ACCIDENTAL DISCRIMINATION IN THE CONFLICT OF LAWS: APPLYING, CONSIDERING, AND ADJUSTING RULES FROM DIFFERENT JURISDICTIONS

Gerhard DANNEMANN*

I. Introduction

The present article invites a new understanding of the conflict of laws.[1] It argues that three different methods are available for determining the rules which influence the outcome of an international case. These three methods are (1) the application of

* Professor, Humboldt-Universität, Berlin; formerly Reader in Comparative Law at the University of Oxford and Fellow of Worcester College, Oxford.

[1] This article summarises some of the ideas discussed more fully in my monograph on *Die ungewollte Diskriminierung in der internationalen Rechtsanwendung: Zur Anwendung, Berücksichtigung und Anpassung von Normen aus unterschiedlichen Rechtsordnungen*, Tübingen 2004, 528 + xxii pp.

Yearbook of Private International Law, Volume 10 (2008), pp. 113-134

substantive rules selected by conflict rules, (2) the consideration of non-applicable rules, and (3) adjustment of the applicable rules.

(1) The applicable substantive rules are selected through conflict of law rules. Such conflict rules are not limited to only private law. Every area of law has its own rules for selecting applicable norms in international cases, including public and criminal law. A full set of conflict rules is also required for procedural laws, covering issues which extend well beyond jurisdiction. Such a full set of conflict rules is necessary in particular for dealing with incidental questions relating to these areas of law.

(2) The consideration of non-applicable rules may be necessary in an international context when such rules have a bearing on a case, even when they are not being applied by the particular forum. This is particularly the case if two fora apply law to the same case, or if the parties have mistakenly assumed that the case is governed by a law which is in fact inapplicable. Non-applicable rules must also be considered in order to identify cases of accidental discrimination.

(3) Adjustment occurs when courts modify or ignore applicable rules in order to avoid accidental discrimination. Accidental discrimination would otherwise occur in a given case if two or more legal systems, whose rules are not dovetailed to each other, combine to produce results that are unintended by any legal system involved – Insufficient maintenance or benefits, heirs receiving more or less than they should, criminals punished too harshly or too leniently, marriages which cannot be terminated, or cases which no court wants to hear.

As a backdrop to these issues, the present article also deals with Public International Law influences on conflict of laws and the international spheres of application for domestic, European, and international human rights provisions.[2]

II. Extension of Conflict Rules

Conflict of laws is often understood to be limited to private international law. It is well established in most Continental legal systems that courts must apply foreign obligations law (contract, tort, and unjust enrichment), property law, family law and inheritance law. Common law countries have been more hesitant to apply foreign family and inheritance laws. They have instead relied on combining jurisdiction with the applicable substantive law rules to ensure, to the degree possible, that English law will always apply whenever English courts assume jurisdiction for family or inheritance cases.[3]

[2] See below, VI., and otherwise DANNEMANN G. (note 1), pp. 347-369.

[3] See e.g. CHESHIRE G.C., NORTH P. and FAWCETT J., *Private International Law*, 14th ed., by FAWCETT J. and CARRUTHERS J.M., Oxford 2008, Ch. 9, 21-25 and 32.

A. Conflict Rules in Public, Criminal, and Procedural Law

The traditional Continental view is that courts will not, or at the very least are reluctant, to apply any foreign public, criminal or procedural law.[4] The main argument is that the application of foreign rules outside of the private law would infringe upon the sovereignty of the foreign country concerned, and perhaps also that of the forum.

The common law's opposition against applying foreign public, criminal, and procedural law has been less absolute. The general rule is not that such a law cannot be applied at all. It is rather that a foreign criminal[5] or tax law[6] cannot be enforced and that other areas of public law – relating notably to foreign trade[7] or involving human rights questions[8] – are subject to particular scrutiny.

The present author sides with the common law view.[9] Closer inspection reveals that foreign public, criminal, and procedural law is applied in all legal systems as a matter of daily routine.[10] For example, the German statutory provision which requires all foreigners to possess a valid passport while in Germany[11] invokes the law of the foreigner's nationality to make two determinations: (1) whether the foreigner's passport is valid for Germany and (2) whether the same passport is also valid for any children of the holder which might be listed in this document. Likewise, it is the law of the country which issued a driver's license which determines whether the license covers, for example, three wheel motorbikes or whether the license has been revoked or automatically expires on a certain date.[12] Furthermore, it does not matter whether this question of the licences validity arises in administrative law (such as an application to convert a foreign driving

---

[4] For German law, see e.g. SCHACK H., *Internationales Zivilverfahrensrecht*, 4th ed., München 2006, § 2 III (civil procedure); JESCHECK H.-H. and WEIGEND T., *Lehrbuch des Strafrechts, Allgemeiner Teil*, 5th ed., Berlin 1996, § 18 I C (criminal law); BGH 17.12.1959, BGHZ 31, 367, 371 (public law).

[5] *Huntington v Attrill* [1893] AC 150, 156 (PC).

[6] *Government of India v Taylor* [1955] AC 491, 514f (HL); see also *In re State of Norway's Application (Nos. 1 and 2)* [1990] 1 AC 723 (HL); CHESHIRE G.C., NORTH P. and FAWCETT J. (note 3), pp. 123-6.

[7] CHESHIRE G.C., NORTH P. and FAWCETT J. (note 3), pp. 130-2.

[8] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd (No 2)* (1988) 165 CLR 30 (Hgh Ct Australia).

[9] For foreign public law, see generally BAADE H., 'Operation of Foreign Public Law' (1991), in: *International Encyclopaedia of Comparative Law*, Vol. III, *Private International Law* (ed. by LIPSTEIN K.), Tübingen [etc.], 1972 *et seq.*, ch. 12.

[10] See DANNEMANN G. (note 1), pp. 26-40.

[11] § 3 Aufenthaltsgesetz.

[12] Every state remains free to accept or reject foreign driver's licenses, to impose limits on it use, or to revoke (perhaps as consequence of a criminal offence) the right to use it in the territory of that state, all subject to international treaties.

license), in a criminal law suit (for driving without valid license), or in a civil law suit (relating e.g. to an automobile accident and the insurer's against the driver).

This example also demonstrates that there are not three separate sets of conflict rules relating to driving licenses in public, criminal, and civil law. Regardless of whether the validity of a driver's license is an incidental question (as e.g. in the civil or criminal law suit) or the main issue (as in the example of conversion of a foreign driver's license), it is the same conflict rule which invokes the law of the country which issued the driver's license. Moreover, there should be no doubt that this uniform conflict rule belongs to public, rather than private or criminal law. The fact that three grand academic designs for a truly international administrative law[13] have failed to gain any lasting support may have obscured this simple daily routine of application of foreign public law in the above-mentioned, and many other, areas.

