties and in national legislation or not, Mancini believed that nation-states have a legal obligation to recognise foreigners' rights and foreign laws.[71] If recognition of international private rights was a mere concession, it would be impossible to ensure international justice and the peaceful coexistence of civilised societies:

> It is no use to hope for substantial and serious progress in the international cilvilisation and in the relationship between States, unless at the foundations of international private law stands the principle of a binding legal obligation to recognise and respect the rights of foreigners rights and to abstain from regulating through municipal law legal relations that, due to their nature, ought to depend on the authority of foreign laws.[72]

Equal treatment was necessary to support the creation of an international community. It was also required to promote international commerce and foreign investment. The principle of equal treatment,

[69] As Koskenniemi has argued, [p]rivate international law was a supranational expression of legal relationships, not a part of the national law of this or that State. This was precisely the ethos of Westlake and Mancini, too, who had both attacked the standard view that the use of anything else than the *lex fori* was always merely a matter of comitas gentium." Koskenniemi, 'The Gentle Civilizer', p. 44

[70] To that end, in March 1963, he had a motion approved by the Chamber of Deputies inviting the Italian government to take the lead in negotiating an international treaty establishing uniform conflicts rules. Mancini, 'Système', p. 20 Mancini also served as Member of the Italian Parliament and he was Minister of Foreign affairs for Italy after the Unification. In 1867, he was put in charge by the Italian Prime Minister Rattazzi of chairing the negotiation regarding a common set of rules governing the civil rights of foreigners. Jayme, 'L'Attualità', p. 28

[71] As he put it, «…l'idée d'un devoir rigoureux et parfait d'une justice internationale vis-à-vis de l'autorité juridique, exige nécessairement l'égalité la plus complète … dans la reconnaissance des droits des individus et des peuples étrangers.» Mancini, 'Système', p. 15. Equal treatment between nationals and foreigners had been defended by other prominent Italian jurists. In his rather critical commentary to the preliminary provisions of the Code, Gabba, for instance, argued that equal treatment was justified by the progress of science, and that it appeared obligatory by comparing civil law with natural law. C. F. Gabba, Gli artt. 6-12 del titolo preliminare del codice civile Italiano, in Annali della giurisprudenza italiana, I (1866-1867), p. 4. Of course, there were also detractors of the ideal of equal treatment. In particular, some jurists affirmed the necessity of imposing a condition of reciprocity. N. Rocco, Dell'uso e autorità delle leggi del Regno delle Due Sicilie considerate nelle relazioni con le persone e col territorio degli stranieri, 1837

[72] Mancini, 'Système', p. 14 (Trans. A.)

devoid of all conditions of reciprocity, was therefore included in the Civil Code of 1865.[73] Equal treatment between natives and foreigners, in private law and in private international law, was not a mere courtesy.[74] Equal treatment, argued Mancini, is a "strict duty of international justice" which a sovereign state who is part of the international community cannot escape without violating the law of nations ("*droit des gens*").[75] The modern *jus gentium* required that the rights of citizens and of aliens were respected across borders, regardless of their membership of a specific political or civil community:

> …in the same way as the law cannot unjustly limit individual liberties of persons who live under the same political power, so individuals should not cease to exercise their freedoms the moment they cross beyond the edges of that society and they start again among other people and nations. Indeed, the right of private law belongs to men as men, and not (to men) as members of a political society.[76]

The elaboration of rules and principles determining in which cases the application of territorial law is warranted and in which cases courts must apply foreign law instead must start from the above premise. Similarly, states ought to have faith and give effect to foreign decisions, a principle codified the Italian code.[77] Given these universalist premises, it cannot come as a surprise that Mancini saw some value in medieval doctrines.[78] He noticed, as had Savigny, that their medieval predecessors had

[73] Articolo 3, «Lo straniero è ammesso a godere dei diritti civili attribuiti ai cittadini.» Before being included in the Code, the equal treatment provision was subject to lengthy discussions. Discussions started with the earliest proposal after the unification for a revision of the Codice Albertino by the Minister for Justice G. N. Cassinis dating 1860. The second reform project by Cassinis, dating 1861, specified that the foreign nationals ought to be domiciled in Italy for having equal rights. Other projects of reform, such as that of 1873, explicitly mentioned reciprocity of treatment of Italian citizens abroad as a condition for equal treatment. See G. Saredo, Del godimento e dell'esercizio dei diritti civili, in La legge, 13 (1873), III, pp. 154-155 (cap. del vol. II del Trattato delle leggi, conflitto delle leggi nei rapporti di diritto internazionale privato), and G. Astengo, A. De Foresta, L. Gerra, O. Spanna, G.A. Vaccarone, Codice Civile del Regno d'Italia confrontato con gli altri codici ed esposto nelle fonti e nei motivi, Firenze-Torino, 1866, p. 110 et seq.).

[74] He dismissed the idea of a comitas gentium as mere courtesy. For Mancini, acknowledging that the legal circumstances of foreigners and the recognition of the force of foreign laws in the domestic legal system depended exclusively on a concession based on mutual interest meant that sovereignty, according to its own interest and fancy, may or may not make that concession; as result, against such arbitrary and discretionary context, it would be pointless to rationalize a subject such as PIL constituted by principles and organized into a system. Mancini, 'Système', p. 12 The 1865 Code dropped the Statutist method and rejected the conditions of reciprocity stipulated in other European civil codes.

[75] He advocated the adoption of his system because, in his own words, "(legal) science cannot consider th[e equal] treatment [between foreigners and locals] but as a strict duty of international justice, which a nation cannot escape without violating the law of nations ('le droit des gens'), without breaking the link which binds together the human species in a large community of law […]." Mancini, 'System', p. 13 (Trans. A.)

[76] Ibid. p. 31 (Trans. A.)

[77] As a result of Article 10 of the C.C. of 1865 and Article 941 of the Code of Civil Procedure

[78] Mancini, 'Système', p. 27 and limited the territorial applicability of 'real statutes' to the territory where the property is located, independently of the origins, domicile or nationality of the proprietor. Like Savigny and Westlake, Mancini preserved the old rules governing immobile and mobile property. but he also conformed them to the precepts of his own theory. Mancini held that immovables were always subject to the laws of the place where they were situated. Movables were instead subject to the law of the proprietor's nation, except in those cases where the law of the situs contain contrary

developed unilateral and multilateral rules starting from the assumption that private rights should be recognised without consideration of space. Through a process of rational exposition of universal principles, the medieval *jus gentium* also determined which law was competent, he argued.[79] Mancini thus held that:

> Savigny spoke well when he argued that the Statutory theory is neither entirely true nor entirely false, and that it contains just a part of the truth. Its first merit is that of being an 'a-priori' theory, designed purposefully so as to encompass all the matters covered by conflict of laws and of statutes. Its second merit is to have recognised, in those particular questions concerning personal status ("*du statut personnel*"), a unique strength which derives from their essence, from their nature which extends their effectiveness in all countries ("*une force propre et dérivant de leur essence, de nature ò en étendre l'action dans tous les pays*"), even outside the (national) territory.[80]

Despite the merits of their theories and their virtuous motives, Mancini denounced the lack of coherence which was typical of the medieval habits of thought, and warned that private international law could not be grounded in "*une théorie qui depuis des siècles flotte sur une telle mer d'incertitudes*".[81] These words echo the critique of Westlake, of Giovannetti and others who dealt with medieval theories in the 19th century. He thus dropped the medieval approach. In line with the classical approach, Mancini believed that legal collisions could be resolved rationally and logically by considering the nature of the legal relation at the centre of the dispute, and that nation-states constituting the international community were under an obligation to apply aprioristic conflict principles and rules. Savigny had also argued that:

> We must be convinced that the leading principle of modern legislation and practice does not consist in the jealous maintenance of [a sovereign's] own exclusive authority; nay, that there is rather a tendency to the promotion of a true community of law, and therefore to the treatment of cases of conflict according to the essence and requirements of each legal relation, without respect to the limits of states and the territory of their laws.[82]

dispositions. Notably, Mancini reached this conclusion not by investigating the territorial scope of real laws, but from an examination of the (territorial) essence of immobile property.

[79] Mancini, 'Système', p. 22

[80] Ibid. p. 28

[81] Ibid. p. 27

[82] Guthrie, 'Private International Law', p. 100

Mancini then pointed out that civilised states that are part of the international community have a legal obligation to apply, in specific circumstances depending on the characteristics of the legal relation, a municipal law other than their own. Like Savigny, Mancini was convinced that this would promote an international community of civilised nations and that it would encourage cross-border exchanges. However, Mancini also acknowledged that, adopting a formal seat-selecting method, the determination of the law governing relations which once fell within the ambit of personal statutes would be far from straightforward. Due to the reality of international life prevalent in the 19th century, in many occasions, a legal relation might possess more than one 'seat'.[83]

> …if the person, the thing and the action belong to different States, by proposing to look for the seat of a legal relation, we will certainly not follow a better criterion and will not apply more safely the law in order to settle the dispute; on the contrary, we may give rise to greater confusion.[84]

Due to the risks raised by the classical method, especially in an age where cross-border transactions had increased and, with them, also their complexity, Mancini believed that the aim of legal scientists and of private international lawyers should be to elaborate coherent concepts and logical classifications which would enable courts to assign a specific law to each legal relation. Uncertainty could be avoided by embarking on a "careful examination" of the relations governed by private law and of their affinities and differences, and by elaborating a comprehensive and coherent sub-division of private law relations. Mancini therefore endeavoured to come up with a coherent classification that could be received in every jurisdiction and could become part of the new *jus gentium*.

For Mancini, the most important division in private law was that between 'mandatory' law and 'voluntary' law.[85] Relations governed by *diritto privato necessario* were subject to the principle of nationality, whereas relations ruled by *diritto privato volontario* were governed by the principle of freedom. With respect to the former, Mancini held that the *lex patriae* was competent. With respect to the latter, he submitted questions arising in legal collisions to the 'autonomy of the parties'. Besides this division, Mancini submitted real property to the principle of territoriality and he added the general

[83] Mancini, 'Système', p. 62
[84] Ibid. p. 25. And he added that « si la personne, la chose, et l'acte appartiennent à des Etats différents, en se proposant la recherché du siège du rapport jurisdicque, on n'obtiendra certainement pas un critérium meilleur et une application plus sûre pour décider la question; peut-être même donnera-t-on lieu à de plus grandes confusions.» Ibid. (Trans. A.)
[85] As he argued, "[a] careful examination […] leads to distinguish, when it comes to the private law of foreigners, two parts, one mandatory, the other voluntary." Ibid. p. 32 (Trans. A.)

waiver that relations which disturb public order are subject to the principle of sovereignty.[86] This classification, I would argue, reflects on the one hand the classical division between the law and the logics of the market and the law and the rationales of the family and, on the second one, national prerogatives.

3.1 The Voluntary Part of Private (International) Law: The Law of the Market

The preliminary provisions of the Civil Code of 1865 and Mancini's theory provide evidence of the widespread influence of classical ideas. Although numerous are the differences with the classical approach developed by Savignian, the basic division between *diritto privato necessario* and *diritto privato volontario* echoed the classical dichotomy between the law of the family and the law of the market based on which the German scholar developed his systematic approach to legal collisions. Similarities do not end here. Like Savigny did not have Germany in mind when he had written his eight book of the *System of Modern Roman Law* but every member of the *völkerrechtliche Gemeinschaft* so Mancini in his vast bibliographical production did not elaborate a theory that should only apply to Italy, but he developed what he considered rules that were universally applicable for solving legal collisions.

This is how we should understand the basic division between necessary and voluntary part. The voluntary part of private international law concerned 'goods' ('*i beni ed il loro godimento*'). Within the scope of the 'voluntary part', Mancini included those laws governing the production, exchange and distribution of goods, such as contracts and their formation, obligations and their fulfilment, etc.[87] Of course, as Westlake and Savigny had also pointed out the reality of transnational commercial life in the 19th century made it difficult to apply traditional rules. Mancini was aware that in too many cases it would be too difficult to indicate with sufficient certainty the natural seat of a contractual relation. Consistently with Savigny's proposal, Mancini argued that, with respect to those matters which fell within the scope of the voluntary part, the parties could choose their personal law or the *lex fori* as applicable law.[88]

However, Mancini did not stop there. Instead of limiting the choice to these two laws, contracting parties could choose a third law, for instance the law of the place where the contract had been made. In line with this idea, the Codice Civile of 1865 provided that "[a]s far as these relationships and

[86] See Nishitani, 'Mancini', p. 30
[87] Mancini, 'Système' 33
[88] This, in the Italian Civil Code. Disposizioni Preliminari, Articolo 9 stipulated that the application of national law is optional and voluntary.

transactions are concerned, a person can choose to comply with its national law, if so he wishes; however, where his actions do not violate the public order, he may also act in conformity with a set of rules which differ from those written in the national law books."[89] Pursuant to the principle of freedom, in cross-border contractual matters falling within the voluntary part, Italian private international law gave paramount consideration to personal preferences, and made it possible for the parties to choose virtually any law.[90]

The principle of liberty affirmed individual power, *puissance individuelle*, virtually at the cost of the force of law, the *puissance de la loi*, which was so dear to nation-states.[91] Mancini acknowledged that, if the legal relation had been created with the purpose of acquiring, enjoying or disposing of a material good, but its legality derived from mere personal will ('*volunté humane*'), "the most serious result would be the suppression of the prerogatives of national and personal law."[92] Mancini therefore accepted that liberty cannot be absolute. He posited that jurists and legal systems must "rest freedom insofar as it is harmless, and no state has any interest to disallow it."[93] Hence, the limit to voluntary subjection of legal regimes of one's preference was not based on substantial and material considerations, but on the abstract notion of it being harmless (*liberté inoffensive*) to other individuals.

Mancini thus incorporated the classical liberal understanding of freedom and the dominant view of self-sufficiency of private law relations into his theory of private international law.[94] Placing autonomy of choice within a minimal regulatory framework and subjecting it to the vaguely defined principle of sovereignty (see next section), there was little or nothing to fear for nation-states. Accordingly, in his inaugural speech at the *Institut de Droit International*, Mancini asked rhetorically: "Why should the foreigner give up his faculty to submit to this (voluntary) part and to his national

[89] Mancini, 'Système', p. 33 (Trans. A.). For Mancini, Should the person not chose otherwise, the law regulating obligations is the law of the place where the contractual obligations were established. ('Disposizioni Preliminari', Art. 7 of the C.C.)
[90] Disposizioni Preliminari, Art. 7-9 of the C.C. For Mancini, the rule that established that the forms of an act were governed by the *lex loci actus* could be waived in favour of more suitable laws.
[91] However, differently from what some argue, the principle of liberty, as conceived by Mancini, did not turn upside down the maxim according to which a provision made by an individual cannot abrogate a provision imposed by law (*hominis vincit provisionem legis*). An individual would still be subject to state laws. In internal substantive law of civil systems, private autonomy refers to the capacity of individuals to act within the ambit of laws which can be derogated (norme dispositive), but it is not possible to derogate from imperative norms (norme imperative). Private autonomy thus merely gives parties the freedom to bypass the non-mandatory rules in line with the wishes of the legislator, thus the hierarchy between ruler and subject making clear.
[92] Mancini, 'Système', p. 24 (Trans. A.)
[93] Ibid. p. 34 (Trans. A.)
[94] As Wieacker has argued "[i]n creating a self-sufficient system of private law imbued with a general theory nineteenth century positivist legal science not only incorporated the methodology of the law of reason but also gave scientific expression and intellectual legitimacy to the relevant attitudes of the bourgeois society of the day Wieacker, 'A History', p. 431

private law?"[95] Like Savigny, Mancini thus also assumed that, subject to some limits protecting public order, will power and *laissez-faire* must constitute the underlying principle and objectives of the law cross-border economic relations and disputes.

Mancini's support for the principle of personal autonomy in voluntary contractual relations was more than a reflection of private autonomy in municipal law.[96] It was an expression of assumptions, schemes and ideas that dominated the scholarship everywhere. The theory advanced by Mancini consisted of more than a set of technical rules for governing cross-border litigation. It appears to be a vehicle for the institutional-juridical project advanced by classical legal scholarship. Classical jurists may have disagreed as to what specific relations to place within the category of economic and private matters, or what rules to include within the scope of private law. But by the end of the 19th century all jurists agree that, as far as economic relations were concerned, law was there to facilitate the expression of free will, within and across borders. Inherent in this conception, however, is also that those relations that did not qualify as private and economic must be governed by antithetical logics.

3.2 The Mandatory Part of Private (International) Law: The Law of the Family

The success of the Italian codification of 1865 and of Mancini's edification of the new *jus gentium* did not derive from originality of his ideas. Rather, it originated in two simple ideas which were also spread by other 19th century private international lawyers. First, the approach envisioned by Mancini supported private initiative and commercial exchanges in economic matters, and it removed parochial norms of particularistic character that created obstacles to cross-border transactions or prevented free trade. The scholarship refers to this allegedly unbiased method, based on the nature of the relationship and directed towards the definition of jurisdictional and legal competence, as multilateralism, to differentiate from medieval unilateralism with which it shared in fact the universalist aspirations.

[95] Mancini, 'Système', p. 34

[96] Mancini seemed to have drawn from private law to support the division between mandatory and voluntary part. The concept of autonomy in private law had been born in German legal philosophy and from there it spread to France and to Italian legal thought. Autonomy in a legal sense had until the turn of the 19th century referred to the capacity of a collective to act with no internal or external restraint. From the 18th and 19th century onwards, autonomy started being referred first in private law, and then in private international law, to the capacity of single individuals to form a jural relational outside direct public control. Nishitani, 'Mancini', p. 26. Ranouil, Véronique. *L'autonomie de la volonté: naissance et évolution d'un concept*. Presses univ. de France, 1980. Other scholars have rejected 'the mirror-theory' and pointed out that Mancini did not use the same classification system in private law and in private international law. See the account given by Nishitani, 'Mancini', p. 38. In Mancini's voluntary part, he did not include real property, for instance, whilst in private law a person is free to dispose of his or her property at will. Some have also argued that Mancini did not recognise any freedom in matters of succession, therefore marking an even greater mismatch between private law and private international law.

Second, according the theory developed by Mancini and accepted throughout European and extra-European jurisdictions, the regulation of family matters grounded in public will and national logics.[97] And here, like the mixed method of Bartolus and medieval scholars, what is simplistically described as the multilateral approach of Mancini reveals its ambiguous nature.

Unlike the law governing business relations which was based on the principle of freedom, family relations were governed by principle of nationality.[98] When it came to family relations, the law of every civilised nation assigned a specific status to family members. Status was a permanent condition and position of the person in society, i.e. as the status of father-husband. Status was an inherent condition or quality of the person. But status was also connected to the identity, to the psyche, and to the consciousness of each people:

> Personal and family status comprises of a collection of attributes and conditions that do not belong to the person as such, but to the person *qua* a member of a given nation. To confer on someone the French, German, Italian or English nationality is, in fact, enough to immediately evoke a particular set of (qualities, capacities and) rights intrinsic to that special organization which is the family that belong to all those who are part of that nation.[99]

What followed from the classical conception of status was that those state laws that regulated family relationships should not be altered or chosen by the caprice of members of national society, because they reflected the history and the characteristics of each nation. In cross-border civil matters touching on family status and, possibly capacity, this meant that persons were bound by their national law 'wherever they may be'.[100] Contrary to the ideas upheld by pre-classical jurists, but in conformity

[97] "Il successo della codificazione italiana del 1865 si può spiegare in una duplice ragione: da una parte, il Sistema manciniano interpretava le aspirazioni, non soltanto italiane ma europee, verso l'affermazione della nazionalità; dall'altra, esso affermava esplicitamente la libertà d'iniziativa private superando le remore di carattere partciolare che si opponevano alla libertà dei traffici (questo vale particolarmente per il principio della libera scelta della legge regolatrice delle obbligazioni da contratto)." Ballarino, 'Diritto Internazionale', p. 57

[98] In Italy, a debate arose regarding the meaning Mancini assigned to the concept of nation, if it was to be understood historically or politically and concretely organized. It seems that Mancini himself adhered to a state based understanding of the concept of nation. See on the case Sanama c. Sanama, Corte di Appello di Lucca, 8 giugno 1880, in Ann. Giur.it , XIV (1881), III, pp. 216-250 and the commentary by Erik Jayme, Pasquale Stanislao Mancini, pp. 77-72

[99] Mancini, 'Système', p. 32 (Trans. A.)

[100] Although the influence of the French Civil Code meant that status and capacity were often taken together, it was not fully clear if capacity, like status, would be exclusively regulated by the law of the nationality of the parties - since, this might lead to the violation of the principle of sovereignty of the state - or, exceptionally or systematically, by Italian law - as this would have meant that people would merely have to cross the border to acquire capacity with respect to actions not recognised or prohibited by their own personal law. One thing was the condition of the person and the enjoyment of rights, governed by status and by national law; another thing was the capacity and power of the person to bind himself which was not necessarily governed by national law. Hence, the difference between Article 3 of the Civil Code and Article 6 of the Preliminary Provisions. According to Esperson and others, the rights of foreigners would only be recognised

with conflict rules developed in other jurisdictions, as far as marriage and family relations are concerned, the principle of liberty and voluntary laws must make room for the principle of nationality and for mandatory laws:

> We call mandatory part the laws that govern personal status, family matters and family relations. Indeed, it does not depend on personal will the modification of this obligatory part (of private law). No one can give up its status and renounce family relations that are assigned to him by the law of his homeland.[101]

The classical conception can be adapted to distinct contexts. Hence, Mancini replaced the principle of nationality with that of domicile. However, the idea that the same law governs matters of status everywhere, regardless of personal circumstances and desires, is adopted everywhere. Like Savigny and Westlake who derived from the absoluteness of family laws a general obligation to recognise status, Mancini also drew from the impossibility for individuals to freely choose family laws the requirement to recognise the status of foreign subjects.[102] However, unlike the recognition of private rights acquired abroad in economic matters, this obligation was not absolute. Once the law governing civil status was embedded in essential national traits, the only option for a court was either to accept that status or to reject it:

> …if the foreign individual cannot waive his personal status and strip (of his rights and duties), in the same way the government of the country hosting him cannot but accept that status or, alternatively, must reject him … .[103]

As rules governing marriage and family relations become status-conferring, and individuals can no longer create rights and obligations autonomously in family relations, the recognition of 'rights' and 'obligations' in marriage and family relations becomes contingent on the recognition of personal status itself. Classical mentality eradicated from juridical consciousness the notion that the contract

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insofar as they were also accorded by foreign law, and capacity was always regulated by the national law. Esperson, Pietro. *Il Principio di Nazionalità applicato alle relazioni civili internazionali*, 1868, p. 29; Esperson, Pietro. *Condizione giuridica dello straniero secondo le legislazioni e le giurisprudenze italiana ed estere, i trattati fra l'Italia e le altre nazioni*. Vol. 1. L. Vallardi, 1892, p. 25

[101] Mancini, 'Système', p. 32

[102] «Si l'on fait ces changements, on comprend facilement pourquoi les lois de la première catégorie peuvent et doivent conserver toute leur force et régler les conditions de la personne et de la famille, même en dehors du territoire; on comprend pourquoi le pouvoir souverain d'un Etat a le devoir d'en laisser la jouissance aux étrangers de toutes les nations qui se trouvent sur son territoire; pourquoi au contraire les lois de la second catégorie exercent rigoureusement leur actions dans les limites de chaque Etat respectif, et au lieu de rester inertes en présence de la personnalité étrangère, règnent sur elle, et l'obligent a ne pas troubler l'ordre et le droit publics du pays.» Ibid. p. 36

[103] Mancini, 'Système', p. 33 (Trans. A.)

of marriage carried international validity and produced rights and obligations not by force of a status, but merely by the force of the will of the parties. A national court confronted by a cross-border dispute concerning the civil status of a person should in principle recognise that status as regulated by the personal law, subject to the overriding condition that the personal law does not breach the principle of sovereignty.[104]

In principle, according to Mancini's theory, states had a duty to recognise a personal status and rights acquired abroad, regardless of the nature of the relation in question, based on abstract principles. This is what demands multilateralism. Independently of choices of contracting partners and the nationality of the spouses, private rights and personal status should *de jure* maintain their force abroad. But the question soon arose about the limits that could be legitimately raised by courts and legislators to such broad legal obligation. Even if rights had been acquired abroad in conformity with the competent law, and even if the status and effects attached to it ought to 'follow' the person, did it mean that all states should recognise them no matter what their content? The answer elaborated by Mancini lies in the notion of 'absolute laws' and in the principle of sovereignty. Mancini argued that:

> …each legislator safeguards the prerogatives of sovereignty and its political independence when he makes citizens and foreigners alike subjects to the criminal laws valid in its territory and to the laws of public order of the country – that is to say, (when he obtains) the utmost respect for its political prerogatives.[105]

Accordingly, the preliminary provisions of the Italian Civil Code specified that foreign laws governing status and the rights acquired abroad must respect the public, economic and moral interest of the receiving state for the local court to apply them and give them effect.[106] The recognition of status and of family relations was therefore also subject to the absolute condition of respect for the public order of the state ("*ordine publico*" or, known in common law countries, public policy).[107] A court could therefore either recognise the status, and therefore the effects which originated in it, or, if it violated the public order of the receiving state, it must reject it, and so its effects.[108] The vagueness of the notion of public order and its systematic application could therefore generate very harmful

[104] Ibid.
[105] Ibid. p. 37
[106] Article 12
[107] This is a problem that medieval scholars had dealt with by developing the notion that came to be referred to under the heading of 'statuta odiosa'. Medieval jurists understood public order to be rooted in natural law, i.e. in the rights of all men, not in the prerogatives of the local sovereign.
[108] Mancini, 'Système', p. 33 : «si l'individu étranger ne peut pas renoncer à son état et s'en dépouiller, de même les gouvernements qui l'accueillent ne peuvent que l'accepter avec cet état ou le repousser.»

results for individuals, other than prejudicing the universally cherished ideas of uniformity of decisions and equality of treatment.

The scope of the public order exception envisaged by the Italian legislator and by Mancini was so wide that it became a matter of controversy how far did the scope of the public order exception extend and what exactly it would take for a violation of the clause to take place.[109] For some Italian scholars, public laws, procedural matters, penal laws, matters concerning public security, all fell within the scope of the public order exception.[110] Part of the scholarship argued instead that only magistrates would be in apposition to provide a definitive answer.[111] Either way, what it reveals in combination with choice of law rules governing the mandatory part of private international law is that, the rules and functions of the multilateral method were shaped by the dominant mode of thought and by the fundamental prerogatives of the nation-state, rather than being driven by experts in isolation from cultural and political processes.

4. The Boundaries of Italian Society and the Decline of the Classical Approach

Mancini associated the voluntary part with purely private and economic relations. In contrast, he tied the mandatory part to moral, public and social relations, in other words, to relationships affecting civil status. Mancini placed the individual and free will at the centre of private international law of the market, and the nation and public will at the centre of the private international law of the family. In private and economic relations, conflict rules bestow on the individual the ability to choose the law to which he submits all his actions. Courts must respect the principle of liberty. Hence, they must recognise the rights acquired abroad by foreign laws, independently of the position and condition of the person within the organised community.[112] In the case of marriage and family matters, a court must pay tribute to the principle of nationality, and thus apply the national personal law regardless of personal preferences.

[109] For A. Weiss, Traité théorique et pratique de droit international privé, Tome III, Le conflit des lois (Paris, Larose & Forcel 1898) p. 61: '… rechercher dans quelle mesure les droits qui appartiennent à tout homme, même en dehors du territoire de sa patrie, sont compatibles avec ceux de l'Etat sur le sol duquel il en demande l'exercice, dans quelle mesure la souveraineté personnelle de la loi étrangère peut être conciliée avec la souveraineté de la loi locale.' See A. Nussbaum, 'The Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws', 42 Columbia Law Review (1942)
[110] Esperson, 'Il principio di nazionalità', pp. 29-34
[111] Fiore, Pasquale. *Diritto internazionale privato*. Le Monnier, 1869, pp. 82-83 and 37-4; specifically, on civil magistrates and their role, pp. 42-44
[112] Mancini, 'Système', p. 37

Accordingly, Mancini rejected all doctrines that left room for a voluntary subjection in international family relations.[113] Mancini argued that family relations that fall within the mandatory part should be governed by conflict rules in accordance with the permanent link that bound a person to his or her civil and political community. Mancini was the greatest advocate of the nationality principle in the 19th century. In place of the *lex domicilii*, he thus advocated adoption of the *lex patriae*.[114] Domicile was by then the most popular connecting factor, and it was not without supporters in Italy.[115] However, Mancini argued that domicile increased unpredictability of result, because it had a transient nature and it carried a psychological element that courts could not ascertain objectively.[116] Nationality was instead an objective characteristic of the person, and it was naturally predisposed to govern an inherent condition.

Despite their differences, the imperative logics that underpinned the systematic enforcement of the law of nationality and domicile transformed status into a natural feature of the person conferred and enforced by national law within and across borders.[117] Nationality and domicile thus naturalised the permanent bond between the individual and the family, and between the family and the community of belonging. [118] The *lex status*, whether in the form of nationality or domicile, enforced its consequences regardless of personal circumstances and preferences. In this sense, the enforcement of the consequences of this bond, and the incapacity of individuals to opt for another national law, undermined the idealist notion, advanced by enlightened jurists, that the relationship between individuals and states, between governments and the governed, was contingent on personal consent, at least as far as status was concerned.

[113] Mancini thus dismissed Huber's vested rights theory under the pretext that it increases legal uncertainty. For him, jural relations would have to be governed and judged according to the law of place where the juridical relation itself was constituted, thus making it difficult to determine where and at which point in time such juridical relation was acquired. Mancini, 'Système', p. 23 It is noteworthy that Mancini erroneously claimed that the Statutists had already taken full notice of the special content of family relations, although I have shown below that the Statutists were anything but strict 'separatists' and that they did not place family matters in any special category – treating for instance marriage as a form of contract. Mancini, 'Système', p. 26-27

[114] Mancini, 'Système', p. 18. For Mancini, rules should avoid risks of divergent results. For this reason, he advocated the adoption of the *lex patriae* in an expanded category of mandatory laws which would also include succession, even immoveable property, and testaments.

[115] C. F. Gabba, 'Gli artt. 6-12', pp. 4-6

[116] Ibid. p. 16

[117] In the following century, the literature would discuss in depth the pros and cons of domicile and nationality. Pålsson, Lennart. *Marriage and divorce in comparative conflict of laws*, Sijthoff, 1974. See chapter 2, pp. 4-111

[118] This classical intellectual and institutional project successfully transformed Roman and medieval notions of status, marriage, and contract and made them look natural and necessary: "In both the common law and civil law worlds of the late nineteenth century, legal norms and concepts tended to be formalized and expressed in the conceptualistic way that had been typical of revived Roman law and the canon law. Legal rules, which often were but the temporary resolution of conflicting interests, acquired a life of their own, producing "logical" and "necessary" consequences." Glendon, 'The Transformation', p. 34

Mancini acknowledged that social contract theories failed to consider that no individual had ever truly consented to surrendering and relinquishing his rights insofar as family matters were concerned. He saw instead "a kind of expropriation" in the enforcement of rights and duties against the wishes of individuals in those matters that fell within the mandatory part.[119] And yet he posited that the mandatory subjugation of the person was for the benefit of the whole of humanity "since we do not regard the social state ("*état social*") as voluntary and conventional, but as a necessity for mankind."[120] The process of formalisation and juridification that had started in the second half of the 18th century had come to full maturity within a hundred years.

Domicile and nationality were nothing but distinct manifestations of the classical programme and of the emergence of a new form of statehood in specific political and cultural contexts. Nationality and domicile, as Westlake had pointed out, differed in one important respect. Domicile maintained the distinction between the political and the civil dimensions of one's community, whereas nationality merged them.[121] The Kingdom of Italy had achieved political independence but not civil unity. In this context, the adoption of the *lex patriae* played an important role because it strengthened the bond between the civil and the political dimensions of the national order. It is not accidental that, where sovereign states pursued national consolidation and the polity lacked civil and political integration, as Italy, in Belgium, in the Netherlands and in Germany, and in countries which were historically young or geographically divided, civil codes adopted nationality as connecting factor.[122]

If Bartolus and Baldus had replaced the idea of *populi liberi* with that of territorial *civitates*, Mancini substituted the disaggregated people inhabiting territorial states with the bounded national community. Going back to Giovannetti's complaint that conflict principles made people strangers in the same homeland, the re-statement of conflict of laws in the classical age consolidated the bond between individuals and the national community. Of course, the mandatory subjugation was subject to the exception that, as far as private and economic matters, free will reigned supreme. Private international law reinforced national jurisdiction, whereas conflict rules erased jurisdictional boundaries in economic and commercial matters. This, however, was presented as the inevitably result of the progressive evolution from status to contract. Individuals were no longer free to give up

[119] Mancini, 'Système', p. 34
[120] Ibid.
[121] For Westlake, a separation of the civil sphere (domicile) from the political sphere (nationality) by means of private international law rules might thus be encouraged, because: "This method of proceeding … is recommended by various solid motives, such as the welfare of the civil society with which a person is most intimately connected, the wishes or intentions which from his connection with a certain civil society he may be presumed to entertain…" Westlake, 'A Treatise', pp. 262-263
[122] Around the turn of the century, Mancini's nationality principle had been adopted in the legal systems of Latin America, Africa and Asia. Erik Jayme, 'Mancini, L'Attualità del Suo Pensiero', p. 32

their membership and their status, but this was a necessary and beneficial consequence of the transformation of state entities.

The link between state sovereignty and the law governing cross-border relations which was forged in the Middle Ages thus survived the decline of medieval mentality. In the classical age, private international law is *instrumentum regni*. Conflict of laws contributed to the consolidation of national institutions. At the same time, rules and principles governing cross-border relations were shaped by classical legal thought, a global consciousness which Savigny, Westlake and Mancini each contributed to popularise within and outside Europe. The same jurists who were at the forefront of the redefinition of the legal consciousness embedded conflict of laws in the new legal science.[123] Private international law is not to be understood as a set of techniques development by experts in isolation from the cultural and political context. In describing Mancini's work, Dionisio Anzilotti (1867-1950) thus declared that:

> The doctrine developed by Mancini benefited from so widespread an approval and corresponded so fully to the aspirations of the time and place in which it arose, that it was considered almost as the universal law per se, intrinsically and substantially, wholly apart from the concrete recognition it might receive in positive provisions of statutes and treaties. To develop and apply this doctrine was thought to be nothing less than to develop and apply a true law of nations, which was bound to become in due time the common rule of civilized countries. Thus a phenomenon took place similar to that experienced by the famous school of natural law: a system wholly subjective, embodying the ethical and legal ideals of the time and place, was taken to be the true eternal immutable law, whatever might be the real conditions of mankind. … *No wonder that legal science followed such an example and substituted a theory for a law, a conceptual system in place of the observation of real facts*.[124]

Savigny, Westlake and Mancini transformed private international law into a powerful tool consistent with classical assumptions. However, at the dawn of the 20th century, the popularity of the classical legal thought started declining. As Anzilotti's words suggest, jurists in the future institutional-intellectual will blame classical scholars for having replaced a law with a

[123] Jurists in Italy, in England, in Germany, but also in France and other European jurisdictions ended up conceiving Private International Law a 'a veritable law binding the member states of the community of nations'. A. Pillet, *Principes de droit international privé*, Pedone (1903) «un véritable droit qui lit les Etats membres de la société des nations.» p. 81

[124] D. Anzilotti, Studi Critici di Diritto Internazionale Privato, Rocca S. Casciano (1898), Cited by De Nova, 'Introduction', p. 31 (Emphasis Added)

theory, the observation of real facts with abstract concepts and formal ideas. The classical approach entered in a crisis. With the emergence of a new dominant consciousness, however, conflict of laws will undergo another fundamental transformation, as we shall see in the third part of this genealogical reconstruction.

Part III

The Age of Social Legal Thought

Chapter 7

The Rise of the Social and the Transformation of Italian Private International Law

The third part of this study examines how the decline of classical legal thought and the rise of social legal thought transformed European conflict of laws between the end of the 19th century and the 1960s.[1] In the last years of 19th century, jurists embarked on a profound and comprehensive critique of the classical programme and of its fundamental assumptions. If classical scholars had criticised their medieval predecessors for the lack of conceptual coherence and methodological rigor, social jurists blamed their predecessors for the abuse of deduction, for their delusive appetite for conceptual coherence and for having entirely disregarded the reality of law while pursuing their abstract goals and formalist fetishes.[2] If law in the classical age was understood as a conceptually-coherent and logically-organised body of legal precepts deduced from first principles, law in the new institutional-legal age was understood as positive law rooted in social life and driven by social purposes.

Eugen Ehrlich (1862-1922) was among the earliest scholars who attacked the classical idea that law is an aggregate of legal precepts and a set of logically-arranged norms of behaviour.[3] When he looked at society, Ehrlich saw concrete relations and groups, not the imagined communities or the abstract relations occurring between disaggregated individuals described by 19th century jurists.[4] In contrast

[1] On the social age, see Kennedy, 'Three Globalisation's, pp. 37-63. Kennedy emphasises developments taking place in the U.S. since the 1920s and 1930s, when 'legal realism' led to a profound revision of convictions in American jurisprudence. The realist tradition continued until the 1960s, when, he underlines that legal realism was succeeded by 'policy science'. He also underlines the shared ground between these earlier critical movements and those that emerged since the 1960s, among which 'critical legal studies' and 'feminist legal theory', 'law and…' which are also essentially positivist in their concept of the nature and sources of law. Similar developments have occurred in Europe, with mutual influences and exchanges, some of them emphasised in this study. Compare Wieacker, 'A History', p. with Horwitz, Morton J. *The transformation of American law, 1870-1960: The crisis of legal orthodoxy*. Oxford University Press, 1992 and with Grossi, Paolo. *Scienza giuridica italiana: un profilo storico: 1860-1950*. Giuffrè, 2000

[2] On the 'abuse of deduction' that brought to an end CLT, see Kennedy, D. "Legal Formalism". in Smelser, Neil J., and Paul B. Baltes, eds. *International encyclopedia of the social & behavioral sciences*. Amsterdam, 2001

[3] Ehrlich, E. *Fundamental Principles of the Sociology of Law*. Trans. by Walter L. Moll, with an Introduction by Roscoe Pound. Harvard University Press, 1936(1975). A summary of his thought may be found in Id. 'The Sociology of Law', *Harvard Law Review* (1922)

[4] Pound in Ehrlich, 'Fundamental Principles' p. xxxi. et seq. For Ehrlich, society is concretely composed of various human associations. Law was the inner normative order of all social associations. In the eyes of Ehrlich, the law that concretely governs and regulates particular human associations and society as a whole does not correspond to a set of coherently arranged and rationally deductible legal propositions, as argued by classical jurists. He did not oppose the introduction of legislation and case law because they posed a threat to the idealised order pursued and cherished by classical jurists. Rather, he denied that law could ever be found in law books or in law schools. "At the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself. This sentence, perhaps, contains the substance of every attempt to state the fundamental principles of the sociology of law." Law lived and was to be found in society, in national society and in international society, in various

to the assumptions of the metaphysical and conceptual jurisprudence prevalent in the 19th century, Ehrlich understood the legal order positively and functionally, not abstractly. The answer to legal questions was to be found using an inductive, rather than deductive method. Jurists reached the same conclusion even when they did not adopt Ehrlich's sociological method. The starting point to formulate a workable theory could not be abstract ideas or the intuitions of scholars. The starting point was society itself, understood as the various groups that composed it and kept it together, and the rules that concretely and objectively governed it.[5]

Positivism constituted the other side of this 'naturalist' shift. Positivists especially applied the inductive method to the study of the norms which originated in the state, the society *par excellence*. Positivism, or the analytical study of law, already dominated the common law world by the early years of the new century, and it grew more popular in the civil law world thanks to Rudolph von Jhering (1818-1892) and Georg Jellinek (1851-1911). For Jhering, law corresponded to the rules that constrain the behaviour of individuals in an organised society, and most obviously in the state.[6] But the state was not the only organised society. The international community of sovereign states also constituted a society. The positivist critique applied to relations within and across state jurisdictions, between individuals and between states. From the final quarter of the 19th century, under the influence of von Jhering and Jellinek, the idea of a supranational order based on vague notions of a community of civilised nations began to fade.[7]

European experts criticised "the language of natural law in a slightly modernised form" in which international law was grounded as "politically naïve and methodologically amateurish".[8] Consequently they distanced themselves from the classical conception of (public) international law, but also from the classical approach to problems raised by legal collisions. The universalist assumptions and abstract concerns that underpinned the classical approach to legal collisions could be squared neither with the premises of positivism nor with those of sociological jurisprudence, the

human associations and in the family: "I doubt whether there is a country in Europe in which the relation between husband and wife, parents and children, between the family and the outside world, as it actually takes from in life, corresponds to the norms of the positive law." Law ought not to be understood, and studied, as an abstract phenomenon but, rather, as a living one (hence, the 'the living law'). Especially expressed in Chapters XX and XXI of Ehrlich, 'Fundamental Principles'

[5] Sociological jurisprudence spread from the German-speaking world to the rest of Europe through Ehrlich and François Gény (1861-1959). On the influence of French scholars on the critique of the classical period, See Belleau, Marie-Claire. "The 'Juristes Inquiets': Legal Classicism and Criticism in Early Twentieth Century France", Utah Law Review, 379 (1997)

[6] For Jhering, law is "the sum of the rules of constraint which obtain in a state." von Jhering, Rudolph. *Der Zweck im Recht* (Vol. 1). Breitkopf & Härtel, 1877, p. 320, cited in Pound, ibid. p. 67

[7] von Jhering, Rudolph. *Law as a Means to an End*. Trans. by Isaac Husik. *The Boston Book Company*, 1913

[8] Koskenniemi, M., "Nationalism, Universalism, Empire. International Law in 1871 and 1919", paper delivered at the conference 'Whose International Community? Universalism and the Legacies of Empire', at Columbia University, New York, April 29-30, 2005, p. 25; see also p. 31

two jurisprudential cornerstones of the naturalist approach. Classical private international law provided a perfect illustration of the flaws and limits of the classical legal science seen from a social perspective. Classical experts were admired for their erudition but were also accused of having replaced the law governing legal collisions with an abstract theory. As Roberto Ago, one of the most influential Italian legal experts of the 20th century argued:

> "[The doctrine ascribed] to the work of jurists of the 19th century, aimed at the creation of grand systems, raised on purely theoretical foundations of a universalistic nature, such as the principle of the common law, or that of the nature of things [and relations], or else the three principles of nationality, freedom and of sovereignty, the indisputable merit of having generated a theoretical inquiry concerning the specific problems of this branch of the legal science, and, above all, of having exerted a strong uniforming influence on the new legislations. At the same time, the character of such doctrinal constructions gradually gave way to purely scientific systems [which were] far removed from the juridical reality, whilst the need was growing for greater attention for [the reality of law].[9]

Jurists turned away from the abuse of deductive reasoning from first principles of classical scholars when dealing with cross-border matters. Looking at the 'reality of law' under the naturalist lens, experts discovered that, despite the hope of classical experts that national systems would eventually converge into a common set of rules, there were as many jurisdictional principles, choice-of-law rules, classificatory rules as there were jurisdictions. In the classical age, private international law was understood to be part of the *jus gentium*, or a version of the *jus gentium* adapted to classical assumptions, and it was assumed that local rules ought to conform to the general theory advanced by experts. From the early decades of the new century, experts lo longer understood private international law as part of a general theory, but as a positive manifestation of sovereign power and sovereign will. Accordingly, they denied that rules and principles developed in the general theory were by default obligatory.[10]

The naturalist approach to law was not necessarily incompatible with the idea that there existed an objective law or a living law that governed the practice of states, an international law which would also include common conflict rules and principles. Because law was grounded in sovereign will,

[9] Ago, Roberto. *Teoria del diritto internazionale privato. Parte generale*. Cedam, 1934, p. 5 (Trans. A.)
[10] In some cases, these new theories started denying a fundamental assumption of classical scholars, for instance that there was a general obligation to apply in given circumstances foreign law. Niemeyer, Theodor. *Vorschläge und Materialien zur Kodifikation des internationalen Privatrechts*. Duncker & Humblot, 1895. See De Nova, 'Introduction', p. 478

however, the idea of an overarching legal framework which placed effective limits on the exercise of sovereignty could only be accepted if states themselves willingly contracted an obligation to apply uniform norms.[11] Rather than assuming the existence of a binding general theory, jurists started discussing, and dismissing, the existence of common rules in treaties and customary law. European private international lawyers started to cut "one by one all the conceptual moorings that previously were held to tie them to the law of nations and [toned] down the importance of the goal of universality."[12]

One of the effects of the paradigm shift is that the common ground between *jus inter gentes* and *jus intra gentes* was buried under new assumptions. Questions of competence, applicable law and enforcement were no longer understood as universal problems to be solved in accordance with a general theory, but as local issues to be dealt with autonomously by sovereign states, in accordance with local prerogatives and needs. Social jurists rejected the idea that there existed only one seat for every relation and pointed out that local courts followed different procedures for identifying the seat.[13] Classical jurists had instead assumed that there existed only one law for each relation and that different orders would understand and classify like legal relationships in like manner. Even if all countries adopted the same connecting factor, domicile for instance, each court would end up with a different answer regarding its location. The decline of classical assumptions opened a Pandora's Box of concrete issues that had been ignored in the 19th century. The discipline entered in a crisis. As Dionisio Anzilotti put it:

> Conflicted between profoundly different scientific conceptions, discredited and rejected each time by a different juridical science, private international law sees its own existence and scientific legitimacy questioned; it is a real crisis, whose sinister effects affect practical jurisprudence which, day after day, shows the urgent need for a reliable doctrine, able to provide help in the difficult tasks it is called upon to solve in this field.[14]

The crisis of private international law was scientific and existential, as we will see Chapter 7. In the same sense in which the existential crisis of medieval consciousness had led to a scientific crisis in *conflictus legum*, the crisis observed by Anzilotti resulted in the rejection of old assumptions and methods. In a context characterised by stronger territorialism and legal nationalism, national systems

[11] "Law is a body of rules for human conduct within a community which by common consent of this community shall be enforced by extended power." Oppenheim, Lassa. *International Law: A Treatise*. Longmans, Green, and Co. 1905, p. 10
[12] De Nova, 'Introduction', p. 478
[13] Anzilotti, 'Studi Critici', pp. 13-14
[14] Anzilotti, Dionisio. *Il diritto internazionale nei giudizi interni*. Ditta N. Zanichelli, 1905. p. 122 (Trans. A.)

drifted apart, and experts took different and incompatible methodological viewpoints. However, as in transition from the medieval to the classical age - when the rise of classical assumptions and ideas generated the crisis of the medieval approach but also comparable processes of transformation - so in the transition from the classical to the social age, the ascendancy of a new dominant thought, the social consciousness, led to the rejection of pre-existing convictions but also offered common ideas and principles that underpinned the restatement of conflict of laws across European jurisdictions.

The third part of this thesis will show that social legal thought was not merely a critical language, but also a reconstruction project.[15] Social jurists went beyond a sterile ascertainment of what the law is. Law corresponded, as argued by Jhering, to rules constraining individual behaviour. However, seen from a different perspective, law was also a 'means to an end'.[16] In the social age, law did not merely constitute a coherently and systematically arranged set of precepts. Law came to be understood everywhere teleologically, as a concrete order with specific aims and purposes. Law was reconceptualised as an instrument for achieving public policy objectives and concrete social ends.[17] Under this dominant conviction, legal orders could overcome the crisis of the nation-state model to which the abstract concerns and assumptions had led them to.[18] The new consciousness generated a transnational redefinition of legal-institutional orders.

The social critique and reconstruction affected all branches of law, public and private, conflict of laws included. Classical conflict experts were blamed for having prioritised the production of theoretically impeccable rules at the cost of an examination of their effects and of the development of norms capable of protecting social interest.[19] In this context, each legislator, court and expert focused on local conceptions and local needs and developed different methods to respond to the challenges arising in cross-border disputes. However, the bigger picture examined in the third part of this genealogy reveals that the aspiration of experts everywhere was to create "a new system of conflict of laws, a system which tends to derive its concepts not from abstract postulates of purported self-

[15] According to Duncan Kennedy, the "globalization [of The Social] began around 1900 and had spent its force by the end of WWII". What was globalized this time was a critique of [classical legal thought] and a reconstruction project." Kennedy, 'Three Globalizations', p. 37

[16] Jhering, 'Law as a Means to an End'

[17] Pound, 'Jurisprudence, Vol. 2', p. 68. In this sense, Jhering brought together the ethical idea of law, inherited from classical and medieval scholars, and the analytical idea of law…. a little bit like Savigny had reconciled the philosophical conception of law of medieval scholars, with medieval justice theories grounded in natural law, and the historical conception of law. Ibid. p. 67

[18] Romano, Santi. *Lo Stato moderno e la sua crisi*. (Discorso inaugurale dell'anno accademico 1909-1910 nella Regia Università di Pisa). *Rivista di Diritto Pubblico* (1910). Giuffrè, 1969

[19] Among the earliest scholars to challenge the universalist assumptions and abstract concerns of Mancini and Savigny in Europe was probably Franz Kahn (1861-1904). Kahn employed a positivist approahc and criticised the followers of the classical approach because they had overemphasised the importance of theory at the cost of legal reality and because they had failed to distinguish the law as it is from the law as it should be. In his lifetime, these defects could especially be attributed to von Bar, *Theorie und Praxis des internationalen Privatrechts*, Hannover, 1889

evident validity but from the actual problems of life."[20] Experts were not driven by the desire to formulate universally-valid solutions, but to re-orient conflict of laws towards the protection of public policy and social interest.

The rise of what Kennedy has called social legal thought may therefore explain common transnational developments taking place in European private international law in the 20th century, even though such developments are confused with local and isolated changes. Regardless of methodological preferences and local legal traditions, the law of the economy and contract law, the law of the family but also private international law were redefined everywhere in consideration of social purposes and social functions. With the aim of bringing such processes into the light, Chapter 7 begins with an examination of the work of Anzilotti to show the widespread disillusionment with the classical assumptions (section 1.1). Despite the long-lasting influence of classical universalism, jurists started to delineate from the early years of the new century what rules and principles the anti-formalist and positivist critique of classical private international law should produce (s. 1.2).

The decline of classical universalist assumptions led scholars to confront the difficult question of how to justify the application of foreign laws and rights against a background of renovated jealousy of sovereign interest and prerogatives. Mutual interest not to ignore and dismiss foreign orders, rather than the vague idea of membership in the Christian civilisation, provided an answer, though a precarious one (s. 1.3). The application of foreign rules could not happen at the cost of undermining sovereign authority. Classical assumptions had led to the crisis of the 'modern-state', as pointed out by Santi Romano (s. 1.4). Abstract concerns and theoretical assumptions had brought the scholarship to neglect concrete threats to state power. In this context, conflict of laws, but also market law and family law were re-oriented towards the protection of public interest and the consolidation of the social state. The social critique and social reconstruction especially transformed contract law (s. 2.1) and family law (ss. 2.2 and ff.).

The social consciousness transformed the character and functions of legal fields dealing with internal and international relations, but it did not undermine the idea that each had discrete nature and purposes. Although unlimited contractual autonomy became the subject of increasing regulatory considerations, social jurists conceived the market as driven by individual interest. In contrast, family law, in its internal and international declinations, was the emblem of social law. Italian family law was therefore redefined as public rather than private law (s. 2.3). It was reconstructed as an instrument

[20] Rheinstein, Max. "Methods of Legal Thought and the Conflict of Laws: A Book Review (reviewing The Logical and Legal Bases of the Conflict of Laws by Walter Wheeler Cook)." *University of Chicago Law Review* 10.4 (1943), p. 471

to protect state interest (s. 2.4). Status was also reconceptualised as a tool to protect collective interest (s. 2.5). This transformation led to changes in the regulation of wholly internal and cross-border family relations (ss. 2.6-2.7). It is against this background that Italian private international law was redefined as a branch of public other than of domestic law (s. 3.1), hence dealing with cross-border disputes in accordance with public policy and as defined in the internal order of every state (ss. 3.2-3).

Although scholars elaborated different methods and advanced seemingly incompatible proposals for solving cross-border disputes, developments in Italian law and in other civil law countries reveal a transnational re-orientation of private international towards social considerations (ss. 3.3-4). The reconstruction of Italian law during the fascist era was based on a corporativist rationale, but the new Italian code, introduced in 1942, embodied some of the most characteristic elements of the social programme, both with respect to international law (s. 3.5) and contract law and family law (s. 3.6). Social legal thought spread in civil countries as well as in the common law world, regardless of local circumstances and political convictions. This chapter, which primarily investigates developments taking place in Italian law, and the next one which mainly examines changes in law and in discourse which happened in English law in the same period, will try to bring to light the transnational and pan-European re-orientation of private international law towards social considerations in the 20th century.

1.1 Dionisio Anzilotti between Classical Legal Thought and Social Legal thought

The above introductory considerations about the crisis and the beginning of the transformation of European private international law following the decline of classical legal thought and the rise of social legal thought, apply to the discipline in general. They especially apply to those jurisdictions and 'national schools', like the Italian one, where the discipline and positive conflict rules and principles had developed under the predominant influence of jurists who participated themselves in the construction and popularisation of classical ideals.[21] It was therefore not accidental that the remark that the discipline was in crisis came especially from German and Italian jurists, among them Anzilotti. Savigny and Mancini were celebrated for having produced the first theoretical inquiries and a degree of consistency in the law and in the practice of local courts to deal with the problems raised by legal collisions.

[21] See Cannizzaro, E. 'Il mutamento dei paradigni della sceinza giuridica internazionalista e la dottrina italiana', *Annuario di diritto comparato e di studi legislativi* (2014)

Italian private international law, the doctrines and the rules of which had been codified in the preliminary provisions of the Civil Code of 1865, represented noble aspirations to social legal scholars, but also what they considered the methodological and practical failures of classical conflict of laws. The 1865 Code contained a few rules which, although systematically arranged and coherently organised, could not help Italian courts to deal with every sort of cross-border scenario. Classical experts took for granted that these rules, although low in number, were sufficient to settle all disputes. They also assumed that foreign states would follow the Italian lead, and, in a spirit of liberal tolerance and cosmopolitanism, the same rules would soon be adopted by legislators and applied by courts everywhere. Despite the admiration inspired by Mancini, however, foreign legislators did not reproduce the preliminary provisions of the 1865 Code.

Far from becoming spontaneously harmonised or brought together by international conventions, conflict rules and principles of different countries had significantly diverged between themselves and from the general theory. As Italian jurists sarcastically remarked, the 1865 Code "*non aveva fatto il giro del mondo*".[22] The decline of classical legal thought revealed the unrealistic faith posed by classical jurists in cosmopolitanism and, at the same time, it also showed the damage generated by the abstract concerns of classical scholars. In many atypical cases, experts observed, the application of theoretically impeccable rules codified and interpreted in divergent and often conflicting ways led not only to limping situations and to unpredictability, but also to unjust decisions. This was made worse because classical aprioristic rules were supposed to be 'blind' to the contents of foreign law, courts must have no bias for the *lex fori* and were to give effect to foreign laws and to recognise foreign decisions, regardless of their content and their effects.

The aggregate result of the application of classical rules, jurists began to argue, was damaging to the systemic interest of each legal order. Experts were convinced that when laws conformed to the general theory and to classical abstract principles, as in the Italian case, states had ended up worse off. Anzilotti was the leading Italian scholar in the discipline at the time when the scholarship was coming to terms with the disappointing reality which classical jurists had ignored for the sake of theoretical elegance and systematic coherence.[23] Anzilotti lived between the classical and social age. In his early

[22] P. Grippo, Riforme urgenti in tema di cittadinanza e naturalizzazione, in IV Congresso giuridico nazionale, vol. VI, Relazioni della Sezione di diritto pubblico, II, Cittadinanza e naturalizzazione, Napoli, 1897, pp. 31-46, p. 32

[23] Anzilotti was professor of International Law at the University of Rome. Anzilotti succeed Pierantoni at the prestigious chair of international law in the University of Rome. See Tanca, Antonio. "Dionisio Anzilotti (1867-1950) Biographical Note with Bibliography." *EJIL* 3 (1992). At the his commemoration at the Academia dei Lincei, Tommaso Perassi said, regarding Anzilotti and the Rivista di Diritto Internazionale, discussed later: «Attorno a Lui e alla Sua Rivista si raccolsero tutti i cultori del diritto internazionale, anche di diversa provenienza, perché tutti riconoscevano in Lui la guida per il rigore del motodo ed il richiamo ad un incessante ripensamento dei problemi fondamentali della scienza. Si deve a Lui il formarsi di una scuola italiana del diritto internazionale che, pur attraverso un continuo lavorio di critica e di ricostruzione

years, Anzilotti was inevitably and profoundly influenced by Mancini's ideas, but he was also exposed to new juridical convictions. He therefore sought to find a compromise between the theories of his predecessors and those that were vigorously defended by a new generation of experts. The arguments and ideas contained in his early works reveal the lasting influence of classical ideals and aspirations but also his disillusionment with the classical method.

Contrary to his classical predecessors, Anzilotti expressed a clear preference for a 'positivist approach' to questions raised by legal collisions. We have seen in the end of the previous chapter that, in 1898, in one of his early publications, he had remarked that the Italian school had replaced a general theory for a law and had placed a conceptual system in place of the observation of real facts. As the citation suggests, Anzilotti took an opposite stance to that of his predecessors. He argued that law is neither an opinion nor a conviction.[24] Law, he argued, "is a historical and positive reality; it is an effectively binding norm". What followed is that, when the scholarship develops conflict theories and principles, it must do more than produce elegant and abstractly virtuous rules. It must demonstrate their value positively and concretely, in national and international law.

According to Anzilotti, the doctrines propounded by Italian scholars, although in conformity with the "ideals of science", originated in an "anti-positive" approach that rendered Italian law and the classical method flawed.[25] Due to their anti-positivism, his predecessors failed to consider that most rules and principles governing cross-border relations originated in municipal legal orders. They also failed to acknowledge and deal with the concrete problems that were being exacerbated by social, economic and political changes. The most prominent Italian jurists who inquired into private international law shared Anzilotti's view. Carlo Francesco Gabba (1835-1920) complained that "plenty of good books have already been published …, but in all these books, I do not find that the most general questions of Italian civil (international) law have been duly considered, especially those relating to the law of the place of its application, and the general criteria for its interpretation."[26]

Anzilotti, Gabba and other Italian jurists were critical of the classical scholarship because experts had prioritised abstract concerns and cosmopolitan goals at the cost of what will become a crucial element

e la varietà dei temperamenti dei singoli studiosi, afferma la sua unità nel rigore del metodo che fu insegnato dal Maestro.» Perassi, T. Dionisio Anzilotti. *Rivista di Diritto Internazionale*, 1953, p. 14

[24] Anzilotti, Dionisio. *Corso di lezioni di diritto internazionale*. Atheneum, 1918, p. 9: «…il diritto non è un fatto d'opinione, una convizione subbiettiva; è la realtà storica e fenomenica, è norma effettivamente vigente: non basta aver dimostrato la convenienza, l'opportunità, la necessità di date norme giuridiche per affermare l'esistenza, il valore positivo e concreto; bisogna dimostrare che una volontà idonea, nel caso nostro la volontà collettiva degli Stati, le ha poste come norme obbligatorie della condotta dei consociati.» Ibid. p. 62

[25] Anzilotti, 'Studi critici', pp. 93-373, p. 191

[26] Gabba, C. F. *Introduzione al diritto civile internazionale italiano*. Reale Accademia dei Lincei 1906, p. 6 (Trans. A)

of the new legal-institutional age, 'national interest'.[27] *Opinio juris* was quickly moving to the opposite pole as experts and commentators argued that Italian courts should interpret the provisions of the Code restrictively, and should deny, in all but exceptional cases, foreign people and foreign rights full recognition, unless it was in the interest of Italian society to do otherwise. Against a background characterised by mounting political tensions and the increasing influence of scientific racism, experts were especially critical of the principle of equality between natives and foreigners which had been codified in the Code of 1865. Gabba, for instance, could not believe that "the Italian legislator could have intended … to invite Europeans, Papuans and Fijians to wed Italian girls."[28]

In this context, Italian jurists started asking that the Code be either rejected or that its core provisions be amended to make space for a radically different approach to questions raised by cross-border relations and disputes. Anzilotti was also critical of the lack of consideration for actual problems, both theoretical and practical, which followed from the 'anti-positive method'. He agreed that the Italian legislation was lacking in many senses.[29] However, he was not so much critical of cosmopolitan principles as he was of the fact that his predecessors had produced a simple, elegant and coherent system of conflict rules which did not correspond at all with the legal reality. Anzilotti was not a nationalist. On the contrary, he firmly believed in the value of internationalism and international law.[30] Harmony of decisions and the protection of the principle of equality were aspirations that Anzilotti shared with classical jurists, regardless of their methodological flaws.

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[27] «Gli stranieri sono assimilati, quanto ai diritti civili, ai nazionali, quando pure all'esterno debbano soffrire costoro le più grandi umiliazioni. Ma che importa! Abbiamo dato un mirabile esempio al mondo civile. A furia di siffatti esempii termineremo con la bancarotta all'interno, senz'avere nessuna importanza fuori, perché essendo le nostre relazioni esterne a beneficio di tutti gli Stati, nessuno di essi avrà lo speciale interesse di stringersi in alleanza con noi. Tra i principi astratti della scienza e l'ordine concreto vi è l'abisso di mezzo."» Fiorentino, P. *Saggio di un esame critico dei codici italiani sulle disposizioni generali premesse al codice civile e specialmente su quelle che riguardano il diritto internazionale proivato*. Messina, 1869, pp. 154-156. Fiorentino was a follower of the ideas of Rocco who had been among the most vocal critics of the equal treatment provision included in the Code of 1865.

[28] Gabba, 'Introduzione', p. 6 (Trans. A.)

[29] Anzilotti, Dionisio. *Teoria generale della responsabilità dello Stato nel diritto internazionale*. F. Lumachi, 1902. [also La codificazione del diritto internazionale privato, in Scritti], p. 61; see pp. 54-65

[30] Anzilotti, 'Teoria generale': «Si può rimpiangere con Jellinek che la vecchia concezione del diritto naturale, pressoché bandita da ogni altro ramo della giurisprudenza positiva, continui ancora a celebrare le sue orge nei sistemi del diritto internazionale; ma sarebbe mancanza di senso storico e critico non comprenderne le profonde ragioni, sarebbe antiscientifico ignorare o trascurare quell'anima di verità, che può trovarsi anche nelle dottrine più false. Credo anch'io che la concezione naturalistica possa e debba eliminarsi dal campo del diritto internazionale, ed è stato anzi questo un obiettivo costante delle indagini precedenti; ma credo con eguale fermezza, che, se non vogliasi insieme negare il diritto internazionale, ciò sia possibile soltanto ad un patto, che si affermi e si dimostri perentoriamente che questo diritto non cessa di essere quello che si è sempre inteso che fosse, un'autorità, un potere sopra gli stati. Se ammettiamo che la fonte formale delle norme giuridiche internazionali sia la volontà collettiva degli stati, formatasi nei modi e coi procedimenti indicati, lo stato non ha più di fronte a sé la sua volontà, né quella di un altro stato qualunque, che giuridicamente, che giuridicamente sarebbe uguale alla sua, ma una volontà distinta a superiore, come lo è ogni volontà collettiva di fronte alle volontà particolari da cui risulta; onde possiamo ben dire che il diritto internazionale esprime una potestà a cui lo stato è soggetto, riprendendo così in senso positivo, concreto, ed anche eticamente più elevato, il vecchio concetto del diritto naturale.» p. 61

Anzilotti, like many others who wrote about the subject in the transition from the classical to the social age, believed that conflict principles and rules were not to be found in an abstract general theory, but that they were part of international law. His early works, and most notably *Studi Critici di Diritto Internazionale Privato*, published in 1898, show the influence of new axioms, but also sought to preserve a degree of internationalism. Anzilotti did not reject the partly 'supranational' nature of conflict rules and principles theorised by his predecessors. Hence, he argued that private international law is truly "at the same time, private and international, because it refers to private legal relations that display an international character, in that they come in contact with more than one legislation and because the regulation of such legal relations presupposes the determination of the limits of the jurisdictional competence of single States vis-à-vis the others."[31]

Unlike classical jurists, Anzilotti adopted a positivist framework to examine theoretical and practical problems in private international law. In contrast with what will become the new basic axiom, he also believed that choice-of-law rules ('*norme di collisione*') which must solve the 'competition of laws' ("*concorso di leggi*") fell within the scope of what Mancini and classical jurists regarded as the *jus gentium*.[32] According to the earliest works of Anzilotti, the selection of the applicable law in international disputes was thus an activity that transcended the functions and the interest of single states. Hence, concrete problems should not be ignored, but solutions should not only be looked for in domestic law but could only be found in international law and international principles. Combining positivism and cosmopolitanism, Anzilotti argued that states could and should codify uniform rules at international level to achieve uniformity of decisions.[33]

As mentioned above, some international treaties containing uniform rules had in fact entered in force. At the same time, Anzilotti and those who still rested hopes in universalism, were aware that the process of codification at international level was to put it mildly incomplete. They were also conscious that the numerous imperfections within the existing conventions gave rise to problems of interpretation and implementation. Anzilotti had himself investigated systemic lacunae in international conventions and problems of interpretation that followed from them. In antithetical terms compared to future experts, but also to what he would himself acknowledge some decades later, Anzilotti argued that it was not international law that replaced national law in exceptional cases but *vice versa*:

[31] Diena, Giulio. *Principi di diritto internazionale*. L. Pierro, 1908, p. 9 [vol 2] (Trans. A.)
[32] Anzilotti, 'Studi Critici', pp.120-121
[33] Scholars who considered Private International Law to fall within the scope of (Public) International Law emphasised that insufficient activities within the context of the community of nations made the universal codification of conflict rules a utopian endeavour. De Nova, 'Introduction', p. 484-485

> the legislative and judicial function of individual states makes up for, out of necessity, the lack of legislative and judicial organs belonging to the international juridical order; ... these laws do not in themselves have the necessary and sufficient force, but rather appear as parts of a whole which extends beyond the single units, that they together contribute to form, from which they derive their meaning and value and in relation to which they must be considered and studied.[34]

Having adopted a positive method, Anzilotti could not deny that most rules concretely governing cross-border disputes were to be found in municipal orders. However, the influence of the cosmopolitan beliefs of his predecessors resulted in the conviction that municipal rules temporarily replaced uniform rules. As he specified elsewhere, municipal rules "integrate[d] and fill[ed] up the gaps in the principles of international law, thus fulfilling the function that international law should, but is not yet able to perform."[35] Differences in municipal law and the problems created by conflicting national conceptions could not be ignored, as it had been implicitly done by his predecessors, but solutions could not exclusively depend on national law and national prerogatives. For Anzilotti, "internal laws in private international matters are … a real part of an international juridical order which is still incomplete or imperfect: hence the need to consider and study them in relation to this order that they contribute to shape, and from which they and their value originate."[36]

1.2 The Crisis of Classical Private International Law and the Rise of a New Legal Science

Although Anzilotti did not believe that national legislators and local courts were under an obligation to respect principles of purportedly universal validity developed in the previous decades, he nevertheless believed that appropriate solutions to legal collisions could only be found by taking account of the international juridical order. The question was, however, how to complete the international juridical order? Like Westlake, Savigny and Mancini at the time of the transition from the medieval to the classical age, Anzilotti argued that experts must rely on legal science. This could not correspond to the 'anti-positivist' convictions because, argued Anzilotti, such convictions lacked true scientific value.[37] Classical scholars, he argued, confused ideas and facts. They ignored differences in sources and the hierarchies of legal obligations. They replaced juridical principles with

[34] Anzilotti, 'Studi critici', pp. 93-373 (Trans. A.) See also pp. 240-241
[35] Anzilotti, Dionisio. *Il riconoscimento delle sentenze straniere di divorzio in ordine alla seconda convenzione dell'Aia (12 giugno 1902). Memoria.* Gamberini e Parmeggiani, 1908, p. 151 (Trans. A)
[36] Anzilotti, 'Studi critici', p. 134
[37] He argued that "[t]he contrast between [classical] systems and the most secure needs of thought … is so evident that it is not exaggerated to say that [the former] lack true scientific value." Anzilotti, 'Studi critici', p. 84

utopian ideals. They prioritized abstract elegance over social reality. They did not consider the effects of aprioristic rules.[38]

Anzilotti thus denounced the classical method as flawed, resulting in a growing gap between "the law and the reality of life".[39] Anzilotti pointed out that the split between the reality of cross-border situations and the old "habits of thought" had produced a crisis in the discipline.[40] He remarked that the crisis of the discipline was "critical and methodological" and, as such, it could only be solved with a renovation of the juridical science. Anzilotti thus explained that, in his view, the very problem of private international law had philosophical character and content, and jurists could not hope to solve it without going back to the first principles of thought and knowledge. Legal science could no longer be based on old mental habits, and it must change in accordance with what Anzilotti branded as the 'most secure needs of thought' which corresponded, as this chapter shows, to social legal thought.

Classical scholars, Anzilotti argued, erred when they developed a general theory ignoring entirely the behaviour of states and the concrete problems arising in international life.[41] Anzilotti demanded that closer attention was paid to sources; that rules and principles were proposed observing the reality of law; that concrete solutions to concrete problems were found.[42] Practical matters and positive laws must be the starting point for the scientific investigation.[43] Accordingly, Anzilotti examined closely the problems arising from the implementation of rules codified by international organizations, and the differences in interpretation between national courts.[44] He dedicated himself to investigate the peculiarities, limits, methods of private international law as it was developed and applied in different jurisdictions.[45] Together with an ever increasing number of scholars, he engaged in an investigation of differences, comparison, points of contact between national systems.[46]

[38] Ibid. p. 73
[39] Ibid. p. 72
[40] Ibid. p. 73
[41] Anzilotti, 'Corso', p. 9, see Anzilotti, 'Studi critici', p. 62
[42] Anzilotti, 'Studi critici', p. 18
[43] "I have not neglected practical matters", he argued, "but I have considered them either as the material from which to infer the law that governs a given category of phenomena or as the means of testing and applying the principles discovered and determined by scientific investigation." Anzilotti, 'Studi critici', p. iii
[44] Anzilotti, 'Il riconoscimento'. In the classical age, universalists took for granted that nations were compelled to enforce foreign rights. The literature started to regard this answer not only to be indefensible in principle, but also wrong in law. In family litigation, Anzilotti found, absent a fully-fledged international system, the application of what were considered universally valid conflict rules and principles, or what were now naively assumed to be internationalist parts of international law, gradually led local courts to choose the solution that best suited them, or that was in agreement with their procedural law etc.
[45] Anzilotti, 'Teoria Generale' [la Codificazione] p. 20 et seq.
[46] In Italy, among the earliest and most influential studies were that Gabba (Gabba, C. F. *Studi di legislazione civile comparata*. Milano, 1861) in civil law and in private international law, that of Pierantoni, (Pierantoni, Augusto. Della

The same scientific method must be followed everywhere, Anzilotti argued. However, unlike what classical jurists had argued, the purpose of doctrinal and scientific advancement was not the production of definitive solutions and uniform rules. The scholarship could not progress by trying to develop a theory and rules that were "ideal, comprehensive and general" and could be applied to "all civilised peoples".[47] Although the discipline must be grounded everywhere in the same method and, in the long-term, the aspiration should be to include harmonised principles in international law, Anzilotti wished that the "doctrine aspire, above all, at achieving a scientifically exact practically useful understanding of private international law, without pretending to discover and formulate rules that should be equally valid in all [jurisdictions]."[48] To escape the crisis, doctrine must not aspire to universal solutions. Rather, it must replace the old method with new ideas which:

> [are not] real principles, or institutes, or rules of international law in the exact sense of the word, which would be necessary for private international law to be truly a universal and universal right; in fact, the institutes, the rules, the principles of law are established and organized by the particular laws of the states, and therefore always contain ... the tendency to vary. But legal ideas are another matter compared to principles and rules: a juridical idea does not have its *raison d'être* and does not derive its force from a given positive legal order; it has its own independent value…[49]

The legal principles underlying the new private international law are not common to all peoples in the same declination in which classical jurists understood their seat-selecting multilateral method. They are not part of a universal law, or a modern form of *jus gentium*.[50] The solution to problems of private international law and the path out of the crisis could not be found by following scholarly intuition or some abstract, general principle.[51] For the scholarship to move forward and to acquire new scientific credibility, Anzilotti argued that the discipline must be grounded everywhere in the same principles, but "these principles correspond to the faithful interpretation of the positively recognized juridical norms, and the result of an objective investigation of that system of needs,

prova in giudizio delle leggi straniere. Proposta di un codice dei codici, in *Rassegna di diritto commerciale italiano e straniero* (1888), pp. 401-427

[47] Anzilotti, 'Studi critici', p. 18

[48] In questo contesto, si vuole che "la dottrina miri, soprattutto, ad ottenere una cognizione scientificamente esatta e praticamente utile del diritto internazionale privato…senza pretendere di scoprire e formulare delle regole, che valgano egualmente per tutte [le legislazioni]." 'Studi critici', p. 20

[49] Anzilotti, 'Studi critici', p. 93 (Trans. A.)

[50] Ibid.

[51] Ibid. p. 92

interests, goals, that this part of the law ought to protect... ."[52] The solution was to be found in a 'method' that gives priority to the positive reality of law, and that protects social interests and needs.

Coherently with the incipient social consciousness, Anzilotti believed that problems with legal collisions and solutions to them were to be investigated in the positive law effectively regulating international relations, and that they must be examined together with the concrete interests and needs that this branch of the law, like all other laws, must protect. As in the previous ages, with the change of mentality, the mode of knowledge production also changed. Since most rules were codified in national law, and national laws reflected local interest and needs, international journals gave way to national periodicals.[53] Anzilotti founded *La Rivista di Diritto Internazionale*, the first journal dedicated to international law.[54] If the founders of international journals in the classical age saw them as the voice of the conscience of the civilized world, the founders of *La Rivista* wanted it "to be … the organ and the centre of national industriousness … so that … the voice of our country would be properly heard."[55]

La Rivista soon became a reference point for Italian scholars.[56] The journal celebrated the Italian school. However, published contributions and editions reflect the declining influence of Mancini.[57] Thanks to contributions by a new generation of experts, *La Rivista* became a vehicle for the methodological renewal of the discipline.[58] The transformation of the mentality thus produced a change of method, a change of means of knowledge-propagation but also a change of unit of analysis. Scholars paid less attention to general theory and to abstract ideas, and closer attention to the sovereign state, to its legal order, to its will and to the interests and policies protected and pursued by the state.[59] As declared by Anzilotti in '*La Formazione del Regno d'Italia nei riguardi del diritto*

[52] Ibid. p. 76
[53] For instance, the 'Revue de droit International' and the 'Journal du droit international privé' in France. 0'Zeitschrift fur Internaitonales Privat and offentliches Recht' in Germany. American Journal of International Law' for the U.S. etc.
[54] Together with the founders, together with Ricci-Busati and Senigallia.See Gaja, Giorgio. "Le prime annate della Rivista di diritto internazionale ed il rinnovamento del metodo." *Quaderni fiorentini per la storia del pensiero giuridico moderno* (1987)
[55] «…essere, in qualche modo, l'organo e il centro della varia operosità nazionale, nel campo della disciplina onde s'intitola, così che per lei risuonasse meglio, anche in questo campo, la voce del nostro paese.» Anzilotti, D. Ricci-Busati, A. and Senigallia, L.A. "Introduione". *Rivista di Diritto Internazionale*, 1906, p. 3 (Trans. A.)
[56] In their 'Introduction' (pp. 3-7), Anzilotti, Ricci-Busati and Senigallia remarked that any opinion and doctrine, scientific or political, will have the opportunity to be made publii, without other restrictions except those imposed by the nature of the magazine, and by the desire to do something useful, eliminating what would not be useful for this purpose. The journal, they held, did not belong to a school or to a party. In a marked way, however, the journal contributed to the emergence of a new italian school.
[57] In the 'Introduction' the founders celebrated the achievements of the Italian school, but also pointed out its decline. They remarked, with special reference to private international law, that there was a new «contributo fecondo alla formazione e allo svolgimento di questo diritto.» (p. 3)
[58] Gaja, 'Le prime annate', pp. 486-487
[59] Speaking of the sources of international law, for instance: Se invece il diritto internazionale è soltanto il complesso delle norme create dalla volontà degli Stati per il regolamento dei loro rapporti, esso non può derivare che da questa

internazionale', published on *La Rivista* in 1912, legal science must abandon the method and aspirations of the school of Mancini, and it must pursue the "study of the State as a legal entity":

> …the legal science must emerge from a rigorous juridical study, that is, not only conducted with the method and with the proper criteria of the science of law, but freed from any interference by other contents …; a study that … does not confuse a moral and ideal order of justice with an empirical and real order of norms, justice with law, the content of law with his form.[60]

1.3 The Coordination of Legal Orders in Santi Romano's *Ordinamento Giuridico*

Anzilotti was not alone in his quest to put the 'study of the State as a legal entity' at the centre of the scientific investigation. The scholar who placed the state and its legal order at the heart of the juridical science was Santi Romano (1875-1947). Romano vigorously rejected the classical conception that reduced law to a system of coherently arranged norms of behaviour.[61] Like Eugen Ehrlich, Romano pointed out that most jurists had neglected the multiple legal orders that existed and regulated behaviour in organised societies.[62] Romano, like Ehrlich, understood law as a living and concrete phenomenon. The Austrian scholar had advanced his theory of the 'living law' as a counter-measure to the then popular abstract ideas of his predecessors. In the *Ordinamento Giuridico*, Romano, first published in 1917, adopted an 'institutionalist' approach to solve what he saw as the crisis of the modern state which had been brought about by the abstract concerns of his predecessors.

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volontà; ed il concetto di fonte si restringe necessariamente alla volontà stessa ed a' suoi modi di manifestazione.» 'Introduzione', p. 45

[60] Anzilotti emphasised that legal scholars must pursue the « studio dello Stato come ente giuridico» and in a deeper and 'sociological' sense compared to the theoretical approach used by his predecessors under the influence of Mancini: «Lo Studio dello Stato come ente giuridico ha da essere uno studio esclusivamente e rigorosamente giuridico, e cioè non solo condotto col metodo e coi criteri propri della scienza del diritto, ma liberato da ogni intromissione di contenuti specifici, di causalità sociologica; uno studio che consideri come diritto solamente ciò che ne presenta quei caratteri esterni formali che ne costituiscano la vera natura, che non confonda un ordine morale e ideale di giustizia con un ordine empirico e reale di norme, la giustizia col diritto, il contenuto del diritto con la forma sua.» Anzilotti, Dionisio. *La formazione del regno d'Italia nei riguardi del diritto internazionale*. 1912, p. 490

[61] Romano, S. *L'ordinamento giuridico*. Sansoni, 1918(1951). In the classical age, it had become a juridical cliché to conceive law as a logically arranged set of rules of conduct. This was for Romano an unforgivable reduction of complexity of the legal phenomenon which affected the study of the state order as well as of any other legal order. E' altresì riduttivo, per lo studioso Italiano, concepire un diritto come un insieme o un sistema di norme di comportamento, come nel caso dell'intero ordinamento giuridico di un ente: 'diritto francese', 'diritto della chiesa' etc… Romano, 'L'ordinamento', p. 10-11. See the commentary Cassese, Sabino. "Lo Stato,«stupenda creazione del diritto» e «vero principio di vita», nei primi anni della Rivista di diritto pubblico (1909-1911*)." Quaderni fiorentini per la storia del pensiero giuridico moderno* (1987) for a study examining the convergence with other European jurists.

[62] Romano, 'L'ordinamento', p. 9

According to the institutionalist theory, a legal order can only exist within a structured and organised society.[63] Ehrlich had also argued that social order rested on institutions that could be found in all societies such as marriage, family, possession, contract, succession.[64] For Romano as well as Ehrlich, persons engaged in relationships through norms that originated in social institutions which, in most cases, did not correspond to the rules theorised in law books and codified in legislation. But for Romano, institutions were not merely a source of law. They were law. Every legal order is also an institution, Romano posited, and every institution is a legal order.[65] Although Ehrlich and Romano shared a starting point, their 'methods' and 'projects' were radically different. Romano did not consider himself a sociologist.[66] Romano considered himself a positivist.[67] Unlike Ehrlich, he placed emphasis on the state and its legal order.[68]

Romano examined the nature and functions of private international law from an institutionalist perspective, and he did so within the context of what he regarded as the constitutional crisis of the modern state and its legal order. Conflict rules and principles, Romano agreed with contemporary jurists, belong to the internal legal order of states.[69] Private international law, he argued, was not part of international law.[70] And even if it were to be codified at international level, sovereign states were

[63] See for context Kennedy, 'Three Globalizations', p. 41
[64] Ehrlich, 'The Sociology', p. 130
[65] In Romano's view, there was an absolute and necessary identity between these two concepts. Romano, 'L'ordinamento', pp. 22-23. Diritto and istituzione are synonymous. They are the "medesimo fenomeno". Ibid. 39 There is not one without the other. There is not one prior to the other.
[66] Santi Romano dismisses those who have misunderstood his theory for a non-juridical theory. Bobbio, Capograssi and others mistook it as pre-juridical and sociological. (He refers to it in, 'L'ordinamento', p. 34, footnote 30ter) To their critique that he did not emphasise sufficiently the difference between social order and juridical order, Romano responded by placing his analysis in the pure legal discipline of public law: «… io ho precisamente mirato a includere nel mondo giuridico quel fatto dell'ordinamento sociale che generalmente si riteneva che fosse un antecedente del diritto, cercando di dimostrare che precisamente da tale errore derivano i difetti e le incongruenze delle comuni definizioni del diritto…. …si dovrebbe almeno riconoscere che io ho tentato di dare del diritto una definizione giuridica. Risultato questo al quale non si poteva giungere se non risolvendo il fenomeno giuridico nel fenomeno sociale-istituzionale e questo nel fenomeno giuridico, cioè identificando l'uno con l'altro, il che non è un circolo vizioso, una tautologia o una petizione di principio, ma la dimostrazione della perfetta autonomia del concetto del diritto e della sua suscettibilità di rinchiudersi e concludersi interamente in sé stesso.» Ibid. p. 34-35. 30ter.
[67] He was convinced that there could be no more 'positivist' theory than Ibid. 79 Law was not an abstract or a sociological idea, he thought. Law corresponds to a social entity that has a concrete, effective and objective juridical dimension. Ibid. p. 55
[68] Ibid. p. 35 For institution, Romano meant any "social entity or body" which displayed specific characteristics. Among these, the most important was structure. Structure, however, was not sufficient for law and for an institution to come into being. The essential condition for a structure to become institution is its continuation across time and space. Ibid. p. 35.
[69] «Il così detto diritto internazionale privato … in quanto non è un diritto iperstatuale o vi si ricollega.» Ibid. p. 121
[70] For Santi Romano international law qualified as an institution and legal order. «Il diritto internazionale, infine, ci offre l'esempio di un ordinamento superiore a quello dei singoli Stati, che tuttavia, non ne dipendono né per la loro esistenza complessiva, né per la validità delle loro singole estrinsecazioni. Da questo principio discende il corollario della c, d. separazione dei due ordinamenti giuridici, cioè del diritto internazionale e del diritto interno statuale.» Romano, 'L'ordinamento', p. 125. To the critique that it is absent in the international order a superior authority, he answered that «A noi però non sembra che il concetto di organizzazione implichi necessariamente un rapporto, così inteso, di superiorità e di correlative subordinazione.» Ibid. p. 45 «Così, accanto alle istituzioni semplici, sono frequentissime le istituzioni che possono dirsi complesse, e che sono istituzioni di istituzioni. Per esempio, lo Stato, che di per sé è una istituzione, è compreso in quella istituzione più ampia, che è la comunità internazionale, e in esso poi si distinguono altre istituzioni.» p. 32

the only subjects of international law.[71] It followed that only states could give themselves rules to regulate those private relations that had a cross-border dimension, and they legitimately did so in accordance with their own will and interest rather than in accordance with a general theory. Questions arose, however, if the recognition of rights granted by foreign states posed a threat to state sovereignty, and if it was in the interest of sovereign states to ignore the law of other members of the international community.

One of the fundamental premises of the institutionalist theory is that the concrete existence of legal orders does not depend on the recognition by other orders/institutions. Canon law and secular laws existed and exerted influence on individuals' behaviour regardless of mutual recognition. States may or may not recognise the effects of foreign laws and rights in their own orders, if it was in their interest, but they not get any material advantage from denying the legal character of other institutions. This idea also applied to the international community where states and their laws existed and regulated factual situations regardless of reciprocal recognition.[72] According to Romano, to recognise foreign laws did not pose a threat to state sovereignty. Recognition of foreign laws was not an obligation under international law either. States may wilfully ignore foreign nationals in their territory and deny recognition to foreign laws according to their own discretion.[73] However, would this be in their own interest and in the interest of the international community?

According to Anzilotti, the appropriateness of local rules and principles should not be judged in consideration of a vague general theory. However, cross-border disputes raised problems that concerned the whole international community. The solution to such problems could not be dictated by the interest of a single state and the *lex fori* should not be applied in all circumstances without consideration for the needs of international life.[74] For Anzilotti, the appropriateness of principles and solutions governing cross-border disputes also depended on their capacity to fulfil the needs and

[71] For Santi Romano, the subjects of international law were states, and not individuals. «il diritto internazionale si rivolge soltanto agli Stati considerati ciascuno nella propria unità, non ai loro organi o sudditi…» Ibid. p. 125

[72] Due to his institutionalist approach, Santi Romano did not deny but affirmed that all legal orders, and most especially state legal orders, were valid and authoritative independently of the recognition of other state orders. The majority of the discipline will instead affirm the contrary principle, that the existence of a foreign legal order is only admitted if the state itself recognises it. «Che in un dato ordinamento originario le norme di un secondo ordinamento non possano aver valore se non in base a norme del primo, è esatto, ma, secondo noi, è viceversa inesatto ritenere che ogni ordinamento consideri giuridiche soltanto le sue norme e irrilevanti tutte le altre in quanto tali: ciò è, non soltanto arbitrario, ma in contrasto la con la realtà. Il principio che ogni ordinamento originario è sempre esclusivo, deve intendersi nel senso che esso può, non che debba necessariamente negare il valore giuridico di ogni altro: donde mai deriverebbe questa necessità e, quindi, questa limitazione, che sarebbe poi incompatibile col carattere stesso degli ordinamenti originari, che, perché tali, sono sovrani e non conoscono altre limitazioni se non quelle poste o riconosciute da essi stessi?» Romano, 'L'ordinamento', p. 119 foonote (95bis)

[73] As it often occurred in Italy, Ibid. pp. 165-166.See also, Anzilotti, 'Il riconoscimento', p. 57 et seq.

[74] Anzilotti, 'Studi critici', p. 90

interests of the international community.[75] In line with the argument put forward by Anzilotti, for Santi Romano, recognition of foreign laws did not undermine sovereignty, but to systematically deny the positive existence of foreign institutions certainly ran counter to the interests of each member of the community and of the community as a whole.[76]

According to Romano, the coordination of the legal orders of members the international community was in the interest of states and of the community. This was especially true because sovereign states were free to set conditions for the acceptance and enforcement of foreign laws.[77] The 'coordinating function' of private international law was to 'make space' for the law of other institutions.[78] Private international law contained useful principles that enabled states to give effect to foreign laws and foreign decisions without undermining sovereign integrity.[79] One principle was the theory of 'acquired rights' as it had developed since it had been put forward by Huber. Romano distinguished between choice-of-law rules and doctrines that merely gave effects in the internal order to rights vested on persons by foreign laws or by the official organs of a foreign state. Whilst the former raised some challenging questions, the latter did not. Accordingly, Santi Romano argued:

> There is a choice-of-law rule when immediate and direct efficacy is attributed to the foreign legal order, considered as a system of positive law *per se*. Then it will be necessary to instruct the appropriate authorities … to apply it, in those cases where [foreign law is] deemed to be relevant. But [the same authorities may face a scenario in which what is asked is] the mere recognition of the effects of the acts (suppose a sentence) delivered by the same foreign State based on its own law: [in this latter scenario] the foreign State will have already applied its own law; the other State which [is asked to] enforce such acts will limit itself to examining whether they are, in accordance with the law on which they are based, legal and valid. In this way, the existence of foreign law is

[75] Ibid. p. 89
[76] See Cassese, 'Lo Stato', p. 4. «In altri termini, un ordinamento può ignorare o anche negare un altro ordinamento; può prenderlo in considerazione attribuendogli un carattere diverso da quello che esso si attribuisce da sé e quindi, se crede, può considerarlo come un mero fatto; ma non si vede perché non possa riconoscerlo come ordinamento giuridico, sia pure in certa misura e per certi effetti, nonché con le qualifiche che potrebbe ritenere opportuno conferirgli.» p. 119 Romano, Santi. *Corso di Diritto Internazionale*. [edition] p. 51
[77] sovereignty and legal independence of one order «non impedisce che ciascuno Stato, pe proprio conto e per mezzo di proprie disposizioni, dia rilevanza al diritto di altri Stati riconoscendo il regolamento che essi fanno di certe materie e astenendosi dal regolarle positivamente da sé.» Romano, 'L'ordinamento', p. 150
[78] «Il … diritto internazionale privato … si ha per l'appunto quando uno Stato, da sé e per sua propria volontà, fa un certo posto nel suo ordinamento all'ordinamento degli Stati stranieri.» Ibid. p. 121
[79] One of them was, for instnace, to decide the effects of a foreign decision: «Ora questo riconoscimento implica anche che al diritto straniero, così richiamato, si attribuisca una certa efficacia, ma resta ancora da determinare quale questa debba essere.» Ibid. p. 150

> always recognized, but it is not necessary to apply [foreign law]: what are instead recognised are its effects.[80]

Under the doctrine of '*diritti acquisiti*', courts did not have to apply foreign law but have to give effect to rights acquired abroad. In a context in which states came to jealously guard their sovereign rights and the integrity of the internal orders, the idea of acquired rights became popular once again. Acquired rights facilitated cross-border exchanges without raising questions of compatibility between the application of foreign laws and the autonomy of the internal order. Under the doctrine of acquired rights, foreign law and internal law remained separate, but they would not ignore one another.[81] This idea caught the attention of those jurists who, like Romano, were keen to promote co-existence and coordination between institutions and legal orders. In this sense, private international law offered resources that enabled states to interact with other legal orders, both state and non-state.

