THE CONFLICT OF PERSONAL LAWS

By Edoardo Vitta*

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Both now and in the past a number of States have permitted members of ethnic or religious groups (whether or not nationals of that State) to be governed, as to all or part of their legal relationships, according to the laws of their group and not by the law of the State. The former are here termed "personal laws", and the expression "conflict of personal laws" refers to the situation which arises out of legal transactions involving members of one or more such groups.

I. HISTORICAL AND COMPARATIVE BACKGROUND

1. Early medieval times

The first large-scale instance of a system of personal laws is to be found in the Frankish State, in early medieval times, and later in the territories conquered by the Lombardians in Italy. It was then that the personal laws reached their widest extension.¹

* Professor of Public Law; Dean, Faculty of Economics and Commerce, University of Cagliari.

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¹ On the origin, characteristics, operation and decline of the conflict of personal laws
Recent historical researches, however, have disclosed that elements of the system which ripened after the dissolution of the Roman Empire existed previously. More particularly such elements were to be found in the ancient world, when a dominating class of warriors or great landowners coexisted within a single city with inferior classes composed of workmen, foreigners, or subjected populations. Thus in Greece there were the "parioeci" and the "matoikoi"; in Ptolemaic Egypt the Alexandrines, i.e. the descendants of the conquering militiae of Alexander, and the native Egyptians; in Rome the Roman citizens, to whom the "jus civile" (or "jus Quiritium") was applicable, and foreigners ("peregrini"), to whom a special magistrate ("praetor peregrinus") applied special rules of law, resulting from a mixture of Roman and provincial law tempered by considerations of equity ("jus gentium").

The system that emerged after the barbarian invasions derives from the coexistence within a single territory of several barbarian nations and the descendants of the conquered Latins. The barbarian peoples, while continuing to follow their primitive customs ("warfidae") permitted the Romans to continue living according to Roman Law. A system was thus created in which different laws were applied to the various sections of the population, according to their racial origin.

The application of the personal laws was remarkably wide. As Arminjon has pointed out: "the subjects of the barbarian kingdoms were competent or incompetent, contracted, transmitted by donation, will or succession, possessed, acquired and alienated property and were punished according to their national laws".

Capacity to undertake obligations and to conclude legal transactions of any kind, including marriage, depended upon the personal law of the individual concerned. Gifts in contemplation of marriage were also governed by the personal laws of the spouses. Rights of succession were determined according to the law of the "de cujus". Contracts of sale fell under the law of the seller, and donations under the law of the donor. Compensation for quasi-delicual
damages had to be paid by the defendant to the plaintiff according to the personal law of the latter. Later, when the authority of the State became gradually more effective and replaced the original right of private vengeance, punishment came to be determined by the personal law of the guilty person. Similarly questions of procedure, both civil and criminal, were settled according to the principle that every person has the right to be judged according to his own law.

At first it was easy to distinguish between the various conquering races and the local inhabitants: differences of customs, names, culture and even external appearance were very great. But with the passage of time there occurred an intermingling of the barbarian and Roman populations and the objective differences became less conspicuous. In 787 Charlemagne promulgated a law requiring his provincial official to ascertain on the spot the law followed by each person (“per singulos inquirant quale habeant legem ex nomine”).

In the eighth century the practice developed of asking the parties to a legal transaction to make a declaration concerning their own law. Such declarations of the parties (professiones juris) were embodied in the various legal instruments.

Originally these declarations corresponded to the real situation and no one was allowed to declare that he belonged to a nation (natio) not really his own. In the course of time, however, the parties became free to declare their association with any of the personal systems actually existing. The professio juris thus became an instrument for a subjective choice of law by the person concerned.

With the weakening of the marked ethnic differences that had been the main reason for the birth of this system, the personal laws lost their individuality. A process of mutual reaction started between German customs and Roman law and both came under the influence of the canon law. The statutes enacted by the barbarian kings for all their subjects, irrespective of their natio, also constituted a strong unifying factor. Finally the very practice of determining a person’s natio according to his own declaration, which gave him the possibility of avoiding a system of personal law and preferring another, also weakened and undermined the existing system.

2. The Ottoman Empire and successor States

Several centuries after the barbarian invasions in the West another substantive migration of peoples took place in the eastern half of the European continent. The Turks emerged from the steppes of Central Asia and, after

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extending their domination over the greatest part of the Moslem world, over-
ran what remained of the Roman Empire of the East.

The Turks, having adopted Islam, were subjected in all their legal relation-
ships inter se to the norms of Moslem law, exclusively applied by Moslem or
Sharia courts, i.e. the courts which applied the shari or traditional interpreta-
tion of Qoranic law. So far as Christians were concerned, Sultan Mohammed
II, the conqueror of Constantinople, permitted foreign merchants living in the
coastal towns of Asia Minor and in Constantinople to remain subject to their
own laws. Similar toleration was shown towards the former subjects of the
Byzantine Emperors: the Sultan assembled the heads of the Greek Orthodox
Church to elect a Patriarch who, assisted by a Synod, or Council of ecclesiastic
dignitaries, was to “rule the Church of Constantinople according to the cus-
toms existing at the times of the Christian Emperors” and “to exercise un-
limited jurisdiction over his co-religionist subjects of the Sublime Porte”. The
heads of the other Christian communities (Patriarchs) and of the Jewish
community (the Chief Rabbi) were granted similar privileges. Their status
derived from special Charters (Berats), the contents of which differed from
time to time, depending upon the importance and influence of the community
with the Porte and upon the measure of support extended by influential
foreign powers.

The privileges of the communities were confirmed in 1839 by the so-called
law of Tanzimat. They were again confirmed in a series of Notes sent in
1856 by the Sultan to the main European Powers and also in a Firman
(imperial rescript) addressed to the heads of the communities and in a
Proclamation to the Nation, all of the same year.

This was not considered sufficient by the representatives of the Powers as-
sembled in Paris to discuss the conditions of peace after the Crimean war.
At the request of Great Britain, France and Austria the Sultan signed, on
March 30, 1856, a famous Firman, known as the Hatti Houmayoun, which con-
formed anew the ancient privileges of the communities and defined more
precisely their jurisdictional powers. As the Ottoman authorities tended to
interpret the Hatti Houmayoun restrictively, the so-called High Circulars of
the year 1891 instructed them to respect its provisions and gave details as to
their interpretation.5

The system created by the above acts is to be explained by the fact that
the Qoranic traditional norms apply only to Moslems; non-Moslems, so long
as they remain unconverted to Islam, being permitted to continue to be
governed by their former national and religious laws.6 This, together with

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5 For the text of the Hatti Houmayoun, see British and Foreign State Papers, Vol.
47, 1363.

6 See Arminjon, “Le droit international privé en droit interne, principalement dans
les pays de l’Islam”, Journal du droit international privé, 1912, pp. 706 ff. As to
the legal status of non-Moslems in Moslem law, see Cardahi, “La conception et la
pratique du droit international privé dans l’Islam”, Recueil des Cours, cit., 1937,
the tendency towards a unified system of law which, under European influence, developed in the second half of the last century, gave the Ottoman legislation a very complex structure. Side by side with the religious laws and courts, Sharia and other, a series of civil laws, mostly imitated from the French codes of the time, were enacted for all the citizens of the Empire. These laws were applied by newly set up tribunals (Nizamie tribunals, i.e. established according to regulation).

The relationships between Sharia courts and the courts of the religious communities underwent an interesting transformation. The Sharia courts, originally competent in all questions between Moslems, but only between Moslems, gradually assumed jurisdiction in questions of personal status arising between Moslems and non-Moslems and, in certain cases, also between non-Moslems only. They thus assumed the character of State courts for all questions still under religious jurisdiction, while non-Moslem religious courts enjoyed only a residuary jurisdiction in such matters. The exclusive jurisdiction of the communities’ courts persisted for matters of marriage (including dowry), alimony, divorce, the status and capacity of persons and testamentary questions between members of the same community. For the remaining matters of personal status—maintenance, guardianship, legitimation and adoption of minors, interdiction, absence, intestate successions, etc.—the jurisdiction of the communities’ courts subsisted only when all the interested parties consented thereto. In the absence of consent jurisdiction was exercised by the Sharia courts.

