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The law of the forum and the method of attribution: reflections on its primary role

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INTRODUCTION

The core mission of Private International Law is to solve legal disputes involving more than one jurisdiction and one body of legislation. In terms of the first of these, both regarding the international judiciary power (establishment of the 'sanction') and the recognition and implementation of foreign sentences (sanctions' that are already established), the law of the forum is used exclusively to determine the corresponding legal order, that is, *qua fori*. The following reflections refer to the hypothesis that in the second of these spheres, the law of the forum also carries out a fundamental role in establishing the applicable legal order for international legal relations and contexts.

From the outset, it should be stressed that our field is concerned with international legal relations and contexts, that is, cases wherein at least one of the essential elements is in some way foreign, thereby creating contact with a different legal order from that of the domestic order. This domestic order has a crucial function in defining the aim of Private International Law, which will be reflected throughout the entire process of assigning a specific legal order for the legal category in question, and which must be expressed in a normative process, which may be carried out by means of a multitude of processes or methods.

The constitutional nature of the principle of equality of legal orders has become established, both in terms of the need for a generalized scope in the application of foreign legal orders, as well as for Private International Law itself.[1] However, a broader and more comprehensive principle should be established regarding the requirement that, once the relevant foreign legal order has been established for the case in question, an appropriate law should also be indicated regarding its foreign elements. Indeed, it would seem logical and coherent that the legal order provides a legal distinction between national and international legal traffic.

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1 On this point, see Vitta, E. (1964), 'Il principio dell'uguaglianza tra "lex fori" e diritto straniero', in *Riv. Trim. Dir. Proc. Civ.*, XVIII/4; Wengler, W. (1963), 'Les conflits de lois et le principe d'égalité', *Revue Critique*, pp. 201-231 and 503-527.

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2. Nevertheless, one of the processes that Private International Law uses in order to regulate international legal issues fails to take into account the point raised above. Peremptory norms[2]assimilate international traffic into domestic traffic and regulate both in the same way due to their immediate introduction into a state's domestic legal order. In terms of the specific themes[3]which are affected by these principles and criteria in the process of norm creation, there is no doubt that the law of the forum is both exclusive and excluding: only the principles and criteria of the legislator and their jurisdictional interpretation can lead to such a drastic adaptation. For this reason, peremptory norms cannot be applied in such a way outside a particular legal order, as this would require the mediation of a norm of conflict and, therefore, the internationalisation of the case, which runs contrary to the initial and necessary irrelevance attributed to its foreign element.[4][5]

3. Outside of this possibility, which is quantitative- and qualitatively exceptional, the different systems of positive Private International Law find themselves compelled to use specific regulations — distinct from domestic law — where the legislator considers legal categories to be international. This regulation can be developed through two systems: direct assignation of the legal consequences fora typified legal category, or indirect regulation of the legal order applicable to the legal category in question. The first of these refers to the substantive procedure which is reflected in the domestic material norms of Private International Law. The second, which comes through the method of attribution, is expressed through the positivisation of conflict norms.

   The material norms of Private International Law characterise the legal category in that they directly determine its legal consequences, embodying the law of the forum as a concept which responds to the idea that 'in some circumstances international life, requires a different — and sometimes contrary — form of regulation to that of domestic law, without resorting to the interference of a foreign legal order'.[6] We thus observe that the substantive procedure expresses the particular conceptions of the forum on which legal order should deal with particular international legal categories, and whether the norms should be domestic or international.

   Regarding the first type of norm, the forum by definition plays an exclusive role in that the domestic material norms are a projection of its own socio-legal characteristics, only tempered by the fact that the object of regulation has been defined as external. This makes us aware that it is necessary to define one of the principal distinguishing criteria of these norms in comparison with peremptory norms.

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2 Here I use the term coined by Dr. Francescakis rather than those used by Nussbaum and De Nova.

3 Francescakis, PH, (1968), *Encyclopédie Dalloz*, Paris. I A-E, 'Conflits de lois', nº 125.

4 Such as in Spanish law with the principles of indissolubility and confessionality in marriage: see González Campos, J. D. (1967), 'Nota sobre la sentencia Benedicto-Barquero, 15 April 1966', *R. E. D. I.* XX. pp. 367 and ff.

5 Graulich, P. (1963), 'Règles de conflit et règles d'application immédiate', *Mélanges en l'honneur de J. Dabin*, Paris, pp. 629 and ff.