1.4 The Crisis of the Modern State, Private International Law and Non-State Institutions

For Santi Romano, modern states were in a constitutional crisis. What had led to the crisis of modern states was that the plurality of legal institutions and legal orders which existed in society had been disregarded. The value of private international law was therefore commensurable to the resources that it offered to modern states to exit their crisis by recognising and coordinating the interaction of the plurality of legal orders which had been fatally ignored by classical jurists. Unlike classical scholars, Romano included a variety of orders within his institutionalist theory. Legal orders and institutions could have private or otherwise character.[82] They could be secular or spiritual in nature. They may have or not territorial boundaries.[83] They could be voluntary or necessary.[84] They could be simple or complex, ethical or unethical.[85] But all institutions had, by definition, a concrete legal dimension.[86]

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[80] Ibid. p. 151 (Trans. A.)
[81] The two legal orders were formally separate: «l'efficacia di una legge straniera è determinata dalla legge nazionale, senza che la legge straniera cessi, per quest'ultima, di esistere come tale e si trasformi anch'essa in legge nazionale.» Ibid. p. 153
[82] Ibid. 'Lo Stato', p. 13
[83] Ibid. pp. 18-19
[84] Romano, 'L'ordinamento', p. 111: «Anche gli enti volontari, dunque, sono dei sistemi di diritto obbiettivo, delle istituzioni, delle organizzazioni…»
[85] In the category of 'institution', and its conception, there is no space for ethical considerations. «Infine ci sono istituzioni che si affermano in una posizione antitetica con altre, che possono alla lor volta considerarle anche illecite, come sarebbero gli enti che si propongono uno scopo contrario alle leggi statuali, o le chiese scismatiche di fronte a quelle da cui si sono separate.» Ibid. p. 32
[86] To the church and Christian communities, for instance, corresponded canon law. «L'ordinamento della Chiesa e quello di ciascuno Stato per le materie ecclesiastiche sono due diversi e distinti ordinamenti che hanno una propria sfera, delle fonti proprie, una propria organizzazione, delle proprie sanzioni, e non costituiscono, l'uno insieme all'altro, una vera unità.» Ibid. p. 98

The first part of this genealogy has shown that, in the medieval age, jurists did not ignore the plurality of legal orders. Medieval jurists elaborated rules and principles which enabled courts to settle disputes by referring to principles, divisions and ideas that applied to all legal orders. Throughout what is here defined as the classical age, however, the existence of institutions other than the state had been ignored. It was no doubt true that the process of juridification of social life that had started at the turn of the 19th century had brought under the purview of the state different laws and the customs of different people which previously fell within the scope of private ordering and non-state orders. In the *Ordinamento Giuridico*, however, Romano pointed out that the modern state did not manage to subsume all orders that existed in society under its control:

> In the Middle Ages due to the very constitutive elements of the society, split, indeed shattered in many different communities, often independent or weakly connected to one another, the phenomenon of the plurality of legal orders manifested itself with such clarity and force that it was impossible to ignore it. Without taking account of other orders, with their own marked autonomy, it is sufficient to recall the law of the Church, which certainly could not be considered as part of the law of the State. However, with the affirmation of the so-called modern State, and because of its growing strength and its dominance over other communities, hitherto independent and sometimes antagonistic, the scholarship was deluded that they had unified the legal system and, without a too obvious and strident contradiction with reality, the theory that considers the State the lord and the arbiter not only of his own law, but of all the law, [was universally accepted].[87]

The modern state had fallen victim this narrative of supremacy.[88] It managed to preserve some of its power through the force of its institutional organisation and machinery.[89] However, under the veil created by classical consciousness, the many institutions of differing natures that existed in society had been disregarded. Norms and institutions that did not fit the rigid classical conceptual schemes were dismissed as 'non-legal'.[90] Although the state claimed full control over society, Romano

[87] Ibid. p. 89 (Trans. A)
[88] Romano, 'L'ordinamento', p. 63
[89] Romano, 'Lo Stato', p. 7
[90] Santi Romano argued that failure to recognise the existence of non-state orders because 'social norms' and not 'legal norms' was in great part due to the jurididical convicitons held by his classical predecessors. The same division had been made by 19th century positivists. European jurists in the following decades will continue to divide between social mechanisms of control and legal norms, most famously Hans Kelsen (1881-1973). This made sense, as the pure theory of law advanced by Kelsen "carried on the tradition of the positive [i.e. analytical, in the common law world] theory of law of the nineteenth century." Kelsen, Reine Rechtslehre (1934), 25. Cited by Pound, p. 81. In English, Kelsen, H. "The Pure Theory of Law", *Law Quart. Rev* (1934). Kelsen, who nevertheless drew a distinction between social norms and legal precepts and mechanisms properly so called. Kelsen understood law as a sanctioned rule of conduct. Famously, he

emphasized that various groups and organisations, from merchant communities to labour unions, from banking institutes to families, had acquired immense power, often at the cost of the state and its legal order.[91] While lawyers were distracted by abstract and theoretical debates, the power of these institutions, which performed specific functions and protected the interest of their members, grew to the point of determining the crisis of the modern state:

> … it is precisely from these [doctrinal] contrasts [between specialists] or, rather, from a special attitude assumed by them that the movement which determines a kind of crisis in the modern State receives its greatest strength. Within it, and often … against it, a series of organizations and associations multiply and prosper with a flourishing and effective life and these, in turn, tend to unite and connect with each other. They have different special purposes, but all have a common character: that of grouping individuals according to a professional criterion or, rather, of their economic interest. They are workers' federations or unions, trade unions, industrial unions, mercantile unions, agrarian unions, unions of officials; they are cooperative societies, institutions of mutuality, chambers of commerce, leagues of resistance or of social security, all established on the constitutive principle indicated above, from which they derive their collective physiognomy.[92]

Under the influence of classical legal thought, too much 'private' or 'quasi-legal' had been left outside the scope of (public and state) law. 'Private' institutions grew abnormally because they fulfilled a role which naturally and constitutionally pertained to the state but from which the state had itself abdicated. This role was the protection of social and collective interest.[93] Romano used labour unions

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argued that the state and its constitution are the ultimate norm. For Kelsen, "Legislation and custom … rest upon the constitution, which in the sense of legal logic is the ultimate norm, the final source of the system of law. The decisive element for the positivity of law which gives law the character of a self-sufficient system, distinct from all other systems of norms, independent, and closed within itself, lies in [the constitutions] as the highest, derivable from nothing beyond, through the quality of sovereignty lent by this ultimate norm to the whole system of law raised out of it." Kelsen, Das Problem der Souveranitat (1920) 94, cited in Pound, 'Jurisprudence, Vol. 2', p. 81. The distinction made between social nroms and legal precepts may give the impression that the overall objective of Romano and of other notable jurists, like Kelsen, who adopted a positive approach was entirely different. Notably, Romano was not a sociologist. He was an institutionalist. His objective was to submit what had been considered as 'non-legal orders' to state power and under the control of public law. This objective was shared by Kelsen. In fact, the reason for submitting non-state orders advanced by Romano can be compared to another distinction made by Kelsen. For Kelsen, the politically organised body has the duty to carry out a coercive measure to what is socially desirable behaviour or to apply a sanction to what is regarded as a socially undesirable behaviour. "Looked at from a sociological point of view, by which it is distinguished from all other social mechanisms, is the fact that it seeks to bring about socially desired conduct by acting against contrary socially undesired conduct … with a sanction which the individual involved will deem an evil." Kelsen, H. "The Pure Theory of Law and Analytical Jurisprudence". 55 Harvard Law Review (1941). Romano, as we shall see below, considered the proliferation of organisations protecting the economic interests of their members in many cases irreconcilable and in most cases absolutely incompatible with the social functions of the state legal order.

[91] Kennedy, 'Three Globalizations', p. 40

[92] Romano, 'Lo stato', p. 12 (Trans. A.)

[93] «Scomparsi e soppressi i ceti e corporazioni, ridotti alla minima espressione persino i Comuni, non si volle porre di fronte allo Stato che l'individuo: l'individuo all'apparenza armato di una serie infinita di diritti enfaticamente conclamati

to illustrate his point. Labour unions existed because they guaranteed a degree of protection to their members against the damaging forces of the market that had been set free by classical liberalism.[94] As shown by labour unions, parallel institutions sometimes overlapped with the state, i.e. they performed public and social functions. At other times they were free-standing, pursuing objectives that were autonomous or even incompatible with those of the state.[95] Either way, the persistent incapacity to recognise their existence and their functions had disempowered and delegitimized the modern state.[96]

Admittedly, as in the case of states interacting with other members of the international society, the choice of a state to recognise or not a parallel institution and a non-state order was political. As in the case of cross-border disputes, legal orders could recognise each other or deny and resist one another.[97] However, the crisis of the state showed that lack of recognition was not in the interest of the state. Instead of ignoring other institutions, states could give themselves the equivalent of conflict rules and set conditions for recognition. In this way, Romano argued, the modern state and its order could be taken out of their crisis and into a new era.[98] Although the state was the institution having the most to lose from this situation, for Romano, it also had the most to gain, as the state was also the only organisation that could maintain the peaceful co-existence between other institutions.[99] The state could recognise, but also submit all other orders under its power and control.

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e con costosa generosità elargiti, ma nel fatto non sempre protetto nei suoi legittimi interessi. Mentre l'organizzazione dello Stato moderno, in quanto concerne il suo affermarsi come unico potere sovrano, non è dubbio che abbia fedelmente rispecchiato la nuova struttura sociale, essa si palesò presto del tutto deficiente, nel regolare, anzi spesso nel non riconoscere gli aggruppamenti degli individui, pur così necessari in ogni società pervenuta ad un altro grado di sviluppo.» Ibid. 14

[94] Ibid. 18

[95] Discussed in Romano, 'L'ordinamento', pp. 86-87

[96] Romano, 'Lo stato', p. 15

[97] «L'efficacia di tale ordinamento sarà quella che sarà, quella che risulterà dalla sua costituzione, dai suoi fini, dai suoi mezzi, dalle sue norme e dalle sanzioni di cui potrà disporre: sarà infatti debole, se forte sarà lo Stato; potrà talvolta essere anche così potente da minare l'esistenza dello Stato, medesimo; ma ciò non ha alcuna importanza per la valutazione giuridica dell'ordinamento. E' noto come, sotto la minaccia delle leggi statuali, vivono spesso, nell'ombra, associazioni, la cui organizzazione si direbbe quasi analoga, in piccolo, a quella dello Stato: hanno autorità legislative ed esecutive, tribunali che dirimono controversie e puniscono, agenti che eseguono inesorabilmente le punizioni, statuti elaborati e precisi come le leggi statuali. Esse dunque realizzano un proprio ordine, come lo Stato e le istituzioni statualmente lecite. Il negare a tale ordine il carattere della giuridicità non può essere che la conseguenza di un apprezzamento etico, in quanto siffatti enti sono spesso delittuosi o immorali….» Romano, 'L'ordinamento'. 101

[98] Against the unrestricted and often destructive social forces unleashed by social, economic and technological revolutions between the 19th and 20th century, the survival of the modern state had come to depend on the recognition of parallel institutions, their legal orders and their functions.Taking once again labour unions as an example, Romano argued that, if recognised and controlled by the state, unions could not only help to mitigate the excesses of liberalism, but could also strengthen the legitimacy of the state and the faith in its legal order by citizens and workers. Romano, 'Lo Stato', pp. 19-20

[99] "A principle seems to us to be increasingly urgent and indispensable: the principle, that is, of a superior organization that unites, reconciles and harmonizes minor organizations …. And this superior organization can be and still will be for a long time the modern State, which will be able to preserve almost intact the shape that it currently possesses." Ibid. 24 (Trans. A.)

2.1 The Transformation and Fragmentation of Contract Law in the Social Age

The decline of classical legal thought and the emergence of a new consciousness grounded in naturalism and in the notion of social interest and social protection provoked a global reconsideration of the boundaries, principles and functions of all legal branches. Conceptual and abstract concerns gave way to social protection within the various components of the legal orders, including the law of the economy. Given the predominant place occupied by private law, and especially contract law, in classical consciousness and in classical law, it was perhaps inevitable that the classical conception of contract law and, by extension, the law governing international contracts were to be the interrelated fields where the emergence of a new consciousness and of a new discourse grounded in social interest and social purposes was to generate the most obvious and most dramatic changes. Until the early years of the 20th century, Italian jurists still held that:

> …the highest principle of reason that governs contractual matters is the full liberty of contracting parties, which [alone] can measure the value of transferable objects, in anything that concerns private interest.[100]

Under the conviction that modern legal orders must ensure the greatest possible scope for self-determination, however, Italian scholars had ignored the fact that unrestricted contractual freedoms and the lack of protective measures for certain subjects had led to growing inequalities and increasing social tensions between groups. The proliferation of interests-groups that resulted in a crisis of modern states described by Santi Romano was caused by the sweeping freedoms granted by classical contract law. Already towards the end of the 19th century legal scholars had become more sensitive to instances of social and economic oppression.[101] A new generation of private lawyers started emphasising the social functions of contract law.[102] Particularly important were Emanuele Gianturco (1857-1907) and Enrico Cimbali (1855-1887).[103]

When Romano wrote the *Ordinamento Giuridico*, free will was still considered the universal currency of the law governing the market. Regardless of the economic sector in question, most scholars stuck to the classical mantra and did not dare to pollute the pure principles underlying classical private

[100] Giorgi, Giorgio. *Teoria delle obbligazioni nel diritto moderno italiano: esposta con la scorta della dottrina e della giurisprudenza*. Fratelli Cammelli, 1895, p. 151 (Trans. A.)
[101] Chiodi, Giovanni. "La funzione sociale del contratto: riflessioni di uno storico del diritto." *La funzione sociale nel diritto privato tra XX e XXI secolo* (2017), p. 156
[102] Ibid. p. 157
[103] See the exchanges between Gianturco and von Jhering, Wesener, Gunter. "Rudolf von Jhering. Beiträge und Zeugnisse aus Anlaß der einhundertsten Wiederkehr seines Todestages am 17. 9.1992." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*. Germanistische Abteilung (1994), p. 139

law.[104] It was because of the classical dogma of free will that unfair salaries in employment contracts had ended up dominating the economy, and especially the industrial sector.[105] It was for the same abstract concern for free will which classical jurists religiously cherished, that trade unions, industrial unions, mercantile and agricultural organisations had proliferated, defending the interest of their members. Such organisations had power to regulate, enforce and adjudicate. However, instead of addressing the specific grievances of each group, the state submitted to contractual logics:

> [For the state and] for its legal organs the institution of the contract is, at least as a rule, the only one that can have relevance: everything that fails to fall within its remit will be unprotected within the state order and it might even be declared illegal…. What for the viewpoint of the state order is a mere contract, seen from the eye of [groups of industrialists and workers] is a self-standing legal system, more or less autonomous, of objective law, which is enforced by means of the instruments of which each organization is endowed: [these] means may be for the State extra-juridical or even anti-juridical, but they are, vice-versa, legitimate according to the special regime in which they originate.[106]

Even though jurists were growing increasingly aware that the law must adapt to the needs and reality of the modern economy and modern society, Italian jurists, like most European jurists, did not venture into a thorough revision of the classical law of contract. They assumed that private law was founded on universal and perpetual principles, and that such principles governed every interpersonal matter which was not connected to status. They took for granted such principles applied to all types of economic relations, regardless of the sector and of the characteristics of the parties.[107] The emergence of social legal thought, however, brought under the spotlight the dysfunctionality of classical contract law. Classical jurists were accused of having romanticised free will which had led to pathological behaviour in the market at great social cost. Experts:

> …had finally come to realize that if no control is exercised over freedom of contract in a competitive economy, the concentration of power which such freedom of contract makes possible can produce conditions in which the weaker loses his freedom to the stronger.[108]

[104] Romano, 'L'ordinamento', p. 104
[105] See Cazzetta, G., "Il lavoro", in *Il contributo italiano alla storia del pensiero*, Diritto, 2012, pp. 422-429
[106] Romano, 'L'ordinamento', p. 105 (Trans. A.)
[107] Chiodi, 'La funzione sociale', p. 155
[108] Wieacker, 'A History', p. 432

Although the turn to the social did not undermine the idea that economic law is underpinned by the principle of freedom of contract, it nonetheless subjected such freedom to state control. It forced courts to take into consideration the circumstances in which the parties expressed their intentions. This was a significant moment in the transformation of private law in the social age. With the rise of the new consciousness, intervention in private matters became acceptable whenever autonomous social forces "threatened the solidarity of society", regardless of the economic sector in question.[109] One may wonder why the realisation of the social costs of classical legal thought and the gradual transformation of domestic contract law is also relevant for the regulation of cross-border private matters. More generally, one could also ask what effects the rise of the social produced on the boundaries and divisions conventionally accepted in the previous age.

To fully understand the transformation of private international law, both with respect to the regulation of the economy and the regulation of the family, it is necessary to examine how policy-oriented rules and mandatory norms - which used to mark the family province - went from being an anathema to becoming a fundamental dogma propounded by most private lawyers. Part II of this genealogy showed that, although contractual freedoms and party autonomy are different concepts, they both originated in the classical ideal of free will. The fact that contractual freedoms became the subject of greater regulatory attention in private law can also explain why the same process would also take place in private international law in later decades. The fact that mandatory provisions proliferated in private international law, that different types of contracts became subject to specific rules, can be explained by the inroads that were made in private law with the ascendancy of social consciousness.

From the early 20th century, European experts became convinced that "the classical conception of private law as a complex of private spheres of action must defer to the solidarity of the economy as a whole."[110] Accordingly, legislators and courts first started developing *ad hoc* rules and corrective mechanisms for addressing concerns and grievances in spheres of social life that classical jurists had strenuously protected from 'paternalistic' state control. Then, experts started pushing for systemic legal reforms in private law.[111] Employed persons, land labourers, but also consumers and service users gradually came under the protective net of what Otto von Gierke (1841-1921) had prophetically called 'social law'. The discourse in Italy experienced a profound change as in other European

[109] Ibid. p. 434
[110] Ibid.
[111] Wiaecker describes other inroads of social law in the classical province of private law. Ibid. p. 434 et seq.

jurisdictions.[112] Jurists claimed that civil law was a branch of state law and, as such, subject to public prerogatives.[113] Santi Romano also held that:

> [Private law] is, without doubt, a simple specification of [public law], one of its forms and directions, one of its branches. Not only is it attached to public law, which constitutes its roots and its trunk, and it [thus] necessary for its protection; [Private law] is also constantly, though sometimes silently, dominated by public law.[114]

Taking a great leap forward from classical jurists who argued that only private law constituted 'true law', Romano argued that all law was truly public.[115] He stressed that even private law was subject to public law.[116] He vehemently dismissed the opinion of those who argued that relations governed by public law lacked legal essence.[117] The state and public law, he claimed, were not lifeless and spiritless institutions. On the contrary, the legislative, administrative and adjudicative functions of state officials best represented the contemporary national laboriousness.[118] Even though all laws and institutions were in principle subject to Italian public law, Romano denounced the fact that, under the classical myth of free will, the power of private organisations and private ordering had turned the force and functions of public law into a legal fiction.[119]

Only in some limited instances did Romano admit that state law and public bodies should be called upon to enforce private rights.[120] However, since the publication of the *Ordinamento Giuridico* in 1917, European states had placed checks on financial institutions. They controlled cartels in various industries through anti-trust legislation. They fixed prices in the transport and insurance sectors. They regulated practices in agriculture. They increased their regulatory power in housing and property

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[112] Cazzetta, G. *Scienza giuridica e trasformazioni sociali. Diritto e lavoro tra Otto e Novecento*. Giuffré. 2007. Esp. pp. 27-65 where he also lists relevant publications. See also Solimano, S. "Un secolo giuridico (1814-1916). Legislazione, cultura e scienza del diritto in Italia e in Europa" in Alvazzi Del Frate, P. et. Al. *Tempi del diritto. Età medievale, moderna , contemporanea*. Giappichelli, 2016, pp. 319-387, pp. 364-368

[113] For instance, the influential work of Petrone, Igino. *Il Diritto Nel Mondo Dello Spirito* (1910), p. 134 et seq.

[114] Romano, 'L'ordinamento' p. 8 (Trans. A.)

[115] Ibid. p. 7

[116] Ibid. p. 103

[117] Responding to the thesis put forward by Ravà (esp. in Ravà, A. *Il Diritto come norma tecnica* (1911), p. 102) «L'opinione, invece, diametralmente contraria …che vero diritto sia soltanto quello privato, mentre i rapporti di diritto pubbico non sarebbero intrinsecamente rapporti giuridici, non può spiegarsi altrimenti che ponendo mente a quanto diciamo nel testo: che, cioè, la definizione comune del diritto, da cui si parte, è essenzialmente formulata con riguardo al diritto privato, e perciò in certo senso esclude dal suo ambito concettuale il diritto pubblico. E' dunque un'opinione che può servire a confermare il bisogno di rivedere tale definizione dal punto di vista pubblicistico.» Ibid. p. 8 (footnote 7).

[118] «Se così è, il momento giuridico, nell'ipotesi accennata, deve rinvenirsi, non nella norma, che manca, ma nel potere, nel magistrato, che esprime l'obbiettiva coscienza sociale, con mezzi diversi da quelli che son propri di ordinamenti più complessi e più evoluti." Ibid. p. 17 Qui si da risalto all'idea che sta allo stato un importanza fondamentale nell'ordinamento giuridico.»

[119] Ibid. p. 103

[120] Ibid. p. 104

ownership. Absolute autonomy no longer governed employment contracts in the industrial and agricultural sectors. The once coherent classical private law had gone through a process of 'disintegration' as "the socially sensitive areas within it were excised and became separate from it" and they were placed under the scope of state law and state power.[121]

The process of reforms started earlier than Italy in other European states, especially Germany. However, Italian jurists were especially responsive to the re-orientation of the law and the discourse towards the social.[122] Italian scholars saw in the organisation and in the principles codified in the Civil Code of 1865 an objective proof of the abstract concerns and of the egotistic ethos that underpinned classical contract law. The Code thus came under criticism from a growing number of jurists who emphasised that private lawyers had fatally ignored growing economic and social inequalities. As in other jurisdictions, specialists demanded the introduction of mandatory provisions and that power asymmetries should no longer lead to abuses of freedom of contract. Among them was Emilio Betti (1890-1968) who would be involved in drafting the Civil Code enacted in 1942. Accordingly, discussing autonomy in contract law, Betti argued:

> The concept of a boundless contractual freedom is to be confined to the mythology of liberal individualism and to be replaced by [that of] an autonomy whereby the contracting parties [are free to] set the rules governing their interest but always operate in accordance with positive law, within the scope of social finality sanctioned by [the law], and in conformity with the logics underlying it.[123]

Although most jurists in the social age would agree with Betti's statement, each one could understand the substance of the 'social finality' in different ways. In the early decades of the 20th century, the Italian 'private law' school was as divided, philosophically and politically, as other European ones. Experts therefore advanced different and often conflicting proposals for possible reforms in civil law and in contract law.[124] However, Italian specialists agreed that 'social private law' must mediate

[121] Wieacker, 'A History', p. 431

[122] See Chiodi, 'La funzione sociale' and from the same author G. Chiodi, La giustizia contrattuale. Itinerari della giurisprudenza italiana tra Otto e Novecento, Milano 2009

[123] «…il concetto di una libertà contrattuale sconfinata è da relegare fra i miti dell'individualismo liberale e da sostituire con quello di una autonomia, con la quale le parti dettano bensì regola ai propri interessi ne' loro rapporti reciproci, ma operano sempre sul piano del diritto positivo, nell'orbita delle finalità sociali che esso sanziona e secondo la logica che lo governa». In Betti, Emilio. *Per la riforma del codice civile in materia patrimoniale*. Hoepli, 1941. On this, and a comparisonwith the thought and work of Vittorio Scialoja, see M. Brutti, *Vittorio Scialoja, Emilio Betti: Due visioni del diritto civile*. Giappichelli, 2013

[124] Some private lawyers proposed to use equity. The written law, they argued, could not anticipate where risks of abuse might arise. This meant expanding the functions of the judge. Notably this is a position defended especially in common law systems, even in the contemporary age. See for instance on unfair contracts and equity, H. Collins, Regulating

between individuals and society, between freedom and solidarity on the one hand and, on the second one, that it must minimise the risks of contractual abuse and thus protect weaker parties from the dangers of social and economic exploitation.[125] Regardless of their political preferences, experts agreed that the modern state must perform regulatory functions in private and economic matters.

With the rise of fascism, the law took a corporativist turn in Italy.[126] For Betti, Italian civil law must be reformed to submit private interest to public interest. The state, he argued, must be able to coordinate conflicting social interests by directing and regulating the economy.[127] The turn to corporativism, however, was nothing but one institutionalised version of social private law.[128] So close were the concerns of jurists from different European jurisdictions in this period that, no matter how different the political prospects and the constitutive principles of each state, the unification of 'private law' in Europe appeared a viable, rather than utopian ambition.[129] In fact, European jurists understood the increasing number of mandatory laws in private and economic matters and the greater regulatory functions acquired by the state as pointing in the direction of the rise of a "dirigiste contract law" in a "dirigiste state".[130]

From the earlier decades of the 20th century, the liberal nation-state thus gave way to the social or dirigiste state under the influence of new logics and ideas. It is in this climate that Italian jurists advanced the first proposals for a comprehensive reform of the civil code. The forces that paved the way for the Civil Code of 1942, which are visible in the abandonment of classical principles and ideals and in the convergence of the law and of the discourse around social interest were not a phenomenon circumscribed to specific jurisdictions. The result of the emergence of social policy and

Contracts, Oxford 1999, p. 267 Others criticised this proposal since it gave discretionary powers to the judge. They opted for excluding one-sided and unfair clauses. See Chiodi, 'La funzione sociale', pp. 160-162

[125] See F. Wieacker, in particolare riguardo alla Germania, Storia del diritto privato moderno con a cura di U. Santarelli e S. A. Fusco, II, Milano 1980, pp. 195-197, esp. p. 196

[126] Somma, Alessandro. "Il diritto fascista dei contratti: raffronti con il modello nazionalsocialista." *Rivista Critica del Diritto Privato* (2000)

[127] See Betti, 'Per la riforma del codice', pp. 85-190 and esp. 124-136;

[128] With manifest differences, although 'social solidarity' comes close to 'corporativist solidarity' in its fundamental traits. As Kennedy remarked: "the social could be based on socialist or social democratic ideology, on the social Christianity of Protestant sects, on neo-Kantian 'situational natural law,' on Comptean positivism, on Catholic natural law, on Bismark/Disraeli social conservatism, or on fascist ideology." Kennedy, 'Three Globalizations', p. 39

[129] In Italy, the proposal is voiced especially by Vittorio Scialoja who spoke about a « alleanza legislativa fra le nazioni latine» in private law. His proposals resulted in a combined French and Italian project on contractual obligations. Notably, family law was left out of the proposal as it was considered too close to the «spirito nazionale». Scialoja, V. "Per un'alleanza legislativa tra gli Stati dell'Intesa", Studi giuridici. IV. Diritto privato, Roma, 1933, pp. 189-190

[130] In France, this view was famously expressed by Louis Josserand in Josserand, L. "Le contrat dirigé", in *Dalloz, Recueil hebdomadaire de jurisprudence*, 1933, pp. 89-92. This influential article was translated in Italy in the Rivista di diritto civile as "Considerazioni sul contratto 'regolato'", in *Archivio giuridico Filippo Serafini*, (1934), pp. 3-21. Although Josserand was open to the idea that there should be mandatory laws that protected the weaker party and that the public authority should intervene to balance out the contracting position of the parties, he also argued that courts and legislators shoud not undermine the basic principle that *pacta sunt servanda*. States should not encourage the violation of contractual agreements.

social interest determined a transformation of private law across European legal orders. In the words of Filippo Vassalli (1886-1955), who played a prominent role in the drafting of the future code, especially of its family provisions, "[p]rivate law is today different from yesterday's in the sense that it operates in consideration of objectives overriding individual interest."[131]

2.2 The Law of the Household in the Beginning of the Social Age

The rise of the new consciousness transformed the logics and rationales underlying the law governing private and economic relations. It transformed, by extension, the rules and principles of private international law of the economy. It also shifted the law and the discourse concerning marriage and family relations.[132] If it was somehow inevitable that the romantic idealisation of free will in contractual relations by classical jurists was to undergo a dramatic reconceptualization in the social age under the influence exerted by talk of 'social interest', so were many of the myths concerning the family propagated by classical legal thought doomed to become the target of the social critique. In the early years of the 20th century, as in the case of private and economic relations, so in family relations, the classical discourse still held sway.

Although the Italian Civil Code in 1865 had 'juridified' family life in principle, Italian civil law had remained dead letter. The other side of the harmful illusion that states had subjugated all orders and organisations in the economic sector was the classical categorisation of family relations as quasi-legal or non-legal. The idealisation of free will and personal autonomy was mirrored by the protection of the lack of intervention in the sacred space of the family. Accordingly, officials limited their interference to instances of physical abuse taking place in the household. If the unrestricted contractual freedoms granted to economic actors had led to the proliferation of informal orders, systematic lack of compliance with marriage law had led to the proliferation of informal marriages. Between the first and the second decade of the 20th century, an odd mix of liberal and socialist forces succeeded in including in the reformative agenda the reform of marriage law, the introduction of divorce, and the abolition of the law of coverture: the "*autorizzazione maritale*".[133]

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[131] «Il diritto privato di oggi si distingue dal diritto privato di ieri per ciò che in esso è assai più operante la considerazione di fini che sono sopra ordinati ai fini individuali: con tutto un nuovo e diverso orientamento delle regole, dandosi al diritto civile una configurazione diversa da quella del diritto civile anteriore.» (Trans. A.) F. Vassalli, 'Motivi e caratteri della codificazione civile', in Id., *Studi giuridici* (1942-1955), Milano, 1960, pp. 605-634, p. 633. Cited in Chiodi, 'La funzione sociale', p. 151

[132] Romano spoke of household law, and not of family law: Hausrecht and not Familierecht. Romano, 'L'ordinamento', p. 61

[133] and, more generally, on putting an end to other forms of institutionalised discrimination and violence against women, married or not. For Anna Kuliscioff, the Italian woman was 'tre volte schiava': «nella famiglia, nell'officina e nella società, che le nega ogni diritto politico e la pienezza anche dei diritti civili» A. Kuliscioff, *Per Augusto Bebel (nel suo settantennio),* in «CS», XX (1910), p. 51. Socialists and liberals should however not be confused. Notably, Kuliscioff

Since the last decades of the 19th century, when the earliest surveys carried out at local and national level became widely available, it had become clear that the new-born Italian state had failed to enforce its marriage laws. Italians continued to marry outside the procedures established by civil law in the hundreds of thousands. Many marriages were celebrated following local form, whilst the majority was celebrated in accordance with (unrecognised) canon law. Italian courts had clarified that a marriage pact contracted religiously did not produce any effect in civil law, regardless of its validity in canon law.[134] The high number of informal marriages and the lack of recognition explain why, around the turn of the 20th century, members of the Italian parliament attempted to reform the law on various occasions. Each time, however, reform proposals met vigorous resistance by civil society.[135]

Lack of compliance not only exposed the spouses to the risk of prosecution, inter alia, for concubinage and bigamy, but also increased uncertainty with respect to patrimonial and succession rights. An informal marriage endangered the legitimacy of their children. If a claim for succession was brought in court against children of informal marriages, courts would consider them under civil law to be born out of wedlock and this would inevitably prejudice their succession claims. The reasons for lack of compliance with state law were no doubt various and of complex nature. One may wonder, to begin with, how many Italians were aware of legal requirements set in the official law. The explanation provided by historians is that Italian citizens did not have much to gain from civil law and from the public administration. In fact, bypassing Italian law of marriage meant:

> to run away from burdensome double formalities as well as from the expenses incurred for obtaining the necessary documents; to prevent children from being registered by the civil registry, and thus [to save them] from the military conscription; to circumvent the limits and prohibitions imposed on members of the army; for the widows who re-married, to avoid losing pension rights…[136]

It could therefore be argued that, despite some personal and social costs in which individuals may incur, failure to comply with civil law was the result of a deliberate choice to stay away from the official laws of the state and to stick to non-state orders. The dominance of informalism and private

opposed, together with members of the Italian Socialist Party, such as Turati, free divorce ('matrimonio a termine'). See Ungari, 'Diritto di Famiglia' footnote 6, p. 206. In fact, socialist reformers largely neglected the civil law aspects of institutionalised violence.

[134] Caet seq. Torino 20 febbr. 1879, in *Legge*, 1879, 1, 795

[135] For Ungari, the number amounted to about 120.000 between 1866-1871. Various attempts to reform Italian marriage law had in fact occurred between the Progetto Mazzoleni of 1872 to Finocchiaro Aprile of 1914.

[136] Ungari, 'Diritto di famiglia', p. 189

ordering meant that Italians did not comply with marriage law and, potentially, with any other provision codified in the Civil Code of 1865, including the prohibition of divorce. The Civil Code had prohibited divorce and re-marriage. Article 148 of the Codice Pisanelli established that the marital tie is inherently indissoluble, and that only death could put spouses asunder. However, Italians could still marry and separate outside the purview of state law or could, as we shall see below, travel abroad to divorce and then-remarry in accordance with foreign law.

Some reformers believed that one possible solution to reduce the magnitude of the phenomenon of informal unions was to introduce divorce. Several proposals for reform had attempted, without success, to introduce divorce before the end of the century and in the early 1900s.[137] Most jurists, however, dubbed divorce as alien to Italian culture, which led to their rejection.[138] The debate on the reform of marriage law and on the introduction of divorce illustrate how the classical vocabulary shaped the arguments advanced by both the supporters and the detractors of the reforms. To find a way out of the deadlock, for instance, advocates of divorce insisted that marriage had a contractual nature, and there was no reason why the legislator should interfere with its dissolution. Those opposing the reforms held instead that marriage was not like any other contract, but a "contract sui generis". For Salvatore Brandi (1852-1915), the future director of the influential journal *Civiltà Cattolica*, marriage was, both in canon law and in civil law, a "unique contract".[139] Hence, the spouses should not be free to dissolve it at will, or to dissolve it at all.[140]

Brandi argued that, even though marriage came into being after the spouses had given their consent, marriage was "in every sense, different from other contracts". Marriage was not governed by the

[137] The 'progetto Berenini', advanced in 1901, was the first legislative project that received a modicum of support by experts and by the government. Among the supporters of the project was the then Minister of Justice Francesco Coccu Ortu (1849-1922). Coccu-Ortu declared that the "law on divorce was demanded by high reasons of civility" and that he "would have not hesitated to propose it to Parliament, certain" as he was that "in so doing, [he was] interpreting the desires of the renovated civil conscience". (As declared by the Minister and recorded by the newspaper Tribuna. Cited by Civiltà Cattolica, 1902, p. 26). Some Italian jurists and philosophers thus defended the introduction of divorce as a stepping stone in the liberal advancement of Italian society. See Ungari, pp. 191-198. The content of the progetto Berenini was by and large coherent with proposals and reforms introduced in other European jurisdictions. Divorce would only be granted after a period of separation (one year without children; three years with children). Only serious offences would justify divorce, such as imprisonment for ten or more years. Notably, also incapacity to consummate. See Ungari, p. 195.

[138] The legislative project of Bernini, as previous projects, was met with great resistance from Italian Catholics, which persuaded the government to drop the project. It was claimed that by three million and a half signatures by Catholics opposed the reform, a number that has been contested by historians, but induced the government to drop the project Ibid. As the influential journal 'Civiltà Cattolica' denounced it, there was no space in Italian law for "the folly of divorce". CC, LIII, 16 Aprile 1902, pp. 166-168. See Chapter 4 and 5 of Seymour, Mark. *Debating divorce in Italy: marriage and the making of modern Italians, 1860-1974*. Springer, 2006. See also M. Seymour, Till Death Do Them Apart? The Church-State Struggle over Marriage and Divorce, 1860-1914, in P. Willson (ed.), Gender, Family and Sexuality: The Private Sphere in Italy, 1860-1945

[139] Brandi, Salvatore Maria. "La follia del divorzio: fatti e note". *Civiltà Cattolica*, 1901, pp. 28-29

[140] Ibid. p. 30

same rules that regulated 'ordinary contracts'.[141] The contract of marriage was unique because "other contracts, due to their indeterminate nature and because of the object of their regulation, subject as they are to human mastery, present endless variations and limitations depending on the will of the contracting parties, with respect to the duration, to the purpose, to the end, and to the terms of the contract".[142] Marriage, in contrast, "is [pre-]determined, due to its nature, with respect to its end, to its terms … and as far to the rights and obligations that spring from it are concerned."[143]

Brandi's words are evidently evocative of the classical conceptual vocabulary but also reflect, from an antithetical viewpoint, the position taken by his opponents in the debate. In the early years of the 20th century, the ethical principles and jurisprudential ideas underlying family law and family discourse were still under the influence of classical legal thought. Marriage is contract, but it is a special kind of contract. The matrimonial bond is sacred and indissoluble. The family stood at the foundation of the nation-state.[144] The family was also its moral bulwark. Coherently with the classical conception, family relations are considered quasi-legal. The family must be protected from outside interference, including that of the state. For this reason, many specialists continued to oppose the idea of reform of family. Among them was Gianturco even though he was a defender of a strong social state.[145]

This is the context in which Santi Romano wrote the *Ordinamento Giuridico*. Romano advanced the argument that the family was a social institution. But the family was not just an institution. The family was the most important institution, before and for the state. The family-state metaphor was, of course, nothing new.[146] What was new is that Santi Romano, contrary to Savigny and to classical jurists but also differently from medieval jurists who had not speculated on the legal nature of family relations, regarded the family as a proper legal order. The family presented the characteristic elements of an institution. The head of the state within his territory, the businessman in his company, the school-

[141] «…non segue affatto che del matrimonio debba o possa giudicarsi come si giudica di un qualsiasi contratto; segue anzi l'opposto, poiché esso è un contratto singolare, al tutto diffeente dagli altri. » Ibid. p. 29

[142] «Dove gli altri contratti, per la loro indeterminazione naturale e per la loro materia, appieno soggetta al dominio umano, ricevono infinite variazioni e limitazioni dalla libera volontà de' contraenti, rispetto al tempo, all'uso, allo scopo, agli obblighi annessi; il matrimonio è determinato di sua natura nel fine, ne' mezzi, nelle attitudini presupposte, ne' doveri e diritti che importa.» Ibid. p. 29

[143] Ibid.

[144] «La famiglia sta alla base dello Stato», p. 27, p. 33. Journals were published for the purpose of opposing the reform as «*Il divorzio*», il «*Bollettino contro il divorzio* »

[145] In his Sistema di Diritto Civile Italiano, Gianturco had immersed himself in the old conceptual debate whether the family was governed by private or public law, a discussion which in itself signals the influence of classical formalism, but also announced some new interesting ideas in line with the emerging political and institutional reality. 1° vol., Parte generale e diritto di famiglia, *Paravia* 1894

[146] As in the past with Bodin and Grotius, the family served the purpose of illustrating the basic elements that any institutional and legal order must have, and especially the state legal order: a ruler, a territory and the subjects. Romano, 'L'ordinamento', p. 59

master in his school, and the father-husband in his household, each represented a legal order, a *dominus*, to which the citizens, the employees, the pupils and the wife-children were subject.[147]

Whereas classical scholars regarded family-relations as quasi-legal and advocated immunity from state interference, Romano regarded the passive stance taken by the state as an illustration of its weakness. As in employment relations, so in family relations, the theoretical concerns and abstract classifications of classical jurists had facilitated the rise of private ordering and the evasion of official law. The multiplication of informal marriages illustrated this conundrum. Romano pointed out that the state order was undermined by the fact that in several provinces most Italians continued to contract marriage outside the civil law, that many only married in accordance with canon law, and that a significant number did not marry at all. This was a problem because, for Romano, the most important institution was the family, and the family was founded on marriage. For Romano, marriage was not a 'contract sui generis'. A simple contract could not create an institution.[148] In contrast:

> … the conjugal society, which, considered in itself and for itself, would only be a [social] relationship, can and does normally acquire the constitutive form of the family *qua* a legal entity, that is, of an institution. Indeed, as a result of the intervention of the state and of public law, which … for instance, awards to the husband the quality of being its head, and also because of the very nature of the goals [that the family institution pursues], to which the individuals are subordinated; because of its possible and likely continuation [through the offspring] after the spouses; in light of the bond that unites its present members with [those from] the past and with the future [ones], [the family] is transformed into a perpetual entity, into a social body, whose elements vary according to its constitution, which has changes in different times and in different places.[149]

The family was a fundamental institution of society. Due to the influence of classical divisions and ideas, however, the state and the family had fallen victims to the narrative of supremacy. The result of this passive stance was that the number of irregular unions increased, despite their invalidity in civil law and then also in canon law from 1907 after the decree *Ne Temere*. It is against this background that more and more jurists, Romano included, started to place greater emphasis on the

[147] Ibid. p. 62
[148] Hence, there was a fundamental difference between legal exchanges happening within the scope of the institution and a simple relation which does not refer to a structured entity, however organised. A simple relation could only become 'institutional' should the terms of its existence be "durably connected to an organic position". Two institutions could, however, create a super-institution: If two persons cannot create a social institution, two juridical persons/entities can, without additional interventions. So, an international community would exist even if there were only two states as member. Ibid. pp. 56-58
[149] Ibid. p. 56 (Trans. A.)

public dimension and social functions of family regulation. The family and family law provided an illustration of the weakness of the modern state, but also showed that a reconceptualization of marriage and family law as fully legal and public could be used for strengthening the state order. The intervention of the state and of public law, argued Romano, transformed the marital relationship into an institution. Marriage, the foundation of the family, was constituted by the intervention of the state.

Romano was not alone in his advocacy of the appropriation of the uncharted social territory of the family by public law. In the *Ordinamento Giuridico*, he cited the work of a jurist who was to become the most influential family lawyer in the social age in Italy and possibly in Europe, Antonio Cicu (1879-1962).[150] Cicu played a crucial role in bringing to completion the institutionalist ideas advanced by Romano.[151] Cicu, like Romano, was immersed in the cultural and juridical environment of his age.[152] In this sense, his theory of family law was not so much innovative as it captured a shift in the social paradigm. Cicu's vast bibliographical contribution can be summarised in three basic elements which are examined in the following pages. These elements reflected the profound change in methods and assumptions and, thanks to the popularity of Cicu's ideas, they contributed to transform family law and, indirectly, also the law governing cross-border family relations.

First, in line with the naturalist approach to law, Cicu examined family law in inductive, and not deductive, terms. Like Anzilotti in his own field, Cicu drew conclusions about the character and functions of family law from an 'objective' analysis of positive law. Following this method, Cicu reached the conclusion that marriage is not a contract *sui generis*, as assumed by classical jurists, but that family law is a '*tertium genus*' between private law and public law. Family relations are not partly social and partly legal. For Cicu, family relations are fully legal. Unlike his predecessors, Cicu, like Santi Romano, argued that family law is part of public law (see section below). Second, Cicu posited that family law, like all public laws, must further collective interest and public policies (see

[150] In the later editions of the 'Ordinamento', Romano referred especially to Cicu, Antonio, *Diritto di Famiglia. Teoria Generale*. Athenaeum, 1914 which is also used in the analysis in this study. The other work referred to especially in this chapter is Cicu. Antonio. *Diritto Civile. Matrimonio. Diritto Civile. Matrimonio. Principi Generali del Diritto Famigliare. Appunti*. Ciocca, 1912-1913 These notes were taken from a course he gave between 1912-13 at the University of Macerata

[151] In the social age, the 'institutionalist approach' to family law and the ideas advanced by Cicu dominated in the European scholarship, no matter how different the political background was or the personal beliefs of family specialists who adopted them. For instance, Renard, Georges Francois. *La théorie de l'institution: essai d'ontologie juridique*. Recueil Sirey, 1930. On Cicu and his influence on Italian and European law, see Sesta, M. "Profili di giuristi italiani contemporanei: Antonio Cicu ed il diritto di famiglia." *Materiali per una storia della cultura giuridica* (1976), esp. pp. 443 et seq. In general, on the reuglaiton of the family and of marriage, Passaniti, Paolo. *Diritto di famiglia e ordine sociale: il percorso storico della società coniugale in Italia*. A. Giuffrè, 2011

[152] The numerous references to the work of Ehrlich, Jhering and Kelsen publications suggest that his theory of family law was not as innovative as it captured a change in legal thought. Cicu himself believed his theory was not an innovation As he argued in the introduction of his Cicu, 'Teoria Generale', p. 11. See Sesta, 'Antonio Cicu'

section 2.4). Third, Cicu contributed to redefine status coherently with the assumptions of social legal thought and with the functions of law in the social age (see section 2.5).

2.3 Antonio Cicu, the Social Function and Public Nature of Family Law

In his '*Teoria Generale del Diritto di Famiglia*', published in 1914, Cicu carried out an in-depth analysis of the rules and principles that governed marriage and family law in Italy. Contrary to classical scholars, Cicu used a positivist method to claim that family law belongs to public law. As he acknowledged, his objective in the *Teoria Generale* was to demonstrate that principles underlying private law did not apply to family relations.[153] Cicu agreed with classical jurists but also with contemporary scholars like Ehrlich that individual freedom and enabling provisions were prevalent in the field of contractual obligations where individuals were free to pursue their own personal goals.[154] Enacting and enabling provisions, Cicu pointed out, were a trademark of private law.[155] They were not only rare in family law, but also altogether absent in family matters.[156] Family law is dominated by public law and by mandatory provisions.

Cicu noted that in family law, personal will was incapable of producing effects either with third parties or between parties. He also noted that, under the distorting influence of classical ideas, specialists had come to conceive of many family relations as contractual.[157] But he rebuked them, because "in family relations what is lacking is the independence, the liberty, the autonomy, that characterise private law relations, especially patrimonial ones."[158] Cicu made a systematic comparison between the law governing family relations and the law that governed patrimonial and commercial relations. He remarked, that in private law, the proprietor can dispose, exploit or even damage his own property.[159] In contrast, in family law, status-conferring set obligations and duties

[153] Cicu, 'Teoria Generale', pp. 213-313. "Il nostro compito sarà qui pertanto prevalentemente negativo: ci proponiamo cioè di dimostrare come, nè il concetto, nè i principi che la dottrina privatistica considera propri dei negozi giuridici di diritto privato, sono in massima applicabili ai cosidetti negozi del diritto famigliare." Ibid. 214
[154] Ibid. 209
[155] Cicu, 'Appunti', p. 32. If marriage could still be regarded a legal transaction, it was one that did not fall within the scope of private law, and it certainly could not be confused for contract. Ibid. p. 222 Of course, the legacy of Classical legal thought is undeniable: "…perciò preferiamo abbandonare del tutto la concezione contrattuale del matrimonio, comunque intesa. Per noi il campo dei contratti è il campo del dominio della libera volontà privata. Nel matrionio al contrario, da una parte si esclude una qualsiasi efficacia alla volontà privata nel regolare il rapporto coniugale, dall'altra invece si assicura che la vonoltà che deve dar origine al rapporto sia del tutto libera, con l'escludere ogni vincolo che possa menomare quella libertà." Cicu, 'Appunti', p. 36
[156] Cicu, 'Teoria Generale', p. 208
[157] Other than marriage, also adoption because the Civil Code regarded the effects of adoption to begin the day of the consent to the act of adoption (Art. 217); For Cicu, neither marriage nor adoption were anything like a contract. Adoption came into existence after the approval and certification by a Court. Cicu, Ibid. p. 226
[158] Ibid. p. 85
[159] Hence, in family law, Cicu showed, the doctrine of 'abuso di diritti' did not apply, wherease abuso di diritti remained within the scope of personal freedom in private law. Ibid. pp. 131-138

on spouses and on parents that could not be relinquished as in patrimonial relations.[160] Rules of interpretation that apply to private transactions do not apply to family relations.[161]

Drawing on the above and other differences, one could thus find sufficient evidence in positive law to claim that family relations did not fall within the scope of private law.[162] However, as it emerged above from the debates concerning the reforms to the law of marriage and divorce, many were still under the influence of the classical conception and, accordingly, used the example of marriage to claim the opposite. Specialists pointed out that marriage could only be valid if the parties had freely expressed their consent, a reminder of the conceptual ground shared by marriage and contract in the medieval age.[163] Cicu acknowledged that the contractual conception of marriage was widespread and accepted for a long time in the Middle Ages.[164] Although common elements between marriage and contract could be found in legal history, he argued that, in the 20th century, positive law pointed to fundamental differences between 'patrimonial relations' and 'matrimonial relations'.

Cicu admitted that consent had a role to play in the formation of marriage, but he regarded it as a ritualistic or symbolic value.[165] When looking at the positive law and at the jurisprudence of the courts, it was manifest that the validity of the marriage, as well as its effects, resulted from the intervention of the civil functionary officiating at the ceremony, not from the expression of the consent of the spouses.[166] Whereas mere declaration was sufficient to create a legal bond in commercial contracts, personal will ("*la volontà privata*") was insufficient to produce juridical effects in marriage and family relations.[167] *Consensus facit nuptias* only applied in the pre-modern legal world. As Cicu put it:

> It can therefore be argued that whilst the will of the parties can give life, insofar as patrimonial relations are concerned, to a binding contract, which will be given effect unless it violates a legal provision, insofar as marriage relations are concerned, this is

[160] Ibid. pp. 273-313
[161] Ibid. p. 250
[162] Other examples provided by Cicu were that the doctrine of fraude à la loi and the notion of immoral transactions did not apply to family law. Ibid. p. 250 Also, he added, that temporary and conditional transactions were not valid in family law. Family relations are not governed by rights and obligations which are acquired and can be relinquished as in commercial transactions. 'Cause' and the 'motivation' were irrelevant in family law, and parties could not establish time limits to the validity and enforceability of obligations Ibid. pp. 251-252
[163] Ibid. pp. 214. Degni emphasised that marriage still had a contractual nature. Degni, Francesco. *Del matrimonio*. Eugenio Marghieri, 1926. see especially pp. 10 et seq.
[164] Cicu, 'Appunti', p. 20
[165] He did not believe that the symbolic value of consent sufficed to include marriage and family relations within the scope of contract and private law. Cicu, 'Teoria Generale', p. 215
[166] Cicu, 'Teoria Generale', p. 216. As provided by the Civil Code, Article 70 et seq.
[167] Ibid. p. 18

> not enough: to [the consent of the spouses, it is necessary] to add the official declaration of marital status.[168]

Unlike in previous times, consent of the parties was incapable of producing any effect in the law. Consent did not in itself create the marriage. Conformity with forms, conditions and procedures established by law did.[169] Unless the state official declared the parties fit to marry and declared them bound in matrimony, the marriage did not come into existence.[170] In the formation of marriage, it could be therefore said that the act of the '*pubblico ufficiale*' acquired more than a 'declarative function', as Cicu himself suggested above. The public act constituted the marriage. Accordingly, neither *la volontà privata* nor a prolonged factual situation of '*conditio maris et foemina*' determined in themselves the juridical existence of a marriage bond. What kept family members together was a legal bond constituted and enforced by state law, not the consent of the parties, whether formally expressed or tacit, and not the factual and social existence of the union.[171]

Marriage was not, as claimed by Savigny and classical jurists, a contract *sui generis* or a specific type of contract of family law. If one looked at codified law and at the jurisprudence of the courts, marriage, Cicu argued, it was clear that marriage has nothing in common with contract.[172] He applied the same analytical approach to other controversial aspects and debates for reforms of family law such as divorce. Again, Cicu admitted that marriage in Roman law, the foundations of civil law, had essentially contractual elements, and that, at least until the Council of Trent, these elements remained prominent in European laws, also resulting in high numbers of nullity proceedings and divorces *de facto*, among Catholics.[173] However, in the 20th century, marriage was a public act. For a marriage to come into being, the spouses and the marriage must meet conditions and requirements set by the law, among which were the 'exclusive' and 'perpetual' nature of the marriage bond.[174]

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[168] A. Cicu, 'Appunti', p. 29
[169] Cicu, 'Teoria Generale', pp. 215-217
[170] Cicu, 'Appunti', p. 28
[171] Cicu posited, coherently with his predecessors, that sexual intercourse (conditio maris et foemina), is the basic factual requirement for a marriage to come into existence. Additional elements of marriage as a unique social phenomenon are its duration ("una unione duratura"), and that it is aimed at the creation of a family and of a common life, with or without children. Ibid. pp 8-9. Although there was often some overlap between the factual and the juridical, Cicu also specified that the social fact ("fatto sociale" or "fenomeno sociale") does not necessarily correspond to the juridical essence ("concetto giuridico") of a marriage. Ibid. p. 10
[172] Cicu, 'Teoria Generale', p. 215
[173] Ibid. p. 19.
[174] For Cicu, the juridical essence of marriage is its perpetual, and not merely durable nature: «…l'unione non ha da essere temporanea, anzi per il nostro diritto essa deve essere perpetua. Ed è questa esigenza di perpetuità che può dirsi l'elemento che principalmente distingue il fatto sociale dal giuridico.» Among the other elements of marriage as a "fatto sociale" and as a juridical concept is its monogamous nature. Bigamy is therefore punished. Lack of capacity to consummate marriage is a ground for its annulment. Cicu, 'Appunti', p. 10

Drawing on the same conception of marriage, Cicu also took a strong stance against divorce. Because *volontà privata* does not suffice to create and to waive one's rights and obligations in family relations, and because the family was an institution that performed social functions, state law could legitimately prohibit divorce.[175] In marriage, the individual is not free pursue his own goals. Obligations in family law are not constituted by an act of personal power ("*atto di potere*"), that is "a clear expression of free will aimed at the pursuit of an individual interest".[176] Personal will did not suffice to bring about a marriage, and so it was not enough to dissolve it.[177] This also meant that the spouses could also not modify the terms of the marriage.[178] Accordingly, a 'contract of marriage' freeing the wife of her obligation to follow her husband and eliminating the '*autorizzazione maritale*' could not be considered valid.[179] This led Cicu to:

> … conclude by stating that while in private law the principle applies whereby every expression [of personal will] aimed at a practical purpose is recognized as sufficient to produce legal effects that represent and guarantee [the pursuit of that individual interest], in family law the opposite principle applies: individual will is, in principle, incapable of producing legal effects, except for those limited cases in which this power is granted [by public law].[180]

What emerged from a positive analysis of the Italian legislation and the law applied by the courts was that the state established conditions for the validity of marriage. It set rules governing the capacity of the spouses. Public functionaries determined if the conditions had been met. State law established what the duties of the spouses were. Even though the requirements of the law may have been evaded by some individuals, and even if at one point in history marriage had been conceived as a pact constituted by intent which the parties could dissolve, it could not be argued that in the 20th century the relations between spouses fell outside the scope of state law. Contrary to what had been assumed by classical jurists, and coherently with the view of Santi Romano, family relations could not be regarded as partly social and partly legal bonds. As Cicu pointed out:

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[175] As argued by Cicu: "It is entirely superficial and erroneous to argue that, since marriage [it is claimed] is founded on the agreement between two parties, when personal will is withdrawn, the marriage bond must come to an end; we must instead bear in mind the primary social function of marriage, in that it establishes [and it si the foundation of] the family, the same environment in which future citizens are raised…" Cicu, 'Appunti', p. 19 (Trans. A)

[176] «…una manifestazione di volontà libera diretta alla cura di un interesse individuale.» Trans. A. Cicu, 'Teoria Generale', p. 230

[177] Cicu therefore argued that, if one wanted to talk about obligations in family law ('*negozi giuridici famigliari*'), one must also understand this expression in a completely different sense than it has in private law. It must be understood in public law terms. Ibid. p. 230

[178] Ibid. p. 224

[179] Ibid. pp. 232-233; 293-295

[180] Ibid. p. 231 (Trans. A.)

> …we cannot accept what has been said, and is currently being said, again and again, that is, that the relationship that [also] have moral character [and] are founded on marriage cannot be reduced to legal entities but for a small part, and thus that the overwhelming majority of the aspects relating to the relationship between husband and wife [necessarily] occurs outside the field of law. We regard instead that all [aspects concerning the mutual] behaviour between spouses fall within the remit of the law and that, as such, it must be considered in legal terms…[181]

Having established that marriage and family relations are governed by law, the question arose of what the nature of family law was. Drawing on Cicu's ideas, Santi Romano argued that marriage did not belong to the same category of contractual relations in which, with some qualifications, classical scholars had placed it. Romano posited that marriage constituted by a public act, and not by private will.[182] Marriage corresponded to an institution, rather than a contract *sui generis*, and that its regulation served whatever purpose the state considered to be in the interest of the public. At the beginning of the 20th century, family law was often regarded either as special type of private law or as a '*tertium genus*' between public and private law.[183] In contrast with classical jurists, Romano argued that family law is not only law, but it is public law. Adopting an inductive method, Cicu reached the same conclusion:

> The analytical study of positive family law made it more and more apparent that [family law] cannot be subjected … to many of those concepts and principles that are usually included in the general part of private law. The conviction thus grew [in us] that to achieve a clear and rigorous view of the place of family law in the legal order, it was necessary to move forward to an examination of the fundamental differences between public and private law.[184]

The positive analysis of the differences between public and private law convinced Cicu that family law fell entirely within the scope of public law. Furthermore, the objective of the functions of family law also showed that family law pursues public and collective interest, not private interest.[185] In the social age, the division between private and public law, between the law of the market and the law of the family, and each sub-field within them, does not follow from a conceptual and abstract analysis.

[181] Cicu, 'Appunti', p. 12 (Trans. A)
[182] Romano, Santi. *Principi di diritto costituzionale generale*. Giuffrè, 1947, p. 54
[183] Cicu, 'Teoria Generale', p. 14
[184] Cicu, 'Teoria Generale', p. 10 (Trans. A.)
[185] Ibid. p. 216

It is grounded instead in the objective evaluation of positive sources and the social functions pursued by each law.[186] Cicu asserted, like his predecessors, that there were fundamental divisions within the law. Rather than a mere conceptual contraposition, however, the distinction was justified by the different interest pursued by each.

2.4 Family Law and the Protection of Social Interest

In the social age, no matter in what sphere, internal or international, economic or domestic, the law and the discourse shift to social interest and social functions. Cicu argued that both private law and public law performed social functions. Regardless of the nature of the legal relation in question, the state and the public administration must protect individual and collective interest. In private law and public law relations, the interest pursued is different. In the former, the state would only get involved to protect the interest of the parties. [187] As seen in the previous section, Cicu advanced his argument that family law is essentially public law after carrying an analysis of the positive law. The same conclusion could also be reached by considering that family law pursued a social interest.[188]

Private laws also pursued a general purpose. Contrary to private law relations, however, family law was not driven by the objective of enabling individuals to pursue their own interest.[189] Family relations were governed by public law in line with collective interest.[190] Collective interest did not amount to the 'fusion', the 'sum', or to the 'common denominator' of individual interest.[191] In family law relations, as in all other public law relations, the collective transcended the individual.[192] Hence, for Cicu, in family relations governed by public law, collective interest amounted to state interest or, more precisely, to what the state regarded or defined as public interest.[193] Such interest was variable, but its content was not contingent on individual preferences but rather on public policy. Family law pursued collective goals as defined by state organs.

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[186] This is noted by Roscoe Pound, "If law is still to be divided into Public Law and Private Law, it must be on grounds of the general utility of such a classification, not as a necessity of scientific method" held Pound, 'Classification', p. 363. See also Ibid. pp. 942-944
[187] Cicu, 'Teoria Generale', p. 15
[188] Cicu, 'Appunti', pp. 37-38
[189] Hence, it was also wrong to cite 'public order provisions' to compare private and public law, because public order in private law made it possible to take account of a general purpose, but did not exclude a priori individual freedom. Cicu, 'Teoria Generale', p. 212
[190] Ibid. p. 34
[191] Ibid. pp. 40-41
[192] Ibid. 108. "Family interest is singular, like State interest; and this [is true] despite the fact that the juridical unity of the family entitity is missing. It is singular therefore because it is the interest of the aggregate, and not of each member." (Trans. A.)
[193] Ibid. p. 35

The regulation of family matters must pursue collective interest, whether what is debated are informal marriages, adoptions, legitimacy or the dissolution of the marital status. It is because of collective interest that the state established absolute conditions and mandatory procedures for entering in marriage.[194] For the same reason, parties were not free to stipulate mutual rights and obligations in family relations as they were in commercial relations.[195] It was in the interest of the collective that no exceptions should be made and that the state must take a rigorous stance against practices which violate public law, like putative marriages, filiation out of wedlock, or that it should prohibit divorce. Hence, the question was not if marriage was contract or a contract *sui generis* but, rather, what the social cost of non-compliance with marriage law was. It made no difference if the spouses willingly lived *more uxorio*.[196] The consequences were damaging to society.[197] For Cicu:

> The denial of any effectiveness to private will [in family law] depends on the fact that a public interest is here at stake [that does not translate in] a mere interest to determine the existence of a marital status, but also [in] an interest to prevent illegal unions, [those which are] socially harmful or [those] entered excessively light-heartedly. [198]

Collective interest may or may not correspond to the interest, or preferences, of individuals.[199] Unless the state opted for a policy change, courts would not recognise the effects of a putative marriage, even if the parties considered each other husband and wife and they risked prosecution for concubinage. It would not recognise children born out of wedlock as legitimate, even if the parents wanted their natural children to inherit property. It would not recognise the dissolution of a marriage, even if the marriage had broken down and the parties had started living separately.[200] Cicu admitted that the application of this logic to the regulation of family relations - the superimposition of the juridical element over the factual element, of collective interest over individual interest - might come across as excessive, especially in the case of marriage, legitimacy and the prohibition of divorce.[201]

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[194] Which public officials from the civil registrar ought to read out loud and clear to the spouses their duties and rights, as specified by the Civil Code, Articles 130, 131, 132.
[195] Cicu, 'Appunti', p. 33
[196] "poiché al fatto del matrimonio non è riconosciuta dal diritto alcuna capacità di produrre effetti giuridici, nessuna importanza ha la distinzione fra esistenza giuridica ed esistenza di fatto del matrimonio; e ciò a differenza di quel che avviene nei diritti patrimoniali in cui anche la esistenza di fatto ha soltanto valore giuridico." Ibid. p. 42
[197] Speaking, for instance, of concubinage. Ibid. pp. 48-49
[198] Ibid. p. 32 (Trans. A.)
[199] See Cicu, 'Teoria Generale', pp. 13-43; 157-204
[200] Cicu, 'Appunti', pp. 38-41
[201] «Eccessiva anzitutto in quanto costringe i coniugi all'indissolubilità della loro unione; eccessiva inoltre perché prescrivendo delle forme determinate per la celebrazione del matrimonio, e determinandone gli effetti, esclude ogni altra diversa forma ed effetto, anzi non riconosce un'esistenza qualsiasi al matrimonio non celebrato in quella forma e vieta che gli effetti possano essere diversamente regolati.» Cicu, 'Appunti', pp. 16-17

Cicu did not merely acknowledge the content of the law or passively accepted its logic. Rather, he embarked on an investigation of the policies pursued by the state through its family law provisions. He did not justify the radical posture taken by the state against these practices, for instance, the absolute prohibition of divorce, by mere reference to the law as it was codified and applied, by referring to abstract moral standards, or by citing the abstract Savignian idea that husband and wife would be incomplete if "taken separately". He dealt with the controversial question of divorce from the perspective of social interest. The question that the specialists ought to have answered was not if marriage was a contract that could be unilaterally dissolved by its parties. The question was if divorce was in the interest of society. His answer was that it was not.[202]

The prohibition of divorce was neither a religious matter nor a conceptual one, and so were also other matters such as the legitimacy of natural children or the *autorizzazione maritale*. They were all social questions. The impossibility of obtaining a divorce could not be justified by reference to abstract theories or by moral or ethical considerations. The prohibition of divorce, or its legality, could only be justified if it could be demonstrated that it was in interest of society. In Cicu's view the dissolution of marriage resulted in the disaggregation of society. Hence, it led to 'social damage' ("*danno sociale*").[203] Influenced by evolutionary theories but blending them with the social vocabulary, he labelled the prohibition of divorce as the natural result of a historical evolution and the expression of a social necessity ("*il sentimento di una necessità sociale*").[204]

State law and interference by state officials may cause emotional distress or personal cost to individuals, but the protection of collective interest justified them. The policy-oriented conception of law propounded in the social age thus solved a paradox which classical scholars had not resolved. The argument advanced by classical jurists that states should prohibit divorce was in contradiction with the idea that states should rarely, if ever, interfere with family matters. Cicu, like Jellinek and other contemporaries, believed that in the public administration as well as in the household, state officials and family members have absolute duties.[205] Family members and state officials have a duty to maintain, to care, to educate, to help, to obey, to be loyal. The public nature and the social functions of family law not only legitimized intervention by the state and by public law to ensure that that individuals comply with their duties, but also demanded it:[206]

[202] Cicu, 'Teoria Generale', p. 221
[203] Cicu, 'Appunti', p. 20
[204] Cicu, 'Teoria Generale', p. 221
[205] Cicu, 'Teoria Generale', pp. 47-50. Jellinek believed that the power and legitimacy the family rested on the same grounds as the state imperium. Sistema, p. 99 sg. TEDESCO O ITALIANO? If i dont find it, look for this reference in article on status
[206] Cicu, 'Teoria Generale', pp. 159-176

> …this conception of the family and its social function not only grant on the State the power to intervene, but also impose on its officials the duty to regulate those relations connected to a high social interest…[207]

Cicu, Romano and their contemporary European jurists had no doubt that collective interest began at the family threshold. Accordingly, in the social age, in Italy and in other European jurisdictions, family law was 'instrumentalised' to protect social interest.[208] From this point of view, family law came to embody Gierke's social law. The institutionalist theory advanced by Cicu thus brought the Hegelian family ideal back to life and infused it with a utilitarian spirit. It also brought family law exceptionalism back to life although the latter, as the dichotomy between private and public law, was recast on an objective assessment of the distinct character and of the social functions pursued by the law of the state in the family realm. The social vocabulary also revitalised and reconceptualised 'status' in accordance with the new dominant institutional-legal paradigm.[209]

2.5 The Reconceptualization of Status in the Social Age

The return and transformation of status is a recurrent theme in this genealogy. Status has maintained across history some of the normative content that it had in Roman law.[210] At each intellectual turn, however, it also lost aspects that did not fit the dominant consciousness. Since Roman times, status carries a reference to the position and the situation of the person vis-à-vis the organised community.

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[207] "la concezione della famiglia e la funzione di essa nella società non solo autorizzano lo Stato ad intervenire, ma gl'impongono il dovere di regolare i rapporti cui sono connessi ad un alto interesse sociale ed una quantità di diritti individuali." (Trans. A) Cicu, 'Appunti', p. 44

[208] It is apparent that the social started giving way to a new kind of formalism. In the age of SLT, state established forms, conditions and effects of family relations in conformity with collective interest, in Italy and abroad. Karl Lewellyn discussed of 'social-purpose functionalism' in the case of the law of divorce as a sort of neo-formalism. Llewellyn, Karl N. "Behind the law of divorce: I" Columbia Law Review (1932). Llewellyn, Karl N. "Behind the law of divorce: II" Columbia Law Review (1933). Commenting on the article, and also relevant to understand the redefinition of the law of marriage and divorce in Italy, Janet Halley has argued: "The purpose of marriage requires its formal fixity: only by insisting that procreation, and thus heterosexual sex, should happen only in marriage–only by insisting that marriage is the social form for procreation–can societies assign fathers reliably to children and provide a stable, regular form for their reception into society." …. "Underlying this rationality assessment is a vividly social image of what marriage achieves for all of us." Halley, 'Behind the Law', p. 7

[209] In Cicu's words, once the scholarship came to understand the law of the family as instrumental for protecting collective interest, "Once this [obstacle] is overcome, the public structure of family relation[s] appears to us as self-evident: not only as far as the internal structure of the relation is concerned…but also as far as its external structure goes, that is, as structure common to the family and to the State: in each aspect, we have a relation determined by status. Cicu, 'Teoria Generale', p. 204 (Trans. A) This definition of status is in itself markedly different with the Roman conception. See Prosperi, 'Rilevanza della persona', p. 6

[210] For Cicu, this is clear, although he emphasises those elements that suited his reconceptualisation: "the essentially different position of the person cannot, for the sake of scientific objectivity, be labelled with the same term 'obligation': what we have instead is a condition, a position, an end, a status of the person: not accidentally it is this expression that since Roman law characterises [this type of] relations from truly contractual relations." Cicu, 'Teoria Generale', p. 89 (Trans. A.)

However, in the medieval age, status was 'contingent': it varied from place to place and from community to community. Status was also conceived as the result of rights that varied according to place and group. In the classical age, status was reconceptualised as a permanent and inherent condition of the person. It became linked to the family and to the civil and political community to which a person belonged. Status thus undergoes cyclical redefinitions, as Cicu pointed out:

> From Roman law times onwards, the term 'status' systematically re-appears in the legal vocabulary. Yet the [actual meaning of the] concept that [the doctrine] ascribes to it has remained one of the vaguest in the scientific elaboration of legal concepts[211]

Because of the vague meaning of status, and what he considered the improper use by some of his contemporaries, Cicu felt bound to clarify what status meant. Status could only apply in situations where the individual was part of a greater whole, when he was a member of an organised society "held together by a common goal." Status was therefore linked to the idea of a 'common purpose'. But membership in an organised community held together by a common purpose was not sufficient for creating a status. In addition to a common purpose, for a status to come into being, a person must belong to a necessary organisation. It was not possible to speak of status in the context of voluntary organisations because status "excludes a priori free will".[212] A status cannot be lost or acquired according to personal preferences or merely because they help to protect individual interest.[213] As Cicu put it:

> …not in every organised community do we detect a concept of status, but only in those where the individual enters as a member, and not as a self-standing unit: hence, not in communities constituted voluntarily. We should not be misled by the analogy of a juridical situation [of an individual] arising in an organisation based on a [common] goal: because this is freely set by individuals who [autonomously decide] to limit their personal freedom.[214]

Private law relations also performed a social function. Private law also set limits and conditions. However, whilst individuals acquired rights and obligations through the creation of voluntary organisations, in necessary organisations the legality and effects of an action did not depend on

[211] Cicu, A. "Il concetto di status", in Studi per V. Simoncelli, Napoli, 1917, and in A. CICU, *Scritti minori*, Vol. 1, Jovene, 1965, p. 181 (Trans. A.)
[212] Ibid. p. 186
[213] Ibid. p. 194
[214] Ibid. p. 196 (Trans. A.)

personal will, but on status.[215] One could not speak of status in the case of private and voluntary relations such as those between creditor and debtor, or employer and employee, because the debtor and the employee had autonomously decided to limit their personal freedom.[216] Status instead corresponded to a bond between the individual and an aggregate with which he was in a forced relation.[217] Status referred to a membership which is pre-determined, obligatory, permanent and hierarchical which subordinated the individual to the pursuit of collective interest.[218]

Accordingly, Cicu argued that one could only speak of two types of status: family status and citizenship status. Like the state, the family presented the characteristics of a natural and necessary formation.[219] In the family and in the state the individual is "properly a member, part of the whole."[220] In voluntary organisations, individuals acquire rights and obligations. In the family and in the state, in public law and in family law, individuals do not have obligations. They have duties that correspond to the specific position and condition occupied by an individual. The family institution and the 'social' conception of status thus provided a self-explanatory illustration of the fundamental basis and purpose of the state.[221] The common 'constitutional element' of the family and of the state was to be found in their social functions. In the family "the concept of status is purer than in the state aggregate" and its characteristics are more evident.[222] In the family:

> More evident and stronger is the necessity that generates and keeps together the family aggregate: the moment of duty is thus unmitigated, also because the definition of [one's] functions [in the family] pre-date [the individual] and are personalised, so that much narrower is the room for freedom and individual will.[223]

Cicu did not merely clarify the concept of status. What he described was a transformation of status in accordance with the rise of social legal thought and the emergence of the social state. Status was set

[215] Cicu distinguished status-based relations, also defined as "organic relations ", which were governed by public law in line with social interest, from private relations which are governed by private law coherently with the (conflicting) interest of the parties. Cicu, 'Teoria Generale', p. 315
[216] Cicu, 'Concetto di Status'. p. 183
[217] …lo "stato di vincolo in cui si trova l'individuo nell'aggregato." Cicu, 'Concetto di Status'. Ibid. p. 192, p. 194 Ibid. p. 193. When one speaks of status, by definition, there could be neither free will nor equality among members. Ibid. p. 192 The individual is dominated by the group. Cicu, 'Toeria Generale', pp. 87-88
[219] Cicu, 'Teoria Generale', p. 77
[220] Cicu, 'Concetto di Status', p. 186
[221] In his theory, Cicu always referred the family as the fundamental cell of the public body, as its indispensable nucleus. Children are subjects to the sovereignty of the pater familias in the same way citizens are subject to the sovereignty of their government. Ibid. p. 191
[222] Ibid. p. 196 (Trans. A.)
[223] Ibid. p. 196 (Trans. A.)

by each state and by each society in accordance with collective interest and public ends.[224] Collective interest corresponded to what the state considered "social necessities".[225] Hence, status was not a universal concept, nor was it subject to individual preferences. Status was a source of duties for every individual which cannot be waived.[226] However, status did not represent backwardness and primitive dependence, but the ideals of "interdependence and solidarity".[227] Status implied the subordination of personal desires and interest to a common purpose. Status brought duties to the fore and suppressed egotistical desires. Cicu "bound individuals together in the pursuit of an end which is considered socially and legally necessary".[228]

This work played a crucial role in the redefinition but also in the rehabilitation of status. Compared to Sir Henry Maine's conception, Cicu used status not to demonstrate the inferiority of traditional relations and primitive societies but to demonstrate the beneficial effects of abandoning the selfish forces of the liberal market and of embracing social law in a social state. In fact, drawing on his examination of the history of family regulation, Cicu could advance the argument that societies evolved from contract to status. Legal history showed that, starting from a private ordering paradigm that dominated in pre-modernity, family law was gradually placed within scope of public law and under the control of states and of the public order.[229] To go back to a 'medieval' private ordering paradigm, such as the one that resisted in some pockets of Italian territory and Italian society, would mean undermining collective good but also being anti-historical.

The ideas advanced by Cicu in relation to status, Romano pointed out in the *Ordinamento Giuridico*, were also relevant for the general conception of the law.[230] Variations of the redefinition of status that Cicu highlighted can be found among other Italian and European jurists from the same period of the social age.[231] Cicu, as suggested by Romano, used status to advance broader claims. As in the case of the evolutionary theory advanced by Maine, the reconstruction of a legal evolution that went from

[224] Cicu argued elsewhere that the family was a necessary social aggregate whose governing law did not consider the individual and free will as an end, but where the individual is dominated by a superior will where private interest is replaced by collective interest. Cicu, 'Teoria Generale', p. 91
[225] Cicu, 'Concetto di Status', p. 193
[226] Ibid. p. 194
[227] Ibid. p. 196
[228] In necessary organisations, the individual is "sublimated" in the collective. Concetto di Status. Ibid. pp. 191-192 In all necessary organisations it is possible to find an 'orgnic relation' between the members, that is, a relation: «lega i soggetti al conseguimento di un fine che è socialmente e giuridicamente considerato come necessario, quindi superiore in confronto dei fini che l'individuo possa liberamente proporsi, sottratto perciò al libero potere di disposizione della volontà privata.» Cicu, A. "La filiazione", in Vassalli. *Trattato di Diritto Civile Italiano*. UTET, 1958, p. 2
[229] It was the state that bound the parties in matrimony. It was the state that gave husband and wife, parents and children duties for the greater good of the society to which they belonged: «E non è dubbio che questa fosse la meta dell'evoluzione storica: è lo Stato che unisce in matrimonio.» Cicu, 'Toeria Generale', p. 220
[230] Romano, 'Ordinamento Giuridico', pp. 110-111
[231] Especially Jellinek.

contract to status was not merely descriptive but also prescriptive. 'Social status' could be used to redefine law, its boundaries and functions: no longer founded on abstract ideas, but on concrete needs and concerns; no longer resulting from first principles, but from a positive and inductive examination of the law and its purposes; no longer grounded in the abstract dichotomy between private and public law but centred on the difference between 'individual law' and 'social law'.

2.6 The Reform of Family Law in the Early Years of the Fascist Regime

As we progress through the social age, discussion among Italian reformers shows a significant change of conceptual vocabulary. The impact of the reforms began to be discussed from the perspective of social interest, rather than from an abstract one focused on the definition of marriage, or on the conformity with the legal boundaries drawn by Pandectists. The question was not if marriage was contract or a contract *sui generis*, or if divorce necessarily followed from withdrawing personal consent, but rather what the social harm of non-compliance and marital dissolutions was. Accordingly, the discussion shifted from abstract and theoretical concerns to the protection of social cohesion and of collective interest.[232] The social vocabulary united the voices that made up the rich and diverse scholarly, cultural and political debate about reforms in the 1920s and 1930s.[233]

In the new cultural and institutional climate, experts supported proposals that had been dismissed just a few years before. Law n. 1776 of 1919, for instance, abolished the *autorizzazione maritale*.[234] Although less than what some reformers had expected, this was the first blow against the legal and ideological foundations of the Italian law of coverture. Not every expert supported social and economic reforms. Some civil lawyers in fact advocated a return to ancient economic and social structures.[235] They pointed out that the state had failed to help the family and traditional institutions

[232] Ungari, 'Diritto Famiglia', p. 182-183

[233] On the confluence of artistic (futurist and D'annunzian), political (socialist, fascist) and scholarly opinion regarding the position of Italian women in society, and their civil and political rights, see Ungari, Chapter 7, 'Verso la Codificazione del 1942', esp. pp. 218-219

[234] See Ungari, pp. 185-186; 198-200. The scholarship was not unanimous in the positive reception of the reforms. Hence, after the Law n. 1776 of 1919 abolished marital authorisation, Fumaioli criticised the measure and held that «la tradizione è l'unica e suprema garanzia al mutar delle leggi laddove ogni brusca variazione è pericolosa: e soprattutto nell'istituto familiare, statico per natura, siccome più di ogni altro perenne, nel mutevole ritmo della vita sociale e dei suoi ordinamenti».

[235] According some civil lawyers, the Code of 1865 had consolidated artificial national bonds and had neglected the richness of Italian customary law at the cost of weakening the 'rural family'. In particular, Fulvio Maroi (1891-1954) and his work on the Italian rural family. (for instance, his *Le costumanze giuridiche e la riforma del diritto privato in Italia* (1929). Maroi emphasised the need for a robust state presence, the demanded the return to the 'fedecommesso' and the sanction of the pater familias. He criticised the code of 1865 for having ignored, based on its 'individualist ethos': «tutto quello che di coesione e di cooperazione, di fraterno e di patriarcale c'è ancora nel costume delle nostre famiglie rurali» ("Difesa della stirpe e diritto rurale" in Rivista di diritto agrario, 1938, p. 162). It is in this context thatsSpecialists started investigating in sociological studies practices that constituted, or had constituted, pre-existing customary traditions with the goal of revitalising old economic and social structures. The Rivista di Diritto Agrario was one example. The attempt

to perform their original social functions.[236] However, the influence of the social vocabulary is as evident at either end of the reformative spectrum. Virtually all scholars regarded the exaltation of individual interest by legal means as an anti-historical process. Accordingly, they all advocated reforms that would strengthen social solidarity and cohesion.

Accordingly, reform proposals were often incompatible with one another. No matter what the content of the proposals, however, jurists never failed to employ the social vocabulary to defend their proposals. This was the case, for instance, of the failed proposal by Vassalli for extending marital rights to unmarried couples who lived *more uxorio,* for giving their children succession rights, and for granting divorce when the marriage had broken down.[237] Advocates and detractors of divorce no longer indulged in discussions about the contractual or nature of marriage. Both framed their ideas in a social vocabulary. Hence, the majority rejected divorce because it put in danger the integrity of the family and its functions of assistance and care.[238] But even reformers argued that the dissolution of marriage should only be permitted in limited cases and remarked that "the interest of society … ought to be given primary consideration, even greater than the nature of the juridical institution".[239]

Socialist, liberal and Catholic jurists who were involved in the debate on the proposal for divorce would disagree in many respects, but they all referred to the social functions and the public nature of family law. Accordingly, a new discourse emerged among family specialists that resulted in the 'socialisation' and 'constitutionalisation' ('*giuspubblicizzazione*') of Italian family law.[240] Although some changes in the law horrified part of the Italian and European scholarship, they were coherent with the premises of social family law. Hence, the *Carta del Diritto* bound the family and the state in a symbiotic relation, specifying that the state depended on the economic and social integrity of the

to restore ancient social and economic structures was not a unique Italian development. An exmaple is provided by the Code de la famille del 1939 in France.

[236] The widespread impression among civil lawyers was that family members could no longer rely on the social functions traditionally performed by the household. From the early 20th century, scholars inverted the classical logics and started celebrating traditional economic and social structures. Cicu, 'Toeria Generale', p. 77-79

[237] Ungari, p. 237-238. Notably, Vassalli proposed a different conception of marriage as a "public act" advanced by Cicu. He believed that the consent of the parties was not constitutive of the marriage, like Cicu. But he also specified that marriage was a "negozio giuridico complesso" that was formed as a result of the will of the parties and that of the state official. Vassalli, Lezioni di diritto matirmoniale, Padova, 1932, p. 77. This reform proposal, as others that aimed at similar changes, systematically failed. Some members of the Italian Parliament attempted to include in the new law of 1919 an article that extended the grounds of nullity, similarly to the same reformative process ongoing in English law, but the attempt was immediately stopped by the government. See Ungari, 'Diritto di Famiglia' p. 217

[238] As in Civiltà Cattolica, « CC », LXX (1919), f. 1652 (19 aprile), pp. 173-174.

[239] Maurizio Roccarino had exhorted that «si vegga se all'interesse della società, al quale certamente deve aversi riguardo prima ancora che alla natura stessa dell'istituto giuridico, sia veramente nocevole questo scioglimento in alcune determinate circostanze.» Roccarino, Il Divorzio e la legislazione italiana. Il divorzio e la legislazione italiana, stato odierno della questione, 1901, p. 36

[240] Ungari, 'Diritto di Famiglia', p. 210. Significantly, family law was excluded from the proposed unification of private law. See before, footnote n. 131

family, and vice-versa. The regime established the indissolubility of marriage and fixed the objectives of the family as protection, reproduction and the education of the offspring.[241]

The *Carta del Diritto* set the prerogative of the state to determine individual responsibilities within the family and it constitutionalised the power of state organs to check that duties were properly fulfilled.[242] Family laws and duties were set in accordance with what the state regarded as the supreme interest, regardless of individual preferences. Hence, the regime also included in the *Carta del Diritto* an absolute prohibition of interracial marriages.[243] Other reforms reflected the efforts to strengthen the state and public order. After the Concordat signed between Church and State in 1929, civil law recognised the effects of a marriage celebrated in front of a priest. Religious and civil marriages produced the same effects in civil law. Contrary to what some had feared, this change did not halt the process of *giuspubblicizzazione*.[244] Although recognised churches might add some requirements for a marriage to be valid, they had always to comply with conditions, forms and rules set by the state.

2.7 The International Dimension of the Family in the 1920s and 1930s

The *giuspubblicizzazione* of Italian family law also had important international implications. The rise of the social brought about a gradual transformation of all branches of law and also conflict rules dealing with cross-border family matters. In contradiction with the cosmopolitan spirit celebrated by classical jurists, the Italian legislator introduced several mandatory and absolute prohibitions ("*leggi di applicazione necessaria*") that applied regardless of one's domicile or nationality. Accordingly, Italian law prohibited Italian "white women and men" to marry members of the populations of African colonies.[245] Other than a general prohibition of marriages between Italians and 'Semitic and non-Arian races', the Law n. 1728 of 1938 also required the consent of the Ministry of Home Affairs for

[241] Il matrimonio. « Matrimonio è unione esclusiva al fine della procreazione. Il vincolo deriva dalla consumazione la ragione della sua indissolubilità. Ma è reso eticamente perfetto solo se consegua il suo fine assicurando la continuazione della famiglia ».
[242] La famiglia nello Stato. «La famiglia è il nucleo fondamentale della società nazionale. L'unità e la saldezza morale ed economica della famiglia sono garanzie della forza della Nazione. Lo Stato riconosce il carattere religioso dell'atto di fondazione della famiglia; rende inattaccabile il patrimonío di essa; stabilisce gli organi dei poteri familiari, ne controlla l'attività e, nel difetto, li sostituisce».
[243] La tutela della stirpe. «Difendere e rinvigorire la stirpe è fine precipuo dello Stato. Ad esso compete assicurare l'integrità morale e la sanità nella successione delle generazioni. Prime cause di decadimento della razza sono gli incroci di razze ed i matrimoni di persone ereditariamente tarate.».
[244]It is noteworthy that the fascist regime feared that the Patti Lateranensi represented a step back in the process of constitutionalisation of the family. In this sense we can understand the letter sent by Mussolini to the Italian king short after the entry in force of the Concordato: «non nascondo alla Maestà Vostra che lo ostacolo piú grave da superare nel Concordato è la clausola concernente il matrimonio. Qui lo Stato retrocede di molto, e quasi vien fatto estraneo alla Costituzione e alle vicende della famiglia» Cited in Ungari, 'Diritto di Famiglia' p. 236
[245] Regio Decreto n. 880 del 19 aprile 1937-XV

any Italian to enter into marriage with a foreign woman or man. The same law also established the absolute prohibition for public employees and civil servants to marry 'foreign women of any race'.[246]

Reforms taking place in the 1930s echoed the concerns of Gabba and other jurists who, in the early years of the new century, had invoked prohibitions against the celebration of marriages between Italian men and women and persons of "lower races". Disregard for individual preferences and for the fact that those affected by them were foreign nationals and residents was justified by referring to collective interest and to the integrity of Italian society.[247] In conformity with prevalent opinion and dominant discourse, public policy dictated a progressive limitation of the freedoms granted by the Civil Code of 1865. The *giuspubblicizzazione* of Italian law increased the chances (?) of collisions between family regimes. At the same time, the emergence of the social vocabulary, transformed the premises and functions of conflict of laws. This is clear from mandatory prohibitions against international marriages and divorces.

By the 1930s, Italian scholarship and Italian courts had already dealt for several decades with challenging questions raised by the recognition of divorces granted abroad. As we have seen, one of the earliest contributions came from Anzilotti, who had investigated the compatibility of Italian procedural law with the first Hague Convention on divorce and separation. The Convention aimed at dealing with conflict of laws and of jurisdiction created by the great divergence between national family laws in this area. Given the prohibition of divorce in Italy and in many other European countries, and, at the same time, the possibility of divorcing in foreign jurisdictions without being a national of those countries provided by different basis for the lex status - domicile or nationality. Growing number of Italians, or at least, those who could afford it, went abroad to dissolve their marriages.[248]

The Civil Code of 1965 prohibited divorce in Italy but did not clarify if foreign decrees would be valid. In the new climate, foreign divorces started to be challenged in Italian courts. Coherently with

[246] See Bartolini, Giulio, The Impact of Fascism on the Italian Doctrine of International Law, in *Journal of the History of International Law*, 2012. Ibid.

[247] For Alfredo Rocco, national unity required a strong social organisation and the sacrifice of single individual interests, including reproductive rights: «il matrimonio conserva tutta la sua importanza di istituto sociale e politico, giacché la famiglia legale, prima cellula della Nazione, rimane pur sempre regolata dalle leggi dello Stato. Ma lo Stato non può dimenticare che a quell'atto essenziale della vita individuale e sociale con cui si costituisce la famiglia le religioni riconoscono un carattere sacro, che per la Chiesa cattolica lo eleva a dignità di sacramento.» Alfredo Rocco e l'ideologia giuridica del fascismo, Brescia, 1963, nuova ed accresciuta, Brescia, 1974

[248] See Il Regime Matrimoniale Italiano ed il Divorzio. Unione Tipografica Editrice. 1900. This essay presents the challenges brought about by the Attorney General Giuseppe Borgnini agaisnt various decisions by Italian courts to recognise the effects of divorce decrees issued abroad. It is constituted by three parts: 1) Ricorso presentato dal Proc. Generale. 2) Motivazioni a corredo del ricorso svolte nell'udienza del 14 Novembre 1900. 3) Sentenza pronunziata dalla Corte di Cassazione di Torino.

liberal premises of classical conflict of laws and with the classical conception of status as an inherent characteristic of the person that ought to be universally recognised, Italian Courts of Appeal had recognised foreign divorce decrees at the beginning of the 20th century.[249] The Courts had rejected claims that divorce was contrary to Italian public order and that the recognition of foreign divorces offended the morality and manners of Italian society. They held that foreign decisions carried effects also in Italian law and that civil servants ought to register the change of personal status ("*l'esecutorietà nel Regno e l'annotamento ne' registri dello stato civile*"), even if the dissolved marriage had been celebrated in Italy and even if it could not be dissolved in the Italian jurisdiction.[250]

Against the decline of classical legal thought and the gradual shift towards collective protection, these decisions could not but attract the attention of experts and lawyers. The Italian senator and attorney general Giuseppe Borgnini (1824-1911) advanced an unfavourable and alarming opinion and campaigned in order that decisions would not be upheld by the higher judges. For Borgnini, the recognition of foreign sentences dissolving an Italian marriage was not only wrong in law, but also constituted a "danger for the State and an ongoing threat for its citizens".[251] The Court of Cassation in Turin was convinced and struck down the rulings on Appeal.[252] Accordingly, from the first decade of the new century, Italian divorce law had been considered mandatory on all Italians, regardless of their residence abroad, even in the presence of foreign decrees validly pronounced by a foreign court and in accordance with their own conflict rules and principles.

In the 1930s, the topic of 'foreign divorces' became once again widely debated because of the annexation of various territories where divorce had been legal. However, Italian jurists opposed attempts to introduce divorce whether through the main entrance of domestic law or through the backdoor of rules governing cross-border family relations.[253] After the city of Fiume and other Austro-Hungarian territories were annexed to Italy, the questions arose, firstly, if Italian authorities and courts should apply Italian or foreign law to relations and disputes arising in annexed territories, and, secondly, if they should recognise as a side-effect of the annexation the validity and effects of

[249] Ibid. 'Il Regime' refers to decisions in Milan, Modena and Brescia.
[250] Ibid. p. 95
[251] «un pericolo per lo Stato ed una minaccia continua per i cittadini.» Ibid. p. 89
[252] «L'autorità giudiziaria italiana non può dar corso e molto meno ammettere una domanda di scioglimento di matrimonio, sia esso celebrato in Italia od all'estero, perché la nostra legge non ammette assolutamente siffatta azione." And also that, "L'autorità giudiziaria italiana non può riconoscere e rendere esecutive, né rapporti di diritto personale, una sentenza estera che pronunciò lo scioglimento di un matrimonio celebrato in Italia colle condizioni e forme qui vigenti, e non può quindi autorizzare la trascrizione od annotamento della sentenza estera di divorzio in margine all'atto di matrimonio ricevuto dall'ufficiale dello stato civile italiano.»
[253] «In forza alla medesima sentenza deve dirsi altresì fallito il tentativo di coloro, i quali, riconoscendo che il divorzio era stato interdetto alla porta di Italia, si studiarono di farvelo entrare per la finestra, inaugurando una perniciosa giurisprudenza.» Brandi, Salvatore 'Il Divorzio in Italia. Studio Giuridico', Civiltà cattolica, 1901, p. 25

divorce decrees granted by the Austrian authorities before the annexation.[254] Although such divorce decrees had been granted by legitimate foreign authorities under foreign law, they dissolved the marital status of Italian citizens.[255]

The Italian state extended Italian law to annexed territories. As to foreign divorce decrees, although it could be argued that the marital status - or free status - determined by foreign authorities with respect to persons who were under the authority of a foreign sovereign ought to receive universal recognition, the Italian government unilaterally rejected their validity and effect. In accordance with the social reconceptualization, personal and family status was no longer a universal idea. States regulated status in accordance with collective interest. Pursuant to this new conception of status and the social-oriented redefinition of public laws, the Italian state managed to achieve at once the unification of family law across its territories and the imposition of the same collective logic across its provinces. The Royal Decree n. 2325 of 1929 annulled the validity of the '*Divorzi Fiumani*'. The then Minister of Justice Aldo Oviglio (1873-1942) commented the law as follows:

> … with a recent government decision... the law governing matrimonial matters has been finally unified, thus eliminating once and for all the institution of divorce which, under the law of the provinces pre-existing the annexation, was provided for; in this manner, the legislative unification of the norms governing the status of persons and [that] of family law is now complete. ... The Government has thus paid appropriate tribute to the deeply-held [patriotic] sentiment of the Italian people, to that sentiment that craves for the rigorous defence of the indissolubility of the family as much as it strives to protect the integrity of the country itself.[256]

Conflict rules governing family matters were thus being changed in accordance with the shifting institutional logic of the social state and with the shift towards collective interest. Even though the preliminary provisions of the Civil Code of 1865 were still in force, the multiplication of mandatory and absolute provisions made it possible for the legal order to develop rules and principles which were oriented to a specific result. The rigidification of the system inevitably increased chances of limping situations - and, in the case of divorce, of criminal proceedings, as divorced couples whose

[254] See De Nova, Problemi di diritto interlocale ed internazionale privato relativi ai territori annessi, Comunicazioni E Studi, 1942, p. 127 et seq.
[255] For instance, Gerö, Ernö. *Libertà di contrarre e sciogliere il matrimonio pei gli italiani in Ungheria - Con speciale riguardo alla convenzione dell'Aia sul diritto matrimoniale. Con speciale riguardo alla convenzione dell'Aia sul diritto matrimoniale: guida pratica per avvocati*…. Budapest, 1912
[256] A. Oviglio al teatro comunale di Bologna, 30 marzo 1924, in I grandi discorsi elettorali del 1924, p. 210. Cited in Ungari, p. 218 (Trans. A)

marriage had been dissolved abroad would often get re-married and might be prosecuted for bigamy upon their return to Italy - but this personal cost was fully justifiable once weighted against the protection of collective interest and the integrity of society.