Likewise, foreign criminal law is also frequently applied. For example, requests for extradition are commonly granted only if there is a reasonable prospect of the extradited person being found guilty under the law of the requesting state – a fact which is verified by the state from which the extradition is requested. Similarly, extraterritorial jurisdiction may depend on whether the act in question is considered a criminal offence in the place where it was committed.[14] Those authors who believe that foreign criminal law can never be applied may unconsciously have based their views on the mistaken assumption that the application of criminal law is limited to the determination of guilt or innocence.

It is suggested that the real issue is one of jurisdiction rather than of applicable law. If we look at two fictional countries, Ruritania and Arcadia, it is clear that no criminal law court in Arcadia will convict a defendant for a criminal offence under Ruritanian law. However, neither will any civil law court of Ruritania convict a defendant for a criminal offence under Ruritanian law. Nevertheless, civil law courts in Ruritania will apply Ruritanian criminal law – such as in a civil law suit for breach of statute – if that statute forms part of criminal law. Likewise, a criminal law court in Arcadia will apply Ruritanian criminal law when deciding whether a person should be extradited to Ruritania. Similarly, while motor traffic authorities have no jurisdiction to give a person a foreign driver's license, they nevertheless apply foreign law to the question whether a foreign driver's license is valid for a particular person and vehicle.

B. Public International Law Sources of Conflicts Rules

It is furthermore suggested that public international law not only tolerates the application of foreign public and criminal law but in some situations even dictates

[13] NEUMEYER K., *Internationales Verwaltungsrecht, Vol. IV, Allgemeiner Teil*, Zürich and Leipzig 1936; NIBOYET J.-P., *Traité de droit international privé français, Vol. VI*, Paris 1949; BISCOTTINI G., *Diritto amministrativo internazionale, Vol. I*, Padova 1964; *Vol. II*, Padova 1966. See DANNEMANN G. (note 1), p. 50.

[14] As e.g. in § 7 Strafgesetzbuch (German Criminal Code).

that foreign law must be applied.[15] Some basic conflict rules arise from the power of a state over its territory and its citizens.

An obvious example is nationality. Every state has the right under public international law to regulate is own nationality.[16] The necessary consequence is a conflicts rule according to which the question of whether a natural person has the nationality of a particular state is governed by the law of that state. A similar conflicts rule follows for passports and other identification documents and further from the fact that the state of permanent residence has certain responsibilities for stateless persons. This conflicts rule could be formulated as follows:

(1) Every state issues passports to its own citizens.

(2) Every state also issues passports to stateless persons with permanent residence in their territory.

(3) The state where a person has permanent residence may also issue a passport to a person if this person is unable or cannot reasonably be expected to procure a passport from the state which is competent under paragraph (1).

Public International Law also requires the application of foreign law to money claims in a foreign currency when the currency has been converted into a new currency (e.g. with the introduction of the Euro).[17] Foreign law must also be applied to traffic law violations on foreign territory,[18] to the question whether an applicable foreign law may be reviewed against the constitution of that country,[19]

---

[15] German legal writing is generally critical of any public international law influences on conflict of laws; see e.g. KEGEL G. and SCHURIG K., *Internationales Privatrecht*, 9th ed., München 2006, § 1 IV 1 c; SONNENBERGER, H.-J. (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. 10, Internationales Privatrecht*, 4th ed., München, Einl IPR, nos. 123 *et seq*.; VON BAR C. and MANKOWSKI P., *Internationales Privatrecht, Vol. I*, 2nd ed., München 2003, § 3 I 1 b. Different reasons why and how public international law influences conflict of laws are given by BLECKMANN A., *Die völkerrechtlichen Grundlagen des internationalen Kollisionsrechts* (with contributions from SCHMEINCK S. and SCHOLLMEIER A.), Köln [etc.] 1992; see DANNEMANN G. (note 1), pp. 51-73.

[16] A possible exception concerns the refusal of English courts to recognise the effect of § 2, 11, *Verordnung zum Reichsbürgergesetz* of 25 November 1941 which stripped all Germans of Jewish origin who were living abroad of their German citizenship, see *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249, 265.

[17] PCIJ 12.7.1929, *Case of Serbian Loans*, Pub. PCIJ A No. 20, p. 44: 'It is indeed a generally accepted principle that a state is entitled to regulate its own currency.'; MANN F.A., *The Legal Aspect of Money*, 3rd ed., Oxford 1992, p. 461.

[18] BGH 23.11.1971, BGHZ 57, 265, 268.

[19] See e.g. KROPHOLLER J., *Internationales Privatrecht*, 6th ed., Tübingen 2006, § 31 II; SONNENBERGER H.-J. (note 15), Einl IPR Rn 350-1; BLECKMANN A. (note 15), p. 51; BayObLG 21.2.1969, in: *NJW* 1969, 988 = *IPRspr.* 1968-69 No. 106, p. 237 *et seq.*; see also *Settebello Ltd v Banco Totta and Acores*, [1985] 1 WLR 1050, 1057G (CA, Sir John Donaldson MR, *obiter dictum*). From a comparative viewpoint, see MARTIN M., 'Constitutional review of foreign law in English and German courts: a comparative study', in: *Oxford U. Comparative L. Forum* 2002, at <ouclf.iuscomp.org>; KAHN-FREUND, SIR O, 'Constitutional Review of Foreign Law?', in: *Internationales Recht und*

and to decide whether a foreign judgment or decision is final.[20] This list of conflict rules which stem from public international law is modest in scope[21] and essentially consists of rules which are self-evident. That should, however, not detract from the fact that these are nevertheless conflict rules which require the mandatory application of foreign law, predominantly in the area of public law; many of these laws are in fact applied as a matter of daily routine.

III. Consideration of Non-Applicable Law

In the classical view, the work of a conflicts lawyer is done once the forum's choice of law rules have served up to three functions (1) selected the applicable substantive law, (2) determined the scope of this reference by way of qualification, and (3) perhaps narrowed this scope by invoking the forum's *ordre public*. Those rules govern the case, and all rules which have not been selected are irrelevant. The present author argues that this is not true. Rather frequently, rules which are definitely not applicable to a case will nevertheless have a bearing on the legal outcome.[22]

A similar observation can be made for foreign judgments or other decisions. The classical view is again that the work of a conflicts lawyer is done once the law of the forum has determined whether the foreign decision will be recognised; if not, that foreign decision will have no bearing on the case. It is argued that this is likewise untrue.

Three examples should illustrate why non-applicable norms and unrecognised decisions must be considered in some situations.

(1) In 1918, the *Reichsgericht* (German Imperial Court) had to determine the fate of a contract governed by German law.[23] The defendant argued that performance was rendered impossible by the British rules on 'trading with the enemy,' as performance was to be made in Britain, who was at war with Germany.