6 Miaja de la Muela, A. (1963), 'Las normas materiales de Derecho internacional privada', *R. E. D. I.* XVI, p. 436.

In principle the process of substantive regulation and its domestic deployment (that is, from the perspective of each legal order)has its field of application in terms of certain themes with which the forum is most concerned. In this sense we can consider, for example, the regulations regarding nationality or immigration, or the complex issue of international legal powers. However, this type of international norm does not limit its application to such specific, and in some way marginal, themes, but rather invades themes that, traditionally reserved for Savignian procedures, contain aspects on which the legislator of the forum wishes to establish certain, specific criteria. We thus see that in article 732-3 of Spain's legal code that Spanish citizens can make a will holographically in a foreign country, even though the *lex loci* does not permit this, thereby correcting the excessive generality and indetermination of the conflict norm of article 11-1.

Together with the type of material norms mentioned in the foregoing paragraph, every system of Private International Law includes legal rules in which the basic guideline is the harmonisation of its own solutions with those of other legal systems, thereby achieving a certain degree of homogeneity. Within this we should include all manifestations of uniform law, both where this is sought by an individual state (such as in the case of former colonies with respect to metropolitan law) and where there is a collective project through international agreements. There is, beyond any doubt, a strong effect from international values and legal concepts from foreign legal systems which, especially in cases where uniformity is sought collectively, can be clearly seen in the transactional nature of norms. However, the role of the forum remains key in that it is the body which interprets and applies these values and foreign concepts.

4. To conclude, the specific regulation for international legal traffic can be pursued through the indirect establishment of its legal consequences. In such cases, we move into the sphere of attribution procedures and conflict norms in that this becomes positivised. Indeed, the conflict norm indirectly determines, through the legal connection, the legal consequences of the case being examined, as it assigns its regulation to a certain foreign legal order. In this sense it provides the only possible channel within the law of the forum to 'import' norms from other legal orders. For this reason, I consider that it is within the ambit of the law of the forum where we find a systematic framework for the principle of equality of legal orders. Indeed, it is here that we are able to observe that this principle produces undeniable consequences, which are reflected in the appeal made by *lex fori* to certain norms from foreign lawin order to collaboratively formulate the most appropriate solution for a particular international relation or situation.

It is precisely due to the fact that *lex fori* appears during the process of attribution within a framework of equality with other legal systems that the problem of the primary role of the domestic legal order over foreign legal orders becomes relevant. In this article I will focus on this, and the following reflections distinguish between the two broad phases in the process through which conflict norms are applied: firstly, the localisation of the case, and secondly, the implementation of a material resolution for it.

I. *'LEX FORI'* AND THE LOCALISATION OF THE DISPUTE

5. Within international public law the concept of the state, with its inherent sovereignty, leads to the concept of legal equality between states and the different powers they are bestowed with. In parallel to this, within Private International Law legal equality is based on both legislative activity and legal frameworks. Therefore, the principle of equality, together with the demands that laws have international effectiveness, puts limits on a state's legislative powers in the same way it does to other states. This requires recognition of a certain scope of generalised application of foreign law.[7]

From a broader perspective, justice, in terms of the application of law to the reality which it is designed to regulate, necessarily requires an awareness and consideration of the legal systems with which a certain reality interacts. For this reason, appeals to justice play a central role in a wide variety of constructions of Private International Law. To this effect, I consider it to be irrelevant to distinguish between material justice and formal justice: in the quest for the most ideal regulation for international legal traffic, justice appears as an unambiguous concept that resonates with all parties and which justifies the application of foreign legal norms within the law of the forum.[8]

This notwithstanding, the acceptance of a scope of application for foreign law simultaneously brings up the issue of its particular nature. The foreignness of a particular legal norm necessarily implies some special features that may not permit its direct assimilation into legal processes. Indeed, when a judge investigates a foreign norm, they look at *what it is,* that is as a legal regulation in its country of origin; this does not mean it should be treated as an established legal regulation in the country in which it is being applied. As Professor De Angulo notes, 'Foreign law is applied as foreign law, but only when it is called for by the domestic conflict norm; there is no incorporation of foreign law into the law of the forum, and its application is nothing more than a legal consequence of a national norm. The aim is not to incorporate a foreign norm but rather to use it to characterise a case: we subsume certain legal proceedings into a foreign legal framework.'[9]

In short, we must remember that the application of a foreign law is not an objective in itself but rather a means;[10] the objective here is the fair resolution of a legal dispute and, in this sense, its application in conjunction with domestic law works to do what is fair and proper.[11]

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7 See Aguilar Navarro, M. (1958), 'Afinidades existentes entre el Derecho internacional público y el Derecho internacional privado', *R. E. D. I.* XI, nº 1-2.