So far as foreigners were concerned their national laws were applied to them by their own consuls (consular courts) under the Capitulations. But foreign Moslems were subjected in matters of personal status to the exclusive jurisdiction of Moslem Sharia courts. Moreover the consular courts, when the national law of the foreigner declared the applicability of his religious law, used to refer the question to the appropriate religious court.

The Ottoman Empire came to an end after the First World War. In Turkey itself the Kemalist revolution completely abolished both religious law and religious jurisdiction. As from April, 1924, the civil courts enjoy exclusive jurisdiction including questions of personal status. They now judge all Turkish subjects, irrespective of religion, according to the Civil Code of September, 1926, which is an almost literal translation of the Swiss Civil Code.

Vol. 60, pp. 511 ff. and authors there quoted.

8 The name Capitulation was given to the system of extraterritoriality applied to foreigners in the Ottoman Empire and in certain parts of the Far East. The system was postulated upon a series of bilateral treaties, based upon the text of the French Capitulation which was drawn up in the year 1535. See Pelissié du Rausas, Le régime des Capitulations dans l’Empire Ottoman, Paris, 1902.
In the Balkans the treaties of territorial cession between the Porte and the new States (e.g. the treaty of 1881 by which Turkey ceded Thessaly and the Epirus to Greece) stipulated that the Moslems remaining therein should enjoy a certain autonomy, including the jurisdiction of the Qadis in purely religious questions and in matters of personal status. Even in the absence of special treaties the Balkan States generally granted to Moslems the jurisdictional autonomy to which they were accustomed. Under a Greek law of 1910, for instance, Moslems were under the exclusive jurisdiction of the Qadis in matters of marriage and divorce, alimony, guardianship, status of minors, testamentary and intestate successions. In Bulgaria, until the Second World War, the exclusive jurisdiction of the Qadis extended over questions of marriage, divorce, patrimonial relationships between husband and wife, between parents and children and testamentary and intestate successions.

At first the Balkan states also left a certain measure of jurisdiction to the courts of the non-Moslem communities, mostly in matrimonial matters. Thus in Bulgaria the authorities of these communities were exclusively competent in matters of marriage and divorce; while in questions connected with the relationships between husband and wife and between parents and children there was a division of jurisdiction between the civil and the religious courts.

A law of May, 1945, of the present communist regime, has completely displaced religious law and jurisdiction. Greece, on the other hand, still recognises only religious marriage (Code of 1940).

In the Asiatic and African countries once part of the Ottoman Empire the personal laws were more firmly rooted, probably owing to the prevalence of Moslems in their population.

In Syria and the Lebanon the French Mandate did not introduce substantial modifications. An attempt by the French High Commissioner in the year 1926 to limit the jurisdiction of the religious courts, Moslem and others, was unsuccessful owing to the opposition of the local clergy. Later, a decree of February 3, 1930, while leaving untouched the jurisdiction of the Sharia
courts, limited the jurisdiction of non-Moslem courts to matters of marriage and divorce, alimony and damages for breach of promise to marry or *pendente lite* (the amount to be actually paid however being established by the civil courts), relationship between parents and children, guardianship of minors (including the appointment of guardians) and certain questions connected with the administration of religious foundations (*wakfs*). Questions of personal status between non-Moslems formerly falling under the jurisdiction of the Moslem courts were transferred to the civil courts. A special tribunal (*tribunal des conflits*), set up by a decree of December 5, 1924, decided in doubtful cases whether a judgment by a religious court had been rendered within its jurisdiction.

In Palestine the British Mandatory administration clarified the pre-existing situation by enacting the Palestine Order-in-Council, 1922, and the Succession Ordinance, 1924. All questions of personal status between Moslems (such questions being defined by sec. 51 of the Order as matters of marriage, divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons), as well as questions relating to the constitution and internal administration of Moslem *wakfs*, were left under the exclusive jurisdiction of the *Sharia* courts. Such exclusive jurisdiction originally extended also over Moslems of foreign nationality. But in 1939 it was excluded for Moslems who in matters of personal status are under their national law, subject to the jurisdiction of courts of a civil nature.

A Palestinian citizen who was a member of the Jewish or one of the nine recognized Christian communities was—for questions of marriage, divorce, alimony and confirmation of wills—subject to the exclusive jurisdiction of the religious courts. In all other matters of personal status the religious courts had jurisdiction only when all the interested parties submitted to it. Failing consent the civil courts had jurisdiction, but nevertheless applied the religious law of the parties. Non-Moslem foreigners came under the jurisdiction of the civil courts which applied, in matters of personal status, their national law. But if all the parties agreed, their religious courts had jurisdiction and applied the religious law.

In Egypt, alongside the religious courts and the local civil courts there existed consular courts, judging nationals of European Powers in accordance with the Capitulations, as well as mixed courts of European and Egyptian judges for cases between foreigners and local nationals or between foreigners of different nationalities. The last-mentioned courts, which judged according to special Mixed Codes drawn up on French models, were first established in

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15 See especially Messina, *op. cit.*
1875 and ceased to function as from 1949, in accordance with the provisions of the Treaty of Montreux of May, 1937. The same Treaty put an end to the Capitulations, also bringing to an end the operation of the consular courts. In matters of succession, however, Egypt originally followed the Ottoman system, under which testate successions came under the jurisdiction of the religious courts of the parties, while intestate successions came under the jurisdiction of the Sharia courts, but the heirs were entitled to opt, by common agreement, for their religious courts. Later this was radically altered by two laws of 1943 and 1946, dealing with intestate and testamentary successions respectively. These laws, which reproduced *grosso modo* the substance of the Moslem law of succession, applied to all Egyptian nationals, irrespective of religion.

A further evolution took place after the Second World War, when the countries of the Middle East attained independence. The movement of codification, already started in Ottoman times (the Mejelle, or Ottoman civil code, which was but a codification of Moslem law along the lines of the Napoleonic code, was enacted between the years 1869–1876), has gained impetus. It has given place, on the whole, to an increased reception of Western legal principles and ideas and at the same time, it has brought about the codification of part of the religious laws. The imitation of Western law was mostly drawn from French (in Egypt, Syria and the Lebanon) or English (in Israel and Iraq) models; while, especially in matters of personal status, there has been a tendency to codify the main provisions of Moslem Sharia law (and, in Israel, of Jewish rabbinical law). Complex reasons of expediency and uniformity of the law on the one hand, and of a religious or nationalistic character on the other, have influenced the measure of reception from one or the other of the above sources. With the secularization of the law, there has been a corresponding reduction in the jurisdiction of the religious, in favour of the civil courts.

A good example is Egypt where, following the succession laws of 1943 and 1946 referred to above, a comprehensive Civil Code was enacted in 1949. A law of September 21, 1955, subsequently abolished all the religious jurisdictions. Actually, therefore, the civil courts apply both the civil and religious laws (in the matters not dealt with by the 1949 codification). The Egyptian Civil Code, mostly based on local judicial precedents, which were strongly influenced by French law (and in a much lesser degree by Moslem Sharia law), has been accepted, with only slight modifications, by Syria (in 1949).

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17 On the methods adopted by Egypt to bring about the modernization and westernization of her law, see the series of articles by Anderson in The Muslim World, 1950, 1951 and 1952. It is noteworthy that the influence of French law was also noticeable in the Persian Civil Code of 1928–1935; see Amiran, “Dans quelle mesure le droit civil Iranien s’est inspiré du code civil français?”, *Bulletin de la*
and by Iraq (in 1952). While the *Mejelle* is still in force in Jordan and Israel, the latter country is planning a codification of its civil law, which will take into account Jewish rabbinical law.

3. Personal laws in the colonies

Apart from the Middle East, personal laws were to be found, until recently, for various legal relationships, in wide regions of the Asian and African continents colonized during the last centuries by the various European Powers.

*Société de Législation Comparée*, 1937, pp. 66 ff.

18 The Syrian Code, however, does not include the sections relating to land law of the Egyptian Code, as in this matter there existed original Syrian legislation since 1932.

19 Thus Iraq, whose legislation is on the whole on English lines, has been partly influenced by French law, through the Egyptian codification.


