UNILATERALISM AND CONFLICT OF LAWS

Dr. Rafael Arenas García
Universitat Autònoma de Barcelona

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ABSTRACT

For centuries, PIL has used unilateral and multilateral approaches. Each of them takes, as point of departure, a different conception of the aim and objectives of PIL, although, at the end, the results of unilateral and multilateral methods do not diverge essentially in the solution of many specific problems.

Maybe we should considerer unilateralism and multilateralism as different tools, and for this reason, it would be necessary to focus in the practical use of each method instead relying on the essential differences of unilateral and multilateral PIL.

Here we will discuss some of these issues, trying to understand the differences between unilateralism and multilateralism as two different phases in a two-steps PIL, but without leaving aside that these differences are also connected with changes of the political structures that have become lawmakers. As we are going to see, there is a connection between the decentralised political system during the Middle Ages and unilateralism; centralization of the political power in the 19th and 20th century and conflictualism; and the multilevel governance in Europe at the end of the 20th century and 21th century and the growing importance of unilateralism.

RESUMEN

Durante siglos, el DIP ha utilizado enfoques unilaterales y multilaterales. Cada uno de ellos toma, como punto de partida, una concepción diferente del objetivo y los objetivos del DIP, aunque, al final, los resultados de los métodos unilaterales y multilaterales no divergen esencialmente en la solución de muchos problemas específicos.

Quizás deberíamos considerar el unilateralismo y el multilateralismo como herramientas diferentes, y por esta razón, sería necesario centrarse en el uso práctico de cada método en lugar de buscar diferencias esenciales entre el DIP unilateral y multilateral.

En este trabajo, platearemos algunos de estos temas, tratando de entender las diferencias entre el unilateralismo y el multilateralismo como dos fases diferentes en un DIP en dos escalones, pero sin dejar de lado que estas diferencias también están conectadas con cambios en las estructuras políticas que se han convertido en legisladores. Como vamos a ver, hay una conexión entre el sistema político descentralizado durante la

Edad Media y el unilateralismo; la centralización del poder político en los siglos XIX y XX y el conflictualismo; y la gobernanza multinivel en Europa a finales del siglo XX y XXI y la creciente importancia del unilateralismo.

I. INTRODUCTION

Very often, unilateralism and conflictualism are shown as opposite approaches to PIL. A very common presentation of the history or PIL suggests that in the medieval origins of the discipline, authors were limited to a unilateralist point of view. Only in the 19th century, with Savigny, was universalism, as a more perfect method for PIL, discovered.

This schematic vision is not correct. Medieval authors of the Italian Scholl tried to find the most suitable solutions for cases connected with different laws, but the unilateralist approach that they used was, in essence, the same method that Savigny developed in the 19th century. "Real" unilateralism was a consequence of the creation of sovereign nations in Europe during the 17th and 18th centuries and was characterised by the use of recognition as a key part of PIL. In the 19th century, conflictualism was capable of giving answers to some PIL problems that could not be solved with the existing tools, but that conflictualism (mainly linked to the paramount figure of Savigny) was not a completely new invention, because, as Savigny had recognized, his method was deeply linked with that of the medieval authors of the Italian School.

Nowadays, conflictualism and unilateralism coexist and each of them dominates different parts of PIL.

We will deal with the historical evolution of unilateralism and conflictualism in sections II, III and IV. After that, we will briefly consider the main areas in which unilateralism currently has a strong presence (sections V, VI and VII).

The purpose of this paper is to show that unilateralism has been an essential part of PIL since its beginnings in the Middle Ages and that it is now poised to play a more significant role in PIL. This is because the features of the globalized world, in contrast to the era of sovereign nations, demand a more intense use of the method of recognition.

II. WHAT IS PIL ABOUT?

1. REGULATION OF SITUATIONS CONNECTED WITH MORE THAN ONE JURIDICAL SYSTEM

When we try to explain what PIL is about, nowadays, probably the most common approach is that focused on the regulation of situations connected with more than one juridical system. This is the most common approach in the Spanish doctrine and also in other countries[1].

[1] See FERNÁNDEZ ROZAS, J.C./SÁNCHEZ LORENZO, S., *Derecho internacional privado*, Cizur Menor (Navarra), Civitas/Thomson Reuters, 12ª ed. 2022, p. 24. In France, see MAYER, P./HEUZÉ, V., *Droit international privé*, Paris, Montchrestien, 10 ed. 2010, p. 2. In England see MCCLEAN, D./BEEVERS, K., *Morris The Conflict of Laws*, London, Sweet & Maxwell, 6º ed. 2005, p. 2.

From this point of view, PIL is a specific branch of the law devoted to the ruling of those situations that have relevant connections with more than one law. In the same way that Commercial Law differs from Civil Law because the first one is a specific set of rules that applies when a merchant is involved[2]; PIL differs from Civil, Commercial or Labour Law because the first one only deals with Civil, Commercial or Labour situations linked with several countries.

Of course, there are many nuances that could be introduced here. For example, I have used the terms "juridical system", "law" and "countries". Obviously, these are not synonyms and there are significative differences when we consider PIL as regulating situations connected with different juridical system and when we focus on situations connected with different countries; but I am not going to enter in this discussion because, for the purposes of this paper, as we are going to see, the relevant point is that PIL is about regulation of situations. We can also try with a word different than "situation"; for example, "institution", "case" or "relationship"; but I do not want either to enter into this issue, because it is not important for the question we are dealing with.

Finally, I am not going to enter into discussion about one feature of our discipline that could also be interesting. I am talking about de "P" of "Private". Till now, I have avoided limiting the "situations" (or cases or institutions) to those that could be characterised as "private". That is, I am not going to stress that PIL is a part or private law, as opposite to public law. This issue could be of some interest for this paper; but I think that it is not necessary to go beyond than saying that the adjective "private" in PIL is more linked to the distinction between public international law and private international law, than to the question of the characterization of PIL as a part of private law. The distinction between public and private law is not easy in some cases and, most important; maybe it is not very useful. Particularly, when we consider an international instead of domestic perspective. The different approaches to the separation between private and public law in each country demands a careful consideration of the essential principles of each legal order. This could be of some interest, but it is not necessary for our purposes.

Here we should stress that we are talking about regulation, and that means that each rule that should be used in order to rule situations connected with different legal orders, is a PIL rule. That is, for example, the Vienna Convention of 1980 on Contracts for the International Sale of Goods is a part of PIL. Conflict rules are only one of the types of rules that are used in PIL. Yes, it is the most important kind of rule in PIL; but the definition and characterisation of PIL does not depend of the conflict rule. We could imagine a world in which there will be international conventions with harmonised substantial rules for all matters. That is, a world without conflict rules and still there will be PIL in this world, because the specific feature of this branch of the law is not the type of rule used, but the matters that regulates. For as long as there will be frontiers, there will be PIL. From another point of view: for as long as there will be different legal orders, there will be PIL, only the establishment of a world substantial law, without differences according with the territory or the persons obliged, will mean the end of PIL.

However, conflict rules are so important in PIL, that just saying that they are a kind of norms, without exploring the reasons for their abundance, is in some way disappointing. There must be some connection between the conflict rules and the goal of PIL. There

[2] Or an act of commerce, see URÍA, R., *Derecho Mercnatil*, Madrid, Marcial Pons, 15º ed. 1988, p. 5; GERMAIN, M./VOGEL, L., *Traité de droit commercial*, Paris, L.G.D.J. 17 ed. 1998, p. 1.

should be some reason for ruling the private situations connected with several laws, precisely, using a rule that determines which, of these different laws connected with the situation, is going to apply. In fact, for some authors, PIL is not the branch of the law devoted to the regulation of the situations connected with different laws, but the one who resolve conflicts arising from international situations "by choosing and applying the domestic law of one of the involved states"[3]. Conflict rules, in some way[4], transforms an international situation in a domestic one.

Here we will discuss about this argument and the connection between this approach and what has been called "unilateralism", a way of understanding PIL different than multilateralism.

2. ASCERTAINING TERRITORIAL AND PERSONAL SCOPE OF APPLICATION OF THE RULES

When we consider PIL from a unilateralist point of view, the aim of this branch of the law is not the regulation of the international situations, but the substantial rules of the different laws connected with the case. In pure domestic cases there is no doubt about which law should be applied; but in cases connected with several laws, it is necessary to ascertain the personal and territorial scope of application of the substantial rules of each legal system in order to determine which of those rules covers the case. PIL will be the branch of the law that analyses this scope of application; and the correct definition of that scope will become the key tool to resolve conflict of laws.

So, the centre of a multilateral approach to PIL will be the international situation and of a unilateral approach will be the rule. It is not a small difference; but, at the same time, we should admit that the final solution could be the same following a unilateral approach than according with a multilateral approach based on the use of conflict rules. In both cases, at the end, the regulation of the international situation will consist on the joint application of several domestic rules. The difference will rely on the ground for the application of this rules: from a multilateral approach, we found this ground in the

[3] SYMENONIDES, S.C., "Accommodative Unilateralism as a Starting Premise in Choice of Law", *Balancing of Interests: Liber Amicorum Peter Hay*, Frankfurt am Main, Recht und Wirtschaft, 2005, pp. 417-434, p. 3. In a similar way, RÜHL, G. ("Unilateralism (PIL)", in BASEDOW. J./HOPT, K./ZIMMERMANN, R. (eds.), *Max Planck Encyclopedia of European Private Law*, Oxford University Press, 2012, p. 1), affirms that "Private international law (PIL) deals with the question of which law applies in cases that have connections to more than one legal order". Almost one century ago, R. Ago has already defended that, when we want to define PIl we must take into consideration the way in which the international situations are regulated, see AGO, R., "Règles générales des conflits de lois", *R. des C.*, 1936-IV, t. 58, pp. 243-469, pp. 282-283. Following the same approach, SIEHR, K., *Internationales Privatrecht. Deutsches und europäisches Kollisionsrecht für Studium und Praxis*, Heidelberg, C.F. Müller, 2001, p. 1 ("Das Internationale Privatrecht (IPR) entscheidet nicht selbst einen Sachverhalt. Das muss das materielle Recht einer bestimmten Rechtsordnung tu. Welche dies ist, bestimmen die Verweisungsnormen des IPR"); DE LIMA PINHEIRO, L., *Direito Internacional Privado. Volume I. Introdução e Direito de Conflitos Parte Geral*, Coimbra, Almedina, 2005, p. 26 ("O Direito Internacional Privado regula as situações transnacionais através de um *proceso conflitual*"); VITTA, E., *Diritto internazionale privato I Parte generale*, Turin, Unione Tipografico-Editrice Torinese, 1972, p. 2 ("Il diritto internazionale privato (d.i.pr.) può essere definito come l'insime di norme le quali, in ogni Stato, stabiliscono se le fattispecie caratterizzate da elementi di estraneità debbono esser regolate in base all'ordinamento dello Stato stesso, oppure in a base a quello di altro Stato, con cui presentino dei punti di contatto").