8 See Arminjon, P. (1928), *Précis de Droit international privé*, 3rd ed., and 'L'objet y la méthode du Droit international prové', R. C. A. D. I. I, vol 21, pp. 440-441. And, more recently, Graveson, R. H. (1961), 'Judicial Justice as a Contemporary Basis in the English Conflicts Law', *XXth Century Comparative and Conflicts Law*, volume in honour of H. E. Yntema, Leyden, pp. 307 and ff.

9 De Angulo Rodríguez, M. (1969), *El Derecho extranjero en el proceso civil español*, PhD thesis, Granada, p. 172.

10 Zajtai, I., (1958), *Contribution à l'étude de la condition de la loi étrangère en Droit international privé français*, Paris, p. 29.

11 Vouilloz, B. (1964), *Le rôle du juge civil à l'égard du droit étranger*, Freiburg, p. 81.

Given that the fundamental characteristic of the attribution method — in contrast to other methods of positivisation used by Private International Law — is that it calls for the collaboration of foreign law, which is thus the possible legal consequence of the application of a domestic conflict norm, I believe that Motulsky is right when he observes that *'tout l'accent, on le voit, est mis sur la régle de conflit: c'est d'elle que la loi étrangere tient son titre d'intervention*.'[12] This thus brings us to the problem of the structure and nature of the conflict norm.

6. With regard to the first question, and despite the solid arguments which support unilateralist conceptions of the conflict norm, out of respect for national sovereignty I believe in a bilateral approach, though I am aware of the problems involved in its application in practice. On the one hand, the bilateral technique would require a supranational legislator to ensure consistency in resolutions. And on the other hand, as a result of the previous point, the bilateral system by default involves a division between the law of the forum and foreign law owing to the state-centred nature of its origin;[13]there is thus a difference derived from the legal nature of foreign law itself that, when applied outside its territory, only enjoys an indirect mandatory nature (which derives from the system of the forum).While both systems are exemplary, within law of the forum we see both *auctoritas* and *potestas*, whereas foreign law receives its mandatory nature from the order of the forum, with which it collaborates to produce a suitable resolution to the international legal traffic in question.

   In terms of the legal nature of the conflict norm, I believe that this forms part of each national legal system, with the same legal scope and power as any other material act from within the same system. Compliance is thus imposed on the judge, who must apply this norm, dispensing with the legal consequence — national or foreign — that this might directly or indirectly bring about. Compliance is also imposed on private actors, who may select one from various connections that a conflict norm may contain.[14]

7. As Professor Aguilar[15] would put it, the collision norm positions international legal traffic as a river that flows between two banks, one representing foreign law and the other the law of the forum. And between these banks it is necessary to construct a bridge, a collaboration which allows 'de faire "vivre ensemble" des systems jurídiques differents.'[16]

   In this way, the Savignian method of conflict norms, which provides an essential coordinating function between the legal system of the forum, in which these norms are rooted, and foreign legal orders whose general application is specified with the updating of the typified legal connections.This means, however, despite the international nature of these rules, their national roots and the fact that the

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12 Motulsky, H. (1960), 'L'office du juge et la loi étrangère', *Mélanges Offerts à J. Maury*, Paris, p. 361.

13 On the appropriateness of the bilateral system, despite its shortcomings, see Aguilar Navarro, M. (1963), *Derecho internacional privado*, I. I., Madrid, p. 10.

14 Yanguas Massia, J. (1958), *Derecho internacional privado*, 2nd ed., Madrid, p. 339.

15 Aguilar Navarro, M. (1964), *Derecho internacional privado*, I. II., Madrid, p. 57.

16 Batiffol, H. (1956), *Aspects philosophiques du Droit international privé*, Paris, p. 16.

coordinating mission I mentioned above is expressed in practice through a process of integration of the foreign norm into the domestic legal system, that we must bear in mind the guiding nature of *lex fori* in this process. From a broader perspective, Professor Batiffol notes this paradoxical situation which I highlight above when he writes that '*Le droit international privé donne le spectacle d'une enterprise apparemment internationale menée par chaque Etat pour son propre comte*.'[17]

8. By way of summary, we can thus affirm that the attribution procedure offers the only possibility of taking into consideration foreign law and, therefore, in this context, questions the primary role of the law of the forum. Nevertheless, although the coordinating function that this procedure responds to does, in itself, reserve a preeminent role for *lex fori* throughout its development, we should indicate the effect of this in the two different stages that the process of applying the conflict norm involves: an initial phase of localisation, both formal and 'conflictual', and a second phase involving the material resolution in which the adaptation of orders is carried out at the level of substantive norms.