Wirtschaftsordnung. Festschrift für F. A. Mann zum 70. Geburtstag am 11. August 1977, ed. by FLUME W., München 1977, pp. 207-225.

[20] BGH 29.4.1999, in: *BGHZ* 141, 286, 294.

[21] See DANNEMANN G. (note 1), pp. 55-73.

[22] Some support for this view can be found in the datum theory developed by Ehrenzweig and the German scholarly doctrines of *Tatbestandswirkung ausländischen Rechts* and *Zweistufenlehre*. See EHRENZWEIG A., *Private International Law*, Dobbs Ferry, NY 1967, sec. 34; STOLL H., 'Deliktstatut und Tatbestandswirkung ausländischen Rechts', in: *Multum non multa. Festschrift für Kurt Lipstein aus Anlaß seines 70. Geburtstages*, ed. by FEUERSTEIN P. and PARRY C., Heidelberg and Karlsruhe 1980, pp. 259-277; HEßLER, H.-J., *Sachrechtliche Generalklausel und internationales Familienrecht. Zu einer zweistufigen Theorie des internationalen Privatrechts*, München 1985. For a full and critical appraisal see DANNEMANN G. (note 1), pp. 79-121.

[23] RG 28.6.1918, in: *RGZ* 93, 182, 184.

The British 'trading with the enemy' rules were obviously inapplicable before a German court. And even if they should have applied in principle, they would have been rejected as being against the German *ordre public*. Germany's highest court nevertheless recognised that performance of the contract had been made impossible by the imposition and enforcement of those rules in Britain. The non-applicable British rules had the effect of discharging the defendant from its obligation to perform under the contract.[24]

(2) A case decided in 1987 concerned a German man who, in 1976, had married in front of a German registrar an Israeli woman who subsequently became stateless.[25] An Islamic wedding ceremony celebrated shortly afterwards resulted in a document signed by both parties, two witnesses, and a religious official. This document stated that the dowry had been fixed at DM 100,000 and contained no choice of law clause. The spouses, who were divorced in 1980, remained domiciled in Germany at all relevant times. As to the dowry agreement, no German conflict rule, regardless of whether it related to family or contract law, could have applied any law other than German. The validity of this agreement nevertheless depended on its proper classification. Both matrimonial property agreements and promises of a gift (§ 518 BGB) require notarial certification under German law (§ 1410 BGB). However, in 1987 there was no similar requirement for agreements on post-divorce maintenance.[26] The Federal Court of Justice held that, in order to establish what the parties had in mind when entering into this agreement, recourse would have to be made to the Islamic law which had shaped the parties' expectations. The Court referred the case back to the lower court, which was to inquire whether under this Islamic law such a stipulated dowry was to be paid in lieu of or in addition to any maintenance or matrimonial property rights on divorce. The validity of the agreement thus depended on a law which was clearly inapplicable.

(3) A case decided in 1930 by the French *Cour de Cassation* concerned jurisdiction for a divorce between two British nationals domiciled in Paris.[27] At the time, French courts only had jurisdiction when at least one of the spouses was French. English courts, on the other hand, had jurisdiction only when at least one of the spouses was domiciled in England. The *Cour de Cassation* resorted to emergency jurisdiction to avoid the situation of a case which no court wants to hear. This emergency – an instance of an accidental discrimination – could only be spotted by the *Cour de Cassation*, because it considered a law which was inapplicable: English jurisdiction rules are not applied by French courts, and the doctrine of *renvoi* does not extend to jurisdiction issues.

---

[24] See also *Ralli Bros v Compania Naviera Sota Y Aznar* [1920] 2 KB 287, Lord Sterndale MR referring to Dicey on the Conflict of Laws: 'A contract ... is in general invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed'.

[25] BGH 28.1.1987, in: *IPRax* 1988, 109, with a case note by HEßLER H.-J., *ibidem*, pp. 95 *et seq.*

[26] Such a requirement has since been introduced by § 1585c BGB.

[27] Cass. req. 30.12.1930, in: *Rev. dr. int. pr.* 1933, p. 111.

These cases represent the three main situations where norms which are clearly inapplicable must nevertheless be considered. The reason in case one is that a foreign law, which is not applied by the forum, nevertheless effectively controls an aspect of the case, and this control is decisive for a requirement established by an applicable norm (impossibility of performance in our example). In case two, regard must be given to a non-applicable law because of a rule requiring a party's intent to be ascertained, and because the intention of that party is guided by an inapplicable law. Case three, an example of accidental discrimination, also involves a foreign law which controls an aspect of this case. In our example, French jurisdiction rules would refer the case to England, but are powerless to do so.

The following sections will elaborate on accidental discriminations, their causes, their constitutional significance, and their solution.

IV. Accidental Discriminations and How They Are Caused

An accidental discrimination occurs when the outcome of a case is different merely because it is connected to more than one legal system and the different treatment is not intended by any applicable rule.[28]

This difference is measured by comparing the outcome of the international case (e.g.: no jurisdiction anywhere) with the outcome of otherwise identical cases which are connected to only one of the systems involved (an English couple seeking divorce in England, a French couple seeking divorce in France). If the two legal systems agree on the treatment of national cases (there is jurisdiction) and the treatment deviates from the result which both legal systems produce when taken together (no jurisdiction), then the international case is treated differently just because it is international.

Accidental discriminations are caused by the fragmentation of applicable rules, including the fragmentation of the process of applying law.[29] This fragmentation creates a combination of rules from different legal systems which are not dovetailed to each other, leading to accidental discriminations. Many examples for such accidental discriminations can be found.

[28] For a more detailed analysis, see DANNEMANN G. (note 1), pp. 153-217. Similar now SONNENBERGER H.-J. (note 15), Einl. IPR no. 601.

[29] See DANNEMANN G. (note 1), pp. 265-339.

A. Fragmentation through Application in One Forum

Some accidental discriminations result from *diverging classifications* of issues, both within substantive law and between substantive and procedural law.

Much ink has been spilled over the so-called widow's case. This is a textbook case of a husband who dies intestate, leaving his widow without a penny because the applicable matrimonial property law belongs to one legal system and the applicable inheritance law to another.[30] The legal system whose rules apply to the matrimonial property leaves the issue of the widow's share to inheritance law. However, the legal system whose rules govern inheritance law, would instead give the widow a share of her deceased husband's assets under matrimonial property law. This is an accidental discrimination: both legal systems want the widow to receive a share of the husband's assets, but when they are applied in tandem the widow is left with nothing. *Beaudoin v Trudel* is an example of the reverse situation; a widower received more than he was entitled to under either the law of Quebec (which governed matrimonial property) or the law of Ontario (which governed inheritance).[31] This is also an accidental discrimination, which will adversely affect the children of the deceased rather than the widower.