21 On the personal laws and their conflicts in the colonies, see the main French (Solus, Daire, François and Mariol, Girault, Merighac, Camerlynck, Devèze, Luchaire, Rolland and Lampué), Italian (Romano, Mondaini, Malvezzi, Cucinotta, Sertoli-Salis, Borsi, Quadri) and English (e.g. Burger) treatises on colonial legislation. The following more specific works (some of a retrospective character) may also be quoted: Kollewijn, "Interracial Private Law (The Colonial Conflict of Laws)", *The Effects of Western Influence on Native Civilizations in the Malay Archipelago*, edited by Schriebe, Batavia, 1929; id. "Conflicts of Western and Non-Western Law", (1951) Int. L. Q. 307; Wengler, "Die Kollisionsnormen im Recht der italienischen Kolonien", *Zeitschrift für ausländisches und internationales Privatrecht*, 1937, pp. 71 ff.; id. *Das Kollisionsrecht der englischen Kolonien*, *ibid.*, 1940, pp. 410 ff.; Lampué, "Les conflits de lois interrégionaux et interpersonnels dans le système juridique français", *Revue critique de droit international privé*,
European colonial expansion has been characterized, at least in its early days, by an almost complete disregard for native laws. But outstanding jurists, including Grotius and Vitoria, defended from the very beginning of colonization the right of the natives to continue to live, at least to a certain extent, according to their own laws. This principle was endorsed by the leading colonialists.

The penetration of metropolitan legislation has taken several forms. Sometimes the laws in force in the metropolitan territory have been introduced en bloc or with only slight modifications to suit local conditions. In other instances locally enacted rules have been drafted largely according to metropolitan models. These laws were territorial laws, applicable to all the inhabitants of the country. Native laws, applied as such to certain relationships between the natives, became personal laws.

In British India metropolitan law was at first applied to Britons and Indians alike. But as early as 1772 Regulations made by Warren Hastings, followed by the Regulating Act, 1773, declared that matrimonial and succession matters, as well as matters relating to the caste system and to other religious usages and institutions, were to be decided according to Hindu law for Hindus and according to Moslem law for Moslems. All these laws were applied by British judges, and this was not without difficulties. As a matter of fact the judges, not trusting the local legal experts (pundits), requested a literal translation of brahminic texts and rendered their judgments accordingly. They thus artificially strengthened written law as against the customary rules which had naturally evolved in the course of time.

At a later stage the legal evolution of British India was characterized by a stronger penetration of English law through a series of laws and codes exhibiting a territorial character. From 1860 onwards laws were enacted relating to civil and criminal law and procedure, evidence, contracts, execution, probate and so on.

In British India, therefore, the system which finally prevailed was the application of territorial laws of British origin and model to all the inhabitants of the country with due allowance to the needs of the individual provinces. In the absence of such laws, native law was applicable: Hindus followed their laws in matters of marriage, adoption, patrimonial relationships within the family and successions, and Moslems were governed by Moslem law in questions relating to marriage, succession and Moslem religious foundations (wakfs). These laws were applied by civil courts staffed mainly by British judges. Under the case law system the body of precedents of these courts gradually transformed and integrated the Hindu and Moslem customs.

The general trend of French colonial policy, which aimed at assimilating

the natives to French civilization, has not been without influence on legal
developments in the French colonies.

Native institutions concerning the family were generally respected. It was
accepted that these institutions comprised not only marriage and divorce,
minority, relationships between parents and children, guardianship, the status
of women, etc., but also patrimonial relationships between husband and wife
and succession. Native laws relating to ownership, and in a lesser degree also
those relating to obligations and contracts, were left in force in several French
colonies.

The penetration of French law in the colonies was effected by permitting
the natives to opt for it in certain instances and by resorting to metropolitan
legal rules when native law could not be applied for reasons of public policy.
Such cases will be examined later. The practice of French judges to apply
metropolitan law when native laws or customs appeared to them non-existent
or incomplete is also noteworthy. French colonial courts freely applied French
law wherever the laws of the natives appeared unclear or unsatisfactory. This
practice has been criticized by French authorities on colonial law. Finally the
tendency to give preference to French law was particularly evident when the
need arose of a choice between French law and native law. Wherever a
French or assimilated national concluded a civil or commercial transaction
with a native, French law applied. In criminal matters as well, when a
Frenchman was the accomplice or victim of a crime committed by a native,
French courts had jurisdiction and French criminal law was applied.

French colonial practice may usefully be contrasted with the Dutch legis-
lative policy in Indonesia. After an early period in which native law was
not recognized, there was a general reversal of policy. In 1887 the Jurists’
Society of the East Indies met at Batavia, and decided that marriages between
Europeans and Indonesians or Chinese should be performed according to the
personal law of the husband, which should also govern the personal relation-
ship between the spouses (including the admissibility of polygamy or its pro-
hibition) and eventually divorce. This decision, which placed Dutch and
native laws on a footing of equality, was embodied in a Royal Decree of 1896.
A similar policy was followed in other fields. Illegitimate children of mixed
marriages, if recognized by their father, followed his status. Intestate and
testamentary successions fell under the personal law of the deceased, whether
European or Asiatic.

The relationships between metropolitan and native laws may also be con-
sidered from the point of view of jurisdiction. While in British India the
courts set up by the colonizing power applied both metropolitan and native
laws, in most other territories the application of the latter laws was entrusted,
at least up to a certain extent, to native courts. Native courts, being more con-
versant with local custom and languages and with native psychology, appeared
better qualified to understand the spirit of the native laws and to apply them
in practice.
The jurisdiction of native tribunals was generally excluded so far as metropolitan or assimilated foreigners were concerned. The courts set up by the colonizing power were therefore competent not only in cases between such persons, but also in mixed cases between nationals and natives. But, in certain colonies (e.g. French Somaliland and French West Africa), metropolitan nationals could voluntarily submit to the jurisdiction of the native courts in suits involving natives.

Suits between natives were within the jurisdiction of the native courts but the rule was not without qualifications. In the first place native tribunals had jurisdiction only when native law was applicable. When native law did not apply (e.g. in criminal matters) native jurisdiction was excluded. Secondly, even in those civil and commercial matters in which native law was applicable, jurisdiction could be variously distributed between metropolitan and native courts. In most colonies only matters of personal status (including caste questions in the Orient) were within the latter courts' jurisdiction. But there could be a different rule, as in certain French possessions in Oceania where the native courts' jurisdiction was limited to questions connected with real property.

The control of the colonizing power on native courts was enforced in various ways: execution of their judgments by the civil authorities, possibility of an appeal from the native courts to the courts set up by the metropolitan authorities, necessity of a visa by such authorities before execution of the judgment, etc.

For the application of native law, midway between the metropolitan and the native courts stood the mixed courts, composed of native judges presided over by a metropolitan official or judge; or of metropolitan judges with native assessors. Sometimes both the courts of first instance and the appellate courts were thus mixed. In other cases the courts of first instance were purely native, and only the appellate courts were mixed.

The mixed courts judged the natives according to native law. Mixed courts of quite a different type were set up by the Franco-Vietnamese Convention of December 30, 1949. These courts dealt with cases between nationals of the French Union, between nationals of States with which France had concluded conventions granting jurisdictional privileges (in practice the Chinese) and between Frenchmen or such foreigners, on the one hand, and Vietnamese on the other. Although these tribunals bore some resemblance to the mixed courts which until recently existed in Egypt, they differed from them in that they dealt with mixed cases relating to a very restricted category of foreigners and also in the manner of their composition.

As a rule, foreigners who were nationals of European States or other States which have adopted the Western civilization and way of life were treated as if they were metropolitan nationals: local laws were applied to them in the same way and to the same extent as to the latter, except when the rules of private international law required the application of a foreign law. On the
other hand foreigners coming from neighbouring territories, similar in race and way of life to the natives, were frequently assimilated to them, so far as their legal status was concerned. This was an intermediate category, generally indicated by the expression "foreigners assimilated to natives", falling under the jurisdiction of the same courts and dealt with according to the same laws as were applicable to natives.

All the former African and Asiatic territories which have attained statehood in the last decades retain to a greater or lesser degree the general features of the legal system which prevailed before independence. The changes which have taken place are of course to be studied in relation to each new State. There are, however, certain common developments which we shall try to illustrate briefly.22

It is first of all interesting to note that, on the whole, decolonization has accelerated and reinforced certain processes which were already noticeable in colonial times. These processes tend, however, at present, to attain ends differing somewhat from those of the colonial legislators. The codification of native customs, already initiated in several colonial territories, has gained impetus as part of the general trend of the new States towards revaluation of local culture, including legal culture,23 while in colonial times its aim was to facilitate the clarification and easy ascertainment of the law.