   In order to verify the relevance of the law of the forum in this first stage of localisation of the case within the most appropriate legal framework in line with its international nature, it is worth briefly analysing the functional corrections through which the forum mitigates the indirect character of the conflictual method.In the first phase of the application process of the conflict norm, localisation is focused on defining the legal category and its legal connections; in this sense we look at the general problems of characterisation, fraud and *renvoi*.

9. *Characterisation*, as an intellectual operation that forms part of all legal reasoning, has been defined by Motulsky as '*toute traduction d'un objet de connaissence en termes de droit*.'[18] Indeed, a characteristic of legal rules is that they are expressed in general terms so that their application to a particular set of events represents a transition the adaptation of the general to the tightly defined, of the abstract to the specific.

   In addition, and due to gaps in legal language, the term *characterisation* is also used to designate the concepts or categories on which this reasoning is carried out. The operation of characterisation is thus understood as a choice between various possible 'characterisations'.[19]However we understand characterisation, it generates special difficulties in Private International Law, as the conflict norm uses concepts which are, in principle, taken from the domestic law in which they are embedded. Therefore, as Batiffol observes, the conflict of characterisations can be interpreted as '*celui de savoir selon quelle loi le juge doit qualifier l'objet du litige pour déterminer la loi qui lui est applicable quand les differentes lois en conflit adoptent des qualifications différentes*.'[20]

   In any of the three aspects of the characterisation problems within Private International Law (determination of the situations contained within the conflict norm, the precision of the points of connection, and establishment of the part of

17 Batiffol, H. (1956), *ibid*. p. 103.
18 Motulsky, H. (1969), 'Procédure civile et commerciale', *Encyclopédie Dalloz*, II. F-Z, Paris, p. 651, n. 27.
19 Francescakis, Ph, (1967), 'Qualifications', *Encyclopédie Dalloz*, op. cit., p. 703, n. 4.
20 Batiffol, H. (1967), *Droit international privé*, 4th ed., Paris, p. 332.

the foreign law which is called for by the conflict norm),[21] within the options for characterisation — in accordance with lex *civilis fori, lex civilis causae* or through autonomous concepts derived from studies of comparative law — it is impossible to ignore the nexus between the conflict norm and the material order to which it pertains. The law of the forum will thus be the obligatory starting point, regardless of whether, in terms of characterisation, we see a problem of 'interpretation' of the conflict norm, or whether we interpret it as a problem of integration of the foreign norm or institution into one or another conflict norm of the forum.

Not only is the law of the forum responsible for deciding, in accordance with its own criteria, which institutions should be internationalised,[22] it is also responsible for defining the appropriateness of the concepts of a foreign norm once its application has been accepted. In this function the forum will have to stress the social functions of legal institutions (Rabel), or use the '*qualification pour fonction*', as proposed by Batiffol;[23] but the application of a foreign norm or institution will only lead to coherent results if, after studying its meaning, we 'translate' it into the legal categories of the forum, from where we will see the other acts with which it has to 'coexist'.

10. The second of the problems which I wish to briefly analyse is that of *fraud to the law*. Due to the particular structure of the conflict norm, this occurs where there is a legal but false modification of the connection within the norm that designates the application of a particular law with the sole aim of evading the consequences of its application. Hence, the concept of fraud to the law, which is unviable within a strictly legal and formal interpretation, appears, in the words of Professor Aguilar, 'as a notion which is equidistant between two forces which attract it […] and which aims to simultaneously save a human life and protect the authority and imperative of certain norms.'[24]

In short, it is the relative mobility of the two points of connection which allows the interested parties to 'move' or modify them; for this reason, we should distinguish between the sanction for fraud, whereby a new, real connection has been falsely created, from the sanction which the law can apply for false or fraudulent acts. Within fraud to the law, the alteration of the connection and the subsequent localisation of the legal relationship in a legal order different from that which is primarily authorised occurs through actions which are lawful but which overlook the *ratio legis* of the manipulated conflict norm.[25]

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21 The difference between these aspects is set out by Professor F. de Castro (1933), 'La cuestión de las calificaciones', *Revista de Derecho privado*, p. 219. This is generally accepted within the doctrine today. See Garde Castillo, J. (1947), *La 'institución desconocida' en Derecho internacional privado*, Valladolid, p. 52; Francescakis, PH, (1968), *Encyclopédie Dalloz*, I, A-E, Paris, pp. 490-491.

