

**NATIONALITY OR DOMICILE?
THE PRESENT STATE OF AFFAIRS**

by

L. I. DE WINTER

**To my colleague and friend
R. D. Kollwijn**



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ABBREVIATIONS

A.B.	Wet Algemene Bepalingen 1829. (General Provisions on legislation in the Kingdom of the Netherlands).
ABGB	Allgemeines bürgerliches Gesetzbuch (Austria).
Actes	<i>Actes de la Conférence de La Haye de droit international privé.</i>
AJCL	<i>The American Journal of Comparative Law.</i>
AJIL	<i>The American Journal of International Law.</i>
Annuaire	<i>Annuaire de l'Institut de droit international.</i>
BGB	Bürgerliches Gesetzbuch (Germany).
BGH	Bundesgerichtshof (Germany).
BGHZ	<i>Entscheidungen des Bundesgerichtshofes in Zivilsachen</i> (Germany).
Clunet	<i>Journal de droit international.</i>
Documents	<i>Documents de la Conférence de La Haye de droit international privé.</i>
EG	Einführungsgesetz (Germany).
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch (Germany).
G.P.	General Provisions (see A.B.).
Hoge Raad	Supreme Court of the Netherlands.
ICLQ	<i>The International and Comparative Law Quarterly.</i>
ILA	International Law Association.
NAG	Bundesgesetz betreffend die zivilrechtlichen Verhältnisse der Niedergelassenen und Aufenthalter, 1891 (Switzerland).
NJ	<i>Nederlandse Jurisprudentie</i> (Netherlands).
NJW	<i>Neue Juristische Wochenschrift</i> (Germany).
NTIR	<i>Nederlands Tijdschrift voor Internationaal Recht—Netherlands International Law Review</i>
RebelsZ	<i>Rebels Zeitschrift für ausländisches und internationales Privatrecht</i> (previously: <i>Zeitschrift für ausländisches und internationales Privatrecht</i>).
Recueil	<i>Recueil des Cours de l'Académie de Droit International.</i>
NJB	<i>Nederlands Juristenblad</i> (Netherlands).
Restatement 2nd	<i>Restatement of the Law Second, Conflict of Laws, Proposed Official Draft</i> (USA).
Revue Critique	<i>Revue Critique de Droit International Privé.</i>
Revue Sotille	<i>Revue de Droit International de Sciences Diplomatiques et Politiques.</i>
RMTh	<i>Rechtsgeleerd Magazijn Themis</i> (Netherlands).
S	<i>Recueil Sirey</i> (France).
Standesamt, das (StAZ)	<i>Zeitschrift für Standesamtswesen, Ehe- und Kindschaftsrecht, Staatsangehörigkeitsrecht</i> (Germany).
Travaux	<i>Travaux du comité français de droit international privé.</i>
WPNR	<i>Weekblad voor Privaatrecht, Notarisambt en Registratie</i> (Netherlands).

Quotations marked with * are translated from the original language.

INTRODUCTION

1. Any student of Private International Law asking himself why this particular branch of law is so tangled that only the initiated can fight their way through, and—worse still—why in the various countries the viewpoints in respect of the solution of conflict of laws adhered to in legislation, case law and legal writings often diverge to the extent that hardly any international security exists in private law cases, and notably so in the realm of family law, would inevitably arrive at the conclusion that this state of affairs is largely due to the controversy regarding the principle of nationality and that of domicile as the basis for the *personal law*.

Any solution of this issue, which might well be called the “iron curtain” of Private International Law, would not only drastically reduce the number of conflicts of law instances, but also many—at present practically insoluble—problems would vanish as if by a touch of the magic wand. Limping legal relationships in the realm of the law of persons, of family and of succession would be virtually eliminated and the administration of justice considerably simplified.

In these circumstances it is hardly surprising that the respective supporters of the nationality and of the domicile principles have made many efforts to convince each other, but so far without any decisive success. Rabel¹ observed that “the contrast between the two systems of determining personal status is deeply rooted in traditions and policies and the near future holds no prospects of its elimination”. Yet no one should be disheartened by this remark of the past master of comparative Private International Law. For it is in a constant state of flux, and its practical importance has increased very considerably in the course of the last decades. Consequently, more than ever, there are cogent reasons to direct one’s attention to the *unfortunate controversy that is dividing the conflict world into two opposing camps*, in order to examine the present position and also to ascertain whether and if so to what extent, ways do exist to reconcile the diverging views.

1. Rabel I, 168.

At first sight there would appear to have been relatively little change in the controversy over the past 50 years. According to a much-quoted account of the Argentinian scholar Zeballos effected in 1909² some 500 million people were at that time subjects of countries that upheld the principle of domicile, whereas about 460 million were subjects of countries adhering to the principle of nationality. According to an unpublished investigation carried out by the Centre for Foreign Law and Private International Law of the University of Amsterdam, taking into account 108 countries with a total of 3,400 million inhabitants, the proportions in 1968 were: about 1,450 million subjects of countries adhering mainly to the principle of domicile and about 1,600 million committed to the nationality principle, whereas approximately 350 million people were citizens of countries sanctioning a system whereby the principle of nationality applied to their own subjects and that of domicile to foreigners residing in those countries. It should immediately be added that such a count affords only a broad view without taking into account the gradations of the present position. In the first place the scope of the personal law varies widely in those countries. Under the broadest definition the personal law governs status and capacity of persons, legal relations between members of a family (particularly the relations between husband and wife, parent and child, guardian and ward), and also transactions of family law, especially marriage, divorce, adoption, legitimation, emancipation and succession, both testate and intestate, of movables and immovables.³ In many countries the scope of the personal law is, however, much narrower and does not, for instance, comprise the law of inheritance and that of matrimonial property.⁴ Furthermore, many countries in which the principle of nationality is for the most part upheld make numerous and often very important exceptions in favour of the application of the principle of domicile, whilst some countries adhering mainly to the principle of domicile do in certain cases apply their own law with respect to

2. Cf. Cassin, 725.

3. Rabel I, 110, and Makarov, "Personalstatut".

4. The range of subjects coming under personal law is often designated by the collective term "personal status". It should be realised that where this term is used in these lectures, it will mean something which varies according to the countries in question.

subjects living abroad. The true picture, therefore, shows many more gradations than appear from the colourless result of a count. Moreover, from these very gradations and the recent changes thereof, a trend can perhaps be deduced. That is the reason why our investigation will be directed in the first place to the *shifts* that have occurred in the past few decades in case law, the administration of the law, legislation and treaties, and to the causes that gave rise to them.

2. Before starting to investigate whether there is any prospect of settling the controversy regarding the nationality and the domicile principle it would seem appropriate to clearly keep in mind the disastrous consequences that the present schism brings about for the practice of law. Whereas in the "nationality" countries questions of personal and family law are as a rule made subject to the national law of the persons involved, in the "domicile" countries the law of the persons' domicile is applied. It is, therefore, for example possible, that persons who in country A contract a marriage pursuant to the law of their domicile are deemed in country B, which sanctions the nationality principle, to have contracted a marriage that is null and void or voidable. The children born from such union will be considered legitimate in country A and illegitimate in country B. If a divorce is decreed valid according to the law of the domicile of the spouses, but not according to their national law, and the two divorced spouses contract second marriages in the country where they have been divorced, then Mr. X will be regarded in country A and in other countries upholding the principle of domicile as the husband of Mrs. Y, his second wife, but in country B and in other countries adopting the principle of nationality as still being the lawful husband of Mrs. W, his first wife. The same applies to the remarried Mrs. W and her second husband, Mr. Z. Now let us assume for a moment that both married couples, together with their children from the first and second marriages, 20 years hence spend their holidays in the same hotel in a foreign country. The consequent complications arising from that situation may well provide ample material for a dozen farcial comedies. Unfortunately, real life is not quite so amusing, and from such complications there frequently result an unacceptable degree of legal insecurity, and an avalanche of lawsuits;

they are, moreover, fairly often a source of much distress.

Furthermore, it need hardly be pointed out that it is highly undesirable that the same couple should be deemed to have married with matrimonial community of goods in country A but without any such common ownership in country B, that by virtue of adoption a child becomes the legitimate child of his foster-parents in country A, but is still considered the legitimate child of his biological parents in country B, that a child born out of wedlock is entitled to maintenance in country A, which adheres to the domicile principle, but is deprived of any such right in country B, which applies the national law of the father. For the time being, we spare the reader other instances of the chaotic situation which results from the controversy about the nationality and domicile principles. It would be absolutely superfluous to fabricate any such cases, since they abound in the administration of justice in various countries. Not only the uninitiated in law who are victims of the imperfection of Private International Law, but also many lawyers are driven to despair, and in their bewilderment they sometimes wonder whether there remains any justification for the existence of a branch of law that has been practised for more than 600 years, when they notice that situations similar to those just outlined still frequently occur.

CHAPTER I

HOW DID THE CONTROVERSY ORIGINATE?

A. From Roman Law to 19th-Century Codification

3. A very concise synopsis of legal history¹ may elucidate how the present situation has come about. In the legal system of ancient Rome everyone was governed by his *ius originis*. The "origo" was the legal link that tied a person to his "civitas", comparable to a certain extent with present-day "nationality". Francescakis called the "origo" the *nationalité avant la lettre*. This tie was established by birth,² by adoption, formal emancipation from slavery (*manumissio*) and civic acceptance (*allectio*). Thus one became a citizen either of the City of Rome or of some other municipal community. This citizenship entailed mainly fiscal and procedural consequences: a citizen had to contribute his share towards the "munera" (burdens) of his town or city, where he could also be summoned to appear in court. As for substantive law, all Romans were subject to the *ius civile*, but *in addition* they were subject to the particular laws of the city whose citizenship they held. Roman law established a close connection between forum and *lex*, which were regarded as only two distinct aspects of the territorial body of law.³ By "domicilium" a further link with a given city was acquired. Domicilium was held in the place of permanent residence and was where the centre of the private life and business activities of the person in question was to be found.⁴ If a person had his domicilium in a city, he was an "incola"; this had the same legal consequences as citizenship. As a rule origo and domi-

1. More detailed historical data are found in Lainé, *Introduction*; Von Savigny VIII; Neumeyer; Meijers, *Histoire*; Stouff; Gutzwiller, *Recueil 1929* IV, and Onclin.

2. In this *ius sanguinis* and not *ius soli* prevailed. It was not the place of birth that determined the child's origo, but the father's origo at the moment the child was conceived; children born out of lawful wedlock possessed the mother's origo. Cf. Von Savigny VIII, 47; Onclin, 1302.

3. Von Savigny VIII, § 356.

4. Von Savigny VIII, § 353.

cilium coincided, but—it is assumed—if they did not, the *origo*, the legal tie, prevailed. “I do not doubt” says Von Savigny “that the local law to which every person was deemed to be subject, was determined—if he had citizenship and residence in two different towns—by citizenship and not by residence”.*⁵

4. In the 5th century A.D. the Roman Empire was swamped with a number of Germanic tribes, each of which had its own tribal laws. Territorial laws were wholly unknown. Everyone, no matter where he happened to be, was deemed to be subject to the laws of his tribe, i.e., in so far as he did not belong to a hostile tribe and was deprived of all legal rights on that ground. According to the Germanic concept of law a person was, therefore, likewise subject to his *lex originis*. However, whilst for the Romans the “*origo*” had already become a political or near-political concept, for the Teutons it had only the restricted meaning of descent by birth.

5. About the 11th century the principle of the personality of the Law was displaced by a system which would now be termed a “*lex fori* approach”. This development was connected with the important political reforms that took place in the 11th and 12th centuries. The various tribes living on the former territory of the ancient Roman Empire had mixed and amalgamated into new population groups with permanent settlements. The centre of the civilised world of those days was formed by a number of towns in Northern Italy, such as Bologna, Padua, Florence, Venice, Modena, Pisa, Genoa, Siena and Piacenza, where not only business but also science and the arts prospered and flourished. On the one hand a renaissance of the old Roman law, supplemented by notes (*glossa*) written by the leading jurists of the day, led to the decay of the ancient tribal laws and Lombardic law. On the other hand, the above-mentioned Italian cities gained great political power and a large measure of independence from central authority. In this way, alongside Roman law, regarded as the *ius commune*, the various cities individually made their own separate rules called “*statuta*”. In those prosperous towns, in which commercial interests then

5. Von Savigny VIII, 87.

converged, *intercommunal* legal relations frequently started to play a part. At first the courts of these towns, which increasingly assumed the character of independent states, invariably applied the town's own rules—i.e., the *lex fori*—if its *statuta* conflicted with those of (an)-other town(s). Early in the 13th century, however, there was a revolutionary change. An entirely new concept, viz. that only the town's citizens (*subditi*) are governed by the city's municipal law, is evolved and starts to gain acceptance. Whilst the application of the domestic law to everybody and everything is a consequence that is typical of newly won independence, this fresh concept reflects greater, more delicate flexibility: the sovereign's power extends only to those who owe him allegiance and obedience.

But what then is the exact meaning of the term "subditus"? Should one take this to denote the persons who either on the strength of their descent or by virtue of their residence belong to a given state? Meijers considered that in Italy *descent* was regarded as decisive. As opposed to this, in Southern France, where in the several towns different customary laws (*coutumes*) obtained, *residence* instead of descent was considered to be the decisive factor for the determination of the law governing a person.⁶ The terminology however is confusing, as the commentators, the romanists as well as the canonists, also represented "origo" as "domicilium" of a kind. The genus *domicilium* comprises the *domicilium originis* and the *domicilium habitationis*,⁷ while, moreover, *domicilium originis* differs from the origo of Roman law. In ancient Rome origo by descent was derived from *civitas*—we would say nationality—of the father, but later on from the *domicilium* of the father at the time of the child's birth.⁸

6. Whenever reference is made to the writings of the early medieval commentators, one gains the very forcible impression that the issue which is now of such great interest to us, the link with *descent* (the old origo) or with the *actual place of residence*, was not at all a clear-cut one in their minds, or at least that it mattered little to them.

6. Meijers, *Histoire*, 619.

7. Cf. Onclin, 1309.

8. Von Savigny VIII, 103.

Nevertheless, as from the 14th century a pronounced preference for the *actual* place of residence appears to have existed.⁹

This view is shared by the French and Netherlands' learned authors of the 16th and 17th century. Most of them do not go beyond a mere reference to the writings of their predecessors, but some support their views by stating their own reasons, like the French author Bouvot, who urged: "the law of the residence, more than any other, recognizes the customs of and the circumstances surrounding persons subject to the law, and what sort of regulation he needs for himself as a person and his legal acts. On these grounds this law is the only one which can provide such regulations".*¹⁰ This could very well have been written 300 years later.

The jurists of the famous Dutch School of the 17th century, who also gave preference to connecting personal status with the law of a person's residence, emphatically stated that the residence had to be a permanent one.¹¹ The authoritative Ghent advocate Burgundus stated that he did not attribute any value to the place of origin (*locus originis*). On the other hand, it was his opinion that persons remain subject to the law of their place of residence ("domicile") even if staying temporarily elsewhere. The law imposed on a person remains attached to him in the same way as real estate law to real property, says Burgundus, but since persons move about, the law accompanies them to whichever territory they go, it being immaterial to whom such territory belongs. Likewise it clearly appears from the writings of Rodenburg, a judge of the High Court of Utrecht, that by domicile he understood the same as the Romans understood by that term, viz. the place where a person has settled permanently and to which he always returns. The legislature to which the citizen submitted by the fact of his establishing residence there is the naturally indicated one to regulate his personal status: it would be absurd if a mere journey modified a person's status and rights or if he possessed for that time yet another status or capacity.¹² Paulus and Johannes Voet similarly

9. Cf. Lainé, *Introduction* II, 199 et seq., who more particularly relies on Baldus, and Onclin, 1311.

10. Lainé, *Introduction* II, 123.

11. Cf. Kollewijn, *Geschiedenis*.

12. Cf. Kollewijn, *Geschiedenis*, 62.

refer to the requisite permanency of residence.¹³ Ulrich Huber, professor at the now extinct law school of Franeker (Frisia), whose publications had a great influence on the development of Private International Law in England, Scotland and the USA, held what would at first sight appear to be a different opinion in respect of the requirement of a permanent residence, thus diverging from that propounded by the other 17th century Dutch scholars. Huber comprised the fundamentals of his teachings in three propositions, of which the first two read: I. The laws of every empire have force only within the limits of its own government and bind all who are subjects thereof, but not beyond those limits. II. All persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof.*¹⁴ So Huber considered that in principle even temporary residence in a given State is in itself sufficient to make a person subject to its laws. This was the strict principle of territoriality which all lawyers of a young State, that had just gained its independence, considered "summum ius". But, as Kollwijn observes,¹⁵ Huber's heart is in his third proposition in which, relying on the *comitas gentium*, he advocates the applicability of foreign law to persons who find themselves within the territory: "The rulers of every empire from comity admit that the laws of every people in force within its own limits, ought to have the same force everywhere, in so far as they do not prejudice the powers or rights of other governments or of their citizens".*

From the examples given by Huber in respect of the personal status it appears that he obviously implies that abode or residence and domicile usually coincide, and where they do not, he too says: "Personal qualities impressed by the laws of a certain place surround and accompany the person wherever he goes".*¹⁶

13. P. Voet, Sect. IX.1.9; J. Voet, lib. V, tit. 1, 98; also vid. *Hollandse Consultatiën*, vol. V, ch. 85, advice of Johan de Witt, 30 Sep. 1638, regarding Cornelis van Leeuwen. The latter was deemed to have retained his domicile in Utrecht in spite of having already resided for ten years in Amsterdam for trading purposes, and of having died in that city. It was held that *domicilium in loco originis* was retained so long as it was not changed *cum animo manendi*.

14. Huber II, lib. I, tit. III, no. 2. Translation by Story, 35.

15. Kollwijn, *Geschiedenis*, 151.

16. Huber II, lib. I, tit. III, no. 12.

7. Connecting personal status to the law of domicile as distinct from an only temporary abode or residence remained the generally accepted doctrine. In the 18th century a number of authoritative French writers, amongst whom Froland, Bouillenois, Bouhier and Merlin may be mentioned, departed from this point of view in that they wished to see contractual capacity made subject to an immutable law, to wit, the law of the region or district where the person concerned was born, at least when this was also the residence of his parents at the time of his birth. Later changes of residence were not to be taken into account. Some considered this view to be a return to the original Roman principle whereby *origo* prevailed over *domicilium*, and to herald the principle of nationality adopted by the Code Civil. However, the views of these authors as to exactly which subjects were governed by an immutable law and which were not, diverge widely and, moreover, their expositions contain many inconsistencies. Lainé is probably right when he concludes his examination of these theories by saying: "What emerges most clearly is that the traditional doctrine is upheld as a general rule".* 17

It should be borne in mind that prior to the 19th century there was no room for the complex of problems arising nowadays from the antithesis between nationality and domicile. The concept of nationality was still unknown. In the 18th century France was still divided into numerous jurisdictions, in which many different "coutumes" prevailed. Domicile was synonymous with fatherland, in so far as residence was permanent. Lainé calls "domicile" also a "patrie juridique". Furthermore, an essential difference with the present situation was that the population of those days hardly ever moved. As a rule one stayed in the area where one was born, and where in most cases one's parents also had been born and all one's relatives were living. People who went to other parts of the country or abroad, usually returned to their native area after a stay, whether short or long, elsewhere. The controversy we are now examining and which raises such great problems still had only little practical significance in the 18th century.

17. Lainé, *Introduction II*, 211.

B. *The Revolutionary Change in the 19th Century*

8. The promulgation in 1803 of the French Code Civil, and especially the provision contained in Section 3, paragraph 3: "The laws relating to the status and the capacity of persons are binding upon French subjects even when residing abroad",* is generally thought to be the root of the controversy over the domicile and nationality principles.¹⁸ Now, did this provision constitute a deliberate revision of the views held up to then? Let us consider the history and trace the origins of the enactment of this provision and try to ascertain whether this clarifies the position.

In 1793, soon after the Great Revolution, Cambacères, commissioned by the Constituante, drew up a draft of a civil code purporting to bring about the unification of private law in the whole country. This draft contained a provision reading: "Foreigners shall be subject to the laws of the Republic while residing in France; they shall enjoy the full capacity granted by those laws; their persons and possessions shall be under the protection of the law".*¹⁹ The application of foreign law was excluded altogether, which probably emanated from the idea that the new revolutionary law was so excellent that it should be applied to everybody on French soil. The modified drafts of the years II and IV contained provisions of similar intent. Only in the draft of the year VIII (1800) do we find a provision for Frenchmen abroad, reading: "A Frenchman residing abroad shall continue to be subject to French law in respect of his property situate in France and of whatever concerns his personal status and legal ca-

18. Korkisch, 95, claims for Austria the honour of having made the connection with the national law of the person as regards his capacity, the general rule of Private International Law. This is supposed to appear from a speech made by the Committee Chairman Von Zeiller on 1 Feb. 1802, when the draft of the ABGB (General Civil Code) was being considered by the Austrian parliament, and in which he stated that the principle of making the national laws of the person the criterion should be paramount in establishing rules for conflicts of laws. From Sections 4 and 34 of the ABGB, which was promulgated in 1811, it does not however appear—although it would seem that some authors have sometimes interpreted these sections differently—that the Austrian legislator had intended this, and certainly not in respect of foreigners. Von Savigny, 144, sees precisely in these sections a confirmation of the principle of domicile; see also Rabel I, 125, and Köhler, 37/38.

19. On the history of the genesis of Section 3, Code Civil: Lainé, *La rédaction*, Loaré and Fenet.

capacity".* This draft was submitted to the Cour de Cassation and to the Courts of Appeal, and it appears that a query by the Court of Grenoble brought the realisation that there was some contrariety between the proposed rules for foreigners in France and those for Frenchmen abroad. The provisions relating to foreigners in France were amended, and the Draft submitted in 1801 to the Conseil d'Etat provided only that a foreigner was governed by French law "for the property he may possess and, personally, in every aspect of public policy during his residence".*²⁰ One can probably infer from this—nothing is further specifically stated!—that it was not intended to make the status and capacity of foreigners staying in France subject to French law.

I need not dwell upon the further vicissitudes of this Draft which was amended a few more times thereafter. The rule that French subjects residing abroad continue to be governed by French law with respect to status and capacity was maintained, and became Section 3, paragraph 3, of the Code. However, I do wish to call attention to the elucidatory comments of Portalis, the government spokesman, on this provision: "The personal law follows the person everywhere. Therefore, French law, with a mother's watchful eyes, follows Frenchmen into the most remote regions. It follows them to the most outlying parts of the globe . . . One is French by nature, if not already by birth or origin . . . It is more important than ever to state the maxim that in everything concerning the status and the capacity of the person, the Frenchman, wherever he be, continues to be governed by French law".*²¹

Legally this reasoning is rather unsatisfactory, the problems connected with this provision being either completely overlooked or deliberately ignored. Reporter Grenier observed: "The citizens can be governed personally only by the law of the community of which they are members. Neither they, nor that community, nor their families reciprocally, can on the pretext of absence or of the mere fact of stay abroad break the ties that unite them".*²² And Faure, who in the Legislative Assembly of 5 March 1803, proposed on behalf of the

20. Cf. Lainé, *La rédaction*, 37.

21. Loqué I, 580/81.

22. Loqué I, 601.

Tribunate the adoption of Section 3, argued: "The mere fact of being French ensures that personal status and capacity are governed by French law. Whether the individual resides in France or abroad, as long as he is French, the rule is the same: because his quality of being French follows him everywhere, the laws deriving from this quality must follow him likewise".* ²³

Whereas Grenier at least gives a rational explanation of his opinion—for him the link with the Law of the community or society of which one forms a part is decisive, and he instanced only the cases of "absence" and "stay abroad" (simple *résidence dans un pays étranger*)—to Faure the personal law is as an unbreakable bond with the nationality on the ground of the highly contestable consideration that laws are here concerned which derive from nationality.

The famous Section 3, paragraph 3, the first manifestation of the principle of nationality, is evidently not the result of careful analysis and thorough discussion, but rather the expression of a cheap type of juridical patriotism phrased by lawyers who were first and foremost politicians, and who evidently did not comprehend the full significance and implications of the provision. They were rather driven by a sense of mission: "a French citizen should enjoy the achievements of the Great Revolution wherever he might happen to be".²⁴ It is even doubtful whether the break with the principle of "domicile" was consciously intended. Lainé observes ²⁵: "It was quite natural that the national law . . . took the place the law of residence had held in the France of yore. For, when Frenchmen in respect of their status and capacity were governed by the law of their domicile, this was due to the fact that France in the field of Law was parcelled into 'coutumes', a person's legal native country being the province, large or small, governed by the customary law ('une coutume') of his permanent residence, i.e., his domicile. As the multiplicity of the 'coutumes' gave way to the unity of law, the national law, of its own accord, took the place of the various domestic laws in matters of status and capacity".*

23. Locré I, 613.

24. Rabel I, 162.

25. Lainé, *La rédaction*, 54/55.

Niboyet²⁶ considers that Section 3, paragraph 3, of the Civil Code does *not* contemplate Frenchmen who have their *domicile* abroad, but refers exclusively to Frenchmen living in France and temporarily staying abroad: witness in the first place the use of the word “résidant” and, furthermore, the fact that Section 17 of the Civil Code provided that a Frenchman who had settled abroad “sans esprit de retour” (i.e., not intending to return) lost his French nationality.²⁷ Consequently, the rule of Section 3, paragraph 3, of the Civil Code could not possibly refer to Frenchmen who had settled abroad permanently inasmuch as such “Frenchmen” did not exist. The conclusion (which may perhaps surprise a good many people) to be drawn from this would then have to be that Section 3, paragraph 3, should not be seen as a codification of the nationality principle, but rather as a codification of a rule to a great extent resembling the British concept of the domicile of origin, viz. a rule based on a concept which is determined by birth but ceases to apply when a person settles abroad without intending to return.

9. It is remarkable that the introduction of Section 3 of the Civil Code was obviously not viewed—at least at the outset—as a modification of the doctrine hitherto obtaining of the subordination of the personal status to the law of domicile. The then very authoritative Foelix²⁸ contended as late as in 1866 that, with regard to his person, everyone is subject to his national law, but that the expressions “lieu du domicile de l’individu” and “territoire de sa nation ou patrie” may be used indifferently. He evidently considered domicile and nationality synonymous! It should also be noted that foreigners living in France continued to be governed by French law with respect to their status and capacity. Moreover, in no other country is any revolution in Private International Law noticeable in the first half of the 19th century.

In 1849 Von Savigny emphatically still defends the applicability of the law of domicile: “According to the present law domicile is to

26. Niboyet, *Traité* III, 199 and 211; *Cours*, 396; Batiffol, “Principes”, 498 et seq.

27. This rule was repealed as late as 1889.

28. Foelix, *Traité*; also vid. Cassin, nr. 32.

be regarded as the determining factor for the particular territorial law by which—as his personal law—each separate individual is governed”.*²⁹ In his view Section 3, paragraph 3, of the Civil Code is no fundamental departure from this rule, and an exception is made only in so far as French law is declared applicable to Frenchmen living abroad. He considers the capacity of foreigners which is subject to the *lex domicilii* also to be in accordance with French Private International Law. Von Savigny adds: “Therefore, I rather favour the opinion that everyone’s personal status should invariably be judged by the law of his domicile, irrespective of whether this occurs at home or abroad, and also irrespective of whether the personal status itself or its legal effects are to be judged”.*

In the Netherlands the rule of Section 3 of the Civil Code was introduced in 1809 by the “French Civil Code arranged for the Kingdom of Holland” and in 1811 upon the incorporation of the Netherlands in France by the “Code Napoléon”. After the liberation Section 6 of the Act of 15 May 1829, containing General Provisions on Legislation in the Kingdom (G.P.), maintained the following rule: “The laws relating to the rights, status and capacity of persons are binding upon Netherlands subjects even when residing abroad”.* But in this country also this rule was not regarded as a transition towards the principle of nationality. The authors of those days considered the principle of domicile to have the force of law.³⁰

10. It was not the French Code, but an address and the writings of the Italian professor and scholar Pasquale Mancini that led to the breakthrough and triumphal march of the principle of nationality. Even in his inaugural lecture in 1851 upon assuming the office of professor of international law at the University of Turin, Mancini made the point that the nation is the natural community of people who inhabit the same territory, are of the same race, have the same morals, manners and customs, and speak the same language. Just like the individual, the nation, at a higher level, possesses an inviolable right to sovereignty and liberty vis-à-vis other peoples and States.³¹

29. Von Savigny VIII, 95, 125.

30. Cf. Kollewijn, *Geschiedenis*, 199.

31. Mancini, *Della nazionalità*, 35; also in *Diritto Internazionale*.

It is readily understandable that in the political situation of Italy at that time the speech was received enthusiastically by the large and select audience. The Italian peninsula was divided into small states, part of them under foreign rule, and the people were yearning for unity and independence. The astounding influence exercised by Mancini's ideas, in and also outside Italy, should, in my opinion, be attributed to the circumstance that his creed conformed to the leading political and spiritual trends of the 19th century: nationalism and liberalism, ingeniously connecting them at the same time. Mancini's principle of nationality was a political tenet dressed up and displayed as a rule of the law of nations.

One can hardly assume that the author in shaping his revolutionary ideas ever thought of Private International Law. However, soon afterwards the principle of nationality triumphantly entered Private International Law.³² In the Code of the Kingdom of Saxony published in 1863 capacity to engage in legal transactions, the contracting and dissolution of marriage, parental authority and guardianship were made subject to the national law, and a *general* provision (section 6, Disp. Prel.) is found in the Italian Codice Civile that was promulgated in 1865, reading: "The status and capacity of persons and family relations are governed by the law of the nation to which they belong".*

The Italian Esperson in his book (*Il principio di nazionalità applicato alle relazioni civili internazionali*), which appeared in 1868, raised nationality to the leading principle of Private International Law. Mancini himself did so only in 1874 in the report he published for the newly founded Institut de Droit International, of which he was the first President.³³ According to Mancini the tenor and functions of many rules of law are determined by climate, the country's landscape and scenery, language, customs, history and religion.³⁴ For

32. The "*Privatrechtliches Gesetzbuch für den Kanton Zürich*" contained even in 1853 the provision that contractual capacity, family-law and law of succession of the Canton's own citizens, are subject to the law of the Canton (as regards foreigners to the extent to which the law of their fatherland so determines). Cf. Bluntschli §§ 2 and 3. See also Section 4 of the *Greek Act* of 29 October 1856, probably inspired by the above.