[4] As we are going to see in the next part, neither the conflict rules nor a unilateralist approach to PIL implies the transformation of an international situation in a domestic one of one of the countries connected with the case.

objectives of the conflict rule, ideally, based on the determination of the closest connection with the case[5]. Taking into consideration a unilateral approach, we are going to considerer the function and values of the rule and the interests of the legal order that has enacted the rule[6].

To take into consideration the interests of the legal order could easily drive us to the assimilation with sovereignty and, as a consequence, to the understanding that unilateralism is closer to a nationalist and, maybe parochial approach to law[7] than multilateralism, that would be grounded in the interests of private parties and their freedom[8]. This is not completely correct.

Firstly. Unilateralism takes into consideration not properly the will of the legal order, but the aim of the rule. That is, it is closer to a proper interpretation of the rule that must be applied than to political or, even, social considerations. Values and interests are going to be considered, but -mainly- when they are part of the rule; so, it is not adding something different that the same rule that is going to be applied.

Secondly. Conflict rules are part of legal orders with specific values. This is the case when we are talking about domestic conflict rules, but also when we consider EU rules and conflict rules within international conventions. So, conflict rules also reflex values and interests; so, here we do not find an essential divergence between unilateralism and conflictualism (or multilateralism). Further, unilateralism implies that we should consider the values of all legal orders connected with the case (or, in a more accurate way, the aim of the rules that are susceptible of being applied to the case). In this sense, unilateralism could be even more universalist than conflictualism[9].

Thirdly. When we look at history, we realize that unilateralism was not strictly based in domestic interests, but more in common values of the different legal orders that could be applied. We are going to see it in the next part of this paper.

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[5] Savigny's approach was that the applicable law depends on the nature of the relationship. See VON SAVIGNY, F.C., *System des heutigen Römischen Rechts*, t. VIII, Berlin, 1849, https://www.deutschestextarchiv.de/book/view/savigny_system08_1849?p=50, p. 28; but it is clear that conflict rules also include substantial values. Even in Savigny we found these substantial values; for example, when the author proposes a conflict rule on form with a clear substantial purpose: the validity of the legal transaction. See VON SAVIGNY, F.C., *op. cit.*, pp. 349-350, https://www.deutschestextarchiv.de/book/view/savigny_system08_1849?p=371. See RODRÍGUEZ MATEOS, P., "Una perspectiva funcional del método de atribución", *REDI*, 1988, vol. 40.1, pp. 79-126, p. 91. See also LEWALD, H., "Règles générales des conflits de lois", *R. des C.*, 1939-III, t. 69, pp. 1-147, pp. 61-63 about how "classic" conflictualism could be used to achieve substantial goals. See also, AUDIT, B., "Le caràctere fonctionnel de la règle de conflit (Sur la "crise" des conflits de lois)", *R. des C.*, 1984-III, t-186, pp. 219-397, pp. 306-352.

[6] See RÜHLE, G., *loc. cit.*, p. 1.

[7] See RÜHLE, G., *loc. cit.*, p. 1: "for unilateralism, private law -like public law- is an expression of state sovereignty. It effectuates state interests and fulfils social functions"; and SYMENONIDES, S.C., *loc. cit.* p. 2.

[8] See RÜHLE, G., *loc. cit.* pp. 1-2.

[9] See in this sense, SYMEONIDES, S.C., *loc. cit.*, p. 6.

III. UNILATERALISM IN THE ORIGINS OF PIL

"Our" PIL is born in Italy during the late Middle Ages. Of course, there were regulations of situations connected with several legal orders before that moment[10], but there is no continuity between those regulations and the PIL we have nowadays. The Middle Ages introduced a clear distinction between previous regulations and those we have today. In some way, we still live in a continuation of the medieval world, and PIL is not an exception.

As it is known, the origins of what we call PIL is the medieval statutory law. This doctrine appears in the moment of transition from personalism to territorialism in law; and this is not a mere coincidence. During the High Middle Ages each person was linked to his or her "personal law" (Hispano-Roman, Galo-Roman, Goth, Frank, etc.) and in cases connected with persons from different groups, conflicts were solved through mixed courts; that is, tribunals integrated by persons from the different communities involved in the conflict[11], or using the *profession legis*[12].

This situation changed in the Late Middle Ages. Territorialism of the laws substituted personalism and this change allowed other even more important: it was possible to dissociate *forum* and *ius*[13]. That is, the judge could apply a law different than the law of the judge's territory. This change is linked to a political change. During this time, local authorities became "conscient lawmakers"[14] and judges were no longer mere experts, but authorities of a city or other political entity. As we are going to see, this change is important from several points of view, but at this moment I only want to underline that, in principle, these judges must apply their own law. Not a different situation than in the time of personalism of the law, but reinforced for the fact that now the judge is something equivalent to a public officer[15]. The link between *forum* and *ius* was strong and maybe it was not easy to find a path to break this union, although it was also clear that it was not fine to give the same solutions to pure domestic cases and to those connected with other

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[10] See YNTEMA, H.E., "The Historic Bases of Private International Law", *AJCL*, 1953, vol. 2, pp. 297-317, pp. 300-301; GUTZWILLER, M., *Gesichte des internationalen Privatrechts*, Basel/Stuttgart, Helbing & Lichtenhahn, 1977, pp. 1-6; LEWALD, H., "Conflits de lois dans le monde grec et romain", *Rev. crit. dr. int. pr.*, 1968, t-LVII, pp. 419-440 and 615-639.

[11] See HELDRICH, A., *Internationales Zuständigkeit und anwendbares Recht*, Berlin/Tübingen, Walter de Gruyter & Co/J.C.B. Mohr (Paul Siebeck), 1969, p. 5; GONZÁLEZ CAMPOS, J.D., "Les liens de la competence judiciaire et de la competence legislative en droit international privé", *R. des C.*, 1977-II t. 156, pp. 227-336, pp. 253-254; DE VALDEAVELLANO, L.G., *Curso de Historia de las Instituciones españolas*, Madrid, Ediciones de la Revista de Occidente, 4ª ed. 1975, p. 558.

[12] See NEUMAYER, K., *Die gemeinrechtliche Entwicklung des internationalen Privat-und Strafrechte bis Bartolus*. First Part, *Die Geltung des Stammrechte in Italien*, Munich, J. Schweitzer, 1901, pp. 147-159; STOUFF, L., "Il principio della personalitá delle leggi dalle invasion barbariche al secolo XII, *Dir. Int.*, 1967, vol. XXI, pp. 80-134, p. 91

[13] See HELDRICH, A., *op. cit.*, p. 8; GONZÁLEZ CAMPOS, J.D., *loc. cit.*, pp. 227-336, pp. 256-257; PICONE, P., *Ordinamento competente e diritto internazionale private*, Padua, CEDAM, 1986, pp. 4-7; KEGEL, G., "Fundamental Approaches", chapter 3 of LIPSTEIN, K. (ed.), *Private International Law*, vol. III of *International Encyclopedia of Comparative Law*, Tübingen/Dordreht/Boston/Lancaster, J.C.B. Mohr (Paul Siebeck)/Martinus Nijhoff Publishers, 1986, pp. 3-4.

[14] See NEUMAYER, K., *op. cit,* Second Part, *Die gemeinrechtliche Entwicklung bis zuer Mitte des 13. Jahrhunderts*, Munich/Berlin/Leipzig, J. Schweitzer Verlag, 1916, p. 2.

[15] For an explanation of the change of the role of the judge, see VAN CAENEGEM, R.C., "History of Europeran Civil Procedure", chapter 2 of CAPPELLETTI, M. (ed.), "Civil Procedure", vol. XVI of *International Encyclopedia of Comparative Law*, *op. cit*, 1973, pp. 8-9.

laws[16]. Unilateralist (as it was called some centuries in the future) allowed the use of laws different than the laws of the judge. The first step was to distinguish between substance and procedure. Obviously, procedure should be ruled by the *lex fori* and without this distinction (substance and procedure) was not possible to introduce the possibility of applying "foreign" laws[17]. When Balduino, at the beginning of the 13th century established this distinction it was possible to introduce foreign rules in the regulation of situations connected with different laws[18].

The second step was to determine with laws should be applied, and here the rules about jurisdiction were useful to identify which laws should be considered for each case. We have to take in mind that in the time of the strict correlation between *forum* and *ius*, the rules about jurisdiction were, on one hand, rules governing situations connected with different laws (because these rules on jurisdiction limited the extent of the local laws as a consequence of the limitation of the cases in which local judges were allowed to decide). On the other hand, these rules on jurisdiction were, in some way, also rules about applicable law, since ascertaining jurisdiction was, at the same time, ascertaining the applicable law (the *lex fori*). When it was possible to apply different laws to the same case, the rules on jurisdiction gave some indications about which was the scope of application of the different rules. For example, as it was assumed that in contractual matters, the courts of the place of celebration of the contract had jurisdiction, when the judge is, for example, that of the defendant's domicile and the contract had been executed in other territory, that judge will apply to the substance the law of the where the contract had been concluded[19]. Taking into consideration the origin of the application of "foreign" law and its links with the ascertaining of the competent courts, it is not difficult to see a connexion between application of a rule and determination of its scope of application. So, unilateralism will be in some way, a natural way to introduce rules coming from different laws in the solution of a case connected with several territories.