22 Francescakis, PH, (1958), *La théorie du renvoi,* Paris, especially pp. 21-2.

23 Rabel, H. (1933), 'Le problème de la qualification', *Revue de droit international privé*, pp. 1-62 ; also, by the same author (1958-60), *The conflict of laws. A comparative study*, 2nd ed., 4 vols., University of Michigan, Ann Arbor. Batiffol, H. (1956), op. cit., pp. 44 and ff.

24 Aguilar Navarro, M. (1964), *Lecciones de Derecho internacional privado*, I, II, Madrid, p. 88.

25 See, amongst others, Maury, J. (1952), *L'éviction de la loi normalement compétent : l'ordre public international et la fraude à la loi*, University of Valladolid; Graulich, P. (1961), *Principles de Droit international privé*, Paris, especially p. 161.

Regarding the international element as an integral part of the notion of fraud, I fully share the ideas of Professor Aguilar, who states:

> If by subjective element we understand an intention to deceive which harms third parties, then we must reject this element. If, by talking about the presence of a subjective factor we allude to an overlap of aims which explains the fraud to the law and the behaviour of the agent who carries out the fraud then it is not possible to omit the subjective dimension.[26]

Within Private International Law, fraud to the law has two aspects: it can consist of either the false internationalisation of a domestic case, or of hiding the connections which would lead to it being subject to a foreign law, thereby evading the application of a particular foreign law. In the first of these cases (fraud to the law of the forum), the sanction, in line with the unenforceability of the consequent effects, would offer a new mechanism of defence for the forum, which again becomes present throughout the process of the application of the conflict norm. In the second case (fraud of foreign law), we encounter a tension between the mandatory nature of the conflict norm and the inevitable tendency towards the application of *lex fori*, owing, in my opinion, to ethical reasons. In all cases, the problem can be interpreted from a perspective of the forum as a fraud to the conflict norm and not to the foreign legal order.

11. To round off this first phase of the attribution procedure that consists of the localisation of a case within the framework of a legal system, we must refer to the issue of *renvoi*. This negative competition between legal systems[27]takes place when there is an examination of 'the scope of the reference of the foreign law'[28]which is brought into effect through the conflict norm of the law of the forum. In order to understand the role of the conflict norm, the problem should be looked at not as a clash between foreign and domestic collision norms but rather in terms of the search for an improved coordination. Activities focused on the coordination of legal systems can be seen not just in the substantive field of material norms, but also in the harmonisation of contrasting localisations which different systems of positive Private International Law effectuate.[29]If this is indeed the case, the governing task will obviously be carried out by the forum and, in any case, the acceptance or rejection of the renvoi will always be in accordance with criteria from the domestic legal order, even within the specific English system of 'foreign court theory.'[30]

II. *'LEX FORI'* AND THE MATERIAL RESOLUTION OF INTERNATIONAL LEGAL TRAFFIC

12. The effects of the law of the forum on the first logical phase of the process of applying the conflict norm, known as the localisation phase, highlights a basic fact which many

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[26] Aguilar Navarro, M. (1964), op. cit., volume II, p. 97.
[27] Francescakis, PH, (1958), op. cit., pp. 260 and ff.
[28] Aguilar Navarro (1955), *Derecho internacional privado*, I, Madrid, p. 387.
[29] Batiffol, H., (1967), 'Réflexions sur la coordination des systèmes nationaux', *R. C. A. D. I.* I, vol. 120, pp. 169 and ff., especially p. 173.
[30] SuayMilio, J. (1956), 'Una solución jurisprudencial inglesa: el doble reenvio', *R. E. D. I.*IX, pp. 87 and ss.

scholars of private international law tend to overlook: each domestic legal order constitutes a system which contains conflict norms as an arbitrated means for the regulation of international legal traffic. The definition of a material resolution for a case will be guided by this *lex fori* in which the collision norm is embedded.