33. Mancini, "De l'utilité", 221, 285.

34. Similar ideas had been developed before by Montesquieu, Book I, Chapter III, 14th para.

these very reasons the rules relating to the status and capacity of persons likewise vary in the legal systems of different nations. The rules of law reflect the character of the people, are made by and for people belonging to one and the same nation, and are adapted to the qualities, temper and the conceptions of justice of the members of that nation. Consequently, by respecting a person's national law, says Mancini, respect is shown for his personality and liberty.

11. Mancini's teachings triumphantly conquered Europe and developed into the golden standard of Private International Law, as Neuhaus has it.³⁵ In addition to the codifications already mentioned, the nationality principle was embodied in the codes of many countries including Rumania, Portugal, Germany, Spain, Turkey, Poland, Finland and in the countries which, such as the Netherlands and Belgium, had borrowed their rule of conflicts of laws in respect of personal law from the French code. The one-sided rule of Section 3, paragraph 3, was then explained to be a provision which made nationals as well as foreigners subject to their respective national law.³⁶ The Institut de Droit International in 1880 adopted a resolution reading: "The status and the capacity of a person are governed by the law of the state to which he belongs on account of his nationality".*³⁷ The whole legal world was at Mancini's feet! Outside Europe also the nationality principle invaded a considerable part of the world, including Egypt, Iran, Ethiopia, China, Japan, and a number of South and Central American States, such as Chile, Brazil, Bolivia and Guatemala.³⁸ All East-European countries likewise belong to the camp of nationality States,³⁹ as now do a great number of young States which for the most part have adopted their body of law from that of their former colonial parent States, such as Algeria, Tunisia,

35. Neuhaus, *Grundbegriffe*, 139.

36. For further particulars see Rabel I, 120/129, as well as the summary survey by Valladão in *Liber Amicorum Frédérique* II, 954.

37. *Annuaire* 1881-1882, 57.

38. The first Conference of Lima, held in 1878, pronounced itself in favour of the principle of nationality. As opposed to this the Conference held in 1889 in Montevideo showed a preference for the principle of domicile, whereas the Code Bustamante, accepted in Havana in 1928, left the question open and provided (section 7) that each nation that was a party to the treaty would apply as the personal law either the law of domicile or the national law.

39. Vide Szász, 193.

Viet-Nam (North and South), Cambodia, Thailand, Laos and Indonesia.

In Europe only the United Kingdom, Denmark, Norway and—to a certain extent—Switzerland have maintained the principle of domicile, whilst outside Europe the USA, the States that form or formed part of the British Commonwealth, as well as a number of Central and South American States, such as the Argentine, Paraguay, Nicaragua, Uruguay and, since 1942, Brazil, subject personal status to the law of domicile.

A certain number of States, including the Soviet Union, Mexico, Costa Rica, Ecuador, Honduras, Peru, Venezuela, Chile and Colombia, adhere to a sort of intermediate system, which as a rule amounts to subjecting the personal law of the country's own subjects to the national law and that of foreigners to the law of domicile.

Many of Mancini's disciples in Italy, France, Belgium and Germany were "plus royalistes que le roi". With prophetic zeal they preached that man is naturally subject to the law of the people to which he belongs, the law that is ingrained in him, nay bred in his bone and which, therefore, follows him anywhere he goes. Characteristic of the pathos sometimes used in spreading this gospel are the words of the Belgian scholar Laurent in his introduction to the discussion of the nationality principle as part of his eight-volume work on Private International Law dedicated to Mancini: "No, exclaims the noble mouthpiece of the Italian race, law is not based on variable facts and interests. There is an authority that surpasses customs, laws and conventions. This is revealed by the nature of mankind and human society, it is God who is the author thereof".* 40

The Mancinians often point out that they differ from their predecessors by their lofty and spiritual point of view, whereas the supporters of domicile are assumed to espouse a materialistic and feudal conception in looking upon man as an accessory to the land on which he lives: "The native country really is a much wider, more altruistic and higher concept than that of a physical spot called domicile. The nationality tie, precisely because it is free from material admixtures,

40. Laurent I, 72, 631. Among the fervent supporters of Mancini should also be counted, *inter alia*: Diena, Fiore, Weiss, Surville, Bartin, Audinet, Pillet, Von Bahr and Zittelmann.

is a superior essence of the principle of liberty".* 41 All this smacks of the high-falutin verbosity fashionable in the "fin de siècle" late romanticism. It strikes us as being rather mawkishly ecstatic and empty.

12. By 1860 Mancini had already conceived the idea of making the nationality principle the basis of an international codification of general principles of conflicts of laws by means of one or more multi-lateral treaties.⁴² At his instance the Italian Government took the initiative of discussing this idea with the governments of a number of other countries. The Netherlands especially supported this effort and were prepared to convene a conference in 1874. This failed, however, due to political and other circumstances. Renewed Italian efforts, in 1881 and 1885, to call a conference in Rome failed likewise.⁴³

In 1893 Mancini's Dutch friend Tobias Asser induced the Netherlands Government to convene and organise an international codification conference at The Hague. This time 13 States, including Germany, Austria-Hungary, Spain, Italy, France and Russia, responded to the invitation to attend what was later to be called: the First Session of the Hague Conference on Private International Law. The delegates included nearly all the leading scholars on Private International Law, but Mancini did not live to see this, his greatest triumph: he had died in 1888.

In the memorandum of the Netherlands Government that was sent to all the delegates before the start of the Conference, it was urged, with reference to the preparatory work, that unification of a few general principles of conflicts of laws was aimed at, as well as the establishment of uniform rules of conflicts with respect to the law of persons, family and succession and international regulations for a few parts of the law of civil procedure. In the Netherlands memo-

41. Taken from Cassin's characterisation of the views expressed by the followers of Mancini, 738.

42. In this connection see the speech of the Italian ambassador at the 5th Session of the Hague Conference, *Actes* 336, as well as Gutzwiller, 48; Offerhaus, 27.

43. Vide Mancini, "Négociations"; *Actes Ière Conférence (1893)*, 6. Interesting details are given by Nadelmann in his recent article in *AJCL* 1969.

randum it was stated that the uncertainty caused by conflicts of laws tells most acutely in respect of legal relations of a permanent nature, and, therefore, family, marriage, matrimonial property and guardianship law should be given priority.

The Conference decided, however, to abandon the codification of general, rather too abstract, rules and to deal with subjects of immediate practical interest. The discussions, which were most fascinating, were crowned with success, and it is well known that within a short time four conferences were held at The Hague (1892, 1894, 1900 and 1901), which yielded six important multilateral treaties: on marriage, divorce, guardianship, effects of marriage, interdiction and civil procedure.

All five conventions relating to family law sanction the principle of nationality. That on marriage provides that the capacity to contract matrimony is governed by the national law of each of the future spouses, unless a provision of that law explicitly defers to another law. The power of the national law is such that in the country where the wedding-ceremony takes place, a plea based on contrariety of this law to public policy is not admissible, unless a provision of the national law prohibiting such marriage is founded exclusively on religious grounds. This rule, *inter alia*, entailed that, when during the Hitler regime German law prohibited marriages between so-called Aryans and non-Aryans the countries bound by this treaty, such as the Netherlands, had to apply the prohibitory clauses with respect to Germans desirous of contracting marriage in one of the treaty-States, because the prohibitory clause in question was not of a religious character! ⁴⁴

The divorce Convention provides that spouses may petition for divorce only if their national law as well as that of the country where the petition is made permit divorce on the grounds stated. This entails, therefore, a cumulation of the national law and the *lex fori*. Section 3 shows that the national law is alone applicable, if the *lex fori* so admits.

The Convention on the guardianship of infants stipulates that

44. See, e.g., District Court of Amsterdam, 31 January 1938, *NJ* 1938, 331; District Court of Arnhem, 10 May 1938, *NJ* 1938, 969.

guardianship of an infant is governed by his national law. The authorities of a country where an infant has his habitual residence may appoint guardians only if and so long as the national authorities omit to do so, and also in these cases guardianship commences and terminates at the times and on the grounds laid down in the infant's national law.

The Convention concerning interdiction and similar measures of protection is also based entirely on the principle of nationality. Interdiction is governed by the national law of the person involved and the measures may only be taken by the national authorities, unless they fail to act for longer than six months after having been informed of the plight of the person concerned or state that they will refrain from taking action. In that event the appointment of a curator may be ordered by the authorities where the person in question has his habitual residence, but only on the petition of such persons and on such grounds as are provided by the national law as well as by that of the country of residence, and even then the national authorities may at any time remove the interdiction instituted by the local authorities.

Finally the Convention regarding the effects of marriage sets out rules for the personal effects as well as those on property. With respect to the personal relations between spouses the Convention stipulates concisely that these are governed by the national law of the spouses. With regard to marital property the husband's national law at the time of the celebration of the marriage is stated to be applicable if there is no marriage contract or settlement. The law of domicile is irrelevant. Even if the spouses do make a marriage contract or settlement the intrinsic validity of its clauses and their consequences are governed by the husband's national law. The national law of the spouses determines whether in the course of their marriage a matrimonial settlement may either be made or modified.

In this way the Hague Conference became the driving force behind Mancini's doctrine, and by means of a number of important multi-lateral treaties consolidated the rule of the nationality principle in international family law for many decades to come.⁴⁵

45. Gutzwiller, 97: "If one closely follows the work of the Hague Conference it becomes increasingly clear that historically and in substance its whole work is, certainly until 1925, most intimately connected with the 'théorie de la personnalité du droit' in the version of the so-called Italian School".*

CHAPTER II

DIFFICULTIES ARISING FROM THE NATIONALITY
PRINCIPLE

13. The Conventions on Family Law concluded at The Hague at first gave rise to only few difficulties. This is hardly surprising as the States which had ratified these treaties—except Switzerland¹—considered nationality to be the determining connecting factor. Gradually, however, there emerged some difficulties connected with making the nationality principle the basis for solving conflicts. When in 1913 German military deserters, hailing from the then German Alsace, fled to Belgium and wanted to marry there, the Convention on Marriage barred them from doing so, because they could not produce a certificate proving the capacity to marry under their national law.² This caused France in 1913 to denounce not only the Convention on Marriage, but also the two other treaties made in 1902, to wit those on Divorce and on Guardianship. France considered it unacceptable and an infringement of its sovereignty that on account of the German interpretation of the treaties on Family Law she should be bound to apply to foreigners resident in France provisions of a military or political nature derived from their national law. For this would have meant that foreign authorities would be in a position to exercise and enforce their powers in France. For a country with 1,200,000 foreigners already then living within its frontiers, this could have constituted an incalculable danger. In 1916 France also denounced the Interdiction treaty and the treaty on the Effects of Marriage. In addition to the fear of undesirable interference by and influence of foreign authorities perhaps the desire to return to the traditional

1. Switzerland, which in principle applies the law of domicile, but will apply the law of the canton of origin ("Heimatskanton") with regard to its own subjects who reside in a country that does not apply the *lex domicilii*, found itself in a difficult position in The Hague; cf. Meili at the IIIrd Session (1900), *Actes* 85-87, and Roguin at the IVth Session (1904), *Actes* 12. Switzerland had only ratified the Conventions with respect to marriage and divorce.

2. For further details on this subject see Cassin, 729.

French system of application of the law of the first matrimonial domicile in the realm of marital property law may also have played a part. In 1918 Belgium followed the French example in respect of the Conventions on Marriage and Divorce. In Switzerland the Divorce Convention gave rise to serious objections when it became clear that Swiss girls married to Italians, pursuant to this convention, could not obtain a divorce, even if they had continued to live in Switzerland and had re-obtained Swiss nationality.³ For since these women had acquired Italian nationality by marriage, the Italian prohibition of divorce remained applicable pursuant to Article 8 of the Convention. This unwelcome consequence led in 1928 to the denunciation of the Divorce Convention by Switzerland, followed in 1933 by its denunciation by Germany and Sweden, where similar difficulties had been encountered.

14. The decline of the Conventions on Family Law based on the principle of nationality had already set in when—after a long interval due to the First World War and the preceding political tension—the Vth and VIth Sessions of the Hague Conference were held in 1925 and 1928. In 1925 bankruptcy, the recognition and enforcement of foreign judgments and the law of succession were dealt with.

The draft treaty on Succession which resulted from these Sessions was again based on the principle of nationality (the national law of the deceased) and on the unity of the estate. From the deliberations it appears however that thinking had become more flexible. Thus, the Netherlands proposed to make a few subjects bearing on the legal relationships between the heirs or successors and third parties subject to the law of the deceased's domicile. Switzerland likewise preferred the application of a combination of the law of domicile and the national law.⁴ Views were, moreover, divided on the question as to which court should have jurisdiction to adjudicate disputes over the inheritance. The national court obtained one vote more than that of the deceased's last domicile. This majority was rightly deemed to be insufficient to warrant the establishment of a treaty-rule on such a

3. See the Swiss reply of March 1924, *Documents Vth Session (1925)*, 390.

4. *Documents Vth Session (1925)*, 289 and 387.

narrow basis. It was resolved to leave the whole matter in abeyance for the time being.

In 1925 consideration was also given to the difficulties, referred to earlier, that had arisen in connection with the Marriage and Divorce Conventions of 1902, but the Conference failed to find an acceptable solution. In the course of the VIth Session (1928) an endeavour was made to bring the Convention on Succession to a satisfactory conclusion. Once more the designation of a competent court for disputes in matters of inheritance and succession elicited serious disagreement. This time a small majority pronounced itself in favour of the court of the last domicile of the deceased. A complicated arrangement was thereupon introduced into the draft, sanctioning—at least in a number of contingencies—a choice between the national court and that of the domicile. Furthermore, new efforts were made in 1928 to solve—by means of complementary provisions—the difficulties that had arisen from the Marriage and Divorce Conventions, whilst in the meantime the desirability also to draft rules for stateless persons and dual nationals in connection with all treaties on Family Law had become apparent. However, neither the draft Convention on Succession, nor the proposed clauses to be added to the existing treaties on Family Law have ever reached the stage of ratification.

15. In 1929 the Dutch professor Kollewijn gave a remarkable speech with the significant title “The degeneration of the nationality principle in modern Private International Law”.*⁵ Kollewijn, who in his thesis, published in 1917, had already pointed out the defects of the doctrine of Mancini,⁶ in this speech attacked with great vigour the “romantic notion” that the Private Law obtaining in modern States would always be in harmony with the legal conception of their

5. An Italian translation of this address was published in *Diritto Internazionale* 1929 I, 508.

6. Kollewijn, *Openbare orde*, 10: “How little does officially accepted law represent the sense of justice of the entire population; how seldom can one speak of a national, unanimous legal conviction with regard to any part of private law! Religion, status and political party, social position and civilisation contribute, among other things, to different and conflicting legal convictions being developed within the boundaries of one single country, and they keep the citizens of a State divided, even though they belong to one and the same nation”.*

subjects or, conversely, that Private Law could be deduced from the legal convictions of these subjects. He said: "Religion and outlook on life, descent and occupation, the feeling of class distinction and professional spirit, in many cases rather *divide* the notions amongst the subjects of one and the same State on what is law, whereas they *unite* in one and the same legal conviction the citizens of very different countries".* The well-known judgment of the French Cour de Cassation in the Ferrari case,⁷ as well as the Protocols to the Divorce Convention, adopted by the VIth Session (1928) of the Hague Conference, caused Kollwijn to contend that with respect to divorce the nationality principle cannot lead to a rational solution whenever the spouses have different nationalities and their rights under their respective national laws diverge. Application of the nationality principle to the one is not possible without at the same time infringing the national law of the other. He advocated the application of the law of the domicile in these cases, since domicile is then the husband's and wife's same, common element of their mutual relationship. Kollwijn concluded his address by saying that "Only at a Conference hereditarily tainted with the nationality principle, like the Hague Conference, was it possible to disregard the import of the spouses' common domicile in these relations",* having thus advanced ideas that were considered to be a revolutionary renovation, a quarter of a century later.

16a. Reference to the national law presupposes the existence of a nationality. Failing this, the question immediately arises how a rule of conflicts of laws based on nationality could ever be applied. At the beginning of this century, the lack of nationality was a rather rare phenomenon, but after the Russian revolution of 1917 the fact had to be faced that about 1½ million Russian refugees, who had settled in various European countries, had lost their nationality. According to Section 29 of the German EGBGB the *last* national law, i.e., Soviet-Russian Law, had to be applied in cases in which the national law applied.⁸ It need hardly be argued that this was unsatisfactory in

7. Cour de Cassation, 14 March 1928, *Clunet* 1928, 382.

8. Section 29 EGBGB was amended in 1938 and since then provides that the law of the habitual residence will apply and, if there is no such habitual residence, then the law of the abode will apply.

the extreme, especially in such cases where this entailed the requisite co-operation of their former national authority. In Italy, Italian law was applied to resident stateless persons, but the municipal law of the last nationality governed those living elsewhere.⁹

On the other hand, in France the personal law of stateless persons was considered to be subject to the law of their domicile. This system, which the Institut de Droit International had already proposed in 1880, also formed the fundamental principle for the proposals adopted by the Hague Conference in 1928 for the additional implementation of the Conventions on Family Law.¹⁰ A new flood of apatrides, swept up by the Second World War was needed, however, before in 1954 a treaty was successfully negotiated in New York with respect to the status of stateless persons. Article 12 of this treaty provided that "The personal status of a stateless person shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence".¹¹

16b. Similar problems to those affecting stateless persons arose in the countries embracing the nationality principle with respect to refugees and so-called displaced persons (DP's) who shortly before and after the Second World War swamped the free world. The number of these persons—in Europe alone—"who were expelled, shipped like cattle or driven by fear" in the period 1939-1947 is estimated at about 30 million.¹² Their numbers outside Europe are also very large, especially in India and Pakistan. In many cases these refugees had kept the nationality of the countries they had fled, but in actual fact

9. Cf. Section 14 Act of 13 June 1912, vide Cassin, 750.

10. *Actes VIth Session (1928)*, 416.

11. *Treaty of New York*, 28 September 1954 (Convention relating to the status of stateless persons), 360, *U.N. Treaties Series (1960)*, 130. A similar rule is laid down in Section 11 *Draft Uniform Law Benelux* and in Section 10 of the Hague Convention of 15 November 1956 on adoption.

12. Cf. Woytinsky; Rabel I, 171: "There is one more circumstance apt to destroy what usefulness nationality may still have as a criterion for status. Many millions of people have emigrated in the course of the war, in the estimate of some experts as many as thirty millions in Europe alone, and others will do so; millions have also lost their former citizenship or will not be able to prove to which State they belong. In European countries where the nationality principle had its origin, a formidable intermixture of populations is about to render it obsolete".

all ties with those countries had been severed. Rules of conflicts of laws based on the nationality principle led to serious difficulties in those cases. When the Soviet Union annexed Estonia, many Estonians fled to Sweden. Swedish divorce law was applied to them, because the courts held that their Soviet-Russian nationality as yet was of a merely formal character only.¹³

Later on similar difficulties regarding the Hungarian refugees were experienced, as under Hungarian law, at least until 1947, a marriage licence issued by the Hungarian authorities was required. The Divorce Convention (Article 5) as applied to refugees gave rise to difficulties in cases in which according to their national law (e.g., Hungarian law) the national authorities were vested with exclusive jurisdiction in this matter.¹⁴

In 1951 the Geneva Treaty on the Status of Refugees was concluded. It provided that the status of a refugee was governed by the law of the country of domicile or, if the refugee had no domicile by the law of the country of residence.¹⁵ However, this did not remove the difficulties caused by the application of the Hague Conventions to refugees. The countries from which, as a rule, the refugees hailed, did not accede to this treaty, with the result that the question arose whether adoption of the Treaty on Refugees implied the release from the commitment arising under the Hague Conventions to apply their national law.¹⁶

The Treaty on Refugees provides that a refugee is "any person who . . . (2) as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the pro-

13. Högsta Domstol, 25 February 1949, *RabelsZ* 1950, 145, with annotations by Michaeli.

14. Cf. Kollewijn, *NTIR* 1961, 129 (summary 144).

15. *Convention relating to the Status of Refugees*, Geneva, July 1928, 1951, art. 12, in 189 *U.N. Treaties Series* (1954), 137, superseding former treaties of 1933 and 1936.

16. In my opinion there can hardly be any serious doubt at all that one cannot unilaterally, i.e., by concluding a new treaty with other States, free oneself of obligations arising under treaties towards States which are not parties to the new treaty. Cf. otherwise Dubbink, *NTIR* 1958 (summary 253).

tection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.

Since then the question as to whether refugees who as a result of events that occurred *after* 1951 had to be treated in the same way has given rise to difficulties in a number of countries. A decision of the Swiss Tribunal Fédéral of 12 July 1962 is interesting in this context:¹⁷ A married couple had fled Hungary in 1956 and settled in Switzerland; the wife filed a petition for divorce. The court did not go into the question whether this couple should be deemed to come under the Treaty on Refugees. For, as the petitioner, being a refugee, could not institute proceedings in Hungary, the court held that in order to avoid a denial of justice, the action could be brought before the court of her domicile. The court declared that it was irrelevant whether the national law knew of the alleged ground for divorce, seeing that Hungary, deeming the Hungarian courts exclusively competent in divorce actions between Hungarians, would not recognise the Swiss divorce anyhow.

A recent Protocol¹⁸ has extended the application of the treaty to refugees made homeless by events occurring *after* 1 January 1951. Case law has at times also considered refugees as stateless persons *in fact* and their personal status has consequently been made subject to the law of their residence.¹⁹

16c. Reference to national law creates an equally difficult problem if a person has more than one nationality. There are more dual nationals than there used to be, for as a result of recent legislation on nationality in many countries women who marry foreigners retain their own nationality. Should these women marry a man by virtue of whose law on nationality the wife acquires her husband's nationality, then the wife will as a rule acquire her husband's nationality be-

17. (Swiss) *Journal des Tribunaux* 1963, 619.

18. Protocol of New York of 31 January 1967, *AJIL* 63 (1969), 385.

19. Cf. the decision of the Swedish Supreme Court referred to in footnote 13 and Cour d'Appel de Paris, 23 November 1954, *Revue Critique* 1956, 63. The same view is also expressed by Kolléwijn in the article referred to above in footnote 14.

sides her own. A Hague treaty of 12 April 1930²⁰ on certain questions relating to the conflict of laws in respect of nationality provides in Article 3: "Subject to the provisions of the present convention a person having two or more nationalities may be regarded as its national by each of the states whose nationality he possesses", and in Article 5: "Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognise exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected".

Although this treaty pertains to the realm of Public Law—matters of personal status being explicitly excluded—these rules are nevertheless often observed in dealing with the conflict of laws. This amounts to the application in nationality-countries of their own municipal law to their subjects, irrespective of whether they also obtain the nationality of another country, whereas in a "third State" the law of that country of which the person concerned actually has *effective* nationality is applied.²¹

The application of Article 3 of the 1930 treaty obviously leads to undesirable results in the conflicts of laws. If the two countries of which a dual national has nationality both apply their own law in matters of personal status, limping legal relations will clearly often be unavoidable—hence the opinion recently defended by some learned authors that, given plural nationality, the law of the *effective* nationality should alone in *all* cases be considered as *the* national law. This, therefore, must also apply in the case of a given country's own subject having in addition the nationality of another country.²² In the

20. Convention on certain questions relating to the conflict of nationality laws, The Hague, 12 April 1930, *AJIL* 24 (1930), suppl. 169, 258.

21. See with respect to this problem also the additions proposed at the VIth Session (1928) to be made to the treaties with respect to Family Law, *Actes*, 416-421; Makarov, *Allgemeine Lehren*, 311 et seq., and IIIrd Resolution, art. 2, of the Institut de Droit International, *Annuaire* 1932, 567, prescribing application of the law of the habitual residence.

22. In Dutch legal literature: Ko Swan Sik, 225, and Kosters-Dubbink, 657.

Netherlands the Supreme Court (Hoge Raad) recently recognised a divorce granted in Norway in accordance with Norwegian law between a Dutchman and a woman who had Netherlands as well as Norwegian nationality. The Hoge Raad held that the wife's Netherlands nationality could be disregarded, as her Norwegian nationality had to be considered to be the effective one. This concept of effective nationality which should be understood to mean the nationality of the country with which the life of the person concerned has the most real connection, necessarily leads to the conclusion that in most cases the location of that person's actual residence will be decisive. This caused Deelen to observe: "through the admission of the concept of effective nationality the Supreme Court has probably dragged a Trojan horse within the walls of our nationality-tainted private international law".²³

16d. One must understand the national law of a person with the nationality of a State with different law systems in its individual component territories to mean the law of that territory which, pursuant to the legislation of that State, applies to him. In such States, however, rules indicating which is the component State whose law applies, are usually lacking. Very divergent rules have been suggested for the solution of the resulting problem with respect to countries adhering to the nationality principle: application of the law of the territory in which the person concerned was born, or of the component State of his residence, or again that of his last residence, prior to his settling abroad, or that of the State in which the capital of the federal union is situate. A Dutch Court which, on the divorce of a Canadian husband and a British wife, had to pronounce on the appointment of guardians over and the custody of the children having Canadian nationality, applied the law of the Province of Ontario, on the grounds that the father was born there and intended to settle there again.²⁴

The difficulty, referred to in cases where in accordance with a rule

23. Supreme Court of the Netherlands, 9 December 1965, *NJ* 1966, 378; cf. De Winter, *Revue Critique* 1966, 297, and Deelen, *NTIR* 1967, 303. Further the Swiss Federal Court recognises for Swiss nationals, too, an effective foreign nationality, *Clunet* 1965, 921.

24. Utrecht District Court, 14 January 1960, *NJ* 1960, 386; *Clunet* 1964, 613.

of the conflict of laws the national law of a person is declared applicable, is solved in a recent Hague treaty by a provision reading:

“For the purposes of the present Convention, if a national law consists of a non-unified system, the law to be applied shall be determined by the rules in force in that system and, failing any such rules, by the most real connection which the testator had with any one of the various laws within that system”.²⁵

In all probability, whenever the person concerned is living in his native country this rule will result in the application of the law of the individual State (province, territory) in which he resides. Should he not be living there, then it will often be difficult to determine “the most real connection”. Some then advocate the substitution of the law of domicile.²⁶

17a. Up till now we have dealt with the practical difficulties arising from reference to a national law, when a person has no nationality or has a doubtful one, and with those likely to be encountered when it is difficult to ascertain which is the proper national law to be applied. We shall now dwell on the problems arising when various persons of different nationalities are involved in any given legal relationship.

At the time the Hague Conventions on Divorce and on the Effects of Marriage were concluded, a married woman always acquired her spouse's nationality. Consequently, it sufficed to include in both treaties a reference to the national law of the *spouses*. Allowance had only to be made for the event that one of the spouses acquired the nationality of another State by naturalisation during the marriage,

25. Convention on the Form of Wills (1961), art. 1, para. 2; similar provisions: Convention on the Protection of Minors (1961), art. 14; Convention on Adoption (1965), art. 11. See also *Actes et Documents IXe Session (1960)* III, 116.

26. Cf. Kolléwijn, *WPNR 4425*, who in this respect relies on Section 11 *Draft Uniform Law Benelux*, because the applicable national law cannot be determined with certainty in this case. The Leeuwarden Court of Appeal, 3 March 1954, *NJ 1954*, 328, *NTIR 1955*, 104, though following another line of thinking, came to the conclusion that the succession to the estate of an American residing in the Netherlands should be determined in accordance with Netherlands law.

Nadelmann, *AJCL 1969*, has drawn attention to the remarkable fact that Mancini himself already envisaged the application of the law of the domicile when different civil legislations coexist in one State.

and, therefore, Article 8 of the Divorce Convention and Article 9 of the Convention on the Effects of Marriage refer in such cases to the last statutory provisions common to both the spouses. In the twenties, however, the legal emancipation of married women set in, and gradually in most countries the principle was introduced that women on marriage retained their own nationality.²⁷ The Hague Conference then had to consider the consequences of this development with respect to the existing treaties, as has been already mentioned in passing. During the VIth Session a complementary rule for the Convention on the Effects of Marriage was drafted to the effect that if the spouses had never been of one and the same nationality the husband's nationality should apply. For the Divorce Convention, on the other hand, the following cumulative rule was drafted: if spouses had never had a common nationality, or if they had in fact had a common nationality but had each obtained a different nationality thereafter, divorce was to be granted only if both the husband's and the wife's national law admitted thereof.²⁸

In view of the fact, however, that this restrictive arrangement in respect of divorce was completely unacceptable to a number of countries, two Protocols were drafted at the same time, enabling each and every High Contracting State to reserve the right to grant divorce in accordance with its own law on the petition of a wife who had retained or re-acquired that country's nationality and had her habitual residence there. These Protocols also explicitly provided, however, that the country of the husband's nationality and third countries were not obliged to recognise such divorces. This witnessed a serious regression from the Divorce Convention of 1902 which—it will be recalled—was aimed at the international recognition of divorce decrees by way of codification of a uniform conflicts rule.

As mentioned earlier, not one single State accepted the complementary amendments and protocols drafted in 1928 and several States denounced the Divorce Convention. At present this Convention

27. Cf. Makarov, *Recueil* 1937 II, 127. Three treaties have been of decisive importance for the emancipation of the married woman in the field of the law of nationality, to wit: the treaty of The Hague of 12 April 1930, the treaty of Montevideo of 26 December 1933, and the treaty of New York of 20 February 1957; Cf. Kokkini, 13.

28. *Actes VIth Session* (1928), 417, 420.

is in force only between Luxembourg, Italy, Portugal, Rumania, Hungary and Poland. As regards the Netherlands it is no longer effective as from 1 June 1969.²⁹ An essential motivation for the termination of the Convention by the Netherlands was the undesirable consequence that Dutch girls, married to Italian immigrant labourers, could not obtain a divorce if they had become Italian by marriage, even if they had recovered their Netherlands nationality, as in this case their last common nationality was Italian.³⁰

Outside the scope of the Convention the adjustment of a rule of conflict of laws that was based on the nationality principle, likewise continued to cause great difficulties for a divorce between spouses of different nationality.³¹

Probably the most hard-fought battle occurred in Belgium in the case of *Servais v. Rossi*, in which a Belgian wife brought an action for divorce against her Italian husband. The Supreme Court reversed a judgment of the Court of Appeal of Liège which had awarded a decree of divorce. It held that a divorce may be pronounced only in cases in which this is admissible according to both the husband's and the wife's national law, because otherwise this would entail acting contrary to the provisions of Section 3, paragraph 3, of the Belgian Civil Code. The case was remitted to the Court of Appeal in Brussels, which, however, shared the point of view of the Liège Court, and it again granted a divorce decree applying the petitioner's national law. The action was heard once more by the Cour de Cassation, sitting this time with all its divisions in joint session, and for the second time the divorce decree was quashed.³² Although meanwhile the French Cour de Cassation had rendered its important judgment in

29. Poland denounced the Convention on 11 June 1969; this will become effective on 1 June 1974.

30. In the past few years some Dutch courts had tried to avoid the effect of the treaty with regard to marriages contracted after 1963, when Dutch girls retained their nationality, on the ground that the treaty did not contain any rules for divorce between spouses who had never had a common nationality.