So, at the beginning (Late Middle Ages), unilateralism, was more a tool for the regulation of situations connected with different laws, than an instrument of "sovereign" or public interests. In fact, the method of medieval jurists was not really very different from conflictualism, as we are going to see immediately, when we enter in the third step in the "invention" of PIL.

We have seen that the first step was to distinguish between *forum* and *ius*. This allowed the application of "foreign" law and it was necessary to choose some criteria for determining which laws should be applied. These criteria were taken, in a first moment,

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[16] See ALDRICO, already at the end of the 12th century: "*Quaeritur: si homines diversarum provinciarum, quae diversas habent consuetudines, sub uno eoemque iudice litigant, ultrum eaurum iudex qui iudicatum suscepti sequi debeat? Respondeo: eam quae potior et utilior videtur. Debet enim iudicari secumdum quod Melius ei visum fuerit*". Many have quoted the text, see *e.g.*, HATZIMIHAIL, N.E., "On the doctrinal beginnings of the the conflict of laws", *Yearbook of Private International Law*, vol. 21 (2019/2020), pp. 101-133, fn 47 (taken from HÄNEL, G. (ed.), *Dissensiones dominorum*, Leipzig, Sumtibus I.C. Hinrichsil, 1834, p. 153).

[17] Of course, it is not strictly correct the use of "foreign" because at that moment there were no countries in the sense we have today; but be can use foreign as synonym of "alien" or, more precisely, a law enacted by a political authority different that the authority of the judge or a custom developed in a territory other than the territory of the judge.

[18] See MEIJERS, E.-M., "L'histoire des principes fondamentaux du droit international privé a partir du Moyen Age", *R. des C.*, 1934-III, t. 49, pp. 543-686, p. 595; NEUMAYER, K., *op. cit.* Second part, pp. 85 ff.; GUTZWILLER, M., *op. cit.*, p. 13; HATZIMIHAIL, N.E., *loc. cit.*, p. 114.

[19] See GONZÁLEZ CAMPOS, J.D., *loc. cit.*, pp. 256-258.

from the existing rules about jurisdiction (second step), but, obviously, this was too simple, so scholars found a way or reasoning in order to systematize the different rules that could be applied. As it is broadly known, these criteria were based on Accursio's comment (*glosa*) to the *Lex Cunctos Populus*, that established that the law only applies to those who are subject to the authority who enacts the law[20]. Of course, there is a link between the argument and what we nowadays would call sovereignty, because it is a faculty of the public power to determine who is subject to its *imperium*, but this is probably more from our point of view than from a medieval point of view, because the reasoning underlying in the *Lex Cunctos Populos* was used to develop a complex set of rules about their scope of application based on the distinction between three "statutes": personal, real and mixed[21]. The centre of the intellectual construction was the rule, but we should not forget that the scholars did not comment the local laws whose scope of application tried to define. They commented the Roman Law and the solutions they found were not based in those local laws, but in the *Ius Commune,* a sort of Common Law of West Europe[22]. Local laws were, in some way, instruments for the regulation of situations connected with more than one legal system, but there were also enough circumstances to defend that this medieval PIL was closer to an intellectual construction trying to find the best solutions for the regulation of those situations with connexions with different territories than to a mere exercise aimed at defend the will of application of local laws[23].

Of course, the former is a very general consideration, that requires a more detailed examination, but I think that it is enough to show that differences between unilateralism and multilateralism are, in some cases, more a question of perspective than of substance. On the other hand, nevertheless, within medieval unilateralism already were the seeds for a more "publicist" approach[24]. As we have seen, the arguments are based on the assertion that the law only obliges those who are subjected to the authority who has enacted the law. In the Late Middle Ages, conflicts were limited to local laws, and local authorities were part of bigger political structures; as a consequence, the determination of the scope of application of these local laws depends on elements beyond the local law and the local authorities[25]. When medieval political structures declined and nations became sovereign nations, unilateralism adopted a new face, and at this moment arrived Savigny's proposal and multilateralism (or conflictualism). We are going to deal with this question in the next part.

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[20] See NEUMEYER, K., *op. cit.* Second Part, p. 60; GUTZWILLER, M., *op. cit.*, p. 16. Although, he used pre-existent materials, see HATZIMIHAIL, N.E., *loc. cit.*, p. 119. In particular, CAROLUS has previously considered the application of "foreign" laws. See HATZIMIHAIL, N.E., *Preclassical Conflict of Laws*, Cambridge, Cambridge University Press, 2021 (DOI: https://doi.org/10.1017/9781139016674), pp. 111-115.

[21] See SYMEONIDES, S.C., *loc. cit.*, p. 4. There is a discussion about the origin of the division of statutes, see HATZIMIHAIL, N.E., *op. cit.*, pp. 99-100.

[22] See *e.g.* HATZIMIHAIL, N.E., *op. cit.*, p. 262: "Bartolus conceives of las -*ius commune* and local law- as a whole. From a "positivistic" point of view, *iura propia* are the result of the *iurisdictio* with which the imperial power, and imperial law, have vested lesser authorities".

[23] See YNTEMA, H.E., "The Historic Bases of Private International Law", *AJCL*, 1953, vol. 2.3, pp. 297-317, p. 304. Recently, HATZIMIHAIL, N.E. (*op. cit.*, pp. 336-345) has shown the complexity of the doctrine of BARTOLUS, refusing that it could be considered a simplistic approach to unilateralism.

[24] See NATZIMIHAIL, N.E., *op. cit.*, pp. 345-347, about the use of the concept *iurisdictio* in Bartolus and its relationship with sovereignty.

[25] About the political context of BARTOLUS (14th century), stressing the relevance of the unity of Western Christianity for conflict of laws doctrine, see HATZIMIHAIL, N.E., *op. cit.*, pp. 253-255.

IV. A MULTILATERAL APPROACH

1. SAVIGNY AND THE BIRTH OF THE NATIONS

Between the 15th and 18th century, political power in Europe changed in a very significative way. The "multilevel" Middle Age (empire, kingdoms, cities, fiefs…) became a mosaic of nations, mainly kingdoms, at the end of this period, customs were substituted by codes and this implied also a change in the legal methodology. How affected these changes at PIL? First of all, PIL was no longer linked to a vanishing *Ius Commune* and was considered as a part of the (new) *Ius Gentium*[26]. Secondly, while the lawmaker assumed an increasing interest in the regulation of questions as contracts, companies or even family; PIL maintained the traditional solutions of its medieval origins and, in some way, conserves the essence of the European legal community that has been born mainly in the Universities of the Late Middle Ages.

As a result, while most of the solutions applied by the courts continued, probably, being based on the works of the medieval scholars[27], the evolution of the doctrine in PIL connected this branch of the law with the changes in the political structure of Europe. A unilateral approach to the regulation of the situations connected with several laws implied, on the one hand, the assumption that the rules in conflict were products of sovereign powers[28], not local customs or rules enacted by municipalities. On the other hand, the formal ground for the rules governing these conflicts should be placed on the *Ius Gentium*, that is, since the 19th century, Public International Law[29] or, even, in pure pragmatical arguments[30]. Dutch scholars identified some consequences of this fundamental changes in the bases of PIL, so, they stressed the territoriality of the law and the necessity of justifying the application of foreign law (now without quotation marks) through the idea of comity. The theoretical construction of PIL moved to territoriality, unilateralism and recognition of vested rights (we will pay special attention to this last issue in epigraph 4); so, the practical consequences of medieval unilateralism were no longer compatible with the theoretical construction of PIL. Savigny came to resolve this problem through what has been called a "Copernican turn"[31]. The point was not the determination of the personal and territorial scope of the rules, but the relationship connected with several laws. The goal of PIl will be to identify the seat of the relationship in order to determine the law (laws) that should be applied to the relationship.

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[26] See DOMÍNGUEZ LOZANO, P., "Las concepciones publicista y privatista del objeto del Derecho internacional privado en la doctrina europea: reconstrucción histórica", *REDI*, 1994, vol. XLVI, núm. 1, pp. 99-135, pp. 104-105.

[27] See DE NOVA, R. "Historical and Comparative Introduction to Conflict of Laws", *R. des C.*, 1966-II, t. 118, pp. 435-621, pp. 450-451.

[28] See *e.g.* Huber's definition of Civil Law: "Civil Law is that which has its immediate origin in the will of the sovereign power of a free people" (HATZIMIHAIL, N.E., *op. cit.*, p. 400).

[29] See CANÇADO TRINIDADE, A.A., "International Law for Humankind: Towards a New *Ius gentium* (I). General Course of Public International Law", *R. des C.*, 2001, t. 316, pp. 9-440, p. 43.

[30] Paul and Johannes Voet maintained that no superior law bounds nations to exercise comity toward other nations. See HATZIMIHAIL, N.E., *op. cit.*, p. 485; but Huber linked the recognition and enforcement of legal acts performed abroad to the "law of nations" (*ibidem*, p. 490 and fn 78). See also ANCEL, B., *Éléments d'histoire du droit international privé*, París, Éditions Panthéon-Assas, 2017, pp. 327-328, on the grounds for the comity on J. VOET. ANCEL maintains that for the Dutch School, PIL became "national", based on the State sovereignty (*ibidem*, p. 329), but also recognizes that "*n'est pas clairement dégagée par les auteurs*" (*ibidem*).

[31] See HATZIMIHAIL, N.E., *op. cit.*, pp. 17-18.

As we have seen in the first epigraph, this approach, apparently, is very different from the unilateralism that had been developed since the Middle Ages, but Savigny himself thought that his proposal was not, in essence, different than that of the medieval scholars. At the end, the issue is always to determine the rules that are going to be applied to a relationship connected with different laws[32]. I think that he was right. When the determination of the personal and territorial scope of the rule is based not in the specific rule, but in a law that is above this rule, and it is possible to reach common solutions for the several jurisdictions involved, to begin with the rule or to begin with the relationship does not make a big difference. Savigny works, in fact, with the same elements than medieval scholars. They "invented" PIL with the help of the *Ius Commune* (Roman Law) and Savigny introduces his construction in a work entitled "System of contemporary Roman law". In both cases we find a study focused in the resolution of specific problems, that take into consideration the rules in conflict from the point of view of a law above them and with the aim of obtaining solutions than could be use in different jurisdictions.