3.1 The Transformation of Private International Law in the Social: Marinoni

The process of transformation driven by the rise of the social carried implications for contract law and the law of the economy, for marriage law and the law of the family, for the regulation of internal situations as well as for the regulation of cross-border relations. Accordingly, from the early decades of 20th century, not only private international law, but also the discourse shows evidence of the continuation of the profound revision that had started towards the end of the previous century with Anzilotti. The *Rivista di Diritto Internazionale* published many influential contributions in this period that demonstrate the paradigm shift. Among the many publications, particularly illuminating are those of Mario Marinoni (1885-1922).[257] Marinoni supported the idea that private international law did not constitute a branch of international law. Conflict of laws was no longer understood as part of a general theory, but as set by the power of the state in accordance with its will.[258]

At the beginning of the century, it was still claimed by Italian scholars that *concorso di leggi* was "at the same time private and international, because it refers to private law relationships that are international in nature, as they come into contact with several legislations and because the regulation of such relationships presupposes the determination of the limits of the legislative competence of the single States in relation to the others".[259] As classical legal thought continued its decline and the rise of the social transformed the consciousness and assumptions of experts, private international law came to be regarded as a municipal discipline. As we progress in the social age, specialists saw international law and national law, public international law and private international as separate laws and separate disciplines.[260] Hence, Marinoni specified that:

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[257] Marinoni published two articles in the *Rivista*. Marinoni, Mario. La natura giuridica del diritto internazionale privato. *Rivista di diritto internazionale*. 1913. The two articles constitued the bulk of his monography. Marinoni, Mario. Della Condizione Giuridica Delle Societa Commerciali Straniere. Athenaeum. 1914. He further developed the arguments put forward in 1913 in Marinoni, Mario. *L'universalità dell'ordine giuridico statuale e la concezione del diritto internazionale privato*. Società Editrice Libraria, 1916. See Giannini, Amedeo. "Il diritto internazionale in Italia (1851-1948)." *Rivista di Studi Politici Internazionali* (1948)

[258] "We are dealing here … with private international law norms, provisions and rules - set by the will of the various legislators - that, as such, must be valid within the remit and for the scope of the power of the state that posits them." Marinoni, 'La natura giuridica', p. 486 (Trans. A)

[259] Diena, Giulio. Principi di diritto internazionale. Vol. 2. L. Pierro, 1908, p. 9 (Trans. A.) See also by Anzilotti, 'Giudizi interni', pp. 129 et seq.

[260] In Italy, such conception is 'dualist'. Also expressed Anzilotti, 'Giudizi interni'. The dualist conception was supported by the Rivista and popularised in Italy. See Gaja, 'Le prime annate', pp. 494-495. Giulio Diena dedicated an essay to this issue. Diena, Giulio. "Considerazioni critiche sul concetto dell'assoluta e completa separazione fra il diritto internazionale e l'interno", *Rivista di diritto pubblico*, 1913

> The title of 'private' misleads us to believe either that there can be an international law capable of regulating … the legal status of the individual, or that international law, since it would impose limits on the internal activity of States, has acquired an exceptional character, different from that of norms which are part of the law of nations; while it is self-evident that … international law only concerns the relations between States and that the internal activity, which is determined by the will of the state, can never directly depend on the law of nations, unless one is to deny that the will of the State is the formal source, the exclusive source, of the internal order.[261]

International law did not regulate the state of individuals. It was the internal law of every sovereign state in accordance with its own prerogatives. Conflict norms and principles did not spring from a law that imposed obligations on all states, regardless of their will and interest. With the rise of the social, each state was understood to be free to introduce rules and principles according to its will and objectives, from the regulation of the status of the person in family relations to the recognition of rights and obligations in commercial relations acquired in foreign jurisdictions.[262] As Gabba argued in the very first number of the *Rivista*, "every State has the right to regulate autonomously and exclusively every action and fact of every person [which occurs] within its territory."[263] Marinoni agreed that legislators could regulate cross-border matters in full autonomy, both those taking place in the territory and, in principle, even 'foreign' relations.[264] However, he specified that:

> … if such a principle of absolute territoriality applied in every state, as they say, it would disregard the existence of other States. Indeed, if other States exist, there are other legal systems…. Absolute territoriality ... would therefore lead to denying the existence of other States and the established and dominant legal order within a given jurisdiction that they represent.... But if other States are part of the international legal community, and if they take part in it because they exist by virtue of being legal orders, their participation would not ... allow individual States, even in their internal orders, to deny or disregard, in accordance with the principle of exclusive territoriality, the existence of other systems.[265]

[261] Marinoni, 'La natura giuridica', pp. 357-358 (Trans. A.)
[262] Gaja, 'Le prime annate', p. 498
[263] Commenting on the interpretation of Articles 6-12 of the prelinary provisions of the Civil Code, dove affermava che "ogni Stato ha diritto di disciplinare da solo ed esclusivamente tutti gli atti e fatti di qualsivoglia persona, dentro il proprio territorio." Gabba, C. F. "Criterio fondamentale del gius civile internazionale". *Rivista di diritto pubblico*, 1906, p. 9 (Trans. A.)
[264] Marinoni, 'La natura giuridica', p. 349
[265] pp. 349-350 (Trans. A.)

As Santi Romano had argued, when examining the interaction and conflict between the legal orders of sovereign states, one must start from essential identity between institution and legal order, and from the fundamental principle that states are not isolated institutions, but are part of the *societas gentium* made of other states and other legal orders, each governing with a separate body of laws the status and the rights of persons connected to their territories and sovereignty.[266] Participation in the community of states did not mean that states must automatically recognise foreign rights. Conversely, if the recognition the existence of foreign states and foreign orders did not in itself pose a threat to state sovereignty, as Romano had argued, to systematically deny the positive existence of foreign institutions would be against the interest of all members of the international community, including that of the state denying recognition. This, according to Marinoni, would be unconceivable:

> Now, if States, by positing norms of their internal order, disregarded the existence of other legal orders, and did not attribute any effect, any relevance, to the legal character ascribed by foreign law to the relations that other States somehow regulate, the ordinary relationships existing between people who originate in various States, or those concerning material goods located on the territory of States other than those of which the people are subject, would come to an end…. The universality of a single State system would thus be affirmed, without acknowledging in any way other legal systems, which would be absurd, given the existence of different States and thus the impossibility [for a single order] to exercise a power that is territorial unlimited … . This decision, which would be damaging to the interest of every State, cannot but lead every State, especially in these times of large and persistent international exchanges, to set rules with the aim in mind to avoid such results, which would therefore mean the exclusion of … the absolute territoriality of the law ….[267]

We therefore find in Marinoni the sign of the influence of the thought of Romano and his argument that, given their participation in the international community, states ought to consider rights acquired abroad when making decisions in cross-border cases. Starting from the same premise, Marinoni also argued that it was against the interest of all states and against the interest of the international community to impose national law universally and to exclude the application of foreign laws unilaterally in all cases.[268] Even if, in the social age, they assumed that private international law was

[266] Romano believed that international law fully qualified as law. Within an institutionalist theory, the question, for Santi Romano, was: «l'ordine giuridico internazionale è un'istituzione?» Romano, 'L'ordinamento', p. 44. The answer for Romano was in the positive.
[267] Marinoni, 'La natura giuridica', pp. 352-353 (Trans. A.)
[268] Ibid. p. 350

part of the internal order as much as family law or contract law, and thus every legislator could introduce mandatory rules in accordance with its own specific national interest, this did not meant that states made no exceptions to the application of local law or that, in appropriate circumstances, they would not apply or recognise foreign law. Even in the social age, the doctrine still held that:

> There must be some common criteria, or at least some means must be devised and agreed upon that may ensure a modicum of uniformity in result by controlling the interplay of the underlying divergent rules.[269]

These common criteria, or at least, two among the common criteria especially taken in consideration by social jurists, were the doctrine of acquired rights and *renvoi*.[270] In the mind of social experts, *renvoi* made it possible, like acquired rights, to bypass questions relating to the integrity of the internal order when local courts or officials applied foreign law and it also made it possible to get away from practical questions like the 'conflict of conflict principles', ignored by classical jurists.[271]Advocates of *renvoi* argued that this technical instrument facilitated the neutral coordination of separate legal orders and helped to reach a degree of international harmony and legal certainty despite legal pluralism.[272] *Renvoi,* it was argued, was especially helpful in family matters. For social experts, the

[269] De Nova, 'Introduction', p. 520

[270] Renvoi (Le renvoi; Die Ruck und Weiterverweisung) started being discussed in Germany and England around the mid-19th century. The doctrine was discussed for the first time by judges in France towards the end of the 19th century and, soon after, in other European jurisdictions. French Court de Cassation in Forgo's case (1879). The doctrine was also employed in Italy: Court of Cassation of Florence, 1 december 1884, Ann. Giur. It. XIX (1885), I, 67-71. For an early and comprehensive account from the Italian viewpoint see Anzilotti, 'Studi Critici', pp. 193-313

[271] The positive reaction that led to the municipalisation of the subject led scholars to focus again on theoretical problems. One such issue to which Italian scholars dedicated great intellectual effort, was the transformation (or 'reception' and 'naturalisation') of foreign law. How could scholars explain the application of the law of a foreign legal order? Did foreign law apply ex proprio vigore as foreign law or was it transformed into a national law? In most cases, private international lawyers agreed that conflict rules nationalised the substantive law of foreign orders. According to the theory of the "rinvio ricettizio" o "rinvio materiale", conflict rules were empty of contents and received their material substance from foreign law. This is the opinion shared by Marinoni ('La Natura', pp. 469-477). Other scholars, for instance, Ago, were dissatisfied with this explanation, and argued that conflict rules recreated in the national order a rule homologous to one that was contained in the foreign order. According to what was to become the most influential theory of Tomaso Perassi, private international law led to the creation of a special body of laws within the internal legal order which replicate rules contained in the body of rules of foreign states by a process of imitation.

[272] Renvoi offered Romano and legal scholars the resources to discuss the interaction between all laws, those of sovereign states as well as those of non-state organisations, as in the case of canon law. For Romano, renvoi could also be used for recognising canon law in the internal order. ('L'Ordinamento Giuridico', pp. 144-145). Roberto Ago, in Ago, 'Teoria', p. 117), argued that, when the parties opted for canon law for regulating their marriage, they exercised autonomy in the same manner when they submit voluntarily to a foreign law. In this sense, Ago argued, there was no difference between the reception of a state order and canon law. Ago was inspired by Ravà, (Ravà Adolfo. Il matrimonio secondo il nuovo ordinamento italiano. Cedam, 1929, pp. 13 et seq.) where he also remarked that there was no difference between a choice of law in the case of contract that is resolved by letting the parties opt in and out of specific regimes and the choice of the spouses to get married in accordance with canon law, or to submit their disputes to ecclesiastical courts.

great appeal of *renvoi* was its presumed capacity for ensuring continuity of status across borders despite the growing differences between family regimes in marriage and family matters.[273]

If *renvoi* provided an answer to the growing diversity of norms and policies in matters of status, as seen before with Romano (and as we shall see in the next chapter on English law, see section), acquired rights constituted a way to bypass the greater regulatory power in cross-border economic matters. It may therefore seem paradoxical, but the fact that each state regulated social behaviour according to its own prerogatives reinforced the ideal that private international law could act as neutral device against the arbitrary political will of sovereigns. Accordingly, even after the social re-orientation, Italian and European experts argued that private international law constituted an autonomous technical discipline underpinned by unique principles and driven by special goals.[274] Subject to overriding norms included in the internal laws of every state, conflict rules enabled the "harmonious coordination of legal orders".[275] As argued by Rodolfo De Nova (1906-1972):

> The idea that, in justice and fairness, private law transactions should receive the same legal treatment in whatever country the question of their legal character and effects arises, although the rules of private law be different in different countries, is the main prop of private international law. If it does not pursue this goal, and insofar as it does not reach it, the choice-of-law technique appears to be wasteful and senseless.[276]

The myths of autonomy and neutrality and the relationship between the principles and the goals underlying cross-border family and economic matters were therefore reinforced in the social age, despite the transformation of private international law and discourse in accordance with the new dominant institutional-legal model. Even in the social age, states could not impose national law universally in accordance with an absolute interpretation of the principle of territoriality. Santi Romano had also argued that states were under a general obligation to establish limits to the application of their own law and to give themselves rules that would, where appropriate, refer litigation or a situation to foreign law or foreign courts.[277] However, both to Romano and Marinoni,

[273] Lorenzen explained that this was the reason behind the support of the Restatement of the Conflict of Laws of the American Law Institute.. E. G. Lorenzen, Studio critico sulle norme relative al diritto internazionale privato contenute nel progetto di un nuovo codice civile italiano, in *Ann. Dir. Comp*. VII (1933), I, pp. 63-75, esp. pp. 74-75

[274] As Max Gutzwiller (1889-1989) declared in the 1929: «alors que les grands codes civils sont fortement empreints des conditions sociales et économiques de leur époque…le droit international privé est absolument étranger à ces considérations matérielles…les questions des conflits des lois civiles referment un problème purement juridique, voir technique.» Trans. Gutzwiller, A. M. Le developmenent historique du droit international privé, Recueil des courts, 30 (1929-III), p. 376

[275] Marinoni, 'La natura giuridica', p. 354

[276] De Nova, 'Introduction', p. 519

[277] 'L'Ordinamento Giuridico', p. 139

as well as other Italian and European jurists, it was clear that this was nothing more than a 'general obligation' which had a political, rather than legal, character.[278]

A legal obligation could only arise when states voluntarily subjected themselves to such legal obligation in international law, i.e. when they entered in multilateral conventions.[279] As we have seen, from the beginning of the social age, states did effectively sign treatises which pursued this objective.[280] Marinoni therefore did not deny what the Italian scholarship had come to accept and support, that there was a part of international law which had as its very core the introduction of uniform rules and principles of private international law. However, without an international convention or an international norm specifying what principles and rules should follow, states were free to implement the general obligation as they deemed fit.[281] In other words, states were free to evaluate autonomously the implications of the general rule, and they were free to establish when and how to recognise, or not recognise, the existence and the effects of foreign laws.[282]

In the social age, each country had its own internal rules establishing how to comply with the general norm, regardless of the nature and character of the foreign law or cross-border situation. Failure to recognise foreign laws and foreign rights would not give way to an international controversy. The treatment of divorces obtained with Austrian authorities before the annexation by Italy of new or former territories, for instance, did not give rise to an international dispute with Austria. Hence, no scholar would argue that sovereign states should be prosecuted for failing to recognise foreign laws or rights acquired by nationals or foreigners abroad. The subjects of international law were states, not

[278] For Marinoni: «…si deve ricercare se non esista, oltre all'obbligo giuridico internazionale ora ricordato, una analoga necessità, che diremo pratica, politica…» Marinoni, 'La natura'. p. 352 And he added: «La norma interna è conforme o meno alla norma internazionale soltanto politicamente; giuridicamente l'una non può essere né contraria, né conforme all'altra, e reciprocamente, come espressione di ordini giuridici distinti tra loro.» Ibid. p 354. Also discussed by Anzilotti, 'Teoria generale', p. 126. For Santi Romano: «Certamente, esse non possono più difendersi, come faceva la dottrina tradizionale, movendo da principii giusnaturalistici, cioè ponendo al di sopra dei singoli Stati non solo il diritto internazionale positivo, ma anche, oltre di esso, una serie di norme razionali, che ora si è concordi nel considerare estragiuridiche. Ma il problema non viene così risoluto o, meglio, eliminato: esso non fa che cambiare d'aspetto. Si è, infatti, notato che, se manca, nell'ipotesi configurata, una norma di diritto internazionale che specifichi l'obbligo dello Stato di avere un ordinamento con un dato contenuto; tenendo conto dell'ordinamento degli altri Stati, si avrebbe pur sempre l'obbligo generico e indeterminato, di escludere l'assoluta territorialità del proprio diritto, in modo che ciascuno Stato sarebbe libero solo circa il modo di intendere e di attuare tale obbligo.» Romano, 'L'Ordinamento Giuridico' p. 138

[279] Hence, for Marinoni: "After what has been said, it can be safely argued that … only state will … can be a source of legal norms. It is not correct therefore to say ... that there are norms of either international or internal nature that would prevent the application of the principle of the absolute territoriality of the law …. The territoriality [of law] cannot be questioned: wherever the will of the State dominates, no other will can dominate. If the State give recognition to other legal orders … this is a pre-legal consideration ("valutazione pregiuridica"). When the will of the State creates the norm, the will of the state is unlimited, as far as the internal order is concerned, even though there may be other international legal or political limits. Within the territorial power of a given State, only the will of the State can act as a formal source of law." 'La natura', p. 492(Trans. A) Also see, p. 358

[280] (oddly enough, given that centuries of legal practice should have led positivist international lawyers to admit the existence of a consuetudo to be respected under the principle that consuetudo servanda est)

[281] Ibid. pp. 350-351

[282] Ibid. p. 361, 453

persons.[283] Even if states were parties to a multilateral treaty, there would be no consequences for breach of its terms at international level, but only in the internal order if so provided by state law.[284]

Until proven otherwise, Marinoni argued, conflict rules and principles were part of the internal order. As soon as the new consciousness took over, it determined a profound change in the way private international law was understood by experts and how it operated in practice. In Italy as in France, in Germany and, as we shall see, in England, conflict principles were no longer understood as a universal law. Accordingly, Marinoni and most of his contemporaries argued that there was an absolute separation between the internal and the international order. This view was manifestly incompatible with the theory advanced by Anzilotti who had argued that internal laws merely completed international law in the temporary absence of international principles.[285] Marinoni implicitly responded to Anzilotti when he argued that:

> If domestic law and international law were completely separate, as indeed they are, domestic law could not fill the gaps within international law, because one legal order is foreign to the other. If the norm of the internal order integrated those of international law, [the norm] would be binding at international level, that is, it would be a [an international] norm having a [national] source, which is, without a doubt, absurd.[286]

As social legal thought took over, even those European jurists who had been influenced by the universalist aspirations of classical consciousness took a step back and acknowledged that a fundamental difference existed between internal and international law, between private international law and public international law. By the end of the 1920s, virtually all European experts assumed that private international law was a special branch of internal law and that international law and private international law were separate disciplines. In 1925, even Anzilotti conformed to the new dominant assumptions, and accepted that:

> Rules that determine the applicable law to various categories of facts, in view of their links with other legal orders … constitute what is called, with an inappropriate title which is today of common use, private international law. Next to rules of application properly so-called there are others which are closely connected with them, such as those

[283] Ibid. p. 346, 356
[284] Ibid. p. 359. Even admitting that there was a private international law regulating cross-border relations, rules and principles would have to be developed at national level for 'limiting' the application of foreign law. Ibid. 491
[285] Also in Anzilotti, 'Il riconoscimento', p. 151; Anzilotti, 'Studi critici', pp. 93-373, pp. 240-241
[286] Marinoni, 'La natura', p. 456 (Trans. A.)

> relating to the jurisdiction of the courts of the State …, those that determine the conditions for the recognition or enforcement of foreign acts and judgments etc. Posited by each individual legislator purely based on considerations and needs that each State evaluates in absolute independence, all these rules constitute a branch of domestic law and, as such, vary or may vary from one legal order to legal order.[287]

3.2 The Recognition of Foreign Decisions and the Social Purposes of Conflict of Laws

On the one hand, Anzilotti argued that private international law must determine the limits of the application of national law and to come up with principles and rules that regulate the application of foreign law in those cases in which local law does not apply.[288] Romano had formulated the same idea.[289] Marinoni also understood the role of private international norms to be twofold. First, they must determine the territorial or extra-territorial range of internal law. Second, if the *lex fori* does not regulate, they must determine what foreign law should apply in its place.[290] On the other hand, Anzilotti had pointed out that, private international law rules were set by each legislator independently and based on needs and policies that the state evaluates in full autonomy. The predominance of the social vocabulary is noticeable across the work of conflicts experts, regardless of their 'methodological' preferences. Hence, like Anzilotti, Marinoni argued that:

> …the State is to exercise this function because of the multiple needs of social life, which [the State] must enable and not suppress; it must … abide by those ethical rules that follow from an objective assessment of social needs .... The [absolute] disregard [of the existence of foreign legal orders], which is theoretically and legally admissible, would lead to the most anarchic disturbance of the existing juridical order ..., it would deprive those many relations which are factually connected to more than the states' order .... In this case, … the actions of the State ... would be antithetical ... to its very social purposes, which must aim at ensuring full protection for the needs of social life.[291]

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[287] Anzilotti, D. *Corsi di Diritto Internazionale Privato*. 1925, p. 4 (Trans. A.) He added (p. 49) that: «non vi possono essere norme internazionali emanate sulla forma di norme interne, e norme interne obbligatorie in forza della norma – base dell'ordinamento internazionale.» The role of the national legislator was not subsidiary to norms developed at international level or in the general theory.

[288] Anzilotti, 'Studi critici', p. 66

[289] He argued that argued that private international law "makes room" for foreign law when states willingly renounced to apply their own territorial law. Romano, 'Ordinamento', pp. 121 e 136

[290] The double-functionality theory was then widely preferred in the social age. Ago and then Balladore Pallieri argued instead that national law does not need choice of law rules to establish in what circumstances it applies and in what it does not. Conflict rules, they argued, only defined what happens when the law of the forum does not apply.

[291] Marinoni, 'La natura', p. 368-369 (Trans. A.)

Social needs could also correspond to the individual interest of the persons who formed relationships in accordance with foreign laws. They could be equal to the interest of foreign nationals and domiciliaries who entered in commercial relations with Italian citizens in accordance with Italian law. In these cases, foreign law could be applied, and private law transactions should receive the same legal treatment in accordance with the 'traditional' goals. Although mutual recognition was politically expedient, for Marinoni there was no legal limit to the regulating power of social states, within and across borders. Since the interest of the international community and the individual interest of individuals engaging in cross-border relations was always secondary to the internal interest, rules governing jurisdiction, choice-of-law principles and *exequatur* proceedings should always operate in conformity with internal policy.[292]

According to Marinoni, each state was free to determine if and in which circumstances it would recognise foreign people, foreign law and foreign decisions.[293] This was an important comment because Italian experts were dissatisfied with the fact that many magistrates in *exequatur* proceedings were simply content to examine if foreign courts complied with procedural requirements without subjecting the merits of foreign decisions to a scrupulous investigation. Experts typically described *exequatur* proceedings as "formal, small-minded, soulless, inadequate" and insensitive to the concrete needs and to the request of "true justice".[294] This reinforced the impression that the classical method failed to protect collective interest and public policy, by enabling nationals and foreigners to evade their obligations under Italian law. This perception was magnified by the fact that most foreign jurisdictions did not follow the principle of equality between foreigners and natives.[295]

In obvious contradiction with the spirit and with the letter of the Civil Code of 1865, but consistent with social discourse and practice, Marinoni argued that foreign decisions which were deemed

[292] Ibid. p. 370 and p. 453
[293] Ibid. 451
[294] In 'Bortolo Belotti, Relazione della Commissione parlamentare, 19 ottobre 1917, pp. 1299-1336, p. 1308, cited in Claudia Storti Storchi, Il Ritorno alla Reciprocità di Trattamento, Pr*ofili Storici dell'Articolo 16, Primo Comma Disp. Prel. del Codice Civile del 1942*, 1993, p. 534
[295] Article 3 of the Civil Code (equality of treatment) and Article 10 (the 'full faith' clause) of the preliminary provisions respectively. Italian decisions were subject to a more rigorous process of review by foreign courts, which meant that in too many cases decisions were not recognised and enforced. It is in this context that experts proposed to abrogate the principle of equal treatment codified in the Code of 1865. Experts first proposed to introduce the principle of reciprocity in the preliminary provisions With a project of reform of 1913. Storti, 'Il Ritorno alla Reciprocità', p. 531 Amending the Civil Code, however, required a lengthy procedure and, on top of that, it would have not solved the more immediate problem concerning the 'formal' and 'inadequate' reception of foreign decrees and foreign decisions. Ahead of the new Code of 1942, the legislators and experts focused on a more specific revision of the provisions of the Code of Civil Procedure that regulated exequatur proceedings (Art. 941). The amendment to Italian civil procedure, however, did not ease the tensions nor solve problems. The controversy relating to the reception of foreign judgements continued to grow in Italy and abroad. As Rolin had declared some years before, it was one of «des plus palpitantes et des plus graves que l'on puisse agiter.» A. Rolin, L'exécution des sentences arbitrales étrangères en France, in *Revue de droit international et de législation comparée*, s. II, XIV (1912), p. 248

irrelevant or were considered in conflict with the social interest of the forum did not produce any effect in the internal order.[296] The recognition of the effects of foreign decisions could not occur by default. It depended on the express acceptance by the sovereign of foreign decisions or foreign acts.[297] Even more to the point, only when local courts did not apply the *lex fori* would foreign law, foreign rights or foreign decisions become relevant.[298] Even in such cases, foreign law could only apply and foreign rights could only be recognised if their content was compatible with public policy and internal interest.[299]

The application of foreign law and the reception of foreign judgements did not depend on a general and abstract norm that assigned specific relations to specific laws. Marinoni believed that questions concerning the extra-territorial application of national law were to be settled by internal norms that "qualified" and "completed" the material laws.[300] In the view of a significant part of the Italian and foreign scholarship, private international norms were nothing but an 'appendage' to national laws. Since conflicts rules were set by sovereigns in accordance with internal policy, the content of private international norms would remain undefined. It would vary from one branch of the law to another, from commercial law to family law, for instance, depending on the policy and interest pursued by that specific branch of the law.[301] In Marinoni's words:

> It cannot be claimed that [conflict norms] belong to either private or public law, because they have in themselves no material content from which we can draw sufficient elements to classify them as part of one or the other branch of jurisprudence. Precisely because they are not autonomous, they will acquire the nature and character typical of those provisions to which they are connected; and because all the norms must have inherent in themselves limits to their application … they will refer to what is called private law, whether civil or commercial, or what is called public law, in its many divisions.[302]

What did this mean in practice? It meant that only through a positive juridical investigation of how conflict rules operated in each branch of the law could the scholarship formulate some (tentative) answer about the specific nature and functions of private international law. The assumption was that nature and functions were neither permanent nor universally valid, because they would change

[296] Marinoni, 'La natura', p. 369
[297] Ibid. pp. 483-484
[298] Ibid. 461
[299] In this sense, he referred to Article 12 of the preliminary provisions that rejected foreign law based on their content. Ibid. p. 501
[300] Ibid. p. 478
[301] Ibid. pp. 480-481
[302] Ibid. pp. 453-454 (Trans. A.)

according to the specific regulatory field and the distinct social policies pursued by the state. Of course, this view - other than that of the double-functionality - was not accepted by all Italian scholars, or by foreign ones either. However, whatever the specific preferences of experts, and whatever the specific national context in which they operated during the social age, in all of them we can detect the influence of the social-oriented and naturalist mentality and the effort to adapt the classical multilateral method to the changing institutional and cultural context.

3.3 Roberto Ago and the 'Common Scientific Investigation' of Private International Law

The most influential theorist of private international law in Italy in the mid-20th century was Roberto Ago (1907-1995).[303] Ago, like Romano and Marinoni, regarded private international law as a special branch of the internal order.[304] He also believed that states had a general responsibility not to automatically enforce local law but were free to determine in what circumstances foreign law would be relevant and could be 'naturalised' or integrated in the internal order.[305] For Ago, the content of the 'general obligation' was vaguely defined and, adopting a positive method, it was not possible to characterise it as either legal or binding.[306] If one looked at international practice, it was obvious that no sanction followed from a violation of the very general norm.[307] Each legislator and court interpreted the political obligation in markedly different ways. Examining the principles developed in each jurisdiction, contrary to what classical scholars assumed, national conflict rules had not converged.

In some jurisdictions, personal law corresponded to the *lex patriae*, in others to the *lex domicilii*. As far as property was concerned, some jurisdictions followed the ancient Roman principle of *mobilia sequuntur personam*. In other systems, the *lex rei sitae* governed both mobile and immobile property. As far as commercial contracts were concerned, courts sometimes applied the *lex loci contracti* to questions of substantial validity; sometimes, they adopted the *lex loci solutionis* instead; in other

[303] Ago, dopo Perassi e Anzilotti, After Anzilotti and Perassi, Ago became professor of international law at the university of Rome. The ideas of Ago will be further refined and popularised by Rodolfo De Nova, Edoardo Vitta and, as we shall see, Balladore Pallieri. A short biographical note is available in Valticos, Nicolas. "Roberto Ago (1907-1995)." *American Journal of International Law* (1995)

[304] International law and private international law were formally and substantially different, in terms their subjects, sources, and content. Ago, 'Teoria', pp. 4-5

[305] For Ago, the 'purpose' of conflict rules is not to determine when Italian or foreign law apply (see below). Italian law does not need conflict rules. The purpose of conflict rules is just to clarify when foreign rules apply and to give the force of law to foreign decisions that would otherwise be inapplicable, to 'naturalise' them. See Ago, Roberto. "Règles des conflicts de lois". *Recueil des Cours*, 1936. esp pp. 302-308

[306] Ago, 'Teoria', pp. 125-126 e per Ago, «…ciò che rende particolarmente scettici nei riguardi di questa norma generalissima…è che essa non si dà, né si può dare una dimostrazione sufficiente.» Ibid. p. 127

[307] Ibid. pp. 128-129. Ago also believed, contrary to Mancini and other classical scholars belied or hoped, that there was no customary international law inclusive of common conflict principles and rules, not until the *opinio juris* emerged inequivocally and unmistakingly. Ibid. p. 129

cases, they adopted a mixed approach. As far as capacity was concerned, in some jurisdictions the personal law determined competence with respect to all transactions, no matter what their nature was, and regardless of the circumstances of the parties. In others, exceptions were made. Even when the same connecting factor was adopted, conditions for its identification, acquisition, and varied. From a positive analysis of the law then applied in cross-border cases, it was self-evident that:

> … the plurality of the systems of choice of law rules cannot but be considered an inalienable and inevitable fact and characteristic of … private international law, even if the collision that necessarily originates from the different criteria followed in each jurisdiction for the resolution of a same controversy, gives rise to … the most serious consequences, especially in the current state of intensification of international life.[308]

The abstract concerns of classical scholars had led to this messy situation, seriously compromising the objective of harmony of decisions, and Ago regretted that his predecessors had not adopted a 'naturalist' approach to the discipline. He argued that the scientific credibility and concrete usefulness of private international law had been undermined by the "serious uncertainty caused by collisions between trends and conceptions regarding the underlying principles and the borders of the subject".[309] The distinct choices made by legislators and courts reflected the deeper values and irreconcilable differences between systems.[310] Such differences could no longer be dismissed as a passing phenomenon under the false pretence, popularised by classical jurists, that national systems would naturally converge, or that uniform rules would one day be adopted at international level.[311] Having carried out a positive comparative analysis of conflict rules and principles, Ago declared:

> The examination [confirms] that the idea of a truly uniform private international law, codified in a whole series of international treaties, must be considered ... as unrealistic as that of the reconstruction of a unitary system of private international law by deduction from general principles.[312]

Ago's disenchantment with the classical utopia of reaching one day a set of universally valid rules and principles was greatly reinforced by the fact that, in the early decades of the 20th century, national

[308] Ibid. p. 8 (Trans. A.)
[309] Ibid. p. 4
[310] Ibid. p. 11
[311] This is not a transitory stage, p. 9. This is a realist assesment that had been rejected by Gutzwiller who had prophetised the rise of a: «Droit international privé collectif introduit par des conventions internationales.» 'Le développmente historique' (p. 294)
[312] Ago, 'Teoria', pp. 26-27 (Trans. A.)

rules and principles codified or developed in the classical age were going through a process of revision. Reforms were taking place both in civil law systems and in the common law world. Reform proposals and changes in law showed that European systems abandoned the liberal and cosmopolitan premises of classical multilateralism and pursued, explicitly or implicitly, distinct policy goals. The Italian Parliament itself had formally begun a process of revision of the preliminary provisions of the Civil Code. The first project, dating back to September 1930, had been awaited with trepidation by Italian and European scholars alike. The review of the Civil Code of 1865 demonstrated beyond all reasonable doubt that the universal assumptions and liberal aspirations of classical jurists had been unfounded and ill-placed.[313]

In line with changing scientific assumptions and the institutional environment, Ago placed emphasis on differences between national rules rather than on common traits. He especially drew the attention to the differences between common law and 'Romanist' systems.[314] He believed that the common law conception and the Romanist conception were irreconcilable, and that this would constitute an unsurmountable obstacle to the harmonisation and integration of conflict principles and rules.[315] He thus mildly supported the view that there could only be some harmonisation between legal systems that shared the same historical or political roots, or between those which had the same social needs and shared the same policy objectives.[316] However, he also underlined that no true uniformity could be achieved in private international law in the unlikely scenario whereby the process of harmonisation encompassed the whole legal system.[317]

Inevitably, Ago underlined that wide differences in law and in theory gave rise to legal and doctrinal uncertainties. In this context, neither a general theory nor an international law could be realistic achievements. However, as Anzilotti had also suggested, Ago argued that experts could not find the way out of the crisis of Private International Law by closing their minds to broader scientific ideas. Anzilotti had differentiated between, on the one hand, universal rules of law in the exact sense of the word - which would not suffice to solve the crisis because even universal principles would always

[313] L. Babinski, La riforma del diritto internazionale privato in Italia dal punto di cista del diritto polacco, in Ann. Dir. Comp. VII (1933), I, pp. 336-350, esp. 335-336
[314] Ago mistook Story e Westlake for nazionalisti. Ago, 'Teoria', p. 70
[315] Ibid. p. 14
[316] «Ogni tentativo di unificazione può sperare di ottenere risultati concreti…solo quando si rivolga a un gruppo di Stati tra i quali sussista una sostanziale affinità di principi giuridici e di interessi politici…» Ibid. p. 27
[317] Even assuming that every country and jurisdiction would accept uniform conflict principles and rules, absent a deeper and more extensive convergence, national courts would inevitably 'characterise' the same dispute and international matter in different ways. Ibid. 15 This made it necessary to reform institutes one by one. It was necessary to bring about total uniformity in state law. This was, however, either unlikely or downright impossible. National codifications and jurisprudential trends were believed the be the result of specific economic conditions and unique histories, which made it impractical, if not hopeless, to achieve more than a negligible degree of common ground between national legal principles, regardless of the field of law in question.

have to be actualized through the laws of sovereign states - and, on the other, common scientific methods and legal ideas. Ago was also of the opinion that the scholarship should strive to achieve, through a "common scientific investigation" a degree of harmony in its understanding and its response to problems of private international law.[318]

What Ago proposed was to use a positive and inductive method rather than a theoretical and deductive one, and to start from concrete problems and challenges rather than first principles. Experts had to rid themselves of all abstract concerns and theoretical ideas that still characterised the discipline.[319] It was necessary to identify "the fundamental principles that the juridical science assumes to be the foundation of its constructions".[320] Then, these must be uncompromisingly rejected.[321] In their place, jurists must develop a method which is "in greater harmony with the fundamental principles of legal dogma."[322] Accordingly, the blind approach of classical jurists should give way to a positive assessment of conflict rules and principles. Contrary to the past, the scientific effort should not be directed to the elaboration of abstract principles and coherent theories that were universally applicable.[323] It should lead instead to a critical evaluation of the content and the policies pursued by sovereign states through conflict rules and principles.[324]

3.4 The Multilateral Method in the Social Age: Connecting Factors and Public Order

Ago rejected the theory of double-functionality advanced by Anzilotti, Marinoni and Romano. For Ago, the primary task of private international law was not to determine in which circumstances Italian substantive law should apply and those in which it should not.[325] What followed from the very

[318] «comune elaborazione scientifica » Ibid. p. 40
[319] Ibid. p. 5
[320] What was necessary was the «[presa] in esame dei principi fondamentali che la scienza giuridica assume come base delle sue costruzioni.» Ibid. p. 42
[321] «Di qui l'origine di gran parte dei contrasti di tendenze sulle questioni di maggiore importanza, l'impossibilità per alcune teorie di giungere alle estreme conseguenze logiche delle loro premesse, le soluzioni di compromesso e di ripiego, tutto quell'insieme di cause insomma che spinge oggi sempre maggiormente la dottrina più recente verso una revisione veramente profonda e totale dei presupposti e dei concetti fondamentali, la quale permetta di vedere sotto nuovi aspetti molti dei più gravi e discussi problemi del diritto internazionale privato, e di dare a questa disciplina una posizione più definita nel quadro della sistematica giuridica.» Ibid. p. 6
[322] «Questa considerazione critica…sembra ora aver messo in chiara luce la necessità…di vedere se a quella concezione non sia possibile sostituirne un'altra, le cui conseguenze vengano a trovarsi in maggiore armonia con i principi fondamentali della dommatica giuridica.» Ibid. p. 87
[323] The common goal must be to lay out the fundamental problem in exact terms, and to determine dogmatically, through an appropriate revaluation of the older conceptions and a thorough examination of the newest orientations, those concepts that can best help to identify the actual nature of the rules of private international law, so as to respond to problems that have a general nature with a new and more satisfactory answer. Ibid. p. 42
[324] Ibid. p. 48. Also using the comparative method.
[325] Ago did not argue that the primary purpose of Private International Law rules was to determine the limits to the application of local law. Secondo l'Ago, mon può essere più l'individuazione dell'applicazione della legge interna nello spazio, ne un'individuazione di una competenza giuridica. Ago, 'Teoria', P. 87

character of modern law, i.e. that it necessarily originates in sovereign power, is that Italian law did not need conflict rules to apply, either in its own jurisdiction or abroad.[326] Italian law applied to natives abroad and foreigners within the jurisdiction without needing conflict rules specifying the territorial or extra-territorial scope. He also rejected the theory of double-functionality because it implied that the selection of the applicable law happens, in principle, on the basis of an abstract classification of legal relations.[327] This method of proceeding evoked the classical method that selected the competent law based on abstract criteria and theoretical classificatory schemes.

Classical scholars assumed that the selection of the competent law could be determined by a conceptual speculation, without considering the concrete reality of international life or the fact that conflict rules were part of the internal order of sovereign states.[328] Ago rejected the theory of double-functionality because, implicitly, it fell back to the same assumption.[329] When faced with a cross-border scenario, a court or official authority had to find out if, based on an objective examination of the concrete characteristics of the legal relation or dispute in question, if there were relevant and concrete connections with legal orders other than the internal one.[330] Hence, through 'connecting norms' ("*norme di collegamento*") a factual situation was connected to a specific foreign legal order.[331] Although connecting factors may have looked the same, the connection between the legal order and the relation was not inherent in the relation. Conflict norms referred instead specific laws to factual situations based on their concrete existence and specificity.[332]

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[326] In principle, each national legislator could ignore those relations or factual situations that are connected to more than one legal system, or those which have a dimension that extends beyond the territorial jurisdiction, because this arbitrary power is inherent in state sovereignty. Ibid. p. 91

[327] Ibid. p. 100

[328] Ibid. pp. 54-55

[329]Romano, Anzilotti and Marinoni, and those who subscribed to the theory, still considered the problem to be solved by private international law as one of legislative competence. Romano, 'Ordinamento Giuridico', p. 164. Their method was driven by the investigation of the geographical reach of the norm. For Ago, this was not acceptable, because it assumed that foreign norms were not 'received' or 'naturalised' ('rinvio ricettizio' but merely to declared their validity in the internal order ('rinvio formale'. Ibid. 101 Romano discussed this in 'Ordinamento Giuridico', pp. 138 et seq. This view had been rejectted by Marinoni and Anzilotti, 'Il Rincoscimento', pp. 12 et seq. and 'Corso di Lezioni', p. 93et seq. The notion of formal reception could not be accepted by Ago ('Teoria', p. 104 et seq.) because this would either required the production of the same norm under internal law or because it would require the importation of the identical and original norm.

[330] Relevant connections could either come in the form of a substantial and concrete connection between the factual situation and a foreign order or, Ago argued, the substantial connection could also come in the form of 'juridical and conceptual devices', among which there were also traditional connecting factors, like nationality or domicile. However, he also specified that: "That the norms of private international law rely on such legal concepts does not mean that those concepts themselves are connecting factors. [Rather, they are] only a means, a device by which it is possible to indicate in a mediated and synthetic way a whole range of substantial characteristics that relationships that fall within the scope of those rules have." Ibid. p. 192 (Trans. A.)

[331] Ibid. p. 119 Ago did not believe that the objective of Private International Law was that of assigning an applicable law to a specific category of facts. Rather, he argued that Private International Law was a special law that regulated those situations that could not be exclusively referred to internal substantive law. See also Ibid. p. 98

[332] Ibid. p. 123. The various possible connections, that could be but did not necessarily come in an abstract form, revealed what legal orders were willing to regulate that specific relation. Ibid. p. 89

For Ago, private international law rules did not assign a 'natural' seat and an applicable law to a legal relation. Rather, conflict rules assigned specific categories of facts to a regulatory norm. This may seem a theoretical abstraction. However, if one looks at how the internal order determined the link between categories of facts and territorial laws, what emerges is the conformity between Ago's approach and the fundamental premises of the social. One way to prove this is to look at his conception of public order. Classical scholars, like medieval jurists, had admitted the possibility that foreign laws may be, in exceptional cases, rejected because they violated fundamental principles of universal justice. For Ago, public order corresponded to internal, rather than international, public policy. But public order did not merely constitute a protection device. Rather, public order itself assigned specific relations to a specific law based on their "social function".[333] For Ago:

> …since laws are to be distinguished, depending on their social purpose, between laws that protect individual interest and laws of social security or public order ("*di garanzia sociale o di ordine pubblico*"), and, accordingly, in extra-territorial and territorial laws respectively, the concept of public order comes to overlap with that of territorial law, and thus incorporates all the rules of public law ….[334]

The paradigm shift that took place in the social age expanded the function of public order to the point of covering the whole field of conflict rules. Ago's redefinition was consistent with the social-oriented conception of public order put forward by other contemporaries, in Italy and abroad.[335] The link between *ordre public* and social law can in fact be traced back to Antoine Pillet (1857-1926) who, unlike Ago, formulated it in the context of his 'neo-Statutist' proposal. Pillet had tried to solve concrete problems raised by legal collisions by dividing, as medieval jurists did, between territorial and extra-territorial laws. He posited that the distinction was not between personal and real statutes but between "*lois de protection individuelle*" and "*lois de garantie sociale ou d'ordre public"*. The territorial or extraterritorial application of substantive law must be determined according to the 'social

[333] For instance, he argued that, tracing back the origin of the law to medieval statutes, the *lex rei sitae* rule originated in public policy considerations. Ibid. p. 289-290

[334] Ibid. pp. 292-293 (Trans. A.)

[335] In the third edition of his Treatise (Trattato di Diritto Internazionale, 1888) Fiore also spoke of laws which were directed to the protection of "a public interest and a social right" (un interesse pubblico e di diritto sociale»). (p. 63 and f.) Fiore expanded the scope of public order beyond the abstract concerns of classical scholars, and he spoke of laws whose objective is «la sauvegarde des droit et des intérêts collectifs du corps social, de l'ordre moral et des bonnes mœurs.» in 'De la limitation des loi etrangers et de la determination des lois d'ordre public', *Journal de Droit International Privé*, 1908, p. 353 ; 359 he talked of laws whos objective is the «sauvegarde des droit et des intérêts collectifs du corps social, de l'ordre moral et des bonnes mœurs. » This does not mean that there are no references to the protection of moral, public, economic interests of the sovereign in the previous ages. However, public order as understood by social experts does not only municipalise its origin, but also expand the function of public order to cover the whole field of conflict rules.

goal' (*"le but social"*) of the law.[336] Although Pillet advocated for a return to unilateralism whilst Ago - and Europe - stuck to multilateralism, the commonalities between their conception of public order and its relation to the social functions of conflict rules are manifest.

Although European jurists preferred to stretch multilateral principles and to infuse them with the new social spirit instead of restoring the Statutist method, the idea that conflict of laws played social functions and that private international law must protect social ends took over the consciousness of all experts. The extensive and social-oriented conception of public order made it possible to fulfil the promise of protecting social interest without having to abandon the multilateral premises of the European method. Accordingly, for Ago public order becomes a 'special rule' that is attached to every connecting factor to make sure that harmony within the internal order - rather than across jurisdictions - is achieved. In the classical age, public order was generally considered an anomalous part of private international law that justified the exceptional interruption of the mechanical operation of conflict rules when this would have led to the violation of widely shared principles of justice that governed the community of civilised nations. In the social age, public order underpins the development of conflict rules per se. Hence, Ago argued:

> In other words, public order does no longer constitute a mere limit to the application of foreign law which is part of the rules of private international law, but it is itself the inspiring principle of different rules of private international law. [Such rules] establish the application, to certain categories of relationships, of different territorial laws [in accordance with this new conception of public order.] [337]

In the social age, the elaboration of conflict principles and rules was therefore 'publicised'.[338] Accordingly, public order would no longer be a last resort for denying the application of foreign laws

[336] Pillet, « Essai d'un systeme general de solution des conflits de lois », *Journal, De Dr. Int. Prive*, 1894, pp. 250 et seq. Ibid. Pillet, Antoine. *Principes de droit international privé*. Pedone, 1903. Ibid. *Theorie Continentale Des Confits de lois*, Rec. Des. Cours. Haye, 1924. See the bibliographica note : Niboyet, J. P. "Antoine Pillet 1857-1926." *Rev. Droit Int'l & Legis. Comp*. (1926). Gaudemet, E. « La theorie des conflits de lois dans l'oeuvre d'Antoine Pillet et la doctrine de Savigny », Melanges Antoine Pillet, 1929. Pillet rejected the distinciton between internal and itnernational public order: «il n'y a q'une seule espéce d'ordre public toujours à elle-meme, à quelque point de vu eque l'on sa place.» Pillet, Antoine. *Traité pratique de droit international privé*, 1924. p. 118. Public order is always national and always social.Although the assumption is again that distinct types of laws exist and that the 'object' of the law determines their spatial outreach, it is not merely their real or personal in-built character that indicates the territorial or extra-territorial outreach. Rather, in conformity with the emergence of a new consciousness, it is utility in its multiple forms that does. Statutist theories enjoyed more success in the US, where they eventually led to the restatement of private international law. The American scholarship, until then grounded in the natural law, classical and universalist theory of Story, was heavily influenced by 'Neo-Statutist' ideas. It therefore dedicated itself to the rediscovery, often interpreted in light of the new dominant mentality, of medieval writers. It is in this context that Beale translated the Commentaries of Bartolus.

[337] Ago, 'Teoria', p. 291

[338] Pillet believed that the nature of private international law norms was public: 'De La nature des regles d'origine relatives à la solution des conflicts de lois', *Rev. De Dr DInt. Prive*, 1909, p. 24. Ago agreed with Marinoni that norms that governed

or refusing to give effect to foreign decisions. The development of private international law broadly understood would happen pursuant to public policy. This conception of public order was consistent with the dominant thought. "[T]he concept of public order" argued Ago, "necessarily changes in accordance with the established opinion regarding the nature and the foundation of the rules of private international law."[339] The question arose, however, about the content of public order. In line with the domestication of private international law and like all social experts, Ago was also of the opinion that public order was contingent on time and space. Its content varied from epoch to epoch and from jurisdiction to jurisdiction.[340]

Despite the inherent vagueness of the concept, in the quotation above, Ago suggested that that there was a difference between laws pursuing individual interest and those protecting collective interest. In a sense, both pursued a social purpose. However, by differentiating between social and individual interest, Ago reflected the dominant division between individual and social law. Accordingly, when conflict rules and principles were developed, public order demanded that a difference is made between cross-border 'civil relationships' and those that pertained instead to 'commercial life' ("*rapporti della vita civile*" and "*vita commerciale*").[341] Family law embodied social law. Matters pertaining to marriage, divorce, and family relations in general therefore fell within the scope of public order and territorial law.[342] Accordingly, for Giorgio Balladore Pallieri (1905-1980), one of Ago's most celebrated followers, conflict rules applicable to cross-border family disputes must reflect their social functions, whether in questions concerning jurisdiction, applicable law or in *exequatur*.[343]

In some cases, it was not social interest but private interest that the law pursued. In those cases, cross-border continuity should be the goal of conflict principles subject to the autonomous choices of individuals on the one hand, and to the protection of public order and overriding mandatory rules on

relations with connections with multiple jurisdictions were also variable in nature and character. What is more, Ago also believed that this debate ought to be settled by considering the principle of those legal orders that are keen on regulating specific juridical facts. Ago, 'Teoria', p. 115

[339] Ibid. pp. 298-299

[340] Hence, it could not be 'codified' in a clear set of rules and principles. Likewise, Anzilotti, 'Corso di Lezioni', p. 164

[341] Ago, 'Teoria', p. 92

[342] Healy, T. H. Theorie Generale de l'Ordre Public, Rec des Cours de la Haye, 1925, p. 480 et seq. who focused on public order, espeically in matters of marriage, capacity of married women, divorce and filiation. The emphasis is still on the family. See also for the U.S., Lorenzen, Lorenzen, Ernest G. 'Territoriality, Public Policy, and the Conflict of Laws', *Yale Law Journal*, 1924, p. 736 et seq.

[343] Balladore Pallieri, G. 'I principi generali del diritto internazionale nella nuova legislazione sull'esecuzione delle sentenze straniere', *Riv Di Dir Comm* 1928, p. 457

the other.[344] In the social age, party autonomy still played a role in individual law.[345] However, jurists no longer spoke of 'personal sovereignty' as Mancini and classical jurists did. In 1929, Jean-Paulin Niboyet (1886-1952) famously criticised the classical conception of party autonomy because, if unrestricted, it 'elevated' parties above law and above national interest.[346] Accordingly, in the social age, party autonomy in commercial matters was progressively regulated in law. Autonomy was placed within the regulatory framework of the state order. At the same time, social experts continued to assume that 'individual interest' and 'individual law' underpinned conflict rules in cross-border commercial matters. FLE law thus rose up again, although recast in the social vocabulary.

3.5 Giorgio Balladore Pallieri and the Preliminary Provisions of the Civil Code of 1942

Private international law was transformed by the rise of social legal thought. The social consciousness modified principles and rules governing family relations and commercial relations, but it did not resolve the dichotomy between the law of the family and the law of the market, either in internal law or in private international law. This is visible is the discourse as well as in the law, including in the preliminary provisions of the Civil Code of 1942. By the time of the introduction of the new Italian civil code, Ago's theory of had become dominant in Italian doctrine. His work had been taken up and further developed by Balladore Pallieri.[347] Like Ago, Balladore Pallieri challenged the theoretical view of private international law, unrelated to positive internal law and disconnected from the social functions pursued by each branch of the internal legal order.[348] In accordance with this positive conception, the role of experts was to examine the positive existence and the specific purposes of private international law.[349]

The role of experts, however, was not limited to a passive ascertainment of the positive law. Experts also dedicated themselves to the continuous improvement of the positive law pursuant to changing

[344] Weiss, Manuel de droit international privé, 1920, p 367 : "When a law deals with a private interest, its object is always the utility of the person ; it can govern only those for whom it has been enacted, but it ought on principle to gvoern them in all places and in all their juridical relations, subject, however, to the exceptions and limitations that result from "*l'ordre public international*" from the rule *locus regit actum*, or from the autonomy of the will."

[345] Romano, in 'Corso di Diritto' [edition], p. 14 et seq. and p. 51 et seq. specified that: «è un errore credere che l'ordinamento internazionale, come ogni altro ordinamento, si risolva tutto in norme che attribuiscono diritti e correlativamente doveri ai suoi soggetti; esso attribuisce anche capacità e poteri, per cui ciascun soggettosta, non in un concreto rapporto, con gli altri, ma , di fronte a questi, ottiene una sfera di libertà e autonomia che, appunto perciò, si dice privata.»

[346] Niboyet, J. P. 'La théorie de l'autonomie de la volonté', 16 *Recueil des Cours* (1927-I)

[347] Balladore Pallieri rejected the theory of double functionality and argued that «Vi sono nel nostro diritto alcune norme le quali dispongono la applicabilità in Italia di leggi straniere.» Balladore Pallieri, G. *Diritto internazionale privato*. Giuffrè, 1946, p. 6

[348] Balladore, 'Diritto internazionale privato,' p. 17. Also see 2nd ed. 1950, p. 16 et seq.

[349] Balladore Pallieri argued that «per l'interprete del diritto positivo … [v]i è solo da accertare il fatto che norme di diritto internazionale privato esistono nel nostro ordinamento e che questo è configurato in modo da dimostrare appunto di tenere conto di quei bisogni del commercio internazionale.» Balladore, 'Diritto internazionale privato,' p. 10

assumptions and functions.[350] Classical scholars had argued that the rights of foreigners should not come after those of natives, domiciliaries and nationals. They had argued that the same dispute should produce the same result, "whether the judgment be pronounced in this state or in that".[351] This idea had taken shape as the principle of equality which had been codified by the 1865 Civil Code. In the 1930s and the 1940s, the idea of a community of civilised nations which underpinned the principle of equal treatment had been branded an illusion. Scholars had argued that the interest of the Italian state and of Italians should come first.[352] Consistent with the decline of universalism, the preliminary provisions of the new Civil Code, which entered in force in 1942, reinstated the principle of inequality between foreigners and nationals.[353] Equal treatment of foreigners was subject to the condition of reciprocal treatment for Italians abroad. Foreigners were also the object of special laws limiting their rights in banking, credit and property.[354]

The preliminary provisions of the Code of 1942 demonstrate the resilience of FLE in law and in discourse but also point to the transformation of the law governing family and economic matters. As far as competence in commercial matters was concerned, Italian law gave foreigners capacity even if they lacked capacity under their personal law.[355] This exception did not apply to family and

[350] Ago, R. 'Le norme di diritto internazionale privato nel Progetto di codice civile', *Rivista di diritto intenazionale*, 18 (1931), pp. 297-351. As Ago commented, the events and changes of the last decades had undermined the foundation and fundamental canons of the international doctrine which had influenced the provisions of the 1865 Code.

[351] Savigny as translated by Guthrie, 'Treatise', p. 27

[352] Fedozzi, P. 'Appunti sul progetto di riforma del diritto internazionale privato italiano', in *Riv. it., dir. int. priv*. 1931, pp. 9-55 and pp. 53-55. In fact, some scholars had shown how the Code of 1865 was far from having produced exclusively negative results for Italians and for the Italian state. See Gemma, Scipione. 'Notes des droit international privé relatives aux réformes légilsatives italiennes', *Revue de droit international privé*, XXV (1930), pp. 33-51 and 251-269. Other than arguing that the Code had produced a positive effect on internatinonal diplomacy and international relations, Gemma argued that the principle of equality should not only be retained, but even extended to all foreigners, not only those of countries recognised by Italy.

[353] Articles 7 to 21 of the preliminary provisions. Articolo 16(1) delle Disposizioni Preliminari: «Lo straniero è ammesso a godere dei diritti civili attribuiti al cittadino a condizione di reciprocità e salve le disposizioni contenute in leggi speciali. Questa disposizione vale anche per le persone giuridiche straniere.» The first proposal advanced by the royal commission for the reform of the 1865 Code, which published its first proposed revision in 1930, eliminated the principle of equality of treatment with the stroke of a pen (article 3). It did so without considering possible alternatives and without replacing it with an alternative regime. Storti, 'Il Ritorno alla Reciprocità', p. 537

[354] The revised version of the project of reform awarded to foreigners the same rights also afforded on Italian citizens, but also kept in place the special laws. (Art. 8(1)) Cited in Storti, 'Il Ritorno alla Reciprocità', p. 549. The removal of the principle of equality was coherent with the special laws that had been introduced under the fascist regime. With fascism coming to power, the civil, economic and political rights of foreigners had already been substantially limited. Before the introduction of the new Civil Code, special laws had already severely limited the rights of foreigners in banking and credit, property, but also privacy and surveillance. Ibid. pp. 536-537. The special laws introduced in Italy were no doubt symptomatic of the paranoid activities of the fascist regime. However, Italian jurists did not fail to point out that they were also coherent with the general decline of the protection afforded to foreigners in the rest of the Western legal world, even with the visible trend towards the restriction of liberty in self-declared liberal countries. Fedozzi compared measures introduced in the United States with the Italian special laws in Fedozzi, P. 'Gli insegnamenti della guerra circa il trattamento degli stranieri', *Scientia*, Vol. XVIII (1925) and in Id. 'Il dirititto internazionale privato. Teorie generali e diritto civile', in *Trattato di diritto internazionale*, a cura di P. Fedozzi e S. Romano, Padova, 1935, pp. 29-37

[355] Drawing on the Italian Code of Commerce of 1882 (and from the German Civil Code). Storti, 'Il Ritorno alla Reciprocità', p. 538

succession matters.[356] As far as substantial validity of commercial contracts, the effects of cross-border agreements were either governed by the law of nationality of the parties, by the *lex loci contractus* or else by the chosen law.[357] These principles were consistent with a renovated, although conditional, spirit of *favor contracti*. Accordingly, a court confronted with a commercial dispute had not to apply rules blindly. It must first determine to which category the contract belonged to - for rental, for sale – and verify if that type of contract was subject to mandatory provisions and absolute laws. Then, it might consider the choice of law by the parties. But party autonomy was not absolute:

> Party autonomy in domestic law does not exist ... per se, but only in so far as the law of the State recognizes it: from a legal point of view, it acquires the connotations of a 'power' or 'faculty', which, like any other, needs to be sanctioned by a positive law. The autonomy of the contracting parties is also all but unlimited and only subsists insofar the law, after having sanctioned it, refrains from limiting it further with binding or mandatory provisions. In short, party autonomy is not a *prius* but a *posterius* in the law, and it depends for its existence on State law.[358]

In line with dominant assumptions, Italian law did not recognise in individuals the absolute and unrestricted capacity to determine by force of will what law should apply to their mutual obligations.[359] In principle, where individuals had wilfully and explicitly subjected a contract to the law of a foreign state, Italian courts would take their choice in consideration.[360] However, if the parties were Italian, if they resided in Italy, if the contract had been made and was to be fulfilled in Italy, courts would not accept the choice of the parties to have, for instance, Turkish law applied.[361] If there was a mismatch between the chosen law and the factual circumstances of the case, Italian courts would ignore the parties' preferences. Courts would then rely on concrete evidence collected in each case and apply the law of the state which, in consideration of the evidence and of actual connections with the Italian or foreign jurisdictions, governed their rights and obligations.[362]

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[356] Ibid. p. 539. As Balladore would comment, «Questa norma risponde ad una tendenza assai diffusa nella dottrina moderna, la quale sostiene, per la sicurezza delle contrattazioni, che della capacità si giudichi secondo il dirtto del luogo dove l'atto è compiuto, anziché secondo la legge nazionale.» Balladore, 'Diritto internazionale privato,' p. 126
[357] Aricle 15
[358] Balladore, 'Diritto internazionale privato,' p. 181 (Trans. A.)
[359] Ibid. pp. 181-183
[360] Ibid. p. 183
[361] Whether to the question if the contract has ever come into existence, to the determination of the effects of the contract, to questions relating to damages and compensations claimed for breach of contract etc. Ibid. pp. 184-185
[362] Ibid. p. 184

In contrast, the scholarship unanimously regarded provisions governing family matters as falling outside the scope of individual law and individual preferences, and as an instrument for protecting social interest. Accordingly, the *lex patriae* continued to govern the substantial validity and the incidents of a marriage and, in general, governed the status and duties of persons in family relations.[363] In accordance with the provisions of the new Code, Italian law regulated the creation, duration and effects of marital status whenever the spouses had Italian nationality or, in case of different nationality, when the husband had Italian nationality at the time of the celebration of the marriage.[364] In such cases, Italian law imposed on the wife the duty to follow her husband. It removed her contractual capacity. It imposed sanctions for infidelity. It required the registration of the surname of the husband for the wife and children. Italian law also applied in proceedings for separation.[365] Finally, the law of the husband's nationality applied to questions of matrimonial property.[366]

As far as *exequatur* proceedings were concerned, under the new provisions Italian courts would only recognise foreign decisions relating to personal status where the law of the common nationality or the law of the nationality of the husband had been applied.[367] Moreover, Italian courts would not recognise the effects of decisions which did not conform to public order and state interest.[368] Although experts were in general supportive of new provisions, the doctrine was especially dissatisfied with the choice of the royal commission to retain the law of nationality in matters concerning personal status. The principle of nationality appeared to contrast with the more widespread adoption of domicile.[369] The problem, for those Italian scholars who did not agree with the retention of the principle of nationality, was not that the Italian legislator had chosen a principle rejected by other sovereigns. The problem was that the systematic application of the *lex patriae* endangered the social interest of Italian citizens who resided abroad.[370] However, as Balladore Pallieri pointed out:

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[363] Article 6. The word 'stato' replaced that of 'nation' in the Article.
[364] Article 8
[365] Balladore, 'Diritto internazionale privato', p. 143
[366] Article 19: "I rapporti patrimoniali tra coniugi sono regolati dalla legge nazionale del marito al tempo della celebrazione del matrimonio"
[367] Balladore, 'Diritto internazionale privato', p. 186
[368] Through the regulation of status, international family matters had been subject to the scrutiny of state interest and public order since 1865. They continued to be so, under Article 7 of the preliminary provisions, after 1942.
[369] Domicile had been adopted by the Codigo Bustamante and also by the *Instutut de Droit Internaionale* in 1931, Cambirdge Session. See J. P. Niboyet, Osservazioni sugli artt. 6-20 del titolo preliminare del codice civile italiano, in Ann. *Dir. Comp.*, VII (1933), pp. 45-62, emphasising the advantages of domicile.
[370] Italy was a country of emigrants. It had been thought that it was in their interest to adopt the nationality principle. However, each country had adopted different connecting factors in personal matters. Foreign law was indifferent to what the Italian legislator regarded as the personal law of Italian nationals. The result of this situation was that, if they went back to Italy, family relationships and the personal status formed or dissolved abroad, in accordance with, for instance, the *lex domicilii*, would not be recognised in Italy. Fedozzi, 'Appunti sul progetto' pp. 51-52. Hence, the proposed reform did not consider the consequences of the existence of different connecting factors. In addition, the application of the principle appeared to run against the collective interest of Italians whose lives were rooted in foreign jurisdictions. G. Diena, 'Osservazioni sul Progetto di riforma del codice civile relativamente alle disposizioni del titolo preliminare riguardanti il diritto internazionale privato', in *Ann. Dir. Comp.*, VII, I (1933), pp. 3-44, esp. p. 4

> since, according to public international law, the State is free to behave towards its subjects as it sees fit, without any interference by international law in this respect, and since the State can even commit any sort of injustice and any barbarity without the intervention of the international order, it is therefore clear that the State could, without doing anything wrong under international law, regulate all relations between its subjects exclusively in accordance with its national laws….[371]

Accordingly, the existence of alternative regimes of marriage and divorce would lead some Italian citizens who were domiciled or resided in foreign jurisdictions to get married or divorce abroad. This would systematically expose Italian nationals to difficult situations. However, in accordance with established doctrine, the Italian legislator could regulate personal and family status and its incidents purely on considerations of public policy, without interference from the international order. The social consciousness had transformed status into a necessary and inherent condition of members of the political and civil community that could be regulated in accordance with collective interest and public policy. In line with this idea, all family statuses - the condition of father, the husband, of son - were constituted and regulated by the *lex patriae*. Italian law regulated the duties attached to the status arising from matrimony, filiation or adoption in line with state interest.[372] Other than the ad hoc prohibitions indicated in Section 2.7 for international and interracial marriages, the law also imposed mandatory conditions that applied to Italian and foreign citizens.[373]

What the process of transformation of Italian private international law in the social age suggests, a transformation that symbolically and materially culminated with the introduction of the Civil Code of 1942, is that private international law is still *instrumentum regni*. The link between state sovereignty and the law governing cross-border relations which was forged in the Middle Ages clearly endured also in the social age. Far from being a body of technical rules that develop in isolation from political and cultural process, conflict rules were shaped by the transformation on the dominant mentality and, at the same time, reconstructed and consolidated territorial and personal, private and public, individual and social, material and symbolic boundaries of power. They submitted the permanent bonds between national, civil and political, communities to which individuals belonged to

[371] Balladore, 'Diritto internazionale privato,' p. 19 (Trans. A.)
[372] In theory, nationality only governed the status after it had been created. In principle, the law governing the creation of a status ought to be different. However, the law of nationality also governed these particular statuses. For matrimony, see Ibid. pp. 133-148
[373] Among which as the lack of a pre-existing marriage - whether dissolved or not - limits of prohibited degrees of consanguinity, criminal records etc. which, if not respected, would invalidate the marriage As provided by Articles 83, 84, 85, 86 and 87 of the Civil Code.

new logics of social interest. Conflict of laws constituted a powerful technology for ordering space and governing persons in line with the prerogatives of social states.

3.7 Italian Family Law and Italian Contract Law Before the Age of Conflicting Considerations

The redefinition of the underlying principles, objectives and functions of family law and of market law which started in the early years of the 20th century is clearly visible in the provisions of the Civil Code of 1942. Their transformation can be detected in the preliminary provisions of the Code regulating cross-border matters and also in the substantive provisions governing 'wholly internal' situations, both with respect to marriage and family relations and contractual matters. In the second part of this genealogy, we saw that, consistent with the comprehensive category of contractual relations and the virtually unrestricted freedoms in free will cherished by classical jurists, the Code of 1865 had placed all contractual matters in the third book.[374] The Code of 1942 added two books to the classical tripartite division, signifying the fragmentation of private law in accordance with the proliferation of *ad hoc* rules. Book V dealt with labour relations ("*rapporti di lavoro*").[375] Book IV addressed other commercial types of contracts and obligations.

On the one hand, the Code codified the corporativist turn in private law. Significantly, Book IV also specified that the validity and effects of contracts as well as the expectations of the parties were subject to public order and social interest.[376] On the other hand, the modification of the structure and the inclusion of references to social interest and public policy followed what were widely shared concerns across European jurisdictions.[377] The same could be said about the provisions of the 1942 Code dealing with family matters. The provisions of the Code represented the racially and hierarchically organised society imagined by Alfredo Rocco (1875-1935).[378] The Code incorporated pre-existing statutory amendments introduced between the 1920 and the 1930s to the law governing marriage and divorce. Accordingly, it prohibited divorce and interracial marriages. The wife and the

[374] We have seen that the 1865 Code followed the Napoleonic code and that it was divided between the three books on 'persons', 'things' and on actions'. The tripartite division was symptomatic of the abstract concerns of classical jurists, and their simplistic classification of legal institutes, and it had become the subject of the social critique also for this reason. The 1865 Code did not regulate commercial matters, which had been included in a separate code. The 1942 unified the two subjects.
[375] It included provisions governing the "diritto di impresa"
[376] Regio Decreto n. 262 del 16 marzo 1942. Libro Quarto - Delle Obbligazioni (Articles 1173-2059)
[377] The code of 1942 lost the General Part, which was regarded by legal formalists as the most important frame for their constructive art. But social lawyers were afraid "it may obscure the relation between law and reality and thwart their more or political urge to make society more purposive or just." Wieacker, 'A History' [version] p. 385
[378] See footnote n. 249

(legitimate) children must submit to the authority of the husband who, in turn, has reciprocal duties, enforceable in court, concerning their maintenance and education.[379]

Although many of the provisions enacted by the Civil Code of 1942 were the direct expression of the authoritarianism and racism inherent and pursued by the fascist regime, the patriarchal, hierarchical and nuclear family constructed by Italian family law was not a unique fascist development. As we shall see in the next chapter on English law, the logics and spirit underlying the provisions of the new Italian Code could also be found in family law regimes that had political outlooks antithetical to that of the Italian state. The Italian family, as envisaged by the Code of 1942, was in line with the fundamental policies pursued by the regime, and remained in place despite the fall of the fascist government.[380] Whereas Italian family law still subsumed individuals to state interest, in other European jurisdictions the reforms in family law were inspired by the principles of freedom and equality.

The introduction of the Republican Italian Constitution of 1947 brought about what is often referred to as a process of "*defascistizzazione*", the gradual removal of those articles and clauses which were incompatible with democratic values and fundamental rights. However, the *giuspubblicizzazione* of family law was not a fascist project. The constitutional provisions governing marriage and the family were obviously inspired by the social and public conception put forward by Cicu.[381] Due to the ambiguities inherent in such articles, the Italian constitution intensified contrasts and tensions between conflicting policies and goals. Drawing on the ambiguities of the constitutional provisions, part of the doctrine insisted on the old institutionalist and publicist approach to family rights.[382] However it was clear that, overall, the Republican Constitution had placed marriage and the family

[379] Should husbands fail to fulfil their marital and paternal duties, the states would intervene under Article 147 of the Civil Code and replace them in their functions. According to the Fascist conception, the father was merely exercising public functions on behalf of the state. Sermonti, Alfonso. *Principii generali dell'ordinamento giuridico fascista*. A. Giuffrè, 1943, pp. 418, 428-30).

[380] According to Ruscello: «la famiglia disegnata dal codice del 1942 è una famiglia che nasce già vecchia (…) perché viene ad essere modificata, nella struttura, nei principi, nei valori e nelle scelte ideologiche allorquando, con la caduta del fascismo, si affermano e vengono normativizzati i valori che inaugurano la nuova repubblica costituzionale.» Ruscello, Francesco. *Lineamenti di diritto di famiglia*, Giuffrè 2005

[381] Articles 29, 30 e 31 of the Constitution themselves were, in many respects, ambiguous about the extent to which the constituent assembly intended to replace the logics of collective interest and social cohesion with new principles. On the one hand, Article 29 defines the family as a "natural society founded on marriage" and it establishes that family law must guarantee "the unity of the family." In the 1950s, it thus appeared to many that family law and family rights were still rooted in Cicu's idea of the family as a social institution that existed above the interest the single members of the family. In the constitutional assembly, Giorgio La Pira was especially vocal about drawing on Cicu's conception. See, PaSSaniti, Diritto di famiglia, cit. nt. 10, p. 501 ss

[382] Cicu, Antonio. 'Principii generali del diritto di famiglia'. in *Riv. trim.*, 1955 and Cicu, Antonio, 'Diritto pubblico e diritto privato in materia matrimoniale', in *Scritti giuridici*, 1960

within a comprehensive framework that was driven by the goal of protecting individual rights and facilitating the expression of the potential of each individual member of the family.[383]

Accordingly, the Constitutional Court started in the 1950s and 1960s a process of interpretation and reconstruction that would eventually place Italian family law on a par with the family laws of other European countries. From the post-war period, the model of the family protected by the state ("*famiglia sotto tutela*") which had been codified in the Civil Code of 1942 was replaced by a new form of family law which was, in essence, based on the protection of the family from the state ("*tutela della famiglia*"). Rather than mere *defascistizzazione*, experts have thus appropriately spoken of a more profound process of 'humanisation' of Italian family law.[384] According to the new model of family rights, every individual member of the family had individual rights, a legal personality of his or her own and an independent identity. As we shall see in the concluding part of this genealogy, this revolution facilitated the emergence of individual interests and a plurality of family models but also heralded an age of conflicting policies in family matters.

3.8 The Social Multilateral Method at the Outset of the Age of Conflicting Considerations

The rise of social legal thought gave way to a comprehensive redefinition of the law, of its boundaries, character and functions. The process of redefinition is visible in family law and in contract law, in the principles and rules underlying the regulation of cross-border family matters as well as those governing international commercial relations. As in internal substantive law, so in private international law, the dominance of the social made experts rethink and rewrite the underlying principles without necessarily reinventing disciplines from scratch. Accordingly, throughout the social age, attempts were made to develop a viable alternative to the abstract multilateral approach elaborated by classical scholars that would allow appropriate consideration of social interest and public policy in cross-border matters. Instead of pursuing a 'Conflicts-Revolution', Italian private international lawyers - as other European experts - tried to overcome what they considered the fundamental flaws of the classical method by stretching old principles and by infusing them with a new spirit.[385]

[383] Hence, Article 29 also enshrines the principle of moral and legal equality between husband and wife. Article 30, which concerns the parental rights and responsibilities, extended "the rights of the member of the legitimate family to any children born out of wedlock."

[384] Lelio Barbiera, 'L'umanizzazione del diritto di famiglia', *Rassegna di diritto civile*, 1992

[385] In the US, the whole system will pursue governmental interest (B. Currie and 'governmental interest theory'). Under the influence of American legal realism, developments in the US emphasised the purposive and socially functional character. Although this chapter has shown that comparable developments also occurred in Europem the conflict of laws is understood as conflict between state interests. The main objective to be solved by conflict of laws is not the discovery of the seat, but rather the legal order which has the largest interest in the application of the substantive norm.

Hence, with some exceptions, despite the changes in positive law and the turn to the protection of social interest and public order, scholars continued to refer to Italian private international law as a multilateral system.[386] One notable exception was Rolando Quadri (1907-1976).[387] Quadri never aligned himself with the views expressed by his contemporaries regarding the character, the boundaries and the functions of the conflict of laws. According to Quadri, every law had in-built quality which determined its territorial or extra-territorial application, its mandatory or optional character.[388] Private international law rules were not to be found in international codes or national statutes.[389] Rather, the policies pursued by the legal order determined the spatial reach of internal laws and, conversely, the spatial reach of laws could be determined by identifying the purpose and material interest pursued by substantive laws. This is essentially what the Statutists had argued, although, it must be noted, the Statutists had also developed aprioristic rules.

Quadri's theory has been defined as the most sophisticated version of unilateralist doctrine.[390] To simplify the critique of Quadri to advocacy for a return to unilateral principles, however, would be as reductive as it would be to label medieval scholars as unilateralists. Quadri advanced an anti-formalist critique that aimed at exposing the 'political' nature of private international law and the contradictory assumptions of multilateralists. As this chapter has shown, the rise of the social paved the way for a proliferation of policy-oriented rules and for norms that had overriding and absolute nature, although the multilateral method remained, both in law and in discourse, the reference point. Accordingly,

[386] Balladore Pallieri, while discussing of the unilateral system, maintained that «Non abbiamo bisogno di inoltrarci in un esame di questo … sistema, perché non vi è dubbio che il nostro legislatore si è attenuto al primo.» Balladore, 'Diritto internazionale privato,' p. 15

[387] See Cannizzaro, E. 'La doctrine italienne et le développement du droit international dans l'après-guerre: entre continuité et discontinuité' *Annuaire Français Droit International*, 2004

[388] Every legal order includes a general principle of law for the law a foreign legal system to apply, the first one, a negative one, that the internal law does not consider the conditions met, and that there is no sufficient relation with national law or national interest, and a positive one, according to which the foreign law is keen on applying. Courts must therefore establish the scope of internal law. When its geographical scope is not expressly stated, they must resort to various other elements, including the pursued interests. Whenever internal law is not interested in regulating certain matters, it must establish if foreign law regulates, according to foreign PIL rules and interest, and in the affirmative, apply it (Quadri, L. *Lezioni di Diritto Internazionale* Privato. Liguori. 1969, p. 253). The subject matter of rules of PIL are social facts that possess a cross-border dimension, that possess their existence in the international, that the rise of the national cannot completely deny. Hence, the positive approach should not be limited to national law, but also must extend to foreign law that regulates those factual situations. Private international law refers to the application of local law abroad, but also to the application of foreign law beyond the bounds of national jurisdiction ('Lezioni', p. 25). A law that wants to apply, when it is in its interest, applies everywhere, and so are the rights acquired under that law acquired everywhere, unless it comes in competition or enters in conflict with the *lex fori*. If the *lex fori* does not have an interest, there is no reason why foreign law should not apply according to its own will, as established by what Quadri calls the 'principio dell'autocollegamento' (Ibid. p. 262).

[389] Conflict of laws must avoid ambiguities, unpredictabilities and arbitrary interpretations. For Quadri, the rules contained in codes and decisions are too broad, ambiguous, vague, primitive to complete and regulate the application of the law of each national order in space in a complete and predictable manner. Ibid.

[390] See Boden '*L'ordre public : limite et condition de la tolérance: recherches sur le pluralisme juridique*. Diss. Paris 1, 2002

legislators and courts introduced mandatory laws, procedural reforms, special clauses, references to internal public order which fundamentally changed the limits and functions of conflict rules. Not even in fascist Italy, however, did the state fall into an absolute conception of territorialism. In principle, Italy still followed a multilateral 'method'. However, the multilateral method responded to the rise of social legal thought and the dominance of the social state model.[391]

The critical and anti-formalistic approach of Quadri revealed that even bilateral rules mask political choices and social interest considerations. The most obvious example is the preferences, in countries of emigration for the nationality connection, and in countries of immigration for the connecting factor of domicile.[392] Quadri's critique was that even the multilateral system pursued policy objectives set by the state. This was not only the case with connecting factors but also with public order. As seen above, in the social age, public order no longer constituted an outlying part of conflict rules that came into operation in exceptional cases. *Ordre public* was an integral part of social private international law. Regarding the limit of public order, Quadri remarked that what had been given with the left hand, equality of treatment and the reference to one's person law, had been taken away with the right, by means of the vague and indeterminate notion of public order.[393] Hence, even 'multilateralism' had 'political' functions.

Quadri acknowledged the existence and proliferation of overriding mandatory laws (*norme di applicazione necessaria*). These rules themselves contained a specification of their reach. Instead of determining if the *lex fori* or what foreign law must apply when there are foreign elements, they require that the *lex fori* systematically applies regardless of foreign elements. Overriding mandatory norms came across as antithetical to the bilateral system and, but for a few exceptions, European jurists rejected them. Their existence and acknowledgment came across as anathema, because it was the law itself that established its scope of application, rather than it being determined by its nature in

[391] The state was, like the family, "the organization of [a uniform social] conscience and of a [uniform] social will. There is a need to ascertain the needs and objectives of the aggregate, and to satisfy them; the state fulfils these functions. By means and by reason of its law, in that it is a legal order and organism, the State sets and pursues its own ends." Cicu, 'il Concetto di Status', p. 188

[392] As Balladore Pallieri observed: "There are States that aspire to objectively and logically [identify] the governing law for each legal relation … that is, they search for the 'competent law'...; when they believe they have found it, they submit to that order all those relationships that will fall within that category; and they do not care about anything else. ... It may be argued however that [the] State, although under the self-induced false impression that it is being guided in the identification of the competent law only by objective reasons, is in reality driven by its own particular interests .... For example, the question if the national law or the law of domicile should be applied to family relations, is an issue that carries political consequences and touches upon interests that are anything but irrelevant to States. ... When, therefore, we see many of the emigrating states sanctioning the principle that family relationships are governed by national law, and many of the immigrant States opting for the opposite principle of the applicability of the law of domicile, it is natural to suspect that practical and political reasons influence the divergent interpretation of what is the 'competent law'." Balladore, 'Diritto internazionale privato,' p. 15 (Trans. A.)

[393] R. Quadri, Introduzione, In Commentario Scialoja and Branca (ed.), *Disposizioni sulla legge in generale, Dell'applicazione della legge in generale*, Bologna-Roma, 1978, p. 60

an abstract and neutral manner. And yet these rules had not only been present in the conflict of laws since the classical age, especially in family matters, but the rise of the social effectively multiplied them, also outside the family field. Quadri showed that they were there not in contradiction with the true nature and functions of conflict rules, which are always policy-oriented.

What is in this genealogy called social legal thought had shifted private international law towards interest-analysis and social policy-considerations in all European jurisdictions. Quadri pinned this movement down. But the critique of Quadri did not fall short of examining the discipline as a whole. Quadri believed that the critique must encompass more than merely the single positive rule, the traditional dogma or the single piece of legislation. In the future, Quadri argued, the discipline could not do without an examination of the complex whole of interests, needs, purposes - including those of the single persons who engage in cross-border exchanges, of their expectations and significant connections with foreign systems - that are inherent in any system of private international law. Quadri's proposals will not give way to a change in positive law.[394] However, his critique paved the way for a realist acknowledgement of the ambiguous nature and complex functions of private international law in the contemporary institutional and intellectual age.

[394] Some of his proposals will be adopted with the reform of private international law taking place in 1995. Specifically, renvoi, characterisation and proof of foreign law. These provisions, like Quadri hoped, meant that the *lex fori* must respect the fact of foreign law, and its interest, so as to avoid ambiguities, unpredictablities and arbitrary interpretations.

Chapter 8

The Transformation of English Conflict of Laws in the Social Age

The decline of classical legal thought which started in the last years of the 19th century and the gradual emergence of a new mentality, social legal thought, together with changes to the institutional model, can explain the redefinition of the character, boundaries, and functions of private international law in the 20th century, in civil law countries as well as in common law countries. The same factors that led Italian jurists to reject the 'method' and theories of classical century jurists also pushed English experts to dismiss the naïve assumptions and abstract concerns that underpinned classical private international law. This can be understood from the works that were published around the turn of the century. With the decline of classical legal thought, English jurists became suspicious of the idea of a general theory and of a common method, echoing a sentiment that had been expressed by Westlake with respect to medieval doctrines. Frederic Harrison (1831-1923), a notable defender of positivism, declared that:

> Our English conception of law, indeed, preserves us from the fantastic sophism which is current in parts of the Continent, that Private International Law can be treated into a uniform system by the meditations of jurists, and imposed by virtue of its logical consistency on the various tribunals of Europe.[1]

Contrary to what Harrison suggested, the decline of universalist assumptions and abstract ideals was not a phenomenon restricted to English law. As shown in the previous chapter, Dionisio Anzilotti in the same period denounced his predecessors who had replaced facts with theory. He remarked that they had prioritised abstract concerns over the observation of real legal facts. He advocated a positive turn in the discipline. The decline of classical legal thought was, like its rise, a global phenomenon. Despite the emphasis placed on the municipal character of private international law, an examination of changes in English in the same period considered in the previous chapter reveals comparable processes of change in English common law and in civil law jurisdictions. The emergence of a new consciousness pushed experts in Italy, France, Germany and England, to reject the cosmopolitan ideals and abstract concerns of their predecessors.

[1] Harrison, Frederic. *On jurisprudence and the conflict of laws*. Clarendon Press, 1879 (1919), p. 123. Frederic Harrison was Professor of Jurisprudence and of both Public and Private International Law at the Inns Court School of Law between 1878 and 1879

The critique of the classical program was also a project of reconstruction. The ascendancy of social legal thought popularised new assumptions and ideas, starting from social interest and policy considerations. Developments in English private international law taking place between the end of the 19th century and the 1960s show the same re-orientation of conflict rules and principles towards social considerations detected in the previous chapter, although English experts never failed to emphasise the specific character of English conflict of laws.[2] This chapter begins by analysing the contribution to the discipline by the most important English jurist in the period between the 19th and the 20th centuries, Albert Dicey (section 1.1). As in the case of Anzilotti, Dicey's approach to conflict of laws was ambiguous. Dicey was conflicted between the classical aspiration for conceptual coherence and the growing need for concrete solutions (ss. 1.2-3).

There are other common elements between his approach and that of his predecessors, including the contraposition between conflict principles governing family and market relations (s. 1.4-5). On a closer inspection, however, Dicey's interpretation of the rules governing mercantile contracts reveals substantial differences from the abstract concerns of his predecessors (s. 1.6). In the social age, law was understood as rooted and existing in positive law and in social life. The re-orientation of the law towards social considerations is visible in private international law as well as in internal law, especially in English family law (ss. 1.7-1.8). The widespread belief that law must find concrete solutions to the actual problems of life replaced the abstract ideals celebrated by classical jurists. This is what emerges from the second part of this chapter, which examines the theories of Geoffrey Cheshire (2.1-2.2) and Ronald Graveson (3.1 and ff) against a background characterised by social reforms across legal fields.

The influence of social consciousness is clearly visible in the theory of justice advanced by Cheshire and Graveson. Under their influence, English private international law is reconfigured as an instrument to enhance social protections and is recalibrated on the capacity to achieve social purposes. The dominance of social considerations can be detected in doctrinal developments as well as in the reforms taking place across the legal spectrum, from those removing blatant forms of injustice to married wives in family law (ss. 2.3-2.4) and, specifically in rules and principles governing cross-border marriage and divorce (s. 3.2-3.3). Towards the mid-20th century, significant changes also took place in the law governing international commercial relations (3.4) and in the law of the economy (3.5). The analysis carried out in this chapter demonstrates the transformation of English law under

[2] For instance, see Graveson, 'The Special Character'

the influence of the social dogma. Its concluding sections, examining changes happening in the 1950s, point to the early signs of a new paradigm shift.

1.1 Albert Dicey and his Digest: between Classical and Social Legal Thought

The first edition of the most important work that Albert Dicey (1835-1922) published on private international law, the *Digest of the Laws of England with Reference to the Conflict of* Laws, was published in 1896, two years before Anzilotti's *Studi Critici di Diritto Internazionale Privato*.[3] Like Anzilotti's earliest work, Dicey's *Digest* embodied the conflicting tendencies between classical and social consciousness. The *Digest* stands as an illustrious example of the incapacity to abandon the universalist aspirations and doctrinal tendencies of classical jurists altogether and to perform a radical revision of the subject in accordance with the positivist and social-oriented legal science. It was not the only example. At the outset of the social age, one of the few jurists other than Dicey who wrote about the conflict of laws was Thomas Baty (1869-1954).[4] In conformity with the emerging convictions, Baty remarked that conflict of laws was "a branch of the law of England."[5]

And yet, as other jurists who wrote about the subject in the same period, Baty was convinced that rules of private international law should and would eventually be unified in international law. English scholars, like Italian jurists, were caught between the classical obsession for logical organisation and a general method and the emerging positive and result-oriented approach. In the *Digest*, Dicey famously captured the conflicting tendencies by distinguishing between 'theoretical' and the 'positive' methods of conflict of laws.[6] The theoretical school of writers had attempted to deduce conflict rules from *a priori* principles. Those who subscribed to this method, "consider private international law as constituting in some sense a 'common law', tacitly adopted by all civilized nations".[7] Theoretical scholars were universalists, like medieval scholars, although they did not ground their theories in natural justice but in the idea of a universal legal science that applied to a new commonwealth of civilised states.[8] Their objective was thus to advance a theory:

[3] Dicey, A. V. *Digest of the Law of England with Reference to the Conflict of Laws*. Stevens and Sons. 1896. Dicey developed in the 'Digest' ideas that he had already advanced ten in his Dicey, A. V. *The Law of Domicil as a Branch of the Law of England*. Stevens and Sons. 1879

[4] From the lectures that he gave at the University of London: Baty, T. *Polarized Law*. 1914

[5] Ibid. p. 9

[6] Dicey, 'Digest', pp. 15-22

[7] Ibid. p. 16

[8] Harrison argued that: "The English corpus juris (so to speak) contains rules as to the conditions on which rules of Foreign Law may be read with, and correlated with its own. But the rules of other systems do not become part of our own corpus juris. Neither do the rules of any general system of Private International Law outside our own." Harrison, 'Jurisprudence', p. 135

> …starting from some one principle, as, for example, that we must "discover for every legal relation (case) that legal territory to which, in its proper nature, it belongs or is subject (in which it has its seat.[9]

According to Dicey, theoretical jurists were driven by the conviction that "fundamental principles of private international law can be ascertained by study and reflection, and that the soundness of the rules maintained … can be tested by their conformity to, or deviation from, such general principles."[10] Savigny, Westlake but also Wachter and other 19th century jurists who Dicey placed in this group came from different traditions, belonged to distinct 'national' schools, developed different 'methods'. Despite such obvious differences, Dicey grouped them under the same class of 'theoretical' jurists.[11] The theoretical approach was not a method in the sense of a body of rules and principles to solve legal collisions, but rather a mode of thought and, specifically, the classical consciousness. Accordingly, Dicey placed jurists associated with different approaches in the same group because all were driven by the desire:

> …to construct a logically consistent series of rules, which either actually do agree with the rules as to the choice of law upheld in different states, or ought, consistently with sound theory, to prevail in every state.[12]

Dicey pitted theoretical jurists against what he called 'positive scholars'. If the former group judged the legality of a principle against abstract theories, the latter assumed "the truth of the all-important doctrine that no maxim is a law unless it be part of the municipal law of some given country, and that the proper means for ascertaining what is the law, say of England or France … is to study the statutory enactments and the judicial decisions which embody the law of England or France."[13] While theorists "attempt the deduction of the rules of private international law from certain general and abstract principles", adherents to the positive method did not look for "what [the law] ought to be, but what is the law". Starting from this axiom, it was evident to positive scholars that:

> … the rule of the law of England, that status depends in the main on the law of a person's domicil, and the different rule laid down by the Italian Code, that status depends on the law of a person's state or nation, are not only different from, but in many cases opposed

[9] Dicey, 'Digest', 16 Quoting Savigny, in Guthrie 'Treatise (2nd ed.)', p. 133
[10] Dicey, 'Digest', p. 16
[11] Ibid.
[12] Ibid.
[13] Ibid. p. 19

> to, each other. Both, therefore, of the rules cannot, it is presumed, be necessary deductions from the same general principle. Nor can both be articles of any common law of Europe. But to writers who follow the positive method, each rule is equally a part of private international law. They are both rules as to the choice of law: the one belongs to the municipal law of England, the other to the municipal law of Italy."[14]

In the classical age, the legality and the authority of conflict principles derived from their conformity with the general theory. Differences in national law were regarded, and dismissed, as temporary anomalies. For positive jurists, the authority of conflict rules originated instead in the authority of the sovereign.[15] Hence, rules posited by national legislators and applied by local courts were *ipso facto* 'private international laws'. What also followed, Dicey argued, was that, "in the absence of a sovereign binding authority", a conflict principle, even if it conforms to a general theory, "is not strictly law."[16] With theoretical methods, I would argue, Dicey described classical private international law and, with the positive method, he anticipated some of the features of social conflict of laws. What Dicey suggested in the *Digest* is therefore that, with new assumptions and ideas emerging, classical conflict of laws would be replaced everywhere, in the civil law world as well as in the common law.

1.2 Conflict of Laws as the Extra-Territorial Recognition of Foreign Rights

Throughout his career, Dicey considered himself to belong to the second group of 'positive scholars'. In the *Digest*, he developed ideas and principles that he had already expressed in *The Law of Domicil as a Branch of the Law of England*.[17] As suggested by the title, *The Law of Domicil* argued that collisions rules were necessary part of the internal order of each state, and examined "that department of English law which deals with the conflict of laws, and may be provisionally described as principles of the law of England, governing the extra-territorial operation of law or recognition of rights."[18] The principle of domicile was regarded as a quintessential feature of English private international law. It thus constituted a good starting point to clarify some of the mistaken assumptions spread by classical experts about international law:

[14] Ibid. p. 19
[15] Ibid. p. 18
[16] Ibid. Introduction, p. iv
[17] Dicey, 'The Law of Domcil'
[18] Ibid. 3

> [*The Law of Domicil*] rests on the broad distinction between rules which are strictly laws, as being part of the municipal law of one particular country (our own), and rules prevailing in other countries, which are not laws to us at all, since they do not rest on the authority of our own state; and it completely avoids the errors which have arisen from confusing the rules of so-called Private International Law, which are in strictness 'laws' but are not 'international', with the principles of international law properly so-called, which are 'international' since they regulate the conduct of nations towards each other, but are not in the strict sense of the term 'laws'.[19]

Due to the ascendancy of the positivist method, public and private international law took separate ways. In the common law world, due to the influence of Austinian positivism, scholars argued that (public) international law did not constitute law at all, but rather, 'positive morality'.[20] The 'domestication' of private international law thus protected it from the same remark.[21] Conflict of laws was no less law, and no less part of the law of England than a statute of frauds, or the law of contract. However, this did not mean that conflict rules did not have special nature and special functions. Dicey argued that English law, in common with the law of any other country, could be divided into two branches. The first defined the rights of English inhabitants and determined the legal effects of transactions occurring within the bounds of English territory. The second, in contrast:

> …consists of rules which do not directly determine the rights or liabilities of particular persons, but which determine the limits of the jurisdiction to be exercised by the English Courts taken as a whole, and also the choice of the body of law, whether the territorial law of England or the law of any foreign country, by reference to which English Courts are to determine the different matters brought before them for decision.[22]

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[19] Ibid. Preface, p. iv

[20] John Austin will argue otherwise in the later decades of the 19th century: "What is commonly called International Law is excluded from the proper province of jurisprudence. It is obious that those rules commonly known as International Law, can have neither their source nor their sanction in common with the law embraced in the previous description. The subject is, therefore, inevitably relegated to take its place in a department of a sicence which would properly be called that of Positive Morality; and if language rigorously consistent were used, it would be termed, not International Law, but International Morality." in *Lectures on Jurisprudence, or The Philosophy of Positive Law*. Ed. Robert Campbell, J. Murray, London, 1879 Introduction, p. X.

[21] Dicey thus argued, along with Austin, that: "The principles of international law, properly so called, are truly "international" because they prevail between or among nations; but they are not in the proper sense of the term "laws," for they are not commands proceeding from any sovereign. On the other hand, the principles of private international law are "laws" in the strictest sense of that term, for they are commands proceeding from the sovereign of a given state, e. g., England or Italy, in which they prevail; but they are not "international," for they are laws which determine the private rights of one individual as against another, and these individuals may, or may not, belong to one and the same nation." Dicey, 'Digest', p. 14

[22] Ibid. pp. 3-4

For Dicey, the validity of an English marriage and the rights attached to a foreign contract were to be judged and enforced by English courts in accordance with rules and principles contained in the two branches of English law, not according to norms belonging to a fictitious 'common law' of Europe.[23] He thus rejected all theories which originated in the fallacious assumptions, that conflict of laws was part of international law, and that conflict rules and principles ought to conform to a general theory. He therefore rejected core ideas expressed by his predecessors. Private international law was an inaccurate misnomer. He also dismissed 'conflict of laws' because no conflict really takes place between the laws of independent states in cross-border disputes.[24] He opted instead for the title of the law governing the 'extra-territorial recognition of foreign rights'.