31. Vischer, 416: "Every conflicts rule that applies nationality as a connecting link is essentially founded on the single individual person. Nationality, therefore, fails as a 'connecting factor' in any case where we are faced with a couple, as for example in marriage and divorce, with a group in the sociological sense, unless the members of such group have the same nationality".*

32. Belgian Supreme Court, 16 May 1952, *Clunet* 1953, 388, and judgment of 16 February 1955, *Clunet* 1955, 930.

the case of *Rivière*,³³ in which the validity of a divorce of spouses of different nationality was tested by the law of their common domicile, in Belgium the Attorney-General Hayoit de Termicourt and the Belgian Cour de Cassation persisted in their view that the cumulative application of the national laws of both spouses was the only solution that could be considered to be in accordance with the nationality principle espoused by Belgian Private International Law. This case had attracted so much attention in Belgium, however, and the final result was considered to be so unsatisfactory that a private member's Bill was introduced in Parliament, voted and enacted, thereby rendering divorce under Belgian law possible in Belgium whenever one of the spouses could claim Belgian nationality.³⁴

In actual fact the *Rossi* case had clearly demonstrated that a rule of conflict based on the nationality principle is bound to fail in divorce cases between spouses of different nationality when the national laws of the spouses contain conflicting provisions on this score. For, just as much as application of the wife's national law infringed the right to indissolubility of the marriage which the husband's national law conferred upon him, application of the cumulative system infringed the right to that dissolubility conferred upon the wife by *her* national law. As it is logically impossible to apply two conflicting national laws simultaneously, one can only wonder how so many eminent lawyers could overlook this simple fact and be led astray by the blind spot caused by their obsession with the nationality principle.

17b. The complication that has just been outlined does not only arise in divorces between persons of different nationality, but is to be found in all cases where a rule of the conflict of laws based on the nationality principle is applied to a legal relationship between persons of different nationality whose municipal statutes contain essentially different elements of law.

As for the rights and duties of spouses, the Hague Conference—as has been already observed—had suggested in 1928 that the argument should be settled by designating the husband's national law as the

33. French Cour de Cassation, 17 April 1953, *Clunet* 1953, 860, *Revue Critique* 1953, 412.

34. Act of 27 June 1960; cf. Francescakis and Ghotot.

applicable law in cases of spouses of different nationality. Actually this is clearly an emergency solution and a poor one at that, which—it is true—is still accepted at the present time as a rule of the conflict of laws in various countries, but which is becoming less and less acceptable as the married woman is considered to rank *pari passu* with her husband.³⁵ We shall revert to this subject later on.³⁶ The problem referred to here has, moreover, often arisen in conflicts incidental to the legal relationship between a father and his illegitimate child. It is usually assumed this is a subject that must be regarded as pertaining to personal status and, in the countries adhering to the nationality principle, is, therefore, governed by the national law. But, if the father and the child are of different nationality the question arises, of course, *whose* national law governs the relationship. The views on this point are widely divergent. In some countries the national law of the father is considered to be decisive, in others that of the child. In addition there are countries, such as Germany and Austria, which, at least with respect to the child's right to maintenance, apply the national law of the mother.³⁷

This chaotic situation is easily explained by recalling that a rule of the conflict of laws based on nationality cannot bring about a satisfactory solution if applied to legal relationships which involve persons of different nationality whose national laws contain provisions that are inconsistent with each other.³⁸ The Netherlands Supreme Court (Hoge Raad) clearly recognised this problem in a decision of 1955. An action for maintenance had been brought on behalf of an infant of German nationality living in Germany against a Dutchman living in the Netherlands. The Hoge Raad argued in the statement of reasons that even if the provisions laid down in Section 6, General Provisions on legislation in the Kingdom (the rule borrowed from Section 3,

35. One still finds this rule, which has a flavour of anachronism, in the new text of the *Draft Uniform Law Benelux*, Section 3. In order to soften this rule somewhat, it was added that when the national law of the husband declares his wife to be wholly or in part incapable, such provision shall only apply to the extent that the national law of the wife is in agreement therewith. See, furthermore, Kokkini, Valladão and Wahl, 124/127.

36. See below, No. 40.

37. See the summary of Comparative Law by Rabel I, 662.

38. A similar problem arises from a rule of conflicts based on the principle of domicile when the persons involved in a legal relationship have their domicile in different countries.

paragraph 3, of the French Civil Code). were applicable, it would not be ascertained from that Section whether the national law of the *child* or that of the *father* should govern the legal relationship.³⁹

Of a similar nature is the problem presented by the application of the nationality principle in cases of adoption. Adoption creates close legal relationships between adopters and children. This bond, though, is not equally strong in the various countries; and the prerequisites of adoption differ widely. There can be no doubt that this subject pertains to the personal law of the parents as well as that of the child. A rule of the conflict of laws based on nationality is bound to give rise to difficulties if, as so often is the case, the adoption parents and the child are not of the same nationality. And, sure enough, these difficulties did not fail to present themselves. In Germany, Austria, Italy and Switzerland the prerequisites for the intended adoption are examined in the light of the adopter's national law. In French case law the national law of the child is applied. In Greece, Japan, Luxembourg and Belgium a distinction is drawn between legal requirements with respect to the adopters and those relating to the infant, to which the national law of the child is applied. In the Netherlands the Courts are prone to apply the national laws of the adopters and the child cumulatively.⁴⁰ Also, in respect of the effects of adoption widely diverging systems are applied in the countries embracing the nationality principle.

The resulting situation is anything but satisfactory and leads to "forum-shopping" as well as to the making of adoption orders that are considered valid in one country and invalid in another.

18a. In a number of cases application of a rule of the conflict of laws based on the nationality principle produces results that may indeed be capable of legal justification, yet are hardly desirable from a social point of view. In the first place we may mention the contingencies in which the persons concerned have brought about a new situation in a foreign country—usually the country where they are living—in accordance with the law obtaining there and presumably

39. Netherlands Supreme Court, 2 December 1955, *NJ 1956*, 33.

40. Cf. *Actes Xth Session (1964)* II, 15; De Nova, *Recueil 1961*, III, 94.

in good faith which, though invalid under their national law, did exist in that foreign country for a considerable time and can no longer be neglected. The category of cases referred to is best exemplified by an instructive instance from among the difficulties that occurred in connection with divorces abroad.

The Netherlands Hoge Raad had in 1916 handed down a decision⁴¹ to the effect that, pursuant to the provisions of Section 6 G.P., Dutchmen can validly obtain a divorce abroad only if it is pronounced on a ground that is also admissible under Netherlands law. This standpoint, inspired by the nationality principle, has repeatedly and considerably embarrassed the Dutch courts in recent years.

A Dutch couple resident in South Africa and married for three years obtained a divorce in 1962 on the ground of wilful desertion. The deserted wife returned to the Netherlands, whilst her former spouse stayed in South Africa. When in 1964 she wanted to remarry in Holland, the Civil Registrar refused to perform the marriage because in his view the South African divorce could not be recognised, since under Netherlands law desertion without reasonable cause of less than 5 years' duration does not constitute a ground for divorce. The intended spouses, eager to forge the bonds of matrimony without forgery of a marriage certificate, appealed against this refusal, but the Rotterdam District Court shared the view of the Registrar. The objections raised in the Supreme Court were (1) that wilful desertion was also a ground for divorce under Netherlands law, and that the five years' term should be considered a rule of civil procedure to be applied only if the action for divorce was instituted before a Dutch Court; (2) that the special circumstances peculiar to the case justified recognition of the divorce, which was in accordance with municipal and private international law obtaining in South Africa, the more so now that the (former) husband had continued to live in South Africa, where pursuant to that country's law he was unmarried. The objections were, however, of no avail, because the Hoge Raad held that by virtue of Section 6 of the G.P. a divorce decree between Dutchmen pronounced abroad could be recognised in this country only if it was pronounced on the ground of facts which under Netherlands

41. Netherlands Supreme Court, 24 November 1916, *NJ 1917*, 5.

law might afford valid reasons for, and thus result in, divorce.⁴²

By this decision the Hoge Raad settled any doubt that had arisen from a judgment given in 1961 in a similar case by the District Court of Amsterdam.⁴³ Then a South African Court had likewise pronounced a divorce decree between Dutch spouses on the ground of wilful desertion (without reasonable cause) of less than 5 years' duration, and the former wife, having returned to Holland, desired to remarry in that country. In this case the former husband had not only continued to reside in South Africa, but had, moreover, obtained South African nationality in the meantime. Notwithstanding the provisions of Section 6 of the G.P. the Amsterdam District Court had recognised the South African divorce, reflecting in its statement of reasons that any other construction would lead to consequences inconsistent with Netherlands public policy, since in that country the former wife would be considered to be still married, whilst the former husband in the country of his nationality and residence would be held to be lawfully divorced.

In a commentary on this remarkable decision, Deelen observes: "We see the Netherlands judiciary wriggling out of the straight waistcoat of the all too lapidary *statutum personale*. Netherlands judges, with an increasing frequency, withdraw legal relations concerning the status of Netherlands nationals, where need be, from withunder art. 6 A.B., but in so doing they still faithfully borrow their arguments from the nationality system. So to speak, they more and more incline towards application of the law of the domicile but they somehow manage to keep a straight face, 'nationality' written all over it!"

In order to bring this decision in line with the law, Deelen suggested that the words "... are binding on Netherlands subjects even when residing abroad" in Section 6 of the G.P. be construed to refer only to "such manner of sojourn outside the Netherlands as is consistent with a living link with Netherlands legal atmosphere".

Kollewijn has tried another approach towards harmonising the

42. Netherlands Supreme Court, 4 March 1965, *NJ* 1965, 132; cf. Kollewijn, *WPNR* 4924, and Deelen, *NTIR* 1965, 411; same decision 26 Sept. 1969, *N.J.* 1970, 195.

43. Amsterdam District Court, 21 March 1961, *NJ* 1961, 300; cf. Kollewijn, *WPNR* 4739, and Deelen, *NTIR* 1963, 313.

Amsterdam judgment with the nationality principle laid down in the Netherlands law. He argued that the nationality principle needs an escape clause of "*fait accompli*", or a plea of "*fait accompli*", as he termed it. Whenever a divorce between Dutch people has been pronounced abroad contrary to Netherlands law, but in accordance with the law obtaining in the foreign country, and a situation of fact has thus been created and has lasted for a considerable time, in his opinion due allowance must be made for such situations which can then no longer be disregarded.

Well now, the 1965 decision of the Hoge Raad, cited above, shows that this supreme judicial authority has rejected all attempts to eliminate Section 6 G.P., based on the nationality principle, by putting another construction on it, whether by invoking public policy as the Amsterdam Court did, or by interpreting the term "*residing*" restrictively, as Deelen did, or by means of pleading "*fait accompli*" as Kollewijn suggested. It would seem to me that the Hoge Raad could not have decided otherwise. If the nationality principle expressed in Section 6 of the General Provisions on legislation is to be abandoned, this is the work of the legislature and not of the courts, which are in duty bound to abide by the explicit wording of the law.

18b. In the case we have just discussed there were objections to applying the national law, as a situation had been created in a foreign country in accordance with the municipal law obtaining there, with the incidental legal consequences thereto. Another category of cases, in which application of the national law is anything but satisfactory, consists of those in which the persons concerned are altogether estranged from their native country or where nationality has never had any real significance for them. I should like to quote yet another example from Netherlands case law. In 1922 a woman of Netherlands nationality had married a Turk in Turkey, thereby obtaining Turkish nationality. Shortly afterwards the husband was sentenced to death in Turkey and fled to Holland with his wife. She resided there without interruption from 1923 until her death in 1947. Her husband had lost his Turkish nationality, but she herself had kept it, although she had not possessed a Turkish passport since 1923. Upon her demise her husband took the view that her estate was governed by her

national law, i.e., Turkish law. The Court, however, held, according to the statement of reasons, that the facts and circumstances clearly showed that the deceased at the time of, and many years prior to, her death had hardly any ties with Turkey, even through her husband, and that from the very beginning she had in fact wanted to be reinstated as a member of the Netherlands community, in which for that matter the bulk of her capital assets was to be found. On these grounds the Court applied Netherlands law to the estate.⁴⁴

Similar cases have also occurred in other countries embracing the nationality principle, and in respect of other subjects. They cause serious difficulties, especially if and when a provision of mandatory law requires application of the national law and the person concerned has already for many years been permanently established in a foreign country. We shall give further detailed attention to this category of cases later.

18c. A wholly different source of difficulties is caused by the inspiring of trust in other parties. The French Cour de Cassation had already decided in 1861, in the well-known *Lizardi* case,⁴⁵ that a Mexican, aged 22, who had bought jewels in Paris, could not rely on the fact that under his national law he was still a minor as against the other party, who had acted in good faith and without negligence or imprudence. This point of view is the accepted doctrine in France and was also incorporated in the preliminary draft of the Commission de Réforme du Code Civil of 1959.⁴⁶ In Germany (Section 7, paragraph 3, of the *Einführungsgesetz*) the other party is not even required to have acted in good faith and without negligence or imprudence. "A foreigner who engages in a transaction in Germany is considered to have the same capacity as he would have if he were a German".* A similar provision is found in the laws of Switzerland,

44. Utrecht District Court, 12 November 1954, *NJ 1955*, 372. Although according to established (case) law in the Netherlands, inheritance is governed by the national law of the testator, the Supreme Court decided in 1947 that this does not come under Section 6 of the G.P. This, therefore, comes about by an unwritten rule of the law of conflicts, whereby the Court could allow itself to violate the nationality principle with impunity.

45. Cour de Cassation, 16 January 1861, *S. 1861 I*, 305.

46. The French concept was, *inter alia*, followed in the codes of Egypt and Syria, the *Draft Uniform Law Benelux*, and the Polish Act of 1965 (*Revue Critique 1966*, 323); see, moreover, Bluntschli, para. 2, sub. 2.

Greece, Italy, most East European States and a number of other countries.⁴⁷ A French Court has just recently amplified the *Lizardi* case law in an interesting way. The Paris couturier Jean Dessès had sold a number of dresses to the ex-queen of Egypt Narriman Sadek, but her husband, ex-king Farouk, refused to pay for them on the alleged ground that under her national law his wife was not capable of making purchase-agreements independently. The Tribunal de Grande Instance de la Seine⁴⁸ rejected this plea, reasoning that the laws of most countries confer contractual capacity upon married women at least in the domestic field (“mandat domestique”) and that the vendor had acted without negligence or imprudence and in good faith. In the Netherlands this exception to the application of the national law, was usually rejected. Kusters, that well-known authoritative learned author, argued that the intrinsically mandatory rule of recognition of the personal status of the foreigner would be disregarded, if reliance on his national law were to be denied to him, whenever this recourse would put the other party at a disadvantage.⁴⁹ But Dubbink wrote in 1962: “The protection which the national law affords the incapable, must yield to the demands of economic and social intercourse, however not in every case—as is provided by the German, Swiss and Italian laws—but only for the sake of those who in good faith believe the foreigner to be capable of concluding contracts”.⁵⁰

As Dubbink observes, the encroachment on the nationality principle made by the draft Uniform Law Benelux goes beyond all foreign provisions and the doctrine of French case law.⁵¹ It protects not only social and economic intercourse in the Netherlands, but also that in *other* countries, even against the action of an incapable Dutchman.

47. Cf. Rabel I, 202; Batiffol, *Traité*, 492; Szászy, 201. See also the early resolutions of the Institut de Droit International in 1888, *Annuaire 1888/89*, 103, and of 1931, *Annuaire 1931 II*, 237, as well as *Annuaire 1932*, 567 (art. 4).

48. Tribunal de Grande Instance de la Seine, 12 June 1963, *Clunet 1964*, 285, note Ponsard, *Revue Critique 1964*, 689, H.B.

49. See Kusters (1917), 252; also Van Brakel, 226, rejects this exception.

50. Kusters-Dubbink, 613.

51. Section 2, para. 2, of the Uniform Law Benelux provides that protection is given to anyone who considered the incapable person, in good faith and in accordance with the law of the country where the act is performed, to be in full capacity.

Moreover, the Netherlands provision covers not only agreements, but also acts pertaining to Family Law and to the Law of Succession.

Also in the field of Matrimonial Property Law application of the national law often leads to results all too often unexpected by third parties. In several countries it is compulsory to have the clauses of marriage contracts or settlements recorded in public registers for the protection of third parties. In countries where it is permitted to make or modify matrimonial agreements during the marriage, certain statutory provisions have to be observed and are peremptorily to be complied with for the protection of third parties. However, this protection is anything but adequate. Wholly apart from the fact that—at least in most countries⁵²—nothing is recorded whenever foreign Matrimonial Property Law applies to spouses married *without* marriage contracts, the matrimonial property register is, as a matter of course, only rarely consulted. This latter objection naturally also applies to purely internal cases in which marriage agreements are made, but it looms much larger in countries where many foreigners or its own nationals married to foreigners are living, who—as a result of the application of the national law of those concerned or of the husband's national law—come under the operation of statutory provisions on matrimonial property at variance with the corresponding system in that country.

19. We have discussed a number of cases, but not anywhere near all of them, in which application of the nationality principle to matters of personal status gives rise to difficulties in practice, difficulties originating from the fact that the persons concerned have no nationality, are refugees, have more than one nationality, or are citizens or nationals of States with a multiple body of law. And these troubles may well also result from the fact that several persons, each one of different nationality, are simultaneously involved in a given legal relationship; from the fact that those concerned have, in another country—contrary to their national law—created a situation of fact that cannot anymore be undone; from the fact that the nationality has no true significance for the person in question at all; and—finally—from the fact that application of the national law to the personal

52. Otherwise Section 16, EGBGB.

status of the persons concerned will cause prejudice to third parties.

After this preliminary review of the problems of our subject-matter, and before going into the actual development of law more thoroughly, I should like to deal with the question: what motives or incentives can still be adduced these days in favour of upholding the principle of nationality.

CHAPTER III

A TURN OF THE TIDE?

A. What Pleas for Maintaining the Nationality Principle Can at Present Still Be Advanced?

20. Hardly anybody will dispute nowadays that the romantic grounds advanced by Mancini for the application of the nationality principle were inspired by political motives. For, it is very doubtful—to say the least—whether there exists at all in any general way a close connection between the rules of private law and the disposition of the members of the nation. Naturally, geographical, ethnic, historical and religious factors affect the contents of rules of law, in particular those of the Law of Persons, Family Law and the Law of Succession, but if it is borne in mind how many countries received Roman Law, how many countries copied the French Civil Code—from Poland to Latin America—that Turkey adopted the Swiss Civil Code and Japan the German Civil Code, the interconnection between the rules of private law and the factors just mentioned cannot possibly be so close and profound as to cause the application of any law other than the national law to be considered a gross injustice.¹ Moreover, as Kollwijn has observed,² the notion that a people is a collection of souls of like disposition whose uniform concept of law is reflected in the national law, is a naïve figment of the imagination. For see how widely the ideas proclaimed in one and the same State diverge, precisely in the field of matrimonial, juvenile and succession law! And Niboyet observed that if Mancini's assertions were at all correct, it would follow that even after a change of nationality application of the original national law in respect of personal status would have to be continued, a practice which nobody has as yet advocated.³

Not without good reasons a Swedish author wrote: "Mancini's

1. Interesting data on this in Schlesinger, 190.

2. Kollwijn, *Ontaarding*, 3.

3. Niboyet, *Cours*, 447.

doctrine consists of a number of dogmas which ought to be regarded as illusions by modern man. Reality has turned out differently from what the poet thought".⁴ Nationalistic romanticism is not yet quite defunct though. It is not surprising that the law-paladins of national-socialism embraced the nationality principle enthusiastically, but we shall not waste another word on their views. However, a man who is quite free from the taints of "Blut und Boden" (blood and soil), the Greek scholar Professor Maridakis, also argued in his course on the new Greek Civil Code: ⁵ "The argument adduced in favour of domicile, i.e., that a man feels closer to the country where he is living than to that of which he is a national, which may be sound for other people, could not possibly be applied to the Greeks. Greeks, wherever they happen to be, have only one dream, viz. to return and hear the chimes of their humble hamlet's church bells".* Others are not so emphatic, but for many people patriotism even to this day still continues to afford an argument for the principle of nationality. Wholly apart from the fact that patriotism often wanes as integration in the country of settlement waxes,⁶ and that Britons and Americans, who embrace the principle of domicile, are to my knowledge no worse patriots than Italians or Frenchmen, it would seem to me that in choosing between nationality and domicile as the fundamental connection for the personal law we should be guided only by rational considerations.

4. Folke Schmidt 50.

5. *Recueil* 1954, I, 159.

6. With Von Schilling—*RabelsZ* 1931, 639—one may wonder whether it is not, on the contrary, unjust to continue subjecting a person to the law of the community from which he has broken away of his own free will: "Shall a Roman Catholic to whom the Church and country of origin deny divorce not be able to sever the bonds of matrimony that have become unbearable, anywhere in the world? Shall the flagrant wrong of the so-called 'Ehefähigkeitszeugnisse' (the requirement to produce a governmental certificate to prove capacity to contract marriage), issued by the country of origin, which drives countless young people to despair, be everlasting? Shall a pariah remain a pariah always and everywhere?".* Hijmans, *Algemene Problemen*, 143, observed that, whereas those advocating the principle of domicile always advance matter-of-fact arguments, the nationality principle is always defended with a certain degree of enthusiasm. Hardly courteous, he qualified this as "humbug and mystification: one talks about *national* law, but means the law of the State to which a person belongs: the first word sounds better, though, because it evokes the idea of nationality, and there it is, the jurists thrive on fine words".*

21a. Even the great French protagonist of the principle of nationality, Antoine Pillet, observed: "The Italian doctrine is supported only by considerations of fairness and convenience and not by a single clearcut idea that is scientific and incontestable".*⁷ His reasons for the submission of personal status to the national law were that here we only are concerned with rules aimed at the protection of the person ("lois de protection individuelle"). Such rules must, according to Pillet, be subject to a hard and fast law and follow the person to whatever place in the world he may see fit to move. For protection which does not operate uninterruptedly is ineffective. In an unguarded moment the effect of a previous long-lasting protection may be wholly wiped out. Protection of the individual, Pillet moreover argues, is best entrusted to the State whose nationality that individual has, which in international intercourse is obviously the one that also has to take care of his diplomatic protection.⁸ This accounts at least more rationally for the application of the national law, but the explanation is anything but convincing. Wholly apart from the disputable allegation that the rules of law pertaining to the scope of the personal law serve only to protect the person, the reasons advanced by Pillet for making these rules subject to the national law, are, to my way of thinking, untenable. In support of his views he invokes the law of nations and the doctrine of sovereignty, which allegedly confer the right and impose the duty on each and every State not only to grant its subjects diplomatic protection, but also to apply to them—wherever they happen to be—their civil legislation, at least in so far as it bears on the rules concerning their personal status. These considerations cannot, however, be decisive in the conflicts of laws.

Our problem is which solution of the conflict is most in accordance with the interests of the particular person, with the interests of third parties, with the interests of the countries involved in the conflict, and with the requirements of our modern society.

Batiffol, who rightly has a great admiration for Pillet's constructive mind to which the science of Private International Law owes so much,

7. Pillet, 723, note 1.

8. Zitelmann, Frankenstein and several other authors also point to the connection with public law protection, sometimes also relying on history; cf. Batiffol, *Traité*, 383.

also considers that the reasons advanced by Pillet in favour of the principle of nationality are deficient. But he does attach considerable significance to the idea which Pillet developed, that *stability and continuity* are essential conditions for the personal statute: an infant must not lose his incapacity by crossing a frontier; and there are also other provisions that become senseless by removing their continuity. If all that a Frenchman has to do in order to obtain a divorce, unobtainable under French law, is to go to Geneva, says Batiffol, there is little sense in maintaining the French prohibitory provisions.⁹ To Batiffol and many other contemporary scholars the need for continuity and stability of rules of law regarding personal status is the most important and often the only reason for maintaining the nationality principle. We shall revert to what in my view is the only relative strength of this argument later on.

21b. Supporters of the nationality principle often stress that those who have been born and bred in a Western civilization cannot accept being subjected to the law of a domicile whereby bigamy, child-marriages and repudiation of wives are permissible. "Countries accepting the principle of domicile have only two ways of escape: public policy or the introduction of a domicile of origin. A domicile of origin is nothing but a substitute for nationality . . . and the principle of public policy applied in such cases is no more than a mask for the principle of nationality . . .",* wrote my teacher Meyers, who also drafted the detailed explanatory comments on Section 2 of the *Draft Uniform Law Benelux*, in which the nationality principle is maintained.¹⁰

Admittedly application of the law of a person's domicile may in some cases clash with fundamental principles of law in the country of his nationality and for this reason a court in the latter country may then invoke public policy. Such a conflict, however, may also arise when application of a person's *national* law clashes with fundamental principles of law in the country of his domicile. This does not, there-

9. Batiffol, *Traité*, 278, 381, and in numerous other works, including "Les chances de la loi nationale" and "Principes", 504.

10. Meyers, *AJCL 1953*, 1 et seq., as well as Meyers' note in *Annuaire 1954 (45) I*, 257.

fore, constitute an argument of principle for or against nationality as a connecting factor in conflicts relating to personal status. Moreover, the problem we are facing does not entail deciding whether in *exceptional* cases—rarely occurring in actual law practice¹¹—application of the national law produces better results than application of the law of domicile, but whether this is so in *normal* cases.

21c. Many people contend that linking personal status to the national law instead of the law of the domicile has the important advantage that one's nationality can be ascertained with greater certainty than one's domicile and, therefore, this ensures legal security. For the Union Internationale du Notariat Latin this was recently the decisive argument for giving preference to the application of the national law in respect of matrimonial property and succession law over the application of the law of domicile.¹² It could be asked with Schlesinger whether, "in the face of the mass-expulsions, mass-expatriations and frequent (and often controversial) territorial changes which have characterised the history of Europe and Asia in the last decades", it is still true that nationality is easy to ascertain.¹³ But apart from this, the acceptability of this reason for applying the national law to a large extent depends on the concept of domicile which one would wish to use in conflicts of law as an alternative of the concept of nationality. If the concept would have a different meaning in each country and for various subjects of law, and if, moreover, subjective factors would play a considerable part, it must be admitted that solutions of conflicts based on domicile can hardly be expected to be uniform and predictable.

21d. In the Explanatory Memorandum to the Draft Uniform Law Benelux it is observed that application of the national law to Family Law also has practical advantages. In Statute Law on Nationality a person's marital status, his majority, his status of being a legitimate or a natural child, etc., are constantly taken into account. According

11. Even in countries where polygamous and child marriages are still legally allowed, they are becoming more and more exceptional in practice, whereas repudiation of a wife is in fact frequently a divorce by mutual agreement.

12. VIIe Congrès de l'Union internationale du Notariat Latin, *WPNR* 4835, 504/511 (French text).

13. Schlesinger, *Comparative Law*, 461.

to the argument in the Memorandum this can only relate to status, majority, etc., obtained under the person's own national law. Whether a child is legitimate or not, or whether the spouses are legally married, can hardly be judged at one time by one law and then at another by a different law, according to the importance this may have for the ascertainment of a person's nationality or of the legal relations in Private Law of the persons concerned.

This reasoning is not correct, as could have been established already by considering that in the laws on Nationality of countries adhering to the principle of domicile similar concepts of Family Law are used. Legislation on Nationality does not afford any arguments in favour of the nationality principle. If the legislation on Nationality for example connects a person's nationality with his being born in lawful wedlock, this only means that it must first be established whether *according to the applicable law* a certain child is legitimate. However, this applicable law need not be the domestic law pertaining to the legislation on Nationality.

B. A More Recent Trend Urges a Return to the Principle of Domicile

22. During the past few decades a body of opinion favouring a return to the principle of domicile can be observed. Many people attribute this trend to the increase of emigration and the interests of the immigration countries. After the First World War the French learned authors in particular wondered whether it was at all reasonable to continue to subject to their national law some 4 million foreigners who had settled in France. A number of authoritative jurists in France expressed a distinct preference for subjecting personal status to the law of the domicile.¹⁴

Niboyet, in 1928 still a supporter of the nationality principle and a follower of Pillet, but shortly afterwards a keen advocate of the principle of domicile, wrote: "We are increasingly convinced that the change-over from domicile to nationality resulting from a mis-

14. See Niboyet, *Manuel*, nos. 586 et seq.; Lerebours-Pigeonnière, *Précis*, nos. 256, 363; Julliot de la Morandière; Martin, I, 192; Cassin, 732; Donne-dieu de Vabres, 409; Audinet, 296.

apprehension, and later from doctrines, that had stimulated unfounded enthusiasm, was a serious mistake which the world will be compelled to reverse and abandon".* ¹⁵

In 1930 the Société d'Etudes Legislatives, following a report of Niboyet, had already drafted a number of exceptions to Section 3, paragraph 3, of the Code Civil. A few years later the Comité français de droit international privé, once again on the proposal of Niboyet, drafted a provision to replace Section 3, paragraph 3, of the Code Civil, which read: "The status and legal capacity of persons shall be subject to the law of the country of their domicile".* ¹⁶ Of equal importance were the discussions at the meeting of the Institut de Droit International in 1931 and 1932 on "conflicts of law relating to the status and capacity of persons".* ¹⁷

In other nationality countries also people began to wonder whether it had been wise to make the nationality principle the leading principle in dealing with conflicts of law. In 1926 Simons, the President of the German Reichsgericht at the time, gave a course of lectures to the Académie de Droit International in which he said: "With growing confidence in the federal spirit of the League of Nations I foresee a retrograde movement of the national law as the personal law and a return to the principle of domicile".* ¹⁸

In a remarkable article the Latvian law scholar Von Schilling declared that he supported the principle of domicile.¹⁹ The Dutchman Hijmans ²⁰ observed in 1937 that according to numerous pronouncements made by learned authors and the denunciation of treaties proceeding from the national law, the pendulum of history appeared to be swinging back to domicile. Even in the home country of the

15. Niboyet, *Traité*, III (1944), 212.

16. Draft of 1934 (1939) published in *Travaux 1938-1939*, 69/70. This radical proposal was reconsidered and abandoned later. In more recent drafts the nationality principle was incorporated again, with the exception that foreigners who have lived in France for more than 5 years were to be subject to French law; in the latest draft, that was drawn up after the death of Niboyet, this exception also was abolished (1959).