The last point is, I think, an important one. PIL solutions should have certain continuity. If the regulation of international cases is completely different in each jurisdiction, PIL has no sense. During the Middle Ages, the community of scholars and the *Ius Commune* provide the required elements for universal solutions. Or, at least, universal debates. The creation of nations and the fading of the *Ius Commune* broke the theoretical bases for those constructions and, as we have just reminded, there were replaced by approaches based in the territoriality of the law, sovereignty and comity as ground for the recognition of rights acquired in another country. Savigny was opposed to these ideas[33] and found a way to maintain, in the age of the nations, a universal PIL still devoted to the solution of practical problems and separated from the international public law. He just needed to use Roman Law to introduce a reasoning that has been assumed by a community of scholars who, since the middle of the 19th century, have tried, with success, to practice law in a medieval way, still in the middle of the codification. I think that this is the reason that explains that most students think that PIL is "strange". I explain to them that this is because studying PIL (especially the part of conflict of laws) implies going back to the law before codification.

This special approach to the conflict of laws was possible because, as I have already said, the lawmaker had not ruled PIL in deep. Savigny recognizes that the will of the legislator should be respected[34], but when there is no rule, it is possible for the doctrine and the case law to resolve according with common principles, those who come from

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[32] See VON SAVIGNY, F.C., *op. cit.*, pp. 2-3, https://www.deutschestextarchiv.de/book/view/savigny_system08_1849?p=24. See recently, BOOSFELD, K., "Zu den Arten von Kollisionsnormen in der Lehre von der Statutenkollision", *Zeitschrift der Savigny-Stiftung für Rechtsgesichte*, 2021, t. 138, pp. 276-282.

[33] See VON SAVIGNY, F.C., *op. cit.*, pp. 24-25, https://www.deutschestextarchiv.de/book/view/savigny_system08_1849?p=46.

[34] See VON SAVIGNY, F.C., *op. cit.*, p. 26, https://www.deutschestextarchiv.de/book/view/savigny_system08_1849?p=48. Previously, VON WÄTCHER, C.G. ("Über die Kollision der Privatrechtsgesetze verschiedener Staaten", *AcP*, 1841, vol. 24, pp. 230 ff.; *ibid* 1842, vol. 25, pp. 161 ff., pp. 361 ff., *cit.* by DE NOVA, R., *loc. cit.*, pp. 452-456), has underlined that PIL was a part of the domestic law; although at that moment and during the following decades, the general opinion within scholars was that PIL was a part of public international law, see DOMÍNGUEZ LOZANO, P., *loc. cit.*, p. 104. In the Anglo-Saxon countries, however, PIL was considered a part of domestic law, see BELLOT, H.H., "La théorie anglo-saxonne des conflits de lois", *R. des C.*, 1924-II, t. 3, pp. 95-175, p. 99).

what Savigny called a "community of law"[35]. In fact, the result of the work of the scholars since the Late Middle Ages, because, as is broadly recognized, PIL is a "*droit savant*"[36]. In PIL doctrine precedes legislation and till today, this legislation is deeply influenced by the doctrine. It is, perhaps, the only way to achieve the goal that the regulation in each country of the situations connected with different laws is close to the regulation of the rest of the countries. As we have seen, this proximity is necessary if we want that PIL becomes a useful tool for the regulation of the international situations.

So, notwithstanding that in the XIX century law was already mainly a product of the national lawmakers, PIL continued being a branch of the law where doctrine has an essential role. Savigny found the way to sustain in the time of the nations the old method of the medieval scholars. The conflict rule was a clever invention and succeeded, in part because it was a good instrument for the international codification of PIL and for the modernization of the domestic regulations. We are going to see it in the next epigraphs.

2. INTERNATIONAL CODIFICATION OF PIL

For centuries, doctrine was enough to maintain certain continuity of PIL beyond the divergence of the jurisdictions, but at the moment in which the law became a monopoly of the State[37], the continuity of the solutions for the conflicts of laws needed something more. International conventions were suitable tools for the development of PIL when States were the main source of law. On one hand, international conventions are a result of States' will. On the other hand, it is possible to use them to transform scholar thought and case law into legal rules. In the second half of the 19th century some author defended the use of international conventions in PIL[38] and in 1893 began the works of the Hague Conference of Private International Law. The Conference worked on international civil procedure and also on international family law[39] and introduced some canonical multilateral conflict rules[40].

I think that these conventions, and also those elaborated in other parts of the world[41], helped to consolidate the conflict rule. This kind of norm is especially suitable for the regulation of conflictual problems in an international treaty. Unilateral conflict rules, as those included in the first civil codes could not be introduced in instruments that must be applied in several jurisdictions. From a technical point of view, the multilateral conflict rule was the right tool for the international codification of PIL through international conventions.

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[35] See VON SAVIGNY, F.C., *op. cit.*, p. 27, https://www.deutschestextarchiv.de/book/view/savigny_system08_1849?p=49.

[36] OPPETIT, B., "Le droit international privé, droit savant", *R. des C.*, 1992-III, t. 234, pp. 331-434, p. 364; GUTZWILLER, M., *loc. cit.*, pp. 293-294; NEUMAYER, K., *op. cit.* First Part, p. 1

[37] A long process that began with the increasing power of the kings in countries as England, Spain and France, continued with the assumption of nation sovereignty (mainly after the Peace of Westphalia, 1648), codification at the beginning of the 19th century and the theorization of the identity between Law and State in Kelsen in the first part of the 20th century.

[38] See DOMÍNGUEZ LOZANO, P., *loc. cit.*, p. 106.

[39] Conventions of 1896 on Civil Procedure, of 1902 on Marriage, 1902 on Divorce, 1902 on Guardianship, 1905 on Civil Procedure, 1905 on Effects of Marriage and 1905 on Deprivation of Civil Rights.

[40] See, for example, art. 1 of the Marriage Convention of 1902: "Le droit de contracter mariage est régie par la loi nationale de chacun des futurs époux, à moins qu'une disposition de cette loi se réfère expressément à une autre loi".

[41] Regarding America, see FERNÁNDEZ ARROYO, D.P., *La codificación del Derecho internacional privado en América Latina*, Madrid, Eurlex, 1994, pp. 92 ff.

As it has already mentioned, international codification of PIL was (and still is) a suitable tool for the transformation of academic debates into rules. Since the beginning, professors of international law took part in the codification and were allowed to let his or her footprint on the texts. If we consider, for example, the case of Spain, we realize that many professors were members of the Spanish delegations before the Hague Conference on Private International Law[42], since Manuel Torres Campos, Professor of international law at the Granada University, who participated in the first session of the Conference, in the year 1893, till nowadays, the participation of academics with specialization in PIL has been usual. That implies that the success of the conflict rule as a method between the scholars drove to a success also in the regulation.

This strong connexion between academia and codification of international law explains, probably, some of the features of the evolution of PIL during the 20th and 21st centuries and could be also relevant to understand the role of the EU in the last decades, when started to assume competences in the codification of PIL. Complex regulations, as, for example, those of the Hague Convention on Law Applicable to Products Liability[43] or the "federal clauses" in many Conventions of the Hague Conference since the 90's of the 20th century cannot be understood outside the academic framework.

So, conflict rules succeeded in the last 100 years, at least in part, because it was a more suitable technique for international PIL conventions. But, as we are going to see immediately, domestic law also adopted this technic, that replaced the oldest rules based in a unilateral approach.

3. BACK TO DOMESTIC RULES

We have stressed that PIL was not a main concern for lawmakers during the 17th, 18th and 19th centuries. Nevertheless, in the codes of the 19th century some rules regarding conflict of laws were introduced. These rules were based in the unilateral approach we have seen in the Late Middle Ages scholars. For example, article 3 of the Napoleonic French Code (1804), who ruled the personal and territorial scope of application of French laws on the basis of the distinction between territorial and personal statutes and introducing a specific rule for mandatory rules (*lois de police*). Although the unilateral wording of these rules, they were applied in a multilateral way and, in some countries[44], effectively substituted by multilateral conflict rules in the 20th century. This is the case of Spain. The Civil Code of 1889 included unilateral rules similar to the French civil code that were replaced by multilateral conflict rules in 1974.

First. We should notice that, as we have seen, the difference between the method of the medieval scholars, that inspires the unilateral rules in the first Civil Codes, is not an

[42] See BORRÁS RODRÍGUEZ, A., "Cien años de participación de España en la Conferencia de La Haya de Derecho Internacional Privado", *REDI*, 1993, vol. XLV, núm. 1, pp. 149-201.

[43] Convention of 2 October 1973 on the Law Applicable to Products Liability, https://www.hcch.net/en/instruments/conventions/full-text/?cid=84. Academics who have worked on this convention include H.T. VALLADÃO from Brasil,;A. PHILIP, from Denmark; J.D. GONZÁLEZ CAMPOS and M. ANGULO RODRÍGUEZ, from Spain; D.F. CAVERS, from United States of America; P. BELLET and Y. LOUSSOUARN, from France; R. DE NOVA, from Italy; S. IKEHARA, from Japan; L.I. DE WINTER and J.C. SCHULTSZ, from the Netherlands and A.E. ANTON, from the United Kingdom.

[44] See BUREAU, D./MUIR WATT, H., *Droit international privé. Tome II. Partie spéciale*, Paris, Themis, 4ª ed, 2017, p. 26. See also HATZIMIHAIL, N.E., *op. cit*, pp. 154-155.

essential one. So, it is in some way, natural, the evolve from unilateral to multilateral rules. That does not mean a radical change in the approach to conflict of laws.

Secondly. Taking into consideration that, as we have seen, the rules in the international conventions should necessarily be multilateral, it is not odd that domestic system copy the rules, usually more modern and sophisticated, included in international instruments.