On the other hand the new States frequently enact all-embracing civil laws which, even if characterized by some elements taken from local laws and customs, show on the whole a clear derivation from some modern European system. The enactment of such laws may be explained by reasons of expediency and modernization as well as by the fact that these States, naturally proud of their newly attained independence, tend to make full use of their sovereign powers in the field of legislation, while the former colonial rulers, for reasons of policy (namely the opportunity of maintaining the existing social order so as to avoid unrest in the native populations), were much more cautious in altering the status quo. It has been pointed out that new States are free from many of the inhibitions which hampered the colonial legislators, so that they


23 See Francescakis, op. cit., pp. 315 ff. This author points out that codification may impede the development of the legal systems of the new States.
are ready to introduce changes which would have been quite unacceptable in colonial times.\textsuperscript{24}

The personal laws within the framework of the above transformations lost their identity so far as they became, through codification, part of the general law of the country. On the other hand they retain their character as personal laws when (whether codified or not) they continue to apply to certain sections of the local population by reason of their race or religion. As a result the influence of the personal laws is felt more than formerly in the general legislation of these countries. But in so far as they comprise separate sets of rules, these laws have had and continue to have a restricted field of application.

The progressive loss of ground of the personal laws as an autonomous legal system is, however, somewhat counterbalanced by a greater measure of equality between such laws (so far as they still exist) and the general law of the country. This results from the freedom of choice by the parties of the law applicable. In colonial times the possibility of a choice was intended to increase the application of the civil laws of European origin, by permitting the option only to such laws from native laws, and not the contrary, while at present, as a general rule, the interested parties, when granted a right of option, may opt either from religious or ethnic laws to so called "modern" laws, or vice versa.\textsuperscript{25}

Side by side with the above-mentioned changes as to the law itself, similar developments may be noticed in relation to the jurisdiction of the courts. Modern laws are generally applied by civil courts of lay judges, and traditional laws by other ad hoc tribunals. Here the duality of the civil legislation goes hand in hand with that of the respective jurisdictions. In other States a single set of civil tribunals applies both modern and traditional law, although they may follow different rules as to their competence in the one and in the other case. Finally, in a few instances, there is only one set of civil tribunals for the two kinds of cases, but they are composed of two sections, one for the application of modern and the other of traditional law. The latter is but a compromise solution between unity and duality of jurisdiction.\textsuperscript{26}

Of course, these observations are only of a very general character. Each State presents peculiarities of its own, which cannot here be studied in detail.\textsuperscript{27}

\textsuperscript{24} See Francescakis, \textit{op. cit.}, pp. 316 ff.

\textsuperscript{25} See Francescakis, \textit{op. cit.}, p. 320.


4. State and Church law as personal laws

In the Middle Ages, simultaneously with the birth of a system of civil law, based mainly on Roman law but also containing Germanic elements, the law of the Catholic Church gradually came to life. This was not restricted to purely ecclesiastical matters, but also included a wide range of civil relationships. Thus, while on the one hand the coexistence of Roman law and German customs gradually became less evident, on the other hand a new dualism between civil and canon law evolved.

Civil and canon law remained for several centuries the sole legal systems of continental Europe until the Reformation and the growth of new national States radically altered the situation. The Reformation broke the age-long supremacy of the Catholic Church in several European countries, where it was partly or completely replaced by the various Protestant denominations. This led to the coexistence of Catholic and Protestant jurisdictions and the attrition of the canon law. The development of the great national States—France, England, Germany, Spain, etc.—also modified the situation, as new systems of national law gradually emerged, which took the place of civil law previously in force in the whole of Europe. These factors, and later the French Revolution, brought about a progressive generalization of the law regarded as the law of the State, and a gradual reduction, if not complete abolition, of the jurisdiction of the ecclesiastical courts.

Matrimonial relationships continued for a longer time and in most countries to be regulated according to canon law or the religious law of the parties. While in some European States only civil marriage is recognized, in other countries religious law and jurisdiction is still, or has been up to recent times, in force for matrimonial matters.28

In most Balkan States formerly part of the Ottoman Empire religious marriage existed exclusively. This has been changed by the communist régimes set up after the Second World War. In Greece, however, under the Civil Code of 1940, only religious marriages are valid.

A second group of States admit both civil and religious marriage, either for different classes of persons or as alternative forms of marriage open to all.

Under the Austrian Civil Code of 1811 members of recognized communities could marry only before their religious authorities. However, in case of refusal owing to a prohibition in the religious law, they were allowed to marry in civil form. Mixed marriages between members of different communities could be solemnized either by the religious authorities of one of the parties, or in

civil form (although marriages between Christians and non-Christians were as a rule forbidden). Members of non-recognized communities (e.g. Moslems and Anglicans) could marry only in civil form. As for divorce, it was forbidden altogether if any one of the parties had at any time during the subsistence of the marriage been a member of the Catholic Church. Other Christians, and persons without a religion, could obtain a divorce through the civil courts for reasons admitted by the Civil Code. Jews could be divorced by mutual consent by the civil courts on producing a rabbi’s certificate to the effect that they had tried reconciliation without success and on delivery of a writ of repudiation (get) by the husband to the wife.

Up to the Second World War, in that part of Poland known as Congress Poland, religious marriage was compulsory for all members of a religious community. Under the Civil Code of 1825 and the Matrimonial Law of March 16, 1836, marriages were celebrated by the minister of the community of the parties who, in the case of Christian communities, also acted as civil registering officer. For non-Christians a subsequent civil registration was required. Mixed marriages were performed by the minister of the wife’s community (however, marriages between Christians and non-Christians were null and void). The only admitted civil marriages were those between dissidents or persons without a religion. Divorce fell under the various religious laws which were administered, in the case of members of the Christian communities, by their religious courts. In the case of non-Christians the religious laws were applied by the civil courts. Such courts also had jurisdiction for divorces in mixed marriages, and applied the religious law of the plaintiff. For Catholics there was only legal separation.

A free choice between civil and religious marriage is admitted by Sweden (Matrimonial Law of June 11, 1920), Norway (Law of May 15, 1918), Finland (Law of June 13, 1929), Denmark (Law of June 30, 1922, as amended on March 18, 1925) and pre-war Latvia (Law of February 1, 1921). Italy, which until 1929 did only admit civil marriage, now recognizes the civil effects attaching to marriages performed according to canon law and registered in the civil registry (Law of May 27, 1929, giving effect to the Concordat of the same year between Italy and the Holy See).

A third group of States recognizes only civil marriage, as for instance France and Belgium (both under the Code Napoleon of 1804), Soviet Russia (Civil Code of 1926), and post-war Poland (Law of September 28, 1945, in force as from January 1, 1946). A law along the same lines had been adopted by Republican Spain (on June 28, 1932), which thus modified the Codigo Civil of 1889. Subsequently, however, the Codigo Civil was re-introduced by the Franco régime, and under it both civil and religious marriages are recognized, but Catholics must undergo a religious marriage in addition to civil registration. In other countries religious marriage may be sanctified only after and in addition to the civil solemnization, so that the religious marriage is devoid of legal significance: Germany (Civil Code, sect. 1588), Switzerland
(Civil Code, sect. 118), Holland (Civil Code, sect. 136), Rumania (Law of February 11, 1928, sect. 94), pre-war Latvia (Law of November 12, 1925), Yugoslavia (Law of April 3, 1946), Czechoslovakia (Law of December, 1949, in force as from January 1, 1950), etc.

In those States in which religious marriage is recognized, whether alone or in addition to civil marriage, the problem arises as to the legal nature of religious law from the point of view of the law of the State. This problem has been particularly studied in Italy, after the so-called Lateran agreements with the Holy See of the year 1929, by which canon law was recognized for marriages and some other matters (ecclesiastical discipline, religious foundations, etc.). Some authorities maintain that the recognition of canon law in certain cases does not entail a general recognition of the legislative power of the Church, as canon law produces civil effects only because it has been recognized by the law of the State and within the limits of such recognition. According to another opinion canon law, so far as recognized by the law of the State, is to be considered as lex specialis, which as such, prevails over the general rules of law. Thus, it is alleged that canon law has been recognized only for certain matters but that, in such matters, it must be regarded as excluding all other law.