1.3 The Theoretical and the Positivist Method: The Classical and Social Approaches

During the previous decades, the real nature and the proper functions of Private International Law had been neglected by English jurists. Compared to the contract law, English Conflict of Laws lacked clarity. The subject was "involved in so much obscurity", Dicey remarked, that it was necessary to clarify its general principles, rules and maxims. As suggested by its title, the *Digest* constituted an attempt to clarify and rationalise the discipline. For this purpose, he employed a positive method.[25] The fact that he organised and called his major contribution to the field a 'digest' reveals that Dicey was, like Anzilotti, an unorthodox positivist. The digest type of treatise, in which legislative, judicial and doctrinal authorities are exhaustively assembled and coherently organised, was more typical of classical scholars than of social jurists. In the social age, experts declared themselves sceptical of axiomatic truths and abstract postulates of purported self-evident validity. Even when they approached the discipline in a systematic manner, they never failed to point out their "constructive criticism".[26]

Dicey's goal was to systematise the subject. For this purpose, he advanced six general principles or postulates. He explained that these principles "possess a distinct character and value of their own.

[23] Though the opinion of authorative jurists is not without value: "The sources from which to ascertain the law of England with regard to the extra-territorial recognition of rights, or, in other words, with regard to the rules of private international law, are, first, Acts of Parliament; secondly, authoritative decisions or precedents; thirdly, where recourse can be had neither to statutory enactments nor to reported decisions, then such general principles as may be elicited from the judgments of foreign Courts, the opinions of distinguished jurists, and rules prevalent in other countries." Ibid. p. 22

[24] Ibid. pp. 12-15

[25] Dicey argued that the positive method was the proper method of treating the subject of Private International Law. Ibid. 20; also see Ibid. Introduction, p. 1

[26] "The purpose of this book, however, it not merely to indulge my own fancy, but to provide students with a shorter account of the subject than most of those already published. Further, my object has been, not to remain satisfied with mere exposition, but to approach the more controversial topics in a spirit of constructive criticism." Cheshire, 'Private International Law', Preface to the 1st edition.

They are essentially generalisations suggested by the decisions of the Courts taken in combination with judicial dicta, and with the doctrines in regard to the conflict of laws propounded by writers, such as Story, Westlake, or Savigny, of acknowledged weight and authority."[27] Clearly, the systematic exposition, the use of postulates, and the reference to Story, Westlake, or Savigny - who Dicey classified as theoretical jurists - ran the risk of rendering Dicey's work vulnerable to the same criticism he addressed to his predecessors. He thus felt compelled to specify that his postulates:

> are not axioms whence may at once be logically deduced the Rules to be found in the body of this treatise. They are not again propositions covering the whole field of private international law…[28]

Dicey felt it necessary to distance himself from the deductive method, but he could not save himself from it entirely. He faced a similar situation to that of Westlake. In 1896, when he had the first edition of the *Digest* published, there were still legal and doctrinal gaps in English conflict of laws, especially in matters of jurisdiction and choice of law. Principles regulating jurisdiction in divorce proceedings - which gave rise to challenging questions, in England and abroad, due to growing diversity of substantive laws and connecting factors around Europe and the common law world - had not yet been definitively established. Authoritative decisions detailing rules governing international contracts, tort and legitimacy had been laid down barely decades before.[29] Worse still, the decisions of the courts were often contradictory.

Despite the chaotic state of the discipline, Dicey managed to achieve a much greater degree of systematic coherence in the exposition of the subject than Westlake himself had achieved. The influence of the *Digest* on the development of English Conflict of Laws in the social age was extraordinary, even for a work of law and jurisprudence published in those years. And yet it is often said - partly because of the binding value of precedents and partly because of the unique characteristics of English law - that the significance of the work of jurists in English common law is negligible compared to civil law countries.[30] As I have had the chance to remark in Chapters 2 and 5, English law in general, and especially English conflict of laws, often masks doctrine, even doctrines of 'foreign' origin, under the [clout?] of *stare decisis*. Domicile itself, often taken as the most

[27] Ibid. p. 61
[28] Ibid. pp. 60-61
[29] Tort in 1869 and in 1881 on legitimacy.
[30] In 1879, Harrison argued that the development of English conflict of laws "has been done essentially in the English fashion, that is, by judges determining practical cases, not by jurists propounding doctrines." Harrison, 'Jurisprudence', p. 123

characteristic element of English conflict of laws, originated in a Roman principle and evolved in ecclesiastical courts that referred to the authority of the catholic church in Rome.

Dicey's *Digest*, like the short treatise of Huber in the medieval age, and the eighth volume of the *System of Modern Roman law* of Savigny in the classical age, became a source of rules and principles of almost overriding importance in English common law, regardless of the suspicion raised by the notion that the ideas and work of scholars were of greater importance than the positive law.[31] Here therefore lies another contradiction, which points to the ambiguities of aspirations and the method followed by jurists who lived between the classical and the social age. Regarding the paradoxical and long-lasting influence of the *Digest*, Richard Fentiman has commented:

> It is perhaps ironic that Dicey's work taken on almost the status of natural law within the English study and practice of private international law, its positivist form and methodology so embedded in the consciousness of the English private international lawyer that it is itself 'tantamount to being a source of law'.[32]

Even in the social age, and even in English law, the story of the transformation of private international law can be told through an analysis of the work and the ideas put forward by the most influential jurists. Of course, we cannot ignore the facts that Dicey's objective was to develop rules which would help English courts and practitioners in their practical tasks, and that the method he followed for this purpose was shaped by the naturalist mentality. Coherently with the dominant consciousness, Dicey did not act as a universal legislator, but as an English scholar describing the subject for English practitioners, and thus with English law exclusively in mind. He did not elaborate a compilation of English principles and rules starting from first principles. Rather, he produced principles and rules inductively, relying on the (few) written rules and (especially) on case law.

1.4 Vested Rights as an Example of the Neutrality of Conflict of Laws in the Social Age

Hence, there were as many elements of continuity with, as there were breaks from, the assumptions and goals of his predecessors. Dicey's choice of the title of 'extra-territorial effect of law' or 'the extra-territorial recognition of rights' over wording including private international law and conflict

[31] Perhaps fearing criticism, Dicey argued that the systematic organisation of the subject was not at all incompatible with the positive method. Dicey, 'Digest', p. 20

[32] Fentiman, R. "Legal Reasoning in the Conflict of Laws: An Essay in Law and Practice", in Krawietz, W et al (eds) *Prescriptive Formality and Normative Rationality in Modern Legal Systems: Festschrift for Robert S Summers*. Duncker & Humboldt, 1994, p. 459; Fentiman discusses the extent to which doctrinal contributions are not as relevant in the common law in the contemporary period.

of laws was itself inspired by Thomas Holland.[33] Holland had devoted the latter part of his *Elements of Jurisprudence* to general questions concerning the application of law.[34] Holland was a source of inspiration for Dicey's *Digest* beyond terminological preferences.[35] It fact, Dicey's particular choice of title suggests what was Holland's main influence on the theory of his colleague and friend: 'acquired rights'. Holland had revisited the doctrine originally advanced by Huber in the second half of the 19th century. Dicey made Holland's revised theory of 'vested rights' the cornerstone of the *Digest*. The first General Principle of the *Digest* thus reads as follows:

> Any right, which has been duly acquired under the law of any civilised country is recognised and, in general, enforced in English courts, and no right which has not been duly acquired is enforced or, in general recognised by English courts.[36]

As I explained in the previous chapter (Section ?), at a time of growing jealousy of sovereign prerogatives, the doctrine of vested or acquired rights became popular again. This was especially because of the conviction, also stressed by Dicey, that under this doctrine local courts did not apply

[33] So he referred to him, Dicey, 'Digest', p. vii: "To my friend and colleague Professor Holland, also, I am under intellectual obligations of a special character. My whole conception of private international law has been influenced by views expressed by him, not only in his writings but in his conversation." On the title of 'extra-territorial recognition', Ibid. p. 15. Holland discusses it in 'Jurisprudence (7th ed.)', p. 370. Per contra, Holland labelled the title of Private International Law as "indefensible". Ibid. p. 372. According to Holland: "It is most important, for the clear understanding of the real character of the topic which … has been misdescribed as 'Private International law' that this barbarous compound should no longer be employed." Holland had argued that the term private international law had many advantages, as it refers, "in accordance with that use of the word 'international' which, besides being well established in ordinary language, is both scientifically convenient and etymologically correct, 'a private species of the body of rules which prevails between one nation and another.' Nothing of the sort is, however, intended; and the unfortunate employment of the phrase, as indicating the principles which govern the choice of the system of private law applicable to a given class of facts, has led to endless misconception of the true nature of this department of legal science." Ibid. p. 369

[34] Rules that governed the application in space, he explained, "… make up that department of Jurisprudence which we propose to call 'the Application of law'. When a set of facts has to be regulated in accordance with law, two questions of capital importance present themselves. First, what State has jurisdiction to apply the law to the facts? and secondly, what law will it apply? The former of these questions is said to relate to the appropriate ' Forum' the latter to the appropriate ' Lex'" Ibid. p. 360

[35] Although Holland's logical and systematic approach to law, I have underlined in Chapter 5, owes much to Savigny and the concptual method, Holland's though also provides evidence of changing assumptions of his contemporaries. The discussion on the application of law is punctuated with references to the 'sovereign' and to 'sovereignty'. Holland recognised the influence of the General Theory. However, he was also much more cautious than his contemporaries in dubbing any rule or principle which diverged from it as 'wrong: "There is … a considerable general resemblance between the rules of different systems of positive law upon these points; and positive law is more inclined with regard to such questions than to others to pay deference both to the positive law of foreign countries, and to the theories of such experts as have written upon the subject from the point of view of propriety and convenience. The assimilation thus produced of positive systems to one another and to the theories of experts has led to an erroneous impression that there exists something like *a common law of civilised nations upon the subject, instead of, as is really the case, a gradual approximation of national practice, guided to some extent by a growing body of theory*. Some writers have indeed been led so far astray as to assert the invalidity of any national laws which do not conform to their views upon the subject." Ibid. p. 366 (Emphasis Added)

[36] Dicey, 'Digest', p. xliii; discussed between 22-32

foreign laws, but merely rights acquired abroad.[37] This meant that if and when an English court recognised an Italian judgement, it did not enforce the commands of the Italian king, but merely recognised rights acquired under his laws.[38] With the decline of universalism, vested rights helped to circumvent hard questions concerning the protection of the integrity of the legal order and guaranteed equal treatment. Notably, Dicey emphasised that states were under an obligation to acknowledge rights acquired abroad. This was not a 'political' obligation, as would be argued by subsequent jurists. Neither was the application of foreign laws subject to the arbitrary whims of sovereigns. Rather, they were "dictated by reasons of logic, of convenience, or of justice."[39] For Dicey, the recognition of foreign rights as well as:

> …the application of foreign law is not a matter of caprice or option, it does not arise from the desire of the sovereign of England, or of any other sovereign, to show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants, whether natives or foreigners.[40]

Although he made Huber's doctrine of acquired rights the cornerstone of his theory, Dicey rejected the principle of comity.[41] He did so, it must be noted, because it allegedly led to uncertainty. By the end of the 19th century, comity had been misunderstood everywhere as a flexible principle granting discretion to sovereigns to apply or not apply foreign law, to recognise or not recognise foreign decisions.[42] For Dicey, what stood at the foundation of private international law was international justice, and not some form of convenience or courtesy. Like *renvoi*, vested rights constituted a strategic device to overcome the territorialist push and the risk of arbitrariness and uncertainty.[43] Like

[37] Ibid. 10. He also pointed out that "English judges never in strictness enforce the law of any country but their own and when they are popularly said to enforce a foreign law, what they enforce is, not a foreign law, but a right acquired under the law of a foreign country." Ibid. 24
[38] Dicey, 'Digest', p. 24-25
[39] Ibid. p. 17
[40] Ibid. p. 10
[41] Ibid. Instead, Holland had branded the doctrine of comity as "the truth", and considered the adoption of "this or that rule by a State … a matter of indifference to international law" (Holland, 'Jurisprudence, 7th ed'. p. 371) and the selection of the lex from the list of possible connecting factor as exclusively "guided in each country by the laws of that country." Ibid. p. 366. See footnote 42 below on the difference between acquired rights and comity.
[42] But see discussion in Chapter 2, section 2.1 and footnotes 84 and 94
[43] According to Paul ('The Isolation', p. 157) the theory of vested rights developed by Dutch jurists, combined with comity, "constituted a radical departure from the Statutists, whose theory assumed that there was a higher natural order which imposed a universal system on all states. By contrast, "vested rights theory" focused analysis on the territorial borders of distinct sovereign states.". Paul exaggerates the 'anti-universalism' of Dutch scholars. However, there is little doubt that the context where comity and vested rights originated can explain its function in later ages when sovereign prerogatives were more jealously guarded by states, as in the Dutch Provinces during the 17h century and in the 20th century, as also examined in the previous chapter. On the transformation of the concept of comity, see Paul, 'The Transformation'

renvoi, vested rights also left unanswered many questions which might have led to undermining international justice and cross-border continuity:

> The recognition of rights acquired under foreign laws is a leading principle of modern civilisation; it has, however, received its full development only within comparatively recent times. For the whole branch of law with which we are concerned has, in England at least, come into existence within little more than a century. Hence the principle of the general recognition of acquired rights will not be found laid down in any of our older legal treatises, and it is now far more often tacitly assumed than expressly acknowledged as the foundation of judicial decisions. It is therefore a principle which requires very careful study, and there is little exaggeration in the assertion that, for the proper understanding of any sound theory as to the conflict of laws, every word of the proposition embodying the principle of the extra-territorial recognition of rights deserves attention.[44]

Dicey's emphasis on careful review and study was no exaggeration. Under General Principle No. 1, an English Court was to enforce the rights which had been *duly* acquired in a foreign country. Only those rights which had been properly acquired could and should be enforced in England.[45] The question was, under what territorial link between individuals and foreign jurisdictions could a right be properly acquired? And, as he defined the principle as a core aspect of modern civilisation, could rights acquired in all jurisdictions be recognised by an English court, or only 'civilised countries'? As to this latter aspect, Dicey posited that the principle only applied to:

> …any of the Christian states of Europe, as well as any country colonised or governed by such European state, at least in so far as it is governed on the principles recognised by the Christian states of Europe.[46]

The principle applied to the U.S., Italy and France, even to British India - as long as it was governed by "British law" - but did not apply, for instance, to Turkey or China.[47] This did not mean that, whatever the circumstances, a right acquired under Turkish law would be not recognised in England, but that there was not guarantee that it would.[48] Dicey's answer was vague and left the door open to

[44] Dicey, 'Digest', p. 24
[45] Ibid. pp. 26-29
[46] Ibid. p. 29
[47] Ibid
[48] Ibid. 30

multiple interpretations.[49] The same could be said about the many unanswered questions concerning the applicable law.[50] The general answer provided by Dicey was evidently question-begging, as "[t]he nature of a right acquired under the law of any civilised country must be determined in accordance with the law under which the right is acquired."[51] Although Dicey implicitly assumed that a right always has a governing law, he failed to provide a coherent answer to the question of which law should govern its acquisition. And yet, Dicey's vested rights was hugely influential, at home and especially abroad.[52]

1.5 Capacity and Status: Mercantile Contracts vs. Marriage Contracts

Dicey's positivist approach and his desire to systematise the subject, his rejection of theoretical principles and his advancement of postulates, his dismissal of comity and the contemporary adoption of the vested rights theory, his respect for sovereign prerogatives, but also his concern for international justice reveal the complex and contradictory picture of a scholar who lived across two intellectual and institutional ages.[53] The influence of the classical approach and, at the same time, the gradual transformation of key assumptions of his predecessors also emerge from his treatment of rules governing 'contracts of marriage' and 'mercantile contracts', starting from matters of capacity. When he wrote the *Digest*, it was still unclear what law governed capacity and if the same rules governed all contracts, marriages included. Most courts held that, "[a]s in other contracts, so in that

[49] Thus, asking rhetorically: "The Rules in this Digest apply only to rights acquired under the law of a civilised country. What, however, is the law, if any, which in the opinion of English Courts governs transactions taking place in an uncivilised country, e. g., in the Soudan, or in some part of the world not under the sovereignty of any ruler recognised by European law?" Ibid. p. 723

[50] Should rights be acquired in accordance with the *lex loci*, or should the acquisition of the right also be in accordance with the choice of law rules of the forum? Would capacity be governed by the law under which the rights were acquired? Would an English court recognise a contract entered by a person who does not have capacity in accordance with English law?

[51] General Principles Nos. V and VI dealt with choice of law questions, and reiterated Principle No. I. General Principle No. V, Ibid. p. xliv, 56-57

[52] Despite the lack of definitive answers and the risk of undermining predictability, the theory remained an attractive in a context where scholars were disillusioned with the classical multilateral method and, at the same time, they were also concerned that the strengthening of sovereignty would undermine legal uncertainty. Although it failed at home, Dicey's theory inspired the Treatise on the Conflict of Laws by Joseph Beale (1861-1943) and constituted the theoretical foundation of the first American Restatement. The Treatise on the Conflict of Laws was the most influential work in American literature after Story's Commentaries, and the first attempt to move past the method of Story. Juenger, in his typical vivid style, described the transition as follows: "It remained for Beale, who denigrated Story's reliance on foreign authorities, to replace his predecessor's urbane outlook with a narrower perspective from which American conflicts law has suffered ever since. Beale rejected the notion of comity and, following Dicey, put in its place the vested rights doctrine, a theoretical foundation whose obvious deficiencies are in part responsible for the "conflicts revolution" that currently befuddles American courts and scholars." Juenger, 'General Course', pp. 157-158

[53] Dicey himself confesses that the classical method had several merits. One of the merits of the classical scholars was: "First, that it keeps before the minds of students the agreement between the different countries of Europe as to the principles to be adopted for the choice of law, and next, that it brings into prominence the consideration which English lawyers are apt to forget: that the choice of one system of law rather than of another for the decision of a particular case is dictated by reasons of logic, of convenience, or of justice, and is not a matter in any way of mere fancy or precedent." Dicey, 'Digest', p. 17

of marriage, personal capacity must depend on the law of domicil."[54] A few judges, however, still held on to the medieval principle whereby the *lex loci* governed both capacity and validity of marriages. English courts responded that marriage is not merely a contract *sui generis*:

> In truth very many and serious difficulties arise if marriage be regarded only in the light of a contract. It is indeed based upon the contract of the parties, but it is a status arising out of a contract to which each State is entitled to attach its own conditions, both as to its creation and duration.[55]

What the above citation from *Sottomayor v. De Barros (no. 2)* suggests is that, with growing differences in substantive rules governing marriage and family matters and with the contemporary rise of social legal thought, courts had become aware that the choice of rule governing capacity had huge public policy implications. A marriage celebrated abroad may only be regarded as valid by an English court if it had been celebrated according to the rites or ceremonies required by the local law and, at the same time, if both parties had met the conditions imposed by their personal law. Accordingly, *Sottomayor v. De Barros (no. 1)* had removed capacity and validity from control, total or partial from the law of the *lex loci celebrationis* and had given exclusive control to the *lex domicilii* over status and capacity.[56] If the *lex domicilii* prohibited marriages within specific degrees of consanguinity, applying this rule meant that that legal order would impose:

> …it is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnised is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as

[54] *Sottomayor v. De Barros* (No. 1)
[55] Sir James Hannen P. in *Sottomayor v. De Barros* (No. 2)
[56] (No. 1) (1877) L.R. 3 P.D. 1; repeated in (No. 2) (1879) L.R. 5 P.D. 94. Dicey spent a considerable amount of effort detailing the rules governing domicile, its acquisition and loss. In Chapter I, II and III of Book he provided a definition of crucial terms, rules for determining a person's domicile, and to establish a person's nationality respectively. Dicey proceeded to list in a scientific manner the rules and principles governing domicile, its acquisition and loss (Dicey, 'Digest', p. xlvii-vi, Chapter II, Rules 2-19). But for Dicey, the essence of domicile was that it coincided with the permanent home of a person. id. xlvii, Chapter II, Rule 1

> incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnised.[57]

In line with the traditional conception, the Court held, marriage was not regulated by the *lex loci* celebrationis, but by the *lex domicilii*, wherever the parties may be. Dicey specified that both parties should have capacity under their respective *lex domicilii*.[58] In practice, provisions of positive law prohibiting marriage on various grounds, chiefly but not exclusively consanguinity, were treated as essential requirements or, depending on the viewpoint, as absolute prohibitions against certain types of marriage. The regulatory power placed in the hand of local governments expanded beyond the reach of their confines. Under the cosmopolitan assumptions of classical jurists, courts would be under an obligation to refuse to recognise a marriage which "the general consent of Christendom" regarded as illicit when the *lex domicilii* of the parties also considered it void.[59]

By the time Dicey wrote the *Digest*, courts and scholars had realised that every state regulated status, and most notably marital status, in accordance with public policy and state interest. Hence, the UK Parliament introduced in the early years of the new century mandatory legislation governing the marriages of British subjects celebrated abroad.[60] This explicit policy-oriented and regulatory conception of the personal law was absent in the classical conception. What also became clear is that the classical conception led courts to assist foreign powers in exercising control over relationships and unions which may be regarded as void by the personal law of the parties but are valid under English law. Why should an English court enforce a prohibitive statement of foreign law which, for instance, invalidates a marriage celebrated in England between cousins that "the general consent of Christendom stamps as incestuous" but English law does not?[61]

This was the scenario faced by the Court of Appeal in *Sottomayor v. De Barros (no. 1)*. Significantly, the decision to apply foreign personal law was reversed in the subsequent case of *Sottomayor v. De*

[57] *Sottomayor v. De Barros* (No. 1), para. 5
[58] But he also specified that the *lex domicilii* of the husband could also grant capacity to the prospective wife. Chapter XXVI, Rule 169(1). Dicey, 'Digest', p. 626
[59] Sottomayor v. De Barros (No. 1), para. 6
[60] Some had general value, such as the Marriage with Foreigners Act 1906. Some targeted specific countries instead. Marriage in Japan (Validity) Act 1912
[61] *Sottomayor v. De Barros* (No. 1), paras. 5-6. The answer was in the affirmative for the Court of Appeal.

Barros (no. 2).[62] Despite the above remarks by Dicey on continuity of rights across the 'Christian states of Europe', greater attention to the reality of international life revealed that, contrary to classical assumptions, every jurisdiction 'within Christendom' regulated status and capacity differently and in accordance with local interest.[63] Consequently, Dicey pointed out that the famous dictum of *Hyde v. Hyde,* which posited that the conception of marriage was the same in the whole of Christendom, was merely a legal fiction.[64] Classical scholars had assumed that the same law governed status and capacity everywhere and that the effects of a status should be recognised universally. A positive examination showed instead that "[i]n no matter … do the laws of different countries differ more widely than in their rules as to status." [65] Hence, courts would no longer mechanically apply the abstract rules developed in the previous century in matters of status.

The above realisation carried implications also for questions concerning capacity in commercial matters. Contrary to what classical jurists believed, Dicey argued that status included, but did not coincide with the person's "capacity for the acquisition and exercise of legal rights and for the performance of legal acts."[66] For Dicey capacity was an effect of status. And although a status which exists under foreign law should, in principle, be recognised by an English court, Dicey specified that "such recognition does not necessarily involve the giving effect to the results of such status."[67] For Dicey, capacity did not necessarily depend on the *lex status*.[68] The capacity of a person to bind himself in an "ordinary mercantile contract" could also be governed by the *lex loci contractus*.[69] This meant that an impediment under the personal law was not necessarily an impediment under the local law. Ironically, given its medieval origins, this exception did not apply to marriage.[70] Hence, for Dicey:

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[62] A marriage celebrated within Britain where one of the spouses is domiciled in one of the constituent jurisdictions will be valid in spite of the fact that the other spouse does not have capacity under his or her domiciliary law. *Sottomayor v. De Barros* (No. 2) (1879) PD 94

[63] Following reforms that made marriage within parties within the prohibited degrees "absolutely null and void to all intents and purposes whatsoever", rather than merely voidable, and the Brooks v. Brooks case which made such marriages void ab initio wherever they are performed, English law proved in many cases disastrous for the interest of the parties involved. In 1907, the Deceased Wife's Sister's Marriage Act made such marriages valid for civil law. Section 1. Notably, the law was discriminatory to the extent that it did not provide that the marriage with a deceased husband's brother was valid, and, more generally, it did not deal with the numerous relations which were considered incestuous and prohibited under the Book of Common Prayer, the canonical authority for the Church of England. Considered auhtoritative also by common law courts in the 19th century. See *R. v. Chadwick* (1848) 11 QB 173

[64] Dicey, 'Digest', p. 626, 638-639

[65] Ibid. p. 475

[66] Ibid. p. 474

[67] Ibid. p. lxxxiv, p. 478, Rule 124, Chapter XVIII

[68] "Transactions taking place in England are not affected by any status existing under foreign law which … is a kind of unknown to English law… (Rule 122(1)). Chapter XVIII

[69] Hence, Rule 146 governing capacity in contractual matters was suject to the exception that "A person's capacity to bind himself by an ordinary mercantile contract is (probably) governed by the law of the country where the contract is made (lex loci contractus)" Ibid. p. 446

[70] Dicey thus remarked: "A person's capacity to contract marriage, or to enter into any contract connected with marriage, certainly depends upon the law of his or her domicil at the time of the celebration of the marriage or of the making of the contract. [However, i]t is further at least possible, though not certain, that … a person's capacity to bind himself by an ordinary contract also depends upon his lex domicilii." Ibid. p. 545

> On the one hand it is certain that … capacity to marry, or to enter into a contract connected with marriage, depends on the lex domicilii of the contracting party; and it is further clear [from a reading of case law] that a person's lex domicilii governs his capacity to enter into any contract whatever. On the other hand there are strong grounds for holding that capacity to enter into an ordinary mercantile contract, e. g., for a loan, or for the purchase or sale of goods, is governed, not by the lex domicilii of the contracting party, but by the law of the place where the contract is made (lex loci contractus).[71]

1.6 The Objectification of the 'Proper Law' of Mercantile Contracts

The ambiguities in Dicey's Digest - on the one hand taking up ideas and principles advanced by his predecessors and, on the other, re-formulating them in consideration of the changing mentality - also emerge with respect to questions of choice of law and the different answers provided in 'mercantile contracts' and in marriage and family matters. In line with the principles advanced by his predecessors, Dicey believed that mercantile contracts and marriage contracts were governed by antithetical rules. The essential validity of a commercial contract, i.e. the law according to which the terms of the contract would be construed and the law governing the rights and obligations arising with the contract, depended on the 'proper law'. The proper law test had been first theorised by Westlake. In the last edition of his *Treatise*, published in 1925, Westlake still described the proper law by referring to 'substantial considerations' rather than mere parties' preferences.[72]

After the publication of Westlake's Treatise, English courts, under the sway of classical liberalism, gave to Westlake's original conception of proper law.[73] However, there remained some doubts about

[71] Ibid. p. 547 Referring to *Male v. Roberts* (1800) 3 Esp. 163 ; *Sottomayor v. De Barros* (1879) 5 P. D. 94

[72] For Westlake, the proper law was "…the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the transaction has the most real connection, and not to the law of the place of contract as such." Westlake, *Private International Law*, 7th ed., 1925, p. 302. For the evolution of Westlake's view, see Cheshire, Geoffrey Chevalier. *International Contracts. Jackson*, Son and Co, 1948, p. 14 et seq.

[73] Willes J.: "…it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather to what general law it is to presume that they have submitted themselves in the matter." *Lloyd v. Guiber* (1865) L.R. 1 Q.B. 115, p. 120

Brett L.J: "The question what the contract is and by what rule it is to be construed is a question of the intention fo the parties, and one must look at all the circumstances and gather from them what was the intention of the parties." *Chartered Bank of India v. Netherlands India Stream Navigation Co.* (1883) 10 Q.B.D. 521, p. 529

Bowen L.J.: "What is to be the law by which a contract, or any part of it, is to be governed or applied, must always be a matter of contruction of the contract iself, as read by the light of the subject-matter and of the surrounding circumstances." *Jacob v. Crédit Lyonnais* (1884) 12 Q.B.D. 589

the meaning of proper law, if greater emphasis should be placed on substantial elements or on parties' intentions. Although Dicey admitted that the "reply to this inquiry is … open to some doubt", on the face of it, he opted for the latter interpretation.[74] As a result he held that in "this Digest, the term 'proper law of a contract' means the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law or laws to which the parties intended, or may fairly be presumed to have intended, to submit themselves."[75] Dicey thus placed more emphasis on the intention of the parties than on the actual connection between individuals and the jurisdiction.[76]

What followed was that the law applied by the courts would not necessarily be the one indicated aprioristically, such as the *lex loci contractus* or the *lex loci solutionis*, but the one that the parties had in mind at the time of the transaction. It depended on the intention of the parties to determine the law by which the terms of the contract were to be construed, and, finally, under what law rights would be acquired which would then have to recognised everywhere.[77] In principle, the court would be required to delve into the reality of the relationship and the substantial connections between the parties and local and foreign laws only in the absence of an express or tacit choice of the proper law by the parties. Hence, seemingly in conformity with the overriding importance placed on free will and cross-border continuity by classical legal thought, for Dicey:

> …whenever the legal effect of any transaction depends upon the intention of the party or parties thereto… then the effect of the transaction must be determined in accordance with the law contemplated by such party or parties.[78]

In subsequent cases, courts followed the classical interpretation given by Dicey.[79] However, it must be noted that the alleged divergence between the 'objective theory' of Westlake and the 'subjective

[74] Dicey, 'Digest', p. 554 and he continued "… but the answer to be drawn from the reported decisions of English Courts is … [that t]he essential validity of a contract is, subject to very wide exceptions, indirectly at any rate, determined by the proper law of the contract, that is, by the law or laws to which the parties when contracting intended, or may fairly be presumed to have intended, to submit themselves."
[75] (lxxxix, p. 541) Chapter XXIV, Rule 143
[76] Not only in relation to choice of law, but also jurisdiction itself: "General Principles IV and VI were therefore, in a sense, underpinned by the same principle, that Dicey called the 'principle of submission'. Under it a person voluntarily agrees, either by act or by word, to submit to a the judgement of a given court or to the law of a given country."
[77] Dicey, 'Digest', p. 555
[78] Id. xliv; 57-60
[79] Swinfen Eady J.: "A solution of the question by what law the contract is to be governed is arrived at when it has been ascertained by what law the contracting parties intendd it to be ogverned. It is open to the parties to stipulate in express terms that the law of a particular country shall apply. If they do so, that law is applicable. If there is no express stipulation the Court must arrive at a conclusion upon the materials before it as to the law with reference to which the parties contracted, and that law is to be applied." *British South Africa Co. v. De Beers Consolidated Mines Co. Ltd.* [1910] 1 Ch. 354, 381

view' of Dicey, often emphasised by experts and historians, was one of semantics rather than of substance. With the decline of classical legal thought, absolute free will would not be tolerable, no matter how strong liberal inclinations were. The statement that the intent of the parties governed the essential validity of a contract, the interpretation of a contract, and contractual rights and obligations, was not absolute. Parties to a contract could not claim to have chosen a law against material evidence. They could not argue that the validity of a contract effectively entered in accordance with the *lex loci contractus* was governed by the law of a different country.[80]

What is more is that the second General Principle posited by Dicey restricted the application of the first General Principle (see above, 1.3) to those instances where rights acquired abroad did not conflict with an English statute having extra-territorial application, or English public policy, or with the authority of the foreign sovereign.[81] Hence, Dicey specified that a court assessing the material validity of a contract must take in consideration, first of all, if there existed an Act of Parliament making that contract invalid.[82] This qualification is significant because - even if Dicey emphasised the subjective element and thus suggested that courts ought to give parties autonomy in choice of law questions - autonomy was trumped by overriding mandatory provisions protecting "English interests of state".[83] This shows that the growth of absolute conditions and laws of necessary nature concerned both civil law and common law jurisdictions, and that this phenomenon also concerned 'mercantile matters'.

After the triumph of individualism which, in the classical age, subsumed all interpersonal relations in private and economic matters to contractual logics, from the early decades of the 20th century the state abandoned its passive role and introduced legislation protecting group and collecting interest. As can be inferred from Dicey's qualifications to proper law, there were already a few examples of this in English law by the end of the century. One was the Workmen's Compensation Act, introduced in 1897, the year before the publication of the *Digest*.[84] In the common law world as well as in the civil law, in cross-border matters as well as internal ones, legislators and courts placed contractual

[80] Dicey, 'Digest', p. 555. In those instances, like the cases of wills and contracts, where local courts are to ascertain the intention of the wish or the intention of the parties, and that intention cannot be ascertained, Dicey argued, "without considering what was the law with reference to which the testator made his will, or the contractors entered into an agreement." P. 58 Dicey thought this did not constitute so much the source of an alleged rights, but rather an interpretation of an alleged right.

[81] Dicey, 'Digest', p. 32-28

[82] Chapter XXIV, Rule 144. The examples provided by Dicey was that of a contract concerning slave trade valid by the law of foreign country but in violation of the Slave Trade Act, 1824 and the Slave Trade Act, 1843 could not be considered valid in England.

[83] An English court may regard as invalid a contract valid by the proper law if its enforcement was opposed to English interests of state, to English public policy or to "or, if we may use a very vague term, to the morality upheld by English law" (Exception 1, Dicey, 'Digest', p. 558)

[84] In defiance of classical assumptions that recommended the fullest extension of personal will and contractual freedoms, the 1897 Act shifted on employers the duty to compensate workmen who had been injured during their employment.

freedoms within a regulatory framework. Dicey was not unaware of this trend. In fact, he contributed to make the common law world aware of it by drawing on the significance of this legislation to argue that such developments might herald an unprecedented approach to legal disputes in employment relations.[85] What is also worth noting is that, starting from the 1897 Act, Dicey pointed out that, even in economic and employment matters, rights that had been exclusively governed by contractual terms were now governed by "status".[86]

We will return to the deeper meaning of this transformation later (see section? Below) as Graveson will draw on this idea to point to the increasing emphasis on status in economic matters. Suffice it here to note that it would be inaccurate to claim that Dicey blindly believed in free will, and it would be anachronistic to ignore the decline of abstract classical concerns on the one hand and the greater emphasis on regulatory provisions to protect state interest on the other. I would thus argue that, whereas Westlake emphasized evidentiary aspects of the proper law test without however ignoring the fundamental principle of free will, in contrast Dicey stressed the philosophical principle of individual liberty whilst not entirely neglecting either procedural matters or positive laws. In subsequent decisions, courts still felt bound to consider the subjective principle. However, with more numerous mandatory laws and the extension of public policy, English judges were also bound to examine incongruities between the choice of the parties, mandatory laws and the evidence in front of them.

1.7 Reforms to the English Law of Marriage and The Law of Coverture in the Social Age

Dicey wrote the *Digest* during the transition between the classical and social age. Evidence of the tension between the two conceptions is spread throughout the *Digest*. Dicey used a positive method to advance his rules and principles. At the same time, implicitly giving credit to the classical view that saw family matters as closely tied to the history and culture of any place, he stressed that the domestic laws governing personal and family status operated on different premises compared to mercantile relations. Hence, he posited that the proper law test did not apply to questions of capacity, formal and substantial validity of international marriages even though it could be argued that the proper law test originated in the medieval *lex loci* rule in combination with the pre-classical emphasis

[85] Two years after publishing the Digest, Dicey delivered a series of lectures at Harvard on the theme of the relation between law and public opinion. Here, he also discussed the deeper historical and legal meaning of the introduction of the Workmen's Compensation Act, 1897. Dicey, Albert Venn. *Law and public opinion in England*. Macmillan, 1963

[86] He argued that, with the introduction of the Workmen's Compensation Act of 1897, the "rights of workmen in regard to compensation for accidents have become a matter not of contract, but of status." Dicey, 'Law and Public Opinion', pp. 283-4

on intent and *favor matrimonii*. In accordance with judicial practice, the validity of marriage and the rights of the spouses continued to be governed by the *lex domicilii*.

Although rules reported by Dicey were coherent with the classical division between economic matters and family matters, it is possible to observe a shift towards regulatory aspects of the law governing cross-border relations. This re-orientation towards public policy and social interest (which in Italian law was referred to as *giuspubblicizzazione*) is visible also in the substantive law, in relation to 'formal' and 'substantial' aspects concerning marriage and the rules governing the relationship between husband and wife. The shift in the law and in the discourse towards public regulation can be detected in the same fields debated by reformers in Italy, in matters of marriage, divorce and coverture. As to the formalities of marriage, English law was still based on the Marriage Acts of 1836 and 1856 which had established procedural requirements applicable to all English subjects irrespective of their faith.[87] Consequently, courts continued to emphasise that, although procedures varied widely, there was only one law, i.e. state law, and one status.[88] Hence, judges pointed out that:

> …the obligations under the contract, the remedies open to the parties in case of non-fulfilment of the obligations, the period of its duration, and the status acquired thereby are absolutely identical, however the marriage be made.[89]

Like the reforms that would take place under the process of *giuspubblicizzazione* of family law in Italy after the Concordat, English law continued to provide for different forms for different religious communities. However, the law reinforced state power by requiring that all marriages were registered with state authorities and by establishing one uniform marital status. Marriage was no longer considered a private agreement or a contract *sui generis* but a public act, to be solemnised in society rather than in secrecy, according to state-set procedures and in compliance with overriding mandatory norms, under the public eye rather than in the eye of God.[90] Although English courts would sometimes refer to it as a contract, "serious difficulties arise if marriage be regarded only in the light of a

[87] Towards the end of the 19th century, a minor reform made it easier for spouses to register their marriage. Under the Marriage Act 1898, marriages could be solemnised without the Registrar, and the formalities could be taken care by an authorised person. The Registrar could be notified afterwards, and issue the marriage certificate in due course.
[88] "The procedure by which [marriage] can legally be made may vary widely, but the result is in all cases the same. To the law there is only one contract of marriage. It may be solemnized in a church by the parish clergyman with the rites of the Church of England, the parties thereto being persons holding the tenets of that Church, or it may be made before a registrar, the parties thereto being of no religious belief whatever. The result is one and the same in every respect known to the law." *Thomson v. Dibdin*, L.R. [1912] A.C 533, pp. 114-115, per Fletcher Moulton Lj.
[89] Ibid.
[90] Marrying couples were particularly sensitive to the greater involvement of the press which could access information regarding future weddings through Reguster Offices which were displaying notices of intended marriages. See Cretney, 'History', p. 23

contract" - as it was held in *Sottomayor v. De Barros* - because it was evident that English law, as other jurisdictions, regulated the creation of marriage and its effects in light of policy considerations and state interest. Hence, judges pointed out:

> Marriage is more than a simple contract between spouses, or a thing which they can dissolve by their own acts or choice, even consensually. It is a status, involving other and more important interests.[91]

A shift to social interest and public policy can also be detected in questions raised by coverture, both in its cross-border and internal dimensions. If women were allowed, *de jure*, to possess a separate domicile until marriage, married women lost their separate domicile upon marriage. This was consistent with the status of women in the 19th century. As Dicey clarified, "[t]he domicil of a married woman is during coverture the same as, and changes with, the domicil of her husband."[92] As if this treatment was not discriminatory enough, divorced women and widows continued to be domiciled where the husband was last domiciled even after the marriage came to an end and after his death.[93] What is more, due to the overriding policy interests in enforcing the law of coverture, "the amount of control that a husband may exercise over the freedom of his wife", as well as other consequences of the unity theory depended on English law *qua* the territorial law. Hence, for Dicey:

> The authority of a husband as regards the person of his wife while in England is not affected by the nationality or the domicil of the parties, but is governed wholly by the law of England.[94]

What followed from the mandatory nature of the law of coverture is that the freedoms and obligations of a married woman who hypothetically benefitted from a liberal law under the husband's personal law were nonetheless governed by the English law of coverture. What must be noted is that, despite the evident perversity of such rule, experts justified its retention because this rule allegedly benefitted women and society at large. Hence, Dicey included married women within the category of 'disabled persons' who were unable to have a separate domicile and were always under someone else's paternalistic authority.[95] As with infants, lunatics and idiots, the absolute character of English law was meant to protect married women. However, coverture had also become the target of social

[91] *Rutherford v Richardson* [1923] AC 1, at p. 7 per Viscount Birkenhead
[92] Dicey, 'Digest', xlix, Chapter II, Rule 9, Sub-Rule 2; Chapter III, Rule 31).
[93] Ibid. lvi, Chapter III, Rules 32-33
[94] Lxxxv, Rule 127, Chapter XX
[95] Chapter III, Rule 20: " 'Disability' means the status of being an infant, lunatic, idiot, or married woman", Dicey, 'Digest', p. 174

reformers.[96] At the end of the 19th century, John Stuart Mill had produced a book, *The Subjection of Women*, that greatly influenced public opinion.[97] There, Mill famously compared marriage to slavery.[98] And he added:

> [Slavery] is her legal state. And from this state she has no means of withdrawing herself. If she leaves her husband, she can take nothing with her, neither her children nor anything which is rightfully her own. If he chooses, he can compel her to return, by law, or by physical force; or he may content himself with seizing for his own use anything which she may earn, or which may be given to her by her relations. It is only legal separation by a decree of a court of justice, which entitles her to live apart, without being forced back into the custody of an exasperated jailer - or which empowers her to apply any earnings to her own use, without fear that a man whom perhaps she has not seen for twenty years will pounce upon her some day and carry all off.[99]

[96] Some legal changes had already occurred by means of equity. To alleviate the consequences of the so-called 'unitary theory' in property matters, English courts allowed pre-marital agreements to protect its 'separate use' by the wife. As that of 'separate use', See Cretney, 'History', p. 92. However, only the wealthy and middle classes could insist to have a settlement signed before the marriage would take place. The settlement could not, in theory, concern property acquired after the marriage, although some techniques for doing so developed under trust law. See ibid. The majority of married women did not enter settlement concerning their separate property. Ibid. p. 93 The law was blatantly discriminatory towards women, and towards women of lower classes in particular who continued to be governed by default by coverture. Hence, under this selective approach, "the daughters of the rich enjoyed … the considerate protection of equity, [whereas] the daughters of the poor suffered under the severity and injustice of the common law." Dicey, 'Law and Public Opinion', p. 383. As also remarked by John Stuart Mill in *The Subjection of Women*: "In the immense majority of cases there is no [marriage] settlement: and the absorption of all rights, all property, as well as all freedom of action, is complete. The two are called "one person in law", for the purpose of inferring that whatever is hers is his, but the parallel inference is never drawn that whatever is his is hers; the maxim is not applied against the man, except to make him responsible to third parties for her acts, as a master is for the acts of his slaves or of his cattle." para. 1.9, Chapter 2

[97] Great impulse for advancing progressive reforms in the area of matrimonial property came from the publication in 1869 by John Stuart Mill, *The Subjection of Women*, probably written in partnership with his own wife Harriet Taylor Mills. In the book, Mill bitterly condemned women's condition of inferiority that hindered the general advancement of society. He based his views on utilitarian concerns for ensuring the greater good of happiness for the greatest number of people and for individual development. Inferiority was due to social norms as well as the law that also forced women to accept and fulfil the desires of men and not to fully express their potential and fully participate in the market. Contrary to conventional knowledge and popular scientific theories, biology did not determine the condition of women, Mills argued. It was men who did so and prevented full individual and societal development. It is well known that Mill vehemently argued in favor of women's suffrage. However, given Mill's interest to replace the subordination of women with a system of perfect equality which admitted no power and privilege on the one side, nor disability on the other, he also dedicated his attention to the question of women's rights in marriage (Chapter 2). For a critical review, see John Stuart Mill's "The Subjection of Women": A Re-Examination Elizabeth S. Smith, *Polity*, Vol. 34, No. 2 (Winter, 2001), pp. 181-203

[98] Mill, 'The Subjection'. p. 147. In many respects, argued Mill, slavery was less cruel a treatment compared to coverture as married women, unlike slaves, do not a fixed working hours, and have to share their beds with their 'masters'. Chapter 2, para. 1.9: "I am far from pretending that wives are in general no better treated than slaves; but no slave is a slave to the same lengths, and in so full a sense of the word, as a wife is. Hardly any slave, except one immediately attached to the master's person, is a slave at all hours and all minutes; in general he has, like a soldier, his fixed task, and when it is done, or when he is off duty, he disposes, within certain limits, of his own time, and has a family life into which the master rarely intrudes."

[99] Chapter 2, para. 'The need for decision'

The quotation above expresses the growing frustration with state-sanctioned discrimination to which the law of coverture exposed English and foreign domiciliaries and, at the same time, with the classical dogma of non-interference in family matters. Not all the consequences of the law of coverture that had been denounced by Mill two decades earlier were still in force when Dicey wrote the first edition of the *Digest*. Towards the end of the 19th century, social reformers succeeded at having some reforms passed, even though the enactments only gave a modicum of rights to married women and only in property matters.[100] Hence, even they started undermining the foundations of the doctrine of coverture, the legal edifice which institutionalised the subordination of women. [101] The essence of the theory of unity was still part of English law and, accordingly, married women were not given full capacity to contract, whilst their husbands continued to be liable in tort proceedings on their behalf.[102] Despite social, economic and political changes, as late as in the 1920s, English judges would declare, that coverture, also referred to as theory of unity, produces a:

> substantial identity of social and other interests between husband and wife…[and, accordingly, there is] sound sociological basis for the view … that in certain respects there should be a presumption of modified unity between husband and wife.[103]

Even after coverture was modified, litigation between husband and wife was regarded as "unseemly, distressing and embittering".[104] Although the ruling projected the typical classical image of the sacred space of the family in which the state and courts should not interfere, it is worth noting that the court explicitly based its arguments on a sociological assessment. As in Italy, so in England, during the transition between the classical and the social age, most scholars and courts still assumed that state

[100] Successful mobilisation led to the Married Women's Property Act of 1882. The Act democratised the 'separate property' regime already existing in equity. This is a key moment for the history of matrimonial property in English law. As Dicey put it, the 1882 Act did "no more than give to every married woman nearly the same rights as every English gentleman had for generations past secured under a marriage settlement for his daughter on her marriage." Dicey, 'Lectures', p. 389 On the history of the Act, and on its predecessor, Married Women's Property Act of 1870. See Cretney, 'History', pp. 96-97. Notably, the Act was held to be unfair to married men. In *Gottliffe v. Edelston* [1930] 2 KB 378, McCardie J gave a comprehensive account of the effects of reverse discrimination.' See Cretney, History', 98-102.

[101] As Dicey put it, female "teachers, musicians, actresses, or authoresses, gain large emoluments by their professional skill had, since the beginning of the nineteenth century, greatly increased, and … this body of accomplished women had obtained the means of making known to the public through the press every case of injustice done to any one of them." Dicey, 'Lectures', p. 386

[102] The Matrimonial Causes Act of 1857 established that a judicially separated woman could handle both her separate property and assets acquired after the dissolution freely, and that she could also enter into contracts and became fully liable for torts she was considered responsible of. A much gloomier prospect continued to mark the destiny of women who entered in marriage, even after the codification of separate property. See chapters 5 and 6 by Morrison, C. A. in Graveson, Ronald Harry, and Francis Roger Crane, eds. *A century of family law: 1857-1957*. Sweet & Maxwell, 1957

[103] In *Gottliffe v. Edelston* per McCardie J, p. 392. And yet, in the same judgement, the judge also declared: "Husbands and wives have their individual outlooks. They may belong to different political parties, to different schools of thought. A wife may be counsel in the courts against her husband. A husband may be counsel against his wife. Each has a separate intellectual life and activities. Moreover… the modern notion that it is one's right to assert one's own individuality…. We are probably completing the transition from the family to the personal epoch of woman." Ibid.

[104] Ibid.

agencies should only interfere in the worst cases of abuse of power by the husband. At the same time, the growing references to public policy and social interest indicate a trend which suggests the gradual emergence of new assumptions and argumentative structures. The same mixture of classical and social elements can also be noted in the law governing the dissolution of marriage.

1.8 Divorce in the Social Age: Jurisdiction and Applicable Law

When Dicey wrote the *Digest*, the Matrimonial Causes Act of 1857 was still in force. The Act had provided limited grounds for relief, among which adulterous conduct was the most common. Under the Act, a husband could demand divorce if the wife had simply committed adultery, but not the other way around.[105] Although the 1857 Act did not contemplate irretrievable breakdown, amendments in the law added 'discretionary' procedural safeguards to prevent husbands and wives from getting away with an absolute decree of divorce by agreeing behind closed doors to confess their real or fictitious extra-marital relations in court.[106] Other than discriminatory and limited grounds for seeking dissolution, there were also issues of access to justice, not least because jurisdiction was exercised by the Probate, Divorce and Admiralty Division of the High Court, a legacy of the special admiralty courts that examined both maritime and household matters in the pre-classical age.[107]

In relative terms, a surprising number of petitioners sought to dissolve their marriages under the Act, several of whom, as we have seen in the previous chapter, expressly came from foreign jurisdictions where divorce was not available.[108] In proceedings for dissolution of marriage, English courts would

[105] This led in the first years of the 20th century, social reformers and feminist groups to demand "real equality of … status…between men and women." As demanded by the National Union of Societies for Equal Citizenship. Cited by R. Probert, 'The controversy of equality and the Matrimonial Causes Act 1923 [1999] CFLQ 33, p. 35

[106] Conversely, after 1857 procedures were amended and proceedings for divorce became a two-stages process. Matrimonial Causes Act 1860 and Matrimonial Causes Act 1866. Under the reformed divorce law, before issuing an absolute decree of divorce, the Court would initially grant a decree nisi valid for a period of six months. During this interval any person could intervene to show that the parties were acting 'in collusion' and, after further inquiries by the King's Proctor, the Court could invalidate the decree. Section 7 of the Matrimonial Causes Act 1860, as amended by the 1866 Act. The King's Proctor would thus get himself involved in the very private lives of the applicants, often to a degree quite disturbing for popular consciousness. The Under the complex "machinery of espionage" constructed by the Act (Cretney, 'Family Law', p. 179) and sustained by interventions by the Proctor acting in the King's name, "anonymous letters, … cross-examination of cooks, … bribery of maids and porters, the searching of hotel registers, the watching of windows, the tracking of taxi cabs, [and] the exploitation of malicious gossip and interested malignity" (As described by Sir Harold Kent in *On The Act* (1979) p. 70 cited by Cretney, 'Family Law', p. 181) became the norm. Undoubtedly, these practices entered the popular consciousness, also thanks to the public attention, sanction and stigma normally attached to divorce cases in the Victorian era.

[107] The creation of a separate but mixed Probate, Divorce and Admiralty Division of the High Court led to problems of recruitment. By the beginning of the 20th centuries, it was hard to find enough lawyers capable of undertaking both admiralty and divorce tasks. It was noted, for instance, that many Roman catholics would also refuse appointment to the bench if they have to pronounce divorce decrees. Cretney, 'Family Law', p. 198

[108] In spite of the high bars preventing divorce, by the early 1900s, the Court for Divorce and Matrimonial Causes issued 494 decrees. Despite the more restrictive grounds of divorce for married women, women accounted for about 40% of the total divorce petitions issued before the end of the 20th century. This high figure may also be explained by one paradoxical effect of the doctrine of coverture as it also obligated a husband to cover the costs and fees of legal proceedings incurred

apply the *lex fori*.[109] Provided the couple met jurisdictional requirements, even foreign marriages could be dissolved. However, the relative lack of liberality of English law meant that richer couples or wealthier individuals would go abroad, to Scotland or even the U.S. to end their marriages.[110] English courts generally recognised decrees of divorce obtained abroad, provided the same jurisdictional requirements were met.[111] However, it had remained unclear for several decades if residence of the petitioner, residence of the respondent, nationality of the spouses, place of the adultery, or place of celebration of marriage constituted sufficient grounds for jurisdiction, and for recognition of foreign judgements. Eventually, the Privy Council settled in 1895 in *Le Mesurier v. Le Mesurier* that matrimonial domicile was the only ground for jurisdiction.[112] Accordingly, an English court only had jurisdiction to entertain a suit for marriage dissolution - and for a declaration of nullity - if the matrimonial home, i.e. the domicile of the husband - was in England.[113]

Although the Act of 1857 gave women some grounds for obtaining a divorce decree, the domicile-based jurisdiction established in *Le Mesurier* combined with coverture meant that this possibility was only granted to wives whose husbands were English domiciliaries. Moreover, husbands could deliberately settle in jurisdictions where divorce was not available to prevent their wives from seeking a divorce decree. The impact of the decision of the Privy Council also reached out to the question of what the requirements for the recognition of foreign divorce decrees were. English courts would only recognise divorce decrees obtained abroad if the same jurisdictional requirements established by English law had also been met by the foreign court. In his ruling, Lord Watson further held that a decree of divorce which is issued by a court based on a rule of jurisdiction that only exists in the law

by the wife who either petitioned for divorce or responded, independently of the success of the application. Cretney, footnote 55, p. 169

[109] English courts never consciously developed a choice of law rule in divorce. The nature of a decree of divorce as affecting the status of marriage demands not only the exclusive jurisdiction of courts with appropriate competence in matters of status, but the application of the personal law of the parties by those courts. The traditional principle of domiciliary jurisdiction in divorce practically excluded any question of choice of law from arising, the law of the domicile being identical with the *lex fori*. *Niboyet v. Niboyet* (1878) L.R. 4 P. & D. 1

[110] As in the sensational case of the Earl Russel, *Russel v. Russel* [1897] AC 395. The Earl travelled to Nevada, where a court granted him a divorce and he married again. The Earl was subsequently arrested and charged with bigamy on his return to England.

[111] In general, that the parties are domiciled in the country where the decree is obtained at the commencement of the proceedings. (lxxxv; Chapter XVI, Rules 83 and 84). According to Dicey, foreign judgements may have 'no direct operation' in England, (lxxvi, Chapter XVI, Effect of Foreign Judgements in England), if it is not pronounced by a competent jurisdiction, but it is not necessarily invalid if it is not pronounced by a proper court, that is the court competent according to the internal laws of a foreign ruler (Rule 89). Instead It was no sure if foreign courts had jurisdiction to dissolve an 'English marriage' if the divorce could not be obtained in England by the party there domiciled. (lxxvi) S

[112] *Le Mesurier v. Le Mesurier* [1895] AC 517

[113] This rule was not affected by the residence of the parties, by their nationality, by their domicile at the time of marriage and, most importantly, by the domicile of the wife. Discussed by Dicey, 'Digest', p. lxii, Chapter Vii, Rules 48 and 49, respectively.

of the forum could not claim extra-territorial effect "when it trenches upon the interests of any other country to whose tribunals the spouses are amenable."[114]

The relative lack of liberality of English law meant that richer couples or wealthier husbands would transfer their domicile abroad, to Scotland or even the U.S. to end their marriages, often but not necessarily in agreement with their spouse.[115] However, the decision by the Privy Council meant that foreign decrees were sometimes not recognised. In addition, deserted wives ended up worse off as they would not be able to seek a divorce but in the courts of the country of the husband's domicile. Courts' decisions and scholarly accounts from the following decades reveal greater awareness and changing perceptions about the unjust treatment suffered by deserted wives and a gradual shift to social interest in the discourse. A senior divorce judge, Sir John Gorell Barnes, who then went on to sit in the House of Lords and later also chaired the first Royal Commission on Divorce and Matrimonial Causes, held in *Dodd v. Dodd* that there existed good reasons for reform in the law, although he also cautioned that:

> Whether any, and what, remedy should be applied raises extremely difficult questions … [which] touch the basis on which society rests, the principle of marriage being the fundamental basis upon which this and other civilized nations have built up their social systems; and it would be most detrimental to the best interests of family life, society, and the State to permit of divorces being lightly and easily obtained.[116]

Subsequently, the Commission on Marriage and Divorce presided by Sir John proposed amendments to the grounds for divorce as well as to jurisdictional rules.[117] The Gorell Commission, like subsequent Royal Commissions that dealt with questions of divorce, referred especially to the high risks of collisions between English law and civilian systems created by increasing cross-border family

[114] *Le Mesurier v. Le Mesurier*, p. 525
[115] As in the sensational case of the Earl Russel, *Russel v. Russel* [1897] AC 395. The Earl travelled to Nevada, where a court granted him a divorce and he married again. The Earl was subsequently arrested and charged with bigamy on his return to England.
[116] Royal Commission on Marriage and Divorce [1906] p. 169, p. 207
[117] The Royal Commission agreed that the law unfairly penalised poorer sections of society, as it did not give county courts and magistrates jurisdiction to try divorce cases, and it unanimoulsly held that the double standard in the ground for divorce was unjust and unjustified, but also split between a majority and a minority view, and eventually failed its plan for a thorough reform. For the majority, the marriage should not be regarded as "necessarily indissoluble in its nature, or as dissoluble only on the ground of adultery; but …[should] allow other grave causes." Report of the Royal Commission on Divorce and Matrimonial Causes, 1912, Cd. 6478, para. 48. However, the minority argued that a reform based on marriage dissolubility would lead to a "habit of mind in the people" that parties to a marriage could autonomously agree to dissolve the status, and would "lead the nation to a downward incline on which it would be vain to expect to be able to stop half way….[To accept the majority view] would be practically to abrogate the principle of monogamous life-long union." Ibid. p. 185

relations.[118] Members of the Commission on Marriage and Divorce - as well as conflicts experts and practitioners - were aware that, without amendments to the jurisdictional rules, the law would result in social injustice.[119] Despite evidence provided by the Commission, proposals for change were abandoned. The proposal to give jurisdiction to English courts in cases of deserted wives also was not followed. Change in divorce law would only come in 1937.[120] However, the terms on which the discussions among experts were conducted - no longer based on abstract and conceptual questions concerning the contractual nature of marriage but centred on the social costs of the law and of the reforms - reveal a shift towards the social paradigm and social consciousness.

The gradual shift from classical terms to social discourse also emerges from the debates concerning the law of nullity. Compared to the rigidity of the law of divorce, nullity came to be seen as a more flexible and less costly alternative to divorce.[121] In the absence of permissive divorce laws, and in consideration of the high monetary costs of divorce proceedings, the comprehensive list of grounds for nullity, along with the important factor that nullity cases drew less publicity compared to divorce cases, meant that many couples used nullity to escape unwanted relationships and broken marriages.[122] Pragmatism was not the only reason behind the popularity of nullity. There were fundamental conceptual differences between annulment and divorce. A decree of nullity would be granted if there existed a vitiating element prior to the marriage, whereas divorce was only possible after some supervening matter, for instance adultery by the wife.[123] Compared with the still authoritative definition of marriage as a union "for life", nullity came across as a more acceptable

[118] See Jackson, J. *The Formulation and Annulment of Marriage* (2nd ed. 1989)
[119] *Ogden v. Ogden* [1908] p. 46; *Stathatos v. Stathatos* [1913] p. 46; *De Montaigu v. De Montaigu* [1913] p. 46
[120] Noteworthy is that amont the earlier attempts to reform the law was that of William Hunter, a Scottish professor of Roman law who argued that the law of Scotland, which permitted divorce for adultery by both spouses or for desertion, and the law of England should have common grounds for divorce, especially in light of the number of international marriages. The Hunter Bill was rejected by Parliament. On dissatisfying judicial decisions made on the basis of the Matrimonial Causes Act 1857 and on the gradual emergence of reform movements, see Cretney, 'Family Law', pp. 202-229
[121] The Matrimonial Causes Act of 1857 not only transferred jurisdiction to the Court of Divorce, but also incorporated in civil law the rules and principles that governed disputes in ecclesiastical courts. The Court applied the same body of laws applied in the past by Consistory Courts, 'English' canon law. The Church of England recognised that a relation within the prohibited degrees, the existence and subsistence of a previous marriage, lack of age, and incapacity to consummate the marriage were sufficient reasons for annulling it. In other words, capacity to perform "the duties of marriage" was necessary to make it valid. *Greenstreet v. Cumyns* (1812) 2 Phill. Ecc. 10, per Sir John Nicholl. Two scenarios arose in the case of nullity. English law distinguished between marriages which had never existed, i.e. if they were void ab initio, and marriages which are merely voidable. The former annulment could happen on the ground, for instance, of a prior marriage that still subsisted, consanguinity, lack of formal validity etc…. Nullification of a voidable marriage could happen if the parties were phisically unfit at the time of the marriage, if either of the parties carried a venereal disease, of if the wife was pregnant at the time of the marriage.
[122] See Cretney, 'Family Law', p. 41 and
[123] "Nulluty, in its very nature, presupposes a cause existing at the date of the marriage". *Napier v. Napier* [1915] P. 184-192-193, per Warrington LJ.

route for 'dissolving' a marriage because, under it, the marital status had never been created in the first place.[124]

In the social age, reformers started looking at the law governing nullity as offering a safer and flexible alternative to divorce. Even in debates concerning nullity, scholarly opinion revealed a shift towards the protection of public order and health. Some also based their proposals for reform on scientific racism.[125] The flexibility of nullity, the scholarship also realised, had itself social costs. If a marriage - for instance one between persons within the prohibited degrees - was considered not to have come into being at all, children would automatically be considered illegitimate. Following the annulment, the 'wife' would no longer receive financial relief or alimony. Hence, the social costs of easier annulment might outweigh benefits. The law of nullity thus came under scrutiny for its adverse social harms. Grounds for annulment were therefore reduced in the 1920s and the 1930s.[126] What is more, from a cross-border perspective, the same jurisdictional rules applied to both nullity and divorce proceedings, making it nigh impossible for deserted wives to obtain a decree of annulment.[127]

2.1 Cheshire and the Redefinition of English Private International Law in the Social Age

What emerges from an examination of Dicey's *Digest* in its cultural and legal context is that the huge success and influence of the book - which went through several editions under John Morris (1910-1984) in the following decades - was not due to the uniqueness of its aspirations or in the completeness of its answers. In many ways, the principles it advanced echoed the ideas of his predecessors. Westlake had already attempted to advance a systematic and coherent account of the applicable rules. Since conflict of laws was "still in its infancy", as later scholars put it, and English conflict of laws was "in course of process … fluid not static, elusive not obvious", Dicey could not

[124] In *Dickinson v. Dickinson* [1913] P 198, the President of the Probate Divorce and Admiralty Division held that refusal to consummate the marriage constituted in itself sufficient reason for the Court to issue a decree of nullity. This could not amount to a "mere temporary unwillingness due to a passing phase…or a nervous ignorance …but a wilful, determined, and steadfast refusal to perform the obligations and to carry out the duties which the matrimonial contract involves." p. 204, per Sir Samuel Evan.

[125] Report of the Royal Commission on Divorce and Matrinonial Causes, 1912, Cd. 6478. The Commission was opposed to extending the grounds for divorce, but recommended some significant extensions of the grounds for nullity. It is worth noting that the Commissioners were infuenced by eugenics theory and was very concerned about the "deterioration of the stock" that might be brought about by marriages subsisting between "persons unfit to marry" due to some genetic or phisical defect, para. 352. The reason for the first proposal for extending the grounds for nullity had to do with the general interest of society from being contaminated by immoral practices and by health-related problems. Hence, the marriage where one of the spouses was suffering from a venereal disease should be annulled because it would "promote the interests of morality and also aid the complainant in being able to avoid being subjected to the possibility of contamination." Report of the Royal Commission on Divorce and Matrinonial Causes, 1912, Cd. 6478, para. 351

[126] The Deceased Brother's Widow's Marriage Act 1921 and the Marriage (Prohibited Degrees of Relationship) Act 1931.

[127] What it is more, it was unsure on what jurisdictional ground foreign courts could determine the validity or nullity of a marriage celebrated abroad, and this made the recognition of a foreign decree unpredictable lxxvi, Rule 85

provide definitive answers to all problems arising in English private international law.[128] And yet, the *Digest* exceeded by far the influence of Westlake's *Treatise*. The reason for its success was that, as pointed out by Ronald Graveson (1911-1991), "it fitted so well into the context of contemporary legal thought."[129]

The 'contemporary legal thought', as English conflict of laws, was to change dramatically in the decades to come. Although it adopted a positive method and paid attention exclusively to English law, the *Digest* was greatly influenced by classical theories. Inevitably, with the rise of social legal thought, its many contradictions and Dicey's incapacity to provide concrete solutions to pressing social issues led to the gradual decline of its influence on the scholarship and created the need for more fitting ideas and principles. Alongside Dicey, Geoffrey Cheshire (1886-1978) was the greatest authority in English conflict of laws in the 20th century and during the social age. In some respects, Cheshire's theory of private international law was in continuity with that of his predecessor as it was with all social jurists. Cheshire thus argued that:

> Private International Law is not the same in all countries. There is no one system that can claim universal recognition, and this book is concerned solely with that which obtains in England….[130]

In line with the convictions of his contemporaries, Cheshire argued that there was no affinity between conflict of laws and international law.[131] The rejection of the cosmopolitan convictions and abstract concerns of classical jurists can be easily detected throughout the many editions of Cheshire's *Private International Law*, first published in 1923. "Many observations may be raised to the theory of the internationalists" argued Cheshire, "but the one that is both the simplest and the most fatal is that the general customary law of which they speak exists only in their own minds. It cannot be found in practice."[132] Conflict of laws was neither an abstract theory nor a conceptually coherent discipline developed by jurists. "Private International Law is no more an exact science than is any other part of

[128] Cheshire, 'Private International Law, 2nd (1935)', p. 20. Coherently with the view often advanced in the history of the discipline, he also argued that it was of "very recent growth". Ibid. Cheshire argued that, of all the departments of English law, "Private International Law offers the freest scope to the mere jurist. … It is not overloaded with detailed rules, it has only lightly touched by the paralysing hand of the Parliamentary draftsman, it is perhaps the one considerable department in which the coherent body of law is in course of process, it is, at the moment, fluid no static, elusive not obvious…." Preface to the 1st edition, p. i

[129] Graveson, 'Philosophical Aspects', p. 20

[130] Cheshire, 'Private International Law', p. 11. 2nd Edition. Quotes and citations in the following pages from the second edition unless differently specified.

[131] Ibid. p. 22

[132] Ibid. p. 84

the law of England", remarked Cheshire in his typical pungent style, "it is not scientifically founded upon the meditations of jurists, but is beaten out of the anvil of experience."[133]

Starting from the same positivist premise, social experts cut themselves off from the classical emphasis on universalism and theoretical principles, and so did Cheshire with the theory of acquired rights advanced by Dicey. Although Cheshire largely based his *Private International Law* on Dicey's *Digest*, he also pointed out that the purpose of his contribution was not mere exposition but also to address the most controversial aspects of the available theories.[134] One of the most debated topics was that of acquired rights.[135] Cheshire pointed out that the vested rights theory was mistaken on many levels. First, it was incorrect because judges do not give effect to rights acquired abroad in cross-border disputes. The only rights that local courts can enforce are those created under the *lex fori*. However, the local judge might enforce a right which is as close as possible to that which would have been enforced by a foreign judge should the case have ended up in the foreign court.[136]

The doctrine of acquired rights advanced by Dicey was mistaken for another reason. Unlike his predecessor, Cheshire argued that local courts do not apply foreign law out of a sense of international justice. They only do so on grounds of convenience and only if their sovereign directs them to do so.[137] It was not necessary to come up with some vague and abstract theory for explaining why courts, in some cross-border cases, do not apply their own substantive law. Simply put, every sovereign is aware that its own substantive laws are not necessarily the "right and proper rules" for every matter and every dispute. For this reason, every sovereign creates its own conflict rules, in the way that it is

[133] Ibid. p. 91

[134] He pointed out that the purpose of his Private International Law was "not merely to indulge my own fancy" and that his objective was "not to remain satisfied with mere exposition, but to approach the more controversial topics in a spirit of constructive criticism." Preface to the first edition.

[135] In the first edition of the book Cheshire had also based his approach on the vested rights theory. From the second edition, however, Cheshire dismissed comity but also the theory of acquired rights as mistaken.

[136] Cheshire, 'Private International Law', p. 11. In a later edition, Cheshire argued "The only law applied by the judge is the *lex fori*, the only rights enforced by him are those created by the *lex fori*. But owing to the foreign element in the case the foreign law is a fact that must be taken into consideration, and what the judge attempts to do is to create and to enforce a right as nearly as possible similar to that which would have been created by the foreign court had it been seised of a similar case purely domestic in character." Private International Law, 8th ed., p. 9 This conception of Private International Law is remarkably similar to that of Roberto Ago and his 'naturalisation theory' and, also to that generally known as the 'Local Law Theory' advanced in the U.S. by Walter Wheeler Cook under which "No court ever enforces foreign rights as such. Under our system of the Conflict of Laws, an American court when asked to give damages for an alleged foreign tort (wholly committed in some other state) will 'apply' the 'substantive law' of the other state in question. Although it is often said that the substantive law of the other state 'governs' the case, the word 'governs' is misleading: an American court does not hand the case over to the law of the foreign state for decision. If it allows a recovery, it merely decides, on grounds of social convenience, to give a right to damages 'as nearly homologous as possible to the right given by the foreign law." See Cook, Walter Wheeler. The logical and legal bases of the conflict of laws. Vol. 5. Harvard University Press, 1949

[137] Cheshire, 'Private International Law', p. 11. Cheshire's criticism of the vested right theory led Dicey himself to progressively abandon the theory of acquired rights and Dicey's successor, Morris, to tone down significantly his conception of international justice. He toned it down to some broder and somehow more compelling that mere courtesy. Dicey's Conflict of Laws, 7th edition, 1958, p. 7

deemed fittest, to deal with those cases which have foreign elements that are not in its interest to regulate through its own positive laws.[138] Contrary to what some feared, Cheshire argued that "Private International Law involves no abdication of sovereignty."[139]

Cheshire argued that conflict rules and principles originated in sovereignty. Furthermore, they originated in the positive law of every internal order and in the policy goals of every sovereign. Cheshire therefore vigorously criticised the doctrine of *renvoi*.[140] He was convinced that English private international law consisted of a body of rules which originated in sovereign will and local needs. Neither doctrines like *renvoi* and acquired rights nor general theories like that advanced by the classicists could fit them. The seat-selecting method developed by his predecessors could not be reconciled with the positive and social dogma. Faith could not be placed on the assumption that a judge confronted with a cross-border dispute could objectively determine the nature of the relation at its centre and that such relation was universally governed by the same law. Classical jurists assumed that all relations had one seat and were governed by one law, but:

> Just as five hundred years of argument ended in disagreement as to what statutes were personal and what real, so now the internationalists fail to agree upon the most appropriate law to govern each legal relation.[141]

Private International Law should provide concrete solutions to the variety of factual situations that arise in international life. Experts should develop rules and principles consistent with the will and the interest of each sovereign whose courts are to adjudicate the dispute, not in accordance with the fanciful theories of medieval or classical jurists. They should not do it, hoping to achieve universal solutions for all legal problems but rather to satisfy local needs. They should do it considering, and not denying, the uniqueness of each cross-border dispute. These are the fundamental elements of

[138] Cheshire, 'Private International Law', p. 89
[139] Ibid. p. 89
[140] He pointed out that *renvoi* "[is] not only contrary to common sense, but … also repugnant to the true nature of any system of Private International Law, since [it] involve[s] the abandonment of a domestic rule…merely because some foreign country prefers a different rule." Ibid. p. 65. In the first half of the 20th century, renvoi was also widely debated in the English literature. Renvoi had become at this point a fundamental issue in the doctrine, examined also by Morris and Dicey in the later edition of the Dicey and in Morris' Cases on Private International Law. In the later edition, in 1960, Dicey will declare that "The truth appear to be that in some situations the doctrine [of renvoi] is convenient and promotes justice, and that in other situations the doctrine is inconvenient and ought to be rejected." (p. 25) Did English courts apply the doctrine of renvoi and or was it more than a theoretical fancy of the literature? Could it be said that it was part of national law? Was it a logical principle? Did it make sense to apply Private International Law up to a certain point, and then let foreign conflict rules settle cross-border disputes? Cheshire answered no to each of these questions negatively. (2nd Edition, Pp. 45-67).
[141] Ibid. p. 84

Cheshire's theory, and of social private international law. In a passage which reveals his criticism of the ideas of his predecessors as well as of the future of the discipline, Cheshire remarked:

> Are there certain maxims or axioms by reference to which a correct solution of all the diverse cases that arise in practice can be discovered? Do our difficulties disappear if we are reminded that all laws are personal, or that they are all real, or that every right duly established under the law of a civilised country must in general be sanctioned by an English judge? Clearly, such vain imaginings, such infallible nostrums, are untrue of English private international law. They are alien to the Anglo-Saxon tradition and if offered in argument would be a matter of surprise to an English judge. The purpose of the English lawyer is to test a proposed rule by its practical bearing upon normal activities and expectations. …. He is nothing if not an empiricist and a pragmatist. This is the spirit in which the rules for the choice of law are conceived. There is no sacred principle which pervades all decisions, but when the circumstances indicate that the internal law of a foreign country will provide a solution more just [or] more convenient … the English judge does not hesitate to give effect to the foreign rules.[142]

For Savigny, Mancini, Westlake and other classical experts, the process of discovering the applicable law was, above all, directed towards ascertaining the natures of the relation and of the law to which, in consideration of its characteristics, it belongs or is subject. This is what international justice demanded. In the social age, courts claim jurisdiction, and apply local or foreign laws in the case of specific transactions not for reasons that relate to a general theory of legislative competence or from an entire superstructure of legal relations, but for reasons that relate to sovereign will and domestic policy. Experts must reason inductively, starting from positive law and giving weight to specific policy considerations. Outside this framework, all attempts to reach just solutions are doomed to fail.[143] The only possible way to achieve justice is by considering the unique characteristics of the relation or dispute, and to develop rules in accordance with local policy and interest. For Cheshire:

> What particular foreign law shall apply depends upon different considerations in each legal category. Neither justice nor convenience is promoted by rigid adherence to any one principle; it is preferable that the various principles should fit the needs of the different legal relations, and should harmonize with the social, legal, and economic

[142] Ibid. p. 89-90

[143] There is an emerging sense that Private International Law must protect justice, that will also inspire Graveson. As himself noted in Graveson, 'Philosophical Aspects', p. 26

traditions of England. Thus, for instance, the law to govern capacity will vary according as the matter sub judice is a mercantile contract, a contract of marriage, or a disposition of property."[144]

2.2 The Extension and Qualification of the Proper Law Test in Mercantile Matters

As we progress into the social age, social interest and public policy permeate the discourse and drive the development of law everywhere. As observed in the previous chapter, the emergence of the social did not undermine the ideas that there existed different types of relations and legal fields, and that each was underpinned by specific logics and rules. However, jurists in the social age also assumed that if law was to be divided into different fields, it must be based on the social utility of such classification, not merely out of mental elaboration and conceptual speculation. In line with this idea, Cheshire argued that only if they fitted the local context, and if they served their purpose, should divisions and principles governing international mercantile contracts, marriages, and property matters be kept. In his *Private International Law* Cheshire reviewed the applicable principles in light of pragmatic needs and social considerations, starting from questions of status and capacity.

Status in the classical age had been described as an inherent condition of the person from which capacity derived. In contrast, Dicey had advanced the possibility, but was not certain, that a person entering in a mercantile contract may be able to do so in accordance with the *lex loci contractus*, rather than with his *lex domicilii*. However, Dicey conceived this an exception from the ordinary rule. In addition, although the application of the *lex domicilii* enhanced the regulatory power of English law in cross-border family matters, neither Dicey nor the courts had clarified if this exception only applied in commercial contracts. Starting from these gaps and from the assumption that different rules applied in different scenarios, Cheshire pointed out that "[t]he question of capacity is one that concerns a large number of legal transactions. Thus, we have to consider it in connexion (sic) with a mercantile contract [or] a contract of marriage."[145]

Cheshire argued instead that two broad classes of interpersonal relations existed, 'mercantile relations' and 'marriage relations', and that each was governed by different principles and rules including in matters of capacity which always - and not exceptionally - applied.

[144] Cheshire, 'Private International Law', pp. 89-90
[145] Ibid p. 207

In the social age, jurists reject formal divisions and abstract principles. However, the dichotomy between family and economic matters is reconstructed with a new conceptual vocabulary based on positivism but also social functionalism. Consequently, with respect to mercantile transactions, Cheshire argued that the law governing the capacity of a person did not necessarily correspond to that governing the status of a person, as courts in the classical age had authoritatively established.[146] Cheshire noted that the *lex loci contractus* already governed the formal validity of a contract.[147] There were no concrete reasons why the same should also not occur in questions of substantial validity.[148] Law in the social age is not theoretical, but practice-oriented. The application of the law of domicile to the determination of capacity in commercial matters, "may be sound in theory but it is impossible in practice."[149] As in the case of capacity, as in all other matters, if:

> …we adhere rigidly to this principle, we are forced to the conclusion that, irrespectively of the locality of a transaction, the lex domicilii governs all that multiplicity of topics which can be gathered under the title 'status', a manifestly impractical conclusion.[150]

Cheshire was not interested in developing principles that could apply to all scenarios and situations. Rather he was interested in developing pragmatic solutions that were consistent with local policy. English courts had in the past suggested that the *lex domicilii* corresponded to the law governing capacity with respect to all contracts. However, according to Cheshire, each of the decisions where such idea was put forward constituted in fact a *dictum*, and was therefore not binding.[151] But the most important material consideration was that any attempt to force contractual capacity under the remote and abstract connection of domicile in commercial relations would cripple contracting power, and the rejection of hindrances to contracting power was considered in the discipline a "a universal truth."[152]

Relying on the universally-backed *favor contracti*, and surpassing the idea advanced by Dicey that an exception existed to the *lex domicilii* rule in matters of capacity, Cheshire extended the 'proper law' test to all conflicts questions in mercantile contracts. As a result, he argued that the law governing

[146] As in *Udny v. Udny* (1869), L.R. 1 Sc. and *Sottomayor v. De Barros* (no. 1) (1877) 3 P.D.
[147] Cheshire, 'Private International Law', p. 209
[148] Not to do so would be not only illogic, but would also constitute "an infringement of natural justice" and "an obstacle to international trade". Ibid. p. 210
[149] Ibid. p. 208
[150] Ibid
[151] Referring to the criticism of the Sottomayor Case (no. 1) in Sottomayor v. De Barros (no. 2) (1879), L.R. 5 P.D. 04. In *Ogden v. Ogden* [1908] p. 46; *Chetti v. Chetti* [1909] p. 67
[152] Ibid. p. 211 Cheshire was aware that even though in civil systems, in principle, the *lex patriae* should govern capacity, in many foreign systems legislators and courts frequently abandoned this rule when it came to 'mercantile contracts'. These systems, like Dicey, admitted exceptions to the rule. He discussed this in Ibid. pp. 213-214

substantive validity, but also that regulating competence and formal validity could be at times the *lex loci contractus*, at other times the *lex domicilii* and at others again the law of the place of performance.[153] Of course, this was against established conventions, as the principle of *locus regit actum* was considered a general principle of English law and accordingly the formal validity of contracts was determined by the law of the place where it is made. Cheshire contended that contract which did not comply with the formalities of the *lex loci contractus* was not necessarily invalid.[154] Adopting a pragmatic approach, he remarked that:

> There is nothing more exasperating or less expressive of scientific elegance than to test different aspects of a transaction by different laws, and there can be little doubt that the future line of development in the case of contracts will extend the sphere of application of the 'proper law'.[155]

The proper law testshould govern every aspect of the commercial transaction, from questions of capacity to those of formal and substantial validity, i.e. the law according to which the terms of the contract are to be interpreted and construed. As in the case of capacity, Cheshire dismissed the view of scholars who, drawing on old decisions of courts in marriage and divorce proceedings, held that the *lex domicilii* governed both questions of capacity and substantial validity in all contracts, regardless of their nature and of the specific functions of the law governing mercantile contracts and cross-border family matters.[156] Cheshire claimed that "[t]he marriage cases may be summarily dismissed as irrelevant to the present inquiry, which relates to mercantile contracts, for it is obvious that the contract to marry is in a category of its own."[157]

In *Private International Law*, Cheshire reviewed several cases, some going back hundreds of years, where courts dealt with international contracts. As seen in Chapter 2, in the medieval age, English courts grounded their decisions in the same theories and principles advanced in other European

[153] Ibid. p. 217
[154] Ibid. p. 224. Dicey acknowledged that a contract void according to the *lex loci celebrationis* may nonetheless be valid, but did not consider if this rule applied to all contracts, only to marriage relations or only to mercantile contracts. Dicey, 'Digest', p. 645
[155] Cheshire, 'Private International Law', pp. 211-212
[156] The 'proper law' governed the capacity of the parties, the formal validity, and the effects of the contract. This did not necessarily mean that the law that determined capacity and formal validity was the same according to which the terms of the contract would be construed, or the same law that established the rights and obligations of the parties, or the extent of the liability imposed by the agreement. Quite the contrary, Cheshire did not think that the *lex domicilii*, the *lex loci contractus* or the *lex loci solutionis* should govern questions of capacity and validity by default, coherently with the personal preferences of a few jurists and with an abstract theory that should apply regardless of the specific characteristics of each commercial transactions. He argued instead that courts applied and should continue to apply the proper law test to all these matters. Ibid. p. 250
[157] Ibid. p. 245

jurisdictions. When confronted with questions relating to the formal and substantial validity of cross-border contracts, especially marriage contracts, they applied the old rule whereby a contract of marriage good by the law of the place where it was made was good everywhere, subject however to a different choice of law by the parties. Cheshire justified his support for a comprehensive proper law test in past decisions by claiming that English courts had always followed the proper law test.[158] Ignoring the origins of *favor contracti* and of parties' intent, however, Cheshire remarked that "when rightly considered, judicial statements of a past age" always adopted the 'proper law' test, but also limited its application to mercantile contracts.[159]

The rise of the social did not undermine the division between contract and marriage, between the law governing family relations and the law governing economic relations. Each division was still governed by specific principles and rules, also at the cost of historical anachronisms. But the wide conception of proper law, and the rejection of the 'subjective' approach to proper law already noted in Dicey, beg the question of what exactly did Cheshire mean by proper law? In the social age, experts no longer placed exclusive importance on free will. Nowhere was unrestricted free will celebrated as the culmination of legal modernity. Three years after the publication of Cheshire's *Private International Law*, in 1927, Niboyet would give his influential lectures at The Hague Academy where he attacked the glorification of the principle of party autonomy at the cost of all other considerations.[160] Cheshire understood the proper law test expansively, but not absolutely. For Cheshire, the proper law could, but did not necessarily, correspond to a freely chosen law. The intention of the parties was not "of unlimited operation" and due regard would have to be paid to the circumstances of each case.[161]

Contrary the idealised classical understanding of party autonomy, proper law did not mean that the parties could choose any law of their preference.[162] For Cheshire, if the parties made a deliberate choice for a specific law to govern their rights and obligations, the system to which they voluntarily submitted must be already connected in some concrete and meaningful way to the transaction or to the parties.[163] Courts must therefore pay close attention to the contractual terms, and to the factual circumstances of the case, not just to parties' intention. Parties could not unilaterally opt for a law

[158] Ibid. pp. 246-248
[159] Ibid. p. 246
[160] See Chapter 7
[161] Ibid. p. 253
[162] Although Courts should, in principle, respect the reasonable expectations of the parties, the law governing the capacity and the effects of a mercantile contract was not contingent on the choice of the parties per se. English courts tried to respect the reasonable expectations of the parties, also in contract cases. For instnace, in *Re Bonacina* [1912] where the Court of Appeal upheld an Italian contract lacking the essential features for an English contract to be recognised as valid.
[163] Cheshire, 'Private International Law', p. 254

which had no connection whatsoever with the transaction. Cheshire therefore used the proper law as a synonym for the law that, given the circumstances of the case, was most closely connected to the dispute. This 'objective conception' of party autonomy, which is nothing but the same qualified freedom granted by all European conflict of laws in the social age, proved influential on subsequent decisions by English courts.[164] Hence, it was held that:

> The proper law of the contract means that law which the English court is to apply in determining the obligations under the contract. English law in deciding these matters has refused to treat as conclusive, rigid or arbitrary criteria such as leas loci contractus or lex loci solutionis and has treated the matter as depending on the intention of parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding facts.[165]

Other than verifying that the chosen law and the rights and obligations were not trumped by overriding mandatory provisions protecting state interest or with English public policy, as also pointed out by Dicey, courts should investigate every detail concerning the formation and the performance of the contract. They should consider if the choice expressed by the parties corresponded to the circumstances of each case.[166] They should consider the condition of the parties, the nature of the transaction, the terms of the agreement, the place of transaction, the language in which the terms were expressed, before applying any law, the law chosen by the parties included.[167] In the absence of an expressed choice, the court should construe the validity and effects of the contract according to the law that sensible persons in the position of the parties would choose.[168]

2.3 Capacity, Formal and Substantial Validity in Marriage Matters in the Social

For Cheshire, there was nothing more exasperating and further from the required pragmatism than testing different aspects of a transaction by different laws. This 'pragmatism', however, only applied to commercial matters. Contrary to mercantile contracts, different laws continued to apply to different aspects of marriage and family relations, with a predominance of the *lex domicilii*. Different laws

[164]As the House of the Lords held in 1937, "The legal principles which are to guide an English court on the question of the proper law of the contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive. If no intention be expressed, the intention will be presumed by the Court from the terms of the contract and the relevant surrounding circumstances." *R. v. International Trustee for the Protection of Bondholders* [1937] A.C. 500, p. 529 per Lord Atkin
[165] Per Lord Wright, *Mount Albert Borough Council v. Australasian Temperance, etc. Society* [1938] A.C. 224 at p. 240
[166] Cheshire, 'Private International Law', pp. 254-256
[167] Ibid. p. 258 "…every fact that serves to indicate the design of the parties is relevant. No one fact is conclusive."
[168] Dicey, 'Digest', p. 666

continued to apply to formal and substantial aspects of family status. The law of the 'matrimonial domicile' of the parties, which essentially corresponded to the law of the husband's domicile, governed the capacity of the spouses to contract marriage. It also established the 'incidents' of marriage, i.e. the mass of powers, duties, disabilities and liabilities attached to marital and family status. It also determined, by analogy, the jurisdiction of English courts in proceedings for the dissolution and annulment of marriage.[169]

In line with 19th century cases, Cheshire noted that capacity to get married, to enter in property and marriage settlements, as well as the reciprocal obligations existing between husband and wife depended on the law of the domicile of the husband, because domicile governed personal and civil status and because the law of coverture obligated the wife to follow her husband.[170] One may wonder, however, why the proper law test should not apply to questions of capacity, formal and substantial validity in mercantile contracts as well as in marriage contracts and even in family matters more in general. Despite the standard reference to marriage as a 'contractual relation', "a contract to marry stands on a different footing from a mercantile contract."[171] Marriage was not an ordinary contract, but a fundamental institution of society which was connected to the policies pursued by the state:

> It must be universally admitted that marriage is an institution which closely concerns the public policy and the social morality of the State. The community, as a social entity, may be indifferent to the breach of contract to deliver goods, but it cannot ignore an open infraction of its recognized code of morals.[172]

Whereas the distinct rules that governed cross-border marriage contracts and ordinary contracts in the classical age had to do with the belief that marriage and family relations were partly legal, partly social and partly moral relations, in the social age marriage was gradually being redefined as an institution. In the above passage, we thus hear the echoes of the theory which placed in a symbiotic relation the family institution, the social community and state interest. Hence, the law of the matrimonial domicile governed questions of capacity and substantial validity not because of abstract ideas or concerns, but because it protected "the welfare of the civil society with which [the husband] is most intimately connected".[173] In line with intensification of the public and regulatory dimensions

[169] Cheshire, 'Private International Law', pp. 313-374: Chapter XI, Husband and Wife
[170] Ibid. pp. 219-227
[171] Ibid. p. 218
[172] Ibid.
[173] Westlake, 'Treatise' 2nd edition, p. 262

of the law of marriage, within and across borders, when asked to clarify the meaning and consequences of marital status, the House of Lords held that:

> Something more than a mere contractual relation between the parties to the contract of marriage. Status may result from such a contractual relationship, but only when the contract has passed into something which Private International Law recognises as having been superadded to [the contract] by the authority of the State, something which the jurisprudence of that State under its law imposes when within its boundaries the ceremony has taken place. This judicial result is more than any mere outcome of the agreement inter se to marry. It is due to a result which concerns the public generally, and which the State where the ceremony took place superadds; something which may or may not be capable of being got rid of subsequently before a competent public authority, but which meantime carries with it rights and obligations as regards the general community until so got rid of.[174]

Marriage concerns the general community. It creates a status that is of interest to the public generally. It can only be constituted in front of a public official. This is essentially what had been argued by Cicu in Italy. Since the family institution embodied collective interest and public policy, family relations were made subject to mandatory legislation. Husband and wives owe duties to each other as well as to society. Hence, they cannot evade the marital and parental duties attached to a status regulated by the law of their domicile. The proper law test could thus not apply to questions of capacity and substantial validity. The *lex domicilii*, however, did not apply to all aspects. Unlike in mercantile contracts, the formalities of marriage were governed by the *lex loci celebrationis* in accordance with the rule *locus regit actum*.[175] The rise of the social also changed the scope of the medieval rule, although its retention may suggest *prima facie* continuity with *favor matrimonii*.

In mercantile matters, formal conformity with the *lex loci contractus* became secondary to the validity of the contract and to the enforcement of contract provisions. In contrast, in the case of marriages, the increasing emphasis placed on public policy and regulatory goals meant that conformity with the law of the place of celebration was required in matters of form, capacity and mandatory provisions.[176]

[174] *Salvesen v. Administrator of Austrian Property* (1927) A.C. 641
[175] Cheshire, 'Private International Law', p. 322. In the early decades of the 20th century, questions regarding the validity of marriages arose in the context of matrimonial causes, such as petitions for dissolution of marriage and nullification, those for restitution of conjugal rights in which a party deserted the other for an unreasonable cause, but also in criminal proceedings for bigamy etc. In these cases, courts first had to establish if the parties had been married at all. For doing so, they would consider the capacity of the parties, but also formal validity.
[176] Most clearly expressed in 'Cheshire, Private International Law 5th ed', pp. 307, 320

What this meant in practice was that marriages that did not meet the requirements and conditions set by English law were declared invalid and incapable of producing effects even if they were valid for the personal law of the parties. Redefining the old rule according to which a contract good by the law of the country where it is made is good all the world over, courts argued that unless there is a marriage in the place of celebration, there could be no marriage anywhere, even if the marriage was in conformity with the personal law.[177]

Unless the marriage and the parties met the conditions set by English law, the marriage would be declared as non-existent. Polygamous marriages that were celebrated in England in conformity with the personal law of the parties were 'non-marriages' in English law.[178] The extension of absolute requirements set by English law to foreign domiciliaries (and nationals) was evidently a symptom of growing regulatory concerns which, in the case of marriage, intensified because of the cultural pluralism that characterised the Commonwealth. However, the implications of this shift did not only concern 'non-Christian States'. As also shown by the default subjection to the English law of coverture whenever foreign spouses found themselves on the English territory, the symbiotic links between public policy and the law governing family status meant that English law became automatically applicable regardless of personal links to extra-European cultures and peoples.

The development of conflict rules in conformity with public policy, however, was not necessarily prohibitive in nature. If it was in conformity with public policy and it did not violate state interest, a marriage celebrated in England by foreign domiciliaries or nationals whose marriage would be judged invalid by their *lex domicilii* or *lex patriae* could nonetheless be considered valid under English law.[179] The domestication of conflict rules and the rise of the social meant that the development and application of conflict rules was oriented to the protection policies and interests pursued by each legal system. Because of this process, foreign domiciliaries, or nationals, may be enabled by conflict rules and principles to contract marriages or, as seen in the previous chapter, to obtain divorce decrees that they would not be permitted to perform in foreign jurisdictions or under their personal law.