Thirdly. The transformation of unilateral conflict rules into multilateral conflict rules could also be a consequence of the necessity for the courts of giving answer to questions that are not explicitly settled in unilateral rules. When a French court, for example, deals with a case involving a French national, according with article 3 of the French Civil Code, French law will apply to the capacity of this person. But, what about a case involving a Spaniard? Article 3 of the French Civil Code does not give an answer to this question, but the principle relying on the rule drives us to the application of the Spanish law. Of course, from a certain point of view, the French court should consider the will of the Spanish laws about capacity to rule the case; but, as we have seen, the Medieval unilateralism did not properly interpret the local laws in conflict, but the *Ius Commune* (Roman Law). To conclude that what is hidden in article 3 of the French Civil Code is a multilateral rule is compatible with the wording and spirit of the rule.

So, the multilateral conflict rule we have today is a continuation of the Medieval doctrine of statutes, modernized by Savigny when the theoretical construction of unilateralism move from the *Ius Commune* to the *Ius Gentium*.

But Dutch doctrine of statutes and what followed it was not a mere interlude between Medieval doctrine and Savigny. It was a doctrine that fits with the political changes that transform the multilevel governance of Europe in the Middle Ages to the modern Nation-States. So, it has something to say about modern PIL. We are going to deal with it in the next epigraph.

V. UNILATERALISM, VESTED RIGHTS AND RECOGNITION

1. VESTED RIGHT VERSUS CONFLICTUALISM

Vested rights and conflict rules are different approaches to PIL. And in this case, real different approaches. Vested rights were special relevant in Anglo-Saxon countries and, as it is known; the First Restatement of the Conflicts of Laws of 1934, one of its finest results. Although the relevance acquired, the confrontation with the post- Savigny multilateralism cornered the theory. In some way, however, 21st century witnesses a return to a kind of vested rights doctrine[45]. We are going to deal briefly with that in this part.

The approach to the vested rights theory must start with the assumption that the theory implies a (real) unilateral approach to PIL[46]. With "real" I mean that in this case we will

[45] See LAGARDE, P., "Developpements futurs du droit international privé dans une Europe en voie d'unification: Quelques conjectures", *RabelsZ*, 2004, t. 68.2, pp. 225-243, esp. pp. 230-232 and 242; JAYME, E., "Il diritto internazionale private nel sistema comunitario e i suoi recente sviluppi normative ne rapport con stati terzi", *Riv. dir. int. pr. proc.*, 2006, t. 12.2, pp. 353-360; ROMANO, G.P., "La bilatéralisation éclipsée par l'autorité. Developpements récents en matière d'état des personnes", *Rev. crit. dr. int. pr.*, 2006, t. 95.3, pp. 457-519.

[46] See MUIR-WATT, H., "Quelques remarques sur la thèorie anglo-americaine des droits acquis", *Rev. crit. dr. int. pr.*, 1986, t-LXXV, pp. 425-455, p. 433.

rely on the content of each juridical order and determine, according to it, when the right was really acquired (we are going to deal with the way of acquiring a right in a moment). For being specific: we must be in the shoes of an authority of the legal order we are considering. As a consequence of this, there is no need to determine previously whether the legal order we are considering is competent or not. We will consider as a factual question the acquisition of the right according with a specific law[47]. In a second phase we will decide about the recognition of the right and at this moment it is not impossible to consider the links of the situation with the legal order in which the right has been acquired, but it is important to separate these two phases. This distinction is key to realize that the critic that in some occasions we address to the vested rights theory (we cannot know whether a right has been acquired without knowing which law we must take into consideration) has no sense. The critic is based in multilateralism and the vested rights doctrine is strictly unilateral.

So, we already have two main elements for this theory: unilateral approach and acquisition of a right, but still there is another key element. This element is recognition. The acquisition of the right according with one legal order is just the first step. This acquisition is relevant because is a necessary condition for the recognition of the right in another legal order. Recognition implies taking into consideration what has been created in another legal order and granting legal consequences in "our" own legal order.

This is a completely different method than that based on the conflict rules. When we are using conflict rules, we give a solution to a conflict applying general rules coming from several legal orders, but the final decision is a creation of the *forum*. When we use the vested rights theory, we consider at the first moment, the solution already given in another legal order, and we just decide whether we give effects to that solution (recognition) or not.

We may examine these ideas from the perspective of the distinction between general and specific rules. Each legal order includes general rules. These general rules can be projected over the reality and transformed into specific rules. The method of the conflict rule uses general rules produced in the *forum* and abroad. The vested rights method uses specific rules produced abroad. The question is when to use the method of the conflict rule (conflictualism or multilateralism) and when rely on a method of recognition (another way of saying "vested rights theory").

I think that we have to consider the method of recognition when there is a positive specific rule. When there is no positive specific rule, but just a "deduced" specific rule it is better to rely on the method of the conflict rule. I am going to be a little clearer about this distinction between "deduced" and "positive" specific rules.

Any legal order tries to resolve social conflicts. The way to do that is to establish general rules that can, potentially, be transformed into specific rules. The deduction of specific rules from the general rules, confronting a rule or a set of rules with the facts, is one of the most basic activities in social life. For example. You are driving and the traffic light changes from green to yellow. There are a set of rules regarding this situation. You must determine whether it is safe to stop, or you must continue despite the change in the

[47] HATZIMIHAIL, N.E. (*op. cit.*, p. 460) underlines that in Huber's approach to conflict of laws, the circulation and extraterritorial effects of *negotia* is a fact; although the Dutch author refuses to use the doctrine of vested rights for the justification of the extraterritorial validity of legal acts (*ibidem*, p. 473).

traffic light. At the end, the driver deduces a prescription: you must stop. The specific rule has been deduced from the general rules according to the relevant facts (time, speed, distance between our car and the car behind…), but it is not a positive rule. The specific rule has not been formally introduced in the legal order. The situation would be different if there is a policeman who orders us to stop. Here there is a specific prescription that has been given by an authority and, in this sense, is a positive specific rule[48].

My point is that only when there is an intervention of an authority who creates a specific prescription or other kind of specific rule it is advisable to use the recognition method. In other cases, it is better to apply conflict rules (but, as we are going to see, with some exceptions). The reason is that when we are facing a situation connected with several legal orders, before the intervention of the authority, the determination of the specific rule that derives from the set of general rules demand the consideration of the conflict rules of the legal order. In this situation the critic to the vested rights theory that has been commented above has sense. Are we going to apply the PIL systems of the different legal orders involved in the situation before our own PIL system?[49].

So, there are some fields in which it would be advisable to shift from conflict rule method to recognition method. We are going to consider some of these fields in the next epigraphs.

2. INTELLECTUAL PROPERTY

The term "intellectual property" covers a relative broad group of problems, involving what in other languages is called "industrial property" (patents, trademarks, industrial designs, etc.) and intellectual property in a narrow sense (copyright). The method of recognition does not work in the same conditions in all these fields. We are going to consider first what in Spanish is called "industrial property" and then we will move to copyright.

Patents, trademarks and industrial designs are monopolies granted by the authority. Their origin is medieval, but nowadays they are key elements in the economic development. Nevertheless, the legal nature of this institutions continues being based on the decision of an authority who establishes a prohibition of use for those different from the one who has obtained de protection. Since the right is granted by an authority, the use of the recognition method seems suitable.

That implies that when we are dealing with a patent, trademark or other industrial property right granted by a foreign authority, the effectiveness of this right outside the country in which has been granted follows the method of the recognition, which implies that it is necessary to decide whether the right exists from the point of view of the foreign legal order. When the right exists, it is possible to give effects to it, when the right fulfilled the conditions required for the recognition. The existence of the right according with

[48] See ARENAS GARCÍA, R., "The new role of judges in the EU. Going back to the Middle Ages", in SCHMIDT, J./ESPLUGUES, C./ARENAS, R. (eds.), *EU Law after the Financial Crisis*, Cambridge, Intersentia, 2016, pp. 301-316, pp. 301-302.

[49] When we talk about "our own PIL system", we mean the *forum* PIL system. That is, the PIL system of the country we use as reference for the analysis. It is not possible to study any case in PIL without establishing a point of view. In PIL there are no universal solutions, but only solutions valid or invalid according with certain framework of reference. It should be noticed, however, that FRANCESCAKIS, PH. (*La théorie du renvoi*, Paris, Sirey, 1958, pp. 192 ff.) defends that we shouldn't apply our own PIL system to situations that are not connected with it.

another legal order is a previous requirement for the effectiveness of the right in another legal order. The consequence is that we must analyse industrial property PIL's problems from a unilateral perspective[50]. That explains that unilateral conflict rules are frequently used in this field[51].

What has just been explained does not mean that it is not possible to question the validity of a right granted by a foreign authority. In most cases, local courts will not have jurisdiction over a case of nullity (or validity) of a foreign intellectual property right, because of the exclusives grounds of jurisdiction we find in the domestic law[52], but it is not impossible, from a theoretical perspective, a decision of the courts of one country over a right granted in another jurisdiction. We will see some examples in the following epigraphs; although in intellectual property, at least in what we have called industrial property rights, it is not the case. In some way, the exclusive ground of jurisdiction relates to the unilateral approach to these rights. It has sense limiting the competence for knowing about the validity of the right to the courts of the country that has granted the right. As we know, first the European Court of Justice and after it the EU lawmaker have reinforced the exclusive ground of jurisdiction in these matters, making it also applicable in those cases in which the question of the validity of the right is raised as a defence or exception. Because of that, when, for example, a claim is introduced before a court on the basis of the infringement of a patent granted in other country, the existence of the patent will be assumed, when the patent, effectively, has been registered and the validity of the patent cannot be contested before the court that is entitled to give a decision about the infringement. If one of the parties wishes to dispute the validity of the patent, it is necessary to introduce the claim before the courts of the country where the patent was registered. As we have said, this is not a mandatory consequence of a unilateral approach to this matter, but probably there is some connection between this approach and the exclusive ground of jurisdiction.