17. *Annuaire 1931*, I, 163, and II, 69, as well as 1932, 186 and 425.

18. Simons, 480/483; 524/525.

19. Von Schilling. In the Scandinavian conventions of 1931 and 1934 also the principle of domicile was given priority (text in *RabelsZ 1933*, 724; 1934, 627; 1935, 266).

20. Hijmans, 149.

nationality principle, Italy, Fedozzi²¹ expressed his preference for the principle of domicile, and Brazil, one of the few South American States adhering to the nationality principle, switched to the principle of domicile in 1942.²² This trend continued vigorously after the Second World War, as we shall see later.

23a. What arguments can be advanced in support of a rule of conflict of laws based on the principle of domicile with respect to personal status?

First of all: by establishing a residence a choice of environment, of milieu, is also made. Application of the law of domicile, therefore, signifies at the same time making the connection with the legal atmosphere elected by the person in question himself. This atmosphere is one to which for reasons best known to him he has given preference over that of his native country. It also is—at least in general—in accordance with the interests of the person concerned that he be made subject to the law of his (new) residence with respect to his personal status. What is more natural than the wish to live like the other inhabitants, whether they be his working-companions or people he meets socially and associates with?²³ This is especially true of immigrants who are keen to become part of the community of the country where they have settled as soon as they possibly can. People really form part of a community only if and when in their personal life (legal capacity, marriage, matrimonial, parental and filial relationships, divorce and succession) they are subject to the same rules of law as the other members of the community.²⁴

21. Fedozzi.

22. Venezuela also seems to want to give up the nationality principle; cf. De Nova, *AJCL* 1964, 557. The Inter-American Juridical Council proposed in its fifth report on a revision of the Bustamante code: "the addition of a protocol to the convention which would make the law of the domicile the 'personal law' and provide that existence, status and capacity shall be determined by that law". See Nadelmann, *AJIL* 1963.

23. Cf. Lerebours-Pigeonnière, 386/87: "An isolated individual, and even a family, soon adopt the way of life of the country in which they have established their habitual residence... A non-Catholic Italian in Italy will, e.g., put up with the divorce bar to which everybody around him is subject: compliance will be much more difficult if he is living in France among people where divorce is widespread".*

24. Cf. Kauschansky.

Moreover—and it would seem to me that this considerably strengthens the argument advanced—it is not only the wish or supposed wish of the person concerned that matters, but also and especially the question whether it is *just and fair* to subject personal status to the law of domicile. Mancini and his followers urged pathetically that it would be unfair in the highest degree not to make a person's status subject to his *national* legislation. In their eyes this constituted—as we have seen—an undue, even intolerable, encroachment on his personal liberty, a denial of his personality. I should say that in this respect, ideas have changed tremendously. Application of the law of the country of domicile means making the resident subject to the law of the country whose economic and social conditions also apply to him. If economic and social conditions are regarded as important determinant factors of sources of law in the field of Family Law and the Law of Persons as well, this implies that by applying the law of the domicile those rules of law are applied that are most in accordance with these factors.²⁵

The law of a person's domicile is, moreover, the law of the community in which he lives and works, by whose cultural influence he will be affected in a hundred different ways and in almost every domain, whose customs, language and legal concepts he often adopts with astonishing speed, whose joys and sorrows he shares, willingly or unwillingly.²⁶

It will be clear, though, that the weight this carries depends on the duration of settlement abroad, or at least on the intensity of the integration. We shall, therefore, have to deal with this aspect later on.

23b. There is yet one other important reason for considering the application of the law of domicile in the vast majority of cases to be in the interest of the persons concerned. For is not this law—if I may borrow a term from the Sociology of Law—the law of *reality*? Questions regarding the personal status of these persons (their marriage, their matrimonial property rights, the legal relationships with their

25. I have always thought it curious, if not odd, that the socialist countries, with their emphasis on the connection between law and social economic conditions, rank among the most orthodox supporters of the nationality principle.

26. Cf. De Winter, *De maatschappelijke woonplaats*, 19.

children, legitimation of children, adoption, divorce, etc.) will almost exclusively arise in the country where they are living. In practice they show little or no concern for the law obtaining in their native country, but solve these questions in accordance with the law of the country in which they are residing. Moreover, the greater part of the immigration countries are also domicile countries and therefore neither the lawyers nor the courts care much for the law prevailing in the immigrants' country of origin. Consequently, Dutchmen, e.g., who have settled in South Africa, Australia, New Zealand or Canada obtain a divorce, contract a second marriage, legitimate or adopt children, make wills, etc., pursuant to the law of their residence. And if all these legal actions then prove to be null and void, or voidable under Netherlands law this may indeed be highly interesting in theory, but in actual practice it is usually of little significance. If a Dutchman dies in Canada leaving his entire estate there, the only thing that usually interests the heirs is whether they will be considered in Canada to be entitled to inherit. It won't get anyone so entitled under Netherlands law, but not under Canadian law, a crust of bread. In other words, with respect to emigrants, upholding the nationality principle will frequently have no effect whatsoever. The intended purpose, of having the subject submit to his national law is, as a rule, not achieved.

23c. As we have seen, legal questions regarding personal status nearly always arise in the country where the people concerned are living. Consequently—and this is the other side of the picture—for the courts, the lawyers, barristers and solicitors in the countries where these questions have to be solved, it is a great advantage if they can do this in accordance with their own law. It simplifies their work as well as the administration of justice. As things are at present, lawyers in nationality countries, where foreigners of a variety of nationalities are living, must apply foreign law in many difficult cases. A thorough knowledge of this foreign law and its administration abroad is then required, which places the legal profession in the unenviable position of trying to cope with almost insuperable difficulties. Judges and other authorities are saddled with a duty which—especially in smaller towns without large and modern libraries—they cannot properly dis-

charge. This in turn results in a situation in which the courts in many cases apply foreign law guided by obsolete manuals or superseded case-law. And sometimes by invoking "public policy" or other means of escape, they apply the law of their own country, notwithstanding the prevailing rule of conflicts of law to the contrary.

The *unity of forum and ius*, which as a rule will be realised by the application of the law of domicile to personal status, brings about the additional important advantage that the courts will be in a position to avail themselves (in the manner laid down by their own law) of the auxiliary institutions and organisations existing in the field of Family Law. The special bodies in the field of child welfare come to mind in this context. In the legislations of many countries a close connection exists between provisions of substantive law and procedure in the scope of voluntary jurisdiction, which is often deemed to include the removal or relief from parental power, the placing of children under supervision, the appointment of guardians and curators. The legislator intended to establish this close connection. Severing it by the application of foreign substantive law to persons living in the legislator's own country or, conversely, of domestic law to subjects not living in their own country, leads to great practical difficulties, and it is only by means of a number of subtle artifices that more or less acceptable solutions can then be found.²⁷ Should the whole *procedure* with respect to foreigners be left to the foreign national courts—as was done with some exceptions by the Hague Conference at the beginning of this century with regard to guardianship and interdiction—then a highly unsatisfactory situation arises in which parents are divested of parental power, guardians are appointed and children placed under supervision, by authorities who have never set eyes on the children or talked with them, and who can only gather from reports supplied by official bodies and persons in foreign countries of which they have no knowledge, in what circumstances these children are living and growing up. Furthermore, supervision of the direct control over those children will also have to be exer-

27. Cf. Dölle, *RabelsZ* 1962, 230 et seq.; Elke Suhr, 94-98; Wahl, *op. cit.*, 134. See on the problem of unity of forum and jus also Batiffol, "Observations", and Francescakis' review of this article in *Revue Critique* 1963, 869/70.

cised, and the consent of the supervising authority required for certain acts will have to be given on the strength of documents written without any direct contact with the child itself. Only after the spell cast by the nationality principle is broken, is it realised what an impossible situation has been created, particularly on this score. For, in practically all the cases in which the position or the interests of children or other persons in need of protection are at stake, it is not the *national* court, but exclusively that of the place where these people are living which can form an opinion with full knowledge of the facts as to whether, and if so what measures should be taken. The effectiveness of such measures is, moreover, assured only, if they are taken in accordance with the rules prevailing in that country, under the supervision of its established authorities and with the co-operation of such auxiliary organisations located there as the authorities have power to introduce.

23d. In support of application of the law of the country of domicile it may furthermore be argued that it benefits other parties, whose interests—as has been observed ²⁸—are frequently prejudiced by the application of the national law. We have seen that in this connection in very many countries which accept the nationality principle, recourse to contractual incapacity based on the provisions of the national law as against other parties has either been excluded or severely restricted.

If capacity is made subject to the law of the country of domicile there will, however, still be cases of persons who, being incapable under the law of their domicile, perform legal acts in another country under whose law they are considered capable. It should be borne in mind, however, that other parties with whom foreigners perform legal acts will as a rule be persons (whether natural or artificial) living or situate in the same country. Application of the law of the country of residence to capacity will, therefore, in practice usually be tantamount to applying the law which for the foreigners as well as for the other parties involved is the law of their common residence, i.e., the law on which they have both relied. In that event there will be less

28. See No. 18c, *supra*.

need for the Lizardi doctrine. In addition, it will usually be much more simple for other parties to ascertain whether the persons with whom they are trading, *live* abroad, or whether they are of foreign *nationality* although living in the same country.

23e. Furthermore, rapid integration of foreigners is consistent with the interests of the country in which the emigrants are settling. Legal writers have often propounded that emigration countries espouse the principle of *nationality* and immigration countries that of *domicile*. Though to a great extent correct, this is not totally true. Examination of the reasons, however, for which most emigration countries support the nationality principle will show that they are sentimental rather than rational, whereas examination of the reasons why nearly all immigration countries espouse the principle of domicile shows that here indeed very real interests are at stake. Should other rules of law apply to immigrated foreigners than to the country's own nationals with respect to marriage, rights and duties of spouses, relations between parents and children, guardianship, divorce, etc., then the foreigners will continue to form a separate community. This will impede the assimilation which is desirable for political reasons also, and will cause unwarranted delay. As was mentioned before with respect to the difficulties that were occasioned by the Hague Convention on Marriage,²⁹ application of the national law may, furthermore, result in having to tolerate indirect but nonetheless undesirable interference by foreign authorities.

Nor should the purely practical difficulties incidental to the application of the national law to the personal status of foreigners, already briefly referred to earlier, be underestimated. It puts a heavy burden on the administrative and judicial authorities, and its realisation is hardly practicable. It was not mere chance that in a country like Brazil, where large bodies of immigrants had settled, it came to be recognised, in 1942, that the nationality principle could no longer be upheld. Most of the other Central and South American immigration countries which have remained faithful to the nationality principle, such as Chile, Costa Rica, El Salvador, Honduras, Colombia, Ecu-

29. See No. 13, *supra*.

dor, Peru, Venezuela and Mexico, construe it to mean that only the personal status of their *own* nationals (wherever they may happen to be or stay) is subject to the national law, whereas that of *foreigners* is subject to the law of their residence, thus making the nationality principle farcical.³⁰

23f. Cassin in his lectures given for this Academy in 1930 even then pointed to the circumstance that expansion of international trade relations in particular made the application of the nationality principle to personal status very difficult indeed: "When it is a matter of determining the law applicable to the relations between the leaders of industries or trading enterprise and their employees, their financiers, their suppliers and their customers, it is surprising to discover to what extent the concept of nationality is useless on account of the intense interpenetration of international elements that business life nowadays brings into play".* ³¹

How much more telling are these facts now that, 39 years later, we have entered a new era marked by a steadily increasing integration in almost every field. One has to be devoid of nearly all sense of realism still to attribute a decisive importance to the nationality principle in international commerce and with regard to the transactions giving rise thereto. But even outside the domain of businesslife, society has changed so much that the application of a rule of conflicts of laws based on the nationality principle, with respect to personal status, creates ever increasing difficulties, whereas making the connection with the place of residence affords, with increasing clarity, important practical advantages and leads to internationally acceptable solutions of conflicts.

Large-scale migration of labour, growing freedom for the middle classes and the professions to settle and supply services such as

30. Also in European countries mere lip-service is sometimes paid to the nationality principle. In Holland, e.g., Netherlands law is considered to be applicable to Dutchmen living abroad who want a divorce, but for the last 60 years the courts here have usually applied Netherlands law, invoking public policy, to divorces of foreigner's living in the Netherlands! As for Germany, see Braga, 49.

31. Cassin, 760.

shown for example within the EEC, employment in another country, vocational training or specialisation outside the home country, long- or short-term activities in the developing countries, cause millions of people to pass varying periods of time abroad. During their sojourn abroad they contract marriages, beget children, adopt children, are appointed guardians, are deprived of parental authority, are placed under guardianship, seek divorces and make wills. If for the purpose of judging the validity and also of determining the legal consequences of all these acts, the national law of the person concerned has to be applied, it will almost always be necessary to have recourse to authoritative legal assistance, to consult extensive law libraries and to have plenty of time available. The birth of many new independent States, each with its own laws, has considerably increased these difficulties in recent years.³² In our present-day world the uncompromising adherence to the rigid demand to apply the national law to personal status must, therefore, be considered as mere fads of desk-lawyers who show no concern at all as to whether or not their theoretical constructions can be carried out in practice.

This does not mean that application of the principle of domicile will yield a simple and always satisfactory solution in all these international situations. I do feel, however, that in a very large number of cases this will be so and that our society is developing in a direction that makes it ever more desirable, if not imperative, to proceed on the basis of the connection with a person's domicile.

Social, economic and political development is obviously moving towards increasing State-interference in matters which a few decades ago were wholly, or nearly wholly, within the realm of private concern. A telling example is the development of child welfare. Fifty years ago it was entirely entrusted to parents and guardians, whereas now very extensive powers are conferred on public bodies. In civilised countries child welfare has increasingly come to be regarded as a duty incumbent upon the community. The resulting consequences for the conflicts of law were clearly evidenced by the judgment of the International Court of Justice in the famous case between the Netherlands and Sweden in the matter of Marie Elisabeth Boll, an infant of

32. Also Ficker points this out.

Netherlands nationality, living in Sweden.³³ The Court held that “to achieve the aim of social guarantee which is the purpose of the Swedish law on the protection of children and young persons to provide, it is necessary that it should apply to all young people living in Sweden”. This decision was the death-knell for the Hague Guardianship Treaty of 1902, based as it was on the principle of nationality.

As the community, any community, undertakes increasing care of and assumes greater responsibility for the protection of the individual, for his own sake as well as that of the community itself, there is a greater need for the application of its *own* law to all who form part of the community and live within the State’s national frontiers, whether or not they possess the nationality of that State. For, whenever protection of the community is at stake, nationality is irrelevant. This development is encouraged by the proliferation of imperative rules and the blurring of the distinction between Private and Public Law.³⁴

Political development in the direction of increasing integration, also entails consequences for Private International Law and especially for the controversy over the nationality versus the domicile-principles. In their lectures given in 1926 and 1930, respectively, Simon and Cassin were even then able to point to the fact that the birth of the League of Nations in 1919 and the ensuing co-operation of independent States had brought about an increasing influence of the law of domicile.³⁵ Although it certainly cannot be maintained that the development in the direction of intensified inter-State co-operation was accomplished without ups and downs, it is nevertheless evident that the world tends towards integration. What is even more: it is becoming increasingly clear that the slogan “one world or none” is necessarily and ominously true.

Europe, which—at the time Cassin gave his lectures here—was a horrible instance of glaring political, economic and social contrasts,

33. International Court of Justice, 28 November 1958, *ICJ Reports 1958*, 55 et seq.

34. Braga, 39, speaks in this connection of “sozialisierte Rechtsnormen” (socialised legal rules) claiming territorial validity.

35. Simons, 524; Cassin, 762.

has since taken important and decisive steps towards unity and integration. In the field of law progress is also being made, although at a slower pace than many would wish. In the course of an exchange of views in 1964 at the Comité Français de Droit International Privé on the subject of the principle of domicile Cassin asked: "If a Europe is founded, either the Europe of the Six, or a larger Europe, despite the deep attachment of certain countries like Italy and Germany to the national law, will the Europeans yet uphold the criterion of the national law in a State organised on intrinsically regional lines, which will be the forerunner—I do not say of a new State—but at least of a Confederation of States?"* And giving the answer himself he continued: "Will not domicile then gain some sort of added strength again, due to the fact that there will be a much greater mixture of people of different countries? I believe that at the European level, we are inevitably moving towards domicile, whereas, at world level, I should not like to make any forecasts, insofar as everything is going to depend on the future of the United Nations".*³⁶ Professor Lousouarn shared this view, when he referred to recent treaties concluded by the Hague Conference of Private International Law, which will be discussed in greater detail later on. He also pointed out that the two most powerful countries in the world, the United States of America and the Soviet Union, are federal States with multiple systems of law and that for the solution of conflicts of laws between the systems of law of the component states, the nationality of individuals is not considered at all, whereas their residence is decisive.

To me also it would seem to be a correct assumption that if the world develops in the direction of one or more federal or quasi-federal States, in which each component state or state belonging to the regional group would have its own legal system, the national law (within a federation: the law of the State of origin) will no longer govern conflicts of law with respect to personal status, but the law of the domicile will prevail. The Scandinavian countries give an example of such a development. In inter-Scandinavian conflicts Sweden and Finland have abandoned the nationality principle. Within the territory of the Scandinavian countries, the present situation is that each and

36. Cassin, *Travaux 1962-1964*, 318.

every citizen may be called before the courts of the country where he is living, and the law obtaining there will be applied to him in respect of matters of marriage, adoption, guardianship and succession, at least if he is residing in that country for a certain length of time.³⁷

Except for its article 220, the Treaty of Rome of 2 February 1958 does not contain any provisions on Private International Law. That article, however, bears witness to the intention to create a legal unity in Europe within which any connection of personal status with nationality would be an anachronism. Professor Eduard Wahl, vice-president of the Legal Committee of the Council of Europe, who recently published a paper on personal status in Europe, states: "In conclusion it should be stated that the nationality principle has had its hey-day".*³⁸ Schwind rightly observed: "In respect of the present situation the following may be said: the nationality principle differentiates, the principle of domicile amalgamates . . . Wherever political and economic unity has been established already against what is, at least in broad outline, a common historical, spiritual and cultural background, as in the British Commonwealth, or in the United States of America, or where this unification is in progress, as in Western Europe, amalgamation is an essential prerequisite and is most desirable, to say the least".*³⁹

23g. Well then, should it be inferred from this growing preference for the application of the principle of domicile *within* Europe that in matters of legal intercourse between citizens or residents of *different* federal or quasi-federal States (groups of States), the nationality principle should be maintained? This may theoretically be possible, and up to a point it may perhaps even be defended. All the same I am of the opinion that the answer should be in the negative. In the first

37. Philip, *Recueil* 1959, I.

38. Wahl, 152. Similarly Braga, 42, and Zweigert; furthermore, Elke Suhr puts in a strong plea for the domicile principle in Europe. Also Francescakis, *Travaux* 1962-1964, 323, is expecting a system based on "statutory domicile" within Europe, which he thinks to be the best solution.

39. Schwind, *Festschrift Dölle*, II, 113. It is interesting, but by no means surprising that there is an analogous development in international criminal law. Cf. Enschedé: "Culturally we are drawing closer to one another and this uncovers the antiquated character of the nationalist interpretation of the personal system".*

place because, as we have seen already, even if the special reasons outlined do *not* obtain, a number of other important reasons militate in favour of the principle of domicile and against that of nationality. In the second place because a dualistic system of applying the domicile principle *inwardly* and the nationality principle *outwardly* would complicate legal intercourse unnecessarily and cause limping legal relationships that could well be avoided. In the third place because application of the principle of domicile may well promote further integration, and the creation of ever larger legal unities.

It could also be put otherwise: if it is at all desirable *within* large federal States and regional groups of States to make personal status subject to the law of domicile, very convincing grounds indeed will have to be advanced if, for purposes of legal intercourse between citizens of different groups of States, we are to prefer another principle, and to forego the most desirable uniformity of conflicts of laws solutions in this field. I do not know of any such convincing grounds.

CHAPTER IV

DIFFICULTIES INCIDENTAL TO THE CONCEPT OF
DOMICILE AND THE EMERGENCE OF THE NOTION OF
HABITUAL RESIDENCE AS A CONNECTING FACTOR

24a. An objection often raised against a rule of conflicts of laws based on the domicile principle is that differing meanings in different countries are attributed to this notion and that even in one and the same country domicile may have diverse meanings according to the legal subject-matter with which it is connected. The conclusion drawn then is that such a vague and multiple term is unsuitable for use in Private International Law, because subjection of personal status to the law of domicile would lead to difficult problems of classification, which would in turn result in great legal insecurity.

It cannot be denied that opinions on the significance of the term domicile diverge widely. What "domicile" is understood to mean in the United Kingdom is entirely different from the meaning attached to it in continental countries, but it also varies from the American concept of domicile.¹ In the United Kingdom, as we have already observed, the concept of domicile corresponds rather more closely to the continental notion of nationality than to the continental concept of domicile as residence.² The domicile of origin—the domicile of the father at the time of birth of the child, and in the case of illegitimate children the domicile of the mother—follows the person wherever he goes. True, he may acquire a domicile of choice, but this is by no means a simple matter. The prerequisite is the intention of the person concerned to have his permanent home in the country of his choice, and in this context permanent means: "for life". "It has

1. On the various meanings of the concept of domicile see, *inter alia*, Von Steiger, *Wohnsitz*; Lévassieur; De Magalhaes; Cassin; Mösslang; Laube. Franciscakis, *Travaux 1962-64*, 291, refers to "avatars du domicile", derived from the Sanskrit "avatara", designating the various incarnations of a deity.

2. Cf. Batiffol, *Traité*, 433, who refers in this connection to an exchange of letters in 1946 between the British and Syrian Governments in which the national law is regarded as equivalent to the law of the domicile of origin.

several times been affirmed, and more than once by the House of Lords, that the present home of a man is not to be equated with domicile if he contemplates some event, however remote or uncertain, that may cause him at some indeterminate time in the future to change his country of residence. If this possibility is present to his mind, even an intention to reside indefinitely in a place is ineffective".³

Should one succeed in establishing a domicile of choice, then the domicile of origin revives as soon as the chosen domicile is abandoned. Not without reason Cheshire says: "In fact it (domicile of origin) transcends even nationality in stability and permanence, for though it may be placed in abeyance, it can never be destroyed. To the end of his life a man's domicil of origin retains its capacity for revival". It is not surprising that in the United Kingdom similar objections were raised against the principle of domicile as had been advanced against the nationality principle in nationality countries: "It will not infrequently happen that the legal domicil of a man is out of touch with reality, for the exaggerated importance attributed to the domicil of origin, coupled with the technical doctrine of its revival, may well ascribe to a man a domicil in a country which by no stretch of the imagination can be called his home".⁴

With the domicile of origin there is also the inconvenience that third parties often cannot possibly ascertain it. There are strong currents of opinion in the United Kingdom, especially among learned authors, in favour of the introduction of a new concept of domicile. In 1954 the British Private International Law Committee drafted a code of domicile in which the acquisition of a domicile of choice was simplified: "Where a person has his home in a country, he shall be presumed to intend to live there permanently", whilst, at the same time, the revival of the domicile of origin was precluded. The Government adopted a large number of the proposals, but as a result of a number of letters to the Editor of *The Times*, giving expression to the

3. Cf. Cheshire (1965), 145, and Graveson (1969), 197, citing case law.

4. Cheshire, 171. Anton, 181, writes: "The history of the law of domicile illustrates how the law may adopt as a legal concept a familiar idea of everyday life and, through the operation of a rigid system of precedent, transmute it into something further and further removed from the realities of that life".

apprehension that the introduction of a new concept of domicile would entail undesirable fiscal consequences for a number of persons, a reform was provisionally abandoned. A second Domicile Bill, introduced into the House of Lords in 1959, also made no progress.⁵

24b. In the United States of America the domicile of origin is also known as that obtained at birth (domicile of the father); a domicile of choice may be acquired by a person who is legally capable of changing his domicile. In addition to legal capacity, acquisition of a domicile of choice requires physical presence in a place and the intention to make that place one's home at least for the time being. A domicile thus established continues until it is superseded by a new domicile.⁶ Consequently, there is no question of a revival of the domicile of origin. What must be deemed to constitute "home" is defined in the Restatement of the Law, Second, Conflict of Laws, as follows: "Home is the place where a person dwells and which is the centre of his domestic, social and civil life". Although it is observed that the "mental attitude towards the dwelling place in respect to its character and permanency is an important factor in determining whether the place is or is not his home", the examples given in the Restatement show that the ascertainable facts are decisive.⁷

24c. In most continental countries domicile is acquired "animo et corpore" as in Roman Law. But the requirements applied to such "animus" are not the same in all countries, and the requirements in respect of physical presence also vary.⁸ Furthermore, the elements and rules of *evidence* with respect to domicile—in practice a point of very great import—differ in several countries.

5. On the vicissitudes of the proposals of the Private International Law Committee, see Graveson, 191, Anton, 181, and Michael Mann.

6. See *Restatement 2nd 1967*, Part I, §§ 14-20.

7. Cf. *Restatement 2nd 1967*, Part I, § 12 gives i.a. the following example: A was born in State X and lives with his family in a house in State Y for ten months of the year. For two months he and his family live in a hotel in X. A detests Y and always speaks of X with affection, deeply regretting that there is no prospect of his being able to live anywhere else than in Y. The facts tend to show that the house in Y is A's home.

8. Comparative law data are given by the authors mentioned in footnote 1, as well as by Kosters-Dubbink, 685.

The French Code (Section 102) uses the term "principal établissement". A new domicile is obtained by the factual acquisition "d'une habitation réelle dans un autre lieu jointe à l'intention d'y fixer son principal établissement" (Section 103). The Netherlands received this provision into their law but added that, failing such principal abode, the place where a person is actually living shall be taken to be his domicile. The German Civil Code (BGB), Section 7, stresses the lasting character of the abode: "Wer sich an einem Orte ständig niederlässt, begründet an diesem Orte seinen Wohnsitz". To the same effect is also the Swiss Civil Code (Section 23, paragraph 1): "Der Wohnsitz einer Person befindet sich an dem Orte, wo sie sich mit der Absicht dauernden Verbleibens aufhält". The Italian Civil Code (Sections 43 and 44) in defining domicile also takes business and other interests into consideration and refers to the "sede principale dei sui affari e interessi", whereas the place where the person has his habitual residence ("dimora abituale") is designated as "residenza". As against third parties acting in good faith, change of "residenza" can only be invoked if such change has been notified in accordance with the statutory provisions obtaining. In Spain (Section 40) the "residencia habitual" is regarded as the domicile.

Furthermore, even *within* one and the same legislation the notion of domicile does not always have the same meaning. According to the subject-matter in connection with which domicile plays a part, the concept may vary considerably in meaning.⁹ As a rule, e.g., in tax law a comprehensive concept of domicile is adopted, whereas in the law of procedure the concept is frequently a somewhat narrower, yet still a wide one. The conditions pertaining to domicile in family law are usually more stringent.

In Germany, the Netherlands and Italy it is possible to have more than one domicile, but not so in Switzerland and France. The provisions regarding the domicile of dependent persons moreover vary, especially those concerning married women. In many countries a married woman may now take a separate domicile, but this is, in general, not the case in France, Italy, Spain and Switzerland.

9. Cf. extensively Levasseur, Reese and Francescakis, "Les avatars", 291. In the Netherlands Kollewijn has repeatedly pointed this out, i.a. in *Tijdschrift van het Recht* 1929, 28 et seq. and *WPNR* 4833 and 4886.

This very incomplete survey will suffice to make it clear that serious objections can be raised to the use of "domicile" as a connecting factor in conflicts of laws.¹⁰ Not only may different solutions be encountered in the countries involved in a conflict, if the meaning attributed to the notion of domicile in those countries varies, but one is also faced with problems of classification and of renvoi if a person, e.g., is domiciled in country X according to the *lex fori*, whereas according to the law of country X he is domiciled in the country of the forum or in a third country.¹¹ Besides, the establishment of someone's "intention" is, in legal practice, naturally fraught with great difficulties and uncertainty.

25a. For all these reasons a new notion, viz. "*habitual residence*", has practically ousted the conception of "domicile" in modern Private International Law. The term "habitual residence" was used for the first time in a number of bilateral treaties on Legal Aid, in which the authority of the habitual residence of the applicant was designated as the proper authority competent to issue a certificate of indigence. A similar provision is to be found in the first Hague Convention on Civil Procedure of 14 November 1896.¹² Why preference was then given to this term rather than the usual reference to domicile, has not become apparent. Van Hoogstraten¹³ presumes that the term, apparently to be found for the first time in a treaty between France and Prussia of 1880, is a translation of the German expression "*gewöhnlicher Aufenthalt*".

The term habitual residence was once more used in the Hague Convention on Guardianship of 1902. This was done so as to signify that the infant's own residence was envisaged rather than his legal,

10. Mahaim stated in a report to the Institut de Droit International, *Annuaire 1931*, II, 180, that he had found no less than 50 various definitions of the concept of domicile. De Magalhaes drafted a treaty in 1928, with a view to arriving at a uniform interpretation of the notion of domicile; cf. the appendix to the Cours in *Recueil, 1928*, III, 138. See also Brosset on the various attempts to arrive at unification of the notion of domicile.

11. Regarding these problems also see Von Steiger, *Wohnsitz*, 102/186, and Mösslang, 83/123.

12. Cf. *Actes IIe Conférence (1894)*, 108 and Final Protocol, p. 6 (art. 2).

13. *Recueil 1967*, III, 359.

dependent domicile.¹⁴ The same consideration led to the substitution of the term habitual residence for the word "domicile" in the Interdiction Convention of 1905. A more fundamental discussion was held in the course of the VIth Session of the Hague Conference (1928), when the question was tabled as to whether it was desirable to insert in the Conventions of 1902 and 1905 on Family Law a special provision for stateless persons. Karl Neumeyer, the German delegate, had proposed to subject the matrimonial capacity of a stateless person to the law of his habitual residence.¹⁵ He argued: "Habitual residences always vouch for a certain measure of duration, of continuity of the legal situation of the individual concerned. One might consider domicile, but the concept of domicile varies greatly from one legislation to another; in the Anglo-Saxon States, e.g., this notion is completely different from the one obtaining on the European Continent".* Originally the German proposal met with little support; a number of delegates preferred the notion of domicile, the term habitual residence being too factual for their taste. But the drafting committee, once it had studied the problem, appeared to share Neumeyer's views and suggested the use of the term "habitual residence". The Rapporteur Guex urged: "One avoids the notion of domicile so as to end all difficulties resulting from the definition of that term, which is all the more troublesome in that there is no municipal law that provides a means of knowing for sure whether or not there is domicile".*¹⁶ In respect of dual nationals also it has been suggested that one should substitute the connecting factor of habitual residence for that of domicile. The national law, which is at the same time the law of habitual residence, was designated in the first place as the applicable law.