An example of an accidental discrimination which is based on different classifications between substantive and procedural law relates to maintenance payments, where the assets and the income of the debtor must be established in order to determine the amount of maintenance due.[32] Some legal systems (e.g., Austrian law) provide a procedural solution. They give judges the power to investigate the financial situation of the defendant. Other legal systems (e.g., German law) give the person who is entitled to maintenance a substantive right of information against the debtor. If a child living in Austria sues a parent before a German court, it appears that there is no way to force the parent to disclose any personal financial information.[33] German courts have no such investigative powers, and the applicable Austrian law gives the claimant no right to such information. The result would be that the maintenance claim would fail.

---

[30] This textbook case was probably invented by HECK P., Review of C.L. von Bar, Theorie und Praxis des internationalen Privatrechts, in: *Zeitschrift für das gesamte Handelsrecht* 1891, pp. 305-319, at 311. The first attempt to solve this case was probably made by BARTIN E., 'De l'impossibilité d'arriver à la suppression définitive des conflits de lois', in: *Clunet* 1897, pp. 225-255, at 226-7. For further references and a full discussion, see DANNEMANN G. (note 1), pp. 9-11, 221, 226, 432-3, 458-9, 466.

[31] *Beaudoin v Trudel* [1937] 1 DLR 216, 217f, 220, 221ff (CA Ontario); see DANNEMANN G. (note 1), pp. 10, 226.

[32] Cases include OLG Stuttgart, 4.10.1988, in: *IPRspr.* 1988 No. 89, p 174 = *IPRax* 1990, 113; OLG Hamm 3.7.1992, in: *NJW-RR* 1993, 1155 = *IPRspr.* 1992 No. 119, p. 272; OLG Frankfurt 2.10.1990, in: *IPRspr.* 1990 No. 77, p. 152; AG Böblingen 16.1.1992, in: *IPRspr.* 1992 No. 85, p. 195; OLG Karlsruhe 22.9.1994, in: *FamRZ* 1995, 738, 739 = *IPRspr.* 1994 No. 94, p. 193, 195.

[33] As in OLG Karlsruhe 22.9.1994, in: *FamRZ* 1995, 738, 739, which, however, concerned maintenance between former spouses.

Accidental discrimination can also occur through what the present author would call a '*reference into the void*,' the conflicts equivalent to a '404 link' on the internet. This occurs when one legal system presupposes the existence of a particular institution which does not exist in a different legal system which, according to the conflicts rules of the forum, governs that (non-existing) institution. There are, for example, many occasions where English academics must wear a gown – during examinations; when Chancellor, Vice-Chancellor or Pro-Vice-Chancellor are present; and in Oxford and Cambridge, even during dinner in hall at their College. The gown they must wear is the one to which they are entitled by virtue of their university degree. This is a 'reference into the void' for those whose home universities have no gowns, as is the case for most German universities. The resulting accidental discrimination is that many Germans teaching at English universities are forced to break rules, either by not wearing a gown or by wearing a gown to which they are not entitled.

B. Fragmentation through Application in Several Fora

Accidental discrimination can also be caused through a sequence of decisions or other applications of law in different jurisdictions. In one such case, a German woman married a British soldier in Germany in front of a marriage officer of the British Rhine Army.[34] The marriage was valid under English law but void under German, which restricts the right to officiate marriages on German soil to specifically authorised German civil servants.[35] When the couple, still living in Germany, wanted to divorce, this turned out to be impossible. The English courts had no jurisdiction (because the spouses were domiciled in Germany), whereas the German court refused to dissolve a marriage which did not exist under German law. The resulting accidental discrimination creates a limping marriage which cannot be dissolved, with the effect that neither spouse can remarry without risking a conviction for bigamy – a result intended by neither English nor German law.

There are three different ways in which this lack of coordination between the legal systems can result in accidental discrimination; (1) loss of jurisdiction, (2) loss in transfer, and (3) loss of context.

The last case is an example of a *loss of jurisdiction*, as there was no court which could dissolve what, in many countries, would be considered a valid marriage.

If there is no loss of jurisdiction, there may nevertheless be a *loss in transfer*, when a case is handed from one legal system to another. One example concerns a person who had been convicted by a German court to one year imprisonment under § 189 of the German Criminal Code for Disparaging the Memory of a Deceased Person, and who had managed to escape to Italy.[36] He was

[34] OLG Düsseldorf 19.12.1956, in: *IPRspr.* 1956-57 Nr. 110.

[35] Art. 13 para. (3) Einführungsgesetz zum BGB.

[36] BVerfG 27.10.1970, in: *BVerfGE* 29, 312.

subsequently arrested in Italy and held on remand for eight months under a German extradition request, which was eventually rejected because the Italian court considered the offence to be of a political nature. The offender was later arrested in Germany. The Appellate Court decided that the man should serve the full sentence without any credit for the eight months he had spent in an Italian prison. There was no statutory provision which expressly ordered that the offender's Italian imprisonment must be counted towards the German sentence, as the legislator had failed to envision that a German conviction may precede the time when person is be held on remand under a German extradition request. The loss in transfer occurred when German law assumed jurisdiction without taking into consideration the legal developments which had occurred in Italy because of the German extradition request. The Federal Constitutional Court decided that the principle of proportionality required the Italian time to be counted towards the sentence and thus prevented the accidental discrimination which the Appellate Court had sanctioned.

Loss of context is the most subtle form of loss which occurs when different laws are applied to the same case in different jurisdictions. This situation is best illustrated by another example from academia. Very few students fail law exams at English universities, but those who do have little if any opportunity for a re-sit. For examinations at German law faculties, on the other hand, failure rates of 30% or higher are very common. However, these high failure rates are compensated by extended opportunities for a re-sit, which can be taken in a subsequent term. English exchange students who spend a semester or two in Germany can easily be caught between those two systems. If they narrowly fail one examination in Germany and then return to England, they are frequently unable to retake an examination for logistical or even legal reasons (they are no longer registered with the German university). In England, the German examination will count as a final failure and have the same consequence as a failed English examination. This can imply that students will receive no credit for their entire year abroad. There is no loss of jurisdiction in this case (the English university remains in charge), nor any loss in transfer (all examination results are recognised). This is a loss of context – namely the context between high failure rates and extended opportunities for a re-sit. And this is also an accidental discrimination. In a purely English case, the narrowly failed examination in Germany would have been marked as a 'pass' or better. In a purely German case, students who narrowly fail on the first attempt will most frequently pass on their second or third attempt.