The existence of the dichotomy between mercantile and family matters did not mean that old connecting factors and traditional principles could not be re-oriented to public policy concerns. The regulatory shift and territorial turn did not necessarily mean that private international law would not

[177] *Berthiaume v. Dastons* [1930] A.C. 79
[178] See concluding section of Chapter 5
[179] *Sottomayor v. De Barros* (1879) 5 P. D. Provided the state had an interest to do so, the boundaries of the jurisdiction could be progressively expanded through 'technical rules', or fictitious links, regardless of material connections between families and foreign systems. Cheshire, 'Private International Law', pp. 629-629

enable choices and facilitate solutions to concrete challenges, even those raised by foreign polygamous unions. A polygamous marriage celebrated in England was considered a non-marriage. Even a polygamous marriage celebrated abroad by foreign subjects could not be considered a marriage. However, what would happen if the parties moved to England after the marriage? Classical jurists had argued that a family status could either be recognised, and so were the capacity and rights attached to it or, if in conflict with international justice, it simply could not be nor could rights and obligations. Even 'foreign' polygamous unions would be non-existent in English law.

In principle, the same rule was also upheld by Dicey. But Dicey had also argued that, even if a status was unknown to English law, the recognition of such status by an English court did not necessarily involve giving effect to the results of such status.[180] Cheshire turned upside down Dicey's notion. Instead of recognising a status but not its effects, he argued, courts could recognise the effects without recognising the status in family relations. Provided the parties have competence to acquire a certain status under their personal law, and the marriage had been celebrated in a country allowing polygamy, marital and family statuses that do not exist in English law should not be regarded as a complete nullity for all purposes. In the case of a polygamous union celebrated abroad, the law may not recognise the status of husband and wife itself but may, subject also to considerations of public policy, recognise some of its effects.[181]

Cheshire considered that English courts must deny recognition to all polygamous unions, real or potential, which are celebrated on English soil because it was in the interest of the state to do so. But he also pointed out that total lack of recognition of the effects of all foreign polygamous unions regardless of substantial connections with foreign jurisdictions was unwarranted.[182] Recognising

[180] For overcoming the concrete problem that that followed from what his predecessors framed as a binary choice between recognition and non-recognition, Dicey believed that a solution might be found in the division between the formal existence and recognition of status, and questions concerning the effects, i.e. the conditions, rights and obligations attached to status. Dicey, 'Digest', pp. 481-483. Although Dicey only discussed at length the consequences of this division with respect to questions of capacity in 'mercantile relations', he noted that in cross-border family cases, the actual practice of English courts was "to recognise the existence of a status acquired under the law of a person's domicil, while avoiding the practical difficulties which arise from subjecting legal transactions to rules of law which may be unknown in the country where the transaction takes place." (ibid. p. 481) Even if an English court recognised a status acquired under a foreign personal law, rights and obligations accorded would be those established by the lex loci. For instance, if a person acquired marital status or that of legitimacy in accordance with his personal law, recognition of status did not necessarily imply the recognition of marital rights, property rights, or inheritance rights assigned by the *lex status*. English courts may thus recognise a status of husband and wife, children and parents formally but, at the same time, they may refuse to enforce the rights and obligations attached to it when such status is unknown to English law. In place of the rights and duties that the *lex status* would impose, they will apply English law. Dicey believed that judicial practice and the doctrine would continue to move in this formalist direction, giving priority to status rather than effects. He thus criticised the division for being of little practical use in cross-border marriage and family matters. (ibid. p. 482) If anything, the division between status and effects made things worse, because it made it possible for courts and scholars to avoid controversial questions regarding the existence of different national conceptions of status.

[181] Cheshire, 'Private International Law', p. 320

[182] Ibid. 319

some of the effects did not mean enforcing foreign laws or foreign rights. If from the factual circumstances of the case it was obvious that recognising the effects of a relationship which remained non-existent under English law would provide a solution more just, then English courts should not hesitate to do so.[183] This would make it possible for polygamous wives to be able to claim alimony or to declare the children of polygamous unions as legitimate.[184]

2.4 Jurisdiction in Divorce and Nullity Proceedings

In marriage and in family matters, the 'social functions' of private international law were not meant for the protection of individual interest but for the protection of collective interest as defined by the state. It was not to protect the individual interest of the spouses that some of the effects of polygamous unions were recognised, but because it conformed to public policy and did not violate state interest. Family law, and the law governing cross-border family relations, were meant to strengthen the institution of marriage and of the family. The rise of public interest also emerges from the debate concerning possible reforms to the rules applicable to questions of jurisdiction in divorce and nullity proceedings, a debate in which Cheshire took a conservative position, although always referring to the overriding importance of protecting social interest and domestic public policy in matters of status.

More than choice of law questions, the whole debate on divorce was centred on jurisdiction. Due to the intensifications of public policy concerns, it was out of the question that English law should always apply in petitions for separation, divorce or nullity.[185] As we have seen, following a decision by the Privy Council in 1895, courts applied the principle of domicile as a basis for jurisdiction in divorce proceedings.[186] However in some cases English courts had made an exception and based jurisdiction on the pre-marital domicile of wives.[187] For Cheshire, there could be no doubt that, for an English court to lay a claim of jurisdiction over proceedings for dissolution or nullity, both parties

[183] This makes sense also in light of the rejection of the theory of acquired rights. What is applied is English law resembling the foreign law, and not a right acquired abroad, argued Cheshire, "for the incidents and consequences attached to a foreign right when enforced in England may differ from those recognized in its country of origin. An English court, for instance, may exact alimony from a husband, although he and his wife are domiciled in a country where no such obligation is recognised." Ibid. p. 89

[184] See the early discussion in Beckett, W. Eric. "The Recognition of Polygamous Marriages under English Law." LQ Rev. 48 (1932), p. 341

[185] In the case of *Zanelli v. Zanelli* (1948) 64 T.L.R. 556. In that case the wife, who petitioned for divorce under English law, was resident in England. However, she and her husband were Italian nationals. They were also domiciled in Italy. The court nevertheless granted the decree of dissolution by applying the *lex fori* under the Matrimonial Causes Act 1937, s. 13. The *lex patriae*, the law where the marriage had been celebrated, or the law where the offence was committed would be entirely ignored. English law determined if there was a sufficient cause for nullity, divorce or separation, but also the forms of relief to be granted. For For Nullity, see Cheshire, 'Private International Law', pp. 346-347 (here, with the exception of nullity sought after a mistake or a violation of the marriage ceremony, in which case the *lex loci celebrationis* would be applied); for Divorce, Ibid. pp. 361-362

[186] *Le Mesurier v. Le Mesurier* [1895] A.C. 517

[187] *Montaigu v. Montaigu* [1913]

i.e. the matrimonial domicile must be within the English jurisdiction.[188] Divorce and nullity touched upon a fundamental interest of the state. Marriage was a fundamental institution of civilised nations. Hence, the traditional domicile-based jurisdiction should be upheld.[189]

However, the traditional rule had obvious social costs due to the contemporary enforcement of the law of coverture. The hardship caused to married women was partly eased by the Matrimonial Causes Act of 1937 which established that English courts have residence-based jurisdiction in any proceedings for divorce, annulment, judicial separation and restitution of conjugal rights where the wife had been deserted by the husband domiciled abroad.[190]Although residence, a less demanding form of domicile, had found some support among specialists, Cheshire opposed the change in the law because "it would endanger the inviolability of the cardinal maxim that divorce jurisdiction rests solely upon domicil."[191] Cheshire opposed the reform on its merits and argued that it did not make sense to issue decrees that would not be recognised abroad.[192] Although this was no doubt true in consideration of changing judicial practices in foreign jurisdictions, the same could be said about recognising marriages celebrated in England which were invalid under the spouses' personal law.

Despite some resistance by the scholarship, and the lack of structural reforms, the effects of the law of coverture were gradually being removed from English law. It must be noted that reformers in England, as in Italy and in other European jurisdictions, added a cautious disclaimer that changes to divorce legislation and, more in general, to family law - whether in their internal or international dimensions - were motivated by public policy, not by the protection of individual interest and personal desires. Advocates of the 1937 Act thus specified that the amendments were not to give the parties freedom to obtain divorce by 'mutual consent', despite more flexible jurisdictional rules and new grounds for divorce.[193] In fact, what propelled the divorce reform was the awareness that a law that

[188] Subject to the exception in nullity proceedings where the court of the place of celebration can annul a marriage celebrated agains the formalities prescribed.
[189] Following the arguments advanced by Dicey and Cheshire, courts established that the husband's domicile was the exclusive controlling fact for English jurisdiction in divorce (and nullity) proceedings. *H. v. H.* [1928] p. 206
[190] Section 13 of the Matrimonial Causes Act of 1937 helped to remove a blatant violation of injustice, and to protect social interest, by giving English courts jurisdiction to deserted wives on the basis of their residence. Even when the parties are not domiciled in England, an English court has jurisdiction if the wife has been residing for three years in England, or has been deserted by the husband, or the domicile had ceased to be English.
[191] Cheshire, 'Private International Law', p. 340
[192] In a practical sense, it could be argued with some reason that divorce decrees issued by English courts based on residence alone would not be recognised abroad. In this sense see Graveson, 'Philosophical Aspects', pp. 28-29. However, the main concern of English courts was not to issue decrees that would be recognised by courts abroad, otherwise no decree would be issued with respect to parties to whom state law did not give the possibility of divorcing.
[193] Under the Matrimonial Causes Act 1937, either spouse could petition on any of the following grounds, that one of the parties had committed adultery; or that the respondent had deserted the petitioner without cause for a period of at least three years; or that he or she treated the petitioner with cruelty (s. 6(2)); or that the respondent was of unsound mind beyond cure (s. 2.). The Act also amended the law of nullity. Combined with greater jurisdictional flexibility, this opened up greater opportunities to obtain a divorce. The Act followed some reforms in the 1920s. The Administration of Justice

had been codified to protect morality and social integrity ended up encouraging perjury or immorality itself, as parties who committed adultery or pretended to have done so were allowed to remarry, whereas those who took the vow of faithfulness seriously or were not willing to lie, could not.[194]

This conviction was reinforced by international cases, since the richest couples could afford to travel abroad to obtain a divorce in more liberal jurisdictions, whereas deserted wives and people of lower means were forced to stick to relations which were harmful to them and to society at large. In the words of its proponents, the 1937 Act did not transform marriage into a "temporary alliance" nor did it undermine "the foundations of family life."[195] On the contrary, the new law was meant to "strengthen the institution of marriage and increase respect for the law."[196] Clearly, discussions concerning jurisdiction and recognition as well as the grounds for divorce in England echo the struggle of Italian reformers to legalise divorce in Italy. The institutional and cultural background and the result of the proposals were different. In both scenarios, however, reformers referred to marriage as an institution that was meant to protect social integrity and public policy.[197]

At about the same time, the same discussion and the same expansion of jurisdiction - justified by state interest for some, opposed by others on the ground of public policy - was also taking place about nullity, although the controversy did not attract the same degree of public attention.[198] As changes to the law of jurisdiction were being introduced in divorce law, the question whether the wife's residence

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Act 1920 gave Assize judges power to try divorce cases in the provinces. The Matrimonial Causes Act of 1923 gave women and men equal grounds for divorce. After a tortuous road, the law was thoroughly reformed in 1937 thanks to the initiatives of Sir Alan Herbert who also picked up an old proposal for reform of rules on jurisdiction.On the remarkable story of how the Herbert's Act came to be, see Cretney, 'Family History', pp. 234-249. A precious account is provided by Herbert himself in *The Hayes Have it*, 1937.

[194] The 'hotel divorces' were a consequence of the perverse system set up by English law, which were famously satirysed by Evelyn Vaughn in 'A Handful of Dust' and A. P. Herbert in 'Holy Deadlock'. For an account, see Cretney, 'Family history', p. 229-231. The constitutional crisis which eventually led to the abdication of King Edward VIII contributed to precipitate the events.

[195] The Church of England set these conditions for giving its support to the bill. Cited in Cretney, 'Family history', p. 237

[196] As held in the Memorandum to the bill brought about by Herbert himself, who had by then been elected in the Oxford University constituency, as member of Parliament. Cited Cretney, 'Family history', p. 236

[197] The Herbert's Act succeeded because it was held to produce social stability rather than disorder and chaos. Obtaining divorce remained a "daunting legal process involving a high degree of formality" which made it possible to preserve the mythology of the sacred marriage tie, even though in more and more cases marriages were irretrievably breaking down. Cretney, 'Family history', p. 252. See Chapter 7 of Cretney, The Ground for Divorce under the Matrimonial Causes Act 1937 for a detailed account.

[198] Courts grounded jurisdiction in nullity proceedings in the place of celebration despite the profound conceptual differences between types of annulment. In the case of nullity, the two scenarios may give way to the idea that different rules governed the jurisdiction of the courts. In the case of voidable marriages, the jurisdiction of the court seems straightforward and by analogy with all other question of status. In the case of marriages which were void ab initio, the question arose if the parties had never been married, if they had never been husband and wife, it may be argued that the parties had never acquired a status, and that the suit should not be taken up by courts of the law of the matrimonial domicile. The question was discussed in the case of *Inverclude v. Inverclyde [1931]* p. 29. For Cheshire, however, annulment proceedings in this case as well raised a question of status. As he put it, citing some recent case law, "celibacy is just as much a status as marriage." Cheshire, 'Private International Law', p. 339 *Salvesen v. Administrator of Austrian Property* [1927] A.C. 641, p. 662. Hence, jurisdiction should also be based on domicile.

sufficed to establish jurisdiction became contentious issue also in nullity.[199] The debate was triggered by the *White v. White* ruling. In that decision we also notice the shift to public policy and social interest. The Court claimed jurisdiction based on the wife's residence and argued that the wife "should have her status as a single or a married woman established by this Court, and should not have to proceed abroad to wherever place the respondent happens to reside in for that purpose" because this was in the "the public interest of the petitioner".[200]

This wording of the *White v. White* decision is as important as its motivation. It was not the individual interest of the petitioner, but her 'public interest' that led the court to extend jurisdiction to nullity proceedings. Although it was grounded in collective interest, the ruling made it possible to alleviate individual suffering caused by one of the many consequences of the law of coverture. Cheshire criticised the decision for the same reason that he criticised the extension of jurisdiction in divorce.[201] He labelled the judgement as an illustration of recent developments which would lead English private international law to "confusion and chaos".[202] Since "the annulment of a voidable marriage is one which directly affects the existing status of husband and wife" and status was a reflection of public policy, "there can be no doubt on principle that, so far as concerns the jurisdiction of the Court, a suit for nullity must stand on the same footing as a suit for divorce."[203] Accordingly, jurisdiction should be based on matrimonial domicile.

What the above suggests is that the law and the discourse were changing. Due to the shift from abstract concerns to concrete public policy issues, the effects of the law of coverture were being eroded, both in its internal dimensions - in property rights[204], in criminal law[205] and tort proceedings[206] - but also in its private international law dimensions. Hence, some judges claimed in

[199] Answered, subject to certain conditions, in the positive by Dicey, "where the respond is resident in England, not on a visit as a traveller and not having taken up residence for the purpose of the suit." Rule 65 (I) (ii), p. 295

[200] *White v. White* [1937] p. 111 In White and White, an Englishwoman domiciled in England got married in Australia with a domiciled Australian. The respondent husband had a wife and their marriage still subsisted. The petitioner wife returned to England and petitioned the High Court for nullity on the ground of bigamy.

[201] Cheshire, 'Private International Law', pp. 125-126

[202] Ibid. p. 44. He added, "This decision, though expedient in the actual circumstances, represents a retrogression to the days when the law on the subject was uncertain and chaotic… . A system of Private International Law which multiplies grounds upon which jurisdiction may be assumed may perhaps excite envy, but it does not arouse admiration. Reason and simplicity demand that in each type of case jurisdiction should be assigned to the most appropriate forum, and in furtherance of this object there has been a strong and welcome tendency in recent years to make the Courts of the husband's domicil pre-eminent as far as possible for the purposes of nullity jurisdiction." Ibid. p. 343

[203] Ibid. p. 337 In exceptional cases, Cheshire argued that domicile of the husband in England at the time of the suit provided an alternative basis of jurisdiction.

[204] Law Reform (Married Women and Tortfeasors) Act, 1935

[205] Criminal Justice Act, 1925, s. 47

[206] The Law Reform (Married Women and Tortfeasors) Act 1935 to make the consequences in a tort case the same for a married woman, a widow, a spinster or a man. The 1935 Act was passed since, in the words of the Law Revision Committee, "[t]here seems to be no reason, once it is established that they are no longer debarred by the law from holding

the late 1930s that changes in the law had put an end to the "old fiction of our common law that a woman on marrying became merged in the personality of her husband and ceased to be a fully qualified and separate human person."[207] Indeed, there was some truth behind the general assertion, advanced by Graveson that "the movement in domestic status is away from dependence on the head of the family …towards full individual legal capacity".[208] However, rather than a systemic revolution, what the above paragraphs suggest is that the rise of the social diffused a new vocabulary focused on public interest and social policy which determined a re-orientation of conflict rules.[209]

3.1 Ronald Graveson and the Social Purposes of Private International Law

The contribution to the subject by Ronald Graveson, among the most influential experts in the common law in the 20th century, also corroborates the thesis that the rise of a new consciousness determined a profound transformation of private international law. Graveson tried to explain developments in the field since the turn of the century "in terms of a new theory of justice".[210] In line with ideas advanced by Cheshire, Graveson did not believe that the answer to the questions raised by legal collisions could be found in a general theory that was blind to its effects. Graveson was also convinced there was no sacred principle that applied to all disputes, and that, faced with a cross-border dispute, English courts should simply look for the most just solution. In the common law, the responsibility to search for appropriate solutions rested especially with ordinary courts. Graveson thus started from court's decisions to elaborate his theory of conflicts justice:

> The theory set forth in these pages … is thus both pragmatic and ethical. In its pragmatic aspect it endeavours to explain the rules of our conflict of laws as they exist… . In its ethical aspect it attempts to draw from judicial decisions the broad principle of justice as seen by our judges in their own environment of time and place."[211]

property independently of their husbands, why they should not do so with all the corresponding rights and liabilities like everyone else." (Fourth Interim Report, 1934, Cmd. 4770, paras. 16-18).

[207] *Barber v. Pigden* [1937] 1KB 664, 678 per Scott LJ. with reference to the Law Reform Act 1935

[208] Graveson, 'Movement', pp. 266-267

[209] The reality was very different from the optimistic description offered above, as also demonstrated by the resistance put up by experts to the innovations introduced in a variety of fields where the doctrine of coverture still played a crucial role in the development and interpretation of the law. The reforms in substantive law and in Private International Law did not abolish all sources of discrimination. No better illustration of the fact that the theory of coverture was alive in the law and in the discourse then the fact that only in 1973 married women would acquire a separate domicile. With respect to propert matters, see O. Kahn-Freund, 'Inconsistencies and Injustices in the Law of Husband and Wife (1952), 15 Modern Law Review

[210] Graveson, 'Special Character', p. 7

[211] Graveson, Ronald Harry, *The Conflict of Laws*, Sweet & Maxwell. August 1974 (7th edition), p. 41. The first edition was published in 1948. Citations are from the edition of 1974, unless specified.

Graveson was a naturalist. In his *The Conflict of Laws*, first published in 1948, he started from English enactments and precedents. His analysis thus only made sense in the "narrower context" of English law.[212] In his search for a leitmotif in the development of conflict rules by English courts, Graveson was nevertheless inspired by realism, by sociology and by 'philosophy'.[213] This led him to consider English private international law not merely positively and pragmatically. He also examined the law from an 'external' or 'ethical' viewpoint. By taking this external perspective, he argued that English conflict of laws had developed in accordance to 'justice'. No court could do justice if it refused categorically to consider foreign law or if it denied the validity of a foreign judgment.[214] The desire to justice did not correspond to an international obligation.[215] Rather, consideration of foreign laws and foreign rights originated in a specific conception of justice.

According to Graveson, the concept of justice that inspired the development of conflict principles did not originate in the medieval or classical theories of natural law. The theory of justice that Graveson formulated was "relative to time and place."[216] He thus specified that "[t]he justice which courts apply is justice in the spirit of English law, in the spirit of common law and the spirit of equity, and not a vague and indefinable kind of abstract justice."[217] The concept of justice was tailored to local contexts and to local needs. Common lawyers thus underlined that English courts would always give appropriate consideration to the specific circumstances of each case and would give due weight to all social interests involved before pronouncing a decision in cross-border disputes.[218] The same had been affirmed by English courts in numerous influential rulings. As Lord Justice Pearson remarked in *Gray v. Formosa*, an important case for recognition of a foreign decree of nullity:

[212] Graveson, 'The Conflict of Laws', p. 41

[213] Ibid. 42. The fact that Graveson chose to look closely at the ordinary work of courts and at their 'environment' to advance a theory of Private International Law could be the result of the influence of American realist theories which also sought to explain what factors and objectives drove judges to reach their decisions. For Llewellyn, "This doing of something about disputes, this doing of it reasonably, is the business of the law. And the people who have the doing of it in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. What these officials do about disputes is, to my mind, the law itself." Llewellyn. The Bramble Bus (1930)

[214] Graveson, 'The Conflict of Laws', p. 7

[215] Graveson thus dismissed 'comity'. For Graveson, "the doctrine of comity provides an inadequate and unsatisfactory basis for the modern conflict of laws. The responsibilities of comity are broadly comprehended in the primary duty of a court to do justice according to law. It is in pursuance of that duty that reference is made to systems of foreign law. No lesser justification is sufficient. No greater justification exists. The aim of this body of principles is to state (among other things) of which legal system the courts have jurisdiction and by which legal system as a whole the issue shall be determined." Graveson, 'The Conflict of Laws', p. 11

[216] Ibid. p. 41

[217] Ibid. p. 9

[218] Lorenzen, E. *Selected Articles on the Conflict of Laws* (1947), p. 17, who writes, the aim of 'Anglo-American courts' "has been to render a just decision under the circumstances of the particular case and they have reached their conclusions so far as possible by a consideration of the social interests involved." See also Graveson, "The Spirit of English Law," 60 Juridical Review 83

> In my judgment the decree in this case, having regard to all the facts and circumstances which have been stated, does offend against our views of substantial justice, and for that reason the decree ought not to be recognised.[219]

But the overriding concern for substantial justice was not residual or exceptional. It did not coincide with the public policy exception. Rather, as Graveson himself suggests, substantial justice in social conflict of laws meant that 'state interest' and 'public policy' underpinned the elaboration, interpretation and application of conflict of rules *sensu latu*, in questions of jurisdiction, choice of law and *exequatur* proceedings.[220] This was in line with the contemporary legal thought. The "modern approach is to consider law in relation to its value in achieving social purposes".[221] This implied a re-orientation of the discipline towards social functionalism and the protection of public policy and, in general, that "[p]roblems of conflict of laws spread over into yet another field often described as of 'public' law, namely, constitutional law."[222] Conflict rules were therefore developed in accordance with internal policy and state interest. For this reason, a meaningful theory should examine the specific purposes pursued by conflict rules:

> Particularly for the purpose of this subject, law cannot be treated as divided into a number of well-defined and water-tight compartments. For the conflict of laws is a cross-section of almost the whole law, and different systems divide themselves in different ways…[223]

In the social age, the division between legal branches, international and internal, public and private, economic and family, did not flow from an abstract and theoretical reflection, but in consideration of their underlying purposes and functions. Although each branch of the law pursued a different purpose, the whole field of private international law was re-oriented to social functionalism. Conflict rules and principles varied in accordance with the social interests and public policies they protected. This is what transpires from all theories and approaches to conflict of laws examined in this and in the previous chapter, whether they are classified as multilateral or unilateral, whether they are advanced

[219] *Gray v. Formosa* [1963] p. 259 at p. 271. The Court of Appeal unanimously expressed the same feelings. In the same case, Lord Justice Donovan pointed out that "elementary considerations of decency and justice ought not to be sacrificed in the attempt to achieve it. If the courts here have, as I think they have, a residual discretion in these matters, they can be trusted to do whatever the justice of a particular case may require, if that is at all possible." In the same case, Lord Denning also remarked that "I am content to decide this case on the simple basis that the courts of this country are not compelled to recognise the decree of a court of another country when it offends against our ideas of justice." Ibid.
[220] Graveson, 'The Conflict of Laws', p. 42
[221] Graveson, 'Philosophical Aspects', p. 15
[222] Graveson, 'The Conflict of Laws', p. 5
[223] Ibid.

by common lawyers of civil law experts. Graveson plays an important part in this genealogy because, like Quadri, he pinned down this transformation in explicit terms. Although Graveson was not associated to unilateralism, he proposed to re-examine (and simplify) rules and principles in private international law in accordance with their social purposes.

3.2 The Law of Status as an Instrument for the Protection of Social Interest

Superficially it may appear that Graveson merely acknowledged the application of the same rules and principles posited by Dicey and discussed by Cheshire. However, the explicit reference to the social is visible throughout his 'justice-theory' of conflict of laws, starting from the law of status. Graveson thus agreed with his predecessors that there was a difference between status and capacity. But Graveson did not stop here but asked what the conceptual difference was between status and capacity. Why did they differ in cross-border disputes and relations if "status is a legal condition, [and] capacity is merely the sum total of powers attached by law … to that condition."[224] Graveson's answer was that unlike status, which was a static condition regulated by public law, capacity was dynamic and changed in accordance with factual circumstances and types of relations.[225]

Graveson did not passively report what were the rules that had been developed and applied in English conflict of laws. He asked himself what the origins and *raison d'être* of principles, doctrines and theories were. Pushing the analysis of status further, he argued that "[j]ust as a legal system defines its rules and classifies situations … so law for certain purposes classifies persons".[226] The classification of persons and relations into different statuses did not correspond to an abstract or theoretical elaboration, as during the classical age, but to specific social purposes that corresponded to the law governing - or protecting - a given condition of an individual in accordance with public policy. Consequently, status is not an abstract concept or idea:

> Society is classified into status groups with the object of legally protecting certain social relations and individual conditions, and where a personal condition or relation exists which it is in the interest of the community to control or supervise, the law imposes on the person or persons concerned a legal status.[227]

[224] Ibid. p. 230
[225] Ibid.
[226] Ibid. p. 227
[227] Ibid.

According to Graveson, the classification of persons in different groups was driven by an increasing need which could be detected in the law of all "civilised societies" governing a variety of legal relations, in accordance with social interest, the condition of husband and wife and parent and child and the condition of infancy, but also the relationship between creditor and debtor in bankruptcy proceedings.[228] Except for the last example - which Cicu would have classified as a voluntary organisation where status would not arise - Graveson's view is consistent with the 'social' reconceptualization of status that had occurred in Italy. Unlike what had been argued by Maine, status was not a feature of ancient and traditional societies. Status was celebrated as a fundamental institution of modern countries that protected specific categories of vulnerable individuals. Graveson thus held that:

> Status in English law may be described as a person's legal condition in society, either absolute or in relation to another person, which is imposed by the state in order to secure and protect interests of society in its institutions, and carries with it rights, duties, capacities, incapacities, powers and disabilities, or any combination of them, such legal condition and its incidents being generally unchangeable at the mere will of the person or persons subject to the status.[229]

The creation of a specific status depended on public law and on social interest. The inclusion of any person in a class or group of individuals was not motivated by the existence of a relationship of dependence. Rather, it removed the person from the egotistical forces of free will and assigned powers, duties and liabilities by means of public law instrumental to the pursuit of specific social purposes. Whereas individuals are free to pursue their own interest in those relationships where status is not created by public law, status imposes powers and duties that cannot be changed or waived because it protects collective interest. Hence, in the social age, the existence and purpose of status, and the imposition of the incidents of status, are no longer abstract, for example strengthening of national feeling, but the protection of social institutions and social interest. As argued by Graveson:

> … the nature of personal status is such that society is directly concerned in its acquisition and change, and intervenes to the extent it considers appropriate in any legal act designed to affect status through the requirement of approval of the act by some State

[228] Ibid.
[229] Ibid. 226

> official … . Through such officials society ensures the protection of its interests in any change of status contemplated by its members.[230]

What did this mean for the development of rules and principles applicable to cross-border relations? Among the various relations regulated by public law in accordance with social interest was marriage. Although marriage resembled ordinary contracts in the sense that it consisted of an agreement supported by consideration and the desire of the parties to create a legal relation, marriage was not an ordinary contract. Marriage was not constituted by an act of free will or, in medieval terms, by the consent of the spouses. A marriage came into being as a result of the intervention of the public official. Marriage was a vital institution for the protection of social interest.[231] Marriage corresponded to a status. "Although Blackstone[232] described the common law as regarding marriage in no other light than as a civil contract" Graveson remarked, "the importance of the social interest demands that marriage be treated separately from other types of contract."[233]

3.3 Social Functionalism in the Division between Formal and Substantial Matters

Compared to other cross-border relations, Graveson argued that the most characteristic feature of marriage is the "strength of the personal law of the parties in controlling the consequent status in its inception, extent and dissolution; and, beyond this direct action on the status, in fixing capacity … and imposing restrictions and prohibitions on the exercise of such capacity."[234] In the social age, marriage corresponded to a status that could only be created, or dissolved, in accordance with public policy, within and across borders, in accordance with the personal law of the parties which, in English law, corresponded to the *lex domicilii* of each spouse.[235] The justification for the systematic application of a specific personal law does not derive from abstract concerns or purely theoretical divisions between commercial and family matters. It was to ensure compliance "with the legal and social principles and standards of the society of which he forms part at any particular time…"[236]

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[230] Ibid. p. 240
[231] Ibid. pp. 240-241
[232] Commentaries, 2nd ed., I, p. 433
[233] Graveson, 'The Conflict of Laws', p. 241
[234] Ibid.
[235] "Capacity to marry, being an incident directed to a change of status itself, is governed by the law of domicile." Ibid. p. 232
[236] Or… "[or] has become 'his centre of gravity.'" Ibid. p. 189 citing Re Flynn, decd. [1968] 1 W.L.R. 103 at p. 119. For Graveson, the law of a person's domicile "governs the creation, duration, nature and determination of any domestic status" and the strict and automatic application in cross-border matters was justified by the protection of social standards and social interest corresponding to status. Ibid. p. 230

The re-orientation of conflict rules to public policy concerns is visible throughout Graveson's account and his articulation of principles governing cross-border family matters, especially marriage relations. Unlike mercantile matters, where the same test could apply in every respect, Graveson agreed with his predecessors that "[t]he validity of a marriage … depends on conformity with the lex loci celebrationis as to matters of form, and the lex domicilii as to matters known as essentials, i.e. simultaneous compliance with the rules of possibly two different legal systems."[237] Although this division remained in place, we noted above that the intensification of regulatory functions in cross-border marriage and family matters had transformed choice of law rules to the point of questioning the usefulness and coherence of the division between formal and substantial validity. Overriding norms multiplied between Cheshire's *Private International Law*, published in the 1920s, and his monograph on conflict of laws, published in the 1940s.

Accordingly, a marriage celebrated in England must be monogamous, regardless of the personal laws of the parties. When the ceremony takes place in England, the marriage must also respect the mandatory provisions of the Marriage Act 1929 (reformed in 1949) on minimum age[238] and those of the Marriage Act 1935 on the prohibited degrees of consanguinity.[239] As mentioned above, overriding mandatory provisions also regulated the celebration of polygamous unions, in England and abroad.[240] In consideration of such rules of absolute nature, Graveson agreed with Cheshire that no status could arise unless the law of the place of celebration, other than the law governing the essentials, had also been duly observed.[241] However, he also remarked that this made the division between formal and substantial aspects somehow superfluous, and led him to call for a more accurate articulation of the modern law of marriage.[242] He thus proposed that:

[237] Hence, the state regulates marriage in a more encompassing way. As the House of Lords argued in In Starkowski v. Attorney-General, "the courts of one country will not recognise the extraterritorial effect of a foreign statute on the status of a person not domiciled in, or the subject of, the legislating state," but that this principle " should be interpreted as referring to laws directly affecting status and distinct from those which deal with form and only have an indirect or consequential effect on status." [1954] A.C. 155 at p. 173, per Lord Tucker.

[238] Age of Marriage Act 1929 (then Marriage Act 1949, s. 2) rendering absolutely void any marriage in which one of the parties at the date of marriage is under sixteen. This section not only imposes a prohibition on a person under sixteen from contracting a valid marriage, but also prevents a person of full age domiciled in England from validly marrying another person under sixteen, even though by the personal law of the latter no prohibition or disability exists.

[239] "All marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever" Marriage Act 1835

[240] Pursuant to the idea that Private International Law protected social interest, reforms continued after the 1960s especially thanks to the initiatives of the Law Commission. Section 1 of the Nullity of Marriage Act 1971, as amended by section 4 of the Matrimonial Proceedings (Polygamous Marriages) Act 1972, provides that a marriage which takes place after the commencement of the Act (July 1, 1971) shall be void on the ground (inter alia): "In the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.

[241] Graveson, 'The Conflict of Laws', p. 231

[242] Ibid. p. 251

> In distinguishing between matters regarded as essential and those of pure formality we must … resort to a functional test, namely, what is the reason or purpose of a particular legal system in imposing any requirement for marriage? Applying this test, it will be found that whether or not any requirement of marriage is an essential or a formality depends on the degree of intensity of the public or social interest which it embodies and expresses.[243]

Instead of following a theoretical division between formal and essential matters, determining a priori laws should apply to each. Graveson argued that a 'functional test' should be introduced whereby those matters which are considered vital for the maintenance of social order would be classified as essential elements of the marriage, and thus governed by the personal law of the parties. In contrast, matters "of less vital social interest" will be considered as "pure formalities" and ought to be governed exclusively by the *lex loci celebrationis*.[244] Not much had changed in practice from the rules envisaged by Graveson's predecessors.[245] However, the redefinition of parameters in accordance with their social function was logical and perhaps inevitable in consideration of the re-orientation of conflict of laws towards public policy and social interest.

3.4 The Transformation of the International Law of Contract in the Social Age

Changes in law and in discourse are also visible in Graveson's account of the law governing cross-border contracts. In the social age, in commercial matters, debates concerned competence of the parties and choice of law rules governing contracts. Consistent with established doctrine and case law, Graveson argued that in principle the proper law test - in the sense of a qualified form of party autonomy - could regulate not only the effects of contracts but also competence of the parties[246] and formal validity.[247] Cheshire might be convinced that proper law extended over questions of

[243] Ibid.
[244] Ibid.
[245] In *Apt v. Apt* [1948] p. 83, the Court of Appeal, indicated that whether any particular requirement of marriage, such as the presence of both parties at the ceremony, was or was not an essential must be determined according to English law in its wider sense in the light of English public policy. About questions of classification, Graveson argued that "… so far as concerns marriages celebrated in England, English ideas of public policy prevail and the courts apply the process of classification generally according to the *lex fori*, that of England. In short, whether a particular requirement is an essential or a formality is decided according to English law when the marriage takes place in England, wherever the parties are domiciled".
[246] Significantly, also expressing some reservations, "Capacity to make a commercial contract depends (probably) on the law of the place of making of the contract." Graveson, 'The Conflict of Laws', p. 232
[247] As far as formal validity was concerned, the locus regit actum rule continued to apply. However, the law of the place of making a contract may not exclusively determine the validity of the form in those cases where the law of the place of making is different from the 'proper law' governing other aspects of the contract. Drawing on cases of cross-border marriage from the classical age, such as *Van Grutten v. Digby (1862)* 31 Beay. 561, Graveson argued that "there seems no reason why English courts should not allow an exception to the rule as to formal validity in favour of the proper law

competence, but Graveson had reservations which centred on the specific meaning given to proper law, i.e. if it stood for the intention of the parties or for a substantial connection.[248] The same doubts were also expressed in the context of choice of law rules, where the doctrine was much more alert to the risks of evasion of the law.[249] In choice of law, the trend towards the objectification of proper law noted above continued from the 1930s onwards.[250] Lord Denning thus remarked in *Boissevain v. Weil* that the proper law of the contract:

> …depends not so much on the place where it is made, nor even on the intention of the parties or on the place where it is to be performed, but on the place with which it has the most substantial connection.[251]

Although the opinion varied among judges - and even between decisions of the same judge - the judicial trend was evident.[252] In *Tzortzis v. Monark Line*, Lord Denning pointed out that "[i]t is clear that, if there is an express clause in a contract providing what the proper law is to be, that is conclusive in the absence of some public policy to the contrary."[253] In *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd*., some members of the House of Lords understood the test as "the law which the parties intend should govern its operation."[254] Lord Denning, sitting in the same court, pointed out that the proper law test meant "what is the system of law with which the transaction has the closest and most real connection."[255] Although there was some variation in *opinio juris*, in no case did respect for the expectations of the parties translate into an unrestricted choice. Courts delivering decisions towards the end of the social age expressed themselves as follows:

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of the contract, since they in fact determine the far more important facts of essential validity by that law." Graveson, 'The Conflict of Laws', p. 400

[248] "English courts will probably adhere to the general principle of locus regit actum in matters of capacity, subject to exceptions in non-commercial contracts and transfers of immovable property. There is juridical but no English judicial authority for referring the question to the proper law of the contract, but whether such a criterion is acceptable depends on whether one accepts a view of the proper law as governed by the intention of the parties or by factors of real connection." Graveson, 'The Conflict of Laws', p. 403

[249] What the proper law meant was widely debated in the literature. For an important comparative study of the time, see Lando, "The Proper Law of the Contract" (1964) Scandinavian Studies in Law, at pp. 107-201. See also Mann, " The Proper Law of the Contract," 3 Int.L.Q. 60; Morris, "The Proper Law of a Contract: a Reply," 3 Int.L.Q. 197. Yntema, Autonomy in Choice of Law" (1952) 1 Am. Journal of Comparative Law 341; Mann, "Proper Law and Illegality in Private International Law" 18 B.Y.B.LL. 9

[250] Direct authority for the application of the objective view of the proper law may be found in the unanimous decision of the Court of Appeal in The Torni. [1932], p. 78

[251] [1949] 1 K.B. 482, at p. 490

[252] Lord Denning, in a decision by the House of Lords, for instance, made the objective search for the proper law subject to the primary principle that, if an express clause existed in the contract by which the parties themselves had indicated their choice, this should be respected. *Tomkinson v. First Pennsylvania Banking and Trust Co*. [1961] A.C. 1007 at p. 1068

[253] And he added, "But where there is no express clause, it is a matter of inference from the circumstances of the case." [1968] 1 W.L.R. 406 at p. 411

[254] [1969] 1 W.L.R. 377 As per Widgery L.J

[255] Ibid. at pp. 380, 383

> Presumptions, once fashionable during the earlier development of English private international law, are now, whether for good or ill, out of fashion and rejected. That, indeed, is a necessary result of the adoption of the 'closest and most real connection' test.[256]

As we draw to the conclusion of the third part of this genealogy, it is possible to find evidence on the one hand of a progressive extension of the proper law test. Parties might acquire competence in accordance with local law. They could choose to submit themselves by express provision to a specific local law. They could include in the contract a provision establishing that disputes should be submitted to the courts of a certain country, or even an arbitration clause - a provision nominating an arbitrator and the body of laws that should be used for settling a possible dispute.[257] As Graveson remarked, even "the choice of arbitrators is clearly one of subjective intention."[258] This expansion of party autonomy became especially relevant in the following decades as the cheaper and more flexible procedures of arbitration courts were often preferred by contracting parties to state tribunals.

On the other hand, courts were progressively entrusted with the responsibility to verify that the chosen law corresponded to the law most closely connected to the parties or to the dispute. The process of objectification of the test translated into the gradual standardisation of various factors that courts should consider and weigh in evidence for determining what the proper law was, such as the place of contracting and the place of performance of a contract; the language in which the contract was written and terms of art used in the contract; the circumstances, the residence, nationality or domicile of the parties etc.[259] Evidence of this dual phenomenon is also visible in other jurisdictions, Italian law included. Courts were empowered in another sense, as they also had to verify that neither the contractual terms nor the chosen law were trumped by overriding mandatory provisions:

> The law of contracts is based broadly on a wide measure of liberty of the individual to make what agreements he pleases. While it can be said that principles are well settled as to what law governs the separate parts of the contract, full effect can only be given to the will of the parties by applying to the most important aspects of their agreement, such

[256] *Coast Lines Ltd. v. Hudig and Veder Chartering N.V.* [1972] 2 Q.B. 34. at p. 47, per Megaw L.J.
[257] In *Hamlyn v. Talisker Distillery*, the House of Lords upheld the validity of an arbitration clause providing for the appointment of English arbitrators in a contract made in Scotland where such a clause would have been void had the proper law been Scots. [1893] SLR 31 - 143
[258] Graveson, 'The Conflict of Laws', p. 417. In addition, referring to cases from the end of the 1960s and beginning of the 1970s, he also argued that the applicable law and the curial law should not necessarily be the same (at p. 604). *Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.* [1971] A.C. 572
[259] Discussed by Graveson, 'The Conflict of Laws', pp. 413-432

> as essential validity and discharge, a system of law that they themselves may have selected, known as the 'proper law.' [However,] contracts of all kinds are subject to certain overriding considerations of the law of the court…"[260]

A contract that was made in due form by parties who were competent did not necessarily produce effects in English law. Graveson pointed out that the purpose or contents of the contract could be illegal under English law when English law coincided with the *lex loci solutionis*.[261] Alternatively, the chosen law might be contrary to public policy.[262] Courts would also have to be alert to the possibility that the selection of a foreign law might have been to evade the *lex fori*.[263] The contract or the choice of law might also be vitiated by its purpose or contents etc. Consistent with the rise of the Social, regardless of the retention of the 'multilateral method', mandatory laws and result-oriented provisions had been introduced to protect state interest and public policies in private and economic sectors, something which would have been inconceivable in the classical age.[264]

Graveson did not merely take account of the positive law, but also engaged in an examination of the development of conflict rules in relation to changing contemporary mentality. This led him to consider the question of how to reconcile the proliferation of overriding mandatory considerations in the market sector with 'traditional' private international law. This question had not been addressed by the specialised literature. The existence of overriding provisions had already been noted by Dicey in the context of the introduction of the Workmen's Compensation Act. Dicey had then advanced the claim that, as far as employment matters were concerned, rights that had been exclusively governed by contractual freedoms were governed by 'status'. The proliferation of 'status-like' protection in

[260] Ibid. p. 400

[261] In general, echoing the claim also advanced by Cheshire and others, Graveson argued that in English law "the scope of public policy is narrow; in Continental systems generally, its application is considerably wider." Ibid p. 163. However, Graveson also specified, "It is conceded that to some extent the difference may be one of words in the sense that English courts talk less of public policy than Continental courts. "Beyond its specific rules for dealing with normal cases in the conflict of laws, however, every developed legal system reserves to itself an ultimate residue of power and discretion which it exercises, when necessary, on the basis of its concepts of justice, public policy and international comity. The major difference of various legal systems in this respect lies not so much in kind as in degree." Ibid. For a discussion of public policy and its relevance for the English conflict of laws published in the mid-20th century, see Kahn-Freund, 'Reflections on Public Policy in the English Conflict of Laws' 39 Grotius Society Transactions (1953), 39. See also, by Graveson, his comparative study, including on public policy matters, 'Comparative Aspects of the General Principles of Private International Law' 2 Recueil des Cours (1963), especially Chapter 3

[262] Lord Justice Scarman, for example: " It follows that, since I must apply German substantive law as the law of the domicile, the English doctrine need not, in terms, be considered. It is not, however, to be thought that blind adherence to foreign law can ever be required of an English court. Whether the point be described in the language of public policy, 'discretion,' or ` the conscience of the court,' an English court will refuse to apply a law which outrages its sense of justice or decency. But before it exercises such power it must consider the relevant foreign law as a whole." In *Re Estate of Fuld* (No. 3) [1968] p. 67

[263] Although there was no general doctrine of evasion of the law in England, and the choice of law was presumed bona fide and legal until the contrary was shown. Graveson, 'The Conflict of Laws', pp. 411-412; also Ibid p. 174

[264] Graveson discussed of Dicey and the contemporary mode of legal thought in *Lectures on the Conflict of Law and International Contracts* (1951).

(cross-border and internal private and economic matters will be a distinctive feature of the next intellectual and institutional period. Graveson was among the earliest to comment on the significance of this incipient paradigm shift.

3.5 From Status to Contract, from Contract to Status?

In *The Movement from Status to Contract*, which he published in 1941, Graveson pinned down what he considered the two distinctive legal processes of his period.[265] On the one hand, he argued that "the movement in domestic status is away from dependence on the head of the family …towards full individual legal capacity".[266] On the other, he rejected the claim advanced by Henry Maine - discussed in Chapter 5, section 3.2 - that - insofar as ordinary interpersonal relations, capacity, rights and duties were no longer determined as in 'ancient societies' by a person's belonging to a certain class, or by law in consequence of his position in society - private and economic relations had become exclusively dependent on the will of the parties.[267]

Graveson noted that jurists and legal historians had a tendency to read back into legal history evidence of the presence of legal ideals, such as free will and status, and, at the same time, to deny those contradictory elements that made that story, or the account of contemporary law, incoherent. Starting from the symbiotic relation between free will and ancient Roman law celebrated by Maine, Graveson pointed out that Maine's account "is a theory out of accord with the facts. [Free will] is a doctrine of Savigny, not of Justinian."[268] As well as advancing a theory which was historically inaccurate or conceptually anachronistic, Maine turned out to be no legal prophet because he had failed to anticipate in his evolutionary account of the law of civilised society the return of status in what were considered purely private and economic relations.

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[265]R. H. Graveson, 'The Mvement from Status to Contract' *Modern Law Review*, 1941, Compare with Roscoe Pound, Survey of Social Interests, 57 *Harv. L. Rev.* 1, 9 (1943) ("[I]n rural, pioneer, agricultural America there was no call to limit the contracts a laborer might make as to taking his pay in goods. To have imposed a limitation would have interfered with individual freedom of industry and contract without corresponding gain in securing some other interest. On the other hand, in industrial America of the end of the nineteenth century, a regime of unlimited free contract between employer and employee in certain enterprises led not to conservation but to destruction of values. . . . Hence we began to put limits to liberty of contract between employer and employee.").

[266] Graveson, 'The Movement', pp. 266-267

[267] Ibid. p. 261

[268] Ibid. p. 262. In the article, Graveson stresses the common origin between status and land rights. "Status in the Common law, moreover, has a wider basis than the family: its basis is in part the family, but to a far wider extend it lies in estates and tenure of land…" Ibid.

Graveson observed that states intervened more and more frequently to set limits to contractual abuse by employers in contracts of employment,[269] but also to fix in law basic remuneration thresholds for persons employed in the farming sector,[270]and introduced various regulatory frameworks governing working,[271] unemployment,[272] and health insurance schemes.[273] The multiplication of policy-oriented provisions and mandatory rules fragmented the once coherent and widely encompassing category of 'contract law'.[274] This was a notable phenomenon already observed in civil law countries. What is more the frequency and motivation of public intervention "has given rise to a new type of personal legal condition which bears many of the features of a status" in sectors which were deliberately and ideologically excluded from classical legal thought from regulatory provisions by the state.[275] Graveson thus spoke of a transformation of 'legal conceptions':

> Through the recognition by the legislature and judiciary of the modern purpose of law as the regulation of and active participation in social control and industrial and commercial organisation, a movement from contract to status has become apparent. The aim of law throughout the greater part of the nineteenth century was to secure individual rights of property and to give effect to the freest expression of the will in contractual undertakings. The law stood by as umpire or referee to state the rules of the game of civilised life, to see that the game was played according to those rules and, when disputes arose, to intervene neither on one side nor the other. This century has seen the early growth of a different conception of law; a conception in which law is gradually, and in England slowly, changing its purpose from the upholding of an abstract autonomy of the will and a concrete securing of gains and acquisitions to an active social and public concern in the protection from exploitation of the economically weaker members of society.[276]

[269]Inter alia: Coal Mines (Minimum Wage) Act 1912, Factories Act, 1937; Young Persons (Employment) Act, 1938. See *McCarthy v. Penrikyber Navigation Colliery Co.* [1938] 107 L.J.K.B

[270] By various marketing schemes, e.g. of milk, potatoes, pigs and fish. The latest one when Graveson wrote the article, passed in June, 1940, fixed the minimum rate of 48s. a week as the wages of all male agricultural labourers.

[271] Workmen's Compensation Acts, 1897 to 1925

[272] Unemployment Insurance Acts, 1919-1940; National Insuxance Act, 1911

[273] Old Age Pensions Act, 1919

[274] The definition of contractual relations extended as far as marriage and business companies. Contractual relations included employment relations, the sale of private property but also the provision of public services by governments to their citizens. As High Collins has argued, "[t]he [19th century] category of contract law threatened to subject nearly every kind of social and economic relation to its logic." And he added that "The empire of the law of contract expanded in tandem with what Marx decried as the commodification of social life." Hugh Collins, the Law of Contract, Third Edition, p. 4

[275] Graveson, 'The Movement', p. 267

[276] Ibid. pp. 268-269

Graveson thus evoked the possibility that the proliferation of status-like protection under the social conception of law brought about a movement in economic relations opposite to that anticipated by Maine, one that went from contract to status. Following Dicey's intuition, Contract lawyers in the 1920s and 1930s already noted that the trend was "to withdraw the matter more and more from the domain of contract into that of status…".[277] Reversing the simplistic reconstruction traced by Maine, Graveson held that "an ever-increasing state regulation of industrial [and commercial] undertakings is resulting in the relation of master and man becoming largely one of status."[278] According to the new conception, society had a stake in economic relations. Public policy and social considerations would determine which and to what extent certain matters were for contract or for 'status' instead.[279]

Graveson did not use status as a technical legal concept or as a perfect replica for 'domestic status'. In the case of commercial or labour relations, he noted that employers and employees "can voluntarily enter into and terminate their relationship, and on the duration of their agreement depends the life of their special status."[280] These were 'voluntary relations'. Hence, theirs could not correspond to a full status, since a "characteristic feature of true status is its legally imposed condition which cannot be got rid of at the mere will of the parties without the interposition of some agent of the State, administrative, legislative or judicial."[281] Parties to an employment contract, to an insurance scheme, or consumers could relinquish their special condition out of their own volition. Although their position fell short of status in the traditional sense, status was an appropriate title for this special condition because of the public and social interest inherent in the concept and because of the manifest differences with a purely contractual relation.[282] In 1941, Graveson concluded:

> The movement towards the socialisation [of the law] which has been noted is yet in its early stages. Its manifestations will be more apparent and of infinitely wider scope in the years after the present war … . Every indication is of an increasing emphasis on status. Maine believed that the movement from status to contract was characteristic of progressive societies. The further movement from contract to status may characterise a

[277] Salmond and Winfield, Law of Contracts (1927), p. 12, cited by Graveson, Graveson, 'The Movement', p. 269 Graveson noted a growth of standard contracts (as in Prausnitz, Standardisation of Cmmercial Contracts (1937). As he put it: "A corresponding tendency of the age is towards the standardisation (forgive the word) of commercial contracts, so that if one wishes, for example, to buy a railway ticket, to obtain goods on hire purchase or to take a lease of a modem flat, one's liberty of contract is restricted to a simple choice of unqualified acceptance of all the usual terms or of complete failure to obtain the ticket, goods or flat, as the case may be." Graveson, 'The Movement', p. 269
[278] Ibid.
[279] Ibid.
[280] Ibid
[281] Ibid. p. 270
[282] Ibid. p. 268. It made sense to refer to this special condition as status because "it is so different from a purely contractual relation … at least to merit the description of legal condition in the nature of a status." Ibid. p. 270

> … a movement to a plane of legal progress higher than Maine conceived. The history and spirit of the […] law give every assurance that [this possibility] embodies the future of our legal system.[283]

Although Cicu had already noted this in the context of family relations and necessary communities, Graveson pointed out that status could not be considered a trademark of ancient and traditional societies. On the contrary, it ought to be seen as a sign of legal civilisation. Graveson's evolutionary account, ironically expressed in a prophetic tone, lent weight to his conviction that societies would progress according to a movement antithetical to the one anticipated by Maine. In the following decades, Graveson's prediction turned out to be well-founded. Standard form contracts or '*contrats d'adhésion*' multiplied in a variety of economic sectors.[284] Policy-oriented rules and mandatory provisions also proliferated. Both these developments carried cross-border dimensions, raised unprecedented questions and suggested a trend in conflict of laws.[285] So, three decades after publishing *The Movement*, Graveson remarked:

> Except in matters of domestic status …, the conflict of laws is a body of predominantly private law. [Yet] in those cases where the private interests of the parties directly affect the public or social interests of the country in which such parties seek either to carry out or to enforce their private transactions, that the courts must apply overriding rules of internal law to protect interests which they consider of greater importance than those of the parties themselves. [For instance, the] Contracts of Employment Act 1963, which established certain conditions of employment such as minimum periods of notice, provided also that … the Act should apply 'whatever the law governing the contract between the employer and the employee.' Such overriding considerations of English law are concerned with the security and welfare of the state internally and internationally, and include the avoidance or non-enforcement of transactions that are contrary either to public policy or broad conceptions of justice and morality.[286]

As he had anticipated, the end of the war and the intensification of cross-border exchanges intensified the need for 'status-like' protections. Standard terms contracts and mandatory provisions proliferated side by side with the social concerns brought about by growing exchanges in the international market.

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[283] Ibid. p. 272
[284] Ehrenzweig, Albert A. "Adhesion Contracts in the Conflict of Laws." *Colum L. Rev*. (1953)
[285] Should contrats d'adhésion in which the element of mutual consent is negligible be regarded as contracts, and thus subject to conflict rules applicable to ordinary contracts? Should the same rules apply even if only "by a fiction of English law [they] are regarded as contracts"? Speaking of judgement debts, Graveson, 'The Conflict of Laws', p. 400
[286] Ibid. p. 164

In general, it could be said that in ordinary contracts, such as those between employer and employees, for the sale and purchase of land or goods, loans, insurance or agreements for personal services, individuals were free to opt in or out of specific legal regimes by means of principles such as the proper law. However, Graveson also noted that with a variety of relations with cross-border dimensions that once would have fallen under 'contractual principles', such as employment or those of producers and consumers, "it has been found necessary in the interests of protecting consumers to introduce into the law of all parts of the United Kingdom limitations on the free choice of a governing law".[287]

This suggested an epochal change. Although mandatory provisions had been introduced in the whole field of private international law, Graveson noted that "it is in contracts that the need chiefly arises to invoke them."[288] Accordingly, after the end of the war and the creation of the European market, the UK Parliament introduced further legislation that limited the preferences of individuals in cross-border scenarios. These measures were held justifiable in consideration of the protection needed by specific categories of persons against the higher risks of abuse in the European and international market.[289] This suggested the completion of the process whereby, in economic matters, social interest was put on a par with individual interest. It also anticipated that this trend would gain momentum as the European market integration continued.[290]

4. The Renovated International Spirit and the new Transformation of Conflict of Laws

As we approach the end of the social age, the principles and logic governing family and market relations in both their internal and cross-border dimensions were in a sense converging in the law and in the discourse. Between the 1950s and 1960s, we also notice another significant development in the conflicts literature which would intensify in the following decades. Private International Law was still described by Graveson and English specialists as a branch of the law of England.[291] However, the destructive social and historical forces which resulted in the two world wars had also cast a long shadow of doubt and resentment across legal nationalism, in all its forms and shapes. After 1945, the

[287] Speaking of in contracts for the sale of goods. The Supply of Goods (Implied Terms) Act 1973 contains two provisions specifically designated as conflict of laws. Section 5 (1) adds a new section 55A to the Sale of Goods Act 1893 is directed against an unreal choice of an otherwise irrelevant law which might prejudice the consumer in purely local transactions. Ibid. p. 401

[288] Ibid. p. 164

[289] See before the The Supply of Goods (Implied Terms) Act 1973

[290] English courts may have felt inclined to restrict as much as possible the scope of mandatory provisions in past ages, but it was clear that "[w]ithin the scope of their operation these overriding considerations are decisive." Graveson, 'The Conflict of Laws', p. 164

[291] As late as Private international law is a "branch of English law" in L Collins (ed) 'Dicey and Morris on The Conflict of Laws' (13th edn Sweet & Maxwell London 2000) (henceforth Dicey and Morris (2000)

discipline experiences a gradual renovation of the spirit of internationalism that had been abandoned at the outset of the social age. Conflict rules varied from place to place. However, experts emphasised once again that there was uniformity at a deeper conceptual or philosophical level.

Hence, Ben Atkinson Wortley argued that, although private international law was part of the internal order of every sovereign state, European systems all pursued a conception of justice inspired by the Western Christian legal tradition.[292] Others did not limit this assertion to countries bound together by the same religious or cultural traditions and noted in law and in discourse a shift whereby "the principle of the comity of nations is enlarged to cover all peoples."[293] This was a significant change. Compared to scholars in the previous decades who took every occasion to specify that the title of the discipline was inappropriate due to its plain domestic character, in a later edition of his *Conflict of Laws*, Graveson pointed out that the subject had undoubtedly a clear "international character".[294] He argued that there was "a good deal of common ground" between international law and conflict of laws, first in their historical origins and second in some of their fundamental underlying principles, among which comity and sovereignty.[295] He emphasised that:

> The philosophy of English private international law, we would submit, lies in the creation and application of a branch of English law, largely derived from and continuously influenced by principles of international law, for the achievement of just and convenient solutions in the context of international society.[296]

Although private international law is a branch of English law, Graveson is here suggesting that it does not develop in accordance with a time-specific and context-specific conception of justice, as he emphasised in the earliest editions of *The Conflict of Laws*. The restored internationalism was not merely a fancy of a few authors. In the 1950s and 1960s, there was a proliferation of organisations and efforts to bring about uniformity or harmony in private law.[297]A renovated sentiment of internationalism convinced the United Kingdom to join The Hague Conference of Private

[292] "The judicial technique varies from place to place, but there is considerable uniformity in results where [the judges] deliberately try to do justice within the framework of the Western Christian legal tradition.", in Wortley, Ben Atkinson, 'The General Principles of Private Internatonal Law from the English Standpoint', Recueil des Cours de l'Académie de la Haye, RCADI, 1947, p. 21.
[293] "The law and the lawyers are groping towards a more flexible system in which nation, domicile and religion have their fair recognition in matters of personal status, and the principle of the comity of nations is enlarged to cover all peoples." Norman Bentwich, Recent Developments of the Principle of Domicile in English Law, 1955, RCADI, p. 188
[294] Graveson, 'The Conflict of Laws', p. 3
[295] Ibid. p. 6
[296] Graveson, 'Philosophical Aspects', p. 50
[297] For instance, the UNIDROIT which produced Conventions of 1964 relating to a Uniform Law.on the International Sale of Goods; and relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods in the years immediately after WW2.

International Law in 1956.[298] Hence, after the 1960s, there was a general movement towards recognition of the value of harmonisation that, merely a few years before, would have been utterly unconceivable. The most notable manifestation of this restored internationalist faith was the accession of the UK to the European Community in 1972.[299]

Pursuant to the goal of eliminating obstacles to international commerce originating in national dispositions, members of the EC joined their efforts to harmonise conflict rules governing jurisdiction and recognition of foreign judgements.[300] These harmonisation efforts were initially limited to bringing a degree of harmony in economic matters by means of international conventions negotiated by governments with full autonomy.[301] Despite the limited scope of the earliest conventions, this process raised unprecedented questions, whose latitude and magnitude were no doubt enlarged by an enduring shadow of suspicion cast by social private international law over internationalism in all European jurisdictions. However, conflict of laws was exiting its niche and, given the increasing internationalisation of social life, the character and functions of private international law were inevitably to be discussed once again. It was thus clear to Graveson and his contemporaries that "the present time is not simply one of problems, but of exciting change".[302]

[298] The first Conferences were those of 1951, 1956 and 1960 and in 1961 the UK ratified the first convention on the Legalisaiton of Documents. Graveson, like other European jurists, felt that the harmonisation of conflict rules was especially useful in those fields, like family law, which were less susceptible of unification compared to others, like commercial law. The unification of conflict rules of various systems within the context of the activities of intergovernmental organisations such as The Hague Conference was "simpler because it leaves untouched the sensitive branches of internal law and it seeks to realise more effectively the international function of the conflict of laws." Graveson, 'The Conflict of Laws', p. 21 See also Graveson, The Unification of Private International Law (1962) Report of the International Law Conference (David Davies Institute). Graveson felt that the English conflict tradition could not be reconciled with Continental doctrines and ideas without considerable sacrifices of autochthonous principles, especially in matters of personal law and personal status."It is probably in questions of domestic status, involving the personal law, that harmonisation generally is most difficult. While the majority of European countries govern such status by the national law of the parties, England and all other common law countries traditionally decide questions of status according to the law of domicile (though with increasing exceptions in favour of habitual residence), since there is no law of nationality as a single system applicable to all British subjects." Graveson, 'The Conflict of Laws', p. 21-22

[299] "English private international law can now justly claim an international appreciation of the subject. This aspect is reinforced by the accession of the United Kingdom to the European Economic Community and the consequent obligation to negotiate Conventions on various topics relevant to the conflict of laws…" Preface to the edition of 1974, p. Vii

[300] Neither the Treaty of Rome nor the following Single European Act contained any explicit reference to judicial cooperation with regard to cross-border disputes. However, Article 220 of the EC Treaty invited member states to simplify the formalities governing the recognition and enforcement of judgments of other MS' courts and tribunals. In the 1960s, European governments commenced negotiations which aspired to the establishment of a common 'European judicial area'. Discussed in the next chapter.

[301] The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of September 27, 1968. Discussed by Graveson, 'Conflict of Laws', p. 25

[302] Discussed by Graveson, 'Conflict of Laws', p. viii

Part IV

The Age of Conflicting Considerations

Chapter 9

The Conflict Transformation in the Age of Conflicting Considerations

The last part of this study examines developments taking place in European conflict of laws, in the context of what Duncan Kennedy and Janet Halley have described as the fundamental traits of an incipient dominant consciousness.[1] The contemporary mentality is not dominated by one single integrating concept, as it was in the classical and social ages.[2] In the contemporary age, there is no longer one absolute or axiomatic conception of law. Legal scholars can neither commit to coherently arranged and logically ordered systems nor to the imposition of consistent policy objectives. The dominant consciousness appears to be split between 'conflicting considerations', by the "unsynthesized coexistence of transformed elements of C[lassical]L[egal]T[thought] with transformed elements of the social".[3] Legal thought in the contemporary age results from "the contingent outcomes of hundreds of confrontations of the social with CLT".[4]

The boundaries, methods, principles and functions of private international appear to be going through an epochal transformation. Some consider recent developments as evidence of a methodological revolution comparable to the one that took place in the U.S. at the beginning of the 20th century. The revolutionary thesis is based on the claim that there is a return to unilateralism in European conflict of laws. Others have contested this claim by arguing that the current redefinition of private international law cannot be defined as a revolution because it is organised and implemented at supranational level. They have thus advanced the argument that what we are witnessing is an evolutionary process.[5] Having explored how the decline and rise of modes of legal thought resulted in a redefinition of the character, principles and functions of conflict of laws in previous institutional-legal ages, the final part of this study aims to show that we are currently witnessing, not a revolution or an evolution, but another transformation.

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[1] Examined by Kennedy, 'Three Globalizations', pp. 63-71; Halley, 'Family Law', pp. 248-293

[2] Legal scholars have not been able (yet) to produce an abstract synthesis of the legal organisation of society which is as encompassing as those constructed in previous intellectual ages. According to Kennedy, "What there is not is a new way of conceiving the legal organization of society, a new conception at the same level of abstraction as CLT or the social." Kennedy, 'Three Globalizations', p. 63

[3] "I would describe the structure of the consciousness globalized after 1945 as the unsynthetized coexistence of transformed elements of CLT with transformed elements of the social." Kennedy. Ibid. p. 63. Drawing inspiration from Kennedy, Halley has argued that the current age is primarily characterised by the pragmatic balancing of conflicting consideration. Halley: 'Family Law', p. 191

[4] Kennedy, 'Three Globalizations', p. 64

[5] See Introduction.

Evidence of the beginning of this transformation was noted as early as the 1940s and 1950s. In that period, the ideas and assumptions that had led to the rise of social conflict of laws were weakened by institutional changes and by the dawn of a new institutional and cultural climate. Since the post-war period, various international and regional conventions for the protection of human rights have entered into force. Bodies of supranational laws, such as the *lex mercatoria*, were re-created or re-imagined.[6] Scholars reported the progressive 'transnationalisation' of law sources, with the proliferation of norms and orders that transcend national frontiers and undermine conventional categories.[7] However, the renaissance of internationalism took a new shape. If the universal and natural order constituted the overarching framework in the medieval age, the international order in the classical age and inter-state obligations in the social age, since the 1950s and 1960s scholars reported the rise of a 'global' and 'transnational' order.[8]

The gradual abandonment of the social emphasis on national interest and state sovereignty resulted in the multiplication of international and regional conventions, as in the case of those entered by members of the European Community, aiming at harmonising conflict principles. These developments would have been unthinkable in the social age. The restored faith in supranationalism, which we noted already in Chapter 8, indicates that the cosmopolitan conception of conflict of laws - one of the most illustrious characteristics of classical private international law - has been penetrating the legal consciousness since the post-war period. Looking at global developments, conflict experts have therefore reported a rapprochement between public and private international law under what they have labelled 'world law' or, symbolically and evocatively, the new *jus gentium*.[9] At the same time, however, contemporary private international law displays characteristics in common with social conflict of laws.

[6] At the same time, some legal writers have begun to explore the possibility of once again resolving multistate problems in a supranational fashion, and there is talk about an emerging new lex mercatoria326generally Kahn, Philippe. *La vente commerciale internationale*. Vol. 4. Sirey, 1961; Langen, Eugen. *Transnational Commercial Law*. AW Sijthoff, 1973; Goldman, Berthold. "La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives." *Travaux du comite francais de droit international prive* 2.1977 (1980) ; Goldstajn, A. "The New Law Merchant," *Journal of Business Law* (1961) ; Schmitthoff, 'The Unification'

[7] Jessup, Philip Caryl. *Transnational law*. Yale University Press, 1956

[8] See A Garapon, 'Le global et l'universel', Centre Perelman, Université Libre de Bruxelles, Séminaire de philosophie du Droit, March 2010

[9] Berman, Harold J. "The historical foundations of law." *Emory LJ*54 (2005), p. 13, pp. 21-22: "The growing body of world law includes not only public international law, that is, the law created by nationstates in their relationships with each other, including the law governing the United Nations and its subordinate intergovernmental organizations, but also the enormous body of contractual and customary legal norms that govern relations among persons and enterprises engaged in voluntary activities that cross national boundaries. World law is a new name for what was once called ius gentium, the law of nations, embracing common features of the various legal systems of the peoples of the world." pp. 21-22

As predicted by Ronald Graveson, the intensification of cross-border exchanges resulted in the proliferation of overriding mandatory provisions and result-oriented conflict rules for protecting the essential economic and social structures of states. The transnationalisation of sources of private international law rules intensified this trend towards social considerations. Restricted to family matters in the classical and social ages, however, imperative norms and policy-oriented rules have expanded to contractual and economic matters. As seen in the previous chapter, the scholarship interpreted as status-like frameworks the proliferation of legal protections addressing specific categories of individuals who might be vulnerable to market processes, such as national workers and consumers.[10] The movement towards regulation in the market suggest that rationales and ideas traditionally associated with specific social fields have mixed. Consistent with Kennedy's intuition, elements of social and classical legal thought co-exist and interact in unorthodox ways in the contemporary institutional and intellectual age.

The last part of this thesis examines the ongoing redefinition of the character, boundaries and functions of private international law against a background characterised by what appears to be an uncomfortable co-existence between elements of the classical and of social conflict of laws. In contrast with past intellectual and institutional ages, the crisis denounced by experts in the beginning of the contemporary age has not found in the incipient consciousness a set of clear ideas from where to begin a coherent reconstruction of the discipline (section 1.1). Given its heterogenous components, the transformation of European private international law that began in the 1950s and 1960s point to the redefinition of conflict of laws as a mechanism for mediating between conflicting normative visions and substantial considerations (s. 1.2). In this context, the internationalisation of sources and, specifically, the 'Europeanisation' of conflict rules and principles does not seem to respond to a methodological revolution, but to the need of managing effectively the conflicting social and economic interests, concerns, values, and goals that come to the fore at transnational level (s. 1.3).

The limited success and scope of international conventions dealing with cross-border family matters in the last decades of the 20th century suggested to experts that family regulation and economic regulation would continue to follow distinct paths, the former protecting social cohesion, the latter enabling cross-border exchanges, although not at the cost of undermining social structures and national interest (s. 2.1). However, changes in Italian and English family law generated by human rights protections since the 1960s and 1970s led to the gradual rejection of the 'traditional' - read

[10] For Graveson, ('The movement', 1941), the frequency, nature and motivation of this intervention "has given rise to a new type of personal legal condition which bears many of the features of a status" in sectors which were deliberately and ideologically excluded from Classical Legal thought. Reference to previous chapter.

classical and social - family model and to the progressive deregulation of family matters, a process that some lawyers started suggesting might lead to the privatisation of family law (ss. 2.2-4). Given the persistent lack of supranational harmonisation, national developments in private international law of the family were focused on finding an alternative to the *lex domicilii* and the *lex patriae* (ss. 3.1-4). The search for alternative commutive factors was not without significance since experts and courts adopted some which were borrowed from conflict rules governing cross-border market relations.

Considered at systemic level, trends brought to light in chapter 9 indicate a process of greater regulation of cross-border economic relations and progressive de-regulation of family relations, an antithesis which anticipates the 'family anomaly' examined in Chapter 10. These two chapters therefore indicate that current developments in European private international law are part of a complex process of redefinition of its character and boundaries that began in the 1950s and 1960s and are reflected the emergence of 'conflicting considerations'. Compared to previous transformations, the ongoing redefinition of European conflict of laws is uncertain and ambiguous because it responds not only to the renaissance but also to the uncomfortable co-existence of classical and social ideas. The ongoing transformation is part of an unfinished project. The story in this last part is also more about systemic changes and less about individual contributions from experts and judicial authorities. It is less heroic and more corporate compared to previous transformations. And yet, as in previous intellectual and institutional ages, the law governing cross-border relations remains an indispensable *instrumentum regni* which is reconfigured by the decline and rise of dominant modes of thought.

1.1 The Crisis of Private International Law in the Contemporary Age

In private international law and discourse, the confrontation, co-existence and multiplication of the entanglements between classical consciousness and social legal thought also take the form of methodological twists and methodological incoherence. The involvement of state institutions in the economy takes the shape of 'unilateral rules' and is regarded by some as evidence of the return to unilateralism. As Pillet had petitioned and Quadri had postulated, private international law was bound to shift towards interest-analysis and social policy considerations. At the same time, the multilateral method has not been replaced by a neo-Statutist method as in the U.S.[11] Although one could therefore

[11] In the previous chapters, I have noted how the earliest proposals to overcome the rigidity of the classical approach, either through exceptions or through a return to 'Statutism', had come from European lawyers. See G. Paulsen and M.I. Sovern, 'Public Policy in the Conflict of Laws', 56 *Columbia Law Review* (1956) pp. 969-1016. The American conflict of laws revolution is generally identified by the scholarship with the 'governmental interest analysis' of Brainerd Currie,

argue that the impact on legislation of the proposals advanced by Quadri and other 'unilateralists' has been negligible, their calls for a paradigm shift has opened the eyes of the scholarship to the growth of overriding mandatory provisions that occurred in the 1950s and 1960s.[12]

Since that period, the growth of special clauses protecting public policy suggested a trend towards the rise of a regulatory model of the economy.[13] Unlike the previous ages, in the contemporary age, overriding mandatory norms and result-oriented rules are no longer considered exceptional. They are widely considered an intrinsic characteristic of contemporary conflict of laws.[14] Social policy considerations underlay the contemporary conflict method.[15] Far from being universally hailed as a positive trend, since the 1960s, these 'upsetting' developments were denounced by the defenders of 'traditional' approaches because they constituted "a serious threat to the universalist ideals still cherished."[16] Derogations from the multilateral method contaminated it, thus undermining established understandings of the nature and functions of private international law. Using a rhetorical move which also used in the transition from the classical to the social age, experts thus denounced that the "progress of academic scholarship in the field […] was leading to a weakening of its fundamentals" and to a new crisis of private international law.[17]

Against a background characterised by profound methodological uncertainty - an uncertainty that I understand as the uncomfortable co-existence of fragments of the classical consciousness and elements of social legal thought - experts started interrogating themselves about the meaning of

David Cavers and his 'principles of preference', Robert Leflar and his 'choice-influencing considerations', William Baxter's 'comparative impairment approach' but also proposals by Albert Ehrenzweig and Arthur von Mehren, among others. In fact, not even in the U.S. was the allocation method entirely replaced, but merely complemented by these proposals which essentially all boiled down to consideration of the contents and purpose of the rules which could be eligible for application.On the American 'conflicts revolution' see Juenger, 'General course', pp. 88 et seq; S.C. Symeonides, 'The American Conflicts Revolution in the Courts: Today and Tomorrow', 298 *Recueil des Cours* (2002)

[12] One of the most forceful advocates of unilateralism was the Russian exile Pilenko, Al. "Le Droit spatial et le droit international privé dans le projet du nouveau code civil français." *RHDI* 6 (1953), pp. 319-355; *idem*, 'Droit spatial et droit international privé', *Jus Gentium* (1954) pp. 35-59. See P. Gothot, 'Le renouveau de la tendance unilatéraliste en droit international privé', *Revue critique de droit international privé* (1971) pp. 19 et seq.

[13] Bureau, Dominique and Muir-Watt, Horatia, *Droit international privé* 2007: on the interwar period in Germany, with the invention of "special clauses of public policy" and the rise of public economic regulation in Europe, such as exchange controls (see also for this history Francescakis, Phocion. "Quelques précisions sur les «lois d'application immédiate» et leurs rapports avec les règles de conflits de lois." *Revue critique de droit international privé* (1966)

[14] Models that were considered antithetical have started to converge (Pierre Mayer, Droit international privé, 6th ed., Paris 1998, pp. 46-47 speaking about the re-approach between American and European method). In fact, as I have argued, the difference was merely one of tone and emphasis, rather than a radical methodological one. See especially, Symeonides, Symeon C. The American conflicts revolution: a macro view. *RCADI*, 2002. See also, on a level of legal technique see the analysis by Muir-Watt of the provisions of Rome II on loi de police, which opens this methodology outside the scope of party choice (see on all these methodological points: Bureau, Dominique and Muir-Watt, Horatia, *Droit international privé*, 2007

[15] See Bucher, Andreas. L'ordre public et le but social des lois en droit international privé. Martinus Nijhoff, 1993

[16] Th.M. de Boer, 'Living Apart Together', p. 17

[17] Kegel, Gerhard. *The crisis of conflict of laws*. Martinus Nijhoff, 1964, p. 95

justice in private international law. They also asked themselves how to achieve what they considered the fundamental goals of conflict of laws, against a background characterised by the hybridisation of conflict methods. Gerhard Kegel (1912-2006) famously advanced the thesis according to which private international law should not strive to protect a 'substantive form' of justice, and he called for a return to a 'conflict-justice' model.[18] If conflict-justice reflects the classical approach whereas substantive justice embodies the social ideal and, at the same time, conflicting considerations makes classical and social approaches irreconcilable, we can understand why, in the contemporary age, experts are unable to give preference to either. Each has its own virtues. Each requires distinct techniques, judicial and legislative. Discussing certainty and justice, Paul Neuhaus defined that:

> One is the public interest in clear, equal, and foreseeable rules of law which enable those who are subject to them to order their behavior in such a manner as to avoid legal conflict or to make clear predictions of their chances in litigation. The other is the need for deciding current, concrete disputes adequately, by giving due weight to the special and perhaps unique circumstances of each case. The former aspect calls for legislation, the latter for judicial decision.[19]

In the contemporary age, certainty and justice, conflict and substantive justice, have equal value. Each calls for a different technique. In this context, the law and the discourse turned to the objective of creating techniques and principles for balancing and administering the variety of interests, often conflicting among themselves, that characterise contemporary society.[20] Since different concerns and interests generated different approaches, 'methodological uncertainty' became one of the dominant themes in the doctrine. Many experts were incapable of reconciling established ideas with the lack of methodological clarity. Henri Batiffol (1905-1989) pointed out that there was a plurality of methods, and that these methods were doomed to conflict with each other.[21] To these claims, others responded

[18] The thesis that conflicts law is only concerned with 'conflicts justice' (*internationalprivatrechtliche Gerechtigkeit*), not with 'substantive justice' (*materiellrechtliche Gerechtigkeit*), was originally defended by G. Kegel, 'Begriffs- und Interessenjurisprudenz im internationalen Privatrecht', in *Festschrift Hans Lewald* (Verlag Helbing & Lichtenhahn 1953) pp. 259-288; *idem*, 'The Crisis of Conflict of Laws', pp. 955-266; G. Kegel and K. Schurig, *Internationales Privatrecht, Ein Studienbuch*, 9. Aufl. (C.H. Beck 2004) pp. 131 et seq. Cf. Juenger, 'General Course', pp. 69 et seq. ; S.C. Symeonides, S.C., Material Justice and Conflicts Justice in Choice of Law, in P.J. Borchers and J. Zekoll, eds., *International Conflict of Laws for the Third Millennium, Essays in Honor of Friedrich K. Juenger* (Transnational Publishers Inc. 2001) pp. 125-140. K. Zweigert, 'Some Reflections on the Sociological Dimensions of Private International Law or What Is Justice in Conflict of Laws', *University of Colorado Law Review*, 44,1973 .

[19] In P. H. Neuhaus, 'Legal Certainty Versus Equity In The Conflict Of Laws', Law and Contemporary Problems, 28, 1963

[20] Schlag, Pierre. "The aesthetics of American law." Harv. L. Rev. 115 (2001)

[21] Batiffol, Henri. *Le pluralisme des méthodes en droit international privé*. Martinus Nijhoff, 1973

that, rather than a truthful 'conflict of conflict of laws', the co-existence between different methods appeared to be a distinctive characteristic of modern private international law.[22]

1.2 Conflict of Laws as a Mediating Mechanism between Conflicting Visions and Interests

Since the beginning of the contemporary age, conflict of laws has come to be regarded as a hybrid set of techniques and rules which pursue a variety of purposes.[23] Mixed methods and conflicting purposes are a fundamental trait of contemporary conflict of laws. Of course, this 'eclecticism' or 'hybridity of methods' was not a novelty in the history of conflict of laws. This genealogy has emphasised that, since the middle ages, experts, legislators and courts have either developed mixed methods or, even within the multilateral approach, they advanced policy-oriented rules, although hidden behind technical formulas and principles. In contrast with previous ages, the distinctive feature of eclecticism in contemporary private international law is that experts cannot hide the nature of rules and principles and the policies pursued against claims of scientific and dogmatic objectivity.[24] Of course, some experts continue to read texts and legal sources and claim that private international law is pure technique or should merely strive to achieve conflict justice.[25] Others consult the law books and advance the claim that conflict rules must protect substantive justice. In the current age, however, it is impossible for either side to claim that the other is guilty of fraudulent casuistry.

Conversely, in the contemporary age, methods and techniques, unilateralism and multilateralism, acquire greater symbolic and material value than a mere approach to cross-border disputes. Since the beginning of the present age, they are understood as world visions. Accordingly, some experts give priority to "national interest" and make a methodical choice based on the set of values they associate to that approach. Others instead "attach more importance … to the ideal [internationalist] vision of a world where one's own State has to be treated on a strict footing of equality with the others."[26] Hence,

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[22] Picone, P. "Caratteri ed evoluzione del metodo tradizionale dei conflitti di leggi." *Rivista di diritto internazionale* (1998). Picone, Paolo. Les méthodes de coordination entre ordres juridiques en droit international privé: cours général de droit international privé. Vol. 276. Martinus Nijhoff Publishers, 2000. See also Leflar, Robert A. "Choice of Law: A Well-Watered Plateau." *Law and Contemporary Problems* 41.2 (1977); Vitta, Edoardo. *Cours général de droit international privé*. Martinus Nijhoff, 1979

[23] William A. Reppy Jr., Eclecticism in Choice of Law: Hybrid Method or Mishmash?, 34 Mercer Law Review 645-708 (1983)

[24] And neither will disagreements. Since the 1960s, controversies and disagreements have become endemic in the field. The serenity of both the European and North-American academic communities of conflicts experts is, as Rodolfo De Nova put in the 1960s, "frequently shattered by the exchange of colorful epithets and ironic thrusts" and animated by "skilful polemicists, who like to enrich their arguments with pointed words". De Nova, 'Introduction'

[25] See the literature that defends "natural method" against the inroads and the 'appetites of unilateralism in Ancel, Bertrand and Lequette, Yves. *Les grands arrêts de la jurisprudence française de droit international privé*. Dalloz, 2006, especially the early 19th century case on Moine Busqueta

[26] Pierre Mayer, 'Droit international privé', p. 50

they give preference to the opposite method. In the classical and social ages, nationalism and internationalism could be clearly associated with a certain method. In the contemporary age, which is which - multilateral or unilateral, nationalist or internationalist - is no longer clear. Unilateralism is synonymous with the protection of local interests. Multilateralism is synonymous with universal values. However, in a legal-institutional age characterised by conflicting considerations, eclecticism gives way to perplexing results. Sweeping categories hide contradictory and mixed characteristics.

According to the typical narrative, multilateralism is premised on the idea of compatibility between local and foreign rules. It is said to be cosmopolitan and outward-oriented. However, as shown by this genealogy, multilateralism can hide policy-oriented rules. It forces foreign laws and foreign rights within its own legal categories. It sets up high limits to the acceptance of foreign laws.[27] In contrast, the unilateral approach starts from the assumption that rights come as they are and must be accepted as such. If the threshold of tolerance is not crossed, unilateralism could, in principle, allow greater legal diversity than the multilateral method.[28] Overriding mandatory rules enhance regulatory power and allow for the protection of superior interests. These interests may correspond to government interest. However, nothing prevents unilateral rules from protecting universal values.[29] It is not accidental that, in a context of greater internationalism, the doctrine of vested rights advanced by Dicey has found new supporters since the 1950s and 1960s. Unlike its advocates in the social age, supporters of vested rights do not pursue national interest, but universal human rights.

One of the earliest advocates of the theory in the contemporary age was Clive Schmithoff (1903-1990) who argued, in the aftermath of the second world war and at the beginning of the institutional and economic reconstruction of Europe, that "there exist human rights which should be recognised and protected by the courts of all civilised countries, subject to the exigencies of municipal public policy."[30] In the new age, universalism employs new techniques and takes up new shapes, and is also grounded in new instruments. The foundation of Schmitthoff's theory was constituted by the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, and not by a vague international justice imposing some unclear obligations. According to Schmithoff, vested rights meant that English courts must give effect to

[27] See Didier Bodin, 'L'ordre public, limite et condition de la tolérance. Recherches sur le pluralisme juridique'. Paris I, 2002
[28] Ibid. "who has shown how unilateral ideas have invisibly colonized the 'general theory' of private international law, at the price of frequent conceptual confusion."
[29] For a recent account, J. Bomhoff, `The reach of rights: the "foreign" and the "private" in conflict-of-laws,state-action, and fundamental-rights cases with foreign elements' *Law and Contemporary Problems* (2008)
[30] Schmithoff, The English Conflict of Laws, 3rd Edition, 1954, p. 34

foreign rights duly acquired abroad and must recognise foreign judgments. It was an international obligation, neither a political choice or a self-limitation dictated by reciprocal sovereign interests.

What the above suggests is that, in the contemporary age, specialists do not deny but openly acknowledge the relevance of 'extra-legal' ethical, political or philosophical criteria, national or international standards.[31] At the same time, experts become increasingly reluctant to hide behind dogmatic claims. Methodological uncertainty undermines confidence in dogmatic approaches. The classification of principles and rules as 'unilateral' or 'multilateral' - their association with nationalism or internationalism, their inclusion in the discipline, the preference for conflicts justice over substantive justice - is not the result of a deduction from first principles and cannot be the result of an objective assessment of positive law and policy interests. Dogmatic approaches which prevailed in the 19th and 20th centuries have given way to a discipline which no longer comes across as the sum of coherent principles and rules as posited by classical scholars, and is no longer the expression of consistent objectives as postulated in the social age. In this sense, the many ambiguities and contradictions of private international law embody conflicting considerations.

In this context, instead of pursuing axiomatic truths or consistent specific policy objectives, experts can only produce techniques and rules that can be used by courts for balancing the variety of interests, often conflicting among themselves, that come to the fore in cross-border relations and disputes. Experts, systems, courts will combine methods and rules to balance rights, interests and priorities. In this context, private international law becomes more than a just a body of techniques and principles to govern cross-border disputes. It becomes a fundamental instrument for the effective coordination of the variety of national, individual and supranational policies and interests that often collide at 'trans-national' level. Accordingly, conflict of laws would play a 'mediating function'.[32] Batiffol therefore argued in the 1960s that private international law should coordinate legal systems in a way that satisfies national interests, those of the international community and does not forget personal expectations.[33]

As Phocion Francescakis (1910-1992) remarked - significantly, in the Preface to the first French version of the *Ordinamento Giuridico* of Santi Romano - private international law has a function as

[31] Batiffol, Henri. *Aspects philosophiques du droit international privé*, Dalloz, 1956. For England, see Graveson, 'Philosohphical Aspects'.
[32] See Lequette, 'Mélanges'. See Rass-Masson, Lukas. Les fondements du droit international prive européen de la famille. These de dectorat. 2015
[33] H. Batiffol, 'Aspects', pp. 102 et seq., esp. P. 141; *idem, Réflexions sur la coordination des systèmes nationaux*. Martinus Nijhoff, 1967, pp. 165-190

"management of pluralism" which is essential in a context characterised by greater legal (and cultural) diversity and by an intensification of cross-border exchanges.[34] Unlike the coordination envisaged Romano, the contemporary function does not refer to legal orders as such, but to the multiple interests and conflicting considerations which are pursued by laws and by persons and which come to the fore in transnational disputes.[35] The question arose, of course, if this mediating function could be performed by multilateral choice of law rules only? Should the basic unit and the overriding interests remain within national law? In the contemporary age, the renovation of theoretical and methodological debates, whatever its importance for the advancement of the discipline, should not lead as in the classical age to ignoring the actual problems raised by the intensification of trade and cross-border mobility. Recalling the risk that abstract concerns and theoretical debates distract experts from the concrete issues raised by legal collisions, Friedrich Juenger (1930-2001) pointed out:

> Uncertainty about the proper approach to multistate problems reigns supreme…. Centuries ago, d'Argentré already complained that befuddled professors leave their students even more befuddled. … There is, however, one aspect on which everyone agrees: the subject is difficult. Indeed, the very reputation of the conflict of laws as an arcane field accounts for the fascination it has long exerted on lawyers. … Yet, in spite of all the valiant intellectual efforts lavished on it, and the voluminous literature that has built up over the ages, the subject remains mired in confusion. One reason for this state of affairs is the very surfeit of theories that bedevil the conflict of laws. The proliferation of ideas and ideologies tends to distract attention from the real-life problems our discipline is called upon to resolve, so that the subject is in constant danger of becoming an academic game rather than a technique for coping, as best we can, with multistate transactions.[36]

Against a background characterised by a renovated spirit of internationalism, by the reconstruction of international institutions and by the formation of new regional organisations, addressing concrete problems raised by increasing cross-border transactions and at the same time enhancing the coordinating potential of conflict of laws were bound to happen through international conventions. As argued by De Nova, "[u]ncoordinated attempts at coordination" taking the shape of local conflict

[34] See Ph. Francescakis' Preface to Romano, Santi. "L'ordre juridique, trad." *L. François et P. Gothot, Paris, Dalloz* (1975).
[35] Batiffol consistently argues that this function could be best performed by rules and principles indicating the most closely connected law. In the new age, however, the proper law test must satisfy the preferences of the parties, State policy but also the overall interest of the international order. Batiffol and Lagarde, 'Traité de droit International Prive'.
[36] Juenger, 'General course', 167-168

principles are doomed to disappoint whereas "[c]oordinated efforts are more promising … and the most effective instrument at the disposal of states so inclined is the conclusion of international conventions."[37] Multilateral treaties did not endanger national policies. They facilitated international exchanges. They fulfilled the interests of the international community as a whole. They did not prejudice sovereign prerogatives, but they could help to realise the "common statute law of all nations" idealised by Savigny and classical jurists.[38] From the end of the second world war, various international and regional organisations, and especially The Hague Conference and the European Economic Communities (EEC), promoted the entry into force of various multilateral conventions.[39]

1.3 The Harmonisation of Private International Law

The objective of the EEC, enshrined in the Treaty of Rome, was to eliminate obstacles to market integration and to grant foreign workers the same rights and conditions granted by each Member State to its own nationals, an objective that could be achieved by common rules of private international law.[40] European Institutions did not acquire a specific competence to enact conflict provisions until the 1990s. Hence, 'Europeanisation' took the shape of selective harmonisation of national rules of private international law rather than 'systematic communitarisation'. Accordingly, member states commenced negotiations and entered into some multilateral conventions which aspired to the establishment of a common 'European judicial area' in specific civil matters.[41] Although the negotiations followed the more uncertain intergovernmental method, successful negotiations led to

[37] De Nova, 'Introduction', p. 521. For De Nova, renvoi was an example of an 'uncoordinated attempts' that lead to greater confusion and uncertainty.
[38] Consider private initiatives, for instance, the Uniform Benelux Law on Private International Law,
[39] See Fiorini, 'The evolution'. The international economic community was taking in the European context the specific form of "central and carefully organized modern bureaucracy". The EEC was not the community of civilised nations or the commercial society imagined by Adam Smith. Rather, it was a "central and carefully organized modern bureaucracy that was [also] becoming the ideal of academic elites." Koskenniemi, 'A history', p. 957
[40] Neither the Treaty of Rome nor the following Single European Act contained any explicit reference to judicial cooperation with regard to cross-border disputes. However, the EC Treaty of 1957 stipulated that MS were bound to simplify formalities governing the recognition and enforcement of judgments of other MS' courts and tribunals. MS could thus act within the scope of the European Economic Community for guaranteeing citizens of State Members the enjoyment of rights under the same conditions granted by each state to their own.
[41] For European Judicial Area is meant guaranteeing legal certainty and equal access to justice to their own citizens across borders The concept of 'European judicial area' finds first expression in the Single European Act of 1987, but is contained in the idea of borderless and ever-closer Europe enshrined in the Rome Treaty of 1957. The hard core of several conventions would survive by constitut the blue print for following reforms. Article 220 of the Treaty of Rome invited member states to simplify the formalities and the PIL architecture. Along the lines of Article 220 of the EC Treaty stipulated that member states were bound to simplify 'formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards'. For instance, the Brussels Convention on jurisdiction, recognition and the enforcement of judgements in civil and commercial matters, which was adopted in 1968 and entered into force in 1973, had the objective of guaranteeing legal certainty and equal access to justice to citizens across borders, as provided by Article 220 of the EEC Treaty (later Article 293 of the EC). The 1968 Convention therefore inaugurated the era of European cooperation in civil and commercial matters.

the Brussels Convention on jurisdiction and enforcement of judgements in civil and commercial matters of 1968[42] and the Rome Convention on the law applicable to contractual obligations of 1980.[43]

The Brussels and the Rome conventions were not typical international agreements, in the sense that they did more than ensuring an expeditious definition of the competent forum, predictability of applicable law and uniformity of results.[44] In the age of conflicting considerations, governments could not place the aspiration of coordinating the interaction of legal systems ahead of social interest, so vigorously cherished in the previous age. In this sense, it was the protection of social interest that posed an obstacle to international conventions. As Balladore Pallieri had remarked, "to give up the protection of all such other interests, renouncing to [the possibility of introducing] all those limitations and derogations [from the multilateral approach], from those particular ways of understanding certain norms of private international law which they use for their particular purposes, and fulfil only that universal concern [for international trade]. From this originates the resistance which the States have [placed against] the intensification of the norms of international law in this field."[45]

International organisations pursuing the harmonisation of conflict rules, especially those trying to achieve a degree of harmony in cross-border commercial matters, should try to achieve a greater degree of legal certainty, but could not ignore the proliferation of policy-oriented rules that had taken place in specific sectors, including in the economy, nor the many overriding mandatory laws that had been set in place by social states to protect 'substantive justice', i.e. local interest, in the social age. Accordingly, the Brussels and the Rome conventions incorporated policy-oriented rules in commercial matters, and thus internationalised the 'socialisation' of economic matters. The provisions of the Brussels Convention therefore differentiated between various types of proceedings where nationals and domiciliaries were involved - contracts of employment, various types of insurance liability, consumer contracts - "to strengthen in the Community the legal protection granted

[42] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version), [1998] OJ C 27, 26.1.1998, 1-24
[43] Convention on the law applicable to contractual obligations (consolidated version), OJ C 027, 26/01/1998, 34-46
[44] J Basedow, 'Specificité', 275 et seq.
[45] «Rinunciare alla tutela di tutti questi altri interessi, rinunciare a quelle limitazioni a quelle deroghe a quei modi particolari di intendere certe norme di diritto internazionale privato di cui essi si valgono per scopi loro particolari, e curare solo il soddisfacimento di quell'unica universale esigenza [del commercio internazionale]. Di qui quella certa resistenza che gli Stati hanno frapposto e continuano a frapporre all'intensificarsi delle norme di diritto internazionale in questo campo.» Balladore Pallieri, 'Diritto', p. 21

to persons therein established".[46] The Convention also established different rules for ensuring the recognition of judgements in the same matters, subject to the limit of public policy.[47]

The harmonisation of national rules did not undermine, but rather intensified the trend towards *ad hoc* protections in economic matters. The measures included in the Brussels Convention may give the erroneous impression of embodying anachronistic state parochialism given the common aspiration and common interest of member states. At first sight, they represent what Savigny himself had acknowledged might be included in multilateral systems, that is the existence of "laws of a strictly positive, imperative nature" which were meant to protect economic and public order.[48] But neither the Brussels Convention nor the Rome Convention allowed the displacement of the allocation method in order to protect national interest. Rather they did so to enable nationals of member states access to and participation in the common market and, at the same time, to protect specific categories of individuals against its harmful forces.