This question has been examined from another angle, by asking how the recognized rules of canon law fit into the general framework of the State’s legislation. Opinions here are varied. Some are derived from the so-called theory of reception in its two accepted forms, that is to say material reception, by which is meant that the State embodies as part of its own legislation the rules of canon law relating to certain matters, and formal reception, where the rules of canon law are accepted within the law of the State, but as belonging to a different legal system and without being embodied in its legislation. On the other hand there are some who accept neither of these theories, and maintain that the State only recognizes single legal acts performed in accordance with canon law, without recognizing the rules of canon law as such. Finally some authors hold that it is enough to take note of the fact that the State recognizes the civil effects attaching to certain rules of canon law, this being a natural consequence of the power to enact legal rules traditionally enjoyed by the Church.

Similarly the State’s recognition of the Church’s jurisdictional power, i.e. of the jurisdiction of the ecclesiastical courts in certain matters, has been

32 See D'Avack, La base giuridica del nuovo diritto matrimonale, Rome, 1933, pp. 46 ff.
33 See Falco, op. cit., pp. 46-47.
variously interpreted. It has been argued that the State only recognizes and grants civil effect to some strictly limited ecclesiastical judgments; 34 while others maintain that the Church has an inherent jurisdiction of its own, recognized as such by the State. The latter opinion has a clear resemblance to the theory which looks upon canon law as lex specialis, since it implies that both the State and the Church enjoy similar jurisdic- tional powers, each in its own particular sphere.

Although these theories have been maintained in relation to problems connected with the situation arising out of the 1929 Concordat between Italy and the Holy See, they also help to explain the legal situation which arises whenever the State in one way or another recognizes canon law and the jurisdiction of the ecclesiastical courts.

II

THE PERSONAL LAWS AS AUTONOMOUS LEGAL SYSTEMS

1. Notion of legal system

The existence of various personal laws within a State gives rise to several problems. How are the relationships between such laws and the law of the State to be regulated? How is the field of action of the various personal laws in relation to one another to be ascertained? When special courts exist to apply these laws, how is their jurisdiction to be reconciled with that of the courts of the State?

These problems may be answered by resorting to the concept of legal system. Such a notion was first developed by Dean Hauriou. 35 Hauriou points out that every social group naturally organizes itself to attain its ends. The origin of every society (or institution) is therefore to be found in the collective will and in the conscience of its members. Hauriou develops his theory with a subtle analysis of the complex process of organization through which a society comes to life. He concludes by saying that every society is originally started by a single person, or founder, thus supporting the view that the individual, and not the mass, is the basis of society. Hauriou's conception includes also the State, considered by him as a species of a wider genus.

Hauriou's theories have been developed in Italy by Prof. Ianti Romano, 36 who states that an institution is an entity objectively existing and concretely observable, and which may consist of a number of individuals bound together by common interests (corporation) or a mass of means for attaining a certain purpose (foundation). In both instances a legal system (ordinamento giuridico) comes to life, namely an internal organization of the institution. In

36 See Romano, L'ordinamento giuridico, Pisa, 1918 (2nd ed. Florence, 1945).
other words a legal system is nothing more than the internal organization which every society gives itself in order to conduct its affairs. It is therefore coeval with society. This connexion between society and legal system runs contrary to all traditional definitions of law based on the conception of subordination to the authority of the State (law being defined as rules imposed by the State). In other words Romano's theory boldly puts aside the axiom of the character of law as depending on the State, thereby extending law to fields hitherto traditionally regarded as being outside its range. Rules of behaviour not previously considered legal, may then be classified as such.

2. **Personal legal systems**

According to this theory, personal laws existing within a State may be defined as legal systems the rules of which relate to the organization of sufficiently homogeneous communities of a corporate type. The recognition of such systems by the State, while no doubt important for their practical application, is not indispensable for their existence. The territorial element, moreover, generally considered indispensable for the existence of States, is not required in this case: the members of groups of a personal character are not settled on a territory of their own, but are intermingled with members of other groups within the territory of the same State.

On the other hand a necessary element of every legal system, whether territorial or personal, is the existence of a sufficiently homogeneous community concerned with important facets of the social life of its members. It is difficult to define precisely and in general terms the constituents of such an element, as these factors may vary greatly, depending on changing historical situations and social concepts. However, there is no doubt that the peoples which settled within the territories which once formed part of the Roman Empire, the religious communities of the Ottoman Empire and the populations of certain colonial territories were groups whose members were governed by rules of behaviour relating to fundamental relationships of a social or religious character.

The degree of homogeneity of a given society determines the number and importance of the relationships between the members falling under its rules. If there are purely religious links between persons living within a community, which is for the most part secular, as for instance in the religious denominations in France or Germany, homogeneity will not be great, and only purely religious matters will be dealt with under social rules, to the exclusion of almost all relationships of a strictly legal character. When, on the other hand, religion is a fact of great social importance, extending beyond matters of purely ritual and dogmatic concern into many fields of life, as in the case of some Oriental countries, the links between members of any single religious community multiply. This multiplication provides a broad basis for a strong and well-developed legal system. This is even more so where whole populations maintain their ethnic differentiation from other populations living in the
same territory. In such cases not only family matters, but a number of relationships connected with public law, are dealt with under the rules of the personal systems.

The notion of a legal system in its relations to private international law has been particularly studied by Prof. Arminjon. This author defines the legal system as a human collectivity bound together by a written or customary legislation relating to legal acts and relationships sufficiently numerous and important to produce among its members a community of law (une communauté de droit) and sometimes also possessing its own legislative, judicial and administrative institutions.

The essential components of this definition are a human collectivity and a legal system possessing certain minimal requisites. Other elements—such as the existence of a territory or the presence of particular institutions—are considered merely contingent. This distinction between essential and contingent elements is particularly important for the personal legal systems here under examination. In fact the territorial element is always absent from such systems. The other contingent element—the existence of particular institutions—is only sometimes present, and personal legal systems may exist without such an element being present. But systems with their own courts and their own executive authorities are undoubtedly more developed than those which do not possess such institutions.

3. Relationships between personal legal systems and between such systems and the State

Members of different legal systems living within the borders of a single State naturally come into contact with one another and conclude various legal transactions. This raises the question whether, and to what extent, the legal system to which a person belongs recognizes acts performed by him under the laws of another system.

A similar problem arises in the discipline known as private international law in relation to the laws of different States. It is commonly held that a State cannot refuse to recognize all legal transactions concluded under the laws of another State and, in practice, a certain measure of recognition is always granted.

On the other hand the personal legal systems, particularly those of a religious character, for the most part do refuse to recognize all acts performed under another law and, at times even exclude the application of their own law when one of the parties belongs to another system. Thus the Catholic Church only recognizes marriages concluded under canon law, but admits canon marriages also when one of the spouses is not a Catholic, on condition that the children be baptized and brought up as Catholics. On the other hand

rabbinical law not only refuses to recognize the validity of marriages performed according to another religion; it also does not permit a marriage to be performed according to its own rules between a Jew and a non-Jew. This derives from a difference of outlook between the two religions, favourable to proselytism in the case of the Catholic Church and more particularistic in the case of Judaism (owing to the defensive position of the Jews in their age-long dispersion).

The refusal to recognize other personal laws is, however, not absolute. We have seen that in early medieval times the members of the various barbarian nations and the Romans freely concluded all kinds of legal transactions with one another, each individual in accordance with his personal laws. In a later period they were even free to choose the law under which they wished to be tried. The acts thus performed were apparently recognized by other legal systems. Reciprocal recognition is also the rule for acts performed under the laws of religious communities which were originally closely connected with one another, such as in the case of certain Christian communities in the Near East, and under the laws of different rites of the same religion, as in the case of the various schools of Moslem orthodox jurisprudence.

Turning now to the relationships between personal legal systems and the laws of the State, the central problem is whether and to what extent the latter will recognize the various personal laws.

The State's recognition of the personal laws mostly derives from the existence within its boundaries of strongly differentiated groups. Laws must always take social reality into account, and a State can hardly afford to disregard the fact that all or part of its citizens belong to groups closely knit together by racial, religious or similar ties. The State has to consider the numerical importance of each group, its internal and external political influence, the degree of cohesion of its members and their devotion to their way of life, the manner in which members of similar communities are dealt with in adjacent territories and so forth. The State, moreover, must take into consideration, and give due recognition to the most vital and important institutions of each legal system. For instance the rules relating to marriage and the family, having proved more vital, are more widely recognized than those related to other matters.