V. Adjustment and Accidental Discrimination

Adjustment (*Anpassung* or *Angleichung* in German,[37] *adaptation* in French,[38] *adaptación* in Spanish,[39] *aanpassing* in Dutch[40]) is recognised as an instrument of conflict law in most continental legal systems. It is, however, hardly known or recognized in this generality in the common-law world.[41]

The present author makes four propositions relating to adjustment:

(1) Adjustment should be understood narrowly, as an act by which courts or other authorities intentionally ignore or modify applicable legal norms. Adjustment must be clearly distinguished from regular legal application and interpretation. Setting aside the applicable law is an act by which courts correct the legislator. Exceptional reasons must be found in order to justify such an act. Extending the use of the term 'adjustment' into regular interpretation obscures the border line which courts cross when they set aside applicable rules. Such an obscurity facilitates a wide understanding of situations which allow for adjustment, leaving courts as *de facto* legislators for all conflict situations perceived as being somehow difficult or problematic.[42]

(2) Adjustment should be permitted and is normally necessary as *ultima ratio* in order to prevent accidental discrimination. Accidental discrimination will normally amount to an infringement of human rights or of the rule of law, most commonly as an infringement of the principle of equal treatment. The rights to liberty and property will also frequently appear on the casualty list. It is argued that the power and duty of courts to prevent accidental discrimination through adjustment is linked to and limited by the degree to which the legislator is bound by human rights provisions and the rule of law. Whenever the legislator would be prevented from deliberately treating cases differently on the ground that they are linked to more than one legal system, courts may and must intervene if the same unequal treatment occurs accidentally (below, VI).

(3) Adjustment should not be used to overcome other obstacles involving conflict of laws. German courts in particular have become accustomed to resorting to adjustment whenever they perceive a 'gap' in the applicable norms. Scholarly writing supports the notion that adjustment is permitted whenever rules from

---

[37] SCHRÖDER J., *Die Anpassung von Kollisions- und Sachnormen*, Berlin 1961; LOOSCHELDERS D., *Die Anpassung im internationalen Privatrecht*, Heidelberg 1995.

[38] LEWALD H., 'Règles générales des conflits de lois. Contribution à la technique du droit international privé', in: *Recueil des Cours* 1939-III, pp. 1-147; CANSACCHI G., 'Le choix et l'adaptation de la règle étrangère dans le conflit des lois', in: *Recueil des Cours* 1953-II, pp. 81-162.

[39] BOUZA VIDAL N., *Problemas de adaptación en derecho internacional privado e interregional*, Madrid 1977.

[40] OFFERHAUS J., *Aanpassing in het internationaal Privaatrecht*, Amsterdam 1963.

[41] JOFF G. J., 'Adjustment of Conflicting Rights. A Suggested Substitute for the Method of Choice-of-Laws', in: *Virg. L.R.* 1952, pp. 745-768.

[42] See below VII.A.

different legal systems are 'contradicting.' Outside accidental discrimination, such problems can generally be solved through proper construction and interpretation of rules, without having to resort to overriding applicable norms (below, VII).

VI. Adjustment, Human Rights, and the Rule of Law

It has been argued above that accidental discrimination normally amounts to an infringement of human rights or of the rule of law.[43] This will naturally depend on the way and extent to which the forum protects human rights and the rule of law through its constitution, international obligations, and other laws. The German constitutional arrangements can serve as an example for the following observations.

It is submitted that German courts and other authorities are required to prevent accidental discrimination for reasons relating to human rights and the rule of law if the following requirements are met:

(1) The case to be decided falls within the international scope of German human rights provisions or the German rule of law;

(2) The accidental discrimination falls within the substantive scope of German human rights provisions or the German rule of law; and

(3) Constitutional law would have prevented the German legislator from deliberately treating this and similar cases differently on the ground that they are linked to more than one legal system.

A. International Scope of Human Rights Provisions and the Rule of Law

The accidental discrimination examples given above show that some cases have strong links to two legal systems, as for example in the case of the person held on remand in Italy for extradition to Germany.[44] However, other cases are predominantly connected with one legal system, as for example the case of 'gownless' fellows in English academia.[45] It appears evident that the first case falls within the international scope of German human rights provision, but this is far less obvious for the second case.

It is argued that the international scope of such provisions is related to the responsibility which the forum's legal system has assumed in a given case.

(1) If Germany assumes full and exclusive jurisdiction over a case, any accidental discrimination which occurs in Germany is within the international scope of protection of German constitutional law.

---

[43] Similar now SONNENBERGER H.-J. (note 15), Einl. IPR no. 341.

[44] BVerfG 27.10.1970, in: *BVerfGE* 29, 312.

[45] Above, IV.

(2) If Germany assumes only partial or non-exclusive jurisdiction, an accidental discrimination will generally be within the international scope of German constitutional law, if the German legal system has contributed to the fragmentation which caused the accidental discrimination by making or accepting partial or complete references to or from other legal systems.

(a) This is the case particularly if the German legal system employs another legal system for administering justice in Germany. In the above-mentioned extradition request case, this request amounted to a partial reference to Italian law and at the same time expressed the willingness of the German legal system to accept a reference back from Italian law as soon as the person was extradited.[46] It is this reference to Italian law which brought the entire process – including the eight months spent on remand in Italy – within the protective sphere of the right of liberty enshrined in Article 2 paragraph (2) of the German Basic Law (Grundgesetz, GG). The Federal Constitutional Court emphasized that it was the German authorities who had asked the Italian authorities to arrest the applicant and to keep him on remand until extradition.

(b) If the forum refers only part of a case to another legal system without expecting to have it referred back later, that forum remains responsible for any accidental discrimination which results from a loss of jurisdiction, loss in transfer, or loss of context.[47] In a case decided by the ECJ, a French law replaced unemployment benefits for older employees with an early retirement pension.[48] The claimant, who had divided his working life between the UK and France, was not entitled to early retirement in the UK and for four years had to live on a pension which was lower than the pension of fellow workers who had spent their entire working life in France. The French legal system, which partially referred the claimant to a (non-existing) early retirement pension in the UK, was responsible for this accidental discrimination. Had German law applied instead of French law, this loss of entitlements would have been within the international scope of protection of Article 14 GG on property rights.[49] The UK, on the other hand, was not responsible. It had neither made nor accepted any reference to or from French law.

(c) A more difficult situation is the complete and final reference a forum uses to deny any jurisdiction, as in the case of the British couple who were domiciled in France and where neither English nor French courts appeared to have jurisdiction over their divorce.[50] While no legal system should be expected to open

---

[46] BVerfG 27.10.1970, in: *BVerfGE* 29, 312; above, IV.

[47] See above, IV.

[48] Judgment of 7 July 1994, C-146/93, *Hugh McLachlan / Caisse nationale d'assurance viellesse des travailleurs salariés de la région d'Ile-de-France (CNAVTS)*, in: *ECR* 1994 I 3229. The ECJ held that this did not amount to a violation of the claimant's freedom of movement.