The proposals of the drafting committee were adopted unanimously. The Belgian delegate Kinon, who had at first opposed the replacement of the legal concept of "domicile by the factual notion of habitual residence", gave the following reasons for his change of attitude by arguing that: "One of two things: *either* the habitual residence coincides with the domicile, and in that event identification

14. Cf. *Actes IIe Session (1894)*, 94 and *Actes IIIe Session (1900)*, 103.

15. *Actes VIe Session (1928)*, 110 et seq.

16. *Actes VIe Session (1928)*, 131.

is warranted and justified, or they do not coincide, and then we must admit that the domicile becomes a less adequate element, which—so to say—has something fictitious in it”.* 17

The ice had now been broken, and since then it has become more and more customary to avoid the term “domicile” in treaties on Private International Law and use “habitual residence” instead. This was also the case in regard to subjects not relating to family law.¹⁸ In 1926 the International Law Association drafted in Vienna a treaty on international sale of goods. It provided that, unless a commercial sale was concerned, the law of the seller or the buyer, as the case might be, was understood to be the law of the country where he had his habitual residence at the time of the agreement becoming effective.¹⁹ At the request of the ILA the Hague Conference placed the subject of international sale of goods on the agenda of the VIth Session and in the course of it the Swedish delegate Bagge explained that the ILA had chosen the term residence instead of domicile “to avoid differences of interpretation of the latter in the various legislations . . . Domicile is a legal concept, whereas residence is a question of fact”.* On a proposal, once again of Neumeyer, and passed without discussion, the term “résidence ordinaire” was replaced by “résidence habituelle”.²⁰

Discussions on this subject were not completed during this session, and a resolution was taken to entrust the further preparation of a

17. *Actes VIe Session (1928)*, 141, and Rapport, 157.

18. The Institut de Droit International adopted in 1932 a resolution (*Annuaire 1932*, 567) proposing in the field of property law to subject the capacity of incapable persons without or with multiple nationality to the law of the place of their “résidence habituelle et principale”. Section 29 of the EGBGB (introductory law of the German Civil Code) was amended in 1938 in accordance with the motion introduced by the German delegation in the Hague Conference. It now makes stateless persons subject to the law of the state where they have their “gewöhnlichen Aufenthalt” (habitual residence). This term was also introduced in Section 606 of the (German) Procedural Civil Law (Zivilprozessordnung).

19. Cf. Report of the 34th Congress of the ILA (1926), 510. However, in the French text the term “résidence ordinaire” is used.

20. *Actes VIe Session (1928)*, 290, 300. The rules and terminology proposed by the second commission with respect to apatrides and bipatrides were also adopted by the first commission which drafted the treaty on the Law of Succession. Cf. *Actes VIe Session (1928)*, 85/86, 408 (art. 15), but in art. 8 (407) in determining the competent jurisdiction the term “domicile” is used.

treaty to a special committee. The drafts of the VIth Session of the Hague Conference, in general, drew little response, but in the course of this meeting the seeds were sown for the subsequent success of the connection with *habitual residence*, which was to develop into a much more dangerous competitor of the nationality principle than the connection with domicile.²¹

25b. When in 1951 after a long interval the Hague Conference resumed its activities the term "habitual residence" figured in two conventions. In the first place in the Convention on International Sale of Goods, which was completed in the course of this Session (Seventh Session). In the draft prepared by the special committee, which was submitted to the Conference, the term "résidence habituelle" had been adopted integrally as the connecting factor for determination of the law of the seller and that of the buyer and none of the delegates wasted another word about this in the course of the proceedings. Consequently, the Convention, which is now in force between seven European States, in Article 3 applies "résidence habituelle" as the connecting factor. The significance of the term "habitual residence" received more attention when, in discussing the preliminary draft of a convention to determine conflicts between the national law and the law of domicile, the Delegates wished to have the convention further define what was meant by "domicile". The drafting committee suggested that "domicile" should be construed as "habitual residence", unless it referred to someone with an inferred, dependent domicile. This proposal was adopted following an unfortunately not very clear exchange of views and after the Chairman had explicitly proposed that this definition should be regarded not as a generally valid one for the concept of domicile, but exclusively as an indication of what it was understood to mean in this *specific* treaty.²²

What then does this treaty provide, which according to its promising title claims to solve the conflicts between the national law and

21. When I use the term "*principle of domicile*" this should be taken to include "habitual residence".

22. *Actes VIIe Session (1951)*, 228-233.

the law of domicile? It is based on an ingenious idea of the Dutch professor Meyers, who had suggested a purely practical solution for a number of cases in which conflicts of law are solved in a different way in the countries involved in the conflict, in that one of them adheres to the nationality principle and the other to that of domicile.

Under Article 1 of the Convention the law of domicile must be applied if the State where the person concerned is domiciled prescribes the application of the national law but the State whose nationality such person has, would refer to the law of his domicile. Article 2 provides that whenever both the State in which a person is domiciled and that of which he is a national subject him to the law of domicile, each contracting State has to apply the law of domicile, whilst Article 3 provides that every contracting State shall apply the national law if both the State of a person's domicile and that of his nationality refer him to the national law.

These are simple and clear rules²³ which, had they been adopted, could have eliminated, to a not inconsiderable extent, the undesirable consequences resulting from the controversy between the principles of nationality and domicile. In essence they provide that whenever the Private International Law of the State whose nationality a person has and that of the State where he is domiciled adhere to the *same* principle and, therefore, designate one and the same law as applicable, other States also shall apply this law, whilst if the Private International Law of the State of the nationality and that of the State of the domicile refer to each other's laws, the domestic law of the State of domicile shall be applied. The treaty does not provide a solution for the case when the State of which he is a national, pursuant to the nationality principle, deems its *own* law to be applicable, whereas the State where the person concerned is domiciled, by virtue of the principle of domicile, also applies its *own* law. By the very nature of things this controversy will remain unsolvable as long as the nationality and domicile principles continue to co-exist.

Unfortunately, this treaty did not receive the attention it deserved. It was signed by Belgium, Spain, France, Luxembourg and the

23. The same ideas form the basis of Article 11 of the *Uniform Law Benelux*.

Netherlands, but only Belgium and the Netherlands ratified it. Since at least five ratifications are required to make the treaty effective, it remains so far only of theoretical value.²⁴

26a. Before examining any further the part played in present-day Private International Law by "habitual residence" as a connecting factor, we should ask ourselves what this term is to denote.

From the very beginning it has been stressed that "habitual residence" signifies a situation of *fact*, as opposed to "domicile", which is a *legal* concept.²⁵ At the VIIth Session (1951) of the Hague Conference the Japanese delegation proposed to add to "habitual residence", whenever that term was used: "according to the law of the territory in question".* A motion to that effect was lost after the Committee Chairman had observed: "Habitual residence is a factual notion and needs no connection with any given law system".*²⁶

Nevertheless, even nowadays Special Commissions preparing Hague Treaties and usually one or more delegates as well in Plenary Sessions, whenever a rule of conflicts based on the habitual residence of a person is discussed, still move the inclusion of a definition of this term in the treaty. So far, however, the Hague Conference has consistently rejected these proposals. As a matter of course this has the drawback that one cannot altogether rule out the possibility that in different countries different ideas are espoused as to what constitutes "habitual residence" and even that different courts in one and the same country may differ in this respect. Yet it has the advantage that the courts have more latitude to decide—on the basis of all the factual data available and guided by their commonsense—whether or not a person has his habitual residence in a certain country.

Various authors have attempted to define further what factual situation "habitual residence" is supposed to denote. F. A. Mann does not see any difference of principle between "habitual residence" and "domicile": "In so far as the substance of the matter was concerned, the intention was to refer to actual domicile. Instead of using this

24. Franciscakis in his important work, *La théorie du renvoi*, paid close attention to the Hague Draft Treaty, see pp. 177 to 183, 262.

25. See, in addition to previous references, i.a. Meili Mamelok, 258.

26. Cf. *Actes VIIth Session (1951)*, 232.

term, one chose to designate as of old the always conspicuous facts of the case itself, i.e., the place where a person has his 'résidence habituelle', 'die ständige Niederlassung', his 'settled headquarters', 'ubi quis larem ac fortunarum summam constituit' (Cod. 10.40.8)*. Mann is, therefore, of the opinion that the objective and subjective conditions also apply to "habitual residence", the "factum" of the physical presence and the "animus" to continue to stay there.²⁷

Others are of the opinion that the only criterion for the determination of a person's habitual residence is the objective fact of his physical presence for a considerable period of time. Niboyet argued that "résidence habituelle" is "the place where the individual most often has a physical presence",* which he described as the "domicile de fait" as opposed to the "domicile de droit".²⁸

Among those who also require an "animus manendi" for habitual residence opinions vary regarding the question whether this volition must relate to staying in a certain place for an indefinite period of time or only to establishing a "Daseinsmittelpunkt", a "centre of existence", in that place.

It is generally agreed that persons who have a dependent domicile have their habitual residence where they *themselves* are usually staying. There is no such thing as a dependent habitual residence.

26b. Exactly what "habitual residence" must be understood to mean cannot be deduced from what was said or decided in the VIth or any subsequent Session of the Hague Conference. Specification was deliberately avoided, as we have observed, as it was feared that this would involve the loss of the advantages which would be derived from the latitude to adapt this notion to practical requirements. In now trying further to define the meaning to be attributed to "habitual residence", our approach will be purely pragmatic, and we shall be guided by the requirements which "habitual residence" will have to

27. F. A. Mann. See also Rabel I, 151; Mösslang, 72; and Stoll, *RabelsZ* 1957, 187; De Nova, *AJCL* 1964, 562: "résidence habituelle is domicil in modern garb for international consumption".

28. Niboyet, *Cours*, nr. 245. Likewise Schnitzer, 116: "The notion of habitual residence . . . is disburdened of the requirement of volition",* as also Nagel, *RabelsZ* 1957, 183.

meet in order to make the advantages of connecting personal status with that notion as effective as possible, and to reduce to a minimum the incidental drawbacks.

To start with, habitual residence should obviously not be understood to mean a sojourn of short duration—which would also clash with the term “habitual”—but generally a long-term stay. This is essential as otherwise there could be no question of any stability of personal status, and it would also be all too easy for the person concerned to have his personal status made subject to the law he wished to be applied by the simple expedient of moving his residence. The proper foundation for the application of the law of domicile in respect of personal status would, moreover, be undermined if it were not required that this should be the law of the *environment* in which the individual was living.

Should it be required in addition thereto that the person concerned *intends* to maintain his residence indefinitely at the place where he has settled, and to return there if he is temporarily elsewhere? If this is required, and taken to necessitate an investigation of this intention, many advantages incidental to connecting personal status with a factual situation capable of objective ascertainment, will be lost. Therefore, I am of the opinion that when it appears from the *facts* that a person has his *home* in a certain country, his “hidden mental attitude towards the place” can in no way alter the fact that he has his habitual residence in that country.²⁹ This does not mean that no importance may be attached to the intention of the person concerned, but it does signify that this intention is irrelevant for the determination of his habitual residence in so far as it not recognisable or cannot be inferred from certain circumstances of fact. I have substituted the word “home” for the term “habitual residence”, because I consider these to be synonymous. Where the Restatement Second defines “home” as “the place where a person dwells and which is the centre of his domestic, social and civil life” it obviously means the same as

29. Similarly Elke Suhr, 83-84. See, moreover, Bellet: “The notion of habitual residence appears as being essentially a factual concept, and would, according to Mr. Francescakis, constitute a very much weakened synonym of domicile, in the Hague Conventions. It implies a certain stability of duration and intention, but it is simply a matter of establishing pure facts”.*

the expression used in The Hague, "centre effectif de la vie",³⁰ or where Braga refers to the "kollisionsrechtliche Wohnsitz" as "Mittelpunkt des Lebens eines Menschen". To which Braga adds: "This centre should not be construed territorially. Rather it implies social relations of a person, i.e., his cultural, political, economic and personal relations with a legal community . . . Reduced to a simple formula, domicile for the purposes of private international law is the country or juridical territory which in effect is the scene of a person's life".* ³¹

To my mind this view is correct, because it embodies the intrinsic justification for the connection with a person's domicile as thus further defined, in order to determine the law to be applied with respect to his personal status: It is the law of the community to which he sociologically belongs.³² For this reason on an earlier occasion I suggested that in Private International Law the connecting factor "habitual residence" should be understood to mean a person's *social domicile*.³³

26c. The question arises whether in practice the determination of a person's social domicile gives rise to difficulties.

In the great majority of cases a summary investigation will suffice to determine this place.³⁴ For, as a rule, the social domicile of a person is in the country where he has his actual residence. However, this need not always be the case. If an Italian has, e.g., a house in Italy where his wife and children are living, whilst he works in Holland, he will probably be deemed to have his social domicile in Italy, although

30. Cf. De Winter, *Documents VIIIe Session (1956)*, 127; Von Steiger, *Actes et Documents IXe Session (1960)*, IV, 226.

31. Braga, 66; likewise Elke Suhr, 81. See also Lalive.

32. It seems that the French Cour de Cassation also had this in mind in the case of *Tarwid v. Wirtensohn*, 15 May 1961, *Revue Critique* 1961, 547, with the formula "intégration au milieu social par un établissement effectif". Kollewijn, *NTIR-1968*, 245, note 10, pointed out that by domicile Von Savigny did not mean a tie between a person and a country (a territorial link), but a bond between a person and a community.

33. De Winter, *De maatschappelijke woonplaats*—Italian translation in *Diritto Internazionale* 1963, 233.

34. In Private International Law it is, of course, not a matter of determining a place, a spot, but a country, or at least a territory governed by one and the same law.

he may spend only a few weeks there a year. The same applies to a Dutch student who is obviously studying abroad temporarily, or to a Dutch civil servant in the foreign service who lives with his family in the country to which he has been posted, but whose children go to school in the Netherlands, where he and his wife usually spend their holidays; in these cases the Netherlands will in all likelihood have to be considered to be the social domicile.³⁵

In some countries Case Law has apparently adopted a similar view when connecting personal status with domicile. Hilding Eek reports a decision of the Swedish Supreme Administrative Court of 1960 relating to the adoption of a child by Swedish foster-parents in Brazil. The Court held that the foster-parents—in spite of having lived in Brazil for four years—had retained their domicile in Sweden, in view of the fact that the foster-father belonged to the staff of the Swedish Embassy.³⁶

The Court of Appeal of Paris in 1963 decided that French spouses who left France in 1940 due to war-time circumstances and returned only after the liberation, had retained their domicile in Paris during the time spent abroad. Similarly the French Cour de Cassation found in 1963 that an American who had lived in Switzerland for the last two years of his life, was domiciled in the USA—in this case it must be assumed that ill health had prevented him from returning to the USA.³⁷ Francescakis saw in these French decisions a trend to return to the concept of the “domicile d’origine”. To me on the other hand it would seem that the Court took the correct view in attributing more importance to the social ties existing between a person and a given country rather than to his physical presence in that country; this is, in

35. Dubbink in his review of my *Maatschappelijke Woonplaats* in *RMT* 1962, 250, wrongly considered that social domicile always had to coincide with *factual* residence.

36. Hilding Eek, *Clunet* 1966, 432.

37. Cour d’Appel de Paris, 4 July 1963, *Clunet* 1964, 65; confirmed by the Cour de Cassation, 15 February 1966, *Revue Critique* 1966, 273; Cour de Cassation, 19 June 1963, *Clunet* 1964, 555; cf. Francescakis, *Travaux* 1962-1964, 314. I do consider, as did Mann, that the decision of the German BGH (Federal Supreme Court) of 20 April 1955, is objectionable: a Polish clergyman, arrested in Poland in 1940 and interned in Buchenwald until the end of the war, was considered to have been domiciled, i.e., to have had “dauernder Aufenthalt” (permanent residence) in Germany during that period.

my opinion, the proper approach, if one keeps in mind the reason for taking the connection with domicile.

Whenever a person settles in country B, but it is evident or can be inferred from the circumstances that this move is intended to be only a temporary and relatively short one, and when it then is also proved that his social ties with country A, in which he had up till then been living have not been severed in any way, then for these reasons it will be most satisfactory to connect his personal status with the law of country A. However, as soon as country B, where he is in fact living, becomes the country into which he is socially integrated, the social domicile in country A ceases to exist on the ground that the connection with the social domicile can only produce satisfactory results if a person is not assigned more than *one* social domicile. Should a person have strong social ties with two countries, then preference should in my opinion be given to the country where he is actually living.

It may also occur—although in actual practice this will rarely be the case—that a person no longer has relevant social ties either with the country of origin (A) or, as yet, with the country in which he is living (B). The conclusion will then have to be drawn that the person in question has no social domicile, and a subsidiary connecting factor will have to be found.

In my view the most eligible one to be considered is the law of the *last* social domicile—first and foremost for the sake of continuity in the connection of his personal status. There is no reason to substitute another personal law for the last applicable one, if the person concerned has not taken up his social domicile elsewhere. In the second place a subsidiary connection with the law of the last social domicile entails the advantage that a system is adopted which can be readily handled in practice. Principal rule: the personal status is made subject to the law of the country in which a person is living, if his social ties with that country are such that he may be deemed to have the real centre of his life there. Should this not be so, then one should determine from which country he came, and decide whether *when he was living there* he had his social domicile there. Should this be the case, no *further* investigation would be required as to whether those social ties still exist, because the law of that country would then be appli-

cable, either as the law of his *present* social domicile, or as that of his *last* social domicile.³⁸

26d. Some scholars advocating the connection of personal status with the law of domicile have suggested that one should consider a person's domicile to be the country in which he is at least for a *fixed* period of time in fact living. The elapse of such a period is then viewed as an objectivation of the element of volition. The proposals regarding the minimum length of sojourn vary from one to ten years.³⁹ A very detailed arrangement governing the acquisition of a "statutory domicile" after a period of three years was drafted by Frankenstein, who originally was a keen supporter of the principle of nationality, but later thought that the personal law in future "must reconcile man's new mobility with the necessary stability of his rights".* Rabel also favours the introduction of a minimum period, e.g., one year, linked with the requirement of registration, when establishing a new domicile in order to simplify proof of the expiration of the term. Rabel says that in Europe there would be no obstacle to this, but "in this country (USA) such intrusive bureaucratism is probably out of the question".⁴⁰

I feel that cogent objections may be raised against this formalisation of "habitual residence" as the connecting factor. In the first place there might well be some apprehension—unless agreement could be reached by a multilateral convention—that different countries would prescribe periods of different lengths, which would only increase the confusion.⁴¹ Even more serious, it would seem to me, is the objection that the expiration of a term need not in any way reflect the true degree of integration of the person concerned. In some

38. Partly corresponding, but also partly dissenting views have been advocated by Neuhaus in *RabelsZ* 1955 and *Grundbegriffe*, 161 et seq. See, moreover, Papenfuss.

39. In his preliminary draft of the Swiss Code of 1900 Eugen Huber mentioned a term of 10 years; Asser, *Annuaire* 1906, 443, suggested a period of 6 years; French draft Private International Law of 1949, *Revue Critique* 1950, 111, section 27, paragraph 2: application of the *lex domicilii* after a 5-year stay; Scandinavian Conventions of 1931 and 1934, with terms of 2 and 5 years. The new Venezuelan draft provides for the introduction of a period of 1 year, cf. Schwind, "Disposiciones".

40. Frankenstein, p. 10, and articles 56-81; Rabel I, 172.

41. Cf. Batiffol, "Principes", 515 et seq.

cases, e.g., upon emigration with the whole family, the new domicile *of fact* will very often after only a very short time have to be considered to be also the *social* domicile. As a rule this will also be the case when a woman, married to a foreigner with whom she has lived abroad, returns to her native country after the breakdown of her marriage. On the other hand, in cases in which the circumstances show, or in which they infer, that a person clearly intends in due course to return to the country with which—although he is in fact no longer living there—he has kept up strong social ties, the actual residence may even in the course of time not be regarded as his social domicile.

Although we feel that in the very large majority of cases there will not be any real problem in practice in ascertaining where a person has his social domicile, there will nevertheless remain cases of people living abroad where the circumstances do not clearly show whether or not they should be considered to be socially integrated in the country in which they are residing. In such cases it will be necessary, as we have observed, to go by the objectively ascertainable circumstances, which will amount in cases of doubt to considering that a person has his social domicile in the country where he has settled.

In 1962 I made the suggestion⁴² that one should allow a person who has settled in a foreign country to have his intention to return to the country from which he comes publicly registered (cf. art. 15, Spanish Civil Code). I agree, however, with Neuhaus⁴³ that the practical result of such a provision may be doubtful.

27. One of the difficulties arising in connection with the conception of domicile, as we have seen,⁴⁴ was that it has not one and the same meaning in all spheres of law. The question may be asked whether this does not also apply to the concept of "habitual residence". If this is considered to be tantamount to *social domicile* the remark would seem to be warranted that the requirement of social integration is unreasonably onerous in some spheres of law in which it is advocated that habitual residence should be taken as the con-

42. De Winter, *De Maatschappelijke Woonplaats*, 15.

43. Neuhaus, *Grundbegriffe*, 162.

44. Cf. *supra*, No. 24c.

necting factor. If a connection is made, e.g., in International Law of Procedure, with the defendant's habitual residence in order to determine the court with jurisdiction, it should suffice that the defendant is usually staying in a certain place. For, as will be realised, the reason for the rule "actor sequitur forum rei" is *not* that the defendant has to be integrated in the country in which he may be summoned to court, but that he should not be compelled to defend himself in an action elsewhere than in the country in which he is actually living. The same applies to the cases in which a "forum actoris" is recognised. There also it is only intended to enable a plaintiff to bring a suit in a country in which he has his habitual abode whether or not he is socially integrated in that country. In the law of contracts, in which the connection is often made with the law of the domicile of one of the parties, and in international fiscal law, in which the taxpayer's "residence" is a decisive connecting factor, it would, likewise, not be reasonable to require social integration, since the rationale for this connection is a wholly different one from that for "personal status".⁴⁵

What has been suggested earlier (Nos. 26a, b, c and d) with respect to the most desirable interpretation of the notion "habitual residence" applies, therefore, exclusively to the connection with what—for the sake of simplicity—I have comprised in the term "personal status", i.e., that part of Private International Law in which the controversy between the nationality principle and that of domicile has exerted its destructive and paralysing influence.

For these reasons I would prefer to speak of the connection with the *social domicile* only with respect to *personal status*. The term "habitual residence" could then be reserved for other spheres of law in which the connection with a person's domicile at present plays a part. At the same time it should be realised that habitual residence—just like the concept of domicile—may well vary in substance as the underlying reasons for the connection differ.

45. On this also see Van Hoogstraten, 355 et seq., Chapter II.

CHAPTER V

THE ROLE OF THE HABITUAL RESIDENCE AS A
CONNECTING FACTOR IN THE POST-WAR
HAGUE CONVENTIONS

28. The first truly great success of the connection based on habitual residence was scored only in 1956. One of the subjects of the VIIIth Session of the Hague Conference, held that year, was maintenance obligations in respect of children. The Netherlands Standing Government Committee had submitted to the Special Commission of Experts, that met in The Hague in January 1955, a preliminary draft of a convention, the principal rule of which read: "the law of the habitual residence of the minor child shall determine whether and to what extent the minor may claim support".¹ This proposal signified a radical change of policy for the countries espousing the nationality principle, which would have this question governed either by the national law of the debtor or by that of the infant. The Special Commission, having thoroughly gone into the problems, adopted this new principle and incorporated it in Article 1, paragraph 1, of the draft convention of the Commission.

The grounds that had caused the Special Commission to accept the new point of view are set forth in the report as follows: "The application of the law of the habitual residence of the infant is in the very first place justified by the fact that it amounts to the application of the maintenance system obtaining in the country in whose territory the child will be brought up. Now, the authorities of the country in which the infant is living and growing up are those best qualified to lay down rules, in the light of the existing economic and social conditions, establishing in which cases, to what extent and up to what age

1. Cf. Document préliminaire, Les obligations alimentaires, *Projet de Convention et Exposé y relatif élaborés par la Commission d'Etat néerlandais pour la codification du d.i.p.*, 15 September 1954.

the child needs support. Normally, the interests of the child will be safeguarded to a maximum by the application of the law of his residence, and the object of the draft, to wit the protection of the infant in the manner that is most efficacious, will be ensured by the adoption of the principle set out above".* 2

It is, moreover, pointed out that the fact that a child deprived of maintenance contributions will become a public charge, also militates in favour of the application of the law of the country in which it is living.

As the apprehension of the nationality countries, that acceptance of this rule of conflict of laws would mean siding with the application of the principle of domicile to the whole of Family Law, had to be overcome, the Reporter observed that the proposed rule should be regarded as a "rule of conflict *sui generis*: for social and humanitarian reasons. Therefore the recommended solution can be accepted without necessarily abandoning either the general principle of domicile or that of nationality. It should be mentioned that the term habitual residence represents only a notion of fact; consequently it has nothing to do with the legal domicile of the infant".* 3

At the conference the proposed arrangement was hardly opposed; the battle had already been fought in the Special Committee.⁴

It was undoubtedly very important that Article 5, paragraph 2, provided that "decisions rendered in application of the present convention shall not prejudice questions of filiation and of family-relations between the debtor and the creditor".* For in some nationality-countries, such as France, Italy and Luxembourg, the obligation to maintain a child is intrinsically linked with affiliation,⁵ and those countries would never have accepted to subject affiliation also to the law of the child's habitual residence.

An exception to the main rule is found in Article 2 of the Convention where it is provided that any Contracting State may declare its own law applicable if all the persons concerned are its nationals,

2. De Winter, Rapport de la Commission Spéciale, *Documents VIIIe Session (1956)*, 127.

3. Cf. De Winter, *NTIR 1957*, 146/147.

4. Cf. *Actes VIIIe Session (1956)*, 166 et seq.

5. In France since 15 July 1955, an exception applies in respect of adulterous and incestuous children.

and the action is brought before a court of its country, in other words, if and when the habitual residence of the infant in a foreign country constitutes the only international element in the case.

Another and a more justifiable exception to the principal rule is laid down in Article 3 of the Convention, which refers to the "national conflicts rules of the authority concerned, if the law of the habitual residence of the minor denies him any right of support".*

Although it is expressly provided that the rules of this Convention are not to be considered as an expression of special preference for the domicile system, the acceptance of the main rule unquestionably makes inroads upon the nationality principle. The grounds on which the law of the infant's habitual residence was given preference coincide with a number of grounds generally adduced in favour of the principle of domicile. With respect to the present subject-matter these grounds are reinforced by the humanitarian consideration that it would be unjust and unsatisfactory that a child should be allowed no support or less support than other children in the same circumstances and living in the same country.⁶

29. It goes almost without saying that in the Convention on the Recognition and Enforcement of Decisions involving Obligations to support Minor Children, which was also concluded at the VIIIth Session of the Hague Conference, reference is made in the recital of the competent courts of jurisdiction (Article 3) not to "domicile" or "residence", but to the *habitual residence* of the debtor or of the minor.⁷ More particularly, designation of the court of the *domicile* of the infant, which as we know is a dependent domicile, would not have served the purpose intended by the Conference, that an order for

6. Cf. Neuhaus, *Grundbegriffe*, 147: "Could any criticism of the nationality principle in international Family Law be more impressive than that its application to the child's claim to support from its parents, which under the laws of, we may say, all the countries concerned, is a rule of Family Law, would not lead to solutions that are defensible either socially or from a humanitarian point of view!" * The same rule of conflicts has now been incorporated in Article 5, paragraph 3, of the Draft Uniform Law Benelux.

7. This was also the case in the preliminary draft of the *Institut International pour l'Unification du Droit Privé* of Rome in 1950, which had served as a model. Cf. *Documents VIIIe Session (1956)*, 170.

maintenance must be applied for in the courts of the country in which the infant has its habitual residence. For these are the courts which are in the best position to judge the child's needs.⁸

30. The Netherlands Standing Government Committee, which is in charge of the activities of the Hague Conference, had at the request of the VIIth Session (1951) submitted a report to the VIIIth Session (1956) on the question whether it was desirable to deal again with the proposals to modify the old Family Law Conventions drawn up by the VIth Session (1928). The Government Committee in giving its advice had taken the position that, although not being committed to keep to the proposals of the VIth Session, it was not at liberty to proceed on other principles but those on which the conventions themselves were based. It, therefore, considered itself still bound by the principle of nationality and—at least with respect to matrimonial property law—to the principle that the national law of the husband prevails over the national law of the wife.⁹

When this report came up for discussion in the VIIIth Session, it turned out that a number of delegates entertained serious doubts about the usefulness of amending the existing treaties on Family Law, if the principles mentioned above were to be upheld.¹⁰ The United Kingdom delegate Wortley said that modifications based on the nationality principle would not be conducive to making the relevant conventions more attractive for the UK; the French delegate Loussouarn observed that in view of the new case law of his country on divorces between spouses of different nationality, a divorce convention entirely based on the nationality principle would now be unacceptable to his country. The brilliant Greek delegate Valindas, who died at such an early age, wondered whether it would not be preferable to make a new and searching study of the controversy between the principles of nationality and of domicile. After the appointment of two Special Commissions had at first been considered, one of them to prepare by way of a testcase a revision of the Guardian-

8. Cf. Jenard, *Actes VIIIe Session (1956)*, 319. Article 18 of the convention permits a reservation on this point, which the Netherlands have made use of.

9. Cf. *Documents VIIIe Session (1956)*, 187.

10. Cf. *Actes VIIIe Session (1956)*, 251 et seq.; 253 et seq.; 271 et seq.; 326 et seq.

ship Convention, and the other to examine the foundations of all treaties on Family Law, it was finally resolved to set up temporarily only the first of these commissions, for the principles of the rules of conflicts with respect to Family Law were bound to come up when a revision of the Convention on Guardianship was considered and views on this could then be exchanged.