Apart from the above objective considerations, the recognition of personal laws by the State is also influenced by its general legislative policy. Confessional States are naturally inclined to grant a greater measure of recognition to the rules of the dominant religious group and, although to a lesser degree, also to those of other religions. Secular States, on the other hand, tend to reduce the application of religious law and to enact whenever possible uniform civil laws applying equally to all their subjects. A similar tendency is to be noticed in strongly centralized States, which usually oppose all legislative differences within their boundaries. The fact that most modern States are secular and centralized explains the gradual reduction of religious law
and jurisdiction in the course of the last century. As to communist States, which are not only secular, but also anti-religious, even a limited recognition of religious law appears absolutely incompatible with their general, social and political philosophy.

In colonial territories an additional factor was the unwillingness of the colonizing powers to antagonize local customs and feelings by too rapid an introduction of sweeping changes.

Finally we can here draw attention to the interesting phenomenon of the reception by the various civil legislations of whole institutions taken from the religious laws. For instance the Civil Code of the former Ottoman Empire (the Mejelle) reproduced the substance of Moslem law; Egyptian laws on succession are also based on Moslem law; the Civil Codes of Catholic countries have been deeply influenced by canon law, especially in relation to family matters; the new Greek Civil Code of 1940 has incorporated the law of the Orthodox Church as to marriage and family matters and so forth. This appears as an alternative to the simple recognition of personal and religious law by the civil legislator. It may be compared to the incorporation of foreign laws and the enactment of uniform legislation by the various national systems of law, also to be considered an alternative to the simple recognition of such laws by operation of the rules of private international law.

So far we have dealt with recognition of the personal laws by the State. What of the recognition or lack of recognition of the State’s law by the various personal systems? In most cases no clear answer to this question is given in the personal laws. But when the religious laws only deal with some aspects of social life, without providing any rules as to the remaining legal transactions, then it may be said that the latter are implicitly referred to the law of the State. The injunction of the Gospels, “Render therefore unto Caesar the things which are Caesar’s; and unto God the things that are God’s”, contains the seeds of a possible distinction between matters coming within the Church’s jurisdiction, and matters for which the Church admits the supremacy of civil legislation. Talmudic law, as developed after the destruction of the Temple and the dispersion of the Jewish people, contains the rule “the law of the State—is law” (dina demalkuta dina) by which recognition is granted to State laws relating to property and commercial relationships (the rule does not apply to family and religious matters).

4. The dominant position of the State

The application of the rules of the personal systems existing within its boundaries is variously limited by the State.

In the first place the State never recognizes all the rules of a personal system, but only some of them, specifically indicated. In fact the State may

either refuse to recognize the whole body of rules comprised in such a system, or recognize only the rules relating to certain limited matters (e.g. marriage), or grant its recognition to the rules governing wide and important fields of social life.

Secondly, even after having recognized certain rules of a personal law, the State further limits their practical application in a number of ways: by giving the parties the possibility of opting for State law instead of the personal law applicable; by admitting the exception of public policy; by excluding the application of the personal law when all the parties do not belong to the same community; by preferring metropolitan law in the colonies when there is a conflict with native law, etc.

In the third place, when the State recognizes the judgments and acts of the courts and authorities of the various personal legal systems, their activities are mostly controlled or restricted by the need of an exequatur, registration or some other form of control before execution.

Limitations of such a kind do not appear, at first, greatly different from those relating to the application of foreign laws and the enforcement of foreign judgments under the rules of private international law. There are, however, some very important differences between the two cases. First, the internal legal systems may be refused all recognition by the State, while a certain measure of recognition of foreign laws is an invariable feature of the relations among modern States. Secondly, it may be stated in broad terms that the recognition of internal personal laws is much more limited that that granted to foreign laws. Thirdly, recognition by the State within which they exist is an essential element for the very existence of the internal personal system, while States exist independently from the recognition or lack of recognition of their laws by foreign States. The rules of the personal systems, if not recognized by the State, may be applied only with the greatest difficulty. The same may be said of the acts and judgments of their authorities and courts. The difficulty may become an impossibility when there is not only a lack of recognition, but also the active opposition of the State.

The lack of recognition may constitute an injustice for the members of the personal systems. If they are strongly bound to their own way of life, they may silently oppose and sometimes even violently revolt against the State's policy of suppression, and render it nugatory. The edict of Fontainebleau of 1685, which established as a legal presumption that all French Protestants should be considered as Catholics, was not sufficient to eradicate Protestantism. A Protestant community survived in France up to the Revolution, its marriages, divorces and other acts relating to personal status being still recognized in certain foreign countries (England, Germany, the Scandinavian countries, etc.). Similarly, Catholicism continued to exist in England, Scotland and certain Swiss cantons even during the years in which it had been legally banned there. But, notwithstanding this possibility of resisting the State's policy, which itself is exceptional and only partly effective, as a general rule
the State's lack of recognition brings to an end or at least decisively hampers the practical application of the personal laws.

5. The personal laws as autonomous legal systems

The dominant position of the State in relation to the personal laws brings about a kind of relationship which may be explained by reference to the concept of autonomy.39

Autonomy, as originally understood, related to the aptitude of a body or legal system to self-determination. That is to say, it had in view primary legal systems, nowadays generally defined as sovereign. But, as a result of an interesting historical evolution, the concept of autonomy has undergone a gradual change. In present terminology it indicates the relationship between a social group, not of a primary (or sovereign) character, and a wider group or system, on which the first is somehow dependent or subordinate. In other words autonomy is now understood as the possibility of self-legislation, although neither unlimited nor sovereign.

Although autonomy has been particularly studied for explaining the relationships between territorial legal systems and the State, it may also be usefully resorted to for explaining the relationships between the State and systems of a personal character. The differences consist in that, in the first instance, territory is the essential element binding together the members of the legal systems, whose autonomy is recognized because they live within a certain area, while in the second case the essential element on which autonomy is based consists in an ethnic or religious tie between persons scattered over the whole territory of the State.

The personal systems subsist within the State's territory. Their very being and existence is largely influenced by, and conditioned upon, the State's general policy. Their law is applied and their courts exercise jurisdiction because of the State's recognition or tolerance. All this leads to the conclusion that their relationships to the State are well summed up by the concept of autonomy.

On the other hand the personal systems may be considered autonomous only from the point of view of the State. If considered by themselves and in themselves, their rules have a legal force of their own, in no way connected with the State's recognition.

This may be better understood by comparing them to other autonomous systems, namely territorial systems, such as provinces or townships. The latter's existence and measure of competence is exclusively determined by the State's recognition. They do not act outside such recognition. And if they exceptionally do exceed their competence, their acts are absolutely null and void. On the other hand personal systems have sometimes, although seldom,

continued to exist notwithstanding the State’s opposition. Their courts and authorities, potentially, have a wider jurisdiction than that actually recognized by the State. If, therefore, they go beyond their competence as established by the State, their acts may be illegal or null from the point of view of the State, but they are legal and valid from the point of view of the personal system concerned. Such systems, therefore, if considered from the point of view of the State, may accurately be described as autonomous. If considered by themselves, the concept of autonomy is no longer sufficient to describe their essence and we are bound to resort to the intrinsic legality of a legal system from the point of view of its own rules.

A complementary observation relates to the fact that the various personal systems generally extend over the territory of several States, each of which recognizes them to varying degrees. For instance, canon, Moslem and Jewish law are denied all recognition in many European countries, while they are variously recognized in other European and Near Eastern States. There may be, therefore, institutions of a religious law that are recognized nowhere, or recognized only in certain States to the exclusion of others. This shows that there is a possibility of expansion of the personal systems existing within a State: if circumstances are favourable, they may break the limits of their autonomy as established by State law and put into operation rules relating to institutions which previously had been completely or partly inoperative.

III
THE CONFLICT OF PERSONAL LAWS AND THE INTERPRETATION OF ITS RULES

1. State legislation relating to personal laws

States in which personal legal systems are in force generally react to their existence in one of two ways. Either they abstain from enacting any rule whatsoever in relation thereto—so that such systems are legally non-existent as far as the State is concerned—or the laws of the State recognize the personal systems, or explicitly refuse to recognize them—in which case their existence becomes legally relevant, in a positive or negative way, as far as the State is concerned.

State rules relating to personal systems may be either customary or written. Frequently they are customary at first, and gradually evolve concurrently with the evolution of social relationships between the members of the various groups or communities.