[49] Pensions are covered by the constitutional protection of property rights in Article 14 GG, see e.g. BVerfG 16.7.1985, in: *BVerfGE* 69, 272, 300-304; BVerfG 12.2.1986, in: *BVerfGE* 72, 9, 18 *et seq.*; BVerfG 15.7.1987, in: *BVerfGE* 76, 220, 235.

[50] Cass. req. 30.12.1930, in: *Rev. dr. int. pr.* 1933, p. 111; see above, III.

jurisdiction for just any international legal dispute, the example demonstrates that at least one legal system, and sometimes two, must assume responsibility for any case where no jurisdiction seems to exist. In the author's view, German constitutional law, and in particular the right to access to court under the German rule of law established in Article 20 GG,[51] require German legislative and judicative powers to ensure that at least one court – be it German or foreign – will be able to hear any case having a close connection to the German territory or to a German citizen. If need be, German courts must open emergency jurisdiction by adjusting their jurisdiction rules, as was done by the *Oberlandesgericht* Düsseldorf in the above-mentioned case involving a disputed prorogation of arbitration proceedings in England.[52]

(d) Another difficult situation arises where the German legal system accepts a reference from a foreign legal system. It is argued that accidental discrimination resulting from this form of fragmentation falls within the international scope of protection of the German constitution to the extent that the German legal system has accepted the case for a complete and final resolution (as e.g. in the case of a complete enforcement of a foreign decision). Other cases depend on the individual circumstances.[53]

(3) An equally difficult situation is created by uncoordinated jurisdiction – where courts or other authorities in different states have assumed simultaneous and overlapping jurisdiction over the same case without any facility for coordination. It is argued that if one of those jurisdictions is Germany, such cases are within the international scope of protection of the German rule of law, at least to the extent that the German authorities may not impose duties on parties which are incompatible with the duties imposed in foreign proceedings. For example, German courts may not punish a witness for having refused to give evidence if the witness, by making a statement, would have committed a criminal offence under a foreign law.[54]

---

[51] BVerfG 12.2.1992, in: *BVerfGE* 85, 337, 345. See also BAG 25.11.1983, in: *NJW* 1984, 751: German social and labour courts played a game of jurisdiction ping pong with a case in which the Federal Labour Court eventually decided that access to justice was paramount, being part of the constitutional guarantee of the rule of law in Article 20 GG, and more important than the correct application of jurisdiction rules between labour and social courts. A more specific guarantee for access to courts exists for the judicial review of acts of any German public authority in Article 19 para. (4) GG.

[52] OLG Düsseldorf 17.11.1995, in: *IPRspr.* 1995, No. 189, p. 384 = *RIW* 1996, 239. The court stated that German courts had to assume jurisdiction in this situation regardless of whether the arbitration tribunal in England had been right or wrong to decline jurisdiction.

[53] See DANNEMANN G. (note 1), pp. 392-5, 399.

[54] See e.g. COESTER-WALTJEN D., *Internationales Beweisrecht*, Ebelsbach 1983, no. 592.

B. Substantive Scope of Human Rights Provisions and of the Rule of Law

Two of the cases mentioned above involve the rule of law, namely accidental discrimination by creating incompatible duties and excluding access to the courts. In two other such cases, accidental discrimination infringes the rights to liberty and property. However, the human right which is most relevant for accidental discrimination is equality before the law, as expressed in Article 3 GG. This will be treated below in more detail. Suffice it to say at this stage that most cases of accidental discrimination fall quite clearly within the substantive scope of human rights provisions or of the rule of law.

C. Justification of Different Treatment

As has been explained above (IV), accidental discrimination occurs if a case which is linked to several legal systems is treated differently than comparable cases which are each linked to only one of those systems. This difference of treatment between purely national and international cases is frequently justified. It should also be kept in mind that if the different treatment is intended by an applicable rule, it will not amount to an *accidental* discrimination.

However, if the legislator treats international cases differently from cases which are only connected to its domestic legal system, such legislation may nevertheless be unconstitutional for violating the principle of equal treatment, as enshrined in Article 3 paragraph (1) GG. In 1979, the Federal Constitutional Court had to review legislation which subjected the payment of retirement pensions to the condition that the recipients either resided in Germany or were German nationals.[55] This was intended to exclude retired employees who had migrated to Germany to work and then returned to their country of origin. It also excluded Germans who had moved abroad and lost their German citizenship; German law then and now strips Germans of their citizenship when they assume a different nationality through a voluntary act, including marriage.[56] The Federal Constitutional Court held that the exclusion of pension rights violated Article 3 paragraph (1) GG and was unconstitutional. No justification could be found for the different treatment of the international cases. The Court held that those who had acquired pension rights through their work could not be taken hostage by the Federal Government for the purpose of improving its negotiation position with foreign governments on the corresponding treatment of German nationals under foreign pension schemes. A similar, more recent decision held that the exclusion from unemployment benefits for those employees who commute from abroad to their workplace in Germany was unconstitutional.[57] In a nutshell, international cases may be treated differently from purely German cases, but only where the different treatment can be justified.

[55] BVerfG 20.3.1979, in: *BVerfGE* 51, 1.

[56] § 25 Staatsangehörigkeitsgesetz, at the time: § 25 Reichs- und Staatsangehörigkeitsgesetz.

[57] BVerfG 30.12.1999, in: *RIW* 2000, 299.

A series of decisions by the Federal Constitutional Court makes it clear that the requirement that different treatment of like cases must be justified is not limited to legislation, but extends to any application of law by courts and other authorities. The Court held:

> 'The general principle of equality of the law is violated if one group of addressees of a legal norm is treated differently from other addressees of this norm, and when there is no difference between the two groups which by its kind or substance could justify the unequal treatment. (…) It is not only the legislator who can thus infringe basic rights. The same violation occurs when courts, by interpreting statutory provisions or by filling gaps, arrive at a distinction which the legislator would not be entitled to make.'[58]

This implies a constitutional duty on the courts to prevent accidental discrimination. The constitutional yardstick to be applied in all cases of unequal treatment of international cases is as follows: would the German legislator be free under Article 3, paragraph (1) GG to treat cases like the one to be decided differently from purely domestic cases? Could the legislator, for example, exclude a surviving spouse from the estate of her late husband if the couple was linked to several legal systems? Could a German Act of Parliament provide that no court should be allowed to hear certain types of divorce cases or commercial disputes? Would the German constitution allow the *Bundestag* to pass an act whereby children who live in certain foreign countries are not allowed to claim maintenance from parents who live in Germany? The answer in all those cases is 'no.' And because the answer is 'no' in these and the vast majority of other cases of accidental unequal treatment, the cases amount to discrimination which is unconstitutional under Article 3 paragraph (1) GG. It must be kept in mind, though, that a mere difference in treatment between a purely German and an international case is a necessary, but not a sufficient condition for accidental discrimination. The two other necessary conditions are (1) that the same difference must exist between the international case and a purely national case under the other legal system involved, and (2) that no applicable norm intends this difference in treatment.[59]

[58] BVerfG 11.6.1991, in: *BVerfGE* 84, 197, 199; my translation. Nearly identical wording can be found in BVerfG 3.7.1985, in: *BVerfGE* 70, 230, 239-240; BVerfG 22.10.1981, in: *BVerfGE* 58, 373-374. See DANNEMANN G. (note 1), pp. 365-9.