When we move to intellectual property in a narrow sense the situation is a little bit different, because the right may be born without the intervention of an authority. The right of the writer over the book or of the painter over the painting do not need registration or a special act of an authority. In this situation is more difficult to follow a strict unilateral approach based on the recognition of the vested rights; but it is still possible if it is necessary the existence of the right from the perspective of a specific country to obtain the protection of that right before the courts of another country. Imagine, for example, that a claim is introduced in Spain (because Spain is the place of the defendant's domicile, for example) in order to obtain a compensation for the infringement of an intellectual property right over a novel in Canada (the defendant, according with the claimant's allegations, plagiarized a novel written by the actor and distributed it in Canada). In this case it is not enough to apply Canadian intellectual property law on the merits, combined with other laws about capacity or form. It will be necessary for the Spanish court to determine whether in this case, from the point of view of a Canadian authority, the right exists; that is, that all the requirements of the Canadian legal order, including those of the Canadian PIL have been fulfilled. If the right does not exist from the perspective of a

[50] See JIMÉNEZ BLANCO, P., *El derecho aplicable a la protección internacional de las patentes*, Granada, Comares, 1998, p. 37.

[51] Art. 10.4 of the Spanish Civil Code, for exemple. The purpose of this kind of rules is not to exclude the application of foreign laws in the process of granting a intellectual property right, but to indicate that the result of this process is the creation of a right linked to the *fòrum* and with territorial validity. See JIMÉNEZ BLANCO, P., *op. cit.*, p. 39.

[52] Art. 22 of the Spanish *Ley Orgánica del Poder Judicial* or art. 24 of the Regulation 1215/2012.

Canadian authority, Spanish courts will not recognise the infringement[53]. In this case, even in absence of a previous decision of an authority, we must apply the recognition method.

The obvious question is why we are considering Canadian law and not the law of other countries connected with the case. The answer is that in this case, the principle generally accepted, and included in international conventions and domestic law, is that the right must exist in the country for which protection is claimed[54].

So, here we have an example of application of the method of the recognition without a previous decision of an authority. But, as we have seen, in this case we are obliged to place ourselves in the shoes of that authority. We do not have a real decision of the authority but, at least, we have a hypothetical decision of such authority.

3. COMPANIES

The term "company" includes very different kinds of moral persons. One of the most important distinctions within companies divides them between companies with limited liability of the members and companies with unlimited liability of the members. What I am going to tell in this epigraph refers mainly to companies with limited liability of its members, but in some cases, it could also apply to other types of companies. There is, however, a good reason to begin with companies with unlimited liability of its members: this kind of companies were created in the Early Modern Period (16th and 17th centuries), that is, at the moment in which European nations began to rise and Dutch school replaced Italian doctrine of statutes. This kind of companies appears when the kings (and queens) rule commerce and territoriality; and comity and sovereignty were, as we have seen, key concepts in the theoretical conception of PIL.

Maybe, these factors explain that the regulation of companies[55] connected with more than one legal order fits so well to a (real) unilateral approach. Although we tend to forget it, to use conflict rules regarding companies, complicates the solution of the problems and sometimes implies a true *cul-de-sac*[56]. When we rely on the method of recognition things are -I think- significatively easier.

The justification for the consideration of this technic (recognition) can be found in the fact that the incorporation of a company requires the intervention of an authority and, usually, the access to a public register. That means that the company, since its very beginning is linked to a specific legal order; so, we must distinguish the relationship of the company with the legal order that has created the legal personality and the relationships with other laws. This distinction is according with the difference between the law in which a right has been acquired and the legal order who recognizes the right acquired.

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[53] JIMENEZ BLANCO, P. (*op. cit.*, pp. 121-122) defends a "*remisión integral*" ("comprehensive referral").
[54] Art. 8 of the Regulation 864/2007 (Rome II), for exemple.
[55] With the term "company" we are going to refer to companies with limited liability of the partners, unless we say otherwise.
[56] For example, to determine what goes first: recognition of the legal personality of the company or ascertaining which will be the *lex societatis*. See, for example, BEHRENS, P., "Der Anerkennungsbegriff des internationalen Gesellschaftsrechts", *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 1978, t. 7, pp. 499-514, pp. 500 and 514.

Following the method, we have already explained in epigraphs A) and B), the first step in the treatment of companies in international arena is the inquiry about the valid incorporation of the company in the legal order that has been chosen for the creation of the moral person. Without this valid incorporation, there will be no recognition and it is precisely the validity according with a specific legal order, considered as compulsory requirement for the effectiveness of the legal personality in other legal orders, what explains that we are in the field of recognition and not in that of conflict rules.

According with some PIL systems, the valid incorporation of the company is enough for the recognition of the company. These systems follow the incorporation theory (model). Other PIL systems add a further requirement: the country of incorporation must be one with specific connexions with the company. For example, the main administration of the company must be placed in the country of incorporation. These PIL systems follow the "real seat" theory (model). From this point of view, the real seat theory is not properly an alternative to the incorporation theory, but a complement. In all cases the recognition demands the valid incorporation of the company, and in the case of the real seat theory, there is also, the requirement that the incorporation had been done in one specific country[57].

I think that this is the best way to understand how PIL of companies works. If we tried to explain the same from the point of view of the conflict rule we have to assume that there is a conflict rule on companies and that in some PIL systems, this conflict rule establishes as *lex societatis* the law of the country of incorporation (incorporation theory) and in other PIL systems the conflict rule calls the law of the country of the real seat of the company; but I think that this in some way, artificial, because the very important point is not the set of general rules of the country where the company has been incorporated or the country where the real seat of the company is located, but the effective incorporation of the company.

This perspective is also relevant for the case law of the EU Court of Justice. As it is broadly known, the decisions of the Court on the freedom of establishment of companies have established a clear distinction between the country where the company has been incorporated and the other EU countries. While the first one "has the power to define both the connecting factor required of a company it is to be regarded as incorporated under the law of that Member State"[58]. The way of dealing with this problem is fundamentally different that the issue of the restrictions in the exercise of the right of establishment in another Member States[59]. While the first one decides the conditions for the incorporation of companies, the others are obliged to recognize the companies that have been created in the State of origin. We must come back to this issue in epigraph 5.C), but at this point it must be stressed that the way of reasoning fits perfectly well with the method of recognition.

4. MARRIAGE

Traditionally, international marriage has not been considered as something that could be recognised, but as an institution within family law in which we must determine the law

[57] See NEUHAUS, P.H., *Die Grundbegriffe des internationalen Privatrechts*, Tübingen, J.C.B. Mohr (Paul Siebeck), 2ª ed. 1976, fn. 568. P.H. Neuhaus refers to RABEl in this point.
[58] See EUCJ (Grand Chamber) Judgment of 16 December 2008, As. C-210/06, *Cartesio*, ECLI:EU:C:2008:723, 110.
[59] See *Cartesio* (*supra* fn 58), 123.

applicable to the substance, the form and the capacity of the spouses[60]. In the last years, however, the method of recognition has started to be applied to international marriages. We are going to see briefly the reasons for the initial refusal of the method of recognition in matrimonial issues and why nowadays this method gets relevance in this matter.

I think that a correct comprehension of this question needs a careful consideration of marriage in Canon Law. We must take in mind that during centuries, marriage was not even a contract, but a sacrament and the only regulation of the institution was that of the Church. In some countries, like Spain, the first Marriage Act was enacted in 1870[61]; although in protestant countries the secularization of marriage began two centuries before[62]. In any case, however, the influence of Canon law was relevant. The civil marriage was, mainly, the same institution than the religious one, but granted by a public officer and not by the Church.

This is important, because, for Canon Law marriage is a contract, at least since the 13th century[63] and this conception was assumed also by the civil regulations. So, it is easy to understand that the initial approach to marriage in PIL was based on the same principles that apply to contracts. The situation, however, has changed in the last decades and recognition gains ground. There are several reasons that explain this change.

First, we must take in mind that marriage usually requires the intervention of an authority. So, as we have seen, the presumption should be the application of the recognition method. Here it is necessary to underline, that the role of this authority is more relevant than in the Canon Law. In Canon Law, the priest is just a witness of the celebration, in civil marriage, the intervention of the authority is essential for the validity of marriage. Maybe the influence of Canon Law has contributed to reduce the importance of the public intervention in the celebration of marriage, but this intervention is a path to link each marriage with a specific legal order. So, it is possible to distinguish between "own" marriages (those celebrate with intervention of an authority of the state of the forum) and "foreign" marriages (in which the authorisation of the marriage was made by a public officer of another legal order). This connects the marriage with the technics used by the unilateral method, and, specifically, with the method of the recognition of rights acquired according with a foreign law.

Second. During centuries, marriage could be considered as a universal institution, at least when we reduce our field of analysis to European laws and those derived from European laws. The marriage was, mainly, the Christian marriage. In the last decades this situation has changed. The introduction in some legal orders of the same-sex marriage implies that there are essential differences in the conception of marriage. So, it has

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[60] See in Germany HENRICH, D., *Internationales Familienrecht*, Frankfurt am Main, Verlag für Standesamtwesen, 1989, pp. 3-18; in Spain, GONZÁLEZ CAMPOS, J.D./ABARCA JUNCO, A.P., "Normas de Derecho internacional privado", in LACRUZ BERDEJO, J.L. (coord.), *Matrimonio y divorcio. Comentarios al Título IV del Libro Primero del Código Civil*, Madrid, Civitas, 2nd ed. 1994, pp. 1329-1358, 1334-1336, see also SHAKARGY, S., "Marriage by the State or married to the State? On choice of law in marriage and divorce", *Journal of Private International Law*, 2013, vol.9.3, pp. 499-533, pp. 499-500. See also PÅLSSON, L., *Marriage and divorce in comparative conflict of laws*, Leiden, A.W. Sijthoff, 1974, esp. pp. 39 ff..

[61] See MARTÍ GILABERT, F., *El matrimonio civil en España. Desde la República hasta Franco*, Pamplona, EUNSA, 2000, pp. 11-14.

[62] In the Netherlands in the 16th century and in England in the 17th century, see GERNHUBER, J./COESTER-WALTJEN, D., *Lehrbuch des Familienrechts*, Munich, C.H. Beck'sche Verlagsbuchhandlung, 1994, p. 105.