This is clear from the provisions of the Brussels Convention that differentiated between contracts of employment, various types of insurance liability, consumer contracts, but also from the provisions of the Rome Convention. Consistent with the classical approach, the Rome Convention established that contracting parties were free to choose the applicable law.[49] Consistent with conflict rules developed in the social age, the Convention specified that, in the absence of an express choice, the law most closely connected governed.[50] However, the Convention also clarified that "a choice made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the country in which he has his habitual residence."[51] The same principle was reiterated by Article 6 that addressed employment contracts. The choice of the applicable law in a contract of employment could not have "the effect of depriving the employee of the protection afforded to him by the mandatory rules of the law … applicable … in the absence of choice."[52]

[46] Articles 5-16
[47] Articles 26-29
[48] Von Savigny, *supra* n. 26, § 348, p. 33: 'Gesetze von streng positiver, zwingender Natur, die eben wegen dieser Natur zu jener freien Behandlung, unabhängig von den Gränzen verschiedener Staaten, nicht geeignet sind.' Such rules can be based on moral grounds (such as a ban on polygamy), or on public interests, whether they are related to politics, public order, or the economy: 'Die Gesetze dieser Klasse können beruhen auf *sittlichen* Gründen … Sie können beruhen auf Gründen des *öffentlichen Wohls* (publica utilitas), mögen diese nun mehr einen politischen, einen polizeilichen, oder einen volkswirtschaftlichen Character an sich tragen'. Ibid. p. 36 (Emphasis Original)
[49] Article 3
[50] Article 4
[51] Article 5
[52] Article 6

The Conventions suggest that the harmonisation of European conflict of laws strengthened the 'unilateral' provisions in private international law of the economy for the sake of specific categories of European individuals.[53] The process that Graveson and other common lawyers had noted towards the end of the social age in domestic private law thus intensified three decades later at transnational level.[54] Realising that the egotistical forces of the common market could transform comprehensive and unqualified contractual freedoms into an instrument of economic and social oppression, private international law was rewritten for the benefit of European workers, consumers, and debtors.[55] It must be noted that workers, consumers and other categories of market-participants did not enjoy 'status-like' protective measures as members of national communities but rather as voluntary members of temporary communities of common interests.[56] The protections and rights granted by international conventions on market-participants thus reflected another redefinition of status.[57]

Treaty provisions in combination with international conventions fragmented the permanent and organic status imagined by Cicu in various statuses that corresponded to the different conditions and positions occupied by European individuals within the common market.[58] Specific protective measures were not vested on European workers and consumers *qua* citizens of member states. Within

[53] Barcellona, Pietro. *Diritto privato e processo economico*. Jovene, 1977, p. 276 et seq.; M. Bessone, Contratti di adesione e natura «ideologica» del principio di libertà contrattuale, in Riv. dir. e proc. civ., 1974, p. 944 et seq.; Roppo, E. Il contratto. Il Mulino., 1977, p. 28 et seq.

[54] Graveson, Ronald Harry. *Status in the common law*. Vol. 2. University of London, Athlone Press, 1953; G. Friedman, Some Reflections on Status and Freedom, in Essays in Jurisprudence in Honor of R. Pound, Indianapolis (New York), 1962, p. 222 et seq.

[55] Ed è, in sostanza, contro l'illusione che la libertà contrattuale sia di per sé garanzia di una più progredita forma di organizzazione dei rapporti sociali che «gli individui hanno scoperto la comunanza degli interessi apparentemente divisi e lontani e la convenienza di organizzarli per reagire agli interessi contrari. I contratti per adesione, la contrattazione collettiva dei sindacati professionali, l'assicurazione obbligatoria di certi rischi, come quelli derivanti dalla circolazione dei veicoli, i sistemi di sicurezza sociale sono, nella meditazione abituale del giurista, oggetto di attenzione e di denuncia per sottolineare le vie del ritorno del contratto agli status» (Rescigno, Pietro. *Manuale del diritto privato italiano*. Jovene, 1977, p. 142).

[56] The concept of status "si presta perfettamente a ricomprendere le situazioni giuridiche attribuite al soggetto nell'ambito di ogni comunità organizzata, anche se non necessaria." Prosperi, 'Rilevanza', p. 8

[57] According to Rescigno, rather than, status, these phenomena should have been defined as «situazioni», although this definition did not clear the ambiguities. The doctrine becomes very sceptic and suspicious regarding the content of status with respect to the necessary community. It is impossible to detect its content in general terms and abstract terms, especially because this content varies with the varying of the function in a given social and juridical context. Rescigno, Pietro. 'Situazione e status nell'esperienza del diritto.' 209 *Riv. dir. civ* (1973), pp. 128-135. Speaking about the risks, Perlingieri warned that «il maggior pericolo sta nel compiere inopportune generalizzazioni quindi nell'individuare una nozione vaga e generica di status in cui inserire realtà e situazioni assai diverse tra loro, rinunziando così a cogliere le particolarità delle singole fattispecie. Queste esigono una differenziazione: alla varietà delle situazioni corrisponde una varietà di status con fisionomie culturali e funzionali diverse» P. Perlingieri, Il diritto civile nella legalità costituzionale, Napoli, 1984, p. 318

[58] For Rescigno, with the term 'status' «a differenza degli status tradizionali, non si vuole indicare una posizione costante cui ricondurre diritti, obblighi, poteri, situazioni della persona, ma al contrario vuole mettersi in luce che rispetto ai vari momenti della vita la personalità si frammenta [...] in relazione alla condizione che la persona assume di lavoratore, inquilino, consumatore». P. Rescigno, Conclusioni, in Il diritto all'identità personale, Seminario a cura di Alpa, Bessone e Boneschi, Padova, 1981, p. 1188. See G. Criscuoli, 'Variazioni e scelte in tema di status', in *Riv. dir. civ.*, 1984, I, p. 185 et seq.

the European judicial area, European persons were no longer the passive objects of protective measures that were designed and enforced to enhance the public policies and collective interest of social states. By exercising their Treaty rights, and by willingly becoming the members of such supranational communities, the beneficiaries of these statuses became themselves the agents of a supranational project.[59] Seen from this perspective, the inclusion of rules protecting specific categories of Europeans was not for the sake of member states. The overall objective was to build a European legal space where European individuals, regardless of their membership of permanent civil and political communities, could take part in different capacities, as workers, traders or consumers.

2.1 Family Law Exceptionalism and the Transformation of Family Law

The same practical concern for the concrete problems faced by individuals who engaged in cross-border relations that followed from methodological uncertainty also applied to family matters.[60] Except for Hague Conventions in the fields of adoption and abduction which pursued the 'best interest of the child', neither experts nor states could agree on a common set of conflict rules and principles.[61] That the only international conventions concerning cross-border family matters aimed at protecting of specific categories of vulnerable individuals points to the same trend indicated above. Other than these efforts, which found wide consensus among national governments, family-matters were excluded from the process of international harmonisation. Accordingly, the Brussels Convention explicitly removed from the scope of its common rules applicable to cross-border civil matters "the status or legal capacity of natural persons, rights in property not arising out of a matrimonial relationship, wills and succession."[62] Members of the EEC were evidently reluctant to pursue harmonisation in family matters. This was perhaps inevitable, since cross-border family law had been turned into a vehicle for the promotion of national identities first, and for the protection of state interest subsequently. Policy-oriented conflict rules raised fundamental issues of incompatibility.

[59] Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratis der Belastingen* [1963] ECR 1. Seen from this viewpoint, private international law could be used to construct a new institutional architecture but could also redefine the rights and protections granted to European individuals Azoulai et al., 'Being a Person', p. 5

[60] In the context of matrimonial property regimes, for instance, Juenger, 'A tale of two cities', p. 1066

[61] Hague Convention, 29 May 1993, on Protection of Children and Co-operation in Respect of Intercountry Adoption. Hague Convention, 25 October 1980, on the civil Aspects of International Child Abduction. For a list of conventions, see http://www.hcch.net These conferences do not pursue the coordination between legal orders. They are not indifferent to the substantial result. On the contrary, they pursue the paramount interest of the child. See J. Long, 'Le fonti', pp. 131-133

[62] Article 1(1) of the Brussels I Convention of 1968

In the beginning of the contemporary age, the logic of private international law of the family was still firmly tied to the protection of national interest. This is evident in the law as well as in the discourse. As far as the former is concerned, alternative connecting factors were being developed to get away from the dead end created by the conflict between nationality and domicile (see below, Section 3.1) and to enable courts to claim jurisdiction in family proceedings (section 3.2).[63] And yet most European systems stuck to traditional rules governing personal law and jurisdiction in cross-border family matters (Sections 3.3 and 3.4). As far as the doctrine is concerned, it is significant that Batiffol had argued that choice of law rules must satisfy the preferences of the parties, state policy and the overall interest of the international order.[64] In economic matters, choice of law rules should give priority to personal preferences and individual interest.[65] Pursuant to the function of neutral coordination, legal orders should make space for personal choices and foreign laws when these are most closely connected.[66] In contrast, in line with the traditional approach, in family matters he argued that conflict rules protect national interest and pursue social cohesion.[67]

[63]The first Hague Conventions had exclusively referred to the *lex patriae*: Convention du 12 juin 1902 pour régler les conflits de lois en matière de marriage; Convention du 12 juin 1902 pour régler les conflits de lois et de juridictions en matière de divorce et de séparation de corps; Convention du 12 juin 1902 pour régler la tutelle des mineurs; Convention du 17 juillet 1905 concernant les conflits de lois relatives aux effets du mariage sur les droits et les devoirs des époux dans leurs rapports personnels et sur les biens des époux. Post-war Conventions replaced nationality and domicile with flexible combinations of rules or with habitual residence. The Hague Convention, 5 Ocotber 1961, on child protection refers primarily to the state of the child's habitual residence, both as a jurisdictional criterion (Art. 1) and as a connecting factor (Art. 2). Nationality is a secondary criterion, subject to the condition that the intervention of national authorities is required by the best interests of the child (Art. 4). In the Convention on child protection of 1996, the only reference to the child's nationality is found in a list of fora that might be better placed to assess the best interests of the child. (Art. 8(2)) The Convention on the international protection of adults, concluded in 13 January 2000, contains similar provisions in Arts. 7 and 8. In the Conventions on maintenance obligations of 1956 and 1973, and in the Protocol of 2007, nationality plays a minor role in alternative reference rules favouring either the creditor (Art. 5 of the 1973 Convention, Art. 4(4) of the Protocol), or the debtor (Art. 6 Protocol). In the Convention on matrimonial property regimes of 1978, the primary connecting factor refers to the state in which both spouses establish their first habitual residence after marriage. By way of exception, Article 4(2) refers to the national law of the spouses if a complex set of conditions are met, which, in combination, require that all states involved adhere to the nationality principle. As far as adoption is concerned, nationality was a prominent feature of the 1965 Convention. Not a single reference to this criterion can be found in the Convention on inter-country adoption of 1993.

[64] See Batiffol and Lagarde, 'Droit International Privé'.

[65] Hence, in international contracts, Batiffol upheld party autonomy. Batiffol, Henri. *Les conflits de lois en matière de contrats: étude de droit international privé comparé*. Sirey, 1938: "But for contractual obligations, as has been frequently remarked, reference either to the law of the place of contracting or to that of the place of performance, as indicated the one by the objective acts of the parties and the other by their intended acts, is not in all cases acceptable." Yntema 'The Historic Bases', p. 74. Batiffol supported virtually unlimited free will as he subjected the entire contractual matter to the free choice of the parties, including questions of capacity. See Batiffol, 'Aspects Philosophiques', pp. 63-89. This was rejected by English scholars. Graveson, 'Philosophical Aspects', p. 36

[66] Batiffol, 'Aspects Philosophiques', p. 39, p. 34

[67] Francescakis, Phocion. *La théorie du renvoi et les conflits de systèmes en droit international privé: publié avec le concours du CNRS*. Sirey, 1958, p. 26. French conflict of laws was founded on the idea that societies are assemblages of families founded on marriage, « qu'il convenait pour assurer à l'institution familiale sa cohésion et son efficacité de soumettre à une loi unique l'ensemble de rapports qu'elle détermine entre époux et entre parents et enfants. » Lequette, De la proximité au fait accompli, in 'Mélanges', p. 484. « Au-delà de ces moyens exceptionnels il convient de relever combien la réglé de conflit de lois traditionnelle réalise par elle-même une synthèse entre ces impératifs d'ouverture à l'étranger et la défense de la cohésion de la société dont l'Etat a la charge. Vecteur, autant qu'il est besoin, des lois étrangères au sein de la société française, la règle de conflit de lois les relie à celle-ci en respectant son ossature juridique grâce aux grandes catégories qu'elle emploi. Statut personnel, statut réel, contrat et responsabilités civile correspondent

At the outset of the contemporary age, private international law of the economy incorporated elements of social conflict of laws and intensified a trend that could already be noted towards the end of the previous sage. The law governing cross-border family matters, and especially the rules and principles governing the relationship between husband and wife, appeared to be grounded instead in the 'traditional' logic and rationales which had emerged in the classical age and which were consolidated during the social age. The concluding sections of the previous two chapters, however, showed the early signs of a paradigm change, albeit in domestic family law. Even before the entry into force of international conventions protecting human rights, what could be noted were the progressive erosion of the doctrine of coverture, and the replacement of the social paradigm of the family under protection by the state for the sake of collective interest and public order with one where individual and family rights are themselves placed under a protective framework. The process continued both in England (Section 2.2.) and Italy (Section 2.3), leading to evident contradictions with traditional rules and principles applicable to cross-border family matters.

2.2 The Italian and English Law of Marriage and Divorce

As mentioned in the concluding paragraphs of Chapter 7, faced with the anachronistic provisions of the Civil Code of 1942, Italian judges took it upon themselves to reform family law based on the democratic principles and egalitarian values enshrined in the Republican Constitution. The Constitutional Court inaugurated in the 1960s a comprehensive process of review which vested rights and protections in all children, regardless of their legitimate or illegitimate status, and 'de-regimented' the social and public-oriented law governing the relationship between spouses.[68] However, we also saw that Constitutional provisions tried to preserve the organic and collective dimension of the family which was incompatible with the protection of equality between the spouses and of individual interests. Since the 1960s, the Constitutional Court has therefore engaged in a balancing exercise of conflicting rights and interests, public and private, social and individual.[69]

aux piliers de l'ordre civil et emploient de rattachements qui visent a les conforter en permettant à la règle de conflit de lois de remplir pleinement sa « fonction mediatrice. »

[68] See the historical account provided in Pocar, Valerio, and Paola Ronfani. La famiglia e il diritto. Laterza, 2008

[69] It was no longer argued that family ordering must submit to the superior interest of the state and, accordingly, Article 29(1) was to be interpreteed as: «garanzia cosituzionale di rispetto dell'autonomia familiare, nel concreto interesse dei singoli ad ordinare in modo originale e libero i loro rapporti di famiglia» in which, the democratic, rather than authoritarian, conception of family life shared with «primato della personalità» the key role norm of the constitutional order. Bessone, Rapporti etico sociali, in Commentario della costituzione, a cura di Branca, Bologna-Roma, 1976, 18 On the one hand, Article 29 protected marriage as a "natural society". On the second one, it did so, coherently with the spirit of the constitution, family autonomy did not occur against, but "for protecting the interest of single members of the family" and to help them to "fulfil their preferences and freedoms" in the family. It proclaimed the unity of the family, but also the "primacy of the individual personality". The image projected by Italian family law in the age of conflicting contradiction is, similar to 'private law' itself, one where the family is at the service of individual happiness and

In this period, in contrast with the heavily-regulated capacity to get married in the social age, individuals were recognised to have the right to get married and to form a family.[70] Although this right had also been enshrined in international conventions, the implications of the right to marriage were formulated by the Italian Constitutional Court and by the French Court of Cassation in the clearest and widest possible terms.[71] The French and Italian judges did so in the context of proceedings started for wrongful termination of an employment contract based on the so-called 'no-marriage clauses'.[72] The Italian Court held that the absolute prohibition against such clauses in employment contracts was justifiable, because it implemented "the right to contract marriage [which] is necessarily included among the inalienable rights of men."[73] In accordance with this view, Italy and European states removed obstacles to the enjoyment of the right to marriage.

The protection of this fundamental right required changes in private law, and a comprehensive reform of public law provisions codified in the social age. In Italy, a variety of conditions for contracting marriage had been set by the 1942 Civil Code.[74] The legislator and the Constitutional Court abrogated

preferences and, at the same time, the preferences of individuals should not undermine the happiness of other members of the group.

[70] The definition of marriage as basic a human right was advanced for the first time in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1953.

[71] Corte cost., 5 marzo 1969, n. 27, in Giur. It., 1969, I, 1, 1020 e in Giur. Cost. 1969, I, 371 and Cour de cassation, 7 Feb 1968, D. 1968, Jur. 429

[72] The French Court of Cassation also did so in the context of proceedings started for wrongful termination of employment based on the so-called 'no-marriage clauses' that were included in many contracts of employment. The decision of the Court of Cassation followed up a decision by the Paris Court of Appeal (decision of 30 April 163, D. 1963. Jur. 428) where an Air France stewardess sought damages against its former employer that had terminated her contract based on such no-marriage clause. Notably, the no-clause could be consdiered valid in contract law and labour law. However, it implicitly encouraged informal unions. Hence, it held that the clause should be held invalid as a matter of public policy. The Court of Appeal thus declared that "the right to marry is an individual right of public order (ordre public) which cannot be restricted or alienated; ... as a result, in the area of contractual relations…the freedom to marry should be in principle safeguarded and in the absence of obvious and compelling reasons, a no-marriage clause should be declared void as infringing a fundamental personal right." Ibid. 428-429. Cited in Glendon, 'The transformation', p. 79. In 1968, the Court of Cassation thus declared that a no-marriage clause in a contract of employment was an unjustifiable restriction of the "right to marry and the right to work". In 1975, the Court of Cassation made the right to marry a fundamental principle of public order. Court of Cassation Decision of 17 October 1975, D. 1976, Jur. 511.

[73] No-marriage clauss were prohibited under Italian law L. n. 7/1963. "…tra i diritti inviolabili dell'uomo non può non essere compresa la libertà di contrarre matrimonio".

[74] Articles 84-90 of the Civil Code specifically address the conditions, whereas articles 117 et seq. establish the norms governing nullity. In addition to norms governing validity, there are other norms that govern the 'regolarità' of the marriage (Articles 89, 100, 131, and 137). Treated in a comprehensive way by Palmeri, Le condizioni per contrarre matrimonio, in Ferrando, G., Il nuovo diritto di famiglia, Zanichelli, 2007, p. 105 et seq. In these pages, I do not examine the questions of capacity under canon law which establishes different conditions compared to Italian civil law although, it ought to be noted, as a result of the reform taking place in the 1980s, church ministers celebrating marriages must verify that the absolute conditions set by Italian civil law ("impedimenti inderogabili") are met before the religious marriage can be transcribed and have civil effects. Article 8 of the Law of 25 March 1986, n. 121 ('*Ratifica ed esecuzione dell'accordo, con protocollo addizionale firmato a Roma il 18 febbraio 1984 che apporta modificazioni al Concordato lateranense dell'11 febbraio 1929, tra la Repubblica italiana e la Santa Sede'*) provides that: Canon law establishes conditions which are similar, but not identical, to those established by civil law. See Bianca, C. Massimo. *Diritto civile*. A. Giuffrè, 1978, p. 40. For an older study, see Finocchiaro, Francesco. *Il matrimonio nel diritto canonico: profili sostanziali e processuali*. Soc. Ed. Il Mulino, 1989, esp. 30 et seq.

those provisions which were manifestly incompatible with the Republican values and with fundamental human rights. Accordingly, 'eugenic' marriage legislation that prohibited interracial marriages and marriages with persons who were deemed unfit for physical reasons were removed from the statutory books.[75] In Italy as well as in other European jurisdictions, health-related prohibitions were either removed by courts or through statutory amendments.[76] With respect to competence, the most common change concerned the removal of parental consent and the lowering of minimum age at marriage. Consistent with other European laws, English and Italian law set the minimum age at marriage at 18.[77]

Although conditions were relaxed, this process should not be misunderstood as leading to a progressive withdrawal of the involvement of the state from family matters. European domestic laws continued to impose limits on whom could marry who. European family laws considered marriage a consensual union between two persons of the opposite sex which is celebrated in accordance with state-mandated forms.[78] Under Italian law, other than having reached the age of majority, the parties

[75] Since Italian law questions concerning conditions for marriage is also unsystematically codified – something for long denounced by the literature – the doctrine and jurisprudence have a significant role to play. For instance, Lipari, De matrimonio celebrato davanti all'ufficiale di stato civile. Note introduttive agli artt. 84-101., in Commentario Cian-Oppo-Trabucchi, II, Cedam, 1992, 127

[76] Such as those for persons with sexually transmitted diseases or other serious health conditions. See Glendon, 'The transformation', Chapter 2

[77] In Italy it is raised to 18 from 14 for women and 16 for men, which was the minimum age provided by Article 84 of the Civil Code of 1942. In the case of minors, i.e. men and women under the age of 18, state law still required some form of authorization, either by the families, or by public officials. In the same years, the law also changed in France, in Germany and in most American states. See Glendon, 'The transformation', p. 40. In English law, the Family Law Reform Act 1969 reduced the age at which men could contract marriage without parental consent from 21 to 18 according to English law. Pressure to reform the law of marriage came from the social and cultural upheavals of the 1960s and from the reforms being carried out in neighbouring countries which, among other changes, had lowered down the age for 'free-marriage', i.e. marriage involving minors celebrated without parental consent. Such as Scotland. See Cretney, 'Family Law', p. 25 See, Ibid. pp. 57-67 with references to the Marriage Act of 1753. Although the change in law is coherent with the trend of progressive withdrawal of state regulation of marriage formation, in the case of underage marriages, the perception was slightly different. Before the 1970s, state and public interest motivated the reforms, as their goal was to "ensure that marriages are solemnised only in respect of those who are free to marry and have freely agreed to do so and that the status of those who marry shall be established with certainty so that doubts do not arise, either in the minds of the parties or in the community, about who is married and who is not. To this end" it appeared necessary to reformers, "that there should be property opportunity for the investigation of capacity (and, in the case of minors, parental consent) before the marriage and that the investigation should be carried out, uniformly for all parties to all marriages, by persons trained to perform this function." Despite such difference in narrative, especially in the case of underage marriages, the removal of parental consent already suggests a trend towards freer choices over their partners. In this regard, it is significant that, even after the reform introduced in 1969, marriages solemnized before the age of 18 without parental consent were regarded valid per effect of Marriage Act, 1949, s. 48

[78] The Italian constitution does not provide a definition of marriage. However, Articles 107 and 143 of the civil code conbined specify that marriage is a consensual union between two persons of opposite sexes which is formalised in accordance with a specific procedure. vitale il matrimonio civile commentario delle persone e della famiglia Vitali argued that the result of the "atavica connessione tra matrimonio e relazione affettiva eterosessuale" deepened in Italian juridical culture the notion that marriage could not bind two same-sex partners. Vitali, 'Il matrimonio civile', *in Commentario delle Persone e della Famiglia*, in Il diritto di famiglia, Trattato diretto da Bonilini e Cattaneo, I, Utet, p. 109. Citato in Zatti, 'Trattato', p. 672

must therefore be of free status, i.e. they must be unmarried to get married.[79] The parties must also be of the opposite sex.[80] A marriage that does not meet these conditions is a non-marriage: it can never come into existence.[81] When it came to capacity, neither Italian nor English law imposed conditions linked to physical characteristics, except for same-sex unions.[82] English courts had held in the 1940s that marriage does not perform a reproductive function.[83] However, marriage was and remained "the union of a man and a woman" and only two persons of the opposite sex possessed the natural characteristics that made them eligible for marriage.[84]

2.3 The English and Italian Law of Husband and Wife in the Age of Conflicting Consideration

Other than the reconceptualization of marriage as a human right and the relaxation of the conditions for entering marriage, the transformation of family law which started in the 1960s had the effect of equalising the rights and obligations of husband and wife and, more generally, of de-regulating the relationship between husband and wife. Compared to civil law systems, common law never codified in clear and comprehensive terms the rights and obligations of the spouses during marriage.[85] The English law of husband and wife developed mostly because of disputes and precedents, not through systemic codification.[86] As seen in Chapter 3, the French Civil Code and the Italian Civil Code had both 'juridified' the consequences of personal and family status, specifying the rights and obligations of wives and husbands, those of children, rules governing names, the residence of the spouses, etc.

The 'incidents' of marital status were never clearly stated in English law.[87] And yet coverture existed in both civil law systems and in the common law. Although civil law countries codified the law of

[79] M. R. Spallarossa, Le condizioni per contrarre matrimonio, in Zatti, 'Trattato', p. 764
[80] To contract marriage, the parties must have reached the age of majority, which is justified by the required physical development, but also the mental capacity to consent and the cognitive capacity to understand the rights and obligations that follow from marriage. As provided by Article 84 of the Civil Code. On the questions relating to the age and mental and physical capacity, see Lipari, 'Del matrimonio', in Cian-Oppo-Trabucchi Commentari, 129
[81] , the doctrine has held, as also affirmed by English courts and by English family lawyers before the introduction of same-sex marriage in the 21st century, M. R. Spallarossa, 'Le condizioni per contrarre matrimonio', in Zatti, 'Trattato', p. 761
[82] In English law, the mental capacity for consent, however, is minimal, lower than that required for business transactions. Reference to case from thesis. See Cretney, 'Family law', pp. 72-73
[83] In *Baxter v. Baxter* [1948] AC 274, the House of Lords had rejected the doctrine according to which reproduction was the main purpose of marriage.
[84] *Corbett v. Corbett* [1971] p. 106 for Ward LJ. the Court of Appeal in *Corbett v. Corbett*, a prominent case involving the first person known to have gone through a sex-reassignment operation, held that a marriage involving a person born with the sexual attributes and the chromosomal structure of a man and another man could not be valid, even if the person was considered and considered herself a woman.
[85] See Glendon, 'The transformation', pp. 85-86
[86] As Stephen Cretney has thus argued, "[f]amily law carries to an extreme degree the reluctance of English law to establish clear rights". Cretney, Stephen. *Principles of Family Law*. Sweet & Maxwell, 1984, p. 288
[87] See Glendon, 'The transofrmation', pp. 86-87

coverture, English courts had advanced a body of rules which extended as far as residence and property, which imposed a child-bearing and dependant role for the wife, and which established the dominant position of the husband. The English theory of unity had the same origin and essentially similar contents of the law codified in civil systems. Throughout the social age, cultural, social, and political changes led to legal reforms that progressively eroded the foundations of the theory of unity, in Italian law and in English law.[88] Since the early decades of the 20th century, the status and rights of married women - which still conformed in many respects to those enumerated by Blackstone two centuries before - were brought into line with the changing position of women in society.[89]

The last vestiges of the law of coverture were only removed through statutory reforms and judicial review in the contemporary age, in Italy and other European jurisdictions. In English law, it was "[n]ot until 1981 was the doctrine of the unity of husband and wife dismissed as a medieval fiction to be given no more credence than the medieval belief that the Earth is flat."[90] In Italy, the Constitutional Court used the constitutionally protected right to equality to abrogate the provisions of the Civil Code affirming the theory of unity which had not been already abolished by statutory

[88] In France, the duties of protection and obedience had been deleted in 1938. However, the Civil Code still proclaimed the husband the head of the family in 1970. The wife had to obtain permission to work from the husband until 1965. In 1970, the husband was dethroned from the role of the head of the family. In a language remarkably similar to that used in Italy, family authority was divided between the spouses: "The spouses together assure the moral and material direction of the family." (Art. 213 of the Code) There were still traces of the doctrine of unity. The spouses were also declared to be "mutually bound in a community of life." (Art. 215) However, this amendment, which replaced the previous doctrine of unity, was supposed to represent an ideal of shared authority and equality that had emerged from the students-workers uprising of 1968. Notably, the family still played a "pedagogical role" (see Glendon, 'The transformation', pp. 90-91). Hence, The Minister of Justice at the time of the reforms explained: "The Civil Code can fulfill an educational function by encouraging the spouses to exchange their points of view on all the important questions which arise in connection with the running of the household and the education of the children, as well as to come to agreement, before marriage, concerning a common ethic." Cited in Glendon, 'The transformation', p. 91. Hence, the family was still conceptualized as Seminarium Rei Publicae as for Cicero in Roman times.

[89] Lord Denning eloquently expressed the significance of this change, in the law and in the discourse: "Nowadays, both in law and in fact, husband and wife are two persons, not one. They are partners -equal partners - in a joint enterprise, the enterprise of maintaining a home and bringing up children. Outside that joint enterprise they live their own lives and go their own ways …. They can and do own property …. They can and do enter into contracts with others …, and can be made liable for breaches just as any other contractors can be. They can and do commit crimes jointly or severally and can be punished … for them. They can and do commit wrongs jointly or severally and can be made liable jointly or severally just as any other wrong-doers. The severance in all respects is so complete that I would say that the doctrine of unity and its ramifications should be discarded altogether, except in so far as it is retained by judicial decisions or by Act of Parliament." *Jarndyce v. Jarndyce* [1982] Ch 529, p. 538

[90] "Changing families: family law yesterday, today and tomorrow – a view from south of the Border". A Lecture by Sir James Munby. Delivered at the Law School, University of Edinburgh, on 20 March 2018. Only in the second half of the 20th century did married women acquire full legal responsibility in tort and capacity to enter into contracts and to manage property. See Cretney, 'Family law', Chapter 3, 'The Legal Consequences of Marriage: Property Regimes'. As Cretney put it, "Not until the second half of the twentieth century could it confidently be said that the doctrine of unity and its ramifications was dead and that the law recognised husband and wife as two individuals equally capable of acquiring and holding property, entering into contracts, and equally responsible for their own wrongs". (Ibid., p. 91). See *Midland Bank Trust Co Ltd v. Green* (no. 3) [1982] CH 529

reforms.[91] The Court therefore intervened between the 1960s ans and 1970s *inter alia* to eliminate provisions that imposed a discriminatory treatment in maintenance obligations.[92] At the same time, the Court affirmed that the principle of unity and the objective to protect family cohesion did not take precedence over individual righs in the case of separated couples[93] as well as for married couples.[94] The Court also intervened to amend the law of family names and parental responsibilities.[95]

The most significant decisions of the Constitutional Court concerned the removal of double-standards of adultery in separation proceedings, in 1968,[96] and the abrogation of the obligation of faithfulness ("*obbligo di fedeltà*") in 1974.[97] The social conception of the relationship between husband and wife was further shaken by the de-criminalisation of adultery in 1969, by the introduction of divorce in 1970 and, in general, by the reform of family law of 1975.[98] Law n. 151 of 1975 deposed the husband from his position as the head of the family and established that the spouses "acquire the same rights and the same obligations" when entering marriage.[99] The principle of equality resulted, *inter alia*, in the imposition of the default community of property regime (unless the partners choose a different regime)[100] and in the common responsibility of the spouses to set a place of residence in consideration of individual needs and the interest of the family as a whole.[101]

This last change had great symbolic value because it meant that the residence of the wife did not automatically follow that of the husband. Husband and wife were no longer subject to absolute and mandatory laws. Norms codified in the classical and social ages that submitted the marital relation to the logic of state interest and public policy were progressively removed. What emerges from statutory reforms and judicial interventions was that spouses were acquiring unprecedented freedoms in the determination of reciprocal rights. Accordingly, as early as the late 1970s, Italian experts drew the

[91] In Italian constitutional law, the principle of equality does not have autonomous value. Typically, it is described as «il fondamentale principio di parità dei coniugi [è] temperato da quello dell'unità famigliare.» See Paolo Zatti, 'Tradizione e Innovazione', p. 23
[92] Sentenza n. 46 del 1966 on 'obligatory contribution'. Sentenza n. 133 del 1970 on maintenance obligations.
[93] Sentenza n. 46 del 1966
[94] Sentenza n. 133 del 1970
[95] On family names between spouses: Sentenza n. 128 del 1970. In the case of children, the law continued to impose the registration under the paternal name. Sentenza n. 102 del 1967).
[96] On the double standard of the criminal code, Article 559, which considered adultery by the wife offence and did not punished adultery by the husband, and its incompatiblity: Sentenza n. 127 del 1968
[97] Sentenza n. 99 del 1974 which declared Article 156 of the civil code unconstitutional.
[98] Law n. 151 of 19 maggio 1975
[99] Article 143 of the Civil Code
[100] If the partners fail to adopt an alternative property regime, a choice restrained by Article 210 of the Civil Code and by Article 160 which specifies that «gli sposi non possono derogare né ai diritti né ai doveri previsti dalla legge per effetto del matrimonio», the principle of equality result in the default application of the community of property. The law gives spouses a margin of freedom, subject however to the limits set by the Civil Code.
[101] Article 144 of the Civil Code. Paradiso, Massimo. *I rapporti personali tra coniugi*. Giuffrè Editore, 2012, p. 219 ff; and Ferrando, G., il Matrimonio, in Zatti, 'Tratatto', p. 85 et seq.

attention to what they saw as a transition of family law to the logic of private law.[102] It must be noted that individuals could not elevate themselves above the law and set further conditions other than those codified in the civil law for a marriage to be valid.[103] Spouses could neither modify the effects of marriage nor waive rights and obligations set by law.[104] However, for the scholarship, the freedoms granted by Italian law sufficed to include marriage among private transactions.[105]

Italian family law, and the law of husband and wife, took another symbolic turn with the introduction of divorce by Law n. 898 of 1970.[106] The reform of Italian family law of 1975 reformed the grounds for separation. Accordingly, since 1975, separation is no longer based on fault but on the "objective intolerability" of cohabitation. This change, which was significant per se, acquired an even greater practical and symbolic significance since, after the legalisation of divorce, separation became a preliminary step to dissolve the marriage. The introduction of divorce first and no-fault divorce soon afterwards signalled that family unity did not precede individual interest.[107] It suggested that the role of family law was to enable individuals to make responsible decisions concerning their own future.[108] In this sense, the Cicu's conception was turned upside down. Public law is at the service of the individual, and vice-versa. However, it must be stressed that individual interest was not absolute either. In principle, a divorce is not available at will.[109]

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[102] Rescigno, La comunità familiare come formazione sociale, in Rapporti personali nella famiglia, a cura del Consiglio Superiore della Magistratura, Roma , 1980, p. 348 et seq.; also in Matrimonio e famiglia, Torino, 2000

[103] Article 108 of the C.C.

[104] Article 160 of the C.C.

[105] Taking up ideas already expressed in the doctrine in the social age (Ravà, Adolfo. *Lezioni di diritto civile sul matrimonio*. Cedam, 1930, especially p. 400 et seq.) the doctrine places marriage within the category of (private) legal transactions (in Italy "negozio giuridico").This is not the only conceptualisation. Marriage is also considered the most important of 'family transactions', "negozi familiari", Santoro Passarelli, dottrine generali del diritto civile, Napoli, 1981. See Ferrando, G., 'Matrimonio e famiglia', p. 323. Family transactions have characteristic elements. They do not allow the parties to modify the effects. They have solemn nature. Contract norms do not apply to them. Accordingly, old debates concerning the nature and functions of civil law are reviewed in light of this reconceptualization. In Italy, the doctrinal discussion regarding the celebration of (civil) marriage focused on the nature of the functions of the civil official, whether they were 'constitutive', as it had been argued by Cicu or declaratory, as eventually settled in the doctrine Marriage is no longer a public act, as it had been conceived by Cicu, although the consent of the spouses does not suffice. The state official performs a "declarative" or "certifying" function. Ibid. p. 322

[106] Law 898/1970 introduced divorce in Italy. Confirmed after the referendum of May 1974.

[107] The causes for separation and for divorce were not based on fault, but, on the contrary basically coincided with the notion of "intollerabilità della convivenza" which, in principle, does not correspond to the subjective intolerance of the partnership. As in England, so in Italy, judges should have investigated the facts of the cases. However, Italian courts, like English court have never actually fulfilled this role, and the number of cases where courts refused to grant a request for separation for futile reasons, or a divorce, because it put in danger the collective interest of the family is so low that experts argue that there is no relevant praxis in jurisprudence in this respect. Paolo Zatti, 'Tradizione e Innovazione', p. 33

[108] Ibid. p. 24

[109] The Italian legislator did not introduce free divorce. However, the protection shifts from society to the person. Accordingly, the idea of social function remains, although it is the public that must help individuals pursue their own interest. In this sense, Article 3(2) turns upside down the 'traditional' state function and accords to the Republic the duty to facilitiate the full development of the human person, and thus also subvert the previous institutional model that subjected the individual to state interest. Opposite to the social model, it is now the state that must protect individual interest. However, this also complicats the definition of boundaries between public and private. In this sense,

The long-awaited reform of the English law of divorce took place in the same years. The Law Reform Act 1969 introduced "irretrievable breakdown" as the sole ground for divorce.[110] Following the same trend, most European countries have simplified procedures and eliminated fault as ground for divorce since the 1970s.[111] Despite minor amendments, the 1969 Act still governs divorce proceedings in English law.[112] Under the Act, courts have the responsibility to investigate the facts of each case. However, flexible procedural rules mean that the pronouncement of a divorce decree is little more than a formality.[113] It is nonetheless significant that the enactment of the 1969 reform followed from the widespread perception that the previously applicable law had led to 'collusive divorces' which neither humanists nor religious groups were willing to defend.[114] The terms of the debate that preceded the Law Reform Act of 1969 thus evoke similar concerns expressed by reformers before the introduction Matrimonial Causes Act of 1937 (see Chapter 7, Section 2.4). What this suggest is that neither in Italy nor in England, did the protection of individual interest not entail absolute freedoms.

Italian law did not introduce free divorce either. Under the Law of 1970, a decree could only be granted after the verification of 'subjective' and 'absolute' conditions. Among the former were that partners no longer shared their lives in either "a material or spiritual sense".[115] Among the latter were that the parties must have separated or else that either of them obtained the annulment or the dissolution of the marriage abroad.[116] Despite these qualifications, and the fact that a decree

Perlingieriargued that «è difficile affermare che esiste ancora qualcosa di privato, almeno nella sua accezione ottocentesca, come è probabile che oggi non esista più niente che sia interesse pubblico in quanto tale, dal momento che è funzionalizzato alla realizzazione dei diritti individuali.» Perlingieri, P. *Il diritto civile nella legalità costituzionale*, Napoli, 1984, pp. 124 et seq.

[110] It went in force on 1 January 1971. Section 1(1). Irretrievable breakdown could be proved in five ways, three of which involved fault on the part of either of the spouses: Section 1(2) adultery (a), unreasonable behaviour (b), and desertion (c). Otherwise, a period of separation was required before the parties could file, separately or jointly, for divorce. Section 1(2)(d) and (e)

[111] See Glendon, 'The tranformation', pp. 191-192

[112] Minor amendments in the 1980s gave judges greater discretion over the period of separation. Matrimonial and Family Proceedings Act 1984, s. 1. More emphasis started being place on the economic provisions following divorce, and on child-related matters, than on the procedures and the grounds for termination of the divorce. See Glendon,'The transformation', p. 158. The Law Commission proposed to introduce unilateral divorce in 1988. See on this Eekelaar, John M. "The place of divorce in family law's new role." *The Modern Law Review* 38.3 (1975)

[113] Section 1(3) establishes the formal procedure. The practice is that courts grant the decree after the review of the allegations in support of the petitions and of the affidavits by the registrar As also declared in 1979 by the English Court of Appeal, "[i]t is impossible to regard the issuance of a decree by the judge as anything more than a formality."

[114] This is also the position taken by the The Archbishop of Canterbury's Group, Putting Asunder: a Divorce Law for Contemporary Society, January 1964

[115] Article 1: «il giudice pronuncia lo scioglimento del matrimonio … quando … accerta che la comunione spirituale e materiale tra i coniugi non può essere mantenuta o ricostruita.»

[116] Article 3. Among them, also refusal to consummate the marriage, that the sex of one of the spouses had changed, or that one of them had been condemned for a serious crime etc.

dissolving marital status could not be obtained at will, the introduction of divorce had a symbolic meaning that transcended the boundaries of family law and reached out to the deeper meaning of changes that were taking place in the law of the economy. In contrast with the classical and social conception, marriage did not create a permanent union between the spouses. Marriage did not create a permanent status that was regulated in accordance with social interest. Marriage created a semi-permanent status that could be dissolved following a personal decision.

Even more so after the liberalisation of divorce, legal scholars felt entitled to use the notion of status in a different sense than that advanced by Cicu and social jurists.[117] Status did not correspond to a forcible and permanent bond between the individual and the aggregate. Status was no longer a permanent condition. In fact, scholars noted that citizenship and civil status, like marital and family status, could be acquired and lost. The distinction between voluntary and necessary relationship no longer obtained. As had been anticipated by Graveson towards the end of the social age, status could also refer to a legal position and condition that individuals had outside the family sphere. Status could be legitimately used to refer to membership of individuals in voluntary communities of common interest. It could also be legitimately used to refer to specific protections granted to workers, consumers and other categories of individuals. Reforms in family law suggested that status continued its conceptual redefinition that began towards the end of the social age.

2.4 Still the Same Old Family Law? Informal Arrangements, Family Law and Social Cohesion

Before the 1970s, the limited grounds for divorce set by the Matrimonial Causes Act of 1937 in English law, and the prohibition of divorce in Italy, led to the proliferation of out-of-marriage co-habitations. Informal unions which were widely debated by European family lawyers in the beginning of the social age had virtually disappeared from doctrinal discussions. Family law in the social age "rigorously policed the boundaries of the legitimate family" and of legal marriage, and, paradoxically - given that social scholars especially lamented that their predecessors had ignored social reality -, ended up excluding questions related to informal cohabitation until the 1950s and 1960s.[118] Accordingly, throughout the social age, unions that did not conform to marriage as codified in the

[117] According to Resigno, «la pretesa che debba avere carattere di necessità e di permanenza la relazione del singolo con il gruppo, per essere idonea ad essere elevata alla dignità di status, appare contraddetta dalla semplice considerazione della realtà normativa: la situazione dell'apolide, le ipotesi di perdita della cittadinanza, la risolubilità del vincolo matrimoniale per divorzio, i casi di revoca dell'adozione inducono a dubitare seriamente che la nozione di status debba costruirsi sui caratteri della necessità e della permanenza dei vincoli», 'Status', in *Enc. giur. Treccani. Teoria generale*, 1993

[118] Glendon, 'The transformation', p. 253

Civil Code and in Article 29 of the Italian Constitution and modelled on the English case of *Hyde v. Hyde* were not considered a phenomenon worthy of debate or of specific legal protections.

Because of sociological and demographic studies addressing the issue, and because of specific questions included in national surveys, the reality and the significant number of informal family relations and of families that diverged from the 'traditional' - i.e. classical and social - family model started re-emerging from the juridical penumbra.[119] At the end of the 1950s, estimates indicated that, in Italy, more than a million persons cohabited with a person who was not their spouse.[120] In 1969, it was reported that about 4 million people cohabited outside marriage.[121] It is in this context that out-of-marriage cohabitation and informal unions took centre stage in experts' debates. The introduction of divorce, and of permissive grounds, combined with the potential to re-marry made it possible for some to formalise and legalise their long-term partnerships. And yet, legal reforms did not invert the trend. On the contrary, the number of cohabiting partners continued to grow.

Informal arrangements had complex origins and profound reasons. Divorce reforms did not solve the problem. From the 1970s, European legislators and European courts changed their approach. Instead of incentivising individuals to conform to the 'traditional' model founded on marriage, they increased protections for those who did not. In Italian law, *ad hoc* pieces of legislation and unsystematic decisions, including some by the Constitutional Court, vested in cohabiting couples rights which could be compared to those of married partners.[122] These included pension rights, parental rights, contact rights, abortion rights and housing rights. Protections were extended as far as social assistance, adoption, medical-assisted procreation, private insurance schemes, etc.[123] The process of 'equalisation' of marriage and informal cohabitation therefore went from private law to public law.

[119] For one of the earliest studies, and also availabel literature, in the common law world, See Weyrauch, Walter O. "Informal and Formal Marriage: An Appraisal of Trends in Family Organization." *The University of Chicago Law Review* 28.1 (1960)
[120] Glendon, 'The transformation', p. 18
[121] Ibid.
[122] The Constitutional Court distinguished cohabiting couples and long-term partnerhips explicitly in its Sentenza n. 45 del 1980. However, the Consulta had also urged the legislator to consider the growing phenomenon of cohabitation outside marriage in its Sentenza n. 6 del 1977. For the important differences in patrimonial matters, in Italy, ahead of the reform of 2016, see L. Balestra, I rapporti patrimoniali, in Zatti, P. 'Trattato'; F. De Scrilli, I patti di convivenza. Considerazioni generali, in Zatti, P. 'Trattato'; for the equally significant differences relating to housing rights, see Carlo Giuseppe Terranova, Il diritto all'abitazione. La successione nel contratto di locazione per morte del convivente, in Zatti, P. 'Trattato'.
[123] For an account of the various ad hoc laws introduced in Italian law, see Carlo Giuseppe Terranova, Convivenza e rilevanza delle unioni civili cc.dd. di fatto, p. 1084. For commentaries on the legislation passed in the post-war period, see Prosperi, Francesco. *Famiglia non fondata sul matrimonio, La*. Public. della Scuela di Perfezionamiento in diritto civile dell'Universitá di Camerino, 1980 and Furgiuele, Giovanni. *Libertà e famiglia*. Giuffrè, 1979

It affected procedural, civil and penal law. The result was that cohabiting partners were granted rights and responsibilities similar, albeit not identical, to those of married partners.[124]

Even before the comprehensive reforms that took place around the turn of the century, informal cohabitation as a result began to be considered a 'functional equivalent' to marriage.[125] A similar process also occurred, to different extents and with different speeds, in other civil law jurisdictions.[126] Since the 1970s, the progressive equalisation of rights and responsibilities between cohabiting and married couples also took place in English law. This does not mean that in Italy, in England and other European jurisdictions marriage did not remain a 'privileged institution'.[127] Hence, in the 1980s, family lawyer Stephen Cretney commented that the old rule whereby the only way to create a family was by contracting marriage was "subject to many exceptions."[128] Accordingly, married partners were entitled to comprehensive rights compared to exceptional protections granted to cohabiting partners. And yet, combined with easier and quicker divorce, the process of equalisation carried great symbolism and suggested a profound redefinition of the family and of family law. As Mary Ann Glendon commented, it suggested:

> …a general movement away from formalism in modern law. The mere fact of ceremonial marriage does not necessarily give rise to a full set of legal effects, nor does the mere fact that there has been no marriage ceremony necessarily preclude legal effects. Increasingly, long-standing cohabitations entail legal consequences, while marriages of short duration do not. In private law, we encounter informal situations similar to those … of married couples. When cohabitants separate, the law struggles with the same problems of public and private responsibility, separateness and solidarity, autonomy and dependence, that pervade divorce law. When informal family relations are disrupted by death, inheritance law, which at first seems to be a fortress of the

[124] For early developmetns see Glendon, 'The transformation', respectively on French *Unions Libres* at pp. 255-263 and on German *Lebensgemeinschaft* 263-268. For a recent overview of the various arrangements in European and extra-European countries, see Maria Cristina De Cicco, 'La tutela delle convivenze'.
[125] On Italian law before the reform of 2016, see *inter alia*, Balestra, Luigi. *La famiglia di fatto*. Cedam, 2004.; Zambrano, La famiglia di fatto, Milano, 2005. Among the articles, see Ferrando, Gilda. "Il diritto di famiglia oggi: c'è qualcosa di nuovo, anzi d'antico." *Politica del diritto* 39.1 (2008); See also Terranova, 'Convivenza e rilevanza' delle unioni civili cc.dd. di fatto, in Zatti, P., 'Trattato'.
[126] Ahead of the reform of 2016, see Iannone, A. and Iannone, R. F. "Dal concubinato alla famiglia di fatto: evoluzione del fenomeno." *Fam. pers. succ* (2010), p. 131 et seq.
[127] Marriage would still ensure safer and greater rights, and responsibilities, in many respects. For some comparative observations on France, England and Germany until the 1990s, see Glendon, 'The transformation', pp. 284-290
[128] Cretney, Principles of Family Law, 4th edition, London, Sweet and Maxwell, 1984, p. 4. For an account of judicial decisions and statutory changes, especially on legitimacy of children born out of wedlock and property matters and inheritance, see Glendon, 'The transformation', pp. 268-273

> legitimate family, appears on closer inspection to be more like a museum. In public law the interest of modern welfare states in curtailing unnecessary expenditures while relieving man's estate leads them to disregard formal legal categories. In the X-ray vision of the bureaucrat, families are perceived as economic units, or are simply dissolved into their individual component parts.[129]

The shift to informalism and de-regulation that began in the 1960s suggested to experts that the 'traditional family' - the monogamous and permanent union between two persons of the opposite sex founded upon marriage celebrated in accordance with requirements imposed by the law, the model codified and posited in the law in the classical age and consolidated in the social age - was no longer the dominant or exclusive one. The family was no longer necessarily founded in marriage. The family was not conceived exclusively as a site of biological reproduction. It was also an economic resource. It was a society which could be divided into its various components according to their desires, functions and interests. In this context, the role of family law was redefined as a tool for protecting personal rights, autonomy and dignity. Within the limits set by the law, couples could determine reciprocal rights and obligations. Individuals could opt in and out of different family and patrimonial regimes.

It is in this context that European experts started discussing the possibility that what they were witnessing was an evolutionary trend that went "from status to contract".[130] Some civil lawyers enthusiastically declared that the history of marriage law, and of family law by analogy, was "one of continuous liberation".[131] Evoking and romanticising the enlightened reforms taking place between the 18th and the 19th centuries, jurists remarked that this 'individualist turn' suggested the appearance of a 'contractualistic' and 'privatised' family law.[132] However, the so-called process of 'privatisation'

[129] Ibid. p. 290 Commenting developments in the law of marriage, divorce and cohabitation in Western civil law and common law systems taking place between the 1960s and the 1990s

[130] Mengoni, Nuovi orientamenti nel matrimonio civile, in Jus, 1980, pp. 190 et seq.

[131] The transition to new logics and ideas revealed the extent to which family lawyers were willing to re-write the history of family law to find some continuity with an idealised and romanticised past. In France, scholars placed emphasis on the individual liberty of the Revolution. Although we have seen that in domestic matters, the Civil Code had in fact restored or intensified what were the most despicable elements of the ancien regime conception of the family, Jean Carbonnier, who was entrusted with the reform of the Civil code in the 1960s, enthusiastically declared that: "An affirmation of the liberty of man in the formation of the matrimonial bond is the essence of the French message for the social order…. The history of our marriage law for the past one hundred and fifty years is the history of a continuous liberation." Jean Carbonnier, 'Terre et ciel dans le droit français du marriage', in Le droit prive français au milieu du XXe siècle. Etudes offertes à Georges Ripert, Vol. 1 (Paris, 1950), p. 325, cited by Glendon, 'The transfomration', p. 76

[132]The family appears no longer the institution that, for Cicu, submitted its members to a superior and collective interest. On the contrary, the family and family law becomes an instrument for furthering individual preferences and individual interests. Paolo Zatti, 'Tradizione e Innovazione', pp. 24-29. See Resigno, La comunità familiare come formazione sociale, in Zatti, P., 'Trattato', p. 361 et seq. This phenomenon was not only reported by experts in common law jurisdictions, where the doctrine has always been more sensitive to the 'private' dimension of family law, but also in civil

or ‘contractualisation’ does not fully capture the complexity of the trends that characterise the transformation of family law in the contemporary age. Individual interest does not have, except for minors, paramount importance. Individuals have acquired greater freedoms, but autonomy does not extend to all matters. The family retains functions of care, cooperation, solidarity and education. Accordingly, public laws set absolute conditions, and states enact mandatory laws.[133]

In the contemporary age, radical dichotomies between public law and private law, between market and family law, between individual interest and social law advanced by classical and social jurists have not disappeared completely but they have become so blurred and transient that they have lost analytical and prescriptive value. The ‘individualist turn’ carries a reference to the classical ideal of free will which no longer resonates in private and contract law. At the same time, changes in the law and in the discourse show that the regulation of marriage and family relations is no longer merely an instrument for protecting national policy and collective interest, as claimed by Batiffol. In the contemporary age, the family has become a vector for a variety of conflicting policies and interests, individual and social, public and private, regulatory and enabling, which cannot be pinned down in absolute terms using ‘traditional’ principles, concepts and categories.[134]

3.1 The Search for the Most Appropriate Link in Cross-Border Family Matters

In cross-border economic matters, the paradigm shift that started in the social age and intensified with the harmonisation of national conflict rules brought together unilateral and multilateral methods. Interest-analysis and policy-oriented rules which traditionally underpinned principles governing international family law migrated to private and economic matters. In contrast, the reforms and experts’ discussions regarding conflict principles and rules applicable to cross-border family matters taking place in the 1960s and the 1980s bear witness to the resilience of the ‘social’ multilateral method and to the overriding importance of national interest, thus pointing to a convergence of the logic and rationales of the rules governing cross-border economic and family matters. As far as

law countries. See Giaimo, Il matrimonio tra status e contratto, in Matrimonio, matrimonii, pp. 327 and follwing. See also Donati, La famiglia tra diritto pubblico e diritto privato, Cedam, 2004

[133] Legislators and courts have fixed general principles. They have set limits to autonomy. Public officials systematically intervene where parties fail to fulfil their obligations or when they overstep their responsibilities «E’ per questo che acquistano sempre maggiore rilevanza le convenzioni per regolare determinati aspetti della vita familiare, che comprendono anche questi valori, con ampio spazio all’autonomia negoziale, mentre la regolamentazione del legislatore fissa i principi generali, assume la funzione di dettare limiti all’autonomia e, in via residuale, interviene nelle ipotesi di mancato adempimento spontaneo e contrario.» Tommasini, Raffaele, “I rapporti personali tra coniugi”, in Trattato di Diritto Privato. Famiglia e Matrimonio, Giappichelli Editore, 2010, p. 431

[134] Lawrence Stone appropriately described the family of the late 20th century as “intensely self-centred, inwardly turned, emotionally bonded, sexually liberated, and child-oriented”. L. Stone, The Family, Sex and Marriage in England 1500-180, Penguin, 1977), p. 682, cited by Glendon, ‘The transformation’, p. 195

private international law of the family is concerned, most discussions and changes concerned the factor to be used within the multilateral system to localise the seat of marriage and of family relations.

As seen in the previous two chapters, after the 1940s, support for the 'traditional' connecting factors in personal matters of domicile and nationality started to decline.[135] After the 1950s, habitual residence emerged as a more flexible alternative to nationality and domicile.[136] Habitual residence differed from mere residence, which indicated physical presence in the same place for a limited duration, "in its quality of continuity for a substantial period" and it differed from domicile and nationality, which corresponded to permanent membership of a civil community, "in its lack of the need for permanence."[137] Numerous experts supported habitual residence because it appeared "to be the most appropriate available concept to meet the demands of a fluid, modern society."[138] Despite some support in the doctrine and some changes in the law, especially international law, domicile and nationality remained the standard links in matters of personal and family status.[139]

Too strong was the idea that one's personal law should correspond to the law of the community of which he or she is a permanent member either by choice, by birth or by dependence on other family members.[140] Although it did not lead to immediate and comprehensive changes in positive law, the growing popularity of habitual residence triggered a discussion on the virtues, and faults, of the traditional connecting factors. In contrast with residence, domicile and nationality preserved the capacity of the community to regulate personal and family matters in conformity with public policy and social interest. However, as Italian scholars had already pointed out at the time of the introduction of the 1942 Civil Code, the automatic application of the *lex patriae* and, by analogy, of the *lex domicilii*, could have unintended and harmful social consequences. Although domicile was also

[135] After the 1950s, reform proposals advanced in England and courts' decisions (see below) attempted to reform domicile and make it better suited to meet the demands of a changing society. Domicile Bills of 1958 and 1959. See also the First and Seventh Reports of the Private International Law Committee International conventions were also proposed to try to remove the conflicts between *lex domicilii* and *lex patriae*. the Hague Convention of 1955 Proposals for reform demonstrated a widespread frustration and disaffection with the idea that the same 'personal law' should rigorously control all aspects related to status. These changes and the trends were discussed by Graveson in 'The Law of Domicile in the Twentieth Century', Five Sheffield Jubilee Lectures (1960), pp. 85-111

[136] By the 1960s, habitual residence had been already codified in the Private International Law of a significant number of countries. Discussed by Graveson, Ronald Harry. *Comparative aspects of the general principles of private international law*. Martinus Nijhoff, 1963, pp. 68-72

[137] Private International Law Committee, Seventh Report (1963) Cmnd. 1955, para. 11

[138] Graveson, 'Conflict of Laws' 7th ed (1974), p. 194. For instance, Wills Act 1963, the Adoption Act 1968, the Recognition of Divorces and Legal Separations Act 1971 and the Domicile and Matrimonial Proceedings Act 1973

[139] For rules on domicile, see Graveson, 'The law of Domicile', pp. 195-225

[140] As also suggested by Graveson. Ibid. p. 188. For Graveson, Domicile indicated the law of the place in which a person "through the exercise of his own will or through the fact of dependence on other members of his family, has the closest personal connection" in matters of domestic life. Ibid. p. 189

instrumental to the protection of public policy, it is worth noting that English lawyers started emphasising the inherent liberalism of domicile and its common attributes with habitual residence:

> The idea of the personal law is based on the conception of man as a social being.... In accepting domicile as the criterion for this personal law, however, the English courts have regarded man as more than a social being: true to the common law tradition of individualism, they have regarded him as an individual, entitled to determine for himself, through the factual elements of domicile, the specific legal system which should constitute his personal law. For although the law of the domicile is the chief criterion adopted by English courts for the personal law, it lies within the power of any man of full age and capacity to establish his domicile in any country he chooses, and thereby automatically to make the law of that country his personal law. The same is true, mutatis mutandis, of the more recent concept of habitual residence.[141]

The *lex domicilii* thus continued to determine questions regarding jurisdiction and applicable law in English law in what were considered matters of vital social interest, including marriage and its dissolution and also questions regarding legitimacy and succession. This is because, Graveson argued in the 1970s, members of the family were also members of civil communities. At the same time, consistent with the 'individualist turn' noted by family experts in domestic family law, he also drew attention to the 'individualist elements' embedded in domicile. The emphasis placed by experts on individualism and individual choices is significant because it echoes the claims of family lawyers who detected a progressive 'privatisation' of domestic family law. These claims should not be exaggerated: domicile did not correspond to a free choice, and neither did habitual residence, but there were visible signs of change in the discourse as well as in the law governing cross-border personal matters.

Changes in the law especially concerned capacity, and capacity to contract marriage by women in particular. As early as the 1940s, English courts had specified that, although married women lost their separate domicile at marriage, in principle, their capacity to enter in marriage depended on their *lex domicilii*.[142] In the 1960s, statutory law eventually codified what came to be known as the 'dual-domicile' or 'ante-nuptial-domicile' test.[143] According to the dual-domicile test, each party must have

[141] Ibid. p. 187
[142] *Re Paine* [1940] and *H. v. H.* [1954] p. 258
[143] Marriage (Enabling) Act 1960, s. 1 (3) is in favour of the traditional view that the essentials which concern the formation of marriage are governed by the law of each party's domicile at the date of marriage, subject to the exception

capacity under their personal law.[144] Although justified by the fundamental principle of equality, the dual-domicile test had the unintended consequence of invalidating an international marriage.[145] Since two systems, each underpinned by distinct public policies, controlled the capacity and the substantial validity of the marriage, the test created greater chances of limping situations. Courts refused to apply the rule when it led to serious injustice. Experts looked for systemic solutions. In this context, Cheshire proposed to apply the 'intended matrimonial home' test.[146] Under this principle:

> The basic presumption is that capacity to marry is governed by the law of the husband's domicile at the time of the marriage, for normally it is in the country of that domicile that the parties intend to establish their permanent home. This presumption, however, is rebutted if it can be inferred that the parties at the time of marriage intended to establish their home in a certain country and that they did in fact establish it there within a reasonable time.[147]

The 'intended matrimonial home' test, which Cheshire proposed in the 1960s, appeared attractive because it submitted questions of capacity and substantial validity to one law. The test, which carried a reference to personal intent, also came across as more liberal and flexible compared to the nationality principle. However, as the description above suggests, the test was blatantly discriminatory against the wife, something which could no longer be accepted in the 1960s. Later advocates of intended matrimonial home test tried to remedy this bias towards the husband's personal law by moving the presumed matrimonial home, and the corresponding law governing capacity, to the country in which the matrimonial domicile was located before the marriage while, at the same

where the wife has decided before marriage to separate herself from the land of her prenuptial domicile and settle in her husband's country of domicile, the latter's law alone governs her capacity to marry. The doctrine thus dropped the 'matrimonial domicile' test developed in the social age. See Graveson, H. 'Matrimonial Domicile and the Contract of Marriage', *J. Comp. Leg*, (1938), pp. 55 et seq. See Cheshire, 'Private International Law', where he argued that the doctrine of the matrimonial home does not represent English law.

[144] With some exceptions in favour of the *lex loci celebrationis*, Courts continued to hold that, where the wife has decided before marriage to separate herself from the land of her prenuptial domicile and settle in her husband's country of domicile, the latter's law alone governs her capacity to marry: *Radwan V. Radwan* (No. 2) [1972] Fam. 35

[145] Since two legal systems controlled the capacity and the substantial validity of the marriage. Davie, Michael. "The Breaking-up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws." *Anglo-Am. L. Rev.* 23 (1994), p. 33

[146] Ibid. p. 34. As declared by Sir Jocelyn Simon P. in *Cheni v. Cheni*, a case concerning a petition for annulment of a potentially polygamous union, "the courts of this country will exceptionally refuse to recognise and give effect to a capacity or incapacity to marry by the law of the domicile on the ground that to give it recognition and effect would be unconscionable. The rule is thus an example of a wider class which has received authoritative judicial acknowledgment in our private international law." *Cheni v. Cheni* [1965] p. 99

[147] G. Cheshire, '*Private International Law'*, London: Butterworths, 1965 (7th ed.), pp. 277-278, cited in Davie, 'The Breaking Up', p. 34

time, they left the door open to the dual-domicile test.[148] According to its supporters, in this second formula, the test ensured predictability and was coherent with changing social patterns.[149]

Setting aside the question whether all couples acquired a matrimonial domicile before marriage, there were other problems with the 'intended matrimonial home' test. For instance, it did not give weight to the possibility that more than one law may have an interest in regulating the capacity and the incidents of marital status, and that the actual centre of gravity of the life of one person did not necessarily correspond to the law of the place where the couple permanently and temporarily relocated. The test was also vulnerable to criticism because it presumed that the parties were aware of the conditions and requirements set by the 'intended' law, thus putting at risk cross-border continuity of relations. Finally, the test would not necessarily create predictability as it may not be clear from the circumstances of the case to which country the parties intended to move. In the face of such problems, experts and courts started looking for a new test.[150] They found it in the 'proper law' or, in the 'objective version' of the proper law test developed in the social age.[151]

3.2 The Extension of Proper Law to Family Matters: A Market for Divorces?

The proper law test was used in cross-border family matters in *Indyka v. Indyka*, a landmark case where the House of Lords pronounced itself on the recognition of foreign divorces.[152] The *Indyka* decision followed another pathbreaking ruling, *Travers v. Holley*, where the Court of Appeal recognised a divorce decree awarded by a foreign court that did not exercise jurisdiction on the terms established by the Privy Council in *Le Mesurier v. Le Mesurier*.[153] The exceptional character of the law governing cross-border family matters and the protection of the interest of the receiving state demanded the application of the *lex domicilii* to all questions relating to status. They also demanded that jurisdiction in proceedings for dissolving marital status be granted exclusively to the courts of the matrimonial domicile.[154] Accordingly, English courts only recognised competence to try proceedings for divorce by the courts of the domicile of the husband. Combined with the state-

[148] Davie, 'The Breaking Up', p. 35
[149] Ibid. p. 35
[150] See Graveson, 'The English Private International Law of Husband and Wife', RCADI, 1962 and North, P., 'Reform, But Not Revolution', RCADI, 1990
[151] Sykes was probably the first to propose to use the test in (1955) 4 ICLQ 159
[152] *Indyka v. Indyka* [1969] 1 A.C. 33
[153] *Travers v. Holley* [1953] 3 W.L.R. 507, p. 246. This decision was welcomed by Graveson as the most important innovation of the post-war years. See the preface to Graveson, Ronald Harry. *The conflict of laws*. Vol. 7. Sweet & Maxwell, 1965
[154] *Le Mesurier v. Le Mesurier* [1895] A.C. 517

sanctioned power of the husband to control the residence of the wife, this made it impossible for deserted wives to start proceedings for divorce anywhere else than in the husband's domicile.

In *Travers v. Holley* the Court of Appeal established that a decree of divorce issued by a foreign court was susceptible to be recognised even if the court exercised a non-domiciliary jurisdiction, provided the contents of the *lex fori* corresponded to the legislation of the receiving forum.[155] Specifically, in *Travers v. Holley*, the foreign court had issued the divorce decree based on 'deserted wife legislation' which also existed in English law.[156] *Travers v. Holley* was important from a jurisprudential viewpoint because it showed "the capacity of the courts to develop and refine the common law and to bring it into line with changing conditions and new situations."[157] The House of Lords in *Indyka v. Indyka* went further than the Court of Appeal. The challenges raised by the *Indyka* case were of a more general nature because, in this case, the decree of divorce had been pronounced by foreign court based on the separate residence of the wife and the petitioning wife had not been deserted by her husband.[158] The doctrinal and practical importance of *Indyka v. Indyka* was even greater because it did not merely raise a question of reciprocal treatment as *Travers v. Holley*.

One further reason why *Indyka v. Indyka* drew the attentions of experts and jurists was because it centred on the unsettled question of the capacity for separate domicile, or residence, of married women. A few years earlier, Lord Denning had remarked in *Gray v. Formosa* that the rule that forcibly submitted the wife to the domicile of the husband, based as it was on the doctrine of coverture, was one of the last "barbarous relics" of the wife's servitude.[159] The fact of the case and, at the same time, the specific legal culture of the late 1960s made *Indyka v. Indyka* particularly suitable to deal once and for all with the question of "whether an English court can and ought to recognise a decree granted to a married woman by a court other than that of England, being the

[155] Significaly, the Court of Appeal explicitly referred to the words of Lord Watson in *Le Mesurier v. Le Mesurier* where he had referred to the fact that a decree would not have extra-territorial authority if it trumped the interest of the recognising state to support his judgement by inverting the argument advanced by the Privy Council. Hence, Hodson, L.J held that: "…where it is found that the municipal law is not peculiar to the forum of one countru but corresponds with a law of a second country, such municipal law cannot be said to trench upon the interests of that country. … Where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courtts of this country were to refuse to recognize a jurisdiciton which mutatis mutandis they claim for themselves." (1953) 3 W.L.R. at 516

[156] In that case, a court of New South Wales had issued its decree under the Matrimonial Causes Act, 1899 (N.S.W.). In English law, additional grounds for jurisdiction for deserted wives were granted by the Matrimonial Causes Act of 1937.

[157] See Austin, Jean, "Reciprocity in International Recognition of Divorces: Travers v Holley", SydLawRw 30. 1(3) Sydney Law Review, 1954, p. 400

[158] In that case, the Czechoslovak court whose decree of divorce had been challenged had issued it basing its jurisdiction on continuous residence of the wife for three years prior to the proceedings. The Czechoslovak decree was recognised by the English court, thus constituting an unprecedented challenge to the dogmatic idea advanced by the Privy Council that a divorce decree could only be pronounced by a judge of the husband's domicile.

[159] [1963] p. 259, 267

country in which, her husband is domiciled."[160] Unlike the Court of Appeal in *Travers v. Holley*, the House of Lords was not looking for an *ad hoc* remedy but a definitive solution for a deplorable situation brought about by the law itself. Although, strictly speaking, it concerned a technical matter, the decision by the House of Lords had potential far-reaching consequences and it carried great jurisprudential meaning.

Rather than the decision itself - the House of Lords recognising the foreign decree - what captured the imagination of legal scholars was the basis used by the Law Lords for their decision, and the wider implications of the discussion among the Lords concerning jurisdiction and connecting factors in personal and family matters.[161] For the apex judges, the essential requirement for a foreign court to issue a divorce decree which was also eligible for recognition by an English court was not domicile itself, but that there is a real and substantial connection with the country of the court granting the decree.[162] Although what the Law Lords actually meant in their separate rulings was not at all clear and remained subject to some speculation, jurisdiction based on 'the community with which the spouses are most closely connected' and 'with what community they were most closely associated' all pointed to the idea, first formulated by Westlake and then further elaborated by Dicey and Cheshire, of using the proper law test as the basis of jurisdiction.[163]

The introduction of the proper law test in family matters constituted such a novelty - and it indicated such a shift away from 'traditional' abstract links - that it immediately drew the attention of English and foreign experts. It led to the adoption of an 'objective version' of a test which had been, until then, exclusively reserved for 'mercantile contracts'. As the lengthy discussion that took place between the Lord Justices in *Indyka v. Indyka* shows, this extension was not based on ideological

[160] Lord Wilberforce at p. 93. Rudolph Indyka married twice, first Helena and secondly Rose. Rudolph, whose domicile of origin was Czechoslovakia, married Helena in Czechoslovakia in 1938. From 1938 to 1945 Rudolph was fighting the Germans outside Czechoslovakia and unable to communicate with Helena. In 1946 he settled in England, where he acquired a domicile of choice. In 1949 Helena obtained a decree of divorce in Czechoslovakia. Ten years later the husband went through a ceremony of marriage in England with Rose. In 1965 Rose petitioned for divorce in England, a proceeding which logically presupposed the existence of a valid marriage.. On the husband's allegation, that his marriage to her was void for bigamy because the earlier Czechoslovak decree of divorce obtained by Helena was not valid in English law, the issue of the validity of the marriage was taken as the first and subsidiary question, itself depending on the recognition in England of the Czechoslovak divorce.

[161] Discussed by Graveson, 'The conflict of laws', pp. 313-315

[162] Various questions remained ananswered: - should the connection exist with the portioner or with the respond? would the test apply (only) to established tests such as nationality and residence? The various interpretation of the test advanced by the Court, the question whether the proper law was a test in itself, or whether it was an ancillary test, and to what seat could the real substantila connection correspond to are here not considered.

[163] The lack of clarify was criticised by experts. Morris said of the employment of the test in *Indyka v. Indyka*, that "the effect . . . has been to leave the law in a state of grave uncertainty on a matter where certainty is most desirable…. [T]here has been a spate of cases on the recognition of foreign divorces ; the courts have been left to grope their way as best they can through the uncertainties of what constitutes a real and substantial connection; and large numbers of people simply do not know whether or not they are married, and if so, to whom." See Morris, Conflict of Laws, 1st ed. (1971), 142-143

grounds such as the protection of the free will of the parties. On the contrary, the House of Lords advanced the proper law rule as a flexible and definitive test that would enable courts to deal with the problem of establishing a connection between persons, families and legal systems in contexts characterised by greater mobility and risks of legal abuses. The proper law was desirable because it allowed for justice to be done in each case. The House of Lords pointed out that "courts are well able to perform the task of examining the reality of the connection" and, in doing so, the Lords were convinced that "they are more likely to reach just, and to avoid artificial, results.[164]

From the progressive extension of the proper law test, it did not follow that parties could start proceedings and choose the applicable law regardless of a prior substantial connection with the engaged legal system. The pre-condition was the existence of a pre-existing connection, whether in the form of domicile, nationality, residence or otherwise. The recognition of foreign decrees, and more generally the application of foreign law in matters concerning the personal and family status of English subjects and domiciliaries would also be subject to the limits established by public policy, the Lords held.[165] However, the application of the principle of recognition in *Indyka* based on the real and significant connection between the petitioning wife and the foreign forum caught the attention of jurists not only because it put into question the centuries-old supremacy of the domicile rule, but especially because it was borrowed - or so it was assumed - from the proper law test that had been exclusively applied to mercantile contracts in the course of the classical and social age.

Changes in law and in discourse thus suggested a gradual but significant extension of principles that used to govern market-relations to private international law of the family. Hence, the extension of the proper law test brought back questions, characteristic of cross-border contractual matters, that had not arisen in the context of household matters since the medieval age. One example were questions concerning '*fraud à la loi*'. In the classical and social ages, the automatic application of the law of domicile, the strict rules governing jurisdiction, and the high threshold established by public policy made it nearly impossible for parties to escape their duties and obligations under their personal law. Issues relating to the risk of evasion of the law were debated in mercantile matters only.[166] The (re)introduction of the proper law test in matrimonial proceedings increased the risks of evasion.

[164] [1969] 1 A.C. 33. Per Lord Wilberforce
[165] *Indyka v. Indyka* [1969] 1 A.C..33 at p. 58 At the same time, in the following cases, courts also specified that a public policy that granted discretionary powers on courts to refuse to recognise foreign decrees violating state interest or English ideas of justice had to be exercised with caution. Qureshi v. Qureshi [1972] Fam. 173, 201
[166] With the exception of *R. v. Brentwood Superintendent Registrar of Marriages*, ex p. Arias, [1968] 2 Q.B. 956

Commenting the *Indyka* decision, Graveson remarked that "[e]vasion … follows naturally from the principle of recognition."[167] To this risk, Lord Pearce responded in *Indyka v. Indyka* that:

> … our courts should reserve to themselves the right to refuse a recognition of those decrees which offend our notions of genuine divorce. They have done so when decrees offend against substantial justice, and this, of course, includes a decree obtained by fraud. But I think it also includes or should include decrees where a wife has gone abroad in order to obtain a divorce and where a divorce can be said not to be genuine according to our notions of divorce.[168]

The extension of the proper law test to matrimonial causes and to family matters appeared to be in contradiction with the traditional logic and rationales of private international law. It was at risk of prejudicing the result-oriented and policy-based rules and principles that had underpinned the law governing cross-border family matters until a few years before. The adoption of the test implied the risk, implicitly assumed by the court, that in subsequent developments greater consideration would be placed on personal preferences and private interest. One could argue that the simultaneous existence of different domestic laws which pursued distinct policies and the contemporary application of 'liberal' principles and market-logics would lead to the automatic recognition of foreign divorces and marriages that might prejudice the interest and policy of the recognising forum. However, as Graveson commented (in a late edition of his *Conflict of Laws*) echoing the words of Lord Pearce:

> Does evasion of the law justify the suspension of normal rules of applicable law and jurisdiction? Is the threat to the integrity of a legal system through evasion of its law real or imaginary? It is submitted that the danger is largely imaginary. … The remedy for evasion is not to suspend the normal operation of rules of private international law, but by legislation to prohibit acts of an evasive kind which are unacceptable. … This method preserves the integrity of private international law, which is more than a matter of juristic elegance. It is a question of the rule of law.[169]

The application of the proper law test brought back questions that had not been dealt with in cross-border family cases for the centuries. It raised the prospect that the principle of recognition, used by Dicey to advocate the automatic enforcement of rights acquired abroad with respect to mercantile

[167] Graveson, 'The conflict of laws', p. 173
[168] [1969] 1 A.C. 33
[169] Graveson, 'The conflict of laws', p. 174

contracts, would now be used systematically in the context of family matters, in divorce proceedings and perhaps soon enough even in marriage cases (see next section). This idea appeared to be irreconcilable with the exceptional character and functions that experts associated with the law governing marital status specifically, and with cross-border family matters in general during the classical and the social age, which, in all but exceptional cases, justified a structured if not systematic preference for the *lex fori,* where dressed as *lex domicilii* or *lex patriae*. However, as pointed out by Lord Pearce and reiterated by Graveson, there existed solutions to protect the 'rule of law' and, at the same time, to advance more flexible principles such as the most real and substantial connection test.

What is relevant for this genealogical reconstruction is not only that the development of alternative factors in the age of conflicting considerations brought back rules and principles and specific challenges which had not arisen in family matters in previous centuries, but also that the language used by experts and by courts started to change quite dramatically because of mixing logic and rationales. On the one hand, references were made to governance and to constitutional principles, like rule of law, which had not been used in the context of conflict of laws but confirmed the subjection of private international law to public policy and public law. On the other hand, as Graveson pointed out, the passage quoted above of Lord Pearce indicated that the Law Lords were especially preoccupied that the widening of jurisdiction might lead to a "divorce market and the possibility of forum shopping".[170] The application of 'mercantile principles' to the traditionally segregated and heavily regulated family matters led to fears that there might soon be a market for divorces and for family laws. Using a conceptual vocabulary until then unknown, and pointing to a profound transformation of logic and assumptions, Lord Pearce thus distinguished:

> between those jurisdictions which purvey divorces to the foreign market and those who are genuinely trying to make laws for the divorce of its citizens (including its genuine residents) to whom its duty lies.[171]

The extension of jurisdictional rules and choice of law principles which had exclusively applied to mercantile relations meant that specialists and courts translated their preoccupations in a conceptual vocabulary which reflected the greater concerns raised by contractual freedoms in market-relations, applied however to family relations. This is somewhat paradoxical, since the proper law test shares plenty of conceptual and normative ground with medieval principles like consent and intent that

[170] Graveson, 'The conflict of laws', p. 173
[171] [1969] 1 A.C. 33, at p. 89

applied to family matters. However, considering the continuous diversification of laws governing marriage, divorce, adoption on the one hand and, on the second one, the progressive extension of the proper law test, greater flexibility in choice of law and growing emphasis on cross-border continuity, it would need no flight of fancy to imagine that, with, there might be soon be a market for marriages, for divorces or even a market for babies.[172]

No court nor jurist believed that the proper law test in family matters was equal to a free choice. As the Lords themselves made clear, the proper law test was to lay more, and not less emphasis, on actual and substantial links. Within a careful regulatory framework, the test appeared flexible enough to be able to factor in the social interest of the legal systems connected to the parties or to the dispute on the one hand, and the concrete circumstances of each case on the other. With increasing cross-border mobility, and with divorce legislation being introduced in some but not all European jurisdictions, this appeared an appropriate and balanced solution. Accordingly, the United Kingdom endorsed the adoption of the proper law test both as a basis for jurisdiction and for applicable law ahead of the adoption of The Hague Convention on the Recognition of Divorces and Legal Separations of 1970.[173] The Convention ended the stalemate in harmonisation of conflict principles in family matters at supranational level. However, as the proposal was not taken on board, the Convention turned the clock back to the pre-*Indyka* domicile rule.[174]

3.3 Statutory Reforms, International Conventions and the Return of the Law of the Domicile

The result of the reforms and restorations of traditional conflict rules was that principles which had been developed in the previous two centuries were still in force at the beginning of the contemporary age. This is the case of the common law of domicile in England and, as we shall see in the next chapter, of the law of nationality in Italian law.[175] Although the matrimonial domicile rule was put back in place, developments in law and in discourse suggested a gradual and yet significant process of judicial, statutory and doctrinal revision of traditional rules "to remove hardship and to correct injustices."[176] It is in this context that Parliament introduced the Domicile and Matrimonial

[172] Posner, Richard A. "The regulation of the market in adoptions." Boston University Law Review 67 (1987)
[173] Implemented in England with the Recognition of Divorces and Legal Separations Act of 1971
[174] Except for those matters that did not fall within the scope of the convention, i.e. Nullity and other territories. Also ended for nullity recognition with the Family Law Act 1986.
[175] "Many of its rules were first laid down in the 19th century and seem better suited to 19th century conditions than to those of the 20th century." In his view, one example is that of "the common law rules relating to domicile, particularly the rules making it so difficult to shake off a domicile of origin". Lord Collins et al., The Conflict of Laws (2006), p. 10
[176] Many of the reforms that were introduced in English conflict of laws in the contemporary age took the form of legislation. In English conflict of laws, substantial re-writing took place in the 1960s and 1970s in matters of adoption and children, but also the proper law of contract, the applicable law in tort etc. As seen, the integration of legislation in

Proceedings Act 1973 which conferred on married women capacity for an independent domicile, thus eliminating one of the last bastions of the law of coverture. [177] The acquisition of a separate domicile by women, whether married or unmarried, revitalised the debate on the most appropriate test to be used in cross-border family disputes concerning family status. With the restoration of the pre-*Indyka* rule, the discussion no longer concerned divorce, but the validity of cross-border marriages.

What law should govern the competence of the parties and the substantial validity of international marriages? There were technical reasons why the matrimonial domicile rule was no longer widely supported, *inter alia* that a matrimonial home could only come into being after the marriage.[178] But there was also a more decisive reason that justified in the eyes of a growing number of judges and experts the replacement of the old test. From the beginning of the contemporary age, cross-border validity of marriages (and of divorces) replaced the unilateral protection of social cohesion and public order of the internal forum as a fundamental conflict principle. English courts affirmed that there was a strong presumption in favour of marriage validity.[179] Limping marriages, which the dual-domicile rule risked generating in large numbers, should be avoided because they trapped individuals in a legal limbo whereby they are considered legally married within one jurisdiction and not in others, with consequences which range from not being able to obtain a divorce to the inability to claim ancillary relief. The same concern for cross-border continuity was being affirmed by experts:

> Since the laws of all countries encourage the status of marriage, it is evident that choice of law rules as to the validity of marriage should, so far as possible, be such that a marriage, duly celebrated between willing parties, will not be held invalid without good reason. The premise should be that an invalidating rule of a domestic system, whether English or foreign, should only be applied to a given international marriage if there is good reason for its application to that marriage. If a marriage does not fall within the purpose of a domestic invalidating rule, there can be no point in applying that rule. If, for example, the purpose of a country's invalidating rule is to protect the public interest, it should not be applied so as to invalidate a marriage which will not impinge on that

the predominantly judge-made English system also took place in domestic family law, which suggests a noteworthy inversion of legislative and judicial techniques in common law and civil law countries, in internal as well as in cross-border matters. Discussed by Graveson in Preface to 'Conflict of Laws', p. vii

[177] Domicile and Matrimonial Proceedings Act 1973, s. 1(1). Section 1(2) of the 1973 Act provided that the domicile of a married woman should be "ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile." Notably, the same Act (s. 5) also established habitual residence as ground for divorce jurisdiction along domicile.

[178] Jaffey, A. J. E. "The Essential Validity of Marriage in the English Conflict of Laws." *The Modern Law Review* 41.1 (1978), pp. 38-50

[179] *Radwan v. Radwan* (no. 2) [1973] Fam. 35

country's public interest. On the other hand, even where a marriage does fall within the policy of a domestic invalidating rule, other considerations may nevertheless require its validation.[180]

We see here the re-emergence of *favor matrimonii* linked to a consent-based conception of marriage. Only the spouses should be able to impugn the validity of a marriage, and only if there is a significant connection with a country which has a substantial reason of public policy for invalidating that marriage. English courts followed this notion.[181] The emerging trend was that the validity of a marriage should not be questioned merely because the union is objectionable to a country which is remotely connected to the marriage or to the dispute. Experts thus insisted that countries take a tolerant approach, arguing that only in a limited number of cases, and only when the parties themselves sought redress in court should public policy play a role.[182] It is in this context that English courts and common law experts proposed to use the 'most real and substantial connection' also to settle questions concerning the validity of cross-border marriages.[183]

The first to propose this idea was Edward Sykes. Sykes criticised the typical approach to questions of validity because, he argued, "[f]ar less social significance in truth attaches to the contract" of marriage, than to its incidents.[184] Instead of looking for different rules to determine the applicable law for each aspect, he proposed to apply, by analogy, the same rules that govern the cross-border validity of contracts, i.e. the proper law. This idea had been ruled out by Dicey and Cheshire who had argued that, unlike mercantile contracts (where 'pragmatism' and 'scientific elegance' justified the employment of one single test), different laws should continue to govern different aspects of marriage and family relations. The adoption of the proper law test in marriage, however, would guarantee a flexible approach and would enable courts to consider a whole range of contacts between the spouses and legal systems, including their domiciles, the place of contracting as well as the intended

[180] Jaffey, 'The essential validity', p. 38

[181] Accordingly, English courts thus upheld the principle of *favor matrimonii* in some prominent decisions in the 1970s and 1980s. The capacity of the parties to get married was established in accordance with choice-of-law rules that ensured greater chances of cross-border continuity of marriage. Anthony Lincoln J in Lawrence v Lawrence [1985] Fam. 106, for instance, held that, exceptionally the court may look at the capacity of a party to marry in a particular jursidiction by reference to the intended family home rather than the ante-nuptial domicile.

[182] In a nutshell, experts foresaw the possibility of applying principles similar to those that governed international contracts Suggested in ibid. p. 38. Reference to Jaffey, " Essential Validity' of Contracts in the English Conflict of Laws " (1974) 23 I.C.L.Q. 1, 2, 8 et seq.

[183] Sykes, Edward I. "The Essential Validity of Marriage." *International & Comparative Law Quarterly* 4.2 (1955). See Fentiman, Richard. "The Validity of Marriage and the Proper Law." *The Cambridge Law Journal* 44.2 (1985)

[184] Sykes, Edward I. "The Essential Validity'.

matrimonial home. The idea was taken up by the House of Lords in *Vervaeke v. Smith*.[185] In that case, Lord Simon argued that, regardless of the domicile of the parties:

> …England was the territory with which the marriage had the most real and substantial connection: the ceremony was in England, the 'husband' was of English domicile and British nationality, the 'wife' was to assume British nationality and take advantage of it, and she was to become permanently resident in England. There was indeed no other territorial law with which the marriage had any real or substantial connection.[186]

After *Vervaeke v. Smith* was decided, English courts applied the proper law test in several other marriage cases.[187] The flexibility of the test, and the greater complexity of cross-border marriage cases - perfectly illustrated by *Vervaeke v. Smith* - induced Richard Fentiman to advocate the adoption of the test to all questions of status.[188] For Fentiman, the test allowed justice to be done in each case. Questions of validity under the proper law test would be judged flexibly and with sensitivity to their factual matrix, both aspects which English experts and courts normally favour. From a 'sociological perspective', this approach would also be desirable because it is based on the idea that it should be the place where the couple lead their actual marital life, and not their ante-nuptial domiciles or their hypothetical intended matrimonial home, that determines questions of applicable law and validity.[189]

As questions raised by the *Indyka* case and subsequently dealt with by courts showed, and as Fentiman himself acknowledged, the application of the proper law test to cross-border family relations which are rooted in a variety of jurisdictions generated a degree of uncertainty in its application.[190] As in employment and commercial contract cases so in cross-border marriage and family relations, the proper law test placed on courts the burden of identifying the most closely connected law. Increasing cross-border exchanges and immigration from extra-European countries could only make things more complicated.[191] In contractual matters, such problems were avoided by the power granted to contracting parties to choose the applicable law. The possibility of introducing party autonomy was

[185] [1983] 1 AC 145
[186] Ibid. at 166
[187] It was applid in *Lawrence v. Lawrence* [1985] Fam. 106, a case for remarriage after divorce. It was also applied in polygamous cases, *Entry Clearance Officer, Dhaka v. Ranu Begum* [1986] Imm. AR 460. In *R. v. Immigration Appeal Tribunal, ex p. Rafika Bibi* [1989] Imm. AR 1. In the latter one, it was suggested thatt the proper law test should be aplied whenever it validates a marriage which is invalid under the dual domicile test.
[188] See above
[189] Fentiman, 'The Validity'. p. 277
[190] [1985] CU 256; (1986) 6 O J LS 353
[191] Also discussed in *R. v. Immigration Appeal Tribunal, ex p. Rafika Bibi* [1989] Imm. AR 1, pp. 4-5

ruled out in marriage matters.[192] The vagueness of the concept and its question-begging nature made its employment in cross-border family cases questionable because the test ultimately led to uncertainty, which was the reason why the dual-domicile rule had been considered defective in the first place. Hence, the Law Commission remarked in 1985 that:

> [This test] is an inherently vague and unpredictable test which would introduce an unacceptable degree of uncertainty into the law. It is a test which is difficult to apply other than through the courtroom process and it is therefore unsuitable in an area where the law's function is essentially prospective, i.e., a yardstick for future planning.[193]

Given the inherent flaws of alternative connecting factors, in its evaluation of choice-of-law rules applicable to questions of validity of cross-border marriages, it is not surprising that the Law Commission of England and Wales supported the retention of the dual-domicile test in 1985.[194] The Commission published a further report two years later where it upheld the general principle of *favor matrimonii*, but it also took a strong view against any comprehensive re-statement of the law by statutory laws that might ossify the system in a context requiring greater flexibility.[195] Persuaded by the Law Commission, neither Parliament nor courts attempted to develop new connecting factors or a new approach to the challenges raised by the growing international dimension of family law. The effect was that, by the 1990s, the common law of domicile, amended by a few reforms, continued to govern most cross-border family matters. Hence, different tests applied for different aspects of marriage, and different "public and social factors" determined a different approach for each.[196]

[192] North, 'Reform not revolution', p. 67. "Such problems are avoided in contract by the power to choose the applicable law. That makes it possible for commercial men, and their advisers, to organize their affairs prospectively."
[193] Law Commission of England and Wales, Working Paper No. 89, 'Private International Law. Choice of Law Rules in Marriage' (1986), para. 3.20, p. 74
[194] For a discussion, see Lord Collins, *The Conflict of Laws* (2013), p. 943
[195] The reason for the Commission's ostracism was the risk that it might lead to less flexibility. Although the Commission agreed that there was much to recommend in a reform with the aim to clarify the applicable rules, "legislation might have the unfortunate effect of ossifying rules which are still in the process of development has caused us to look carefully at the desirability of recommending a statutory restatement of those choice of law rules." Law Commission, '*Private International Law'*, p. 6. Were statutory rules to adopted, this flexibility would be lost.
[196] As also affirmed in *Radwan v. Radwan (No. 2)* [1973] Fam. 35, 51: "It is an over-simplification of the common law to assume that the same test for purposes of choice of law applies to every kind of incapacity - marriage, affinity, prohibition of monogamous contract by virtue of an existing spouse, and capacity for polygamy. Different public and social factors are relevant to each of these types of incapacity." For an overview of the rules applicable at this point see the systematic report by North, 'Reform not Revolution'.

3.4 Italian Private International Law between Unilateralism and Multilateralism

Italian conflict of laws saw changes in law and in the doctrine: in a nutshell the development of alternative connecting factors and greater emphasis placed on the recognition of cross-border continuity of family relations, comparable to those examined in English private international law of the family. Changes were codified in the Law n. 218 of 1995. The 1995 reform had the twofold objective of bringing the old provisions, until then contained in the preliminary provisions, under an organic law and of overcoming the particularism and local bias which had been enshrined in the Civil Code of 1942.[197] Conflict rules were also amended to bring the law in tune with dominant doctrines and to conform to constitutional provisions.[198] In line with developments taking place abroad, the 1995 Law reformed many of the rules governing jurisdiction, choice-of-law and *exequatur* proceedings introduced during the social age. Accordingly, it diversified connecting factors, and it included domicile and habitual residence among the legitimate grounds for jurisdiction.[199]

The function of Italian private international law was to coordinate the interaction of domestic laws without prejudice to interests of any of the foreign laws connected to them.[200] The reform of 1995 also codified the principle - long accepted as doctrine - that Italian private international law should conform to international law.[201] The Law of 1995 thus restored confidence in multilateralism and in internationalism.[202] Despite multilateral and internationalist elements which were characteristic of the transition to the contemporary age in all jurisdictions, 'unilateral principles' were also included in Italian private international law. Quadri was right. Italian law, like all conflict of laws, was to remain a mix of multilateral and unilateral rules. Although Italian private international law is predominantly multilateral, interest analysis, policy-oriented norms and overriding mandatory provisions underpin the law of 1995. This is especially visible in family matters where, despite some innovations that suggest openness to foreign doctrines and to alternative connecting factors, preference is systematically given to Italian (national) law.