[59] See above, IV.

VII. No Adjustment without Accidental Discrimination

A. 'Gaps'

The leading case by the German Federal Court of Justice on adjustment seems to suggest that any gap within the applicable norms justifies adjustment and that courts are even free to construct such gaps.[60] The case concerned a works contract between two East German public sector companies made shortly before reunification. The client (defendant) was no longer in a position to use the installations to be provided by the contractor (claimant). The client therefore was to pay the agreed price minus any amount by which the claimant could have mitigated the damage, such as by selling the installations to a third party. The case turned on who had the burden of proving whether the claimant could have mitigated its damage.

There was a provision in the East German Contract Act which clearly placed this burden on the claimant. However, the Federal Court of Justice held that this provision, although not repealed, had nevertheless become 'meaningless' when East German procedural law shifted from an Eastern system of investigative judges to a Western style system where parties have to plead the facts. As this now 'meaningless' provision should not be applied, there was a gap. And that gap was duly filled by the Federal Court of Justice by way of adjustment, namely by inventing a burden of proof rule which placed the burden of proof on the defendant. The defendant could not possibly show how many other orders the claimant might have had and therefore lost the case. A touch of irony is added to this case by the fact that the same Federal Court of Justice later held in a different case that it is generally the contractors who must present their calculations in order for the court to establish whether they have been able to mitigate their damage.[61] That, however, was under the German Civil Code as now applied throughout Germany.

This case demonstrates the danger of using adjustment as a general gap-filling tool. Rather than preventing accidental discrimination, adjustment can easily be used to create such discrimination. The old East German law, the reformed East German law, and even the subsequent Federal German law agreed that the contractor had to present the facts which would allow the court to conclude whether any mitigation could have been made. The 'adjustment' in the present case discriminated against the client, who in this case – and only in this case – was improperly saddled with the burden of proof. There can be no constitutional justification for such judicial interference with the applicable law. On the contrary, constitutional concerns rally against such an extension of judicial law-making powers *contra legem*. It also went unnoticed that it was rather doubtful whether this case involved any conflict of laws, as only East German law was involved.

[60] BGH 1.4.1993, in: *DtZ* 1993, 278, 280, referred to as leading case by BGH 7.3.1995, in: *FamRZ* 1995, 1202.

[61] BGH 7.11.1996, in: *NJW* 1997, 733.

B. 'Contradicting Norms'

In scholarly writing, adjustment has traditionally been linked to so-called 'contradicting norms' (*Normenwidersprüche*).[62] There is no agreement on what should be precisely understood as 'contradicting norms.' Resorting back to the textbook case of the surviving spouse who is about to receive too little or too much of the deceased spouses' estate as a result of 'contradicting' rules in inheritance and matrimonial property laws, scholars frequently distinguish between the 'lack of norms' (*Normenmangel*, failing to give any share to the surviving spouse) and the 'abundance of norms' (*Normenhäufung*, surviving spouse receiving a double share of the estate).[63] Kegel additionally distinguishes between 'existential contradictions' (*Seinswidersprüche*) and 'normative contradictions' (*Sollenswidersprüche*), whereas the former ask for something that 'cannot be', for example the logically impossible, and the latter asks for something that 'should not be' (as in the case of the surviving spouse).[64]

As Stoll has observed, the category of 'cannot be' is not existential in a philosophical sense, and equally belongs to the sphere of the normative.[65] Moreover, the examples given for 'cannot be' do not hold up to scrutiny. One such textbook example concerns relatives who die in a car accident and where, due to different presumptions made by different legal systems involved, each of the passengers is presumed to have died before the other.[66] It is indeed logically impossible that both presumptions are true, but they can nevertheless make sense. They are made in two different legal proceedings, one to establish the heirs of the husband and another to establish the heirs of the wife.[67] The result of those two presumptions is that the heirs of the husband (and not those of the wife) inherit the husband's estate, and the heirs of the wife (and not those of the husband) inherit the wife's estate. That is neither a case of 'cannot' nor a case of 'should not,' and it is certainly not a situation that would call for adjustment.

The categories of 'lack of norms' and 'abundance of norms' are similarly questionable as a matter of logic and have little explanatory force. There is no lack

---

[62] WOLFF M., *Internationales Privatrecht*, 1st ed., Berlin 1933, pp. 39 *et seq.*; KEGEL G. *Internationales Privatrecht*, 7th ed. München 1995 § 1 VII 2 d; LOOSCHELDERS D. (note 37), p. 8.

[63] WOLFF M., KEGEL G. and LOOSCHELDERS D. *ibidem*; VON BAR C. and MANKOWSKI P. (note 15) § 7 VII.2; KROPHOLLER J. (note 19) § 34 III; see DANNEMANN G. (note 1), 220-227 with further references.

[64] KEGEL G. (note 62) § 8 II; slightly different now KEGEL G. and SCHURIG K., *Internationales Privatrecht*, 9th ed., München 2006, § 8 II, distinguishing between logical and teleological contradictions.

[65] STOLL H., Review of Jochen Schröder, Die Anpassung von Kollisionsnormen und Sachnormen, in: *FamRZ* 1963, pp. 318-9; SONNENBERGER, H.-J. (note 15) Einl. IPR no 606; OFFERHAUS J. (note 40) p. 193.

[66] KEGEL G. (note 62) § 8 III 4; KEGEL G. and SCHURIG K. (note 15) § 8 III 3. Similar SCHRÖDER J. (note 37), p. 127.

[67] LOOSCHELDERS D. (note 37), p. 117.

of norms for dividing the property of the deceased spouse in any variant of the widow's case. Nor are there too many norms for this purpose. And the applicable norms certainly do not contradict each other. It is just that they together produce a result that can be at odds with the intentions of any of the legal systems involved. If this is the case, this amounts to an accidental discrimination. But that is not necessarily so. The spouses may have been cousins, and the widow may inherit all as the closest living relative of the deceased husband. Although there is the same complete 'lack of norms' which give a share to the surviving spouse, this does not result in any accidental discrimination, and no adjustment is necessary. On the other hand, there are accidental discriminations which have nothing to do with 'lack' or 'abundance' of norms: for example in the above-mentioned case of the University exchange students who narrowly fail a German examination which they would probably have passed in England, without having the extended opportunities for a re-sit which are available to German students.[68]

In summary, the cases which are associated with 'lack' or 'abundance' of norms overlap with cases of accidental discrimination. However, it becomes clear on closer inspection that adjustment is necessary if there is accidental discrimination without any 'lack' or 'abundance' of norms, but no need for adjustment if a 'lack' or 'abundance' of norms does not result in an accidental discrimination.[69] The result oriented approach which establishes accidental discrimination, and which at the same time provides the constitutional justification for adjustment, is to be preferred over an analysis of 'contradicting' norms – which in fact are not even contradicting.