[63] See BART, J., *Histoire du droit privé. De la chute de l'Empire Romain au XIX^e siècle*, Paris, Montchrestien, 1998, pp. 278-280.

become important to identify which marriage we are talking about. When we face a Spanish marriage, we know that it is a union between a man and a woman, a man and a man or a woman and woman. Bulgarian marriage, on the contrary, is only the union of a woman and a man. Marriage is no longer a universal category, and that implies that recognition could be more useful than conflictualism for its treatment at an international level.

Third. We see an increasing demand for the international recognition of the family situations created in a State. The famous *Wagner* decision of the European Court of Human Rights[64] established the obligation, according with the right to a family life, of recognising an adoption formalized in Peru. Nowadays, there is an increasingly case law regarding the necessity of giving effect to the family situations created abroad[65]. So, recognition cannot be avoided in the PIL treatment of marriage[66]. Further, the freedom of movement of persons within the EU has also pushed in favour of recognition as technic regarding marriage. As it is known, the EUCJ has established that EU law prevents the denial of the right of residence in a Member State of a person who is married with an EU citizen on the basis that the marriage cannot be recognised in the country of residence[67]. So, at this moment, the treatment of marriage in PIL must distinguish between marriages celebrated before an authority of the forum and marriages celebrated before a foreign authority. These marriages should be analysed since de perspective of recognition[68]

VI. UNILATERALISM AND EU LAW

1. SCOPE OF APPLICATION OF EU LAW

At the end of the previous epigraph, EU law was considered in the framework of the treatment of marriage in PIL since a unilateralist perspective. Now we are going to enter into more details about how EU and unilateralism are connected, beginning with the issue of the determination of the scope of application of EU law. As we are going to see, however, this firs issue, the determination of the scope of application of the legal order, arises not only in the EU law, but we are going to focus on it, because of the relevance that this determination have nowadays for the European countries.

As we have previously seen, one of the circumstances that allow the preservation in essence of the medieval solutions for the conflict of laws, was the reluctance of national law makers to enter in deep in the regulation of PIL questions. The reason for this unwillingness was, at least in part, that during the 17th, 18th and, even, 19th century, situations connected with several legal orders were rare. Most of the legal relationships developed entirely within the borders of each nation. PIL was not an important part of the legal system. This situation changed at the end of the 19th century and specially in the second half of the 20th century. Globalisation, at the end of the century and the beginning

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[64] Judgment of 28 June 2007, *Wagner and J.M.W.L. v. Luxembourg*.

[65] See, ARENAS GARCÍA, R., "El reconocimiento de las situaciones familiares en la Unión Europea", in CUARTERO RUBIO, M.V./VELASCO RETAMOSA, J.M., *La vida familiar internacional en una Europa compleja: cuestiones abiertas y problemas de la pràctica*, Valencia, Tirant lo Blanch, 2021, pp. 47-79, pp. 58-68.

[66] See, for exemple, BUREAU, D./MUIR WATT, H., *op. cit.*, t. II, pp. 119-120; BUCHER, A., *Le couple en droit International privé*, Basel/Geneve/Munich, Helbing & Lichtenhahn, 2004, p. 37.

[67] Judgment of 5 June 2018, C-673/16, *Conan*, ECLI:EU:C:2018:385.

[68] See a treatment in deep of this perspective 20 years ago in OREJUDO PRIETO DE LOS MOZOS, P., *La celebración y el Reconocimiento de la Validez del Matrimonio en Derecho Internacional Privado Español*, Cizur Menor (Navarra), 2002.

of the 21st century, changed significantly the previous situation and the cases connected with several legal orders became more important. Of course, this also happens inside the EU, as we are going to see in epigraph 7, but now I want to underline that the lawmaker began to realise that the regulation of situations connected with different legal orders was more important than before. Previously, the law maker wrote the laws for pure internal situations, and PIL scholars and case law used these laws for the regulation of international situations, with the help of few very general conflict rules and using a considerable number of theories and imagination. When the extension of cases with significative international connexions made unadvisable to neglect them, the interest of the law maker for determining, directly or indirectly, the scope of application of certain substantial rules, increased.

In the case of EU law, there is another reason to take in mind when we try to define the scope of application of its rules: EU law coexists with national legal orders, so, it is not only necessary to determine its scope of application before extra-UE legal orders, but also because it must be decided in which cases the EU law covers external relations and in which these external relations are competence of the member States[69].

This task, the delimitation of the territorial and personal scope of the EU law, was tackled by Stephanie Francq[70] in 2005 and gives the reasons that explain why the scholars did not try this approach before[71]. In any case, ascertaining in which cases connected with the EU and with third States, EU applies, must be tackled from a unilateral perspective. At this moment, there is not a formal set of rules that cover completely the issue, but it is possible to identify some principles and rules, that have been used in the solution of specific problems. For example, when it is necessary to determine the scope of the EU antitrust rules[72]. Besides, EU regulations and directives may include rules about its territorial or personal scope[73].

The determination of the territorial and personal scope of application of EU rules are especially relevant when the rule can be characterised as a mandatory one. In fact, it can

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[69] See BORRÁS RODRÍGUEZ, A., "Le droit International privé communautaire: réalité, problemes et perspectives d'avenir", *R. des C.*, 2005, t. 317, pp. 313-534, pp. 458-478.

[70] FRANCQ, S., *L'applicabilité du droit Communautaire dérivé au regard des méthodes du droit international privé*, Brussels/Paris, Bruylant/L.G.D.J., 2005

[71] *Ibidem.*, pp. 59-60.

[72] Judgments of the EUCJ of 31 March 1993, C-89, 104, 114, 116, 117, 125-129/85, *Pasta de madera*, ECLI:EU:C:1993:120, and 25 March 1999, T-102/96, *Gencor*, ECLI:EU:C:1999:65.

[73] See, for example, art. 2.1 of the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), *OJ* L 277, 27 October 2022; art. 3.1 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), *OJ* L 178 17 July 2000. It must be underlined that, on one hand, the Directive establishes that Member States shall ensure that service providers established on its territory comply with the national provisions which fall within the coordinated field; but, on the other hand, art. 1.4 of the Directive states that: "The Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of the Courts". Anyway, this clarification, probably, is not connected with the issue we are considering here (the scope of application of EU law), but with the determination of the applicable to services provided within the EU (law of the State of the establishment of the provider of the service *versus* law of the place of the person who receives the service. See DE MIGUEL ASENSIO, P.A., "Directiva sobre el comercio electrónico: Determinación de la normativa aplicable a las actividades transfronterizas", *Revista de la contratación electrónica*, 2001, number 20, pp. 3-40, p. 4. See also art. 1.2 of the Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, *OJ* L 186 11 July 2019.

be hard to distinguish the determination of those cases that enters into the scope of application of EU law, and the identification of a mandatory rule. We are going to deal with this question in the next epigraph.

2. MANDATORY RULES

In November 2000, the EUCJ delivered its judgment in the case *Ingmar*[74]. Probably one of the most interesting judgments for PIL, precisely because the approach is substantial and not conflictual. At the end, the Court of Luxembourg determined in which cases substantial EU law must be applied regarding cases connected with third States. And the reasoning relies on the aim and function of the rule. That is, we face a pure unilateral approach.

In essence, *Ingmar* deals with the classical problem of overriding mandatory rules (*lois de police*). A problem with two faces. One of them is to identify which substantial rules must be considered so important, taking into account the interests they protect, that they are applicable "irrespective of the law otherwise applicable to the contract" [75]. The other face is their scope of application. Because the overriding mandatory rule only applies to situations "falling within their scope" (art. 9 of the Rome I Regulation). This second face is the one who connect overriding mandatory rules with unilateralism. In fact, this kind of rules only can be understood from a unilateral point of view.

In *Ingmar*, the EU Court of Justice did a fine job analysing the aims of the rule (in that case, the rights to commercial agents after the termination of agency contracts) in order to find which was their scope of application, with the final conclusion that this scope covers all agents who carried on his or her activity in a Member State. The solution was not included *expressis verbis* in the Directive about self-employed commercial agents, but could be deduced from the goal of the Directive. It was important because, firstly -in connexion with we have commented in the previous epigraph-, makes clear that the scope of application of EU law is a question ruled by EU law[76]. Secondly, it is an example of analysing the rule in order to identify its willingness to apply to certain international situations. Precisely, the most difficult (or one of the most difficult) issues regarding overriding mandatory rules in cases connected with several legal orders, is the question of identifying which are the relevant connexions that justify the application of the rule.

The situation is far easier in those cases in which the case is only connected with one legal order. In those situations, it is possible to the parties on a contract to choose the law of another country as applicable, but, according with art. 3.3 of Rome I Regulation, mandatory rules of the country where all relevant elements are located. Article 3.3 refers to any provision that cannot be derogated by agreement; so, overriding and not overriding mandatory rules. So, in this case there is no necessity to identify which are the relevant connexions for the application of the rule in international cases. Art. 3.4 of the Rome I Regulation, deals with a very similar case, with the only difference that the contract is not connected with just one country, but with several Member States of the Regulation. In this cases, mandatory rules of the EU law will apply even when the parties have chosen to apply the law of a third State. That is fine; but, again, here we do not need to deal with

[74] Judgment of 9 November 2000, C-381/98, *Ingmar*, ECLI:EU:C:2000:605. See FONT I SEGURA, A., "Reparación indemnizatoria tras la extinción del contrato internacional de agencia comercial: imperatividad poliédrica o el mito de Zagreo", *RDCE*, 2001, nº 9, pp. 259 ff.
[75] See art. 9 of the Rome I Regulation.
[76] See number 25 of the Judgment.

the determination of the international scope of application of the mandatory rules. As a result, the real difficult case, that case in which there are relevant connexions with different legal orders, continue being a battlefield for the classical reasoning in PIL, that we have inherited from the medieval scholars.

Maybe overriding mandatory rules are still the real essence of PIL methodology.

Overriding mandatory rules pose similar problems in EU law and in domestic law. The difference is that, usually, there some unilateral conflict rules in domestic PIL systems that refer to the problem[77], but these rules only provide general principles that must be completed with the analysis of the substantial rules. In international conventions and EU regulations we find also rules regarding overriding mandatory rules[78], but general as well. So, at the end, the analysis of the substantial rules is compulsory. As we have said, a clear sample of unilateralism.