The theory of the spontaneous growth of law, by which the birth and development of the single legal systems is explained, also applies to the birth and development of the relationships between different systems. The rules as to such relationships naturally evolve out of mutual contact, as occurred for instance after the barbarian invasions in early medieval times or in the first years of the Ottoman Empire. The delimitation of the respective competences
of State and canon law also developed, at least at first, out of de facto relationships and reciprocal reactions and counter-reactions. On the other hand this preliminary stage has generally been shorter in the colonies, where the colonizing States at once proceeded to a statutory delimitation of the field of action of the various native laws. This can be explained by the greater legislative development of the modern State and by the peculiar needs of colonization.

Subsequently, the general tendency was towards a more or less complete codification of the rules relating to the sphere of action of the various personal laws. Thus, for early medieval times, the so-called Edictus Rothari of the year 643 may be mentioned and, for the Ottoman Empire, the law of Tanzimat of 1831 and the Firman of 1856, generally known as the Hatti Houmayoun. As to the relationships between Church and State they are dealt with in a number of constitutions, laws and codes of the various European States.

2. The problem of qualification

State laws relating to the application of the personal systems, just like any other legal enactment, are subject to interpretation.

The first problem arises out of the indirect character of the rules here dealt with. These rules do not directly regulate the matters concerned, but only declare which legal system will provide such regulation. Thus, when the law of a State declares that “questions of marriage and divorce” or “successions” are governed by a certain personal law, the problem may arise, what are the precise matters included in these expressions; and, which is the legal system under which such expressions are to be construed.

No doubt arises when the very law of the State expressly lays down the legal system under which the interpretation is to be made. For instance the Egyptian Succession Law of March 22, 1944, declares that the personal law of a non-Moslem deceased shall be applied, if this is demanded by the heirs “as determined by Moslem law and by the laws on testate and intestate succession”. Thus the Egyptian legislator has clearly indicated how the qualification of the term “heir” is to be effected. But when no such indication is to be found, and this happens in most cases, the problem really arises.

Three theories of qualification have been proposed in private international law. In the first, qualification must be made by reference to the law of the State enacting the rules of private international law (lex fori). In the second, by reference to the legal principles of the State whose law has been declared applicable by stated rules (lex causae). In the third, it is not necessary to determine the meaning of the terms used by such rules in either of the two legislations concerned, and they should be construed with the help of criteria furnished by a comparative inquiry as to their meaning in the laws of civilized nations.

The third theory cannot be accepted, since there is no justification for
resorting to criteria of interpretation deriving from comparative law, as long as the State legislator himself has not indicated that he intends that his norms be so interpreted. This objection holds even more strongly in relation to the rules of the conflict of personal laws. In this field, a comparative analysis should relate to very divergent legal systems, namely the State legislation, which is essentially secular, on the one hand, and the internal personal laws, mostly of a religious or ethnic character, on the other.

The option then remains between the first and the second theories, between lex fori and lex causae. The first appears more convincing, for the same reasons that make it generally preferable in private international law. The language used by the State’s legislator to declare which personal law should apply in the various instances is to be qualified and interpreted according to its meaning within the legal system to which it belongs. In the absence of a clear indication to the contrary it does not appear that the State legislator, when he declares, for instance, that “questions of marriage and divorce” are to be decided in accordance with the rules of the internal personal laws, intends to adopt the delimitation of such questions according to the various systems to which he makes reference. This would be contrary to the general canon of interpretation under which the meaning of a word is to be ascertained in accordance with the rules of interpretation of the legal system of which it is a part. The above point of view was supported by judgments of the Supreme Court of Palestine (during the period of the British Mandate) when it decided that the words “alimony” and “maintenance” in the Palestine Order-in-Council, 1922, had to be construed in the sense they bear in English law, because the Order had been enacted by a British legislator, and not under the religious laws governing the specific cases of alimony and maintenance.41

It must, however, be pointed out that the rule by which the qualification of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/S0021223700002430


41 See Vitta, op. cit., p. 28, and the authorities there quoted. The rule prevailing in Mandatory times (qualification according to English law) was at first upheld by the Israeli Courts but, however, the Supreme Court of Israel, and then a Special Tribunal constituted under art. 55 of the Palestine Order-in-Council later expressed the opinion that the words “alimony” and “maintenance” are to be interpreted according to the law of the religious communities. This reversal was based on the practice that had prevailed in Ottoman times and also on the practical difficulties of distinguishing between alimony (under the exclusive jurisdiction of the religious courts) and maintenance (under the concurrent jurisdiction of such courts and of the civil courts). See Rosenbaum v. Rosenbaum (1949–50) 2 P.E. 5, and Rosenbaum v. Rosenbaum (1953) 7 P.D. 1037, as well as Chigier, “The Rabbinical Courts in the State of Israel”, (1967) 2 I.L.R. 147 ff. But the Rabbinical Courts’ Jurisdiction (Marriage and Divorce) Law of 1953 has since reverted (sec. 9) to the practice followed during the Mandate.
is to be made according to the *lex fori* should be understood as referring only to the general meaning of a term in such *lex*, and not to its specific technical meaning therein. Legal institutions of the State may not correspond exactly to those of the personal laws. The expressions used by state legislation to describe matters governed by personal laws are therefore to be interpreted accordingly. Thus it may well be that when the State declares that "marriages", "divorces", "succession", etc., are to be dealt with according to internal personal laws, it really intends a wider interpretation of such terms than that prevailing in its own legislation, so that matters considered as "marriages", "divorce", "successions", etc., by the personal laws (but not by its own law) should be governed by the rules of these laws.

The rule by which the qualification is to be made under the *lex fori* may be subjected to exceptions by the legislator himself. When, for instance, he provides that a certain legal relationship unknown to the State's legislation is to be dealt with according to a certain personal law, it appears that he intends to give to the terms expressing such relationship their meaning under that personal law. Thus, for instance, when the civil law of certain Middle Eastern States declares that the religious foundations known in Moslem law by the name of *Wakfs* are to be governed by the rules of Moslem law, it is quite clear that the meaning of such term is to be ascertained under Moslem law, and not under the civil legislation, which does not know that institution. This is an obvious exception to the general rule of qualification according to the *lex fori*, as the State's legislation clearly indicates that this specific qualification is to be made according to the *lex causae*.42

Special jurisdictions are sometimes created to deal with the qualification problem as it arises in countries where several different "personal laws" exist. Thus under the second part of sect. 55 of the Palestine Order-in-Council, wherever a question arises as to whether or not a case is one of personal status within the exclusive jurisdiction of a religious court, the matter shall be referred to a special tribunal, and under an Ordinance of 1924 such a special tribunal shall consist of two judges of the Supreme Court and the President of the highest court of any community which is alleged by any party to the action to have exclusive jurisdiction in the matter. In other words the jurisdiction of the special tribunal does not extend to questions of qualification at large, but only to those questions of qualification which may have a bearing on the exclusive jurisdiction of the religious courts.43

3. *The renvoi problem*

The so-called *renvoi* problem arises when a rule of private international law declares a given matter shall be governed by some foreign law, and

there is doubt whether the reference to the foreign law relates to it in its entirety (i.e., including its private international law rules), or only to the substantive part of that law (i.e., to the exclusion of its rules of private international law). This is essentially a problem of interpretation, which does not arise when the legislator himself settles it one way or the other, as is frequently done by many laws or codes dealing with private international law.

So far as the conflict of personal laws is concerned, the State legislation does not generally specify whether it intends to make reference only to the substantive provisions of the personal laws, or also to the conflict rules contained therein. Interpretation therefore appears necessary. For clarity's sake it is better to distinguish between the various conflict rules which may be contained in the personal laws, namely rules relating to the application of the law: (a) of a foreign State; or (b) of the local State; or (c) of another internal personal system.

As to the first possibility the personal systems hardly, if ever, embody conflict rules which, in cases containing a foreign element, declare that a law of some foreign State should be applied. Such systems, mostly of a religious or ethnic character, aim at governing all their members, irrespective of nationality. The fact therefore that the parties to a legal transaction are foreigners, or that the transaction has been concluded abroad, is not taken into consideration.