VIII. How to Adjust Rules

There has been some debate as to how rules are to be adjusted,[70] and, in particular, on whether a conflicts solution (choosing a different law) or a substantive law solution (modifying, ignoring, or creating new substantive rules) is preferred.[71] It may be helpful in this context to review the examples which have been given for accidental discrimination throughout this article.

(1) Only one solution is available for the 'case no court wants to hear:' to open emergency jurisdiction (i.e., a conflict of law solution), preferably in the first court seized of the matter, as was indeed done by the French *Cour de cassation* in our case.[72]

---

[68] See above, IV.B.

[69] Similar now SONNENBERGER H.-J. (note 15), Einl. IPR no. 601.

[70] See DANNEMANN G. (note 1), pp. 429-457.

[71] See DANNEMANN G. (note 1), pp. 437-439.

[72] Cass. req. 30.12.1930, in: *Rev.dr.int.pr.* 1933.111.

(2) A conflict of law solution is also advisable for the widow's case, where interpretation (rather than adjustment) should normally suffice.[73] The conflict rules which together govern matrimonial property and inheritance law should be seen in the systematic context of the substantive rules which they invoke. Those rules which seek to give the surviving spouse a share of the assets of the deceased are selected by way of qualification. By such normal qualification of substantive rules, it is perfectly possible to qualify, for example, a matrimonial property law provision in Swedish law as belonging to those norms which Austrian conflicts law invokes for the succession. No conflicts or substantive rule needs to be modified or set aside. No adjustment is therefore required in order to prevent an accidental discrimination.

(3) In the cases where it appears impossible to establish the financial position of the party which owes maintenance, German courts have faced a choice of either assuming investigative powers within civil proceedings, or using adjustment to create a substantive claim for information under the applicable foreign maintenance law which knows of no such claim. The courts have consistently chosen the latter.[74] The reason is that this solution carries a lower risk of upsetting fundamental principles and causing knock-on effects.

(4) There is normally only one end from which a 'reference into the void' can be solved, namely from that of the legal system which makes the reference. It was impossible in our example to obtain any gown from German universities which had abolished them. Adjustment must occur within the legal system which creates a reference into the void. This essentially provides a choice between dispensation from wearing a gown or admitting the gownless academic to wear the gown associated with a degree from the university where he or she teaches. The latter will normally be the better solution, as this will save the potential victim of this accidental discrimination from 'sticking out,' and at the same time do more to achieve the formal atmosphere which rules on academic attire seek to create.[75]

(5) The couple with the limping marriage which could not be dissolved can most easily be saved by adjustment of the English jurisdiction rules, namely with English courts assuming emergency jurisdiction.[76] It would potentially be more damaging for German courts to dissolve a marriage which under German law does not exist, because such a divorce would entail recognition that the marriage was valid, with possible knock-on effects on matrimonial property and post-divorce maintenance rights. Quite generally, cases involving loss of jurisdiction (above VI.B) are best solved by adjustment of jurisdiction rules.

---

[73] DANNEMANN G. (note 1), pp. 466, 458-9.

[74] OLG Stuttgart, 4.10.1988, in: *IPRspr.* 1988 No. 89, p. 174 = *IPRax* 1990, 113; OLG Hamm 3.7.1992, in: *NJW-RR* 1993, 1155 = *IPRspr.* 1992 No. 119, p. 272; OLG Frankfurt 2.10.1990, in: *IPRspr.* 1990 No. 77, p. 152; AG Böblingen 16.1.1992, in: *IPRspr.* 1992 No. 85, p. 195; OLG Karlsruhe 22.9.1994, in: *FamRZ* 1995, 738, 739 = *IPRspr.* 1994 No. 94, p. 193, 195.

[75] DANNEMANN G. (note 1), p. 450.

[76] OLG Düsseldorf 19.12.1956, in: *IPRspr.* 1956-57 No. 110.

(6) The case of the German convict who had be held on remand in Italy could have easily been solved by the competent court by acknowledging a gap in the statutory provisions and then applying the provisions on time spent abroad on remand before conviction in Germany by way of analogy, as indeed the court of first instance had done.[77] Adjustment was therefore unnecessary.

(7) The case involving the failed exams of exchange students could realistically be solved only by developing, by way of adjustment, a specific new substantive rule. The rule which the present author proposed during his time at University College London, and which was then accepted, was to count all examinations which the UCL students had taken in Germany together and consider the student as having failed only if the average of those examinations was below the pass line.[78] The case illustrates that sometimes solutions must be found by way of adjustments which are substantially different from what the laws of either one of the legal systems involved envisage for purely domestic cases.

(8) The case of the reduced pension could realistically be resolved only by adjustment within French law.[79] Pensions are based on payment of contributions, which would have been upset by creating a higher French (or UK) pension. The reduced money which the employee received as a result of this accidental discrimination corresponded to money gained by the French unemployment scheme, so this scheme should have made up for the difference.

In summary, in two of the above cases (2 and 6) accidental discrimination can be prevented by interpretation, which is naturally to be given preference over adjustment. This also demonstrates that the notion of accidental discrimination can be used as a tool for interpretation: if there is any doubt, an interpretation must be preferred which avoids accidental discrimination.

Another two of the above cases (1 and 5) are best solved by the adjustment of conflict norms, in both cases by creating emergency jurisdiction.

The remaining four cases are best solved by the adjustment of substantive rules.

This also shows that no general preference can be established between adjustment of conflicts norms and substantive norms. It is usually advisable to choose the path of least resistance and minimal destruction.[80] In the majority of cases, the best solution is fairly obvious.

---

[77] BVerfG 27.10.1970, in: *BVerfGE* 29, 312.

[78] DANNEMANN G. (note 1), pp. 448-9.

[79] Judgment of 7 July 1994, C-146/93, *Hugh McLachlan / Caisse nationale d'assurance viellesse des travailleurs salariés de la région d'Ile-de-France (CNAVTS)*, in: *ECR* 1994 I 3229; DANNEMANN G. (note 1), p. 445.

[80] KEGEL G. and SCHURIG K. (note 15), § 8 III 1; DANNEMANN G. (note 1), pp. 435-437.