Furthermore, as a regulation system in which the variables remain unknown until their possible specification in terms of the material content of the legal orders involved, the application of the conflict norm brings with it unknown consequences, making this something of a 'leap into the void'. The application of conflict norms can lead us to legal systems which we know nothing about and with which we nevertheless have to coordinate with our own *lex fori in* order to find a harmonious solution to legal relations.

In addition, the localisation of a particular legal relation into a foreign legal order through the conflict norm does not mean that the forum is completely removed from ruling the case in question. Nevertheless, it does mean that although the forum is the appropriate venue from which to 'create' a resolution, some aspects of the case should be regulated by a foreign law, and that there will thus need to be a system of 'articulation' between the two systems in order to reach a coherent legal solution. In this line, Professor Batiffol observes:

> *La solution d'un conflit des lois ne conduit jamais, si une loi étrangère est compétente, à l'application d'une loi unique: il y a au moins le concours de la loi étrangère applicable au fond et de la loi du juge saisi gouvernant la procédure.*[31]

From this perspective, I believe that behind all the 'technical' issues of the attribution process there lies a problem of adaptation, that is, of coordination or articulation of the legal rules which should govern the various aspects of cases of international legal traffic.[32]

During the localisation phase we have seen how the forum can use a series of mechanisms to combat the indeterminate nature of the attribution process. Now, in the phase of the quest for a material solution, the forum can also resort to various mechanisms to adapt the foreign legal order that has been designated to the case in order to ensure that it fits within the system of the forum. In this sense, I will examine two interrelated issues separately: public order and adaptation in its strictest sense.

13. *Public order* represents a case in which it could be 'socially impossible' to apply foreign law. In more technical terms, the public order argument consists of the 'exceptional exclusion of a foreign material norm that has been designated by the relevant collision norm'[33] due to certain legal arrangements of the forum which prevent the assimilation of foreign laws which contradict these arrangements.

In this classic approach to the issue of public order, we see an exclusion of the foreign law which affects basic principles of the socio-legal structure of the forum

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31 Batiffol, H. (1967), op. cit., p. 174.

32 In this line, see Offerhaus, J. (1964), *L'adaptation en droit international privé*, (in Dutch), review in *Revue Critique*, pp. 627-628.

33 Aguilar Navarro, M. (1964), op. cit., p. 154.

state. Such an approach obviously implies an intense analysis of the pre-eminent role of *lex fori*. However, even from a more spiritual perspective of the problem, this role continues to be pre-eminent: public order appears as a clash not between national and international norms, but rather between two different assessments of the situation carried out by the forum itself. That is, a clash between the best localisation for the case, as expressed through the forum's conflict norm, and material justice, which comes from the forum's substantive law. What we see here is an indispensable condition that is required for coordination to be possible[34] public order functions as a measure of the degree of assimilability of foreign norms and institutions, highlighting once again the *prius de la lex fori*.

14. On the other hand, the problem of *adaptation in its strictest sense reflects* a final effort from the forum to coordinate the situation that arises from the application of the conflict norm, which is necessary when the conflict rules oblige the judge of the forum to simultaneously employ material rules which come from different legal orders and which, as a consequence, lack the logical cohesion and compatibility which rules from the same order would share.

The *adaptation problem* is a corollary of the process of the application of the conflict norm, and it is dealt with primarily in the judicial domain. As Cansacchi posits:

> *Les législateurs, en fixant dans leur propre système de droit international privé les rattachements aux ordres juridiques étrangers, n'ont pu prévoir si ces ordres juridiques seraient pas 'rapportables' entre eux et avec l'ordre du for; ils n'ont pas même pu poser des principes ou des règles générales pour indiquer au juge façon de résoudre les innombrables antinomies qui peuvent se vérifier entre les règles matérielles en concours.35*

By situating the theme within the sphere of jurisprudence we see a differentiating feature between the regulation of the case which leads to the adaptation of legal norms from different systems of positive law and that of a substantivist procedure. In the first instance we see how a jurisprudential action attempts to coordinate the outcome of the conflict rules, in the second process we see that the material norms through which the substantivist method is positivised directly determine the legal consequences of the typified case.It is important not to confuse that which is a substitution of one process of positivisation for another and that which is simply a correction of mechanical or unknown consequences that one of these processes of attribution can bring into effect. As Professor de Nova insight fully observes:

> *Il s'agit ici de coordonner les résultats du fonctionnement des règles usuelles de conflit, et non pas de les remplacer par un règlement immédiat et autonome du cas d'espèce, comme les auteurs susvisés le voudraient.36*

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34 Essential reading on this perspective is Lagarde, P. (1959), *Recherches sur l'ordre public en Droit international privé*, Paris.