31. When in 1960 the Special Commission charged with the preparation of a revision of the Guardianship Convention met, with the Swiss delegate Von Steiger in the Chair, the judgment of the International Court of Justice in the case of *Boll* had meanwhile been rendered.¹¹ This decision had shown not only that the Guardianship Convention of 1902 no longer served its purpose, but also that—in view of the interests of the community of the country in which the infant lived—rigid adherence to the nationality principle in respect of this subject-matter could no longer afford a satisfactory solution of conflicts in our time. The Special Commission, therefore, decided to abandon the idea of a revision of the old convention and to draft an entirely new one, which was to comprise not only guardianship *stricto sensu*, but all measures of child-protection. In the preliminary draft prepared by the Special Commission, the new course which the Hague Conference had taken in 1956 with regard to maintenance obligations was followed. The experts were no longer guided by abstract theoretical considerations and principles. Instead they asked themselves what solutions should be considered most desirable *in concreto* and from a social point of view. This pragmatic method, which is characteristic of the Anglo-American approach to conflicts of law, led in the first place to the formulation of rules for the designation of the authorities which in international cases are competent to take measures for child-protection, and subsequently to the provision that those authorities were to apply their *own* law. It is not surprising that the Special Commission thus arrived at the conclusion that the authorities of the country in which a minor has its habitual residence must be considered to know best *whether* there is any cause for taking protective measures and if so, *what* measures. It is

11. Judgment of 28 November 1958, International Court of Justice, *ICJ Reports 1958*, 55; cf. *supra*, 23 f.

equally self-evident that it is the best and easiest course for them to follow their own law and to take such steps and measures as their own law provides. For those are considered to be the most effective ones in that particular country, whilst they may, moreover, rely on support from experience gained in similar cases. Furthermore it is only with respect to the measures which its own law provides, that the authority concerned has the certainty of implementation and enforcement in the manner which the Legislature intended there. It may also rest assured of being in a position to call in the auxiliary or supervisory bodies on whose co-operation the provisions of substantive law are based, and without whose co-operation these provisions could produce little or no effect.¹²

If child protection is to be at all effective, it has almost certainly to be carried out in accordance with the provisions of the law of the country in which the infant is living. The important advantages incidental to the unity of *forum* and *ius* are obvious, especially in the field of child protection, if only because the measures required have frequently to be taken by small town or village officials, who can neither be expected or required to be conversant with foreign law or to investigate its tenor.¹³

In substituting in this field the principle of domicile for that of nationality the Netherlands Government Committee had wanted to go further than the Special Commission and the IXth Session eventually went. The Netherlands Government Committee's desire was to have *exclusively* those measures to be considered for recognition that had been taken by the authorities of the infant's habitual residence. It proved necessary, however, to make a number of concessions to States that were not prepared to abandon the principle of

12. Cf. *supra*, No. 23c, as well as Von Steiger, *Actes et Documents 1960*, IV, 65: "In times when displacements of population are frequent and children often live outside their State of origin, the protection of these children can only be properly ensured by the local authorities".* The new approach was acclaimed by the International Social Service (*Actes et Documents 1960*, IV, 41 et seq.). The International Law Association had in 1960 drafted a convention on "custody of children", conferring "primary jurisdiction" on the courts of the country where the child has its "ordinary residence".

13. On this see especially Von Steiger, Rapport, *Actes et Documents IXe Session (1960)*, IV, 226.

14. Cf. Report Marmo, *Actes et Documents IXe Session (1960)*, IV, 18 et seq.

nationality to that extent.¹⁴ The main rule of the Convention (Articles 1 and 2) provides that the authorities of the State of the habitual residence of an infant have power to take measures of protection, provided by their domestic law, but under Article 4 authorities of the State of the infant's nationality may take measures according to their law if they consider that the interests of the infant so require. These measures then take the place of those taken by the local bodies. It may, however, be assumed that the national authorities will not avail themselves of this power very frequently. For, in spite of the fact that according to the Guardianship Convention of 1902 the national authorities are in the first place designated to appoint guardians, in actual practice they usually fail to do so and leave it to the local bodies to take the requisite measures.¹⁵

Another exception conceded in favour of the national law is to be found in Article 3 in respect of authority arising directly (*ex lege*) from the child's national law, such as the guardianship of the surviving parent after the other has passed away. Of great—and in serious cases of decisive—importance is the provision in Article 8, that notwithstanding the powers conferred upon the national authorities “the authorities of the State of the infant's habitual residence may take measures of protection in so far as the infant is threatened by serious danger to his person or property”,¹⁶

To the Hague Convention on the Protection of Infants Von Steiger devoted one of the lectures given in 1964 to the Academy of International Law. As the Reporter for this subject at the IXth Session of the Hague Conference, he is the person most qualified to elucidate the background of the treaty provisions. The reasons he adduces for the deviation from the principle of nationality, espoused in 1902, are that circumstances have greatly changed since, that migration has increased considerably, that whole population groups have left their native country and settled elsewhere, that millions of

15. Cf. De Winter, *Actes et Documents 1960*, IV, 66/67.

16. Other contracting States are not *obliged* to recognize these measures, but it may be assumed that this will usually be the case. Cf. on this convention (non-official English translation in *AJCL 1960*, 708), *inter alia* De Winter, *NJB 1961*, and “Il progetto di convenzione dell'Aja sulla protezione dei minorenni”, *Rivista del diritto matrimoniale e dello stato delle persone*, 1961, 12.

workmen are employed in foreign countries and that large armies are stationed for longer periods abroad. A consequence of the last two facts is the disruption of many families and the children's deprivation of their parents' protection. Divorces and what in fact amount to desertions are much on the increase, and authorities are compelled to a much greater extent than they used to be to take protective measures for the affected children.¹⁷

Obviously the Hague Convention on Child Protection gives strong support to the tendency to solve certain conflicts of laws in the realm of Family Law by means of a rule of conflicts based on the principle of domicile.¹⁸ Once more a subject-matter, which in the nationality countries had up till then—at least according to legal commentators—been governed entirely by the national law, was largely brought under the sway of the law of the child's environment. It is true that some influence was still conceded to the national law, but it may be anticipated that this influence will in actual practice be only small, i.e., apart from relationships *ex lege*.

32. In the course of the IXth Session of the Hague Conference a draft Convention also came into being on the Form of Testamentary Dispositions. Under Article 1 of this Convention a testamentary disposition shall be valid as to form if its form complies with the internal law:

- (a) of the place where the testator made it, or
- (b) of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or
- (c) of a place in which the testator had his domicile either at the time

17. Cf. Von Steiger, *Recueil 1964*, II, in fine 498. I gather from this lecture (499) that, according to an estimate made in 1961 by Stark, Chef du Centre d'information de la Commission internationale catholique pour les migrations, half a million men migrate annually in search of employment, and also that in 1963, 770,000 foreigners (13.5 per cent. of the population), *not* including seasonal labour, were living in Switzerland. Of the total number of employed in Switzerland 27 per cent. were foreigners originating from more than 100 different countries! In 1963 about 90,000 children of foreign nationality under the age of 15 years lived in Switzerland.

18. Cf. Wahl, relating to child protection (p. 135): "Also in this case what really happened was that the law of domicile gained a victory over the nationality principle, because the exigencies of living were a bar to any other solution".*

- when he made the disposition, or at the time of his death, or
- (d) of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or
- (e) so far as immovables are concerned, of the place where they are situated.

Thus, there is a wide choice, and if and when a large number of countries ratify this convention, it will be well nigh impossible to make an invalid will, at least as far as its form is concerned. Of relevant interest is the juxtaposition of the national law of the testator, the law of his domicile and that of his habitual residence. The question arises whether it was necessary and desirable to declare the law of the domicile as well as that of the habitual residence applicable. The Special Commission in particular, that had drawn up a preliminary draft in 1959, went into this question thoroughly.¹⁹

According to the UK concepts, the form of a will must be considered to be valid in any case, if a person having his domicile (in the British sense) in the UK conforms with the provisions obtaining there. In deference to these rules the other countries that had no need to mention the law of the domicile in addition to that of habitual residence concurred with a proposal to that effect. In view of the fact that the interpretation of "domicile" varies geographically, it was, however, deemed necessary either to include a definition of "domicile" in the convention or to lay down under which law this notion should be classified. It was resolved to provide that "the determination of whether or not the testator had his domicile in a particular place shall be governed by the law of that place" * (Article 1, paragraph 3). It was felt that the drawback of a person possibly being able to have a domicile in more than one country might well be acceptable for the purposes of this convention, inasmuch as this did indeed increase the chances of the validity of a will as to form.²⁰

19. Cf. Rapport Batiffol, *Actes et Documents 1960*, III, 22, 163.

20. At the request of the United Kingdom delegation a reservation was allowed by virtue of which a contracting State may determine in accordance with the *lex fori* the place where the testator had his domicile (Article 9). As a result of the ratification by the UK, the concept of habitual residence has now also been introduced into English law; cf. *Wills Act 1963*, Section 1. In Japan

33. A further step in the direction of the principle of domicile was taken during the Xth Session (1964) of the Hague Conference when a draft convention on jurisdiction, applicable law and recognition of decrees relating to adoption was brought into being.

This again used to be under the sway of the nationality principle. With respect to the requirements of adoption, many continental countries applied the national law, i.e., either the national law of the child or that of the adopter, or both laws cumulatively. The initial proposal which the Netherlands Government Committee had submitted to the Special Commission entrusted with the preparation of a convention, and which had mainly been drafted by the then secretary at the Permanent Bureau of the Hague Conference, Dr. Von Overbeck, went very far towards the substitution of the principle of domicile for that of nationality.²¹ The proposal provided for a procedure in international adoptions in three stages: (1) a preliminary investigation, (2) placing of the child with the adoptive parents, and (3) making the adoption order. At all three stages the "habitual residence" of the person concerned was to be the connecting factor for the designation of the competent authority and the applicable law. Accordingly the preliminary investigation, intended to ascertain whether or not the legal requirements with which the applicants had to comply in a specific case could be met, as well as whether or not the environment should be considered suitable for the child, would be made in the country where the adoptive parents had their habitual residence. The authorities of the country of the child's habitual residence would have to decide on the placing of the child, once they had obtained evidence that parents, members of the family and/or certain bodies had given the necessary consent for the adoption. The final stage, making the adoption order, would in its turn be incumbent on the authorities of the country where the adoptive parents—and now also the child—had their habitual residence. Each authority should, moreover—as is also provided in the Convention concerning the Protection of Infants

upon ratification an altogether new term, "jokyosho" was introduced for designating "habitual residence"; cf. Muraoka, "Japan's participation in the Hague Convention relating to the form of testamentary dispositions", *Japanese Annual of International Law*, 1964.

21. Cf. Aperçu général, Esquisse de Convention et commentaire, *Actes et Documents 1964*, II, 11-53.

—apply its own law. Thus the law of the adopters' habitual residence would govern the prerequisites of adoption and the law of the child's habitual residence the consents on the part and on behalf of the infant. In respect of these consents attention should also be paid to the provisions of the child's national law.²² In the explanatory memorandum it was argued: "As in the Convention on the Protection of Infants, the draft takes as starting point the regulation of the competence of the authorities. According to the principle, already established by that convention and also by the conventions on Maintenance Obligations, to the effect that only the authorities of the place where the persons concerned are really living can have a direct and clear picture of the situation of each of them, *habitual residence* has been chosen as the connecting point".* ²³

The Special Commission of Experts that met in March 1963 did not adopt the proposals of the Netherlands Government Committee in their totality.²⁴ Preference was given to a one-phased procedure in the country where the adopters have their habitual residence rather than to a procedure in three stages, but—so the report reads—: "In order to satisfy the States that link questions of personal status with the principle of nationality, it has been provided that the authorities of the country of the nationality are equally competent to make the adoption order if adopters having the same nationality reside habitually outside the country whose nationals they are".* ²⁵

The Special Commission also designated the domestic law of the competent authority as applicable, but in order to prevent forum shopping as much as possible a provision was included to the effect that the authorities of the habitual residence of the applicants would have to take certain provisions of the national law into account, whilst conversely—unless the adopters and the child to be adopted were of the same nationality—the adopters' national authorities must observe certain provisions of the law of the adopters' habitual residence. Furthermore, the investigation into the consents required on the part

22. This draft was largely inspired by the recommendations of the "Cycle d'étude européen", *Actes et Documents 1964*, II, 54-58.

23. Cf. *Actes et Documents 1964*, II, 30.

24. Cf. Preliminary draft with report by Roger Maul, *Actes et Documents 1964*, II, 81-105, unofficial translation of the draft, *loc. cit.*, 106-109.

25. *Actes et Documents 1964*, II, 89.

and on behalf of the infant and all decisions thereon were entrusted to the authorities of the child's nationality (Article 5 of the preliminary draft).

Although the Special Commission thus recognised in principle the primacy of the law of the habitual residence, it found itself compelled to make a few concessions to the principle of nationality.²⁶

The Xth Session (1964) substantially followed the proposals of the Special Commission. By virtue of Article 3 of the Convention the authorities of the habitual residence of the adopters as well as their national authorities are competent.²⁷ But in the report drawn up by the Luxembourg delegate Maul, it is stated: "There is no doubt that the authorities of the country in which the adopters have their habitual residence are in the best position to examine the situation of the adopters and to appreciate the environment in which it is intended to place the child".*²⁸

As a matter of fact it may safely be assumed that once this Convention has been accepted, adoption orders will as a rule be made by the authorities of the *habitual residence* of the adopters, which at the time of the adoption in the great majority of cases will coincide with that of the child.²⁹

The prerequisites of adoption are governed by the law of the authority that makes the adoption order, subject to the proviso, however, that the authorities of the habitual residence are bound to observe some prohibitive provisions of the adopters' national law, in so far as the contracting State of which the adopter is a national has explicitly declared that in international adoptions it will appreciate

26. It was notable, though, that by no means all nationality-countries insisted that these concessions be made. Japan, e.g., resolutely advocated the exclusive jurisdiction of the authorities of the habitual residence of the adopters (*Actes et Documents, loc. cit.*, 127).

27. But under Art. 22 each State may make a reservation to the effect that it does not recognise an adoption order made by the national authorities of the adopters if the child has its habitual residence in that State and is not a national of the country where the adoption order is made. It is expected that a number of domicile-countries will avail themselves of this reservation.

28. *Actes et Documents, loc. cit.*, 410.

29. On this ground I am of the opinion that a provision like the one of Article 1 bis Wet Nederlanderschap (Netherlands Nationality Act, as amended) is most objectionable. It provides that a child adopted by a Dutchman shall obtain Netherlands nationality only if the adoption order has been made in the Netherlands!

the compliance with these provisions (Articles 4 and 13). Also, in so far as consents are required, the court making the adoption order must observe the national law of the infant. Yet, contrary to the provisions of the preliminary draft, the court is not required to leave the investigation thereof to the national authorities of the minor. Consequently, the whole of the adoption proceedings will be conducted by and before one and the same authority.

Likewise in the rules for the annulment and repeal of adoption orders, the connection with the habitual residence is the principal factor. Apart from the authorities which made the adoption order, those of the infant's or the adopters' habitual residence have jurisdiction to annul or to repeal such an order, and will then apply their own law, at least in so far the repeal is concerned.³⁰

We have dwelt a little longer on the Convention on Adoption, because it tends to prove that even in respect of a subject that is looked upon as a typical example of personal status, the nationality principle has lost much ground.

34. The influence of the new trend was also clearly noticeable in the discussions on a new convention on the recognition and enforcement of foreign divorce and legal separation decrees that is to replace the antiquated Divorce Convention of 1902. The guiding principle of the 1902 Convention was that spouses cannot institute divorce proceedings, unless their national law and that of the place where the action is brought allow divorce. It provided, moreover, that a divorce action could be brought (1) before the national authorities of the spouses and (2) before the authorities of the country where the spouses have their domicile (see Article 5).

The Draft Convention effected in the course of the XIth Session of the Hague Conference (1968)³¹ begins with an enumeration of the courts considered to have jurisdiction, and whose decisions must be recognised in other countries. It commences with the authorities of the habitual residence of the respondent and of the petitioner, if the latter has been habitually residing in the country for more than one

30. For details see Art. 7 and Report, *loc. cit.*, 424.

31. Cf. Final Act, Eleventh Session of the Hague Conference on P.I.L., *NTIR 1969*, 38 et seq., and Nadelmann, *Texas L.R. 1969*.

year or if both spouses had their last habitual residence there. Thereafter the court of the country of which both spouses are nationals is mentioned and the national court of the petitioner if he, also, has his habitual residence in that country, or if he had habitually resided there for a continuous period of one year, falling, at least in part, within the two years preceding the institution of the proceedings. Finally, the national authorities of the petitioner will have jurisdiction, if he was present in that State at the date of the institution of the proceedings and the spouses last habitually resided together in a State whose law did not provide for divorce. A provision regarding the application of the national law, which formed the basis of the 1902 Convention, is now not included. Article 6 of the Convention provides expressly that "the recognition of a divorce or legal separation shall not be refused . . . because a law was applied other than applicable under the rules of private international law of that State". In order to make the Convention acceptable to States that do not recognise divorce, it contains exceptions for divorces of subjects of such States (Articles 7 and 20), while as a result of the insistence on the part of the Netherlands Article 19 renders it possible to make a reservation whereby a divorce between a country's own subjects is only recognised if its law has been observed. A striking feature was that apart from the Netherlands no other nationality State appeared to feel any need for such a reservation.

The development regarding the recognition of foreign divorces which has now become apparent is, therefore, very remarkable: the connection with the national law of the spouses no longer ranks first and foremost; rather—apart from the exceptions mentioned—in this Convention only those authorities are designated that can be considered to have *international* jurisdiction and recognition no longer depends on the law applied by them. The dogmatic arrangement based on Mancini's doctrine has given way to a pragmatic approach that goes a long way towards meeting the needs of present-day society.

35. The increasing departure from the predominating principle of nationality is also reflected in the provisions in the new Hague Treaties that demarcate the scope of the conventions. It used to be con-

sidered more or less a matter of course that the operative sphere of a convention should be restricted to the subjects of the contracting States. The report of the First Commission of the IIIrd Session (1902) states as the reason for this restriction: "It has soon been realised that the States are acting for and on behalf of their nationals and not for foreigners".* ³²

The Conventions on Marriage, Divorce and Guardianship of 1902, the Conventions on Interdiction and on the Effects of Marriage of 1905, therefore, do not apply, if none of those concerned is a subject of a contracting State.³³ The draft convention on the Law of Succession drawn up during the VIth Session (1928) also contains the provision (Article 15) that it applies only to subjects of contracting States and stateless persons who have their habitual residence in a contracting State.

In the post-war conventions this standpoint has been abandoned. The nature of the convention as a rule also determines its operative sphere and there is no general principle that a treaty applies only to subjects of contracting States. The Conventions on International Sale of Goods and on Transfer of Title contain uniform conflict rules that have to be incorporated in the law of conflicts of the contracting States.³⁴ They do not contain a single restriction and, therefore, apply in all international cases.

The Convention on the Choice of Court in international sales of goods applies if and when the court of a contracting State has been designated (Article 2). The general Convention on the Choice of Court of 1965 provides explicitly "This Convention shall apply whatever the nationality of the parties" (Article 3). The Convention on Conflicts between the National Law and the Law of Domicile provides (Article 7): "No contracting State is obliged to apply the provisions of the present convention, when the State in which the interested person is domiciled or the State of which such person is a national is not a contracting State". Application of the convention,

32. *Actes IIIe Session*, 178.

33. Cf. Marriage Convention, Art. 8; Divorce Convention, Art. 9; Guardianship Convention, Art. 9; Interdiction Convention, Art. 14; Convention on the Effects of Marriage, Art. 10.

34. Articles 7 and 8 respectively of these conventions.

therefore, requires that the person lives in and is a subject of a contracting State. This cumulative prerequisite results in a limited operative sphere, but is in conformity with the object of this convention: to arrive at *uniform* solutions of conflicts of law by the application of the provisions of the convention. The Convention on the Law applicable to Obligations to support Minor Children for the first time espoused the system whereby the *habitual residence* of the infant determines the scope of the convention. Article 6 provides that the convention applies in all cases in which the child has its habitual residence in a contracting State. The nationality of the infant is irrelevant. The same system is followed in the Convention concerning the Protection of Infants (Article 13), although in this instance a faculty is provided for any contracting State to make a reservation with respect to children who are not subjects of a contracting State.

The Convention on the Form of Testamentary Dispositions again contains a uniform law of conflicts. Article 6 explicitly provides: "The convention shall be applied even if the nationality of the persons involved or the law to be applied by virtue of the foregoing articles is not that of a contracting State". The Adoption Convention once again espouses the system (Article 1) whereby it is applicable only if the persons involved (adopters and the infant to be adopted) have the nationality of and their habitual residence within a contracting State. In this instance the cumulative prerequisite, again, results from the system of the convention which is based on the interplay of national and domiciliary law.

36. That the connection with the domicile in the conventions on the recognition and the enforcement of foreign judgments in civil and commercial matters play first fiddle, is less surprising. The court of the domicile of the defendant has been considered the "natural" forum throughout the centuries. It was not unusual, however, to restrict the operative sphere of such conventions in whole or in part to nationals of contracting States.³⁵

In the Hague Convention of 15 April 1958, on the Recognition and Enforcement of Maintenance Orders the habitual residence of the

35. As provided, e.g., by the Swiss-French Treaty of 1869, the French-Belgian Treaty of 1899, the Belgian-Dutch Treaty of 1925.

defendant or that of the plaintiff is decisive to vest the foreign court with jurisdiction for recognition purposes (Article 3). No more than in the convention on the applicable law on maintenance obligations does the nationality of the person involved play a part in this convention. The same applies to the general Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, concluded at The Hague in 1966. Article 3 provides: "This Convention shall apply irrespective of the nationality of the parties". The list of fora considered to have international jurisdiction (Article 10) does not contain the word "nationality". There were, however, extensive discussions as to whether in the list of recognised fora "habitual residence" should be substituted for "domicile".³⁶ The preliminary draft contained the provision that the court of the country where the defendant had his domicile or habitual residence should be considered to have jurisdiction, but in the (final) draft convention only the habitual residence of the defendant is mentioned.³⁷

Quite striking is the increasing reluctance to attribute decisive importance to the nationality of a party in legal proceedings for the purpose of determining the jurisdiction of the court. In this connection provisions such as that laid down in Section 14 of the French Civil Code, giving jurisdiction to the French courts on the sole ground of the plaintiff's French nationality are, in particular, frequently regarded as "excessive jurisdictions". A great many people consider that it is quite unacceptable that an alien, not resident in France, may be summoned before a French court regarding obligations contracted by him with a Frenchman, even if these obligations have been contracted in a foreign country.³⁸

At the Extraordinary Session of the Hague Conference in 1966 the delegations of the UK and of the USA expressed their aversion in no uncertain terms. They raised serious objections against the provisions, then only recently made public, of the draft Convention on re-

36. Cf. Report Fragistas, *Actes et Documents de la Session Extraordinaire*, 31.

37. By supplementary agreement the court of the domicile may also be given jurisdiction.

38. Cf. especially Nadelmann, *XXth Century Comparative and Conflicts Law*; *Columbia Law Review*, Vol. 67 (1967), and *Common Market Law Review* 1967/68.

cognition and enforcement of foreign judgments between member-States of the European Common Market, that prescribed the compulsory recognition of judgments rendered in member-States even if the court had derived its jurisdiction from a provision like that of Section 14 Code Civil.

It would lead me too far afield and exceed the scope of these lectures to go further into this interesting aspect and into the fascinating discussions held on it, which also related to other fora considered to be excessive.³⁹ Suffice it to point out that one thing and another led to the insertion of a new article (Article 59) in the draft Convention on enforcement of foreign judgments of the European Common Market countries, as well as to the adoption by the Hague Conference in October 1966 of a Supplementary Protocol to the Convention on the recognition and enforcement of foreign judgments, in which, *inter alia*, it was prescribed that a judgment exclusively based on the jurisdictional ground of the plaintiff's nationality would not be entitled to recognition.⁴⁰

It is also characteristic of the new trend that also in the convention of the Common Market countries the rules concerning adjudicatory jurisdiction apply to anyone, irrespective of nationality, who has his domicile in the territory of a Common Market State (Article 2), although Article 220 of the Rome Treaty, which gave the initial impulse to the conclusion of the enforcement treaty, provided that "member-States shall . . . engage in negotiations with each other with a view of ensuring *for the benefit of their nationals* . . . the simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and of arbitral awards". The Reporter Jenard observed in his report that it would not be in line with legal thinking of the present times if the rules regarding adjudicatory jurisdiction were made to depend on the nationality of the parties.⁴¹

In less than 20 years there had, indeed, been a good deal of change!

39. Cf. De Winter, *ICLQ* 1968.

40. See also the Recommendation relating to the connection between the Convention on the Recognition and Enforcement of Foreign Judgments in civil and commercial matters and the supplementary protocol, *Final Act, Eleventh Session of the Hague Conference (1968)*, and Nadelmann, *Harvard Law Review* 1969.

41. Jenard, *Report*, 26.

CHAPTER VI

HABITUAL RESIDENCE AS THE CONNECTING FACTOR IN
MODERN LEGAL WRITING, LEGISLATION
AND CASE-LAW

37. The growing influence of habitual residence as the connecting point in the modern Hague conventions is partly a consequence, but also partly a cause of the increasing significance of that connection in the views of modern learned authors on Private International Law, recent legislation and case-law. In case-law, legislation and legal writing of the various nationality-countries numerous recent examples bear witness of the trend towards the principle of domicile. To avoid straying too far afield, I will only make sparing use of them. A few, typical of the fading glamour of the nationality principle in the international Law of Persons, Family Law and Succession Law, will now be dealt with.

First of all a simple case of a change of Christian name. Dutch foster-parents had adopted a young Greek boy called Gharalambos in Greece. The Greek adoption was not recognised in the Netherlands, and the child had thus kept its Greek nationality. The adoptive parents filed a petition in a Dutch court for the change of the child's name to Robert. Seeing that Netherlands Private International Law is based on the principle of nationality, we might have expected that the court would check this request against Greek law, since the right to a name indubitably pertains to the realm of personal status. However, the Hague District Court refrained from doing so. It allowed the change of name requested, on the grounds that a child living in The Hague with its adoptive parents, participates in the Netherlands law sphere.¹

38. In nationality States marriage requirements are governed by the national law of the parties. We have already mentioned (*supra*,

1. District Court of The Hague, 25 September 1963, *NJ 1963*, 506.

No. 12) that due to this principle—which was laid down in the Hague Conventions of 1902—German nationals living in the Netherlands in the 1930s were not allowed to marry whenever one of the spouses was a so-called non-Arian according to German law.

Difficulties also arise if the two intended spouses are not of the same nationality. Then each party must be free from prohibitions to marry existing under his or her own national law and it is not always easy to decide whether a marriage impediment has a unilateral or a bilateral character. The law of Sweden for instance prohibits marriage if one of the spouses is suffering from certain specific diseases. Does this provision apply only to a sick Swede marrying a healthy woman of another nationality or also to a healthy Swede desirous of contracting matrimony with an ailing woman of foreign nationality? Further, when the national law of one of the parties, for instance the law of Spain, precludes marriage with a divorcee, whether male or female, the question of the unilateral or bilateral character of the prohibition arises.²

It should be observed that this problem may also arise if the principle of *domicile* is applied and the intended spouses are resident in different States, but marriages between persons who are living in different countries occur less frequently than marriages of persons of different nationality living in the same country. Moreover the solution to the problem when applying the law of the domicile is to assign the question to the law of the intended matrimonial home.³

In Sweden two laws were recently enacted, to some extent introducing the principle of domicile with regard to marriage, guardianship and adoption. In respect of foreigners living in Sweden for not less than two years, the substantive marriage requirements are governed by Swedish law if both spouses so desire.⁴

A further, rather appalling consequence of the application of the

2. The German Bundesgericht, 12 February 1964, *NJW* 1964, 976, is of the opinion that the prohibition is bilateral and that a Spaniard is not allowed to marry a divorced German woman in Germany.

3. See Goodrich, p. 228, and *Restatement Second*, Par. 122 (Tentative Draft No. 4, 1957); also Cheshire, 276-289; Graveson, 279, observes however that this solution does not represent English law, adding: "whether or not it should do so is a different question".

4. Laws of 27 November 1964; see Fischler, "Vorläufige Teilreform des internationalen Familienrechts in Schweden", *RabelsZ* 1966, 505.

nationality principle to capacity to marry is that when a decree of divorce is pronounced in a nationality country between foreigners residing there or between a foreigner and one of its nationals, the foreigners thus divorced cannot be considered to have capacity to contract a new marriage if the divorce is not valid under their own national law. Now this is precisely the truly perplexing result at which i.a. the courts in Germany arrive. There it has been repeatedly decided that an Italian divorced by a German Court cannot contract a new marriage in Germany, because under his national law he has no capacity to do so, and recently also a Dutch wife, divorced in Germany on a ground not recognised by Netherlands law, was not allowed to remarry.

Unfortunately such absurd situations cannot be avoided in countries which still adhere to the Hague Marriage Convention of 1902, which prescribes imperatively (Article 1) that capacity to marry is governed by the national law of each of the intended spouses.⁵

39. With respect to divorce it has already been pointed out (No. 17a) that application of the national law is not logically possible if the spouses are of different nationality. The French courts were the first to settle this matter once and for all by the application of the law of the "domicile commun" in such cases. In 1955 the Cour de Cassation formulated this as a general rule of conflicts in the *Lewandovski* case, in which on the basis of this rule French law was applied to a Pole who had petitioned for divorce from his French wife. The married couple lived in France. Without going any further here into the fascinating development of French Case Law suffice it to say that the Cour de Cassation also upholds its new doctrine if according to *both* the national laws of the spouses divorce is *not* allowed, but it is permitted according to the law of the *common domicile*.⁶

This case-law has also exercised an outstanding influence in other realms and in other countries for the revision of solutions of conflicts

5. See case law cited by Rabel, I, 558, and Oberlandesgericht Frankfurt, 23 March 1964, *Das Standesamt*, June 1964, and HPS 1964, 80.

6. Cour de Cassation, 15.3.1955, *Revue Critique* 1955, 320 (in re Lewandovski) and 22 February 1961, *Revue Critique* 1961, 382 (in re Corcos). Cf. Droz.

of law based on the nationality principle. In Germany, where the law (Section 17 EGBGB) provides for the application of the husband's national law in divorce cases, the Deutsche Rat für internationales Privatrecht, which has prepared a revision of German international marriage and divorce law, proposes that—if the spouses are not (and were not) of the same nationality—the law of the country in which both have their habitual residence should be applied.⁷

We have already stated that in Belgium also application of the nationality principle in divorce cases between spouses of different nationality had presented such difficulties that in 1960 a special law was enacted, declaring Belgian law to be applicable to divorces between married couples living in Belgium if one of the spouses has Belgian nationality.