3. UNILATERALISM AND MUTUAL RECOGNITION

The principle of mutual recognition has become one of the cornerstones in the EU law. It has moved from the free movement of goods[79] to other areas of the internal market and, even, to the judicial cooperation in civil and criminal matters. Nowadays it is almost a "magic word" than can be used in different cases and with different meanings. Moreover, the term has developed to another "magic word": "mutual trust", and both of them have the potential to explain or resolve any problem in EU law[80]. And, of course, the principle of mutual recognition has something to say about unilateralism.

Even at the beginning, when the principle was relevant only for the free movement of goods, it had a connexion with the unilateral method. The reason is that -as Miquel Gardeñes has explained[81]- the principle was, in essence, an issue of extraterritorial application of mandatory rules. We have not dealt with this problem in previous epigraphs, but here it is necessary a remind about the distinction between mandatory rules of the forum and mandatory rules of other legal orders. In both cases we have to determine the territorial and personal scope of application, and that implies a unilateral approach, so, when we consider in the country of the destiny of the goods, the mandatory rules already applied in the country of origin[82], we are using a unilateral approach, in this case in the field of commercial law.

Unilateralism underlying in the principle of mutual recognition is clearer when we consider its manifestations in other fields of EU law. We have already showed how in international company law, the case law of the EU Court of Justice has established that, in principle, companies incorporated in a member State must be recognised in another

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[77] Art. 3 of the French Civil Code, art. 8.1 of the Spanish Civil Code; art. 17 of the Italian Statute on Private International Law, art 20 of the Belgian Code on Private International Law, etc.

[78] Art. 9 of the Rome I Regulation, for example.

[79] Judgment of the Court of 20 February 1979, C-120/78, *Cassis de Dijon*, ECLI:EU:C:1979:42

[80] Of course, I am a little bit ironic, but I want to stress that the use of these terms, without considering the nuances (or, maybe, more than nuances) that we should introduce in the different fields of EU law, may cause more confusion than clarity, more noise than harmony, more darkness than light, more ignorance than wisdom.

[81] GARDEÑES SANTIAGO, M., *La aplicación de la regla de reconocimiento mutuo y su incidencia en el comercio de mercancías y servicios en el ámbito comunitario e internacional*, Madrid, Eurolex, 1999, pp. 100-101.

[82] See GARDEÑES, M., *op. cit.*, pp. 177-178.

member States. The "product" created in accordance with the legal order of a member State must be accepted in the other member States. As we have already seen, this fits with the essence of the recognition method.

Nowadays, the challenge is to incorporate this principle to family law. We have already seen that the Court of Luxembourg has decided that it is not according with EU law the refusal of the right of residence to the spouse of an EU citizen, on the basis that the marriage cannot be recognized. This is not the same than ordering the recognition of the marriage[83], but, obviously, we are still within the framework of the recognition method. The next step could be recognition of parenthood. At this moment there is an initiative to regulate this matter, a proposal for a Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood[84].

Obviously, compulsory recognition of situations created in another member State contributes to a high degree of integration, but, at the same time, we should realize that compulsory recognition implies the acceptance of the values underlying the foreign legal order whose decisions are being recognised. Without common values, recognition, when the conditions for the refusal of that recognition are not those of the state that recognizes, but those imposed by the EU, could drive the EU to a tension of certain importance.

VII. UNILATERALISM AND CONFLICTUALISM NOWADAYS

1. THE NEED FOR A COMPROMISE: A TWO-STEPS PIL

What we have seen till now is that conflictualism and unilateralism are not really two radical different approaches to PIL. In fact, both of them may work in conjunction. Unilateralism implies, on the one hand, determination of the territorial and personal scope of application of the rule; on the other hand, respect to the decisions (specific rules) formalised in a foreign legal order.

The first dimension of unilateralism is essential for the identification of overriding mandatory rules and, for this reason, a key element in any system of conflict rules; because, exceptions to the conflicts rules are also an important part of the PIL, even from a multilateralist perspective.

The second dimension of unilateralism requires a specific rule, deducted from the general rules, and within these general rules are the conflict rules. When an authority must decide which specific rule corresponds to certain facts, the connexions of the facts with different legal orders must be considered, and this consideration implies the use of conflict rules. Doing it in a different way will force an equal treatment for pure domestic situations and international situations. As we have seen previously, when we consider intellectual property, even in this field, in which a unilateral approach is broadly accepted, the granting of the right in the State of origin implies the use of conflict rules. The use of conflict rules in this moment does not prevent the use of the method of recognition for

[83] There is a debate about the consequences of the *Conan* decision (*supra* fn 67). Some authors propose an extension of the consequences on the basis that it is not coherent that the same marriage be recognized for some purposes and not for others (see JIMÉNEZ BLANCO, P., *Regímenes económicos matrimoniales. Un studio del Reglamento (UE) nº 2016/1103*, Valencia, Tirant lo Blanch, 2021, p. 43).
[84] COM(2022) 695 final of 7 December 2022.

the effectiveness of the right in countries different than the one in which the right has been acquired.

Following this idea, we will find a "two-steps PIL". In the first step, the specific rule should be created. The set or general rules considered for the deduction of the specific rule will contain conflict rules and also overriding mandatory rules that only can be identified through a unilateral approach. The second step regards the extraterritorial effectiveness of the specific rule. Here, the recognition of the specific rule already created should be the regel. That does not imply an automatic recognition without controls. The state where the recognition is sought may introduce conditions for this recognition in order to protect its values and interests. But, when the recognition is imposed, as it happens in the EU, it would be advisable to refuse a facilitation in the recognition beyond the shared values and mutual trust.

2. PIL "*AD EXTRA*" AND PIL "*AD INTRA*"

Till now, we do not have deal with the distinction between international conflicts and conflict of laws within a State. As it is known, within those States that include different local or personal laws, it is possible to face internal conflicts similar to those arising from the situations connected with several countries. United States, for example, is a country in which, probably, internal conflicts are more important than the international ones. In the EU, only in Spain we find more than one civil law, but in the world, there are many countries in which this kind of conflicts arises.

Between international and internal conflicts, we may introduce another category. In the EU, those situations connected with different member States, but without relevant links with third States, composes a category in the middle of international and internal conflicts. Art. 3.4 of the Rome I Regulation[85] shows that this kind of situations deserve a specific regulation.

So, from the point of view of a court in an EU member State, there is more than one PIL. There is a PIL whose object is the regulation of the situations connected with third countries, and another aimed at the ruling of the situations linked with several EU member States. If the country is Spain, we must add another PIL: the one who covers the internal conflicts in Spain. So, it is possible to use different methodologies in each of these levels. Moreover, it would be advisable to employ at each level the most suitable technic. At this moment, however, this is not the case.

In Spain, for example, pure internal conflicts are ruled through a pure conflictualist method. There is a set of rules, unique for the whole Spain, composed by conflict rules that, ideally, identifies in each case the most closely connected law within Spain.

Within the EU, there is no specific regulation for the internal conflicts. This implies that the same rules are going to be applied to cases connected with third countries and to cases who show only connections with EU member States. This general principle, however, has two exceptions.

On the one hand, the principle of mutual recognition applies only between the member States, so, through this principle, arises a specific feature in the relationships connected

[85] See *supra* section VI.2.

with several member States. Nevertheless, we must take in mind that mutual recognition only applies when a "legal product" (a company, a marriage…) has existence in one member State, but this institution could have connections also with third States[86].

On the other hand, in situations connected with third States, some domestic or EU mandatory rules can be discarded when the case does not enter within the scope of application of the overriding mandatory rule[87]. In pure EU internal cases, the EU mandatory rules will always apply.

I guess that this is not enough. Internal conflicts within the EU perhaps requirs a specific set of rules according with the level of integration achieved, a set of rules including conflict rules. So, the first step in PIL (formalisation of the specific rule) will follow similar patterns in all the member States. However, there will be still differences, since each State will apply their essential values through the exception of public policy or in the form of overriding mandatory rules; but I think that it is not advisable trying to erase these obstacles for a uniform PIL in the EU, because, as I have said previously, an integration in PIL greater than the harmonization in essential values is potentially dangerous.

VII. CONCLUSION

Unilateralism and conflictualism are not alternative approaches to PIL; they are different tools that should be used in conjunction. In particular, unilateralism, as a method of determining the personal and territorial scope of the rules, is essential for the application of overriding mandatory rules; a type of rule that cannot be neglected in any PIL system, even in those based on bilateral conflict rules. Unilateralism is also relevant for the method of recognition, and nowadays, this method is broadly used in a number of fields, from intellectual property to marriage; it is also important for the application of EU law (principle of mutual recognition, for example). Regarding EU law, unilateralism should also be considered in determining its personal and territorial scope of application.

We have already seen that approaches to unilateralism and conflictualism are strongly influenced by the political context. During the Middle Ages, the Italian School developed solutions for cases connected with different laws, considering that the different local powers worked within the framework of the Church and the Empire, and that there was a common law over the different laws in conflict (*ius commune*). When the nations in Europe became sovereign states, PIL moved to new principles. The medieval PIL was, in fact, less "unilateralist" than is sometimes pretended. Real unilateralism arrived with the Dutch School after the Peace of Westphalia; but a couple of centuries later, conflictualism arose again as a useful tool for the harmonization of PIL in a complex world divided into sovereign states.

Nowadays, unilateralist and conflictualist approaches to PIL should be considered jointly, assuming that in some cases bilateral conflict rules are an advisable solution and

[86] See, for example, the case *Conan*. The place of the wedding was Belgium (a member State) and the marriage deploys effects in Rumania (another member State), but one of the spouses is a US citizen; so, although we face a case of mutual recognition, the situation has links also with a third State. This is also the rule with those rules regarding recognition. For example, EU regulations on judicial cooperation covering recognition of decision or of documents only apply when the decision of the document have been produced in a member State and try to have effects in another member State.

[87] See *supra* section VI.2.

that in other cases, the method of recognition must prevail. In any case, even in those cases where the option is conflictualism, a unilateral approach should be used for determining the rule's scope.

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