[197] Law n. 218 of 31 May 1995 ('Riforma del Sistema Italiano di diritto internazionale privato')
[198] Conetti. Tonolo. Vismara, 'Commento', p. 5
[199] This is the case, for instance, with the general requirement for jurisdiction which went from nationality to residence.
[200] Hence, it is not merely a coordination mechanism. It is a coordination mechanism of interests. The functional objective is that of "coordinare I valori e gli interessi di cui il nostro ordinamento è portatore, con quelli accolti in altri ordinamenti, dando luogo a un'applicazione e un riconoscimento di norme e atti straniri alle condizioni e nei limiti che le nostre regole dispongono." Conetti et al., 'Commento', p. 4
[201] Article 2; Conetti et al., 'Commento', pp. 7-9
[202] Notably, it did not abolish the condition of reciprocity estaboished in Article 16 of the preliminary provisions of the Civil Code. However, it has been argued that the old principle has been implitly abrogated. Mosconi, Franco, and Cristina Campiglio. *Diritto internazionale privato e processuale*. Utet, 2007, p. 6 et seq.

However, unilateralism and the protection of public policy also holds true for those areas where 'traditionally' conflict rules enabled the creation of cross-border exchanges and functioned like a neutral coordination mechanism. The Law of 1995 thus integrated the Brussels Convention of 1968 and by the Rome Convention of 1980. More generally, the 1995 enactment affirmed the unilateral principle according to which the application of Italian law is in some instances required and, vice-versa, that foreign law is precluded, by virtue of its object and mandatory character.[203] The 1995 Law appears to be driven by the desire to reach a balance between different policy interests and objectives. It included unilateral principles within a multilateral framework. It opened up to foreign laws and to foreign doctrines, as shown by inclusion of domicile and residence as alternative connecting factors. In personal matters, the Law of 1995 also established that, whenever the person possesses more than one nationality, that should be considered. Where a person has multiple nationalities, the law gives priority to the legal system of the state with which the person is 'most closely connected'.[204]

Despite the renovation of the multilateral method, local bias remained visible especially, in cross-border marriage and family matters. The Law of 1995 established the general rule that, when determining personal law in the presence of multiple nationalities and connections, courts must give priority to Italian law whenever there exists a connection with Italian law, even if a foreign system is more closely connected.[205] As to questions of capacity to enter in marriage, the law of 1995 is consistent with the provisions predating the reform, although reviewed in light of the constitutional protection of equality between the spouses.[206] Capacity to contract marriage is thus governed by the *lex patriae* of each party.[207] The fact that the substantial validity of marriage is governed by personal law of each marrying partner gives rise to complications which can be compared to those seen above in English law.[208] Such complications are in many cases deflected, as Italian law is applied in the case of dual nationals whenever one of the nationalities is Italian, even if the spouses have a foreign nationality in common.[209]

If the spouses have different nationalities, however, a dual-nationality test will apply, increasing the risks of limping situations that led English courts to try to develop alternative connecting factors. The

[203] Article 17, See Conetti et al., 'Commento', pp. 53-55. But also, Article 34 of EGBGB, Article 20 of Belgian law of 2004
[204] Courts ought to consider factual or legal elements to determine what law is the most closely connected. Article 19
[205] Article 19, n. 2 F. Mosconi e C. Campiglio, 'Diritto Internazionale Privato', 195-196; Conetti et al., 'Commento', pp. 60-61
[206] Legal capacity is, in general, governed by the conflict provisions of the law of the nationality of the person. Article 20
[207] Conetti et al., 'Commento', p. 69
[208] Article 27
[209] Mosconi e Campiglio, 'Diritto Internazionale Privato', p. 197; Conetti et al., 'Commento', p. 60

existence of overriding mandatory provisions, introduced in the Civil Code in 1942 and applicable to both Italian and foreign citizens according to the law of 1995, also increases the risks of limping situations, but corresponds to the conflicting arguments used by reformers.[210] The combined provisions of the Civil Code and of the law of 1995 require that marriages involving Italian citizens meet the condition regarding minimum age,[211] mental capacity,[212] prohibited degrees,[213] and monogamy.[214] The absolute conditions set by the Italian civil code also apply to foreign nationals who marry in Italy, even if they have capacity under their personal laws.[215] These provisions, which we have also found in English law, refer to the protection of overriding interests which, as the case of under-age marriages shows, are considered expression of indispensable and constitutional principles protecting both public policy and individual interest.[216]

As far as formalities for entering marriage are concerned, the reform embodies *favor matrimonii* and at the same time it subjects the marrying couple to rules which protect local interest and public policy and which have a mandatory character. Accordingly, a marriage is valid as to its form if it valid according to the *lex loci celebrationis*, or the law of nationality of either party, or by the law of their common domicile ("*comune residenza*").[217] This existence of a 'cascade' of connecting factors, the doctrine has appropriately argued, indicates a general presumption in favour of validity. In fact, experts have suggested that the presumption is so strong that the rule may be compared to a 'protective measure' ("*norma materiale*") validating marriages regardless of formal conditions.[218] However, the form of celebration cannot be in conflict with fundamental principles that are protected by the internal order. As in England (ahead of the recent reform, see Chapter 10, section 3.2) so in Italy, it is required

[210] Articles 115 and 116. See Article 73 of L.n.218/1995
[211] Article 84
[212] Article 85
[213] Article 87
[214] Article 86
[215] Discussed in Lina Panella, 'Il matrimonio del cittadino', in Trattato, pp. 753-754
[216] Nascimbene, 'Il matrimonio del cittadino italiano all'estero e dello straniero in italia', In Trattato Bonilini-Cattaeneo, I., UTET, 2007, p. 196. In the aftermath of the reform, part of the scholarship nonetheless argued that the preservation of such provisions was a missed opportunity for the introduction of principles which are "more liberal and more tolerant towards the recognition of foreign values and foreign laws". Saravalle, Riforma del sistema italiano di diritto internazionale privato, Legge 31.5.1995, n. 218, Commentairio, sub art. 27 e 28, in *Riv. Dir. It. Priv. Proc*. 1995, p. 1049
[217] Article 28
[218] Carella, Commento all'art. 27, Condizioni per contrarre matrimonio. Commentario alla legge 31.5.1995, n. 218, in Bariatti (ed.), Nuove leggi civili commentate, 1996, 1157 et seq. At p. 167, Carella argues that «Il richiamo alternativo di ben quattro leggi per la disciplina della validità formale del matrimonio rende estremamente improbabile l'invalidità di quest'ultimo, onde a causa del numero elevato dei criteri di collegamento utilizzati, la disposizione si apparenta molto ad una norma di diritto internazionale privato materiale che disponga l'automatica validità formale dei matrimoni con elementi di estraneità per il semplice fatto di essere stati posti in essere.»

that the marriage is celebrated between persons of the opposite sex.[219] In addition, a foreigner marrying in Italy must meet further conditions concerning legal residence and free marital status.[220]

As far as the law regulating rights and obligations between family members is concerned, different provisions apply to the relation between husband and wife[221] and that between parents and children.[222] In general, the 1995 Law submits the relationship between spouses to the law of common nationality, subject to the qualification in favor of Italian law above. Without a common nationality or in the presence of multiple nationalities, rights and obligations of the spouses are to be determined by the law of the place which has the most significant connection with the matrimonial life ("*legge dello Stato nel quale la vita matrimoniale è prevalentemente localizzata*").[223]

The inclusion of the proper law test in Italian private international law points to a process of convergence of systems, with the aim of determining what law and what jurisdictions are most closely connected in a context where marriages and families are frequently rooted in a variety of places and laws. Common residence is normally considered one of the most frequent links. But it is up to the deciding judge to verify where the matrimonial life is most prevalently located in consideration of the circumstances of each case.[224] Hence, the expansion of proper law to family matters reveals greater concerns for the actual and factual circumstances of the parties, relationships and disputes. It also reveals a general concern for continuity of obligations and rights. Conversely, even when it comes to the implementation of the proper law test, Italian choice of law rules are biased towards Italian law and local interest. If one of the spouses has Italian nationality, Italian law will prevail regardless of a more substantial connection with a foreign legal system.

For jurisdiction in separation and divorce proceedings, in addition to general rules, the reform establishes that Italian courts have jurisdiction when either of the spouses possesses Italian nationality

[219] Lina Panella, 'Il matrimonio del cittadino', p. 738. It followed from the above rule, and from the protection of public policy, one or more Italian citizens of the same sex married abroad, even in conformity with the local law, the marriage could not be received in Italy. (Public order, Art. 16, 64 and 65 of the Law of 1995). See Mosconi, Franco. "Europa, famiglia e diritto internazionale privato." *Rivista di diritto internazionale* 91.2 (2008)
[220] Among them, the requirement of a certificate that proves his or her unmarried status and proof of legal residence in Italy (Art. 116 of C.C.) Both these provisions have been challenged in courts because they seem to cause prejudice to the right to marriage., The Constitutional Court has responded, as to the first rpovision, that the "nulla osta" facilitates, rather than creating an obstcle, to marriage. (Cort. Cost. 30 gennaio 2003, n. 14, also in *Riv. Dir. Internaz*. 2003, 814). Doubts persist in the doctrine concerning the provision requiring proof of legal residence. See Lina Panella, 'Il matrimonio del cittadino', pp. 748-753
[221] Articles 29-30
[222] Article 36
[223] Article 29
[224] Conetti et al., 'Commento', p. 126

or when the marriage has been celebrated in Italy, regardless of the residence of the parties.[225] With regard to dissolution of marriage, the 1995 Law submits separation and divorce to the common law of nationality of the spouses at the start of the proceedings. Alternatively, courts can apply the law of the country in which matrimonial life is prevalently located.[226] Although Italian private international law considers the factual circumstances of the parties, it does not give them the opportunity to shop for the most convenient jurisdiction and divorce laws. Consistent with The Hague Convention on the Recognition of Divorces, however, Italian law grants recognition to foreign divorces dissolving marital status, provided some basic conditions are met.[227] As far as *exequatur* proceedings are concerned, the Law embodies the principle of *favor divortii*, so revealing a diffused concern for cross-border continuity of relations and of rights.[228]

4. European Private International Law before its Communitarisation and Instrumentalisation

Changes in law and in discourse which took place before the consolidation of the process of communitarisation and instrumentalisation under the aegis of EU law - examined in the next chapter - suggest a shift away from the relative coherence of social multilateralism consistent with the variety of policies and interests pursued at transnational level, and the gradual convergence of the logic and the rationales of family and economic regulation. Experts reported what they considered, at least in the early years, the 'anomalous' growth of policy-oriented rules and of overriding mandatory provisions, especially in economic matters. This led to 'a weakening of its fundamentals', that is, to the growth of the regulatory power of domestic law over transnational exchanges, even those that do not have strong jurisdictional links to domestic law, at the cost of international predictability and uniformity.[229] This suggests a transition to a new role of the state in the economy and in social life that is actualised through conflict rules.

[225] Article 32
[226] Article 31
[227] As specified in Article 64 of the same l. 218/1995. Already before the introduction of the Regulation, the recognition of divorce was subject to a special procedure. Discussed Picone, 'L'art. 65 della legge italiana di riforma del diritto internazionale privato e il riconoscimento delle sentenze straniere di divorzio', in Riv. Dir. Int. Priv. Proc. 2000, p. 381
[228] *Favor divortii*, in fact, could be also noted in the law introducing divorce in Italy in 1970 (Art. 3(2)(a) of the Law n. 898 of 1970) included among the grounds for divorce in Italy that «l'altro coniuge, cottadino straniero, ha ottenuto l'annullamento o lo scioglimento del matrimonio o ha contratto all'estero nuovo matrimonio.»
[229] For Robert Wai: "The shadow cast by private law can be transnational even while private law remains largely domestic in source and institutions. … Almost all domestic private laws, however, do not delimit themselves by application to exclusively domestic subject matter. The contract law of England does not apply to exclusively English transactions, but potentially covers contracts involving foreign subject matter and foreign parties. Similarly, every domestic private law system has its own procedural rules, including with respect to claims and disputes with a transnational element. The special rules of Private International Law dealing with issues such as jurisdiction, governing law, and recognition and enforcement of foreign judgements are almost exclusively domestic in source. … Again in terms of procedure, most domestic rules of Private International Law permit or enable transnational claims to be made. The cumulative result is that state private laws can cast a transnational shadow over private ordering. This role in turn adds to the coherent relation

At the same time, the entry in force of international conventions and the process of harmonisation of conflict rules and principles at supranational level reflected a renewed faith in international interdependence, together with a realistic acknowledgement that no adequate solution to the concrete problems which the progressive transnationalisation of social life had intensified could be solved by states in isolation from the international community. The multi-level sources of conflict norms, methodological eclecticism and the conflicting interests and policies pursued are gradually transformed into constitutive characteristics of European private international law. Some noteworthy overlap is visible as far as the regulation of cross-border family matters are concerned. As shown by the above paragraphs concerning English and Italian law, policy-oriented rules and mandatory laws mark the boundaries and signal functions of private international law. This reflected continuity with the social approach to cross-border marriage and family relations and disputes.

Against a background characterised by a progressive de-regulation of family relations, the existence of transnational connections to the country of domicile or to the homeland remained a privileged gateway for states to enforce domestic policies and a municipal vision of what were the essential elements of family life. This reveals a convergence of between the law governing family and economic matters. Although conflict rules still give priority to local laws and local interest, we can also note a growing and diffused concern, in law as well as in the doctrine, for the cross-border continuity of family relations, in marriage and in divorce especially.[230] Without a process of harmonisation at supranational level, legislative, judicial and doctrinal efforts concentrated on the development of rules flexible enough to suit the increasingly mobile and fluid society and to avoid difficult situations.

The migration of the most real and significant connection from the law governing cross-border contractual relations to the law of marriage and divorce, from common law jurisdictions to civil law countries, was not driven by abstract concerns or by scientific elegance, but by the desire to protect individual rights and social interest, in other words, by 'substantive justice'. In this sense, it did not suggest a paradigm shift. And yet, the expansion of rules that used to govern 'mercantile relations' in the family province raised concerns that the transnationalisation of family lie might end up creating a market for family laws and thus undermine the authority of national orders. At the same time, the

of private ordering to other normative orders, and adds the legitimacy of state process to the generative capacity of private ordering." Wai, R., 'Private v. private', in Watt, Horatia Muir, and Diego P. Fernández Arroyo, eds. *Private international law and global governance*. Law and Global Governance, 2014, p. 47

[230] Lord Collins, *The Conflict of Laws* (2013), p. 943. The relative ease and speed with which divorces can be obtained and recognised appears in conflict with the rationale of rules such as the dual-nationality and dual-domicile tests which favour invalidity

expansion of principles and rationales that used to underlie conflict principles applicable to family relations to the regulation of transnational market relations raised concerns that this might prejudice harmony of decisions, create obstacles to cross-border exchanges and further undermine methodological certainties. The communitarisation of private international law will intensify these trends and the debate around these themes.

Chapter 10

EUropean Private International Law and European Post-National Societies

The last chapter of this genealogy examines recent changes in European private international law against the rise of a new dominant consciousness and a profound institutional re-organisation that was announced by developments considered in the previous chapter. In the following pages, I will use 'EUropean' to refer to the uniform measures and directly applicable conflict principles developed by official bodies of the EU since the 1990s (sections 1.1-2). In line with a process that can be traced back all the way to the beginning of the 20th century, the communitarisation and instrumentalisation of private international law has further expanded social protections in the transnational market. Measures have been introduced for the benefit of specific categories of European individuals. Consistently with the re-conceptualisation of status proposed by Graveson in the 1940s, experts argue that these measures are generating new statuses for European individuals (s. 1.2). In the contemporary age, ideas dating back to the previous institutional-legal ages are mixed, but there are also turned on their heads.

The communitarisation and instrumentalisation of European private international law has also extended to the family sphere the material and symbolic reach of classical liberal principles that used to apply to cross-border market relations (s. 1.3). EUropean facilitates the regulation of economic relations. At the same time, it expands choices in cross-border family matters (s. 2.1). In line with the notion that the contemporary consciousness has revitalised but also transformed social and classical assumptions, this paradigm shift is regarded by some as a sign of the emancipation of European individuals and transnational families from state control (ss. 3.1-3.2). As demonstrated by previous chapters of this study, conflict principles are not mere technical tools. Private international law of the family has played and continues to play a fundamental role in the constitution of institutional-legal orders. The ongoing paradigm shift thus appears to point to the emergence of a post-national institutional model, rather than a mere methodological change, and it appears to respond to an intellectual project (4.1 and ff.).

1.1 The Communitarisation and Instrumentalisation of Private International Law

Even before the 1990s, using the provisions of the Treaty of Rome, members of the EEC had managed to successfully negotiate conventions which harmonised municipal conflict rules. However, given the limited scope of that Treaty, success depended entirely on goodwill and intergovernmental cooperation, and harmonisation was limited to certain civil matters.[1] The entry in force of the Treaty on European Union in 1993 transformed the EEC into a supranational political body with (shared) legislative functions.[2] Amongst other things, the Treaty of Maastricht endowed European Institutions with some competence in 'judicial cooperation in civil matters'.[3] Although the EU Treaty granted a margin for approximating conflict rules, legislative action in this area remained essentially intergovernmental until the early 2000s. Within the Maastricht framework, proposed reforms were limited in scope and objectives, with little prospect of success.[4]

Rules which were scattered across the directives that were passed in this period have some symbolic value because they confirm the trend towards greater protection, especially in consumer contracts.[5] Since no directive or regulation contained coherent and comprehensive reforms, the measures were insufficient in scope and objectives. If anything, the unsystematic approach and the inclusion of single provisions dealing with the territorial scope of the directives or limiting choice of law to certain legal systems in contractual matters, resulted in greater incoherence. The frustrating and confusing state of the discipline which followed from the lack of comprehensive reforms led experts to denounce European private international law as "a jungle that can confuse even Europeans and that an outsider

[1] As Stefania Bariatti notes, "In fact, some of these activities date back many years, even prior to the conclusion of the Single European Act, with the aim of competing the freedoms envisaged under the EC Treaty. From the very outset, Article 220 of the EEC Treaty […] assigned to the Member States the power to commence negotiations to the extent necessary to guarantee their citizens, inter alia, the protection of persons [and] the enjoyment and the protection of rights under the same conditions granted by each State to its own citizens". Bariatti, Stefania. *Cases and materials on EU private international law*. Bloomsbury Publishing, 2011, p. 1

[2] Goebel, Roger J. 'Supranational: Federal: Intergovernmental: The Governmental Structure of the European Union after the Treaty of Lisbon.' *Colum. J. Eur. L.* 20 (2013), p. 77

[3] The Maastricht Treaty incorporated judicial cooperation within the areas of common interest. Title VI endowed the EU with legislative competence to approximate national PIL rules in line with the stated objective of ensuring the free movement of persons which, since the Single European Act of 1986, had been recognised as one key element for the functioning of the internal market. For Article K.1, Title VI of the Maastricht Trety, instruments of EU law aimed at harmonising COL were not any longer contingent on the willingness of MS to cooperate with respect to cross-border matters.

[4] See N Walker, Walker, N. "Current developments: EC Law—Justice and Home Affairs'[1998]." *ICLQ* 47, esp. p. 235

[5] Some provisions restricted the scope of protective measures that created obstacles to free movement. eg European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281, 31-50. Others, in contrast, enhanced protections against unfair choice of laws in favor of European consumers. eg Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95, 29-34. See Fiorini, Aude. "The Evolution of European Private International Law." *International & Comparative Law Quarterly* 57.4 (2008), esp. pp. 971-972

without guidance may easily become lost in."[6] Legislative inertia at supranational level virtually stopped with the introduction of the Treaty of Amsterdam of 1997.[7]

The Treaty of Amsterdam, which came into force in 1999, moved judicial cooperation in civil matters from the third 'pillar', where cooperation follows the inter-governmental model, to the first pillar which gave the Community legislative competence in private international law.[8] What this change means in practice is that the Amsterdam Treaty brought the whole field of private international law - jurisdiction, choice-of-law matters and recognition of foreign decisions - under the competence of EU Institutions.[9] To a certain extent, the Amsterdam Treaty also clarified goals and simplified procedures.[10] However, procedural and subject-matter limitations remained in place. Measures could only be adopted insofar as they were necessary for the proper functioning of the internal market. In addition, the Amsterdam Treaty did not make the introduction of common rules subject to the 'Community method' from the start.[11]

The story of the evolution of the Treaty provisions and their progressive amendments in matters of private international law, as well as the strong reactions from experts that followed from the communitarisation of the discipline, is one fraught with uncertainties, twists and turns, and one which has been told before.[12] Suffice here to say that, from the early 2000s, the Council has amended Conventions that were already in place[13] and has adopted various Regulations which had the effect of harmonising national conflict rules in a variety of civil matters which were previously subject to

[6] Mathias *Reimann, Conflict of laws* in Western Europe – a guide through the jungle 12, 102-05 (*1995*), p. xxi
[7] See Basedow, Jurgen. "Communitarization of the Conflict of Laws under the Treaty of Amsterdam, The." *Common Market L. Rev.*37 (2000); Michaels, 'The New European' (2008), pp. 1617-1618
[8] Under the new heading, Title IV: Visas, asylum, immigration and other policies related to free movement of persons, Article 65 of the Treaty gave the Council competence to adopt ''measures in the field of judicial cooperation in civil matters'
[9] Article 65 (Amsterdam version, Art. 73, Maastricht version): Measures in the field of judicial cooperation in civil matters having cross‹border implications, to be taken in accordance with Article 73(67 consolidated version) and insofar as necessary for the proper functioning of the internal market, shall include: (a) improving and simplifying: - the system for cross‹border service of judicial and extrajudicial documents; - cooperation in the taking of evidence; - the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases; (b) promoting the compatibility of the rules applicable in the member states concerning the conflict of laws and of jurisdiction; (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the member states.
[10] 'Close cooperation on justice and home affairs, established by the EU Treaty (Maastricht version) was replaced by 'the Union as an area of freedom, security and justice, in which the free movement of persons is assured' (Art. 2 of the EU Treaty, Amsterdam version). It went from Unanimity to Qualified majority.
[11] As to the limitations, Council's decision had to remain unanimous for a period of five years. The ECJ only had a limited power of interpretation. UK, Ireland and Denmark could also opt out of legislative measures introduced under the procedrue.
[12] See Fiorini, 'The Evolution', pp. 973-974
[13] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12, 1-23;

domestic rules.[14] Measures introduced under the aegis of the EU also went beyond the objective of harmonisation as they took the form of fully-fledged (and directly applicable) regulations, thus transforming European conflict rules into EUropean private international law.

Following the amendments to the Treaty on the Functioning of the European Union (TFEU) that took place after the Treaty of Lisbon entered in force in 2009, the establishment of an area of freedom, security and justice has become a specific and separate objective of the EU.[15] In accordance with Article 81 of the TFEU, the EU has now shared competence in this area, and the Parliament and the Council can adopt, following the ordinary legislative procedure, measures with the purpose of ensuring compatibility of national rules on jurisdictions and choice-of-law and securing mutual recognition. Although the use of competence by the EU continues in this field is still subject to the principles of subsidiarity and proportionality, and although procedural limitations still hold, the Treaty of Lisbon has consolidated EU competences in civil cooperation, and it has paved the way for more private international law measures and for further harmonisation.[16]

The mandate to harmonise conflict rules using a 'supranational' rather than an 'intergovernmental' method, and the progressive communitarisation of the discipline provides a cogent illustration of the decline of social assumptions in the field. It is suggested that, "in the future, private international law in the European member states will be Community law."[17] Accordingly, whatever the procedural and subject-matter limitations in place, European private international law can no longer be merely considered a branch of national law. The communitarisation of conflict of laws has discredited the dogma of autonomy which describes private international law as a self-referential discipline which is impermeable to broader institutional developments. The communitarisation of the discipline and the process of harmonisation of conflicts rules undermine the classical myth that private international law is a segregated law and an isolated discipline.

[14] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160, 1-18; Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters s [2000] OJ L 160, 37-52 (now repealed and replaced by Regulation (EC) No 1393/2007, on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), OJ L 324/79); Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174/1; Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, OJ L 174/25; Council Regulation (EC) No 743/2002 of 25 April 2002 establishing a general Community framework of activities to facilitate the implementation of judicial cooperation in civil matters OJ L 115/01;

[15] Title V. See Article 67 (ex Article 61 TEC and ex Article 29 TEU) 1: The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States

[16] Roger Goebel, Supranational? Federal? Intergovernmental? The Governmental Structure of the EU After the Treaty of Lisbon, 20 *Columbia Journal of European Law*, 2013

[17] Muir Watt, Horatia. 'European Federalism and the New Unilateralism.' *Tul. L. Rev.* 82 (2007), p. 1983

However, the process of approximation of conflicts rules does not undermine, at first sight, the dogma of neutrality. Harmonisation is synonymous with legal predictability and decisional harmony.[18] In addition, before the entry in force of the Lisbon Treaty, various procedural safeguards limited measures to those necessary for the proper functioning of the internal market, that is, to rules that were to ensure a straightforward designation of the competent forum, a rapid and consistent determination of the applicable law, and an efficacious recognition and enforcement of judgements, objectives largely compatible with the classical dogma. Officially, EU measures in the field of private international law still aim at enhancing the coordination between national legal orders and at removing obstacles to market integration which are created by the incompatibility between substantive municipal laws as well as domestic provisions of private international law.

However, in line with developments taking place since the 1970s, communitarisation has gone beyond the removal of obstacles to commercial activities and the desire to increase legal certainty and predictability. The communitarisation of the discipline has done more than turn upside down the axiom of isolation that dominated in the scholarship until merely a few decades ago. As it has been pointed out, it has also 'instrumentalised' conflict of laws.[19] European private international law has been turned into a powerful regulatory resource for protecting vital social interests and for achieving policy objectives defined at supranational level.[20] Looking at measures introduced at community level, the seat-selecting multilateral method remains the basic framework. However, more instances of 'social' conflict of laws have found a gateway through overriding mandatory provisions and policy-oriented rules protecting essential economic and social interests.

The influence of 'social' private international law in cross-border economic matters can be seen at the level of choice-of-law rules. As seen in the third part of this genealogy, social lawyers criticised classical experts for having neglected the fact that the blind application of theoretically impeccable jurisdictional and choice of law rules, other than liberal principles governing the recognition of foreign judgments, often resulted in unjust decisions. The critique led to changes which were evidently in contrast with the classical approach. One example came from the replacement of artificial connecting factors like nationality and domicile, and of abstract ones, like party autonomy, with

[18] "Although the quest for harmonization (or, more ambitiously, unification) is not totally uncontroversial, its obvious advantages cannot be doubted. Chief among these would be the fact that it makes international legal dealings easier and also less risky by promoting predictability and security", K. Zweigert and K., Kötz, *Introduction to comparative law*., translation by tony Weir, Clarendon Press, 1998, p. 25

[19] Van den Eeckhout, 'Instrumentalisation'.

[20] Basedow, Jürgen. "Spécificité et coordination du droit international privé communautaire." *Travaux du Comité français de droit international privé* 16.2002 (2005)

substantial links to laws and jurisdictions that had a closer geographical connection with the parties or with the dispute. EUropean private international law has incorporated the notion of most significant and closely connected law.[21] Proper law is now the main test, and not a residual one, in contractual matters.[22]

What is more, widespread concerns for specific categories of European individuals who would end up being systematically disadvantaged and permanently at risk in the common market has led to the proliferation of policy-oriented choice-of-law rules. Such rules limit the contractual freedoms in the interest of specific categories of individuals. Employment contracts, for instance, are now automatically governed by the law of the place of employment.[23] In consumer contracts, the choice of a specific law will not be upheld if it undermines the protection granted to a consumer by the law of his or her domicile.[24] These rules show the dissatisfaction with abstract connecting factors that for a long time determined questions of applicable law (and jurisdiction) in economic matters. Here, conflict of laws no longer rests on abstract considerations alone. Material considerations take the shape of policy-oriented connecting factors and rules protecting specific interests and categories of persons.

Accordingly, the instrumentalisation of EUropean private international law also expanded the reach of overriding mandatory provisions to new economic areas. The determination of the applicable law no longer depends on the blind ascertainment of the location of the seat of the legal relation, but on the public interest and legislative intent behind the eligible laws. Irrespective of the law which would be designated under national choice-of-law rules, European measures submit certain matters to a specific substantive law whenever it safeguards a given "political, social or economic organization".[25] Of course, one may point out that the proper law tests, or better law considerations, have not been systematically incorporated in community measures. Recent Regulations have also limited, to an

[21] Article 4(4) Rome I Regulation: 'Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.' See also: Rome II Regulation, Arts. 4(3), 5(2), 10(4), 11(4), 12(2)(c).
[22] A slightly different approach can be found in Article 4 of the Rome Convention of 1980 on the law applicable to contractual obligations. The provision first refers to the law of the country with which the contract is most closely connected (section 1), presumed to be the law of the country where the party carrying out the characteristic performance has his habitual residence or principal place of business (section 2). The presumption is subject to an exception 'if it appears from the circumstances as a whole that the contract is more closely connected with another country' (section 5).
[23] Article 8(2)(a) of the Rome I Regulation.
[24] Article 6(2) of the Rome I Regulation
[25] Article 9(1) Rome I Regulation: 'Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.'

extent, the scope of *loi d'application immediate*.[26] However, the existence of rules protecting social interest is by now a characteristic feature of EUropean private international law.[27]

1.2 The Multiplication of Statuses of European Market-Participants

The communitarisation of private international law has enhanced the capacity of individuals to carry out activities at transnational level. However, contemporary private international law has also placed policy-based limits on contractual freedoms and it has seen the proliferation of laws protecting overriding interests (*lois d'application immédiate, norme di applicazione necessaria*). Of course, this is not entirely new. Throughout history, conflict of laws has protected public interest by including a variety of safety clauses that were more or less systematic and stringent, and were also given different titles, absolute territoriality to *ordre public*, but performed the same function. Even Savigny had envisaged what he defined as 'laws of strictly positive, compulsory nature'.[28] However, it must be noted that rules set up in the classical and social ages were to defend the political and social organisation of the state and to maintain the integrity of its social and economic structures. They were designed neither for the sake of specific individuals nor to advance policy objectives defined at supranational level.

In addition, classical scholars and, up to a certain point, also social experts referred to public policy especially with regard to family matters, granting the greatest possible degree of freedom in private and economic matters. In EUropean private international law of the economy, provisions follow instead a regulatory rationale. Regulatory considerations were virtually irrelevant in cross-border economic matters in previous institutional-intellectual ages. In contrast, protective clauses are now prevalent in contract matters, in labour law (but also in other relevant spheres, like competition law). This is in line with a transition towards a 'regulatory private law' paradigm which aims at adding at a layer of protective measures in favor of weak parties, such as labourers and consumers who are particularly exposed to the contingent forces of the common market.[29] Compared to previous

[26] Under Article 9(3) Rome I Regulation, effect may be given only to 'the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract *unlawful*' (Empahsis Added). The Rome II Regulation, in Article 16, only acknowledges overriding mandatory provisions of the forum state. However, in assessing wrongful conduct, 'account shall be taken … of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability' (Art. 17)

[27] Ruhl, Giesela, Unilateralism in European Private International Law (January 21, 2012) in Jürgen Basedow, Klaus Hopt & Reinhard Zimmermann, eds., Max Planck Encyclopedia of European Private Law, Oxford University Press, 2012

[28] See Chapter 5, last section

[29] Legal scholars have underlined that in the EU regulatory private law is aimed at ensuring that participants are given concrete opportunities to participate in the European market without giving up on their socio-economic rights. H. Micklitz,

intellectual-institutional ages, the frequency and pervasiveness of regulatory conflict rules in market relations indicate a 'methodological turn', but also a profound reconceptualization of economic law and a redefinition of the role of states in society:

> In the context of the essentially multilateral European private international law, overriding mandatory norms … represent exceptions that prove the rule, namely the validity and supremacy of multilateralism. However, this is not the case in international economic law. Here, unilateralism was largely established in the 20th century and, thus, has displaced the multilateral method. The backdrop to this development was, on the one hand, a changing understanding of the state and its role, and, on the other, insights into the limits of the market. Whereas the liberalism of the 19th century, during which the multilateral method of the Savigny school flourished, assumed the unlimited capacity of the market, the events at the beginning of the 20th century brought an awareness of the dangers of an unregulated market. The resulting insight into the necessity of a framework ordering economic activity led to state intervention not only to protect the economy as an institution, but also to protect the individual from the workings of the economy. … The unilateral method, therefore, gained significance in the entirety of international economic law and is today supreme in determining the application of the relevant norms. … In contrast to overriding mandatory norms, which … represent only isolated incidences of unilateral influence, international economic law is widely seen as the territory of unilateralism.[30]

The paradigm shift described above has led experts to advance the claim that an unprecedented and even revolutionary form of conflict of laws is taking shape in Europe.[31] I will return to this claim in the last sections of this chapter and in the conclusion. Suffice it to say here that international law is being transformed into a powerful regulatory resource which contributes to the realisation of policy objectives that do not merely coincide with the protection of the political, social and economic organisation of member states. The protection of European individuals participating in various capacities and positions in the common market is a policy objective defined and implemented at

'Introduction – Social Justice and Access Justice in Private Law', in H. Micklitz (ed.), *The Many Concepts of Social Justice in Europe*, Edward Elgar Pub (2011), p. 37

[30] Ruhl, 'Unilateralism'

[31] Meeusen, Johan. "Instrumentalisation of Private International Law in the European Union. Towards a European Conflicts Revolution." *European Journal of Migration and Law* 9.3 (2007), p. 287-305; A. Mills, "The Identities of Private International Law. Lessons from the US and EU Revolutions", Duke Journal of Comparative and International Law, 2013, p. 445-475

community level.[32] Experts have thus argued that conflict principles and resources could play an important role in the process of European social and economic integration.[33] Private international law, they claim, could be utilised to construct a mode of governance proper to the EU, reflecting *inter alia* the greater inter-dependence between legal orders and the rise of what is referred to by private lawyers as the 'regulatory-state'.[34]

The redefinition of the underlying principles and functions of the law governing cross-border relations in the European market indicates that the profound and almost clinical cuts between private and public spheres, between individual and social interest, between law and policy are being rejected. Methodological assumptions and dogmatic approaches that prevailed in the 19th and 20th centuries have given way to a discipline which is no longer the sum of coherent principles and techniques, as postulated in the classical age, and which is no longer the expression of objectives consistent with those pursued by social private international law. Conflict rules and principles are not merely a coordination technique. The role of private international law expands beyond the confines of domestic policy. It acquires functions which are consistent with the ascendancy of regulatory states in the place of nation- and social states.[35] The content of policies pursued is defined at supranational level, and it aims at protecting specific categories of individuals from the danger of the market, rather than national economic and social institutions

Since the Brussels and Rome Conventions were negotiated and entered into force, conflict measures have continued to be harmonised to enhance the ability of individuals to engage in cross-border exchanges in the European common market in conformity with the rights and freedoms conferred on them by the Treaties. In this sense, EUropean private international law has equipped producers and employers with greater resources to circulate freely within the Union territories and to participate in

[32] Van Den Eeckhout, 'Instrumentalisation'.

[33] For instace, Christian Joerges argues in favour of a reconceptualization of Conflict of Laws and of a three-dimensional conflicts law approach with the first dimension "reflecting the inter-dependence of formerly more autonomous jurisdictions, the second responding to the rise of the regulatory state, and the third dimension considering the turn to governance, in particular the inclusion on non-governmental actors in regulatory activities and emergence of para-legal regimes." in C. Joerges, 'The Idea of a Three-Dimensional Conflicts Law as Constitutional Form', LEQS Paper No. 28 (2010), p. 2

[34] For Christian Jeorges a restated European COL could go as far as constitutionalising a new mode of governance proper of the EU. C. Joerges 'Constitutionalism in Postnational Constellations: Contrasting Social Regulation in the EU and in the WTO', in C. Joerges & E. U. Petersmann, *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Oxford, Hardt (2006)

[35] Some scholars have also argued that the interrelated processes of privatization and deregulation have paved the way for the rise of the regulatory state to replace the 'dirigiste state' of the past. "Reliance on regulation - rather than public ownership, planning or centralised administration — characterises the methods of the regulatory state." G. Majone, 'The rise of the regulatory state in Europe', 17 West European Politics, 1994. See The Rise of the Regulatory State, Edward L. Glaeser and Andrei Shleifer, *Journal of Economic Literature*, Vol. XLI (June 2003) pp. 401-425

the activities taking place in the market. At the same time, the communitarisation of conflict of laws has not displaced the protective measures that in the social age granted to national employees and consumers what experts, from Graveson on, defined as status like-protections. On the contrary, European Institutions have consolidated the penetration into the economy started by social states. In this other sense, policy-oriented and overriding mandatory provisions systematically protect European workers and consumers against the risks to which they are exposed in the common market.

In line with the reconceptualization of status that began towards the end of the social age, experts have started to refer to European workers and consumers as bound together by a form of disaggregated status.[36] European individuals are now the beneficiaries not only of rights, freedoms and protections enshrined in EU Treaties, but also of a status which they acquire when participating in the common market. What is argued is that, when they take part in the activities of the common market, Europeans do more than exercise their free movement rights and do more than move across different jurisdictions. They also form invisible and transitory bonds with other workers, consumers, students etc. In the common market, individuals are said to move in and out of these communities as they switch from one sphere of community life to another one, as they take up new roles and positions.[37]

In the contemporary age, status is not seen as an inherent condition of the person. Status does not refer to membership in necessary communities of mutual interest and shared destiny.[38] Neither does status permanently bind individuals to national interest. What is more, status does not fix duties. In the European context, status comes across as a temporary condition that varies in accordance with the participation of individuals in the internal market in a given capacity. Status is now used to refer to membership of temporary, voluntary and transnational communities which are subject to the same rights and entitlements and whose existence is rooted in variety of European jurisdictions. In this sense, specialists speak about 'statuses', rather than a single status. It is also worth noting that experts argue that these statuses not only indicate individuals who are subject to distinct rights and protections, but also suggest the creation of new social roles and the construction of new identities:

> What we see emerging is that EU law is engaged in the production of statuses. Status does not refer here to the pre-modern concept of an individual inextricably attached to a particular community…. It also goes beyond the mere attribution of functional roles.

[36] Azoulai, 'The European Individual as part of Collective Entities', Azoulai, Loïc, Ségolène Barbou des Places, and Etienne Pataut, eds. *Constructing the person in EU law: rights, roles, identities*. Bloomsbury Publishing, 2016
[37] Azoulai, 'The Individual', p. 205
[38] Ibid. p. 206

> Status is something which makes the exercise of individual rights possible, an 'underlying idea' of what it means to be a citizen, a student … in relation to others within society. Such idea informs the legal regimes of these individuals. When producing statuses, EU law does not only fashion agents. It creates identities carrying with them ideas about modes of being-in-society.[39]

In the contemporary age, status thus refers to more than a mere set of protections that are set in place because of one's participation in the market as a member of different categories, worker, student, consumer, etc. The bond between persons and communities which was associated with personal and family status and reinforced by means of private international law norms in the previous institutional and intellectual ages is fragmented and diffused in the links between European individuals and the many communities, territorial and non-territorial, voluntary and necessary, that make up the European community itself. In the contemporary age, the literature has therefore extended and also modified the idea of status to refer to the temporary and voluntary condition, position and 'identities' of European individuals as they participate in the European transnational market.

From the above, it appears that the formation of new types of material and symbolic links with voluntary, temporary and transnational communities enabled by means of conflict rules and principles resulting from the process of communitarisation is as important for understanding the transformation of private international law as it is for understanding the ongoing redefinition of the role of the state and the evolution of the European project. Notably, the proliferation of 'unilateral rules' as well as the fragmentation of the once unique status of European individuals appear to derive especially from a redefinition of the principles and functions underlying private international law of the economy. This paradigm shift begs the question of whether a comparable re-orientation of the arguments and principles of European private international law of the family is also taking place.

1.3 Uniformity vs. Private International Law in Cross-Border Family Matters

As seen in the previous chapter, except for the divorce convention promoted by The Hague Conference and international agreements concerning the protection of children - also indicating a trend towards increasing protections for specific categories of individuals - there were no significant developments at supranational level in private international law of the family between the 1960s and

[39] Azoulai, Barbu des Places, Pataut, Being a Person in the European Union, in Azoulai, Loïc, Ségolène Barbou des Places, and Etienne Pataut, eds. *Constructing the person in EU law: rights, roles, identities*. Bloomsbury Publishing, 2016, p. 12

1990s. The Brussels regime, which explicitly excluded matters concerning "status or legal capacity of natural persons", suggests that states explicitly resisted systematic harmonisation of rules and principles governing cross-border family matters. The multiplication of 'international families' with links to more than one European jurisdiction and the persistent differences in family law, however, increased the need for harmonised conflict measures.[40]

In the early stages of the EEC, this need depended on the fact that distinct municipal family laws and the persistent difference in conflict rules created indirect obstacles to free movement of workers. The entry into force of the Treaty of Maastricht in 1993 established that freedom of movement is a fundamental right of European citizens.[41]In this context, the question arose of how to reconcile national prerogatives over the regulation of internal family matters and the protection of fundamental rights of EU citizens, and especially their free movement right. One option would be to extend the process of harmonisation to private international law. Another possibility, more ambitious and yet more effective in eliminating obstacles to freedom of movement of European citizens, would be to introduce a uniform civil code inclusive of uniform family measures.[42]

These two options had already been discussed in the early decades of the 20th century.[43] The second option is currently being advocated by the Commission on European Family Law (CEFL) which has

[40] According to the European Commission, out of 120 million married couples living in the EU, around 16 million – that accounts for 13% of the total – have an international dimension. Out of the 2.4 million marriages celebrated in the EU in 2007, 300.000 were international. The increased mobility of individuals within the EU and across European jurisdictional borders has led the number of divorces with an international dimension to reach well over 10% of all EU divorces. Of about 1 million divorces which took place in the EU in 2007, about 140.000 had an international dimension. It is also reported that in Europe the number of marriages between nationals of member states and third country nationals accounts for a growing share of all marriages.Abteilung Ökonomie Und Finanzwirtschaft / Department Of Economics And Finance Research Note Mixed Marriages in the EU. European Commission Directorate-General "Employment, Social Affairs and Equal Opportunities" Unit E1 - Social and Demographic Analysis

[41] Article 45 of the EU Charter of Fundamental Rights; Article 21 (ex Article 18 TEC) of the Treaty on the Functioning of the European Union governs free-movement rights of EU citizens; Article 45 (ex Article 39 TEC) of the TFEU governs the free movement rights of workers.

[42] The process of 'Europeanisation' does not exclusively refer to the harmonisation of conflicts rules of MS. The most controversial area of legal approximation, and the one with which most legal scholars are familiar with, is the proposal to harmonise contractual, commercial and tort aspects of private law. N. Jansen, 'European Civil Code', in J. Smits (ed.) *Elgar Encyclopedia of Comparative Law*, Edward Elgar Publishing (2006) The unification of private laws of MS would take either the form of a uniform civil code or that of a 'common frame of reference'. Unlike the process of the Europeanisation of PIL, the project immediately came under the political spotlight. The political controversy was and is largely centred on the contested legal competence of the Union and its organs to review and harmonise the private laws of MS, and on the unsettled question of the desirability of legal uniformity across jurisdictions.

[43] Cheshire had already discussed the two options in the 1930s. Faced with growing difference between national systems, uniformity of decisions could be pursued either by the unification of domestic substantive law or by the harmonisation of conflict rules and principles. The unification of the internal law in the first sense, according to Cheshire, raised issues of compatibility between the distinct principles and various policies pursued by domestic law. In the 1930s, this problem was very visible. For Cheshire, "when due regard is had to the modern enthusiasm and the recent outbreak of racialism, it is obvious that this form of unification holds out little prospect of success." Cheshire, 'Private International Law', p. 12 The second option envisaged was to unify rules of Private International Law "so as to ensure that a case containing a foreign element shall result in the same decision irrespectively of the country of its trial."

also turned it into a concrete proposal for a European family code.[44] Adopting a method similar to that employed in projects aiming at the harmonisation of European private law,[45] CEFL members have been working on the production of a supranational body of substantive rules applicable to the family sphere which, they hope, would form part of the uniform European civil code.[46] The measures discussed and proposed so far only concern matrimonial and patrimonial relations and informal cohabitation, but the prospect is to expand into other areas.[47]

One obstacle to the introduction of a uniform civil code in this area is that the European Court of Justice maintains that family law falls within the exclusive competences of member states.[48] Ahead of the introduction of the Lisbon Treaty, members of CEFL nonetheless claimed that the EU had competence to introduce uniform substantive family law measures on the basis of a broad interpretation of Article 65 of the EC Treaty as revised by the Treaty of Amsterdam.[49] Essentially, CEFL claims that the same competence which in principle granted the Union competence to harmonise conflict measures insofar as they were necessary for the functioning of the market, also made it possible to introduce uniform substantive law. Should European Institutions fail to take appropriate measures, they argue, free movement rights of European citizens and families with multiple links in the Union territory would be affected.[50]

However, since the classical age, states have jealously guarded their prerogatives in family matters. Not accidentally, the European Council has remarked that family law is "very heavily influenced by

[44] The website of the European Commission on Family Law provides a list of the basic literature on this topic, available at: [http://ceflonline.net/publications/] last accessed: 27-09-2016.
[45] Notably, the academic discussion on substantive unification of municipal family laws has replaced the older debate concerning the idea of a European uniform civil code applicable to contractual, commercial and tort matters. See J. M. Smits, The Making of European Private Law, Intersentia (2002). See also Jansen, 'European Civil Code'. Before being set aside, the uniform civil code has been repeatedly endorsed by the European Parliament. See Parliament Resolution of May 26, 1989, 1989 O.J. (D 158) 400, concerning private law of member states, and in Parliament Resolution of May 6, 1994, 1994 O.J. (C 205) 518, concerning harmonising measures in European PIL. [Add literature European civil code)
[46] See M. T. Meulders-Klein, 'Towards A European Civil Code of Family Law', in K. Boele-Woelki (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Antwerp, Intersentia (2003)
[47] By comparing family laws of MS, extracting their shared common core and then selecting the 'better law' among them, CEFL has developed some recommendations on harmonised 'Principles of European Family Law Regarding Divorce and Maintenance between Former Spouses', 'Principles on Parental Responsibilities' and 'Principles on Property Relations between Spouses'.Available at: [http://ceflonline.net/principles/] last accessed: 27-09-2016. Members of the project have also started working on new forms of cohabitation and informal arrangements outside marriage.
[48] Johannes v Johannes, C-430/97. Römer, C-147/08, confirmed that, as EU law stands at present, legislation on the marital status of persons falls within the competence of the member states'. With respect to CoE contracting States, the European Court of Human Rights essentially held the same in *Schalk and Kopf v. Austria,* Gas and *Dubois v. France, Chapin* and *Charpentier v. France*: "States 'enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition' of same-sex relationships, and its differences concerning the rights and obligations conferred by marriage." *Chapin and Charpentier v. France*, no. 40183/07 (9 June 2016), para. 48
[49] K. Boele-Welki, 'The Principles of European Family Law: Aims and Prospects', 1(2) *Utrecht Law Review*, 2005, p. 162
[50] Ibid.

the culture and tradition of national (or even religious) legal systems, which could create a number of difficulties in the context of harmonisation."[51] In this context, Katharina Boele-Woelki, one of the leading European family lawyers and members of the Commission, has admitted that "drafting a binding uniform family law for the whole EU […] is much too far reaching and is neither considered to be feasible nor desirable at the present time."[52] As experts, including Cheshire and Graveson, had argued in the social age, a more pragmatic alternative would thus be to harmonise conflicts rules of member states.[53] Wolfram Müller-Freienfels had held in 1969 that:

> Unification of conflicts rules affecting family law is a less ambitious undertaking than unification of substantive family law itself. Substantive unification seeks to eliminate diversity between the various legal systems, but conflicts rules presuppose that diversity exists. The only goal of unification of conflicts rules is to determine that any case involving aspects of foreign law will be decided under the same legal rules whatever the court in which it is tried, thus ensuring uniformity in outcome. In other words, it is dedicated to elimination of choice of court as a determining factor in the decision of a case on the merits, thus, eliminating so called forum shopping. Accordingly, unification of conflicts law has only secondary importance in comparison to the more sweeping aims of unification of substantive law.[54]

Conflict of laws may come across as the obvious solution to the rock and a hard place, between the obstacles to harmonisation created by the law-culture nexus and the unrealistic proposal of codifying a uniform European Family Law that applies to all European citizens and residents regardless of their membership to specific civil and political communities.[55] After the Maastricht Treaty granted on the

[51] Council Report on the need to approximate Member States' legislation in civil matters of 16 November 2001, 13017/01 JUSTCIV 129, p. 114

[52] Boele-Woelki, Katharina. "Comparative research-based drafting of principles of European family law." *ERA Forum*. Vol. 4. No. 1. Springer Berlin Heidelberg, 2003, p. 179. This position is in fact reminiscent of what Otto Kahn-Freund already claimed in the 1970s, that, contrary to other legal fields, unification of family law is a "hopeless quest". O. Kahn-Freund, 'Common Law and Civil Law, Imaginary and Real Obstacles to Assimilation', in M. Cappelletti, *New perspectives for a common law of Europe*, Boston Sijthoff (1978), p. 41

[53] Graveson had argued that the differences between the conflict rules and principles were the result of the need for each order to develop rules in accordance with its own social interest and public policy and with its own conception of justice. And yet, he also pointed out that the Private International Law rules that could be found in different legal orders varied "far less extensively than the main bodies of law of which they form part, for in this branch of law, despite a variance in means, there is general uniformity of purpose." Graveson, 'Conflict of laws', p. 4. See D. Martiny, 'Is Unification of Family Law Feasible or Even Desirable?' in A. Hartkamp et al. (eds.), Towards a European Civil Code, 2004, pp. 307-333

[54] W. Müller-Freienfels, 'The Unification of Family Law', *American Journal of Comparative Law*, Vol. 16 (1969) cited in F. G. Nicola, 'Family Law Exceptionalism in Comparative Law', *American Journal of Comparative Law*, Vo. 58 (2010), p. 781

[55] See in the introduction, notes on methodology

European Institutions shared competence over civil and judicial cooperation in 1993 and especially after the amendments introduced with the Amsterdam and Nice Treaties made the introduction of harmonised measures a more likely prospect, the debate among experts and European governments also extended to the opportunity of harmonising conflicts principles and of introducing common rules governing cross-border family matters.[56]

Of course, the culture-nexus between the family and the law also extended, by analogy, to conflict matters. Significantly, the clauses included in the Treaty of Amsterdam made the introduction of harmonised measures conditional on the satisfaction of removing obstacles to market integration.[57] If the harmonisation or unification of conflict of laws merely helped to remove obstacles to market-integration, the unification of conflicts rules affecting family law would nonetheless come across as a less controversial undertaking than the unification of substantive family laws, and would have greater chances of success. This is how it went with the Brussels II Regulation. Despite legislative and procedural restrictions, the European Council and Parliament adopted in 2000 the first Regulation on conflict of laws issues in family matters, Council Regulation No 1347/2000.[58]

The Brussels II Regulation is considered the cornerstone of EU law in the field of transnational family regulation. The Regulation fixed common principles governing the recognition of foreign judgements in matrimonial and parental matters. Although it concerned cross-border family matters and thus formally over-stepped the exclusive competence of member states in family matters, Brussels II officially aimed at removing differences between national rules governing jurisdiction and enforcement which hampered the free movement of persons and the sound operation of the internal market, an objective also in line with the classical objectives of bringing about uniformity and predictability of decisions.[59] And yet, despite its limited ambition to remove obstacles to market-integration, experts maintained that the introduction of Brussels II constituted an epochal change. Accordingly, Clare McGlynn commented the symbolic change with an evocative metaphor:

[56] J. Meeusen, M. Pertegas, G. Straetmans, F. Swennen (eds.), *International Family Law for the EU*, Antwerpen-Oxford, Intersentia (2007).
[57] Article 67
[58] Regulation (EC) No 1347/2000, [2003] OJ L 338, 1-29 then repealed by Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility.
[59] Recital 4 of No 1347/2000 is instructing as it holds that: "Differences between certain national rules governing jurisdiction and enforcement hamper the free movement of persons and the sound operation of the internal market. There are accordingly grounds for enacting provisions to unify the rules of conflict of jurisdiction in matrimonial matters and in matters of parental responsibility so as to simplify the formalities for rapid and automatic recognition and enforcement of judgments."

> The European Union had crossed the Rubicon: a legal measure had been adopted in a field of law so precious to individuals, families, politicians and so significant in terms of national power and sovereignty.[60]

So long as the procedural limitations of the Treaty of Amsterdam obtained, the expansion of EU law in family matters, and the further conquest by Brussels of territories outside the EU *imperium*, appeared to be depend on a wider reconfiguration of private international law to the requirements that followed from the creation of the internal market.[61] It must be noted however that the Treaty of Lisbon has abolished the 'Amsterdam clause' which made introduction of conflict measures in cross-border family matters conditional on the removal of obstacles to market integration.[62] Article 81 of the TFEU has established that the European Parliament and the Council can now adopt legislation, *particularly but not necessarily* when it is conducive to the proper functioning of the internal market

Following the entry into force of the Treaty of Lisbon in 2009, the establishment of an area of freedom, security and justice has become a specific and separate objective of the EU, i.e. detached from the goal of free movement.[63] Article 81 of the Treaty of the Functioning of the European Union has thus consolidated EU competence in judicial cooperation and expanded the mandate of the Council and of the European Commission to propose EU law instruments in civil matters.[64] Although numerous procedural exceptions and restraints remain in place, the replacement of words ('particularly when' in place of the Amsterdam clause 'in so far as') is practically as well as symbolically significant because it indicates that the introduction of the Lisbon Treaty has further

[60] McGlynn, 'Families', p. 152
[61] Fallon, 'Constrainst of Internal Market Law on Family Law', in J. Meeusen, M. Pertegas, G. Straetmans, F. Swennen (eds.), *International Family Law for the EU*, Intersentia, 2007
[62] Article 67
[63] Title V. See Article 67 (ex Article 61 TEC and ex Article 29 TEU) 1: The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States
[64] Article 81(2): For the purposes of para. 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:
(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
(b) the cross-border service of judicial and extrajudicial documents;
(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
(d) cooperation in the taking of evidence;
(e) effective access to justice;
(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; (g) the development of alternative methods of dispute settlement;
(h) support for the training of the judiciary and judicial staff.

expanded the legal basis of the Union action in judicial cooperation in civil matters, which reflects especially with legislative prospects in cross-border family matters.[65]

Article 81 of the Treaty of Lisbon has paved the way for the introduction of more common measures in private international law, family matters included. Recently Regulations have been adopted on matrimonial matters and matters of parental responsibility, on maintenance obligations, on divorce and legal separation, and on succession.[66] What could be dismissed at first sight as an amendment of minor importance is thus loaded with great symbolic, as well as practical, value.[67] With the entry into force of the Lisbon Treaty, viewing conflict of laws merely as a technical tool devoid of political significance or as a coordination mechanism driven by the desire to increase legal certainty in the common market, becomes highly problematic. This is what emerges from an analysis of the principles underlying the Regulations and from rulings of the European Court of Justice.

2.1 The Method of Recognition and the Protection of Continuity of Status

On top of recently-introduced regulations, further inroads into once heavily-patrolled family territory have been made by the ECJ in *Garcia Avello* and *Grunkin-Paul*.[68] These two rulings concerned the recognition of family names, a matter closely related to civil status and thus falling within the exclusive competence of member states. The decisions are well-known and have been extensively commented on, and thus do not require a thorough review. Per contra, the arguments advanced in the doctrine regarding the deeper meaning of the two decisions deserve to be looked at closely. Consistent with previous rulings, the ECJ maintained that laws governing family names, like all substantive family laws, fall within States' competence. By analogy, conflict rules governing the registration of names of persons, being a matter concerning the status and identity of the members of the civil

[65] For a discussion of the specific procedure, and veto power of Member States in the case of family matters, see Fiorini, 'The Evolution', p. 976. On the change brought about by Lisbon, see M Fallon, 'Constraints', pp. 149-181

[66] Council Regulation No 2201/2003/EC on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, also known as Brussels II-bis, repealing Brussels II, entered into force in 2005. Council Regulation No 4/2009/EC, concerning jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, came into force in 2009. Council Regulation 1259/2010/EU concerning cooperation in the area of the law applicable to divorce and legal separation, also known as Rome III, entered into force in 2012 which is binding on countries to participating to the enhanced cooperation, Belgium, Bulgaria, Germany, Spain, France, Hungary, Italy, Latvia, Lithuania, Luxemburg, Malta, Austria, Portugal, Romania and Slovenia (OJ:2010 L343/10). Reg (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European certificate of Succession (OJ 2012 L2010/107).

[67] Some relevant literature from the period: Baratta, Verso la 'comunitarizzazione' dei principi fondamentali del diritto di famiglia; Bariatti, Stefania, Carola Ricci, and Laura Tomasi. *La famiglia nel diritto internazionale privato comunitario*. Vol. 25. Giuffre Editore, 2007

[68] Case C-148/02 *Garcia Avello v. État Belge* [2003] ECR I-11613; Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-07639

community, also fall within the exclusive competence of national authorities. But the ECJ specified that, when authorities exercise such competence, they must comply with Community law.[69]

In *Garcia Avello*, the crux of the matter concerned the compatibility between EU law and the Belgian choice-of-law rules governing the registration of surnames of dual-nationals. In that case, the child had dual nationality and one of the nationalities was Belgian. As also in Italian private international law, the Belgian conflict rules gave preference to the forum's nationality law. Accordingly, in *Garcia Avello* the name of the child was registered in accordance with the Belgian law of names. For the ECJ, the automatic application of Belgian law as provided by national choice-of-law rules in the case of citizens of the European Union with dual nationality amounted to discrimination on the ground of nationality and therefore violated Community law.[70] In its ruling, the ECJ established that parents of children with dual Spanish-Belgian nationality are entitled to choose the dual-surname in accordance with Spanish law even though Belgian private international law provides otherwise.

Grunkin-Paul also concerned the failure to recognise a name of a child who had links with various European jurisdictions, although not in the form of nationality. The child in this case was born in Denmark from German parents. The name had been registered as 'Grunkin-Paul' in accordance with Danish law. After moving back to Germany, the competent authority refused to recognise the compound name. According to German private international law, the name of the child was subject to the *lex patriae*, i.e. German law, which was also the only nationality of the child. The refusal by German authorities in itself did not amount to discrimination on the ground of nationality, the Court noted.[71] However, the ECJ found that "serious inconveniences" to the exercise of Treaty rights may be caused by the discrepancy in surnames.[72] For the ECJ, an obstacle to free movement could only be justified if based on "objective considerations and was proportionate to the legitimate aim pursued".[73] None of the reasons provided by the German authorities was considered legitimate.[74]

In *Garcia Avello* and *Grunkin-Paul* the ECJ applied the so-called method or principle of recognition. Under the 'unilateral' principle of recognition, courts intervene and set aside 'traditional' conflict rules which violate fundamental rights.[75] In the EU, the method of recognition requires that courts

[69] *Garcia Avello*, para. 25
[70] Ibid. paras. 35-37
[71] Ibid. para. 20
[72] Ibid. para. 23 et seq.
[73] Ibid. para. 29
[74] Ibid. para. 30-31
[75] Muir Watt, H. 'Régulation de l'économie globale et l'émergence de compétences déléguées: sur le droit international privé des actions de groupe.' *Revue critique de droit international* 97.3 (2008)

displace conflict rules which create obstacles to the enjoyment of fundamental human rights enshrined in the Treaties.[76] The principle becomes an imperative to recognise the 'social reality' of a family relationship constituted abroad when lack of recognition threatens the very identity of an individual.[77] Accordingly, in *Garcia Avello* and *Grunkin-Paul*, the ECJ held that the family situation constituted abroad could not be refused recognition because this would lead to the violation of fundamental rights of the EU citizen, i.e. discrimination based on nationality and freedom of movement.[78]

Drawing on these decisions, the doctrine has advanced the claim that the protection of continuity of family relationships across borders may be in the process of becoming a basic principle of EUropean private international law.[79] This would be coherent with developments observed in the previous chapter (see sections 3.1 and ff.). Since the beginning of the contemporary age, side by side with the de-regulation of domestic family laws, a diffused concern for cross-border continuity in family matters has led the search for alternative connecting factors. However, specialists have gone beyond acknowledging the importance of the method of recognition for avoiding limping situations. They have advanced the argument that EU law entitles individuals - in the above cases, the parents - to determine without interference from member states "their personal and family status".[80]

Experts have then argued that it is this status voluntarily created in accordance with foreign jurisdictions that must be recognised across borders, including in the country of nationality or

Especially with human rights law. On this see below on the family, Horatia Muir-Watt, "New Unilateralism"', 2008, where she argues that the turn to fundamental human rights to solve cross-border disputes concerning the family (and the increasing tendency to recognise such relationships) in Europe constitutes part of a reorientation towards a new form of unilateralism.

[76] On the method of recognition, see P. Lagarde, 'La reconnaissance, mode d'emploi' in Ancel et. Al. (eds), Vers de nouveaux équilibres entre ordres juridiques. Liber amicorum Hélene Gaudemet-Tallon (Oaris, Dalloz, 2008); P. Lagarde, 'Is the Method of Recognition the Future of PIL', Martinus Nijhoff Collection, 2014, where he tries to anticipate some of the likely future reforms. R. Baratta. "Problematic elements of an implicit rule providing for mutual recognition of personal and familiy status in the EC." *IPRax: Praxis des Internationalen Privat-und Verfahrensrechts* 27.1 (2007)

[77] In *Case C–208/09 Sayn-Wittgenstein* and *Case C-391/09* Runevič-Wardyn decisions. The surname must be recognised because what is at stake is the identity of the European individual. On the 'right to an identity' in PIL, see Bucher, Andreas. *La dimension sociale du droit international privé*. Brill, 2011

[78] The presumption of recognition is stronger when the affected by a negative decision is a child.as in the case of family names, but also adoption. *Wagner and J.M.W.L. v. Luxembourg*, Application No. 76240/01, 28 June 2007. Before Garcia Avello, Italian private international law required that, in case of multiple nationality, and one of the nationality is Italian law, Italian law applies and thus requires the registration with the paternal name. (Art. 19 (2). Law n. 218 of 1995) See Giorgio Conetti, Sara Tonolo, Fabrizio Vismara, 'Commento alla reforma del diritto internazionale privato italiano'. Seconda edizione. Giapichelli. 2009. Italian courts now extend the principles advanced in Garcia Avello also to. children with double-nationality and whose second nationality does not correspond the nationality of a Member State of the European Union. See Long, Joelle. "Le fonti di origine extranazionale." In Zatti, Paolo, Trattato di diritto di famiglia diretto da Paolo Zatti - Vol. I.1 - Famiglia e Matrimonio, Giuffré, 2011, p. 143

[79] Muir Watt, 'European Federalism' (2007), pp. 1985-1986

[80] G. Rossolillo, 'Nondiscriminazione rispetto alla diversità nell'ordinamento europeo. Diritto europeo e diritto internazionale privato, profili di comparabilità', in Galasso (ed.) Il principio di uguaglianza nella Costituzione europea. Diritti fondamentali e rispetto delle diversità, Franco Angelli, 2007

domicile. What experts argue is that cross-border continuity of status is an imperative because it constitutes an essential pre-requisite for the protection of personal identities.[81] This claim indicates a noteworthy shift towards symbolic aspects raised by cross-border family matters. Rather than the relation created abroad, as suggested by experts in the 1980s and 1990s, or the effects of a status acquired abroad, as stressed in the social age, it would be the status itself that must be recognised across the territory of the European Union. This shift indicates a paradoxical confluence of the universality of status advocated by classical jurists, and freedom of choice in relation to that status, something that neither classical conflict experts nor social jurists could never have accepted.

2.2 An Odd Union: Party Autonomy and the Continuity of Status across Borders

In recent years private international law of the family, an area which until a few years ago every expert would have considered to fall within the bounds of internal orders, has been progressively communitarised. But changes are not limited to the 'internationalisation' of sources of conflict rules. Experts have also noted that the principles and objectives of private international law of the family, like those of the economy, appear to be going through a deep process of redefinition.[82] A gateway for this redefinition, other than the method of recognition, would be party autonomy. Party autonomy – in a nutshell, the possibility for individuals to choose the applicable law regulating their relationship and the most illustrious representation of the classical and social approaches to cross-border economic matters - has become the foundational principle of EUropean private international law of the family.

Given the jealousy with which sovereign states guarded the creation and dissolution of status in previous ages, the irresistible expansion of party autonomy into family matters has been especially significant in divorce. As seen in the previous chapter, in previous decades the doctrine, courts and, to a certain extent national, legislators introduced or attempted to introduce alternative connecting factors that in their minds would be suitable for the 'fluid' contemporary reality. The extension of the objective version of the proper law test, itself derived from rules governing 'mercantile contracts', was dictated by reasons of substantive justice other than for protecting cross-border continuity of relations. Regulation No 2001/2003, the Brussels II-bis Regulation (amending Brussels II) and

[81] See G. Rossolillo, *Identità personale e diritto internazionale privato*, Cedam, 2009

[82] On family law, see Carr, Keiva, Deconstructing and reconstructing family law through the European legal order. Florence: European University Institute, 2014. See also, for Private International Law, Baratta, 'La "comunitarizzazione'

Regulation No 1259/2010, the Rome III Regulation, govern questions regarding forum, choice of law and recognition of foreign decrees combining instead *favor divortii* and autonomy.[83]

Accordingly, Brussels II-bis has increased the number of jurisdictions where proceedings for divorce can be started, making 'forum shopping' - the feared consequence of the multiplication of grounds for jurisdiction for the House of Lords in *Indyka v. Indyka* - a fundamental factor to be considered in European divorce proceedings.[84] As to questions concerning applicable law, Article 5 of Rome III has given to divorcing couples the freedom to choose the applicable law. Essentially, parties can agree to be governed by the laws of any jurisdiction with which they have already developed a substantial connection. The freedom to choose the applicable law and the forum is not absolute. Specific conditions apply.[85] And yet choice of applicable law by the parties is not a residual one but is the favoured solution. Without a choice by the parties, the Rome III Regulation also provides that divorce (and legal separation) could be subject to the law of the (first) court seized.[86]

These are unanimously regarded as historic innovations especially because, only a few years before, there were huge differences in the law applicable in the divorce law of member states. The extension of party autonomy at a time when national divorce laws went from 'free divorce' in Finnish law to the prohibition of divorce in Maltese law led experts to ask their colleagues if the "Europeanization of Family Law [was not] going too far?"[87] This perception was amplified because, regardless of differences in internal law, Brussels II-bis establishes the automatic recognition of foreign decisions along the same lines which had been traced already by The Hague Convention of 1970.[88] This not

[83] Council Regulation (EU) No 1259/2010, of 20 December 2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. In member states that are subject to the 'enhanced cooperation' in civil matters.

[84] Some have criticised this because they push the actor to choose the forum with the most permissive ground. Baratta, Roberto. *Scioglimento e invalidità del matrimonio nel diritto internazionale privato*. Giuffrè, 2004, esp. p. 230 et seq.

[85] Article 1 [Regulation] 'party autonomy' approach necessarily implies knowledge by the parties of the law which govern their rights and duties, and can also be problematic because of the potential hazards to the weaker party to the dispute. In the Rome III Regulation, the risks of exploitation of the weaker party are balanced out by the provision establishing that each party must be informed – or otherwise an informed choice must be facilitated – about the legal and social consequences of the choice of the applicable law. Articles 17, 18, and 19. In addition, the chosen law must be consonant with fundamental rights recognised by Treaties and the Charter of Fundamental Rights of the EU. Article 16 Under this light, party autonomy gives freedom to choose the applicable law, to 'opt-in', but also gives the opportunity to individuals to 'opt-out' of family regulations which go against their interests and rights.

[86] Article 8(d)

[87] Fiorini, Aude. "Rome III–choice of law in divorce: is the Europeanization of family law going too far?." *International Journal of Law, Policy and the Family* 22.2 (2008), pp. 178-205

[88] The existence of different grounds for divorce does not matter for the purpose of recognition. (Art. 25 Reg. 2003; Art. 6(2)(a) Hague Conv. 1970) Internal conflict rules also do not matter. (Art. 24 Reg. 2003; Art. 6 (2) (b) Hague Conv. 1970) Judges cannot examine the merits of the decision (Art. 26 Reg. 2003; Art. 6 (3) (a) Hague Conv. 1970), and only have a very limited scope for refusing recognition on the ground of public order. (Art. 22 Reg. 2003; Art. 10 Hague Conv. 1970)

only allows for the displacement of traditional conflict rules but also makes it virtually impossible for connected laws to override the decision reached in conformity with the preferences of the parties

In this sense, the European divorce regime is consistent with the process noted above in *Garcia Avello* and *Grunkin-Paul*.[89] Party autonomy and the method of recognition appear to be part of the same paradigm shift that undermines the power of member states to interfere with the autonomous choices of the parties in 'matters of status'.[90] Accordingly, Europeans have been vested with the power to dissolve a status that, in previous ages, could only be dissolved by their personal laws and only after meeting strict conditions set by states pursuant to domestic policy. EUropean private international law also requires the changed family status be recognised across member states that are bound to Brussels II-bis and Rome III.[91] Coherently with what is becoming the dominant doctrinal view, "[t]he free movement reasoning of Union law and the coordinating reasoning of private international law thus come together around a fundamentally common objective: ensuring the unity of the status of person."[92]

What follows from the contemporary paradigm shift in EUropean private international law of the family is that individuals have today acquired rights firstly to create and dissolve their relationships by referring to a variety of laws and jurisdictions to which they are more or less connected, and secondly to have their personal and family status recognised across the internal borders of the Union.[93] In other words, European citizens would have the right to carry their status with them when moving across internal borders.[94] In fact, experts have argued that to guarantee free movement rights enshrined in the Treaties, private international law must ensure cross-border continuity of status.[95] This idea which is gradually becoming a constitutive part of the approach of experts to cross-border

[89] At first sight, a difference seems to exist between the emergence of the method of recognition and the extension of party autonomy in cross-border family matters. The method of recognition puts family relationships in front of national courts as a 'fait accompli' whereas party autonomy constitutes an ex-ante expectation that courts allow freedom of choice to the parties. T. Yetano, 'The Constitutionalisation of Party Autonomy in European Family Law', 6(1) *Journal of Private International Law*, 2010, p. 157

[90] See D. Bureau, L'Influence de la volunté individuelle sur les conflicts des lois, melanges en hommage a François Teré. Daòòpz. 1999. C. Kohler, L'Autonomie de la volonté en droit international privé : un principe universel entre liberalisme et etatisme. RCADI, 2012

[91] Article 21 of Regulation 2201/2003, consolidating the provisions introduced by the hague convention (Art. 2(1)) See the criticism of Baratta, 'La "comunitarizzazione"', p. 583 and Baratta, 'Sciglimento'. p. 227 et seq.

[92] Etienne Pataut, 'A Family Status for the European Citizen?', in L. Azoulai et al, 'Constructing the Person', p. 314

[93] Hence, Brussels II and Rome III indicate that individuals have a right to recognition of personal and family status. On the existence of a right to recognition of personal and family status, see Baratta, 'Scioglimento', 213. See also Tomasi, Laura, 'La tutela degli status familiari nel diritto dell'Unione Europea', Cedam, 2007, esp. p. 55 et seq.

[94] Baratta, 'Scioglimento', p. 213. See also Tomasi, 'La tutela', p. 55 et seq.

[95] See Long, 'Le fonti', pp. 185-189. H. Fulchiron, 'La reconnaissance au service de la libre circulation de personnes et de leur statut familial dans l'espace européen' in L. D'avout et al (eds.) Mélanges en l'honneur du Professeur Bernard Audit. Le relations privéees internationales, IRJS Editions, 2013

family matters has pushed some of them to argue that recent developments in community law indicate that personal and family status must be "uniform and, in essence, immutable" within the Union, regardless of the content and policies pursued by the domestic laws connected to that individual.[96]

What emerges from the picture drawn above is thus an odd mix. On the one hand, 'liberal' principles that used to apply to the law governing cross-border economic matters in the previous two intellectual and institutional ages have expanded to the family realm to such extent that experts have reported a process of 'constitutionalisation' of party autonomy in European family law.[97] This process enables individuals to create and dissolve family relationships in accordance with municipal laws with which they may be more or less connected. This indicates a profound shift in the nature and hierarchy of the relation between individuals, families and legal orders. It suggests that EUropean private international law of the family also shapes new bonds and new identities. What is worth noting is not only that many celebrate this development but also that they do so using a classical vocabulary largely inspired by the alleged emancipatory power of contract law. As Loic Azulai has put it, EU law prioritizes the:

> figure of a rational and self-organised individual, capable of expressing her own preferences in an environment composed of different jurisdictions and capable of choosing the law applicable to her situation.[98]

According to the image projected in the discourse by recent changes in law, the European individual is considered either a vulnerable object or a dangerous profiteer when it comes to economic matters. In contrast, when it comes to the family, the European individual is rational and self-organised. What seems to be occurring is the migration of conceptual vocabulary developed in previous intellectual ages from the family to the market, and vice-versa. However, in line with the idea that in the contemporary age the vocabularies, arguments and rationales of classical legal thought and those underlying the social consciousness stand in an uncomfortable relation, the extension of party autonomy and the emergence of the self-organised individual takes place at the same time as the renaissance of status in European law and in European doctrine.

In the contemporary age, personal and family status does not correspond to the status conceptualised by Maine and postulated by Cicu in the classical and social age respectively. European individuals

[96] "L'idea, com'è evidente, è che lo status personale e familiare debba essere unico e tendenzialmente immutabile". Long, 'Le fonti', p. 163
[97] T. Yetano, 'Constitutionalisation'
[98] Azoulai, 'The European Individual', p. 209

are free to create and dissolve their status, away from the 'interference' of protective measures that are 'unilaterally' placed on individuals who belong to certain communities.[99] Family status would thus appear to be loosely connected with the status-like protections to which workers, consumers and students are entitled. But it is also evident that the contemporary status shares elements with classical and social status. Contemporary status appears permanent and invariable, 'immutable' as seen above. At the same time, the permanence of status in time, the hallmark of the classical and social conception, is being replaced by continuation of status in space. In this way, the limits of the recognition of family status and of personal identities coincide with the geographical boundaries of the Union.

3.1 The Family Anomaly in EUropean Private International Law

The rehabilitation in EUropean private international law of the family of principles and rationales that used to apply in cross-border economic matters in the classical age is especially striking at a time when policy-oriented choice-of-law rules and overriding mandatory rules are multiplying in the law of the common market. In the private international law of the economy, the determination of the applicable law no longer happens by means of abstract connecting principles. Social legal thought has undermined the liberal faith in the emancipatory power of contractual freedom and autonomy. The acquisition of rights and their recognition across jurisdictions yields to the interest of specific categories of persons, such as consumers and workers. In contrast, in cross-border family matters, the method of recognition requires states to submit to private choices. Party autonomy has become the main choice-of-law principle. The ongoing paradigm-shift in European Family Law carries profound implications for the way in which individuals who inhabit the transnational environment perceive themselves, their relationship with public institutions, and their membership in civil and political communities.[100]

[99] European citizens are acquiring the capacity to 'choose' their personal status in accordance with a variety of regimes, and that this suggests a convergence of the rationales that used to underpin the market and those that currently govern European families. One commentator, for instance, used the analogy of the free establishment of enterprises. In both cases, she argued, the person is free to choose the law that best fulfils individual preferences and interests, imposing the recognition of that choice to other states for a variety of legal purposes regardless of the public interest and social and economic policies of the countries connected to the person through links different than those chosen by the individual. Looking at the recent decisions by the ECJ in matters of surnames, some scholars have noted that "si sta facendo strada la tendenza ad affermare il diritto di ognuno a scegliere il proprio status personale". See G. Rossolillo, 'Non-discriminazione', p. 43. What is also relevant, is that the same author argues that this indicates a convergence between rules that apply to the market in matters of establishment of enterprises. In both cases, it is argued that the law allows "all'individuo di scegliere la legge più consona ai suoi interesse imponendo poi agli altri Stati membri il riconoscimento del risultato di tale scelta." Rossolillo, Giulia, 'Non discriminazione e rispetto della diversità nell'ordinamento europeo. Diritto', Galasso (ed.), *Il principio di uguaglianza nella Costituzione europea: diritti fondamentali e rispetto della diversità*. FrancoAngeli, 2007

[100] In light of this genealogy, it is obvious that developments in European conflict of laws must be looked historically and comparatively, considering the deeper transformation of legal assumptions and changing institutional models that is

Perhaps unsurprisingly, conservative voices have criticised recent developments from a methodological and dogmatic viewpoint, re-asserting the classical boundaries between national and international law, reaffirming the traditional objectives of private international law, and maintaining the exceptionalism of family law.[101] Accordingly, they denounce that the shift constitutes a radical departure from the traditional multilateral method.[102] As conflict rules move away from their traditional logic and rationales, they claim, private international law may lead to a weakening of social cohesion.[103] The current re-orientation of conflict of laws would undermine the capacity of member states to impose domestic law on members of civil communities. It would thus sabotage the foundations of democratic societies, if not the very existence of states and their legal orders.[104]

This view fails to consider that the recognition of personal choices concerning relationships of intimacy, care and affection which are made in accordance with the law of other democratic member states subject to the same set of obligations to protect human rights does not signify a turn to a chaotic, disaggregated and totalitarian society. Against a background characterised by resilient differences among family regimes and a proliferation of links between individuals, families and jurisdictions, it may be argued that, when choices do not occur in an anarchical level playing field and when the enforcement of rights and responsibilities is guaranteed transnationally, autonomy and recognition may not lead to weaker but stronger civil societies. Rather than chaos and disorder, conflict rules may help to bring about greater confidence in state institutions. The counter-argument that the regulation of the family should be exclusively subject to the *lex patriae* (or to the *lex domicilii*) rests on the contentious and ideological claim that traditional norms are democratic and promote social cohesion.

The above does not mean that the re-orientation of private international law of the family is without faults. In the concluding paragraphs, I will address some of its greatest limits and flaws (see Section

taking place. For an historical and comparative examination of party autonomy, as well as some critical remarks of its expansion in family matters, see Nishitani, 'Mancini'

[101] The arrival on the scene of a new method associated with human rights has generated considerable resistance: see for example, Lena Gannagé, La hiérarchie des normes et les méthodes du Droit International Privé, Tome 353, 2001, Preface by Y Lequette.

[102] The specialised literature has pointed out that the method of recognition displaces traditional conflict rules and the multilateral method and it has blurred the line which separates the determination of the applicable law from the enforcement of decisions. "In French legal literature, the current model owes much to the influential ideas of Pierre Mayer on the distinction between rules and decisions in private international law (La distinction des règles et des décisions en droit international privé, Dalloz, 1973, p. 53) According to his argument, the method of the conflict of laws, which means determining the governing law by means of a connecting factor among innumerableprivate law rules all virtually applicable, is relevant every time the issue before the court is governed by (general, abstract) rules. (of private law), as opposed to (individual) decisions (of which the protype is a judgment), which call either for recognition within the forum legal order, or refusal (for reasons of lack of jurisdiction or public policy). See also discussion in Bureau, Dominique and Muir-Watt, Horatia, '*Droit international privé',* 2007

[103] See Section 2.1, Chapter 9

[104] See Lequette on status, in Mélanges en l'honneur du Professeur Pierre Mayer, LGDC, 2010

5.1). However, as far as the above criticism is concerned, it is framed in classical assumptions and arguments. Also those on the other side of the spectrum, who support the shift towards recognition and autonomy, have often framed their arguments in a 'neo-classical' language, if on antithetical terms. As seen before, recent changes convey the image of the rational and self-organised individual. Accordingly, for scholars who are supportive of the shift, the very same principles and rules which have dominated in international contractual matters - and have come under strict scrutiny for their adverse systemic and social effects - constitute praiseworthy devices that allow the discipline to bypass policy-oriented rules and overriding mandatory norms, and enable individuals to make choices in a an environment characterised by legal pluralism and cross-border mobility.

In the market, the law and the discourse concerning cross-border transactions have embraced regulatory considerations. Accordingly, the myth that presents private international law as a liberal method designed to protect personal preferences is being rejected. The set of functions and assumptions, parameters and principles which used to underpin the law governing economic matters, within and across borders, are either rejected or only reluctantly endorsed by contemporary scholars. There, status-like protections are tokens of legal progress. Fear of the dangers of an unregulated market resulted in the awareness of state intervention to protect the economy as a social institution and the individuals acting in it. In contrast, in family matters, policy-oriented rules and overriding mandatory norms are synonymous with the *ancien régime*. *Optio juris* finds increasing popularity because it is said to promote self-determination.[105] System- and forum-shopping are praised because they protect individuals from conservative social forces.[106]

A paradigm shift in EUropean private international law of the family therefore comes in the form of an anomalous renaissance of the classical narrative of neutrality and isolation. I have called this the 'family anomaly' in European private international law. Instead of engaging in an examination of what connecting factors might be better suited for a socio-legal reality where individuals and families grow multiple and ephemeral contacts with legal orders, more and more experts take the shortcut of defending party autonomy because - using a typically classical vocabulary - it generates 'legal

[105] See D. Martiny, 'The Objectives and Values of (Private) International Law in Family Law, in J. Meeusen et al, '*International Family Law'*, para. 11. References are made to the classical assumption that the choice to give freedom to the parties to choose the law applicable to their relation is mandated by the "Increasing mobility of citizens calls for more flexibility and greater legal certainty. In order to achieve this objective, this Regulation should enhance the parties' autonomy in those areas of divorce an dlegal separation by gibing them a limited possib ility to choose the law applicable to their divorce or legal separation." Recital 15 of the Council Regulation 1259/2010 concerning cooperation in the area of the law applicable to divorce and legal proceedings, also known as Rome III, entered into force in 2012.

[106] Borg-Barthet, Justin. "The Principled Imperative to Recognise Same-Sex Unions in the EU." *Journal of Private International Law* 8.2 (2012), pp. 359-388

certainty' and because it protects the 'legitimate expectations' of the parties involved.[107] The family anomaly thus infuses new life into the classical postulate that conflict of laws can act as a source of moral objectivity. Unlike municipal family laws, private international law of the family is praised as a neutral tool which, unaffected by conservative social forces, is impermeable to overriding political interests.

If in market relations public interest justifies a re-orientation of principles towards social protections, experts are generally supportive of the ongoing shift towards autonomy in cross-border family relations because conflict rules and principles that applied to market relations in previous ages hold in themselves the promise to liberate individuals and families from government control. Autonomy is said to promote the emergence of subjectivity against value-laden and politics-oriented family laws. In cross-border economic matters, the dogmatic divisions between national and international law, between social and individual law, between politics and law are rejected. In cross-border family matters, they are cherished instead because they separate individuals from government control and public policy. Contrary to activities that take place in the market, when it comes to relations of intimacy and care, the narrative of isolation comes across as visionary rather than illusory, and the rhetoric of neutrality appears to be emancipatory rather than oppressive.

As in previous transitions, paradigm shifts do not only take place at the level of positive rules, but also at the deep level of assumptions and characteristic arguments advanced by scholars. Experts' opinion thus suggests a renaissance of ideas and vocabularies dating back to the classical but also an inversion of considerations and rationales of the law governing the family and the law governing the economy. This is giving way to contradictions and paradoxes. From the viewpoint of this genealogy, the greatest one is the claim advanced by a growing number of scholars that the extension of party autonomy and the application of the imperative of recognition to the family realm as part of the evolution of civilised societies from status to contract.[108] As seen in the previous chapter, the idea that family law is moving from status to contract is discussed, and generally accepted, in the European

[107] The conviction among the supporters of the method of recognition is that discussions on the most appropriate link for establishing a connection between persons and civil communities have lost in intensity. Paul Lagard, for instance, thinks that, except for the controversial question of surrogacy, there is greater convergence between the values underlying European societies, and that the pedigree of traditional rules does not justify the uncertainties created at international level by the application of the (classical or social) allocation-method. In personal matters, protective measures, he argues, are only justified with respect the laws of third countries, i.e. of non-Western traditions, which presents "irreconcilable differences" with European values. Lagarde, Paul. "Développements futurs du droit international privé dans une Europe en voie d'unification: quelques conjectures." *Rabels Zeitschrift für ausländisches und internationales Privatrecht/The Rabel Journal of Comparative and International Private Law* H. 2 (2004), pp. 225-243, pp. 226-227

[108] See G. Dalla Torre, Famiglia senza identità?, in «Justitia», 2012, p. 129

and American family law literature.[109] The same assumption, it appears, is now making its way in conflict of laws. Hence, in his *Conflict of Laws,* Adrian Briggs construes the contemporary extension of party autonomy in cross-border family matters as a long-awaited transition from status to contract:

> Indeed, if life is a length of time during the course of which marriage, divorce, annulment, and so on, are regarded as transactions, each tested according to the law or laws to which it seems sensible to refer them, [the once relevant and coherent category of] personal status is simply what results from these events from time to time. And if that is so, the idea that adults may choose the law by which these separate transactions are to be governed, or to which these transactions are to be referred, becomes much more plausible. The common law of private international law never countenanced such a thing (save in the underappreciated sense that the parties with the means may choose where to go to marry or to petition for divorce); but if these processes really are the contracts and engagements one makes to get through life, why should the right to choose the law associated with them be available only to those with the means to travel? To be sure, the legislation and proposals for legislation coming from the institutions of the European Union would open the door to substantially greater choice of law to govern the effect of life-changing events. But if these are just events, mostly entered into by choice, whether happily or unhappily, why on earth should adults of sound mind and the age of discretion not be allowed choose the law to determine the effects of what they are doing? Does personal autonomy and respect for private life not entail the right to choose the law to govern these events? […] Perhaps the idea of a progression of law from status to contract has a part to play here too; perhaps the suggestion from Europe that one should be able to choose how to make one's private life is one to be looked at with increased respect."[110]

Setting aside for a moment the crucial question, entirely ignored by European specialists, of how to reconcile the renaissance of permanent status - in the form of 'continuity of status' across borders - with the alleged evolution from status to contract, legislative and judicial trend discussed in the previous chapter (sections 2.1 and ff.) appeared to move domestic family laws towards greater room for personal choices and protection of individual interest. There, however, I have also pointed out that the so-called process of 'privatisation' or 'contractualisation' does not fully capture the complexity

[109] Martha M. Ertman, Marital Contracting in a Post-Windsor World, 42 *FLA. ST. U. L. REV*. 479 (2015); Yehezkel Margalit, Artificial Insemination from Donor—From Status to Contract and Back Again?, *20 B.U. J. SCI. & TECH. L.* 69 (2015); See also Halley, 'Behind the Law'

[110] A. Briggs, *The Conflict of Laws*, 3rd Edition, Oxford University Press (2013), pp. 328-329

of changes in family law that started in the 1960s. This is important because principles and functions of substantive family law and those of private international law of the family are bound to follow similar transformative paths. Hence, the claim that both are evolving from status to contract calls for an examination of recent reforms in substantive family law of member states.

3.2 The Evolution of Family Law from Status to Contract: Recent Changes in Family Laws

Personal choices and individual interest have gained greater importance in European family law and, at first sight, this has happened at the cost of public interest and government control. Since the 1960s and 1970s, the transformation of family law followed a progressive de-regulation and pluralisation. This trend has continued in the last two decades. Compared to the social and the classical age, formations which transcend the so-called 'traditional family', which this genealogy has shown corresponds to the family model constituted in the age of classical legal thought, find increasing recognition across European legal systems.[111] Since the post-war period, European legal systems have placed non-marital formations on a par with married partners.[112] Accordingly, in most European jurisdictions, individuals and couples can today derogate from the default standard of a "voluntary union for life of one man and one woman, to the exclusion of all others."[113]

Same-sex relationships are today recognised in various forms in all European states. Denmark was the first country offer same-sex couples the right to formalise their partnerships in 1989. Netherlands was, in 2001, the first country to introduce same-sex marriage. According to the family laws of all member states, same-sex couples can either enter in marriage[114] or register their partnership.[115] In

[111] Notably, the EU Charter, unlike the ECHR does not specify the gender of the marrying partners which, in the mind of the drafters, should have left countries free to choose whether or not to legalise same-sex marriage. (Art. 9 Charter) See Celotto, A. "La libertà di contrarre matrimonio, fra Costituzione italiana e (progetto di) Costituzione europea: spunti di riflessione." *Familia* (2004)

[112] «Se si guarda alla nostra Carta nell'insieme delle sue norme, si può ben dire che essa non indica nella famiglia matrimoniale - nel senso riferibile all'istituto del matrimonio/atto - uno schema unico e vincolante da imporre alla società come canale esclusivo di riconoscimento e legalità delle relazioni di coppia e di generazione. Il disegno degli artt. 29-31 conserva il segno di una funzione di riferimento, di una primogenitura della famiglia coniugale, che infatti ha suggerito, per le altre forme di convivenza, un processo di tipo equiparativi; mai limiti in cui l'evoluzione in atto nella vita sociale, che cerca in modalità di convivenza diverse la soddisfazione di bisogni e valori tradizionalmente propri alla sola famiglia "matrimoniale", possa trovare in questa "primogenita" esperienza elementi di analogia, e questione aperta nella quale la forza del costume assume un ruolo primario: sul piano giuridico, si può osservare che tan to dal punto di vista civilistico che - forse con maggiori aperture - dal punto di vista penalistico e proprio il senso ed il nuce dell'esperienza coniugale che finisce per essere cercato in aspetti riscontrabili in una gamma sempre più ampia di situazioni di fatto.» Paolo Zatti, Tradizione e Innovazione nel diritto di famiglia, 'Trattato', p. 13

[113] *Hyde v. Hyde* (1866) L. R., P. & D. 130

[114] Same sex marriage is currently available in the United Kingdom, France, Spain, Portugal, in the Benelux, in Germany, in Ireland, in Norwaty and Sweden and in Malta and also in Denmark, after 2012. See footnote for cases.

[115] The latest European countries to afford this possibility for same-sex couples are Italy and Estonia. Both opposite sex and same-sex couples can either marry or, alternatively register their partnership in several European jurisdictions.

some European jurisdictions, they can choose between the two options.[116] Regardless of their sexual orientation, with only a few exceptions,[117] domestic family laws of member states have also established default protections for cohabiting partners.[118] Significantly, the Italian Parliament, the last to introduce a law establishing same-sex partnerships, has also enacted a clause which stipulates that cohabiting, unmarried and unregistered partners have reciprocal rights and duties.[119] Although marriages, registered partnerships and simple cohabitation result in asymmetrical rights and responsibilities, many municipal systems in Europe hold that durable cohabitation can determine, *inter alia*, access to social security, housing rights, and tort claims.[120]

Since proceedings for dissolution of marriage and of registered partnerships are straightforward and often take place of out court, European individuals can virtually opt in and out of various default regimes without much hindrance. Furthermore, European citizens who are in a stable relationship, marital or otherwise, formalised or not, have also the possibility of defining reciprocal rights and duties.[121] In civil law countries as well as in common law jurisdictions, nuptial agreements regarding financial assistance and property matters for married and unmarried couples are often contracted, and held valid and binding.[122] What this shows is that governments have taken in many respects a non-interventionist stance. Family law is no longer based on coercive arguments and overriding public policies.[123] European individuals, spouses and families are no longer the object of the absolute powers of national authorities that impose comprehensive mandatory rules and family models. They have acquired unprecedented opportunities for expressing preferences and free choices.