Netherlands case-law also has furnished a few examples in which the law of the common domicile of spouses of different nationality or at least that of their last common domicile was applied as the connecting factor.⁸ The Hoge Raad (Supreme Court of the Netherlands) in its judgment of 9 December 1965, explicitly recognised that the rule of Section 6 of the General Provisions on Legislation in the Kingdom does not provide for the contingency where only one of the spouses is a Dutch national and that at any rate a divorce which one of the spouses has obtained in the country in which he resides and to which he also belongs by reason of his nationality ought to be recognised.⁹ So the Hoge Raad does not even consider relevant which law the foreign court has applied in such a case, foreign law or its own law. It only examines whether in its view the foreign court had adjudicatory jurisdiction. The Hoge Raad took yet another step forward in a recent judgment in which it appeared to be prepared to recognise a divorce decree pronounced in Mexico between a Dutch wife and an American husband, provided it could be proved that the Dutch party was not living in the Netherlands when divorce was pro-

7. See *Vorschläge und Gutachten zur Reform des deutschen internationalen Eherechts* (1962).

8. District Court of Arnhem, 22 June 1953, *NJ* 1953, 718, and 20 January 1955, *NJ* 1955, 789; Court of Appeal Bois-le-Duc, 19 December 1957, *NJ* 1958, 443; District Court of Leeuwarden, 23 April 1964, *NJ* 1964, 377.

9. Supreme Court of the Netherlands, 9 December 1965, *NJ* 1966, 378 (cf. De Winter, *Revue Critique* 1966, 297).

nounced. In its statement of reasons the Hoge Raad considered “that the marriage between these two parties married in Indiana, one of whom is a US citizen living in Indiana and the other is Dutch but was neither residing in the Netherlands nor in Indiana, would be so much more connected with Indiana than with the Netherlands that, if as a result of the Mexican judgment the marital band is considered to have been legally severed in Indiana, this would be decisive also for the Netherlands”.*¹⁰ Therefore, according to this judgment, it will suffice for recognition purposes if the divorce *is recognised* in the country where one of the parties has his or her domicile and of which he or she is a national, provided always that the Dutch party has no domicile in the Netherlands. Now that the Hoge Raad—in cases in which parties of different nationality are involved—considers the question with what country the parties have the strongest ties to be decisive and attributes much weight to domicile, it would appear to be probable that it will also recognise a divorce pronounced or recognised in the country in which the spouses have their common habitual residence, even if neither of them are nationals of that country.

A judgment of the Amsterdam Court of Appeal also shows an illuminating, interesting aspect of the importance of the domicile of the spouses in divorce cases.¹¹ Here Spanish Roman-Catholics who were living in the Netherlands were concerned; they had married without a religious ceremony of nuptial benediction. The District Court of Amsterdam had dismissed the wife’s divorce petition on the ground that Spanish law, the national law of the spouses, prohibits divorce. The Court of Appeal, however, found for the petitioner and made a decree of divorce on the ground that at the time the marriage was contracted the parties were already living and working in the Netherlands and that this was still so at the time the action was instituted. According to the Court of Appeal these facts provided enough points of connection to cause Netherlands law to apply. In a country in whose law the nationality principle is firmly embedded this is a very remarkable decision, indeed! Application of the national

10. Supreme Court of the Netherlands, 24 May 1968, *NJ 1968*, 300.

11. Court of Appeal Amsterdam, 30 January 1964, *HPS 1965*, 82.

law would, however, have led to a positively absurd result: the Spanish spouses could not have obtained a divorce in the Netherlands owing to the provisions of a law that did not recognise the marriage, because it had not been celebrated in a religious ceremony.

Even more heretical is a recent judgment of the District Court of Utrecht which made a decree of divorce with respect to spouses of Austrian nationality by applying Netherlands law, bluntly considering that the spouses were domiciled in the Netherlands, that they were both born in the Netherlands and that their children, also born in the Netherlands, possessed Netherlands nationality in addition to Austrian nationality.¹²

40. In France, where the spouses have different nationalities, the law of the common domicile is now also applied to the effects of marriage. When *Campbell Johnston*, a Briton living in Paris, reclaimed the furniture of which he had made a gift to his French wife in 1940 when he was staying with her in New York, the French Court had to decide in the first place which law had governed the gift. Under the husband's national law, English law, applicable according to the traditional ideas, the gift would have been valid and irrevocable. The French Cour de Cassation, however, shared the view of the Tribunal de Grande Instance de la Seine and of the Paris Court of Appeal that "a gift of personal property between spouses of different nationality whose common domicile was in France at the time the gift was made . . . is subject to French law, the law of the common domicile governing the personal effects of the marriage".* As under French law a gift between spouses may be revoked at any time (Section 1096, Code Civil), judgment was given for the plaintiff.¹³

Even previously the French Cour de Cassation had in the case of

12. District Court of Utrecht, 7 May 1969 (as yet unpublished). In a judgment of 14 May 1969 (also unpublished) the District Court of Utrecht applied Netherlands law to a petition for divorce between Danish spouses on the ground that both parties were domiciled in the Netherlands when they married and that after 23 years of marriage they were still living in this country where the three children were born and where the husband was working with a Dutch employer. In this case the Court also referred to Danish conflict of laws which would also apply the law of the domicile of the spouses. See also District Court of Amsterdam, 29 Jan. 1970, *N.J.* 1970, 188.

13. Cour de Cassation, 15 February 1966, *Revue Critique* 1966, 273 (note by Batiffol).

Chemouni held French law as the law of the common domicile to be applicable to maintenance obligations between spouses of different nationality.¹⁴

In this connection a judgment of 1964 of the Court of Appeal of Den Bosch (Bois-le-Duc)¹⁵ should be mentioned. It fixed the amount of maintenance to be paid by a British husband to his wife who was also of British nationality. It did so in accordance with Netherlands law, "in view of the fact that both parties have been living in the Netherlands for years; there the husband earns his income and the wife spends the maintenance to be received, so that the question as to the amount of the maintenance is very closely connected with the Netherlands way of life and the Netherlands sphere of law".* By virtue of Section 6 G.P. the Court did, however, hold that with regard to the question whether or not the liability for maintenance existed at all between the spouses, the national law applied. The District Court of Maastricht¹⁶ went even further, applying Dutch law to a maintenance case between divorced spouses of Polish nationality, considering that the court was not bound by any treaty to apply the national law of the spouses and that it therefore would apply the law of the country where the spouses had both been living for about 20 years, where the husband was earning the money he had to pay for maintenance of his wife who needed the money to spend in the Netherlands!

In the light of the reports of Batiffol and Valladao the Institut de Droit International in the years 1952, 1954 and 1956 gave close attention to conflicts of law in respect of the rights and duties of spouses of different nationality. After very interesting and continued discussions a resolution was adopted designating the law of the habitual common residence of the spouses as applicable. When there is no common habitual residence of the spouses, the law of their last common habitual residence shall apply, or, if there has never been a common habitual residence, the law of the place of celebration of the marriage.¹⁷

14. Cour de Cassation, 19 February 1963, *Revue Critique* 1963, 559 (note by Holleaux).

15. Court of Appeal, Bois-le-Duc, 10 December 1964, *NJ* 1965, 410.

16. District Court of Maastricht, 5 September 1968, *NJ* 1969, 233.

17. *Annuaire*, 1956 (vol. 46), 368.

The Dutch professor Meijers in a memorandum had emphatically defended the designation of the husband's national law. Application of the law of the domicile in cases of different nationalities can, in his view only be defended if the nationality principle is abandoned and the law of the domicile is preferred *in general*. The Reporters rejected this opinion, however, on the ground that in cases of different nationalities they preferred a neutral law to be applied rather than the national law of one of the spouses: "This unitarian solution is just, simple and fair".* Valladao pointed out that if one accepts that a wife possesses a nationality of her own, independent of that of her husband, the principle of "the predominance of the husband's law" * must be abandoned. Batiffol pointed especially to the interests of the immigration countries. In many countries foreigners now marry women in the country in which they are living: "These marriages must be made subject to the law of the country in which they are living. Any other solution, in particular that of the husband's national law, would be unrealistic".* 18

The Deutsche Rat für das internationale Privatrecht has also with respect to the effects of marriage pronounced itself in favour of the law of the common habitual residence if the spouses are not of the same nationality.¹⁹ The "Rat" proposes that the present Section 14 EG, which provides that the national law of the husband shall apply, should be amended.

Two new statutory modifications of Private International Law in countries espousing the nationality principle, viz. Poland and Portugal, likewise provide, in a case of different nationality of the spouses, for the law of the common residence to be applicable to their personal relations.²⁰

18. *Annuaire*, 1952, 1954, 1956, in particular 1956, 125 et seq. Memorandum of Meijers in *Annuaire 1954* (45.I) 257, and contestation by the Reporters, p. 233; see also Batiffol, *Recueil 1959*, II, 541, and *Traité*, no. 432.

19. Unless they originally had a common nationality and one of the spouses still has this nationality; cf. *Vorschläge und Gutachten zur Reform des deutschen internationalen Eherechts* (1962), 2.

20. Polish Act of 12 November 1965, section 17, para. 3, *Revue Critique 1966*, 323 (also for divorces between spouses of different nationality; section 18); Portuguese Act of 25 November 1966, section 52, *Revue Critique 1968*, 369. Poland has denounced the Hague Convention on Effects of Marriage on 11 June 1969; this denunciation will become effective on 23 August 1972. See

41. In the field of Matrimonial Property Law, the law of the domicile of the spouses plays an increasingly important role. In France the doctrine that questions of matrimonial property are governed by the law of the first matrimonial home of the spouses has been followed now for some considerable time.

Originally this was based on the consideration that the matrimonial property regime should be regarded as an agreement between the spouses and that, unless the contrary is proved, it may be assumed that the spouses tacitly intended to be governed by the provisions of the law of the country where they established their first matrimonial domicile.²¹ In France the fiction of the tacit submission continues to be formally relied upon, but it seems to be generally agreed that application of the law of the first matrimonial domicile really is based on a "localisation des intérêts du ménage" (localisation of the domestic interests), i.e., on an objective indication of the connecting point. On these grounds the Cour de Cassation held in 1961 that French matrimonial property law was applicable to the property of an Italian couple married in Italy and who immediately after the wedding had settled in France, where the husband had been living before the marriage.²²

In 1965 the French Cour de Cassation held that Turkish matrimonial property law applied between spouses, the wife having Greek and the husband Spanish nationality. The couple had settled in Turkey. According to the Cour de Cassation, the court should establish in the light of the circumstances what regime the spouses had wanted to adopt in respect of their matrimonial property "especially taking into account the presumption resulting from the establishment of the matrimonial domicile".* The commentator Kahn comments:

also the treaty between France and Poland of 5 April 1967 on applicable law, jurisdiction and enforcement in the Law of Persons and in Family Law, *Clunet* 1969, 530.

21. This doctrine can be traced back to a famous opinion of Dumoulin, dating back to 1525.

22. Cour de Cassation, 7 November 1961, *Revue Critique* 1962, 681 (note by Batiffol), and—without repeating the cited formula—Cour de Cassation, 31 January 1968, *Revue Critique* 1968, 680 (note by Ponsard). See further Wiederkehr, Chapter IV, Voies nouvelles.

"The strengthening of the domicile as a connecting factor at the expense of the nationality . . . may be observed".* ²³

In a number of other nationality countries, too, which, unlike France, put matrimonial property law in the realm of the personal statute and have always applied the husband's national law to it, there is a trend to apply the law of the matrimonial domicile. Thus the Leeuwarden Court recently allowed Indonesians residing in Holland to execute a marriage contract during the marriage, although Section 149 of the Indonesian Civil Code prohibits this. The Court, however, held that more importance was to be attached to "the circumstance that the applicants obviously intend to adapt themselves and integrate into the Netherlands community".* ²⁴

In Germany where Section 15 E.G. is considered to be a general rule of conflicts providing that the matrimonial property regime is subject to the national law of the husband, the Deutsche Rat für internationales Privatrecht now proposes that the law of the common residence should be applied in the same cases in which it applied for the personal effects of marriage (No. 40, *supra*).

Even in 1931 the Scandinavian countries, of which Sweden and Finland are nationality countries, concluded a convention whereby, *inter alia*, the effects of marriage with regard to matrimonial property were made subject to the law of the matrimonial domicile.²⁵

The Benelux Draft provides that the national law of the husband determines the matrimonial property law of the spouses (Article 4), but until very recently the second paragraph contained an important exception to this main rule reading: "if the husband has never been domiciled in his native country or if more than five years have elapsed since he permanently settled abroad the matrimonial property regime shall be determined, in the absence of a marriage contract or settlement by the law of the country where the spouses have established their common matrimonial home immediately upon the celebration of the marriage, unless the national law of the husband does not admit of that regime". Apart from the deflection in the last

23. Cour de Cassation, 15 December 1965, *Clunet* 1967, 398 (note by Kahn).

24. District Court of Leeuwarden, 23 January 1969 (unpublished).

25. Cf. Philip, *Recueil* 1959, I, 284.

passage towards the principle of nationality this meant a big stride towards the principle of domicile. For, the important exception to the nationality principle would apply not only if the spouses are of *different* nationality, but also if both have the *same* foreign nationality. However, something odd happened to this article. Probably on account of criticism levelled at it because of the cleavage of the provision and the practical difficulties incidental thereto²⁶ the second paragraph was deleted. This, in my opinion, shows very little sense of realism. For, if the amended provision comes into force, the inevitable consequence will be that in marriages of Turkish, Greek and Moroccan labourers to Dutch girls, Turkish, Greek and Moroccan matrimonial property law will apply, even if the spouses continue to reside in the Netherlands and even if the husband later on acquires Netherlands nationality by naturalisation!

In the years 1952-1956 the Institut de Droit International also dealt with the conflicts of laws relating to matrimonial property law between spouses of different nationality. A resolution was adopted, reading as follows: "As between spouses of different nationality the effect of marriage upon the rights and duties in their proprietary relations to each other shall be governed by the law of the first conjugal domicile or, if there has never been a conjugal domicile, the law of the place of celebration of the marriage".²⁷

Regrettably the 1963 congress of the Union Internationale du Notariat Latin expressed the wish that the system of matrimonial property between spouses of different nationality should be governed by the national law of the husband. The congress rejected the application of the law of the domicile of the spouses on the ground that determination of the domicile "is at the same time a question of law and of fact presenting great difficulties at the international level, the solution of which is always uncertain".*²⁸ Too little attention had evidently been paid to recent developments with the concomitant accelerated supersession of the notion "domicile" by that of "habitual residence" with the incidental reduction of the connecting factor to

26. See De Winter, *WPNR* 4989 and *Revue Critique* 1968, 585.

27. Cf. *Annuaire* 1956 (vol. 46), 368.

28. French text in *WPNR* 4835; see also Rigaux, *Revue Critique* 1964, 168 et seq.

one of *fact* that will present real difficulties only in relatively few cases. One should have thought that notaries in particular might have shown a better understanding of the *practical* difficulties which the application of the national law of the husband often presents.

Henriquez who until recently was a practising notary in Curaçao, recounts a case in which he had drawn up and executed a mortgage deed for a Lebanese subject resident in the Antilles, in which he had stated that the latter was married in a system of total community of property (this being the matrimonial property law obtaining in the Netherlands Antilles). Late that night the telephone rang, turning him out of bed. It was his client, who told him that, the beginning of the instrument having just been translated to him, he had to insist that the statement concerning his community of property was wrong. According to Lebanese law he had married without any matrimonial community of property under the Islamite law applying to the sect of the Hanefites. "Fortunately", the notary Henriquez continued, "few Lebanese, Chinese, Indians, East-Europeans, etc., are so well-informed as this Lebanese! For, otherwise the Antillian notarial instruments would be interspersed with references to Hanefite, Manonite, Hindustani and Mosaic legal institutions which no living soul in the Western world can cope with".* 29

But even in less spectacular cases a connection with the national law may often lead to results that stagger not only third parties but also the spouses themselves. Paul Scholten refers in his textbook 30 to the case of a Dutch couple married in Canada where they continued to live and who out of the blue learnt that according to Netherlands legal concepts they were living in matrimonial community of property, as a consequence of which a debt which the husband had incurred prior to the marriage and also prior to his emigration, could be recovered from an inheritance that had meanwhile gone to the wife, whereas they had always believed that their legal relationship was governed by Canadian law.

29. Henriquez' argument in *WPNR* 4875, 429, was aimed at the system of immutability of matrimonial property law existing also in some countries adhering to the principle of domicile. His objections are equally valid to a connection with the (foreign) national law of the husband.

30. P. Scholten, 209.

42. The Hague Maintenance Convention of 1956 (see *supra*, No. 28) has had the consequence in the Netherlands that the principle, embodied therein, according to which the law of the habitual residence of the infant shall apply, is also followed in cases to which the Convention does not apply. In one case in which a child of Dutch nationality resident in Czechoslovakia had brought an action for maintenance against a Dutchman living in Holland, who had legitimated the child in Prague, the Court of Appeal applied Netherlands law considering that "the Hague Convention of 24 October 1956 is not directly applicable as the infant in question has its habitual residence in a country which is not a party to the convention; that nevertheless in situations where, as is the case here, a written conflicts rule is not existant, it must generally be deemed to be desirable, in the interests of legal security, to apply the rule adopted in a multi-lateral convention to which the judge's country is a party, even outside the scope of the Convention, unless in a case not covered by the Convention there are reasons to apply a different rule".* The Court continued that even apart from those reasons mentioned, there are good grounds for applying the law of the infant's habitual residence to the question "whether, to what extent and from whom the child may claim maintenance".* ³¹

Futhermore, the rule of conflicts regarding maintenance obligations towards children in the Benelux Draft (Article 5) was, if not entirely, to a very large extent, recently brought into line with the rules of the Convention.

43. The Hague Convention on child protection gave strong support to the endeavours to give greater sway to the law of the domicile of the infant in the relations between parents and children. Anticipating the provisions of this convention the courts in various nationality countries were already applying their own law in order to protect minors living in those countries, irrespective of their nationality.

The Court of Appeal of Paris did this in two judgments of 1962

31. Court of Appeal Amsterdam, 9 June 1964, *NJ 1966*, 68. See Deelen, *NTIR 1964*, 310.

and 1964 regarding “mesures d’assistance éducative” (sections 375 et seq., Code Civil). In 1964 the Cour de Cassation also proved to be willing to agree that in accordance with French law the “garde” (custody) of illegitimate children living in France should be entrusted to their mother without investigating whether this was in accordance with the national law of the father.³² Whilst the Court of Appeal of Paris had still considered that it was beyond discussion that the national law of an infant of foreign nationality governed his personal status and had invoked French public policy to justify the application of French law, the Cour de Cassation merely held that “the provisions for the assistance of young persons in danger are applicable on French territory to all minors, whatever their nationality or that of their parents”.*

In 1967 the Court of Paris³³ deprived the mother of a Spanish child living in France of parental authority, applying French law. This was once again justified by relying on public policy. The court argued that it was a rule of child protection evidently pertaining to the domain of public policy and applicable to all foreigners in France. In his footnote to this decision Foyer calls it a rule “d’application immédiate”. It would seem that jurists in a country that has for so long and so faithfully espoused the nationality principle, can hardly stomach that it is sometimes preferable, i.a., more sensible to modify certain rules of conflicts in such a way that reference is made to the law of the domicile of the person concerned rather than to his national law.

Even in 1942 the Netherlands Hoge Raad held that the parents of a German infant resident in the Netherlands could—under Netherlands law—be relieved of parental authority, in spite of the fact that this measure was unknown in German law. The Hoge Raad not only accepted that this measure was in the interests of the infant, but was also inspired by the urge to protect society against the consequences of young people growing up in unsuitable surroundings. In 1949 the Hoge Raad decided that in accordance with the Netherlands statutory

32. Cour de Cassation, 27 October 1964; Cour d’Appel Paris, 21 June 1962 and 20 February 1964, *Revue Critique* 1965, 119; cf. Foyer.

33. Cour d’Appel Paris, 28 April 1967, *Clunet* 1968, 98 (note by Kahn), *Revue Critique* 1968, 446 (note by Foyer).

provisions, it was possible to place under supervision Italian children who were in the Netherlands, regardless of the fact that in Italian law no such measure was known.³⁴ Since then also the lower courts in the Netherlands—in accordance with Netherlands domestic law—have repeatedly made orders for parents to be relieved or deprived of their parental authority and taken measures for the protection of children of foreign nationality living in this country.³⁵

In a recent judgment the Hoge Raad stated that with respect to children resident in the Netherlands a decision concerning a modification of parental power can best be entrusted to the court of their domicile “which is in the best position to judge the circumstances whereunder they live as well as their interests”.*³⁶

Meriting special mention is a judgment of the Hague Court of Appeal³⁷ quashing the order, made in the summary proceedings before the president of the Hague District Court to surrender children staying with their mother in the Netherlands to the father resident in England, whom the English court had entrusted with their custody. All parties concerned, the children as well as both the parents, were of British nationality. The Court’s view was that such a decision could not be given in summary proceedings because of the possibility that Dutch child protection measures would be taken if and when the Netherlands juvenile court were of the opinion that the children’s moral and physical welfare was jeopardised. In 1967 the Hoge Raad sanctioned the placing under supervision of a child of Canadian nationality who was staying in the Netherlands with his Dutch mother, whilst the infant’s Canadian father wanted him to return to Canada.³⁸

Interesting case-law was the result of an action of a Dutch wife

34. Hoge Raad, 15 January 1942, *NJ 1942*, 286, and 23 September 1949, *NJ 1949*, 634.

35. See i.a. with an extensive statement of reasons District Court of Utrecht, 23 October 1963, *NJ 1964*, 338, as well as District Court of Amsterdam, 17 October 1967, *NJ 1968*, 255; Court of Appeal Arnhem, 20 December 1966, *HPS 1967*, 41.

36. Hoge Raad, 1 June 1967, *NJ 1967*, 337.

37. Court of Appeal The Hague, 6 October 1961, *NJ 1962*, 241, appeal in cassation dismissed, Hoge Raad, 9 February 1962, *NJ 1964*, 396; see in a similar case Court of Appeal Amsterdam, 1 February 1966, *NJ 1966*, 164.

38. Hoge Raad, 6 October 1967, *NJ 1968*, 83.

married to a Venezuelan with whom she had settled abroad, subsequently returning to the Netherlands with her children. The father had waylaid the children in the street and abducted them. The Amsterdam Juvenile Court found that the Netherlands provisions of Section 356, paragraph 3, of the Civil Code applied, giving the court authority to nullify any father's decision regarding his infant children if serious objections can be raised having regard to the infant's interests, notwithstanding the Venezuelan nationality of the children. In the Court's view these provisions contained a child protection measure and, in accordance with the principles of the (then not yet effective) Hague Convention of 5 October 1961, they, therefore, applied to all children whose habitual residence is in the Netherlands. The juvenile court overruled the father's decision on the children's residence and directed that the children were to stay with their mother. The Hoge Raad quashed this decision on the grounds that relations between parents and legitimate children were governed by the national law of the father. However, the Hoge Raad added that the Dutch statutory institution of placing infants under supervision does offer an efficacious solution in such a contingency, as that would constitute a measure of child protection.

The Juvenile Court took the hint and ordered the father to be divested of parental powers and the children to be placed with the mother. And when the Venezuelan court subsequently pronounced a decree of divorce upon the father's petition and placed the children under the father's authority, the Amsterdam Court, to make quite sure, confirmed its former measure of placing the children under supervision, in order to prevent this parental authority granted by the national authorities being recognised in the Netherlands. The father lodged an objection against this decision without avail.³⁹ This case has clearly shown that only the court of the infant's domicile which is completely familiar with the circumstances in which it is living and is educated, can take the appropriate, efficient measures in time to protect it.

39. Juvenile Court of Amsterdam, 15 July 1964, Hoge Raad, 12 February 1965, *NJ 1965*, 199; Juvenile Court of Amsterdam, 14 December 1966, *NJ 1967*, 309, as well as District Court of Amsterdam, 17 October 1967, *NJ 1968*, 255.

The International Court of Justice made it quite evident that it no longer fits in with modern times to continue to subject rules of law for the protection of infants to the national law of these minors, when in its previously cited judgment in *re Boll* it in actual fact placed a ban on the Hague Guardianship Convention of 1902, which was based on the principle of nationality.⁴⁰

The Benelux Draft has recently been brought into line with this newly accepted view.⁴¹

44. Furthermore objections against the application of the national law of the person concerned arose in practice in the appointment of curators. The Hague Convention of 1905 provides that a curator is appointed according to the provisions of the national law of the person involved and that only the authorities of the State of which that person is a subject can take this measure. Outside this convention also practically all nationality countries adopt this point of view. In Germany, though, the Federal Court in 1955 recognised the appointment of a curator for a German by the court of his foreign domicile. The following considerations are of interest: "Although the personal, human and cultural ties of these persons with their homeland may subsist, their legal and economic relations with it have largely and not only temporarily ceased to exist, or they have come to mean less to them in the light of their relations with the state of their habitual residence and its citizens. The habitual place of residence has become to them the actual geographical centre of their permanent relationships, especially of their legal and economic relations, and very often they aim at the prompt acquisition of citizenship in the State of their habitual residence".*

However, the Federal Court did not dare to accept the full consequences of its line of reasoning. It was prepared to recognise the foreign appointment of a curator, provided that in the particular case appointment of a curator was also admissible under German law.⁴²

According to Batiffol it would be possible for a French court to appoint a curator for a foreigner resident in France, provided that

40. Judgment of 28 November 1958, see *supra*, No. 23 f.

41. Section 6 (new) of the Uniform Law Benelux.

42. BGH 7 December 1955, 19 BGHZ, 240 (1955).

this were done with due observance of the latter's national law.⁴³

To my mind it is quite evident that it is in the interests of the person with whose custody a curator is to be appointed, as well as that of the community in which he is living, that a measure like the appointment of a curator is taken by the court of the country where that person has his habitual residence. For it is by far the most suitable authority to form an opinion of the person for whom appointment of a curator is being considered, and of the most desirable protective measures. It is equally evident that it is desirable that the court will take the measures pursuant to its *own* law, i.e., in accordance with the law of the habitual residence of the person concerned, and that they will have the legal consequences for which that law provides. In terms of the legal security of third parties in the country in which the incapable person of full age is living, and in which as a rule judgment will be made whether and to what extent the acts he has performed are void or voidable, application of a foreign law would be attended by the greatest difficulties. On these grounds the Benelux Draft was amended with respect to this issue. Article 7, relating to the protection of majors, has now been brought into line with Article 6, relating to the protection of minors. The District Court at The Hague has recently rendered two decisions by which curators were appointed for foreigners, domiciled in the Netherlands, according to Dutch law. In both cases the Court considered that the person involved "had been received into the legal atmosphere of the Netherlands".*⁴⁴

45. The principle of domicile is similarly gaining ground in yet another field, that of the law of succession, which in many nationality countries is traditionally governed by the national law.

Meijers, the champion of the nationality principle,⁴⁵ in a well-

43. Batiffol, *Traité*, no. 499.

44. District Court of The Hague, 21 April and 23 June 1969 (as yet unpublished). See also Dutoit, with many data on comparative law, as well as the Convention of Montevideo of 1940, which provides (articles 25 and 27) that the appointment of a curator as well as the consequences thereof will be governed by the law of the domicile of the incapable or disabled person.

45. In the preface of his *Recueil de lois modernes concernant le droit international privé*, published in 1947, Meijers emphatically sounded a note of warning against acceptance of the principle of domicile as a basis for treaties

known paper even in 1936⁴⁶ advocated the application of the law of the domicile of the deceased to the administration, settlement and distribution of the estate, on the grounds that the nationality of the deceased is not relevant to these matters and that the interests of the creditors and of business and trade generally are paramount. In support of his views he advanced the following practical reasons. In the Scandinavian countries the administration and winding-up is carried out under the direction of a judicial authority, in England by an executor nominated in the will or by an administrator appointed by the Court, who needs a judicial grant of letters of administration. In Germany and Austria the administration is often carried out under court supervision, whilst in special cases administration by a "Nachlasspfleger" (estate administrator) may be ordered. The extent to which heirs are liable and to which they can do something to limit their liability is closely connected in all these countries with the system of administration laid down by the law. Meijers' question is well put: "How is the national law of the deceased to be applied in all such cases if the devolution of the inheritance takes effect abroad. Even if the jurisdiction of a foreign court over the administration or the competence of a person it designates would be recognised in the country in question, it would still be practically impossible to direct the administration of an estate properly from a remote country". This view was accepted in the Benelux Draft which, it is true, lays down the rule that inheritances are subject to the national law of the deceased, but it *excepts* the administration and distribution of the estate including the execution of the will and acceptance or rejection of the inheritance. To these matters the law of the last domicile of the deceased is declared applicable. (Article 9 Uniform Law Benelux.)

In view of the fact that the Benelux Draft is not yet in force and the Netherlands courts, therefore, still have some latitude in determining which law they consider to be applicable to the estate—in case law

in the field of family law. He was afraid that such treaties would never be ratified by countries "which run the risk of having their population excessively reduced by emigration".*

46. Meijers, *WPNR* 3493/96; *Verzamelde privaatrechtelijke opstellen*, II, 333.

the view is taken that the law of succession does not belong to the subjects covered by Section 6 G.P.—there are some Dutch judgments that are curious examples of application of the law of domicile in cases concerning succession. The Amsterdam Court of Appeal applied Netherlands law to the inheritance of a Dutchman who had been naturalised Estonian. However, this was an exceptional case, indeed: the deceased was Dutch by birth and, but for a few months, had been living all his life in the Netherlands and its colonies. The only tie with Estonia was that of naturalisation. The Hoge Raad took the view that no statutory provision of Netherlands law was infringed by this decision.⁴⁷

Much more interesting is, therefore, the decision of the Utrecht District Court cited earlier (*supra*, No. 18b), which held that Netherlands law was applicable to the estate of a woman of Dutch origin who had acquired Turkish nationality by marriage, but who at the time of her demise, some 25 years later, had no single real tie with Turkey—if ever she had had one. The District Court argued in this case that the question whether to apply the principle of nationality or that of domicile to matters of succession should be considered on the merits of each individual case, on the understanding, however, that the inheritance should be governed by the law that was most in keeping with and best adapted to the social ideas, legal notions, morals and customs of the walk of life to which the deceased belonged and wanted to belong.⁴⁸ Undue fundamental value should not, however, be attached to this judgment. Much criticism has been levelled at the Utrecht decision—understandably so, as the point of view of that Court entailed much legal insecurity, in that it will cause the judicial opinion to be unpredictable as to which law is applicable to questions of succession. A fundamental choice will have to be made between the principle of nationality and that of domicile, but that choice should not be made for each individual case. But for the above exception regarding the administration and distribution of estates, prevailing commentary and case law in the Netherlands continue to

47. Court of Appeal Amsterdam, 11 July 1946, *NJ 1947*, 66; Hoge Raad 21 March 1947, *NJ 1947*, 382. Only since 1963 is cassation on account of violation of an unwritten rule of law possible in the Netherlands.