The question therefore arises whether a court of an internal legal system, in the absence of any rule of private international law in its own law, will be bound to apply the rule laid down in the State's legislation. Let us take the case of a State in which matrimonial questions are deferred to the jurisdiction of the courts of the religious communities existing therein; and let us further suppose that before one of these courts a question arises which, had it arisen before a civil court, would have been settled, under the rules of private international law, according to a foreign law. It may be asked: will the religious court be allowed to decide in accordance with the substantive provisions of the personal law? Or will it be bound to decide in accordance with the foreign law which would have been applied by the civil courts?

In view of the autonomy enjoyed by the personal legal systems and their courts it appears that, when the State grants jurisdiction to the courts of a religious community, such courts must be considered free to adjudicate according to their own law, without taking into consideration other rules, of which they have no judicial knowledge.44

The solution might be different when the personal systems have no courts of their own, and their laws are applied by the civil courts. In such an instance nothing will prevents the latter courts, in the absence of any rule of private international law as to the personal law they are called upon to

44 Streit v. Chief Rabbi (1964) (1) 18 P.D. 598, where it was held that the rules of international law are not binding upon the religious courts.
apply, from making use, in relation to cases containing a foreign element, of the private international law rules of the State legislation.

As to the second possibility, renvoi from the personal systems to the local State's law—no such renvoi appears possible owing to the fact that such systems do not take into consideration State laws of a secular character. The State, it is true, sometimes places the courts of the religious communities under the obligation of applying the civil law in certain matters, (as, for instance, was done to a certain extent in the matter of succession in the State of Israel). But this exception is only apparent, since the application of civil law then derives from an obligation imposed by the State, and not from any rule to that effect in the religious laws themselves.

Coming to the third possibility—renvoi from one personal law to another; wholly different communities generally refuse each other any recognition at all. This is the mutual attitude of Moslem and Jewish religious law, as well as that between either such law and any one of the various Christian communities. On the other hand renvoi sometimes occurs in the reciprocal relationships between similar religious communities. Thus, for instance, certain Christian communities in the Orient still consider themselves branches of the same tree and naturally accord each other a certain measure of recognition as to marriages, divorces, legitimations, etc., effected under the law of a sister community. When the personal systems have their own courts, they can directly apply the rules of other personal systems and the State's authorities have no reason to interfere. Where these courts do not exist and the personal laws are applied by State courts, it may be asked whether the latter courts shall accept the renvoi from one personal law to the other. At first sight it might appear that State courts should accept or refuse to apply the personal law thus declared applicable according to the way in which the question of renvoi is answered in their system of private international law. It should be noted, however, that in a case like this State courts only act as courts of the personal legal system, so that, if they refuse to take into consideration the conflict rules of that system, such rules will never be applied in practice. It appears moreover that, if they apply the alternative personal law, this is not to be considered technically as renvoi, but as primary reference from the personal law applied by the State's courts to another law.

It is interesting to point out that, apart from renvoi from one personal law to another, there may also be renvoi from one to another rite of the same religious system. This may, for instance, occur in relation to the various rites or schools of Moslem jurisprudence.

4. Public policy

There are limits to the efficacy of the rules of private international law. In certain cases these rules cease to operate, so that foreign law will not apply.

The most important limitation derives from public policy, which excludes the application of foreign laws containing dispositions incompatible with fundamental principles of the local law.

In the conflict of personal laws public policy presents peculiarities and difficulties of its own. In some States where internal personal systems are in force there is no State legislation relating to the matters governed by the personal laws. It is then impossible to compare the State legislation in such matters to the personal laws and such laws may therefore be held contrary to public policy only if they are irreconcilable with the principles pervading the State's legislation as a whole.

In the barbarian kingdoms of early medieval times, when the personal laws were most widely applied and related to almost all legal relationships, State enactments were sparse and did not rest on well-defined general principles. A conflict between State legislation and personal laws and a consequent exclusion of the latter for reasons of public policy was then hardly possible.

In the Ottoman Empire State legislation covered a wider field, but did not contain rules on matters of personal status, which as a rule were decided by Sharia courts according to Sharia law even for non-Moslems. In such courts, therefore, the question of exclusion of another law for reasons of public policy would not arise. As to the courts of the non-Moslem communities, they only enjoyed a residuary jurisdiction in some matter of personal status, and within the scope of their jurisdiction, public policy could only operate in preventing the execution of their judgments by the civil authorities.

In some successor States (including Palestine and, at present, Israel) the Sharia courts still enjoy jurisdiction but only for matters of personal status between Moslems, while all matters of personal status relating to non-Moslems previously under the jurisdiction of the Sharia courts have been transferred to the religious and in some instances to the civil courts (which also apply the religious law of the parties). The latter have not been able to develop a notion of public policy of their own by comparing the religious laws to the civil legislation, which is largely non-existent in such matters. Nevertheless they refuse to apply personal law where the latter is repugnant to the general principles of civil legislation. Similarly the civil authorities will refuse to execute religious judgments contrary to such principles or to natural justice.

In the colonies the principle of public policy has been widely resorted to in certain cases in order to exclude the application of native laws. Prof. Solus, for instance, declared that native law even when maintained in force, could not prevail if it was found incompatible with a rule that the colonizing power considered essential to colonization.46

This view appears too sweeping. In fact the cases in which native laws have not been applied for reasons of public policy were mostly connected

with the maintenance of human dignity leading to the abolition of native institutions such as human sacrifices, cannibalism, witchcraft, the power of chieftains to dispose of their subjects, slavery and slave trade. But practices undoubtedly prohibited in European countries were sometimes admitted in the colonies, such as the practice of delivering a member of the family as a hostage (Africa): marriage by sale of a daughter as against payment of a sum of money to the father (Moslem law, African tribal law); incapacity to inherit of apostates and sons of heathen women (Moslem law); the special incapacities of persons expelled from their caste (India and other Asiatic countries). Even polygamy, though forbidden in all European countries, and denied recognition in the metropolis for reasons of public policy, was not deemed contrary to colonial public policy.

These examples show that public policy has been applied more widely in the colonies to avoid application of a native law, than in the metropolis to avoid the application of foreign law. The reason is that the difference of social and legal ideas between the colonizing and the colonized peoples was much greater than that between the legal systems of Western States.

When making use of public policy, Western judges in the colonies had to take into consideration the fact that these ideas are essentially relative and subject to changes not only according to the social and political conditions prevailing in the various territories, but also according to time: the progress of primitive peoples towards civilization may in the course of time make institutions which were not contrary to public policy at the beginning of colonization, irreconcilable with new forms of life introduced by the colonizing nation.

Colonial judges, in deciding what is contrary to public policy, were influenced by the different policies followed by the various colonizing Powers. British colonial policy was generally respectful of local laws and customs. France's aim, on the other hand, was to bring the natives as near to the French way of life as possible. The decrees relating to judicial organization in the French colonies therefore declared that local laws and customs were to be applied "so far as not conflicting with the principles of French civilization". In cases of incompatibility the courts applied French law. This tendency to give preference to metropolitan law has sometimes reached the point of denying recognition to fundamental institutions relating to the family or personal status of the natives. This has been criticized by well-known French specialists.

In European countries where canon law is in force (mainly in matrimonial matters) the question arises whether such law may be refused recognition in particular instances for reasons of public policy. This question has been discussed in Italy where, under sect. 34 of the 1939 Concordat, ecclesiastical judgments on nullity of marriage are executed by order of the competent Court of Appeal. The Court of Appeal must ascertain whether the required documents are in order, whether the ecclesiastical judgment is binding...
and whether the marriage is subject to the Concordat regime, etc. On the other hand it does not deal with the merits of the case, nor does it inquire whether the judgment has been given in accordance with the substantive and objective rules of canon law. It may, nevertheless, examine whether the judgment is compatible with the State's public policy.

But this last point is controversial. Those who maintain that canon law has civil effects only within the strict limits sanctioned by the law of the State, are naturally inclined to insist that canon rules contrary to public policy be denied recognition.47 The State legislator, they say, cannot have authorized the application of rules contrary to his own public policy: should it be held otherwise, it would amount to a denial of his implied will. On the other hand those who regard canon law as lex specialis in relation to the general law of the State, consider that once canon law has been recognized in certain matters, it is no longer possible to restrict its application for reasons of public policy.48

The doctrine admitting public policy as a limitation to the application of canon law appears preferable, being in tune with the practice generally followed in States where internal personal laws are in force.

(Sections IV and V of this article will appear in the next issue.)

48 See Del Guidice, Corso, cit. p. 531; Bertola, Corso di diritto ecclesiastico, Turin, 1957, p. 394.