Looking at recent changes in law and in discourse, one can get the impression that Maine's evolutionary thesis did not manage to anticipate future developments in the law governing economic relationships, but that he may have been right for family relationships after all. Accordingly, echoing the impression reported above by Collision, European family experts have advanced the claim that recent developments stand as evidence that the law governing marriage and household matters will

[116] The law provides this opportunity in France, in the Netherlands, in Belgium and in Luxembourg.
[117] For instance, Romania, where cohabitation does not carry any consequence and is totally ignored.
[118] Finland, Portugal, Scotland.
[119] Law n. 76 of 20 May 2016
[120] the right to compensation and damages in tort law of the surviving partner See De Cicco, 'La tutela delle convivenze', in 'Trattato'.
[121] Contracts between spouses or partners are in many instances considered binding, and enforced accordingly.
[122] For England and Wales, see *Radmacher v. Granatino* [2010] UKSC 42 and, for Italy, Suprema Corte di Cassazione, Prima Sezione Civile, 27 Dicembre 2012, No. 23713/2012 On pre-nuptial agreements concerning matrimonial property. See Clarkson, C. M. V. "Matrimonial Property on Divorce: All Change in Europe." *Journal of Private International Law* 4.3 (2008)
[123] See Dekeuwer-Defossez, Françoise. "Réflections sur les mythes fondateurs du droit contemporain de la famille." *RTD civ* 2 (1995)

be based entirely on private and contractual considerations.[124] However, what this work has shown is that Maine's evolutionary reconstruction of legal history was a fictitious allegory whose purpose was to provide meaning and direction to the reformative classical programme. In the contemporary age, family relationships cannot be classified in absolute terms, either as status or contract.[125] Historically, the regulation of household relations has moved along multiple axes: formal and informal, uniform and plural, public or private, and status and contract.

Although personal choices and preferences have acquired greater importance in family law, civil law and public policy still determine who is competent to create a family, the legitimate forms of family arrangements and most of the rights attached to marital and parental relations.[126] In other words, in all member states of the EU, it is state law that determines who can marry who, and when and who can opt out of the default regime. Accordingly, Constitutional provisions banning same-sex marriage have been introduced in Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Ukraine.[127] But it is worth noting that in many jurisdictions in Western Europe where same-sex couples can formalise their unions, they can only do so by entering in marriage, hence supporting the marriage institution.[128] Although individuals have greater opportunities for 'contracting' their rights, especially patrimonial rights, they cannot do so outside the framework of state law. Civil laws set limits and conditions to the enforcement of contractual obligations.

On the one hand, recent developments in European family law have contributed to undermine long-held assumptions about the underlying principles, boundaries and functions of family regulation. Family does not operate following classical and social regulatory and mandatory logic. It is not

[124] Swennen, Frederik, ed. Contractualisation of Family Law-Global Perspectives. Vol. 4. Springer, 2015; Swennen, Frederik. "Private ordering in family law: a global perspective." General Reports of the XIXth Congress of the International Academy of Comparative Law Rapports Généraux du XIXème Congrès de l'Académie Internationale de Droit Comparé. Springer, Dordrecht, 2017

[125] Halley, 'Behind the law', p. 3. Halley argues that "there are at least three ways in which marriage and its alternatives acquire or lose the "feel" of a status regime. They can resist or welcome contract in their internal structure. I describe this tension under the heading *"Status or contract?"*. But that is not th eonly axis along which marriage-as-status can be strengthened or weakened. Marriage and its alternatives can be mapped as two-option systems […] from[…] singleness [to] pluralistic regimes involving many forms. […] And the legal and social world can be structured so that each form has highly consolidated and distinct legal consequences. […] I discuss this as an ambivalence worrying the question *"Integration or distintegration?"* (Emphasis Original). Halley, 'Behind the law', p. 12

[126] Shah, Prakash A. "Attitudes to polygamy in English law." *International & Comparative Law Quarterly* 52.2 (2003); Take for instance the Act passed by the Parliament of Catalonia in 1998 which recognizes cohabitation arrangements between two or more people living in a shared household for solidarity purposes or mutual assistance. Act 19/1998 of 28th of December regarding Cohabitation Situations For Mutual Assistance.

[127] For instance, the Hungarian parliament introduced in 2009 a law on registered partnerships which is open to same-sex couples. However, shortly afterwards, it banned constitutionally same-sex marriage. Other than Hungary, M. Davis, Conflicts of Law and the Mutual Recognition of Same-Sex Unions in the EU, Thesis, University of Reading, 2015, p. 1 Similarly, Croatian law provides for 'life partnerships' which accord same-sex couples all the benefits of marriage since 2014. And yet, the Croatian constitution now establishes that marriage can only be entered by persons of opposite sex.

[128] In Finland, of Iceland and Scandinavian countries.

necessarily public. It is not completely status. It is not fully formal. On the other hand, the trends characterising European domestic family laws described in the last part of this genealogy do not point to a modernist evolution or revolution which will inevitably end with the elevation of individual interest and personal preferences above all other considerations. The opposite of status is not necessarily contract. The opposite of status may be more status, in the sense of a multiplication of different status-conferring regimes or in the sense of its conceptual enrichment and transformation in conformity with changing assumptions and institutional models.

4.1 *Favor Status* in EUropean Private International Law of the Family

As it is suggested by Briggs' reference to the idea that societies and legal orders evolve from status to contract, recent studies discussing changes in family law share a significant portion of conceptual ground with classical legal thought. The paradigm shift in EUropean private international law of the family takes place at the level of positive rules as well as at the deeper level of assumptions and characteristic arguments advanced by scholars. The language in which the doctrine expresses its support for recent developments is as relevant as the extension of rules and principles that used to govern 'mercantile relations' in previous institutional ages, most notably party autonomy and acquired rights. Taken together, changes in law and in discourse point to a trend which may culminate in the resurrection of a whole set of classical ideas and assumptions which might feel liberal and emancipatory but are distinctively formal and abstract and, perhaps, may end up being oppressive.[129] An illustration of this risk comes from the renaissance of status.

As seen above, status - and the preservation of status across the internal borders of the Union - is emerging as the overriding principle in EUropean private international law of the family. It is no longer a presumption in favor of marriage relationships as such, *favor matrimonii* or *favor divortii*, as in the last decades of the previous century that drives legislative and judicial development of conflict principles. Rather, it appears to be status itself: *favor status* we might call it. The imperative to recognise family status transnationally evokes its classical conception, as classical jurists also posited that status was universally valid across jurisdictions. However, differently from the classical conception, status is not enforced upon individuals and families by their personal laws, regardless of their circumstances and desires. Rather, it is created and dissolved autonomously by individuals. The paradoxical effect of the current paradigm shift is that principles and reasoning that used to govern mercantile relations are being constitutionalised - allegedly tracing a process of evolution of the law

[129] F Dekeuwer-Défossez "Réfletions'.

governing family relationships along the lines indicated by Maine - to protect unity of status, perhaps the very embodiment of family law exceptionalism:

> The country-of-origin principle in family law and the extension of party autonomy are generally viewed with favour in traditional European private international law analyses. Even if it does indirectly lead to party autonomy, *it is seen as the best possible way to guarantee the continuity of a legal status across borders*, one of the classic objectives of conflict-of-laws, since once "created" it will never be open to challenge by applying a different law. Scholars celebrate that the principle generates legal certainty and thus protects "legitimate expectations". Moreover, party autonomy is said to provide the necessary dose of flexibility in a multicultural society, facilitating integration.[130]

The rise of *favor status* is one of the paradoxes of the family anomaly. On the one hand, the scholarship celebrates the extension of autonomy and recognition to cross-border family matters in part pursuant to an alleged movement from status to contract. Autonomy is considered an instrument of tolerance, facilitating integration in plural societies. On the other hand, 'liberal' principles and tools protect status across borders, and the paradigm shift is in this sense destined to reinforce the notion of a personal and family status. Despite the difference in conception, as in the classical age, the recognition of family rights and obligations across jurisdictions come to depend on the recognition of personal and family status. Despite the alleged contractualisation and privatisation of the discipline, experts and stakeholders may therefore end up reducing all legal challenges - and potential violations of the right of European citizens and families, which arise in the context of cross-border family disputes - to ensuring "portability of marital status".

This noteworthy and paradoxical development is especially visible with the rights of same-sex couples whose relation or marriage was registered or celebrated in one Member State and whose recognition is sought in a second country where same-sex marriage is not provided for or where partnerships do not accord the same rights. Due to the current variety of regimes available at municipal level in European systems and due to the traditional conception of marriage as a union between a man and a woman, the recognition of same-sex marriage has generated an intense debate among experts.[131] What must be noted is that recent studies advocating cross-border recognition of same-sex marriages across internal borders reduce legal challenges and political opportunities entirely

[130] Yetano, 'Constitutionalization', pp. 184-185
[131] See for a general discussion, R. Baratta, 'Problematic Elements'.

to the question whether "a refusal by a State *to acknowledge the marriage or partnership status* of a same-sex couple [is or not] compatible with EU law or human rights?".[132]

For many participants in the debate, the failure to recognise the civil status across jurisdictional borders constitutes a violation of fundamental rights enshrined in the EU Treaties and in the Charter of Fundamental Rights, and especially the right to free movement and the right not to be discriminated on the ground of sexual orientation.[133] As observed above, mixed with free movement provisions and citizenship rights, EUropean private international law of the family appears to be directed at granting continuity of status across borders.[134] European citizens should have the right to carry their status with them when moving across internal borders, regardless of conflict provisions and public policy in the internal law of the country of destination. This is the view of the former EU Commissioner for Justice, Fundamental Rights and Citizenship, Viviane Reading:

> Let me stress this. If you live in a legally-recognised same-sex partnership, or marriage, in country A, you have the right – and this is a fundamental right – to take this status and that of your partner to country B. If not, it is a violation of EU law, so there is no discussion about this. This is absolutely clear, and we do not have to hesitate on this.[135]

Status is being reconceptualised as a fundamental right which displaces conflict rules and interference by state authorities. Coherently with the idea that private international law can act as a source of moral objectivity and makes up a neutral tool which is unaffected by conservative and political forces, experts have thus lamented that national authorities still refuse to comply with the "principled imperative" to recognise the status of same-sex marriages and partnerships legitimately created abroad.[136] Accordingly, EUropean conflict principles would constitute an objective standard of righteousness, compared to the internal laws of a Member State which might instead lead to the regrettable situation in which "the civil status of same-sex couples is not readily transported from one Member State to another."[137] Faced with a case concerning the recognition of a same-sex couple married in one European country and moving to a second jurisdiction which does not recognise same-sex marriage, the ECJ should thus be mindful that:

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[132] Stuart M. Davis, 'Conflicts of Law', p. 37 (Emphasis Added)
[133] J. Borg-Barthet, 'The Principled Imperative', 2012
[134] Pataut, 'A Family Status', p. 313
[135] Cited by Davis, S. M. *Conflicts of Law and the Mutual Recognition of Same-Sex Unions in the EU*. Thesis defended at School of Law of the University of Reading. 2015
[136] Borg-Barthet, 'The Principled Imperative', 2012
[137] Ibid. p. 363

> The normative foundations of EU law are now more clearly expressed in legislation that is intended to liberate individuals from the undue interference of the state. This liberalism, and the associated abhorrence of discrimination, should move the Court of Justice to respond positively to demands for the recognition [of personal and family status].[138]

The paradoxical effect of the family anomaly in European private international law is that scholars who denounce the 'traditional family' as a legal artefact that belongs to different intellectual and institutional age, end up claiming that autonomy combined with the method of recognition imposes on Member State the recognition of personal status, the epitome of the classical family conception. Conversely, as seen above, those who reject the paradigm shift in European family law insist that member states have an exclusive competence to regulate the personal and family status of their citizens or domiciliaries. In line with assumptions and ideas that have dominated since the classical age, they claim that states can regulate marriages and families in accordance with state interest and public policy. An odd union is thus being celebrated between 'conservative' and 'progressive' voices at supranational level, 'strange bedfellows' they have been called in the literature on domestic family law.[139] This is what emerges from the discussion concerning the cross-border recognition of same-sex marriage, and from the recent *Coman* decision by the Court of Justice of the European Union.

4.2 The Family Anomaly in European Law: *Coman and Hamilton*

In its *Coman* ruling, the Court of Justice of the European Union (CJEU) dealt for the first time, albeit indirectly, with the question of recognition of same-sex marriages in the EU. The proceedings originated in a request for a preliminary ruling by the Constitutional Court of Romania concerning the interpretation of the Directive 2004/38, the Free Movement Directive, on the right of citizens of the Union and their family members to move and reside freely within the territory of member states of the EU.[140] Coman, who is a Romanian national, married his partner, a citizen of the United States, in Belgium when the couple resided there. The marriage was celebrated in accordance with Belgian internal provisions. Coman later attempted to be reunited with his married partner in Romania where, however, the Constitution has been recently amended with the effect of prohibiting same-sex

[138] Ibid. p. 387
[139] Brian Dempsey, Strange bedfellows in the pro-marriage campaigns, Scolag Leag Journal, 2011. See Norrie, Kenneth McK. "Marriage is for heterosexuals-may the rest of us be saved from it." *Child & Fam. LQ* 12 (2000. See in general, Polikoff, Nancy D. *Beyond straight and gay marriage: Valuing all families under the law*. Beacon Press, 2008
[140] Directive, 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States L 158/57. (Esp. Art. 2, Art. 3(1 and 2) and Art. 7(2)9

marriage. The Romanian judges were interested in knowing from the CJEU, *inter alia*, whether the term 'spouse' covered by the Directive included the same-sex married partner of a European citizen.

In its answer to the Romanian Court, the CJEU maintained that the regulation of matters that relate to personal status fall within the exclusive competence of member states.[141] Romania may or may not allow marriages between same-sex persons in domestic law and, implicitly, may even ban them constitutionally. When they exercise such competence, the Luxembourg court specified, States must nevertheless respect EU law and the fundamental rights and freedoms of EU citizens enshrined in the Treaties and stipulated in regulations and directives, and that among those rights is included the freedom to move and reside in the Union territory in conformity with the conditions laid down in primary and secondary legislation.[142] The CJEU further clarified that the term 'spouse' in the Free Movement Directive is gender-neutral.[143] EU law, the Court therefore ruled, precludes national authorities from refusing to grant residence rights to EU citizens and their legitimate spouses, including to their own citizens who return to the country of origin after a period of residence of abroad, of national conflict of law provisions and of internal policy.[144]

The *Coman* case offered an opportunity, regrettably not taken by the CJEU, to clarify important aspects of EU free movement law which carry implications for EUropean private international law. Among them was the important question of which marriages and spouses are protected by EU law and by the Free Movement Directive, if all marriages, including those celebrated in third countries, or only those celebrated in the jurisdiction of member states. The CJEU also did not clarify if non-marital unions, registered partnerships and cohabiting same-sex couples do or do not enjoy equal rights compared to married partners.[145] The extension of rights and freedoms conferred by EU law to European citizens and their family members who do not fall within the traditional heterosexual model is, for many - including for the author of this study - a change to be welcomed. However, the failure to engage with crucial questions concerning the rights of couples who, for ideological or practical

[141] Case C-673/16, 5 June 2018, Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne, para. 37
[142] Ibid. para. 38
[143] Ibid. para. 35
[144] Ibid. paras. 39-40
[145] Regrettably, the Court left several questions unanswered. The most consequential one probably relates to the place of celebration. Would EU law only grant protection to citizens and their spouses whose same sex marriage has been celebrated in the territory of another Member State or would it only cover marriages celebrated within the territory of the Union? In his opinion, Advocate-General Wathelet had argued in favor of recognising residence rights wherever the marriage was celebrated. The answer of the Court, which would contradict the Metock decision, seems to be in the negative. (Coman, paras 33, 35 and 36).

reasons, are unwilling to get married suggest that the decision may be more conservative than it comes across at first.

But the most striking aspect of the decision, which also confirm the trend towards neo-formalism and neo-classicism observed above and the emergence of unity of status as the paradigmatic element and overriding concern in European family law, is to be found in the specific linguistic formulae and argumentative devices used by the CJEU and by the Advocate-General. In the opinion he submitted to the Court, Advocate-General Wathelet argued that States may ban same-sex marriage in the internal order, but they cannot refuse to ensure the 'portability of personal status' across the internal borders of the Union.[146] Similarly, the CJEU Court the CJEU pointed out the urgent need to recognise the status that follows from the 'institution of same-sex marriage'.[147] The Court also specified that EU law does not require member states to modify the "nature of that institution" as a union between a man and a woman.[148] However, national authorities must recognise the status which follows from the institution of marriage between persons of the same sex.[149] The Court also held that 'spouse' is to be understood as "a person joined to another person by the bonds of marriage".[150]

4.3 The New Permanent Status of European Citizens

In contexts characterised by freedom of movement and legal pluralism, private international law of the family acquires a crucial role in the definition of personal rights and in the expansion of personal choices. Under the influence of the classical dogma, experts claim that private international law liberates individuals from the shackles of outdated family models enshrined in national legislation. A conflict of laws grounded in classical dogmas, they argue, withdraws persons from undue interference from nation-states and from value-laden public policies. EUropean private international law, it is argued, transforms European citizens from subjects to persons, from being dominated and controlled by their *lex patriae* and *lex domicilii,* to a condition of free and autonomous individuals. And yet references to the 'institution of marriage', to the 'bonds of marriage' reflect a conception of family relations and evoke historical images which are hard to reconcile with the idea that autonomy and recognition are mere tools for self-determination.

[146] Referring to Pfeiff, S., La portabilité du statut personnel dans l'espace européen, Bruylant, Coll. Europe, (2017). According to Pfeiff, the portability of marital status is compatible with the so-called 'method of recognition' in private international law and does not pose a threat to the internal order of member states.
[147] Coman, paras. 35 and 36
[148] Ibid. para. 42
[149] Ibid. para. 45
[150] Ibid. para. 34

The contemporary transformation brings back to life a whole a set of assumptions, ideas and vocabularies which date back to the classical and social ages, including the notion that family relations and rights, their recognition and enforcement, can be reduced to personal and family status and the idea that marriage constitutes a fundamental institution of society.[151] Paradoxically, this has happened at a time when the traditional family model founded on marriage celebrated between two persons of the opposite sex currently constitutes just one of the multiple forms that domestic relationships can take. Seen in this light, one might wonder if EUropean private international law can truly generate an emancipatory effect in matters of family and status.[152] Far from emancipating individuals from national control, the renaissance of traditional ideas might force European citizens to stick to a traditional conception of family relations.[153] It might lead scholars to neglect the position and rights of those who do not adapt to that conception.[154] The renaissance of classical ideas casts some doubt over the claim advanced in the literature that:

> …the 'category' of personal status is gradually disappearing from conflict of laws because the very idea of a 'status' of persons could exist in personal and family law has been abandoned. There is no longer any status but different legal regimes, all corresponding to different legal situations or issues. The very idea of 'personal and family status', which appears to imply that there is only one family type, induces an

[151] This renaissance of the classical conception in the context of the debates for the legalisation of same-sex marriage has been noted by Janey Halley in the US. See Halley, 'Behind the Law'. Notably, Halley wrote the article she wrote ahead of the Supreme Court's decision in *Obergefell v. Hodges* (2015) 576 U.S. In that article, Halley declared her intention to write a second paper where she would examine "the rules that apply when a marriage is performed in a state which considers it valid, and the couple, one spouse, or an incident of the marriage travels to another state where the marriage could not have been performed." Ibid. p. 54 We can presume that Halley never wrote that article because in Obergefell the Supreme Court not only held that all American states are required to recognise same-sex marriages contracted in another American state, but also that they must extend marriage to same-sex couples. Whereas the CJEU could not demand in the Coman decision that member states legalise same-sex marriage, it could demand that personal and marital status formed in a different member states be recognised throughout the Union. Similar trends and conceptions in Europe and in the U.S. suggest that some of the considerations advanced in this work apply also for American law and, vice-versa, the considerations advanced by Halley also apply for European law. Overall, common patterns suggest a global transformation of the law and the discourse concerning family regulation.

[152] Discussed by Azoulai, 'The European Individual', pp. 214-215

[153] The ECJ has itself already described the family as husband, wife and children, with little possibility of variation from this dominant scheme. For some early accounts, see K. Armstrong, 'Legal Integration: Theorizing the Legal Dimension of European Integration' 36 Journal of Common Market Studies (1998); L. Ackers, 'Women, Citizenship and the European Community Law: the Gender Implications of the Free Movement Provisions', 4 The Journal of Social Welfare and Family Law (1994), p. 367

[154] Halley, 'Behind the law', p. 3.: "I will argue that, as this trend intensifies, it fosters a legal consciousness in which ideas about law from the classical era wake up from their slumber and take on new life. Marriage as status is conservative not only in the sense that it commits legal thought to using the institution to preserve tradition, but also in the sense that it provides an inlet into contemporary legal thought about marriage for classical legal ideas. The very idea that marriage *is* anything—anything at all—is symptomatically classical."

> ironic smile today, because family and family law are completely liberalised, and multiple family types exist with no hierarchy presumed between them.[155]

Status is not disappearing from conflict of laws. Quite the contrary, status or, better, unity and indissolubility of status appears to be in the process of becoming the essential element of EUropean private international law of the family. What is more, family and family laws have not been completely liberalised or contractualised. Although non-marital partnerships are gradually being put on a par with marriage unions, there are hierarchies and asymmetries between family models. These asymmetries are reflected in EUropean private international law. After *Coman*, married same-sex couples have the same right to move and reside freely within the Union as heterosexual couples. However, it is not at all clear if the same right also extends to registered partners and cohabiting couples. With the growing number of unmarried unions which move, or try to move, to other member states, the protection and priority given to the classical conception translates into lesser protections and lesser rights for individuals and couples who decide not to conform to traditional models.[156] Recent judicial decisions reveal a growing sensitivity for traditional symbols and institutions.[157]

The notion that family laws, both in their internal and international dimensions, are evolving from status to contract is taking hold of legal consciousness. Accordingly, EUropean private international is described as a set of neutral tools that facilitate the emancipation of individuals from government control in conformity with the rise of a liberal paradigm. The problem with this account is that private international law is not merely a set of technical tools. The family anomaly leads experts to either stigmatise or underestimate the powers that state authorities still have over the definition of individual choices in transnational family life. It leads them either to ignore the extent to which preferences are residual and still constrained by institutional and legal frameworks, or to classify all regulatory frameworks as unwarranted and unjustified. The problem is that the idea that societies progress from status to contract is a reduction of legal and social complexity to a simplistic tale which hides intellectual and institutional re-orientations.

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[155] Pataut, 'A Family Status', p. 214

[156] For Halley, "We are often encouraged to think of the contingencies of distintegration as chaos, a symptom of social disorder, the demise of marriage, civilization under threat from a hedonistically motivated metastasis of family forms. But it can also be a way of spreading state power to impose marital obligations wherever marriage-like relationships emerge." Halley, 'Behind The Law', p. 55

[157] Case C-208/09 Sayn Wittgenstein, Case C-391/09; Vardyn & Wardyn. Coman could also be understood as a way to appease national sensitivities. We see here some continuity with trends already noted towards symbolic references in EU law an discourse towards symbols that project continuity with national symbols. [develop] See L. Azoulai, 'The ECJ and the Duty to Respect Sensitive National Interests' in M. Dawson, B. De Witte and E. Muir (eds), Judicial Activism at the European Court of Justice (Cheltenham, Edward Elgar, 2013), p. 167

Neither the renaissance of the idea that 'personal and family status' nor the notion that family laws is moving in a liberal direction. The idea, 150 years after Maine published his *Ancient Law*, that societies evolve from status to contract induces an ironic smile. On the contrary, the renaissance and adaptation of classical ideas to the contemporary legal and institutional environment begs a question about the relation between the conceptual and normative redefinition of status and broader intellectual and institutional changes. Compared with the conceptualisation of status in the classical and social ages, contemporary status has evidently lost some of its content. Status used to define rights and obligations in accordance with one's personal law. Status could not be undone, regardless of individual preferences and circumstances. European citizens who exercise their free movement rights have acquired the capacity to create and dissolve their status without member states' interference. Contemporary status originates in decisions that individuals make in accordance with virtually any law with which they come in contact.

Despite the differences, the contemporary concept of personal and family status has inherited from the classical and social conception one of its characteristic elements, that family and personal status appears permanent and invariable. At the same time, contemporary status has adapted this character of permanence to the current legal and institutional environment: continuation of status in space has replaced continuation of status in time. The 'personal and family status is *forever*' paradigm is replaced by the 'status is *wherever*' paradigm.[158] Accordingly, regardless of where an individual may find him or herself within the territory of the European Union, a status created or dissolved in one jurisdiction in accordance with any law with which he or she has a meaningful connection will be recognised across all European jurisdictions. In the classical and social ages, family law - both in its internal and international dimensions - cemented legal and jurisdictional borders. In the contemporary age, EUropean private international law of the family, like the law of contract in previous intellectual and institutional ages, dissolves boundaries between jurisdictions.

Family status would also appear to be only loosely connected with the status-like protections to which workers, consumers and students are entitled. The latter refer to a temporary condition that varies in accordance with the participation of individuals in different capacities within the internal market. And yet the multiplication of statuses of workers, students, etc. also have something in common with *favor status* in cross-border family matters. As argued above, when individuals participate in the European

[158] In the 19th and 20th centuries, the traditional conception imposed the trans-temporal continuity of marriage. In the 21st century, the dominant conception insists on the "trans-spatial uniformity of married life." Halley notices that many prominent US legal scholars and civil rights advocate adopt a rhetoric of marriage as status to defend the inter-state legality and validity of same-sex marriages. Halley, 'Behind the Law', p. 11

market, they do more than exercise their free movement rights and more than circulate across different jurisdictions. They also form meaningful bonds with other individuals who are members of the same collective entities that act within the market. The renaissance of status, it is here submitted, is not only to be understood in the context of the ongoing redefinition of the dominant mentality. As indicated in the concluding paragraphs of the previous chapter, and in the discussion above on voluntary and temporary communities of interests, it also suggests that the relation between members of transnational communities and public institutions is fundamentally changing.

The redefinition of EUropean private international law of the family and the protection of a permanent personal status across European borders implies that conflict rules and principles facilitate the creation of new identities and new bonds across European communities that transcend the political, jurisdictional and legal borders of member states. These bonds have a transnational dimension. In this respect, they cannot be compared to the civil and political bonds that were created and enforced through the law of status and through abstract and artificial connecting factors like nationality and domicile for creating a common identity and consolidating the authority and legitimacy of nation and social states. And yet the communitarisation and the redefinition of the principles and rules governing cross-border family relations in the EU may be part of a broader process to create a new European identity, one which is not based on an exclusive bond, but one which the person can herself shape and reshape by means of the multiple affiliations with other communities that exist within the European common space.

In this context, the proposal for the unification of European family law advanced by CEFL is again illuminating. Members of CEFL have not made a mystery of the fact that the main driver of the uniform civil code has little to do with the goal of market integration. As Katharina Boele-Woelki has remarked, the "absence of harmonized family law creates an obstacle to … the creation of a truly European identity and an integrated European legal space."[159] According to CEFL members, the creation of an integrated European society and of a European identity depends on uniformity in family law.[160] For CEFL, the desirability of the code originates in the notion that common personal and

[159] K. Boele-Woelki, 'Comparative Research-Based Drafting of Principles of European Family Law' in M. Faure, J. Smith & H. Schneider (eds.), *Towards a European Ius Commune in Legal Education and Research*, Antwerpen, Intersentia (2002), p. 172

[160] This argument that pushes towards uniformity as a reflection of common identities rests on the notion of the 'cultural-nexus' between family law and society. Although the law-culture nexus is not unique to family law, it has in this legal field the most profound persuasive power. To this day, family lawyers spend most of their time disagreeing on the implications of the so-called 'mirror theory' between law and society. The disagreement can come from the contested accuracy and sharpness of the cultural link: whether there is an actual correspondence between the images and the reality. Otherwise, disagreement follows from conflicting views as to whether the content of family laws is unique to political cultures or not, and whether it should remain so. In other words, in this latter case, although scholars agree on the mirror-

group identities must follow from cultural homogeneity, an idea which is irreconcilable with the multiple affiliations between Europeans and necessary and voluntary communities. The proposals for a European uniform family code reflect a nation-bound and absolutist conception of family regulation which is also in conflict with the ascendency of autonomy and the decline of regimentation.[161] A uniform civil code reminiscent of the 19th century codification agenda and modelled on the nation-state institutional model would be incapable of coping with the challenges presented by the internationalisation of family life and by the multifarious expectations of a diverse and 'liquid' European society.[162]

If the elaboration and enforcement of the uniform family code is an unrealistic and possibly even unwarranted project, this begs the question whether the enforcement of uniform law on all Europeans is the only possible legal tool by which an integrated European space and a common European identity can be constituted.[163] The progressive communitarisation and instrumentalisation of EUropean private international law of the family dissolve but do not eradicate the boundaries created by national laws with territorial jurisdictions, but through autonomy and continuity of status across European borders, they provide for an open-end and fluid common identity. As European orders move away from the choice-averse and policy-oriented arguments that underpinned the law governing family relations within and across jurisdictions in previous intellectual and institutional ages, EUropean private international law of the family could facilitate the creation of new communities and new institutional arrangements and, by changing the relation between individuals and public institutions, could function as a powerful *instrumentum regni*.

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theory, they cannot agree on which is the reality and which is the image reflected by the mirror. The nexus between culture and society, however, is a double edged sword which, in its negative dimension, leads to the cultural constraint argument against major reforms to the law. Paradoxically, the ground on which CEFL argues in favour of unification is the very same ground on which legal scholars base their argument against unification and in favour of protection of local legal traditions. Most family law experts point out that cultural as well as historical constraints prevent the unification of family laws envisaged by CELF. for literature. See Antokolskaia, Masha. Harmonisation of Family Law in Europe. *A Historical Perspective, Intersentia*, 2006

[161] The uniform civil code project is as likely to succeed as any attempt to resuscitate the set of political values, normative assumptions and cultural beliefs underlying the idea of a panEuropean Napoleonic code. The 'age of national codification' is over. Stewart, Iain. "Mors Codicis: End of the Age of Codification." *Tul. Eur. & Civ. LF* 27 (2012), p. 17

[162] Habermas, Jürgen. "The European nation state. Its achievements and its limitations. On the past and future of sovereignty and citizenship." *Ratio juris* 9.2 (1996)

[163] CEFL members envisage the future of European family law as a bifurcation between one main road taking straight to the creation of a European 'super-state', and a political and legal cul-de-sac. Similarly, Bobbitt is critical of the EU project if it entails just copying and pasting the nation-state model on a larger scale. See P. Bobbitt, The Shield of Achilles. War, Peace and the Course of History, Penguin Books (2003), p. 234. Despite the justifiable scepticism regarding the enactment of a uniform civil code comprehensive of family measures, CEFL is proof that the ambition to create a 'European nation-state' thanks to the unification of family laws still holds sway in the consciousness of European scholars. "the European Union itself in many ways resembles a state, functionally and structurally, whether it is called a state or not." Michaels, Ralf, and Nils Jansen. "Private law beyond the state? Europeanization, globalization, privatization." *The American Journal of Comparative Law* 54.4 (2006), p. 862

It is not only the legal mentality which has changed in the contemporary age, but also the prevalent institutional model. In this sense, the transformation of European private international law appears to be driven by the re-alignment of conflict principles to a set of post-national institutional demands. As mentioned above, the regulatory state is regarded by many as the post-national paradigm. However, the regulatory state only captures one side of the story of the current redefinition of state functions in society. The distinctive characteristics and objectives of institutional and legal orders in the classical and social ages - maximising opportunities and choices, extending institutional control and regulatory power over society - re-emerge in the contemporary age. However, the family anomaly suggests that the above objectives and characteristics are somehow exchanged. Private international law would thus facilitate regulatory controls in the economy and, at the same time, expand opportunities and choices in cross-border family matters, also implying a radical redefinition of the way in which individuals who inhabit the transnational environment perceive their relationship with public institutions and their membership in civil and political communities.

5. The Incomplete Project of EUropean Private International Law

Developments in the law and in the discourse appear to be driven by an abstract concern for unity of status across borders. The renaissance of status in EUropean private international law of the family and the overriding importance of protection of identity also indicate a turn to symbolism. What this suggests is that the paradigm shift in European family law pushes the scholarship to look at the law governing family and marriage relationships through abstract, symbolic and formal vocabularies.[164] Absorbed by abstract discussions, neo-formalism and neo-classicism leads the scholarship to shy away from the concrete problems faced by members of transnational families that conflict of laws ought to address. It leads experts to focus on symbolic matters rather than on substantial ones, on conflict justice rather than substantive justice and on status rather than effects. The paradigm shift may lead experts to neglect crucial aspects and challenges that follow from the internationalisation of family relations. What could be envisaged is that private international law is to play a crucial and practical role in future years which goes beyond the recognition of personal status and personal identities.

Individuals who move across jurisdictions face unprecedented practical challenges because, when a status is created, rights that affect social security, housing, taxation, financial assistance, insolvency, but also adoption and parenthood are also acquired in accordance with distinct and conflicting

[164] See Fraser, Nancy. "Rethinking recognition." *New left review* 3 (2000), p. 107

national laws and policies. The abstract discussion on continuity of status at European level neglects questions concerning the effects of that status. The effects of recognition are determined by internal law in line with internal policy. Courts may recognise a foreign marriage, partnership or adoption created abroad, but the determination of their effects ultimately depends on internal law. Hence, the appropriate recognition and enforcement of these rights is contingent on the development of appropriate conflict rules. It is here argued that the discussion should also extend to questions concerning the consequences of choices and recognition. Considering family relations as effects rather than status would also allow the discipline to engage in a critical examination of the distributive effects of current rules developed at supranational level.[165]

A second aspect concerns the interpretation of autonomy. I have argued above that, contrary to what is argued by those opposing the abandonment of traditional logic of private international law of the family, autonomy in jurisdiction and choice of law, combined with *favor status*, does not necessarily lead to social disaggregation, although it does lead to what have been defined as system and forum shopping.[166] What must be noted is that even if party autonomy as it is spelled out in EU regulations presupposes a pre-existing link, parties do not necessarily have a significant connection with the chosen law or forum. Moreover, the method of recognition assumes that rights are acquired in conformity with foreign law, thus demanding the recognition of a status and relations created under the law of a jurisdiction with which the parties may or may not have a significant connection according to the law of the recognising state. Against a background characterised by increasing mobility and a multiplication of links between individuals, families and jurisdictions, some experts have pointed out - correctly in my view - that the time is ripe for revisiting the discussion on connecting factors.[167]

[165] For Halley, "This Article argues that a shift in attention to the marriage system, and to seeing marriage legally-really as its effects, can startle that ideological phantom and threaten it with evaporation. […] The [proponents of status in the same-sex marriage campaign—both of the right and of the left] propound ideas not only about marriage but about law: there, they are neoclassicals, neoformalists. They would take our eye off of the immense distributive effects of marriage and its alternatives. But the real normative issue is not whether marriage is or should be status or contract, but whether marriage and its alternatives distribute in ways that we think are just. Addressing that question requires that we attend first to description: how do marriage and its alternatives distribute?" Halley, 'Behind the Law', p. 58

[166] By system-shopping it is meant the capacity of individuals to circumvent the otherwise applicable law by establishing contractual, or family, relationship in accordance with the law of another country which is more favourable or permissive. J. Meeusen, 'System Shopping in European Private International Law in Family Matters, in J. Meeusen et al., 'International Family Law'.

[167] "And just as public policy now clearly varies its demands according to the density of the links between the forum and thepersonal and factual circumstances of the case, it may well be that these elements weigh similarly into the balancing process. And it is probably time for private international law to revisit the way in which it understands such links." Watt, Horatia Muir. "Fundamental rights and recognition in private international law." 13European Journal of Human Rights (2013), p. 34 see also H. Muir Watt, ' Schism', p. 420

In the EU, the discussion may boil down to the interpretation of autonomy. Various proposals have been advanced in the literature that may help to deal with challenges raised by contemporary society.[168] Without the need to develop new concepts and links, it is here submitted that a viable alternative to the subjective and abstract conception of autonomy that is currently cherished by a significant part of the literature may consist of the notion of the proper law test which is discussed at length in Chapters 7 and 8. Autonomy in this sense would be interpreted as a qualified freedom to choose a law with which the parties, the relation or the dispute have a 'real and significant connection'. But refashioning choice to the concrete challenges raised by increasing mobility and more ephemeral contacts between individuals and jurisdictions only partly answers questions raised by autonomy. A related issue concerns the dangers of assuming that individuals can express free and informed choices, especially in scenarios characterised by legal and cultural pluralism, although in family relationships there are often power-imbalances and in the family bargaining power typically varies depending on the position of its members.[169]

What this genealogy shows is that autonomy, like status, is an ambiguous notion and an undefined concept. Autonomy presumes an equivalence of capacity between individuals who are situated differently, and it ignores existing inequalities of circumstances which might undermine bargaining power and, in the case of some individuals, might undermine real freedom of choice.[170] As such, it can be used to maintain inequality in society.[171] Autonomy is a foundational myth of private international law of the economy where, ahead of the recent paradigm shift, the state was restrained from taking a responsive position on matters of substantial equality in the name of abstract concerns

[168] See for instance Hunter-Henin, Myriam. "Droit des personnes et droits de l'homme: combinaison ou confrontation." Revue critique de droit international privé 95.4 (2006) proposing the '*milieu de vie*'. See also Case C-308/89 Singh EU:C:1992:296 para. 23 and Case C-60/200 Carpenter EU:C:2002:434, para. 39

[169] For instance, party autonomy could constitute a principled foundation for the future of European, and also extra-European, choice-of-law rules. It supports and protects personal freedom and responsibility in contrast with the automatic protection of national interests through the selection of connecting factors like nationality or domicile. It could help people to shape their identity and become who they want to be, and could provide an incentive to make informed life-choices. Similarly, Marshall argues that personal freedom could certainly be used as an empowering tool, "by changing the social conditions to enable people to make their own choices" J. Marshall, *Personal Freedom through Human Rights Law*. Martinus Nijhoff Publishers (2009), p. 7. However, party autonomy – and, to a great extent, also the country-of-origin principle – raises two concerns which are relevant for the analysis of this article – as seen in the above discussion on the *ordre public* exception – and for my doctoral thesis overall. These concerns have to do with the definition of the limits to family and cultural diversity which should be set through IPL rules. But the question is; should it also be used "as a restricting tool, preventing certain choices and ways of life through legal prohibitions or bans"? Marshall, 'Personal Freedom', p. 7

[170] Ibid. p. 2

[171] Ibid. p. 19: "Of course, equality and autonomy are abstractions. Their amorphous, overarching, and imprecise natures mean that both terms can be used by those holding disparate positions on governmental responsibility. My point is that neither equality nor autonomy can be understood in isolation from each other and it seems that one will be emphasized or privileged in society at the expense of the other."

like liberty and freedom of contract.[172] Due to the emergence of a neo-classical vocabulary and the turn to abstract and symbolic concerns in EUropean private international law of the family, governments and experts may become unresponsive to the claims of those who are in weaker positions also in cross-border family relations. This would lead to the paradox that genuine and informed choices are neglected for the sake of abstract ideals.[173] This issue is not restricted to relations between partners and spouses, but also extends to the ethical questions and legal challenges raised by surrogacy agreements.[174]

Autonomy could be a smokescreen for the preservation of social inequalities or it could facilitate the emergence and recognition of plural family arrangements.[175] The concrete issues raised by the internationalisation of family life and the renaissance of the classical vocabulary have led the scholarship to take opposite and often incompatible viewpoints. It is here submitted that, instead of advocating a return to the imperative considerations of traditional family law, and instead of referring to abstract ideals such as legal certainty and respect for the expectations of the parties, it may be more fruitful if experts looked into the substantive precautions and procedural safeguards developed in private and contract law after the rejection of the abstract concerns and ideals of classical jurists.[176] If experts were to distance themselves from classical assumptions and rationales, the debate could be re-centred, firstly, on the question of what resources should and could be made available in order to enable individuals to make informed choices and, secondly, on the rules and mechanisms which ought

[172] See F. E. Olsen, 'The Myth of State Intervention in the Family', *University of Michigan Journal of Law Reform*, Vol. 18, (1984-1985). In Fineman's view, this theory should replace identity-based strategies to bring about substantial equality, Fineman, Martha Albertson. "The vulnerable subject and the responsive state." *EmoRy lJ* 60, 2010, p. 7. "From my perspective, one of the most troubling aspects of the identity approach to equality is that it narrowly focuses equality claims and takes only a limited view of what should constitute governmental responsibility in regard to social justice issues."

[173]For Fineman: "If, however, we were to start our discussions of what is the proper relationship between state and individual with the primary objective being that of ensuring and enhancing a meaningful equality of opportunity and access, we may see a need for a more active and responsive state. This would not mean that autonomy was cast aside, but rather that we realize that as desirable as autonomy is as an aspiration, it cannot be attained without an underlying provision of substantial assistance, subsidy, and support from society and its institutions, which give individuals the resources they need to create options and make choices." Ibid. p. 16

[174] Lequette, Yves. *L'ouverture du mariage aux personnes de même sex*e. Éditions Panthéon Assas, 2014. See also cases listed by Bureau and Muir Watt, 'Droit international privé'

[175] "While myths tend to support conservative policies, then can be used progressively and actively. Political myths can be powerful tools in forging many times of social policy. In our current ideological climate, however, they are most often wielded by those in power, who argue for curtailment of emerging family forms, as well as of progressive welfare policies perceived to be undesirable because they support those forms". Fineman, 'The vulnerable subject', p. 16

[176] Abandoning the classical narrative, and classical ideas, allows us to investigate asymmetries of rights and effects, questions of capacity, of reasonable expectations, which arise due to the existence of distinct rules and regimes. As also argued by Maria Marella, the merging of family and contract law rationales not only questions their presumed diversity, but also opens up questions, like that on the limits of social disparity between the parties before it becomes relevant for contractual freedom, which would otherwise be silenced. M. R. Marella, 'The Non-Subversive Function of European Family Law: The Case of Harmonisation of Family Law', *European Law Journal*, Vol. 12, No. 1, 2006, p. 80

to be put in place to avoid power imbalances and bargaining asymmetries. In this way, there may be increasing tensions but not outright opposition between autonomy and opportunities.

This genealogy shows that, despite their contemporary redefinition, status and autonomy have represented privileges and exclusions in legal history. Their renaissance in the context of cross-border family matters does not necessarily lead to the emancipation of the European individual. In fact, continuity of status and autonomy hide one more systemic issue that may take centre-stage in debates among scholars and legislators in the years ahead. As things stand, continuity of status is only guaranteed to those who have exercised their free movement rights (or to those who have dual-nationality) and, as suggested by *Coman*, perhaps only to those who have formed their relationships within European jurisdictions. As far as autonomy is concerned, only those who fall within the scope of EU law have an opportunity to form, arrange and dissolve their relationships in accordance with rules which differ from those provided for by their *lex domicilii* or *lex patriae*.[177] The 'reverse discrimination' suffered by those EU citizens who are unable to trigger the protections and freedoms granted by EU law is fundamentally at odds with the EU political and legal aspirations.[178]

[177] See Rossolillo, 'Identità personale'; "Rapporti di famiglia e diritto dell'Unione europea: profili problematici del rapporto tra dimensione nazionale e dimensione transnazionale della famiglia." *Famiglia e diritto* 7 (2010)

[178] The abstract concerns and symbolic value of status and autonomy, it is here argued, should not lead the scholarship to shy away from questions raised by reverse discrimination. See Verbist, V. *Reverse Discrimination in the European Union: A Recurring Balancing Act*. Intersentia, 2017; Tryfonidou, A. *Reverse Discrimination in EC Law*. Kluwer Law International, 2007

Conclusion

Revolution? Evolution? Cycles? Transformation!

Considering recent developments, some experts have advanced the claim that a 'Conflict of Laws Revolution' is taking place in Europe.[1] Rather than a complete regime change, the last part of this genealogy shows significant continuity between recent developments and fundamental elements of classical and social private international law. The elaboration of policy-oriented rules on the one hand, and the proliferation of overriding mandatory norms on the other, began much earlier than the communitarisation and instrumentalisation of European conflict rules. Despite undeniable change, this work does not indicate a complete overthrow of the legal order either. Current changes do not point in the direction of an organised movement that has "challenged and demolished the foundations" of the previous systems, as in the case of the American Conflicts Revolution.[2] In fact, what this genealogy shows is that in no time in the history of this discipline do we find a carefully planned, coherently organised and full scale regime change. Change is unmistakable, in the contemporary as well as in past ages. The questions, however, are: what are the characteristics of such change, what is driving it, and in what direction does it point?

For reasons different from those advanced in this work, some experts have rejected the 'revolution-thesis'. Since recent processes of harmonisation, communitarisation and instrumentalisation of EUropean private international law are methodically planned and respond to a top-down supranational project, some have remarked that the contemporary reconfiguration and reorganisation of EUropean private international law lack the essential attributes of a revolution. What they have also argued is that the ongoing paradigm shift is part of a progressive evolution of legal orders.[3] The essential element of the idea of legal evolution, it has been pointed out, is that it pre-supposes that law and society advance along pre-determined lines.[4] Accordingly, the evolutionary development of private international law is described as natural and inevitable and any obstacle standing in its way is

[1] J. Meeusen, "Instrumentalisation of Private International Law in the European Union: towards a European conflicts revolution?", European journal of migration and law 2007, p. 287-305; A. Mills, "The Identities of Private International Law. Lessons from the US and EU Revolutions", Duke Journal of Comparative and International Law, 2013, p. 445-475 R. Michaels, 'The New European Choice-of-Law Revolution', Tulane Law Review, Vol. 82, No. 5, 2008

[2] Symeonides, Symeon. *The American choice-of-law revolution: Past, present and future*. Martinus Nijhoff Publishers 2006

[3] See S. Symeonides, 'The American Revolution', 2008. Michaels instead argues that it fully qualifies as revolution in R. Michaels, 'The New European Choice-of-Law Revolution', 82(5) *Tulane Law Review*, 2008

[4] Stein, Peter. *Legal Evolution: The Story of an Idea*. Cambridge University Press, 1980

branded as anomalous, artificial, illogical and temporary. The hypothesis of a linear evolution from European legal orders, in internal law as well as in supranational law, is becoming a leitmotif in much of European legal research, including in the conflicts scholarship. As seen in the last chapter of this work, the evolutionary claim, taking the form of the alleged movement from status to contract, is also put forward in family matters, in internal law as well as in private international law.

In his 2013 General Course given at The Hague Academy of International Law, *Jürgen Basedow* remarked that the architecture of conflict of laws appears to be undergoing a process of linear evolution.[5] Private international law is no longer the heavily government-regulated and policy-oriented system of rules serving parochial interests of what he has called, drawing inspiration from Henri Bergson and of Karl Popper, 'closed societies' but has turned into an instrument of coordination and cooperation between 'open societies'. Recent trends suggesting that we are witnessing a linear progression from closed to open societies are, on the one hand, the withdrawal of the dirigiste state, and, on the other, the increasing space left to autonomous choices of private actors who operate under conditions of freedom and market processes.[6] Linear development from irrational, tribal and national societies to open societies is revealed by an ever-widening scope for personal decisions and responsibilities, a distinctive rational attitude, and tolerance of the habits of other people. This account would hold true for all civil matters, including family law.[7] Notably, the evolutionary thesis is not ideologically innocent, and hides a normative claim which is:

> The increasing unboundedness of social and economic life means that the openness of society, in addition to being an objective to be attained by human tolerance and political action, becomes a fact of life.[8]

Despite the inspiration and fascination of accounts such Basedow's, this genealogical reconstruction shows that evolutionary claims inevitably reduce complexity to simplistic tales to substantiate the assertion that legal history, and the history of this discipline especially, progresses in a coherent manner in a single direction, methodologically or ideologically. In such evolutionary accounts, there is no space for persistent methodological, doctrinal and theoretical contradictions. There is no room

[5] Basedow, J., 'The Law of Open Societies', *Recueil des Cours*, Académie de Droit International de La Haye. Martinus Nijhoff Collection, 2013. *Basedow* is the former Director of the Max Planck Institute for Comparative and International Private Law of Hamburg
[6] Ibid. p. 48
[7] Ibid. Section 2 (Globalization as a Driving Force of the Open Society) of Part I, 'From Closed Nation-States to the Open Society, pp. 64-81 for the crucial steps and triggers of this linear development.)
[8] Ibid. p. 80

for the many paradoxes that characterise old and new developments in the discipline, such as the extension of party autonomy in family matters - which is given great emphasis by Basedow - or for the fact that regulatory logic, policy-oriented rules and overriding mandatory norms which used to govern cross-border family matters have moved to the law of the market. Any development that does not fit the evolutionary claim is therefore excluded as a temporary and irrational anomaly. As suggested by the quote of Basedow above, the historical claim becomes a normative one.

We cannot assume, as prominent European experts still do, that the historical development of conflict of laws is being driven by an unequivocal and unambiguous process of modernisation, or that private international law is today heading towards a liberal and modern future. These concepts are empty shells. After all, even Savigny - who was certainly not a cheerleader for the rise of open societies - saw his contribution to the subject as helping to modernise and liberalise the law of European states. What this genealogy of European private international law took as its starting point and, it is hoped, it has shown, is that there is neither a clear beginning nor necessary finality in legal history. To claim that the discipline originates in an unquestionably irrational and intolerant past is as unwarranted as it is to claim that we are heading towards an unambiguously modern and tolerant future. Whilst evolutionary and revolutionary claims reduce complex developments to regime change and regime progress, the objective of historical studies, especially of *longue durée* studies such as this one and that of *Basedow*, should be to problematise history, to lay emphasis on contradictions. Legal history is contingent and unpredictable. Legal history is itself irrational.

One last general claim must be dealt with before drawing up some conclusions on the transformation of European private international law and before situating my 'transformation thesis' in the current debate on the restatement of European private international law. Could it not be that private international law moves in cycles? Histories of private international law - like those of public international law - are typically presented in epochs as if they are watertight compartments.[9] A cyclical view of the history of the discipline may find increasing popularity as 'unilateralism' seems to take hold of law and discourse once again. Could it be that conflict of laws has merely jumped from unilateralism to multilateralism and is bound to move from a unilateral to a multilateral paradigm until the end of times? The problem with cyclical accounts is that they do not pay due regard to the complexity and diversity of viewpoints within each epoch and in each method. In no time in the history of the discipline did law and discourse simply adopt an uncontaminated 'unilateral' or

[9] …leaving to distinct impression in students that the history of conflict of laws is one of seasonal cycles between the unilateral to the multilateral method, and vice-versa. See M Koskenniemi 'Book review: William Grewe: The Epochs of International Law' (2002) 51 ICLQ 746"

‘multilateral’ method. The ‘cyclical thesis’ ignores the contradictions that are inherent in the methods that this genealogy has identified. Cyclical accounts also ignore convergence at the deeper level of conceptual assumptions and argumentative schemes between experts who formally advocated opposite methods.

To divide the history of the discipline into methodological periods - a pre-modern period dominated by unilateralism, a modern period dominated by multilateralism, the attempted but failed unilateralist revolution at the beginning of the 20th century, and then in recent years the ascendancy of unilateralism - means neglecting too many contradictions and ambiguities within single approaches and methods, as well as neglecting too many overlaps between distinct methods and approaches advocated and developed by experts who formally belonged to different schools. If one must speak of multilateralism, then it must be borne in mind that this comprehensive methodological category only means something in specific political and cultural contexts. What this genealogy has shown is that classical multilateralism was based on arguments and functions which are fundamentally different from social multilateralism. In turn, the unilateralism invoked by European jurists in the social age has little in common with medieval unilateralism, and a lot more in common with social multilateralism. For this reason, if labels must be used, it makes sense to speak about medieval, classical, social and contemporary private international law, rather than Statutism and unilateralism, multilateralism or Neo-Statutism etc.

1.The Transformation of European Private International Law across Legal-Institutional Ages

Methodological debates and cyclical and revolutionary theses commit scholars to thinking of conflict of laws as technique. Histories of private international law that describe the development of the discipline as a series of clearly-defined epochs dominated by the succession of unilateral and multilateral methods, or as determined by revolutions and counter-revolutions driven by intellectual movements that are born and thrive in isolation from political processes, typically emphasise and focus on the technical dimensions of the discipline. A debate centred on technical aspects of the contemporary paradigm shift risks reinvigorating a formalist and myopic approach to the discipline. This would be paradoxical since, as shown in the last part of this study, recent changes are hard if not impossible to fit into strict methodological and formal categories. To make up for the flaws of the above theses and to shed light on the drivers of past as well as current developments, this thesis has developed a transformative and genealogical approach to the discipline. What this form of reconstruction has shown is that private international law is undoubtedly a technique, but because it

is technique, conflict of laws is particularly exposed to changing modes of legal thought and to the redefinition of institutional models.

To repeat the characteristics of private international law in each age would be redundant. Suffice it here to emphasise those constitutive elements of the dominant mentality that played a crucial role in the definition and transformation of the boundaries, principles and functions of private international law in the medieval, classical and social ages. The medieval approach to conflict of laws was pragmatic and universalist. For medieval scholars, the settlement of cross-border disputes must follow principles that reflected the natural division of all legal systems. It must conform to a universal order. Accordingly, experts artfully recrafted Roman sources to advance principles and divisions fitting the disaggregated legal-institutional context in which they lived. Although they acknowledged the existence of a division between private and public law, the most important boundary for medieval experts was that between personal and real matters, which also defined the extra-territorial and territorial reach of statutes. However, for medieval jurists, divisions and principles were neither conceptually clear nor systematically arranged. Their open-endedness served the purpose of maintaining a degree of flexibility in dynamic and uncertain political contexts and in plural orders.

Like medieval scholars, classical experts were also universalists or, better, internationalists. They believed that the same conflict rules should apply to all relations in all civilised nations. Classical scholars, however, approached legal collisions in a deductive and theoretical manner. Their objective was to construct a logical and consistent system of rules that could apply everywhere regardless of specific local and factual circumstances. Accordingly, they deduced conflict rules from *a priori* principles. They applied a conceptual and deductive method to discover for every relation that legal territory to which, by its nature, it belonged. If medieval scholars emphasised the vague division between territorial personal statutes and carved in it the overriding principle of intent, classical scholars rigorously divided between legal branches. Especially relevant for conflict of laws were the divisions between public and private law and between family and market law. Accordingly, classical private international law endowed principles governing cross-border family relations and commercial relations with distinct objectives, reinforcing national and territorial divisions the former, and opening borders and facilitating international exchanges the latter.

Social jurists were not internationalists. If classical jurists assumed that all nations were under a legal obligation to follow the general theory, social experts believed no international theory or principle was to be followed unless it was also posited by the sovereign. Accordingly, in the social age, private

international law was re-formulated as internal law and as a domestic discipline. Every sovereign had the right to deal with questions raised by legal collisions in accordance with its own laws and consistently with its own public policies. Whereas social jurists deduced universally valid rules of private international law from general and abstract principles, social jurists reasoned inductively. They started from the assumption that the only source of legal norms was sovereign will. For social jurists, however, the law did not merely correspond to the dictates of the sovereign. In the social age, the 'modern approach' in private international law was to consider conflict rules in relation to their value in achieving social purposes and social interest. Hence, conflict of laws was also transformed into a means for social ends. Ends varied. In cross-border economic matters, law protected individual interest. In no case, however, could contractual freedoms undermine collective interest. In contrast, conflict rules applicable to family relations systematically pursued social interest.

What this genealogy underlines is that private international law is not an isolated discipline composed of unchanging rules and principles. Conflict of laws does not evolve in accordance with any internal logic. It is not a neutral body of rules which are designed in isolation from the political process. Private international law and its underlying principles and rules have taken shape in accordance with the 'Europeanisation' across jurisdictions of dominant mental schemes and conceptual assumptions. On the surface, principles and ideas repeat themselves. Indeed, the discipline has constantly returned to old ideas, and it has often revisited ancient principles, some as early as in Roman times. As Juenger once put it, the "past has yielded an astonishing rich accumulation of ideas that still guide present theory and practice. Indeed, it seems fair to say that everything worthy of trying has been tried before, under the same or another label."[10] Superficially, this remark is true. At the same time, this genealogy shows that neither private international law *sensu latu* nor specific methods are made of rules and principles written in stone. The deeper normative and conceptual meaning of rules, principles and methods has been continually shaped and re-shaped, like pebbles on the shore, by the decline and emergence of dominant mentalities.

The cautionary advice of Michel Foucault, that we cannot assume "that words [keep] their meaning, that desires still point […] in a single direction, and that ideas retain […] their logic", especially resonate in legal history, and in technical and complex subjects like private international law more than any other disciplines.[11] This reconstruction has therefore examined the transformation of the boundaries, characters and functions of the discipline in broadly-defined intellectual-institutional

[10] Juenger, 'General Course', p. 136
[11] Foucault, M., 'Nietzsche, Genealogy, History', in Rabinow, P. (ed.), The Foucault Reader, New York: Pantheon Books (1984), p. 76

ages, in particular by investigating how the deeper conceptual meaning and normative content of conflict rules and principles has changed in accordance with dominant ideas and assumptions. Following the methodology of Western legal thought which uses binary oppositions as semantic vehicles to define the nature and functions of the legal order and its components, this study has also examined the transformation of private international law by taking as reference point the divisions between territory and personality, public and private, national and international, market and family, contract and status. It has then investigated how the rise and decline of legal consciousness has affected their deeper meaning and normative value. The genealogical approach has revealed the contestable character of the subject, its constantly shifting boundaries and its transient and contingent principles and functions.

As Frank Vischer argued, the great fascination and yet disillusionment with private international law as a discipline comes from the fact that it remains "one of the most debated among all the branches of law and that there is still no general agreement on the principles, methods and objectives of Conflict of Laws. History has shown that once any agreement has been attained, it is challenged by the next generation of conflicts lawyers."[12] The objective of adopting a genealogical method was precisely to examine the confusing history and uncertain present of this discipline, by investigating how, in each generation, rules and principles, divisions and boundaries, doctrines and theories, techniques and methods in the conflict of laws shift, take new meaning, vary their content in accordance with the emergence and replacement of dominant organisational schemes, deeply-held ways of reasoning and characteristic arguments by legal professionals. This study has tried to examine this history, by using as reference point binary oppositions, especially market and family, marriage and contract, and specific principles whose content and location in the division has moved from age to age, like intent and status.

What has emerged is that, in each intellectual-institutional age, binary divisions were transformed or shifted. Deeper conceptual meaning and normative value of basic principles and ideas that underlie conflict of laws also shifted. Take medieval intent. The decline of medieval thought and the rise of the classical consciousness did not obliterate the notion of intent, but they transformed it into free will. The social reconfigured intent as free will and associated it with contractual qualifications and overriding protections. This thesis shows that intent, free will and party autonomy moved across legal fields, household and commerce, then market only, then family again, , with the rise and decline of modes of legal thought. Or take status. Status, which has a common core referring to the position and

[12] Vischer, Frank. 'General course on private international law'. Recueil des Cours (1992), p. 21

condition of the individual, has repeatedly died and resurrected in the conflicts literature. And yet at each renaissance status is conceptually and normatively redefined. After the middle ages when it was understood as a contingent and temporary condition, it became a permanent and inherent condition in the classical age and then an instrument to protect collective interest in the social age.

To regard private international law as a body of technical rules is short-sighted, whether one portrays private international law as a de-politicised technique, as most multilateralists would, or as a political tool, as unilateralists would. Whether one lays emphasis on 'anti-political purposes' or on 'policy objectives', regarding private international law as technique leads experts and historians to ignore the 'big picture'.[13] To regard private international law as technique, and to project its history as cyclical, revolutionary or evolutionary, reinforce the idea that private international law is an autonomous subject and that it pursues objectives that are set by experts in isolation from broader political and cultural processes. Instead the rise of medieval consciousness, classical legal thought and the social mentality transformed the boundaries, principles and functions of private international law everywhere, in the common law world as well as in civil law countries, in multilateral systems as well as in unilateral ones. The value of a genealogical reconstruction is that it leads to the rejection of absolute divisions between methods, schools and jurisdictions. Its added value in terms of contemporary developments is that it enables a cross-temporal analysis of current developments.

[13] Hatzimihail, 'On Mapping'

Below, an overview of the main constitutive elements of medieval, classical, social and contemporary legal thought.[14]

	MLT	**CLT**	**SLT**	**Contemporary**
Rights	Personal and Real Rights	Individual (Property) Rights	Collective Rights	Human Rights
Core Legal Idea	Universal Order	Coherent Order	Means to an End	Balancing Instrument
Overriding Principle	Consent-intent	Free will/Status	Interest (Individual/Social)	Identity
Boundary	Law/Religion	Law/Morality	Law/Society	Law/Politics
Societal Unit	People	Nation	Societies/Institutions	Communities
Statehood	Territorial State	Nation State	Social State	Regulatory State/Market State
Legal Approach	Pragmatism	Conceptualism	Naturalism	Pluralism
Legal Technique	Hermeneutical	Deduction	Induction	Mixed
Medium	Commentaries	Treatises/Digests	National Journals/Manuals	International Journals/Multinational Research
Economic Relations	Unregulated Market	Free Market	Planned Market	Regulated Market
Economic Image	Informalism	Free Trade	Corporativism	Interdependence (EEC, EU, GATT, WTO, IMF, World Bank)
Family Relations	Legal (Economic and Private)	Quasi-Legal (*Tertium Genus*)	Legal (Public Law)	Mixed
Family Image	Informalism	National Paradigm	Social Institution	Liberal Family
Marriage	Consensual Union (Natural Right)	Civil Contract *Sui Generis* (Private Right)	Public Act (Public Concession)	Private Choice (Fundamental Right)
Status	Result of Rights (Variable and Voluntary)	Source of Moral Duties (Invariable and Obligatory)	Source of Legal Duties (Variable and Obligatory)	Source of Protections (Invariable and Voluntary)
Privileged Legal Fields	Natural Law and Roman law	Private (Contract) Law	Social Law (Family law/Labour Law)	Constitutional Law and Transnational Law
Overarching Framework	Universal Law/Natural Law	International Obligations	Inter-State Obligations	Global Law/Human Rights Law
Public International Law	*Jus Gentium*	*Jus Inter Gentes* (Nation-States)	International	Fragmented ↓↓↓↓↓↓↓↓↓↓↓↓↓ Human Rights and adjudication ↑↑↑↑↑↑↑↑↑↑↑↑↑ Regional Treaties and International Courts
Private International Law		*Jus Intra Gentes* (Civilised Nations)	Municipal	

[14] A comparison with Kennedy's overview in 'Three Globalization', p. 21, reveals overlaps but also notable differences.

2. The Contemporary Redefinition of Private International Law and the Family Anomaly

How is a genealogical reconstruction of medieval, classical and social developments useful for understanding the contemporary redefinition of European private international law? Firstly, it shows that the current redefinition of European private international law ought not to be understood as a coherent evolution or as an unprecedented conflicts revolution. Secondly, employing a genealogical approach to investigate the ongoing paradigm shift in the law and in the doctrine, starting from what I have referred to as the family anomaly, suggests that current developments may be driven by and reflect a more profound transformation of intellectual assumptions than a mere methodological shift. The fourth part of this work has shown a convergence of the redefinition of the arguments and principles of private international law and what Duncan Kennedy and others have described as the dominant, and yet unfinished, contemporary mode of legal thought. In the contemporary age, law is neither mere conceptual order nor mere means to social ends. Law, including private international law, appears to be the product of irreconcilable tensions between the aspirations of a wholly coherent and responsive legal regime between the social and the classical paradigms.

As shown in the last part of this study, in the contemporary age, the dogmatic approaches which prevailed in in the 19th and 20th centuries have given way to a discipline which appears no longer the sum of coherent principles and rules, as posited by classical experts, and no longer the expression of concrete and coherent purposes, as postulated by social jurists. In this context, it has become a matter of juridical sensitivity, if unilateral rules constitute exceptions that prove "the validity and supremacy of multilateralism"[15], or vice-versa if unilateralism is gradually taking over the whole conflicts field. Dogmatic approaches no longer obtain. Purely methodological examinations fail to shed light on the complexity and contradictions that characterise the current paradigm shift. Experts have therefore depicted conflict of laws as a form of art in which theories and sensitivities are always combined in new ways.[16] More than axiomatic truths and a set of binding prescriptions, contemporary private international law appears to be directed to the production of *ad hoc* compromises and balancing tools, for reaching a variety of often-conflicting social ends without investing resources on the costly elaboration of coherently arranged and logically ordered conflict systems.

[15] See Boden 'L'ordre public'

[16] Campiglio, C. 'Corsi e Ricorsi nel Diritto Internazionale Privato: dagli Statutari ai Giorni Nostri', *Rivista di Diritto Internazionale Privato e Processuale*, Vol. 49, No. 3 (2013), p. 593: "La sensazione, sempre piú netta, è che l'approccio puramente dogmatico non sia piú (se mai lo è stato) risolutivo, e che il diritto internazionale privato non possa essere ridotto alla somma di tecniche rigorose, ma venga progressivamente assumendo l'aspetto di una vera e propria arte, in cui teorie e sensibilità si mescolano in modo sempre diverso."

Rather than a revolution or an evolution, contemporary developments may be shaped by the rise of a new mode of thought whose characteristic is an uncomfortable co-existence between elements inherited from the social consciousness and the long-lasting legacy of classical legal thought. Against this background, profound and almost clinical divisions - between theory and policy, public and private law, international and national law, social and individual law - that were set and cemented in the previous intellectual and institutional ages, have not disappeared but they have become so blurred and transient that their analytical and prescriptive value is always questionable and questioned. Critical histories are required especially at a time when developments in law and doctrine suggest the instability and uncertainty of methods, concepts, ideas and disciplinary boundaries of 'technical' legal branches such as those of the conflict of laws. What a critical history shows is that there is an exception to this anti-formalist trend: the family anomaly.

The added value of this genealogical approach is that it shows that the family anomaly is no more than a reflection of 'family law exceptionalism', the antithesis between principles and ideas governing family relations vis-à-vis market relations which was first advanced by legal scholars in the age of classical legal thought, although in a reversed way.[17] In a sense, the family anomaly indicates a return to the classical division between the family and the market. But, consistent with the fundamental trait of contemporary consciousness, assumptions and ideas inherited from classical and social legal thoughts, family law exceptionalism included, have been mixed and turned on their heads. According to the image projected, when applied to the market, classical *laissez-faire* is rejected by a significant part of the specialised literature as neo-liberal whilst social regulatory concerns are largely welcomed as a progressive development.[18] In contrast, as far as family relations are concerned, social family law and social conflict of laws are by and large regarded as conservative and traditionalist. The extension of party autonomy and the method of recognition and more generally the transition to market logic are increasingly described and celebrated as a welcome liberal turn and hailed as a progressive development in the discipline.

3. EUropean Private International Law of the Family and the Emergence of the Market-State

Seen in the light of this critical history, the family anomaly provides an illustrious example of a neo-formalist and neo-classical turn in the contemporary consciousness. But the importance of the family anomaly, as in the case of all essential features of all dominant mentalities, transcends the bounds of

[17] Halley and Rittich, 'Critical Directions'
[18] Kennedy, 'Three Globalizations', p. 64

the discipline. Convergence around a set of hegemonic ideas, this study has shown, has provided coherence and direction to the constitutive elements of legal and institutional orders. Far from being a set of technical rules that develop in isolation from the political process, private international law has played the role of *instrumentum regni* across the centuries by constructing, organising, actualising and preserving ideal forms of statehood drawing on dominant assumptions and ideas. The dichotomy between family law and market law was especially important for defining the sovereignty of nation- and social states. In this sense, the family anomaly does not merely reflect a technical shift. The transformation of private international law of the family points to a more complex and more profound redefinition of the relationship between individuals, families and institutions and to a redefinition of membership to political and civil societies. This begs the question of what the family anomaly tells us about the state of the state in the contemporary age.

In the contemporary age, it is not only the juridical culture which is changing. The legal order and the state model which dominated in the 19th and 20th centuries also appear to be undergoing a crisis and consequential transformation. The crisis of the state and the redefinition of sovereignty has become a widely debated topic among European public lawyers at least since the 1990s.[19] The transformation of statehood is also discussed by private lawyers.[20] Although some scholars have gone as far as predicting the end of the sovereign state itself, the state appears to be firmly placed at the centre of the international order and, even more so, at the centre of the EU. What this genealogical reconstruction suggests is that the form of sovereignty and statehood may be changing again. The family anomaly is important in this sense because it evokes two quasi-constitutional requirements of state models in the 19th and 20th centuries: expanding freedoms and opportunities on the one hand;

[19] The debate among constitutional lawyers in Europe virtually started after the Maastricht treaty entered into force in 1993. Soon after it, Neil MacCormick famously argued that national sovereignty had been dispersed and that, given the constitutional utopia of a federal Europe, political and legal power would be now held by supra-state and non-state institutions as well as by states. For MacCormick 'nation-states' would come to be classified as nothing but the passing phenomena of a few centuries. For constitutional pluralists, among whom we find Nico Krisch and Neil Walker, the new era would be marked by a disorder of normative orders, by the absence of a common legal framework and of a clear overarching hierarchical structure capable of solving conflicts between supra-state, non-state and state laws. Despite disagreement about the current legal (dis-)order at constitutional level in Europe, it has become commonplace among public law scholars the conviction that history is unravelling in linear fashion towards a post-national future and that law is to serve a new set of social needs and interests which derive from this unprecedented scenario. See N. MacCormick, 'Beyond the Sovereign State', *The Modern Law Review*, Vol. 56, 1993; N. Walker, 'Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders', *International Journal of Constitutional Law*, Vol. 6, Issue 3-4, 2008; N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford: Oxford University Press (2010)

[20] If public lawyers ask themselves how rule of law, the protection of rights and an adequate governance can be ensured in the post-national age, private lawyers ask themselves if we can speak of law within a private ordering paradigm and to what extent private actors can and should act as a substitute for the state. Private lawyers are essentially concerned, on a normative level, by the re-definition of the role of the private vis-à-vis the withering away of the public and, on a theoretical level, by the conceptual contradictions which would follow from such transition. Michaels R. and Jansen N., 'Private Law Beyond the State?' *The American Journal of Comparative Law*, 54 (2006)

and protecting social interest on the other. However, it also indicates that these two requirements, associated respectively with the market and with the family in past ages, have been inverted.

As a result, the redefinition of the principles and functions of private international law of the economy seem to be consistent with the claim advanced by some private lawyers that the prevalent institutional model is no longer the dirigiste state of the 20th century or the liberal state of the 19th century, but the 'regulatory state'. As it has been argued, "[r]eliance on regulation - rather than public ownership, planning or centralised administration - characterises the methods of the regulatory state."[21] The role of the state in the economy has fundamentally changed. The functions of the legal order have also been transformed. The regulatory state sets up schemes of legal incentives to participate in the market or in certain sectors, and, at the same time, it puts in place regulatory checks and balances that are tailored for specific categories of vulnerable individuals. Under this model, European citizens are provided with means to participate in the market and, at the same time, they are the subject of protections which are supposed to guard against power asymmetries and abuses. The redefinition of the character and functions of rules governing cross-border economic relations, it could be argued, responds to the emergence of the regulatory form of statehood.[22]

This thesis, which finds increasing consensus in the literature, corroborates my claim that private international law constitutes a vital instrument for the definition and articulation of state power. However, it also begs the question of how to reconcile the emergence of the regulatory state in economic matters with the unprecedented choices and opportunities afforded by the contemporary redefinition of the law governing cross-border family relations examined in the last part of this study. If one of the quasi-constitutional requirements of the dominant institutional model is overseeing economic processes and placing additional protections on specific categories of individuals who participate in the market, recent developments and the current redefinition of the logics of the law governing cross-border family relations do not appear to match the regulatory form and method of statehood. On the contrary, they suggest its progressive abandonment. The expansion of market logic

[21] Majone, 'The rise of the regulatory state'

[22] Significantly, in his inaugural lecture to the Academy of International Law, the former secretary of the Hague Conference of International Law, Hans Van Loon, posited that the efficiency of the instruments designed to cope with global challenges is finding a balance between neutral objectives and the instrumentalisation of Conflict of Laws towards social justice goals. As he put it, "[i]n the end, Private International Law faces a two-fold challenge in light of globalisation: to remove outdated and parochial obstacles to productive, positive, global transnational activity, and to protect weaker parties and vital public interests common goods – and so to play its part in building a sustainable future for humanity and for the planet." H. van Loon, The Global Horizon of Private International Law, 380 Collected Courses of The Hague Academy of International Law, 2016

and rationales to the family realm and the re-orientation of private international law of the family may indicate the rise of what Philip Bobbitt has defined the 'market-state'.[23]

For Bobbitt, the crisis of nation states has a variety of causes. Cross-population movements and legal pluralism have contributed to undermine the previously unified national order.[24] As shown by part two and three of this genealogy, alongside the promise to maintain the welfare of its population, the nation state had also committed itself to protect the cultural integrity of the nation.[25] This requirement applied especially to the field of domestic relations, those rooted in the internal jurisdiction and those having a cross-border dimension, whose governing law pursued the objective of maintaining a culturally homogenous population. In a context where states were fused by the national conception of culture and where family laws constituted the paradigmatic expression of national culture, individuals and families which maintained connections with foreign jurisdictions and laws were either assimilated by means of jurisdictional and choice of law rules or ignored and rejected.[26] The expectation was that every member of the civil or political community must comply with the law governing family relations set by sovereigns in their internal orders. The enforcement of domestic family laws despite connections with foreign jurisdictions followed from this very mandate.

Bobbitt argues that nation-states find it increasingly difficult to maintain civil order by enforcing norms embodying one single legal cultural conception on all residents, domiciliaries and nationals.[27]

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[23] P. Bobbitt, *The Shield of Achilles. War, Peace and the Course of History*, Penguin Books (2003). Legal historian and constitutionalist Philipp Bobbitt has argued the nature and constitutional order of the state is being transformed by a crisis of legitimacy produced by, among other concomitant factors, the pressure exerted on domestic legal systems by supranational law, its incapacity to control the (national and international) economy, by global security threats such as climate change and terrorism, and by cross-border population movements. Ibid. p. 228

[24] Of the various factors that Bobbitt emphasises are endangering the existence of nation-states and accelerating their transformation into market-states, cross-border population movements and legal and social processes engendered by them are the most relevant for the purpose of this research. The 'pluralisation' of culture, and consequential diversification of family practices, is one such process which is at the centre of this research. Although Bobbitt mainly approaches the crisis of the nation-state by examining the far more obvious and 'muscular' relation of state legitimacy with security and warfare, his theory also includes a compelling analysis of the instrumental role of 'culture' for the creation and preservation of the nation-state, and an insightful account of how culture will fare in market-state societies.Bobbitt analyses 'culture' in detail in Ibid. pp. 223-235

[25] Ibid. p. 223

[26] For Bobbitt: "[T]he national character of nation-states … isolates and alienates substantial minorities of their citizens even to the point of defining some criminal behaviour in essential ethnic ways. For example, why in the West is marijuana criminalized but martinis are not? Why is polygamy criminalized but not divorce? The ethnic focus of the nation-state, its pervasive analogy to the family, creates a role for antisocial elements. … In every society there are such people, and such groups; in the nation-state they become the enemy of the State … because the State itself is fused to a national conception of the culture." Bobbitt, The Shield (2003), p. 219. According to Bobbitt, independently of policies of reasonable accommodation, cultural minorities in nation-states are inevitably assimilated in what, de facto, is to them a host social body. Even when policies of affirmative action or reasonable accommodation are in place Bobbitt holds that "a dominant group is setting the terms of assimilation on the basis of which the State will assure equality to individuals, and, by setting those terms, implicitly denying equal status to the group that is thought to be in need of assistance." Ibid. p. 225

[27] Ibid. p. 208

Against a background characterised by increasing legal diversity and personal mobility, nation-states struggle to maintain a coherent and homogenous culture and population. At the same time, cultural diversity cannot be undone because it is a direct result of global economic imperatives which liberal states cannot evade. The only way out of this *cul-de-sac* is the emergence of what he calls the market-state.[28] Whilst nation-states and social-states promoted a pre-defined set of political and social values, especially through family law and international family law, the market state is sceptical of value-laden policies and substantive justice.[29] The market-state tries not to maintain a homogenous population. "The sense of a single polity, held together by adherence to fundamental values, is not a sense that is cultivated by the market-state".[30] Rather, the market place sets mechanisms in place that allow the distinct communities inhabiting the national territory to co-exist and interact.[31]

For the above reasons, autonomy rather than conformity appears to be the constitutive principle followed by contemporary states in matters concerning personal identities and relations of intimacy.[32] In the legal and social order of the market-state, values, principles and considerations, , including autonomy, that have been associated with the economy in the past expand into previously uncharted territories. The market-state order has no fixed boundaries or barriers, either physical or symbolic. They exist, but constantly move. The market order is de-centralised and it is, to a certain degree, de-territorialised.[33] The rise of the market state is especially visible in European private law.[34] Discussing the changes undergone by private law regimes in Europe, Hans Micklitz and Dennis Patterson have thus posited that "while other factors surely contributed to it, the acceleration of the integration of Europe was made possible by the accession to the age of the market-state. Nation-states are bound to

[28] See P. C. Bobbitt, 'The Archbishop is Right: The Nation-State is Dying', The Times (London), December 27, 2002
[29] "[T]he market state is largely indifferent to the norms of justice, or for that matter to any particular set of moral values so long as law does not act as an impediment to economic competition." Bobbitt, The Shield (2003), p. 230. Specifically, the market-state will have to be indifferent to culture, race, ethnicity, gender and religion. Id. at 230. It should be noted that neutrality towards religion is not discussed by Bobbitt explicitly. However, the Archbishop incident made clear that his framework of analysis could well apply to religion as well.
[30] Bobbitt, 'The Shield', p. 230
[31] Ibid. pp. 229-230
[32]This is not to say that this order can do without state institutions. In the market-state order, society is held together by means of a "private order" sustained by state institutions. As Franz Bohm puts it, "[a] private law society cannot function without authority… . It requires a support, which it cannot produce from its own resources, in order to function at all." (p. 51) In such system, although all members of society must enjoy the status of private autonomy, "private autonomy must not include the power to command … another person." (p.54) F. Bohn, 'Germany's Social Market Economy: Origins and Evolution', Trade Policy Research Centre, in A. Peacock and H. Willgerodt (eds.), Rule of Law in a Market Economy, Palgrave Macmillan (1989)
[33] Sassen, 'Territory, authority'
[34] See Bobbitt, 'The Shield', p. XXVI for a view of the promises of nation-states vis-à-vis those made by market-states. Bobbitt explains that "The nation state is quite clearly no longer in a position to define its political priorities autonomously (as a 'sovereign'), but is, instead, forced to coordinate them transnationally. The citizens of constitutional democracies can no longer be sure of whether and, if so, how, they can be – in the last instance – the authors of the laws which they are expected to adhere to, while the nation states to which they belong have become accountable to transnational bodies to which their politics are subject to evaluation" Ibid. p. 14

evolve into market-states over time."[35] If the specific considerations, principles and goals of the law governing family relations, within and across borders, were especially important for the emergence and consolidation of nation-states, I would argue that the transfer of market rationales and principles to European family law may provide a cogent illustration of the rise of the market state.

4. Private International Law, Multiple Affiliations and New European Identities

Part four of this work has shown that the contemporary global society faces the progressive weakening and redistribution of personal ties to a variety of territorial and non-territorial communities. Heightened mobility leads to the proliferation of links between individuals, families, polities and jurisdictions and to the growth of an intricate 'world-wide web' of territorial and non-territorial laws.[36] Dual- or multi-national citizenship is one form that such multiplication and distribution of personal ties can take. [37] Other than being multi-nationals, EU citizens may work for significant periods of time in a EU member state while their partner and children reside in another country; they may buy a shared family house in a third country, get married outside the borders of the EU, and choose to give birth to their children in yet another jurisdiction. Marriages and partnerships increase the complexity of this scheme because they double or triple the potential links, as a connection is also created with the *lex loci celebrationis*. What this means is that European family is becoming a cosmopolitan hub connected to an ever-increasing number of countries and legal systems.[38] Hence, family relationships are potentially governed by a variety of laws and principles.

As this process continues, states struggle more and more to enforce national and local law on citizens, domiciliaries and residents, regardless of the substance of the links with foreign legal orders and communities and of personal preferences. In this context, "the integrative function of the nation-state, which sought to transform immigrants into version of the pre-existing national group of the country to which they had come" is replaced by a facilitative function, whereby "[m]aximising the opportunities of its citizens means that the market-state must leave it to those citizens to determine what cultural attachments they wish to form."[39] Although Bobbitt had 'ethnic' and 'cultural'

[35] H. W. Micklitz and D. Patterson, 'From the Nation State to the Market. The Evolution of EU Private Law as Regulation of the Economy beyond the Boundaries of the Union?' in B. Van Vooren, S. Blockmans, J. Wouters (eds.), The EU's Role in Global Governance: The Legal Dimension, Oxford University Press (2013), p. 66
[36] Baubock, R. 'Political community beyond the sovereign state: supranational federalism and transnational minorities', in Vertovec, S. and Cohen, R., (eds) *Conceiving Cosmopolitanism: Theory, Context and Practice*. Oxford: Oxford University Press (2002)
[37] Spiro, P. J. 'Dual citizenship as a human right', *International Journal of Constitutional Law*, Vol. 8, No. 1 (2010)
[38] See Murphy J., *International dimensions in family law*. Manchester University Press, 2005
[39] Bobbitt, The Shield (2003), p. 696

minorities in mind when he made the above remark, his claim extends *mutatis mutandis* to foreign domiciliaries, dual-nationals, foreign national residents, especially in family matters. His claim that we are currently witnessing the rise of a market-state model may explain the shift towards the maximisation of personal preferences in family matters. Conflict principles are the instrument *par excellence* for forming and acknowledging 'attachments', legal and political, territorial and non-territorial, between individuals and communities. It may thus explain a possible destination of the current legal re-organisation and institutional transformation.

Seen from this perspective, the implications of the family anomaly and the expansion of autonomy transcend the disciplinary boundaries of conflict of laws. Harmonised rules applicable to cross-border family relations facilitate not only self-determination but also freedom of movement and the creation of an integrated market. Conflict rules can popularise and actualise through the backdoor an institutional and socio-economic vision, and can enable the creation of bonds between members of voluntary communities in contexts characterised by legal pluralism and heightened cross-border mobility. An autonomy-based EUropean private international law of the family enables individuals to form and dissolve civil links and political alliances.[40] Party autonomy does not necessarily lead to the application of the law to which individuals and families are most closely connected. Couples and families may have no substantial and meaningful links with the social and economic life in the country of residence, of marriage, of divorce, of birth of the child etc. Consistent with the idea that states must expand opportunities and choices when it comes to relationship of care and intimacy, however, EUropean private international law must recognise such connections.

Conflict rules of nation- and social-states were founded on fundamentally different arguments and premises. In previous intellectual and institutional ages, private international law enabled states to enforce their family laws within but also outside their territories. As a result, conflict rules and principles extended state control over personal conduct and over the creation and dissolution of relations that took place other than the state of origin. They therefore forced upon individuals and families a link with their necessary communities, wherever they might be. In this sense, classical and social private international law of the family merged territoriality and personality. In contrast, contemporary private international law 'de-localises' personal and family relations from the law of nationality, domicile and residence and, at the same time, it enables the recognition of bonds between persons and a variety of communities. Against a background characterised by increasing mobility and multiple membership, private international law becomes a strategic tool for the organisation,

[40] See on this Azulai, T'he European Individual'. pp. 212-214

legitimation and operation of the new legal-institutional order. In the present context, conflict of laws facilitates the creation, and demands the recognition, of new affiliations and identities.

As European orders move away from the choice-averse, culturally-homogenous, policy-oriented considerations of nation-states and social-states, private international law of the family could function as an *instrumentum regni* that paves the way and consolidates the rise of market-states. This study has shown that there is a strong correlation between the ways in which individuals understand and engage in relationships of care and intimacy, the limits and possibilities provided by the law and the institutional and socio-economic organisation of the society they inhabit. This was true in previous decades of limited cross border exchanges and, it is here assumed, it must be true in a very mobile society where the cross-border dimensions of family regulation are enlarged. In the contemporary age, it is still in the family realm that law-makers and courts look for a tool to build identities and to forge social and political relations. It is in the very marrow of the relation between law and society that we must look for the potential of the law to provide legitimacy on new institutional models. In contexts characterised by cross-border mobility and by weaker territorial ties, the 'constitutive' role generally associated with domestic family law is taken up by the law governing cross-border relations.

It is against this background that we can fully understand the implications of the imperative of recognition of continuity of status across the internal borders of the Union. The renaissance of status, it is here submitted, indicates not only a return to classical ideas and concepts but also, as indicated at the end of the previous chapter, due to core reference to the position and condition of the individual within communities of belonging, the formation of new bonds, civil affiliations and identities. The bond between individuals, families and European communities represented by status is different from those that united national and social communities. Contemporary personal and family status is based on a preferential and voluntary choice. Connections between individuals and specific jurisdictions are loose and impermanent. If the connection between individuals and single jurisdictions is impermanent and formless, so is status temporary and contingent. However, the temporal permanence of the bond, of the status, is replaced by geographical permanence. Multiple national affiliations merge in a unique transnational bond and identity.

The common objective of free movement law and of private international law, 'ensuring the unity of the status of person' therefore appears to be driven by more than the removal of obstacles to enhanced market integration.[41] It may be driven by the political objective of forging a transnational European

[41] Etienne Pataut, 'A Family Status' p. 314

identity which incorporates material and symbolic connections with a variety of European communities. In this context, personal autonomy and recognition do more than make European individuals the agents of their own future. European individuals who travel across internal borders, who establish connections with other member-state's jurisdictions, who create loose and yet significant civil and political affiliations, become themselves agents of the European project. Contemporary private international law might play a role comparable to the role that the combination of family law and private international law played for the emergence of national cultures, societies and identities. Although legal assumptions and institutional paradigms have changed, so have the principles and considerations underlying European private international law of the family.

Unless it is taken for granted that the fundamental units are still nation-states, the re-orientation of private international law of the family does not necessary undermine social cohesion. It does not sabotage the democratic and egalitarian foundations of European societies, unless the only possible European society is one made of national groups whose laws operate under the commanding principles that are the same as in previous ages. Although there are many critical points that should raise concerns about the ongoing redefinition of private international law of the family, the current transformation does not lead towards social and legal disintegration. Civilisation and democracy are not under threat. In fact, it could be argued that the ongoing redefinition of the character and functions of private international law serves to reinforce state power at a time when the state is in crisis. Against a background of increasing cross-border mobility, transnationalism and legal pluralism, autonomy may lead to stronger bonds compared to abstract and artificial national affiliations.[42]

In the current legal reality, interpersonal relations, whether those of care and affection or of purely economic nature, are being re-distributed and de-territorialised.[43] Porous political and legal

[42] Returning to the more ethical question whether the multiplication of formations founded on care and autonomous choices signifies a turn to a disaggregated society in which egotistical choices occur in an anarchical level playing field: «E' questa, evidentemente, una prospettiva di accentuate privatizzazione delle scelte circa la giuridicità e le conseguenti "forme" delle relazioni fondate sull'affetto e la sessualità, e di correlativa limitazione della giurisdizione dello Stato in materia; non certo una linea di disinteresse verso l'esperienza familiare né di anarchia riconosciuta; così come non è un intervento disinteressato o di resa quello che l'ordinamento riserva alla vita degli altri gruppi intermedi, ai valori e o alle opportunità di bene comune che essi si propongono. Certo è una linea in cui la diversità della famiglia rispetto agli altri gruppi, che ha caratterizzato la sua giuridicità, impallidisce, e non scompare proprio perché ed in quanto una diversità reale la distingue. [Tuttavia c]hi avverte un senso di resistenza a questi scenari potrebbe forse riflettere sulla possibilità che l'autonomia scopra e realizzi ipotesi di vincolo più intenso ed eticamente più stringente a confronto del modello coniugale del diritto di famiglia tradizionale: che a vero dire sotto alcuni aspetti … non ha immacolate connotazioni.» Paolo Zatti, 'Tradizione e Innovazione nel diritto di famiglia', da Calura, Vol. I. Tomo I, p. 47

[43] See P. Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism', 21 *Transnational Law & Contemporary Problems*, 2012; Cotterrell, R. 'What Is Transnational Law?', 37(2) *Law & Social Inquiry* (2012)

boundaries allow the distribution of social and economic lives in more than one foreign jurisdiction.[44] They generate jurisdictional gaps which evoke the loose texture of medieval jurisdiction. Private international law consolidates territorial and jurisdictional links, and it strengthens rather than undermines state jurisdiction.[45] A restated European conflict of laws contributes to reshape identities without implying the end of territorial and internal orders, the end of state prerogatives in themselves, or the super-imposition of a exclusive bond and supranational identity. Conflict of laws may thus come across as the best position between a rock and hard place, for a resolution between the unrealistic proposal, advocated by members of CELF, of codifying a uniform law that applies to all European citizens and residents regardless of their preferences and affiliations on the one hand, and the equally implausible enforcement of imperative logics and principles that go back to the age of nation and social states on the other.[46] As Paul Schiff Berman has put it:

> To assert that geographical boundaries and nation state sovereignty are no longer the only relevant way of defining space or community in the modern world is not to deny that they retain some salience as influences on personal identity. Indeed, even if we were all cosmopolitans…, with concentric circles of allegiance, at least one of those circles would almost certainly include our geographical locale and another might include the nation-state in which we hold citizenship. Nevertheless, although such identities remain important, they are not the only ways of conceptualizing space or identifying with a community. Allegiances to a physical location or a national identity are only two of the multiple conceptions of belonging and membership that people may experience. In our daily lives, we all have multiple, shifting, overlapping affiliations. We belong to many communities. Some may be local, some far away, and some may exist independently of spatial location.[47]

[44] Sassen, 'When Territory Deborders', p. 23

[45] Sassen, speaking of jurisdictions: "sovereignty is being partly disassembled, including formally, over the last 20–30 years, depending on the country. While much remains formally included in the national state and sited in national state territoriality, some of it has shifted to other institutional spaces. Sovereignty remains a key systemic property but its institutional bases diversify. The second point is that even as globalization has expanded, territoriality remains a key ordering in the international system." 'When territory deborders', p. 30

[46] For McGlynn, for instance, "just as uniform rules of private international law have been proposed as necessary for the operation of the internal market, for the development of a common judicial area and as basis for developing European citizenship, it is not unconceivable that similar justification may be put forward for grater harmonization of national family laws of Member States, McGlynn, C. 'A Family Law for the European Union?', in J. Shaw (ed.) Social Law and Policy in an Evolving European Union, Oxford, Hart (2000), p. 238

[47] Berman, P. S. The Globalization of Jurisdiction, University of Pennsylvania Law Review, (2002) pp. 542-543. For a comprehensive account of the relevance of these multiple affiliations in legal theory, and on the notion of 'normative communities' see Berman, P. S. *Global Legal Pluralism. A Jurisprudence of Law Beyond Borders*, Cambridge University Press, 2012

In the contemporary age, conflict rules and principles governing jurisdictional claims, choice of law, the recognition of rights acquired abroad, the enforcement of foreign judgments etc. are not mere technical tools but are the means by which the multiple connections between individuals, families and national communities are given concrete existence and normative meaning. Private international law also establishes connections and protections between members of non-territorial and voluntary communities. Conflict of laws, this genealogy shows, constitutes an essential instrument to govern the legal pluralism and mobility that characterise contemporary society, and it does so on considerations and principles which are neither revolutionary nor progressive but signify a profound transformation from the assumptions and models followed in previous intellectual-institutional ages. Private international law expands opportunities and choices for individuals in what were characterised as inaccessible public and cultural fields, which implies a radical redefinition of the way in which individuals who inhabit the transnational environment perceive themselves, their relationship with public institutions, and their membership in civil and political communities.

5. The Way Forward? Paradigm Shifts and Irrational Turns

The goal of this genealogy of European private international law is to prove, in contrast to the myth of isolation, that the convergence around a common set of ideas and assumptions determines comparable processes of transformation across European jurisdictions. In contrast to the foundational principle of neutrality, this genealogy has emphasised the link between conflict rules and principles and the emergence of specific institutional arrangements and ideal forms of statehood. The transformative theory advanced in this work posits that the law governing cross-border relations has constituted across legal history an *instrumentum regni* whose nature and functions have been transformed by the reconfiguration of dominant modes of legal thought. The claim that we are currently witnessing a transformation of conflict of laws determined by the rise of a new institutional model and by the ascendancy of a new legal consciousness does not mean that we are heading towards an unambiguous future. The current transformation of private international law is still in process. The post-nation state and the definition of the essential components of the current mode of thought are both unfinished projects.[48] The contemporary paradigm shift is still unfolding. What the imminent withdrawal of the United Kingdom from the EU indicates is that jurisdictional claims and borders are still at the centre of legal contentions and political passions. As for previous transformations, so for

[48] Legal scholars have not been able (yet) to produce an abstract synthesis of the legal organisation of society which is as encompassing as those constructed in previous intellectual ages. According to Kennedy, "What there is not is a new way of conceiving the legal organization of society, a new conceptuion at the same level of abstraction as CLT or the social." Kennedy, Three Globalizations, p. 63

the current one, nothing excludes that in the years ahead the ongoing transformation could take surprising, contradictory and irrational turns.

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