48. District Court of Utrecht, 12 November 1954, *NJ 1955*, 372.

regard the national law of the deceased as the general law of succession.⁴⁹

Obviously application of that law causes almost insuperable difficulties in actual practice if the deceased lived in a country where the law of the last domicile is applied to the estate. For, as a rule the estate of the deceased is to be found in the country where he was living. Persons who are heirs or beneficiaries entitled to a reserve (*réserve héréditaire*) in the native country of the deceased according to the law obtaining there, but who are *not* so entitled according to the *lex domicilii*, will only rarely succeed in asserting the reserved rights they derive from the national law of the deceased. The same applies to real estate situated in a country where the succession to it is subject to the *lex rei sitae*, i.e., to the law obtaining there. In some countries, an endeavour is made to make up for the resulting divergences by granting the "prejudiced heirs" a "*droit de prélèvement*" (a preferential right) on other capital assets of the deceased against which recourse can be had. But, as may be expected, "*prélèvements*" lead to "*contre-prélèvements*" in other countries and this in turn produces completely hopeless tangles.⁵⁰

In the French draft of 1959 it was proposed to make the whole law of succession subject to the law of the last domicile of the deceased.⁵¹ The Soviet Union in 1962 switched from the principle of nationality to that of domicile with respect to the law of succession.⁵²

The Union Internationale du Notariat Latin in 1964 adopted a resolution regarding the law applicable to succession and devolution. The notaries were of the opinion that in principle there was as much to be said for as against the application of the national law and that of the law of domicile of the deceased: "An emigrant is at one and the same time attached to the customs of his country of origin and, gradually, indelibly stamped with the morals and manners of the place

49. See Van Sasse van Ysselt.

50. Cf. *Actes et Documents IXe Session (1960) III*, 137; Batiffol, *Traité*, no. 647-649; Benelux Draft, art. 10; *Les régimes matrimoniaux et les successions*, 1027, and extensively Franx.

51. See also Freyria, *Travaux 1946-1948*, 79.

52. See Lunz. Art. 127 reads: "Matters of succession follow the law of the country where the deceased had his last permanent residence".*

where he establishes his residence".*⁵³ However, just as they did with regard to matrimonial property law, they nevertheless gave preference to the national law, because according to their views it was easier to determine. Moreover, according to the Union, it is important to make matrimonial property law and succession law subject to one and the same law.⁵⁴ The Union deemed it desirable, though, to authorise testators to designate the law of the domicile as applicable in their will, "provided the domicile is real and not fictitious, permanent and not uncertain".*

In this way the Union tried to bring about a compromise between the supporters of the principle of domicile and that of nationality. A similar system, but in reverse, is espoused in Switzerland. Section 22 NAG provides that the inheritance is governed by the law of the last domicile of the deceased, but the law of the "Heimatkanton" (for foreigners the national law) may be designated as applicable in the will of the deceased.⁵⁵

46. The examples taken from recent case law, legislation and the learned authors among which—I am aware—the Netherlands figures disproportionately prominently, only serve to show that the recent expansion of the operative sphere of the law of domicile and the assignment of more jurisdiction to the authorities of the country where a person is living are not restricted to the modern Hague Conventions. They are only various instances chosen at random out of abundant data, clearly showing that the traditional nationality countries are becoming increasingly prepared to adopt a more feasible attitude towards the absolute rule of the nationality principle than they did in the past. The usual motivation, however, was, as we have seen, the necessity to cope with difficulties encountered in actual practice and not the respect for the principles as such.

So far there has been a certain crumbling of the nationality principle in a number of nationality countries, but definitely not yet a substitution of the principle of domicile for it.⁵⁶

53. See *WPNR* 4835 (French text), as well as *RabelsZ* 1964, 491.

54. Cf. *supra*, No. 41.

55. See also Von Overbeck; Dölle, *RabelsZ* 1966.

56. Cf. De Winter, *Le principe de la nationalité*.

Batiffol, who appears to be prepared to allow the law of domicile a wide scope, argues: "Whatever others may say, I think that the national law is still deeply rooted in the thinking of lawyers. I do not believe that personal status is on the verge of destruction".* 57

It is, moreover, noteworthy that in those cases where in the nationality countries nowadays the law of domicile is applied instead of the national law, recourse is often had to constructions whereby as a matter of principle lip-service is paid to the continued sway of the law of the nationality.

One of these constructions is the application of "renvoi", i.e., *in principle* reference is made to the national law, but nevertheless with respect to a resident foreigner the latter's domiciliary law is applied if the rules of the conflict of laws of the country of his nationality declare the law of the country of his domicile to be applicable; moreover, the *lex domicilii* is applied when an alien has his domicile in a third country and both the rules of the conflict of laws of the country of his nationality and the rules of the conflict of laws of the country of his domicile declare the law of that country to be applicable.⁵⁸

One dearly cherished expedient to apply one's own law with respect to resident foreigners is to invoke "public policy". Thus again lip-service is then paid to the nationality principle, yet the result is that the law of the domicile applies.⁵⁹ Recently the arsenal of devices used to apply the law of domicile in certain cases without abandoning the nationality principle was increased by the introduction of the concept of "règles d'application immédiate" (rule of immediate application).⁶⁰

Sometimes these constructions are necessary to achieve the desired result when statutory law prescribes application of the national law. This is, of course, not always so, and then one wonders whether irrational determinant motives do not also play a part in this attachment to the principle of nationality. As Lerebours-Pigeonnière ob-

57. *Travaux 1960-1962*, 137; see also *Traité*, no. 385.

58. Cf. Benelux Draft, art. 11; *Hague Convention to determine conflicts between the national law and the law of the domicile* (1955).

59. A notable example of this is Netherlands case-law regarding divorces between foreigners living in the Netherlands.

60. Cf. Francescakis, *Répertoire 1968*, I, *Conflits de lois* no. 122 et seq., and i.a. Foyer, *Revue Critique 1965*, 39 and *Revue Critique 1968*, 446, in connection with measures of child protection (*supra*, No. 43).

served, and apparently not without justification, the preference for the nationality principle is based rather more on “sentiment than on “reason”.⁶¹

However, the battle has once more been engaged and that is an important point gained.

61. Lerebours-Pigeonnière-Loussouarn (8th), no. 339.

CHAPTER VII
CONCLUSIONS

47. The fact that a number of authoritative authors in the nationality countries at present advocate a combination of the principle of nationality and that of domicile corroborates our statement that the battle between these principles has once again been engaged. The most prominent amongst those authors is without doubt the French professor Batiffol, who in the past few years has urged the combination of the two in various publications. This is how he summarises his opinion: "The plain truth, it would seem, is that either solution offers only relative advantages, and that neither the one nor the other provides a satisfactory solution by itself".*¹ In a number of cases Batiffol appears to prefer application of the national law, in a number of others that of the law of the domicile. Furthermore, he is inclined to draw the conclusion that application of the *lex domicilii* is best suited to conflicts of law between countries whose domestic legislation is not too dissimilar, whereas application of the national law is more appropriate in conflicts of law between widely divergent law systems.

We have already mentioned that some scholars advocate the application of the principle of domicile within the E.E.C. I have observed (*supra*, 23 g) that I am not particularly in favour of a dualistic system, which implies that in the legal intercourse with a number of States the principle of domicile is applied and in that with other States the nationality principle is resorted to. In my view it is hardly acceptable to make for instance the personal status of an Italian subject to the law of his domicile (Italy being a member of the EEC), and that of an Englishman or a Swede subject to their national law (because the United Kingdom and Sweden are not EEC members). Further the

1. Batiffol, "Principes", 435 and 510; *Traité*, nos. 384/385; "Réflexions", 44/45; "Les chances de la loi nationale"; "Une évolution"; *Aspects* no. 126, 285. Cf. the exchange of views of the Comité français de droit international privé in *La codification du droit international privé* (1956), 168 et seq.

criterion of similarity between the two systems of law mentioned by Batiffol would, I think, be difficult to apply in actual practice. Must the courts investigate this in each specific case? Besides, such a distinction is—in my view—undesirable in principle, as it might lead to—or at least arouse the suspicion of—discrimination between the various law systems.² The aim of a criterion of similarity is evidently to bar the application of the foreign law of domicile if it differs too much from one's own law. This, however, will always be possible by invoking public policy in really extreme cases, which nowadays also bans foreign national law if and when its application would be contrary to one's own fundamental legal concepts.

Some scholars are in favour of applying the law of the domicile only when the persons involved in a legal relationship have different nationalities, whilst they stick to the nationality principle if only one person is involved or if the persons concerned have the same nationality. I, for one, am of the opinion that this may lead to a hardly defensible disharmony. A married couple resident in France, for instance, the husband being an Italian and the wife a Spanish national, will, according to present-day French Private International Law, be able to obtain a divorce, but if both spouses have either Italian or Spanish nationality divorce will not be possible, because then Italian or Spanish law will be applied. Batiffol defended this curious discrepancy by arguing³ that "The Italian having married a Spanish woman in France where the matrimonial domicile is established, has founded a home which is neither Italian nor Spanish, but in fact French: at least that is the most likely probability".* Goldman has observed⁴ that application of the law of the common domicile to a divorce between an Italian and his Spanish wife cannot be based on the argument that application of the national law would not be possible, as the national laws of both spouses *prohibit* divorce. "It is

2. One feels inclined to think of the concept "civilized nations" in paragraph 38 of the Statute of the International Court of Justice, referred to by most contemporary legal writers, as an inconvenient and even embarrassing qualification.

3. Batiffol, commentary on Cour de Cassation, 22 February 1961 (in re Corcos), *Revue Critique* 1961, 382.

4. Goldman, commentary on the same judgment, *Clunet* 1961, 734; cf. also the discussion between Batiffol and Goldman in *Travaux* 1960-1962, 134-137.

in consequence necessary, in order to justify the solution of the Corcos judgment, to recognise that the law of the place of domicile has a special claim to govern the consequences of marriage or its dissolution, apart from the logical difficulties or practical inconvenience of applying national laws, and even apart from the need to make the family group subject to one single law, for the agreement of the two national laws, in substance if not in form, actually makes it a single rule of law. But it would then be difficult to understand why the argument is not carried to its conclusion: if in fact the law of the place of common domicile is regarded as more qualified, *in itself*, to govern the family group, in what way can the difference of nationality between the husband and wife (or between parents and children) be a condition of its competence?" * To my mind Goldman is right in finding it difficult to explain the most important distinction the French Cour de Cassation makes between the two cases referred to here.⁵

Whether or not a French family is created by the marriage of two Italians or of an Italian and a Spanish girl resident in France, will depend on whether and to what extent these foreigners are integrated in the French community and in actual fact form a real part of it. In other words, in my opinion, it is not the *nationality* but the *social integration* into a community which ought to be decisive as to whether the law of that community applies or not.

48. The determinant argument for Batiffol and several other legal writers who propound only a partial, but not an entire transition to the principle of domicile turns out to be their fear that the connection with the domicile guarantees less *certainty* and *stability* than the con-

5. In *both* cases Goldman would consider application of the *national* law—and of common divorce prohibitions of both national laws—the correct solution: "... in a domain which comes so close to their most intimate affairs, husband and wife should be governed by the law of the community with which they are connected by blood and birth..."*(!) It is noteworthy that even the preliminary Italian draft for a new codification of private international law by Eduardo Vitta, though maintaining in principle the doctrine of Mancini, proposes alternatively to submit all relationships between spouses to the law of their common domicile. Vitta rejects the French system of applying the national law of the spouses if they have a common nationality and the law of domicile in case they have different nationalities. See Vitta, ad art. 6.

nection with the nationality of the persons concerned.⁶ As for the *certainty* of the connection we have already observed that if it is required for the establishment of the connection with "domicile" that the person in question has his "centre of life" in a given country and that "domicile" must be understood to mean "*social domicile*", it will not be doubtful in by far the majority of cases which country is referred to.⁷ In the cases in which doubt does arise, I have advocated that one should look to the country where a person permanently lives as his social domicile, *unless* it is shown or *unless* it can reasonably be inferred from the circumstances that he nonetheless is *not* socially integrated in that country. In the latter case, and also if a person does not live permanently anywhere, in my opinion, the connection will have to be with the law of the country where the person concerned has retained a social domicile or at least of the country where he lastly had it. This, I think, would afford a sufficient measure of certainty so as not to impede a connection with the domicile, and certainly not if there are other important advantages as a set-off. As for the requirement of *stability*, I should like to add that the connection with a person's *social domicile* guarantees at the same time a large measure of *continuity*. A change of domicile in the sense of social domicile, in other words, the establishment of an entirely new life-centre in a foreign country, is anything but a simple matter, and the decision to do this will not be rashly made. The fear that connection with the social domicile would encourage *fraus legis* can hardly be a sound one, at least so it would seem to me.⁸ Moreover,

6. Batiffol, *inter alia*, in *Aspects*, 186 (also quoted by Elke Suhr, 87): "Our distrust regarding the law of the domicile is fundamentally tied up with the thought that it would be all too easy to go abroad to do in a regular manner what the French law prohibits in matters such as the status and capacity of persons, in which the authority of the law must be exercised with some continuity for fear of being illusory"; * see also commentary on Cour de Cassation, 17 June 1968, *Revue Critique* 1969, 60-63.

7. Cf. *supra*, No. 26 b-d.

8. Cf. Zweigert, 561: "Who would readily change the centre of his very existence for the sake of a certain lawsuit?" * This question also played a part in adopting the provisions laid down in article 1, paragraph 2, of the Convention on Maintenance Obligations to the effect that if a child changes its "résidence habituelle" the law of the new "résidence habituelle" applies as from that moment. The opinion of the Special Commission was endorsed that it should hardly be considered likely that the child's "résidence habituelle"

with regard to this objection I would add that anyone who is determined to evade his national law, can already do so now by settling in a country where the principle of domicile is applied.⁹

A much more important fundamental and apposite remark, however, comes to mind here: although continuity of the legal provisions regulating the personal status is in itself desirable, it should not however be regarded as a dogma. It would naturally be undesirable if another law were to govern personal status if, and as soon as a person crosses the frontier of his country, passes his holidays or accepts temporary employment abroad. But it is altogether a different matter if someone severs his social ties with the community of which he forms part and establishes new ones with a community governed by another law. Then, I consider, a strong case can be made out, for changing also the legal system governing his personal rights, his capacity and his status, instead of keeping him tied, for the sake of stability and continuity, as a quasi-subject, to the law of a country with which he no longer has any real bonds. Application of the national law to the personal status of a person who no longer has any social ties with his native country is a rather pointless juridical construction, contrary in my view to the social function of Private Law and, consequently, yielding unsatisfactory results. For, this social function is to ensure the application of standards regarding the personal rights, capacity and status of persons, which are in accordance with the interests and the legal concepts of the community of which they form part. Nationality can be deemed to be a criterion for appurtenance to a community only if and when it means more than a formal juridical tie, i.e., if it implies real social ties with the native country.¹⁰

A century ago Mancini convinced a large part of the world with a fictitious argument. Contrary to his statement the Italian law was not made for the Italians, but for all who socially form part of the

would be moved to another country merely because that would be more advantageous for its maintenance rights. Cf. *Actes VIIIe Session 1956*, 168.

9. Cf. Schneider, 118.

10. Cf. Kollewijn, *NTIR 1961*, 143: "The nationality principle loses its sense if by any circumstance a person becomes altogether detached from his native country and no longer has the slightest thought to return there, which may also be expressed as integration in the social milieu of his domicile".*

community living in Italy, and in this respect the nationality of its members is not of decisive importance.

49. Of really decisive importance for the choice between the principle of nationality and that of domicile are, in my view, the patent *practical* advantages incidental to the connection with the domicile.¹¹ It is in particular of great importance that application of the law of the domicile results in a considerable simplification of the administration of the law in matters of capacity, marriage, matrimonial property, rights and duties between spouses, legal relations between parents and children, recognition and legitimation of children, adoption, divorce, etc. For, as a rule, legal acts are effected and legal relations brought about in the country where the persons concerned have their social domicile, and questions arising in consequence thereof will have to be decided in that country. As we have already observed, in the nationality countries a thorough knowledge of foreign law and foreign case-law is now required whenever such questions arise with respect to foreigners. And whilst the authorities, for instance the civil registrars (registrars of births, deaths and marriages), judges, advocates (barristers and solicitors) and "notaires", cannot possibly boast of such knowledge, they are further not usually in a position to acquire it, having regard to the means and the time at their disposal. The consequence of this undesirable state of affairs is that in actual practice either their own law is made to apply with the aid of artifices or the national law of the foreigner is applied all too often in an imperfect way.¹² This is an inconvenience theorists of Private International Law should not lightly ignore. Millions of people are living in countries of which they are not nationals. They beget children, want to recognise or legitimate children, wish to conclude marriages, must be removed from parental power, must

11. Cf. *supra*, Nos. 23 b-f.

12. I am indebted to d'Oliveira, *NJB* 1968, 977, for a reference by Rhein-stein (*Die Anwendung ausländischen Rechts im internationalen Privatrecht*, Berlin-Tübingen 1968, 187) on this subject, to the effect that out of 40 Private International Law decisions published in American casebooks, foreign law was misapplied in 32 cases, and whilst it was extremely doubtful in 4 cases whether the foreign law was applied correctly, the 4 remaining cases were obviously flukes!

have a guardian or committee appointed over them, wish to divorce, make wills, die abroad and leave estates there. Consequently, in preference to anything else, rules of conflict must be strongly recommended which, with respect to all these acts and the disputes ensuing therefrom, lead as much as possible to the application of the law of the courts or of the authorities who will have to settle these disputes, and these are, as a rule, the judges and authorities of the country where the parties concerned have their social domicile.

50. This is no betrayal of Private International Law by any means. On the contrary: Private International Law has continued to develop to an ever-growing extent, and notably so in the nationality countries, into an extremely complicated and specialised branch of law. No wonder, therefore, that those who have to deal with the application and the administration of law, day in day out, find it hardly comprehensible and, a fortiori, often feel perplexed at handling it. We have only to take a good look at the present-day bungling of Private International Law in legal practice to be deeply and truly dismayed. In numerous instances it becomes apparent that acceptable solutions of conflicts can only be attained by the use of rather turbid and controversial doctrines, such as classification, renvoi, preliminary questions and adaptation, or by invoking public policy and "règles d'application immédiate". A serious effort will have to be made to bring the conflict of laws back to earth, so that it can successfully perform its important function of supplying internationally acceptable solutions of conflicts. This would also take the wind out of the sails of those who would like to throw away the baby with the soap suds and hold a brief for the application of the *lex fori* in all or nearly all conflicts of law.

The number of cases requiring application of foreign law to arrive at internationally acceptable solutions will have to be reduced as much as possible. This can be achieved by a careful distribution of adjudicatory jurisdiction of the courts in international cases and by rules of conflict likely to accomplish the greatest possible unity of *forum* and *ius* without losing sight of the importance of justice and international legal security.¹³ In my opinion it is manifest that in

13. Von Steiger, great partisan of the largest possible measure of unity of

cases of conflicts of law in the field of the law of persons and of family law, as well as of the law of succession, making the connection with the law of the social domicile of the persons concerned would mark an important stride forward.

PROSPECTS

I could begin my concluding remarks with those famous words "Once I had a dream . . .".

I dreamt that the controversy between the principle of nationality and that of domicile was a thing of the past and that a person's nationality was no longer regarded as the connecting factor with respect to his personal status. What changes in Private International Law would that have entailed?

1. Hardly any limping legal relations which used to be such a serious nuisance previously, would exist in the field of the law of persons, family law and the law of succession. Marriages, legitimations, adoptions, measures taken for the protection of children, appointments of guardians and curators, divorces, etc., validly effected according to the law of the social domicile of the persons concerned, would be upheld and their validity be recognised all over the world. Personal and financial legal relationships between spouses would be judged in every country in accordance with the law of the domicile of the spouses. All questions of inheritance would be governed by the law of the last social domicile of the deceased.

2. The problem of "renvoi", the many studies on which might fill whole libraries and to which the most eminent scholars of Private International Law have devoted penetrating expositions, would have lost its interest for Private International Law to a large extent,¹ since most "renvoi" problems are caused by the contrast between the nationality principle and the principle of domicile. Although there would perhaps remain a number of conflicts of law in which the "renvoi" problem would continue to play a part,² they would constitute only a fraction of the number occurring now when the unfortunate controversy between the two principles still exists.

1. See also Laube, 110.

2. Cf. Meijers' original Draft of a Convention on Renvoi, *Documents VIII Session (1951)*, 44.

3. The doctrine of public policy, often invoked, especially in continental countries, to justify the application of the domestic law of those countries to foreigners residing there, would be reduced to its true function and would continue to play a part only in exceptional cases in which the application of foreign law, applied according to the rules of Private International Law, would make an intolerable encroachment on the fundamental principles of law obtaining there. The doctrine of public policy would no longer have to serve as a corrector to counteract the nationality principle. This function had been assigned to public policy by Mancini, the founder of the nationality principle. He and his followers had argued that every State was entitled to attribute territorial validity and effect to its own rules of law whenever "public policy" so required. These territorially operative rules which thus encroached upon the principle of nationality by setting aside the national law of foreigners, in addition to public law comprised also all the rules of private law which served the economic system prevailing in the country or the public interest.³

The doctrine of public policy had thus become the pre-eminent aid to applying domestic law in spite of rules of conflict of a different tenor. As we have seen, adoption of the nationality principle often makes this desirable and even necessary in order to arrive at satisfactory solutions. However, the attribution of a so-called positive function to the doctrine of public policy in this way had highly undesirable consequences in many countries. At all times and seasons the courts relied on public policy so as to substitute—without a proper statement of reasons—their own law for the applicable foreign law. This, so I dreamt, was now largely a thing of the past, since in cases in which application of the court's own law in personal matters (as a rule coinciding with the law of the domicile of the person concerned) should be regarded as the most desirable solution, this result can now be achieved without invoking public policy, because in

3. Mancini, "Rapport", *Revue de droit international et de législation comparée*, 1875, 349, 353; cf. also Weiss, *Manuel*, 392; Laurent II, 90 and 353; Weiss, *Traité III*, 94.

most cases it ensues from the rule of conflicts itself, which refers to the law of the domicile.

4. Even the notorious problem of classification would lose a considerable part of its importance if the controversy between the principles of nationality and of domicile no longer existed. For, in many instances classification would have no relevant significance for the designation of the applicable law. If in all countries the law of the domicile were applied to the rights and duties between spouses, to matrimonial property law and to the law of succession, then the distinction between these subject-matters of law would lose its practical significance for conflicts of law purposes and the classification problems arising therefrom would cease to exist.⁴ This also goes for all other subjects of family law if, irrespective of the subdivision to which they pertain, they were governed by the law of the domicile. For countries which, such as the Netherlands, designate a different law in matters of inheritance for conflicts regarding the devolution and succession (the national law of the deceased) and for conflicts relating to the acceptance or the administration and settlement of the estate (the law of the last domicile of the deceased), international succession law will be considerably simplified, and this will dispose of the difficulties in this field arising from any splitting-up of intrinsically closely interconnected rules.

5. The distinction between procedural and substantive rules will likewise have little significance in the international law of persons, family law and the law of succession, because the *lex fori* will as a rule coincide with the law applicable to the substance: the law of the domicile of the person concerned. Apart from the elimination of the classification problem connected therewith, this will yield the important advantage that wherever there is close interconnection between procedural and substantive rules of law (which frequently occurs in particular in the field of family law), this interconnection

4. This is so for matrimonial property law only if when the spouses change their social domicile it could be decided to apply the law of the newly acquired domicile, as proposed by the Deutsche Rat für internationales Privatrecht. Cf. *Vorschläge und Gutachten zur Reform des deutschen internationalen Eherechts*, 90.

will exist also in *international* cases and will not be broken up, as is nowadays often done in nationality countries in a most unfortunate manner.⁵

6. The removal of the controversy between the principle of nationality and that of domicile would give a powerful impetus to the unification of conflicts of law. When in 1893 the Hague Conference started its work, the realisation of its objectives, unification of conflicts of law by means of multilateral conventions, seemed to lie within the realm of possibilities, because—with the exception of Denmark and Switzerland—all the then member-States accepted the nationality principle. Later on, however, the controversy between the principle of nationality and that of domicile formed an important, if not the most important factor in forcing the Hague Conference to restrict the choice of subjects eligible for unification of conflicts of law, and to devote its attention after World War II initially to subject-matters outside the field of the law of persons and family or succession law.

In South America, too, the controversy between the principles of nationality and domicile has been the big stumbling-block of the unification of conflicts of law. On account of the fact that the Codigo Bustamente had to leave a discretionary choice between these two principles, the much sought-for uniformity of conflicts of law could not materialise.

It was considered a surprise by many that the 1956 Hague Conference succeeded in concluding a convention on children's maintenance rights. This success must be attributed mainly to the marked social and humanitarian aspects of this subject.

Encouraged by this success the Hague Conference also took up child protection and adoption. The effect of the controversy between the principle of nationality and that of domicile told more forcefully than in the discussions on maintenance rights, and this unfortunately led to the regulation becoming more complicated.⁶

I am convinced that once the nationality principle is disregarded, the way would be clear for a worldwide unification of the law of conflicts in respect of all important subjects of the law of persons, family

5. See *supra*, No. 23c.

6. See *supra*, Nos. 31 and 33.

law and inheritance law by means of a few relatively simple multi-lateral conventions, provided that the United Kingdom also would be prepared to substitute the connection with social domicile for the connection with domicile in the English sense.⁷

7. Finally the elimination of the controversy between the principles of nationality and of domicile would make possible an important amplification of the recognition and enforcement of foreign judgments.

The requirements for the recognition of judgments handed down by foreign courts now vary widely in the different countries.⁸

The most important conditions prevailing in the civil law countries are as a rule (a) that the judgment is rendered by a court having adjudicatory jurisdiction, (b) that the law applied is in conformity or in line with, or at least not too divergent from, the law the court of recognition would have had to apply in that case.⁹ Due to the great importance of the recognition of foreign judgments and consequently acquired rights, the recent inclination is to be more accommodating with regard to the requirement referred to under (b),¹⁰ whilst in the common law countries this condition is as a rule not imposed, and the valid jurisdiction of the court pronouncing the foreign judgment is held to suffice.¹¹

7. Cheshire, 173, urges that in order to promote the unification of the law of conflicts "the English legislature should remove some of the archaic doctrines that seem incongruous in their modern environment and should frame a new definition of 'domicil', simpler and more workable and more in accord with the Continental conception of habitual home".

8. Cf. Mémoire sur la question de la reconnaissance et de l'exécution des jugements étrangers en matière patrimoniale, *Actes et Documents de la Session extraordinaire, 1966*, 9.

9. In the well-known *Munzer* case, 7 January 1964, *Revue Critique 1964*, 344, the French Cour de Cassation imposed five conditions for the recognition of a foreign judgment: competence of the court of jurisdiction; regular procedure; application of the law that was also applicable according to French Private International Law; not contrary to public policy; absence of *fraus legis*. Cf. Batiffol, *Traité*, no. 726.

10. Cf. Bredin, "Le contrôle du juge de l'exequatur au lendemain de l'arrêt *Munzer*", *Travaux 1964-1966*, 19-51. In a number of other nationality countries it is only in matters of personal status that application of the national law of the persons concerned is considered a requirement for recognition, and sometimes exclusively in the case of the country's own subjects.

11. Cf. Graveson, 663 et seq.

Likewise the Hague Draft Convention on the recognition of foreign divorces, negotiated in 1968, no longer requires that the law applied was that applicable under the rules of private international law of the State in which recognition is sought, if the divorce was pronounced by an authority which pursuant to the convention had jurisdiction to do so (article 6). Contracting States may, however, reserve the right not to recognise a divorce between two spouses who were nationals of the State in which recognition is sought if a law other than that indicated by the rules of Private International Law of that State was applied (article 19).¹²

Numerous bilateral recognition and enforcement treaties do not apply to judgments concerning personal status, mainly because the effect of the dissimilarity of rules of conflict is more telling in this than in any other subject. The convention on the recognition and enforcement of foreign judgments in civil and commercial matters which the Hague Conference drafted in 1966 likewise provides (article 1) that "the convention shall not apply to decisions the main object of which is to determine the status or capacity of persons or questions of family law, including personal or financial rights and obligations between parents and children or between spouses" and, furthermore (article 7, paragraph 2), that "recognition or enforcement may be refused if, to reach its decision, the court of the State of origin had to decide a question relating either to the status or the capacity of a party or to his rights in other matters excluded from this convention . . . and has reached a result different from that which would have followed from the application to that question of the rules of private international law of the State addressed". Even the draft convention on jurisdiction, recognition and enforcement of decisions on civil and commercial matters of the EEC does not apply to the status and capacity of persons, matrimonial property law, gifts, wills and successions (article 1) and contains the provision (article 27) that recognition of other judgments also shall be refused if, in respect of preliminary questions relating to these matters, the foreign decision violates a conflicts rule of the State

12. In the Convention it is added, following in this respect the French doctrine of "équivalence": "unless the result reached is the same as that which would have been reached by applying the law indicated by those rules".

applied to, unless the decision has produced the same result as would have been obtained by the application of the rules of Private International Law of the State in which recognition is sought. If in these matters the rules of conflict could be unified, there would no longer be one single reason to maintain this important exception.¹³

Elimination of the controversy between the principle of nationality and that of domicile, therefore, paves the way not only for unification of conflicts of law with respect to all subjects I have referred to as "personal status", but at the same time for universal recognition of decisions pronounced by foreign courts of competent jurisdiction, and this would mean the creation of a large, perhaps even of a universal law community, i.e., at least in the field of private law.

This dream is almost too wonderful to come true, and it is feared that the realisation of this ideal could still take considerable time . . . unless the jurists of all countries, inspired by the successes of the technologists who have put the moon within man's reach, will at least make a strenuous effort definitively to dispose of the unfortunate controversy to which these lectures were devoted.

13. This would also largely eliminate the very controversial doctrine of the "preliminary question". For this, in most cases, refers to a matter of personal status on which the rules of conflict of *lex fori* and *lex causae* diverge.

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