35 Cansacchi, G. (1953), 'Le choix et l'adaptation de la règle étrangère dans le conflit de lois', *R. C. A. D. I.*, II vol. 83, p. 112.

36 De Nova , R. (1948), 'Solution du conflit de lois et règlement satisfaisant du rapport international', *Revue Critique*, pp. 202-203, and references which he makes to the works of Hijamns, Frankel, Kollewijn and Jitta.

What these processes of adaptation and coordination at the jurisdictional level highlights the creative role of the judge in Private International Law. From another perspective, this also underlines the tension which exists between the internationalist aims of these activities and their execution by means and criteria from within the forum, whose role essentially focuses on the localisation procedure.

CONCLUSIONS

In the foregoing reflections I have endeavoured to highlight the way in which, despite the formal equality that exists between foreign laws and the law of the judge, *lex fori* enjoys a privileged role due to the general possibility that exists for its application in setting the legal regulation for international legal traffic.[37]This can be seen in three fields:

A. When the forum is faced with a case of international legal traffic, its first task consists of selecting the technique or procedure to be used in order to successfully deal with the case. Only when there is not an assimilation of the private international relationship into internal legal processes (peremptory norm), nor is there a specific regime designated for the relationship (substantive technique), is it possible to use conflict norms, whose attribution procedure constitutes the only channel through which to import foreign law.

B. When the law of the forum has accepted the internationalisation of the case without providing a direct solution, thereby resorting to the conflictual method, the forum will then locate the case within the legal order which it deems most appropriate, in line with the forum's categories and ways of interpreting legal institutions. In this sense, only in exceptional circumstances will the forum take into account formal foreign law in terms of its connections in *renvoi* and preliminary hearing (as far as its own legal system permits this),and its teleology of legal characterisations.

C. Finally, following the use of the attribution procedure,when the forum comes to define a material solution for the case, the relevant collision norm may contain a reference to its own domestic legal order or to that of a foreign order. However, even in the latter case, *lex fori* will 'control' the content of the foreign legal order in question by means of a series of functional corrective mechanisms which may even lead to it being discarded and the subsequent application of the order of the forum (characterisations, public order, fraud of law, adaptation).

The above points lead us to consider the 'special intensity' of the *lex fori* in the planning of the legal solution for international legal traffic. This does not involve the discrediting of the foreign elements present in the case, given that the forum may examine the possibility of renouncing its powers to preside over the case through its recognition that the applicable legal norm may be foreign. Furthermore, it should be borne in mind that, despite the foreign element present within the case, the situation or

[37] On the 'basic' nature of the law of the forum, see, amongst others, Ehrenzweig, A. A., (1967), *Private International Law*, Law from 1967.

relationship in question displays a prior link to the legal order of the forum, namely the link that comes from there being sufficient legal connections in order to attribute it to international jurisdiction.

Rather than advancing a thesis, what I have endeavoured to do is to draw attention to a reality which, when related to legal uniqueness and fragmentation, could appear to be nationalistic if it were to be interpreted as a value judgement or theoretical proposition. In terms of outlining the reality of this theme, what these observations offer is, in my opinion, an interpretation which fits the underlying dynamic of international legal traffic. In this sense, rather than positing a conclusion, what the analysis sets out is a starting point.

I do not believe that such a reality should be circumscribed by a specific positive legal order, but rather we observe the functional structure of private international law with the abstraction of each legal order. What needs to be reiterated is that this analysis constitutes a starting point from which we can ascertain the *nationalism* or *internationalism* of a specific legal system.[38] If, as we have observed, the process which allows us to reach a solution for the broad issue of international legal traffic is going to be influenced by the constant involvement of the legal order of the forum, its characterisation as international will be based more on its openness to foreign norms, principles and criteria, rather than its interiorisation of such values. The label of internationalist should be withheld in the case that it fails to comply with the double requirement that I referred to at the beginning of these reflections: on the one hand, the need for a differentiated interpretation of the external or internal nature of legal traffic; and on the other hand, the manifestation of this internationalist aspect within a specific regulation in one or more cases. Only in this way can we avoid the betrayal of the internationalist vocation of our discipline by its national roots.

[38] On this point see Carrillo Salcedo in this edition.