

Choice-of-law rules and the prohibition of discrimination under the ECHR

'Between the idea
And the reality
...
Falls the Shadow'

T.S. Eliot, *The Hollow Men*

1. Introduction

The ECHR is not an instrument of great substantive originality – nor is it desirable that it should be so. The ECHR's greatness lies in the efficiency of the international protection of human rights that the acceptance of the jurisdiction of the ECtHR ensures. But in terms of substance, its main provisions merely repeat the content of the Universal Declaration of Human Rights of 1948,¹ which itself reflects, at the very least, two hundred years of legal thought. This lack of originality is not to be lamented, for it shows that the idea of human rights has a life, independently of the European Convention, in national constitutions or in other regional or universal instruments. And that, incidentally, will allow us to complement the (up to now rather rare) decisions of the ECtHR which are relevant to the theme of this paper with equally authoritative pronouncements of national courts, and also with the speculations of academics, on the interaction between the conflict of laws and the prohibition of discrimination.

A reminder, first, of the specific form which the principle of equality takes under the European Convention. Within the text of the Convention itself, Article 14 defines the right to equality and non-discrimination not as a general right, but as a right to non-discrimination in the enjoyment of the human rights otherwise guaranteed by the Convention. This (voluntary) defect is remedied by Protocol No. 12 to the Convention ('General prohibition of discrimination' in the 'enjoyment of any right set forth by law'). The ratification record of Protocol No. 12 is mixed, however,² and there is no significant case law on the Protocol. Discrimination, whether under Article 14 of the Convention or under the Protocol, can take the forms of the unjustified distinction between situations that are comparable, and of the unjustified refusal to distinguish between situations that are not – the latter being a later development, starting with the case of *Thlimmenos v. Greece*.³ In each case, the justification for the distinction or the refusal to distinguish will be at the centre of the judicial attention.⁴

This paper deals with the relevance, or irrelevance, of the principle of non-discrimination to that part of private international law that deals with choice of law. It may well be that the relevance of the principle to some national rules relating to the international jurisdiction of courts is actually clearer (a notorious example is Art. 14 of the French, or Luxembourg, Civil Code which provides for the jurisdiction of the courts over any suit brought by a national of the forum State; this can be considered as an instance of discrimination on grounds of nationality), but if it is, it is also of lesser scope. As we shall see, non-discrimination potentially goes to the very core of conflict of laws rules as they are traditionally conceived – that, at least, is the idea at the basis of several (academic) schools of thought. The empirical reality of case law is to a large extent different. And it may be possible to adopt a compromise solution.

2. The idea: the ECHR as a basis for a more perfect equality in choice of law?

It may be useful to deal immediately with one aspect of unequal treatment that is quite common, indeed characteristic of all national conflicts systems, and to exclude it from further consideration. That is the unequal treatment between foreign law and the law of the forum. Procedural rules relating to the proof of foreign law, to the limitation of supreme court review to forum law or – to the extent that it exists in a given national system – the right of the parties to opt out of the applicable foreign law and to opt for the law of the forum, and other rules of private international law (such as the rules relating to *renvoi*, or various types of unilateral conflict rules⁵) which increase the likelihood of the application of the *lex fori* disproportionately have all been criticised as infringing the 'equal treatment of the law of the forum and of foreign law'.⁶ That kind of – abstract – unequal treatment between legal systems cannot be submitted to scrutiny under the ECHR whose scope is limited to discrimination between persons.

1 General Assembly Resolution 217 A (III), of 10 December 1948.

2 Among States that are both Member States of the European Union and Contracting States to the ECHR, only Cyprus, Finland, Luxembourg, the Netherlands, Romania, Slovenia and Spain have ratified the Protocol.

3 Judgment of 6 April 2006, no. 34369/97, ECHR 2000-IV.

4 Under a test developed in the *Case 'relating to certain aspects of the law on the use of languages in education in Belgium' (merits)*, judgment of 23 July 1968, *Series A*, no. 6, § 10: 'the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.'

5 Not to speak of the infamous (and obscure) 'Save our State' amendment to the Oklahoma Constitution, which was approved by popular vote on 2 November 2010 and directs the Oklahoma courts to 'uphold and adhere to the law as provided' in federal or Oklahoma law 'and if necessary the law of another state of the United States provided the law of the other state does not include Sharia law... The courts shall not look to the legal precepts of other nations or cultures.'

6 See the Resolution, adopted under that title, by the Institut de droit international at the Session of Santiago de Compostela in 1989, *Annuaire*, Vol. 63, II, p. 332.

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In a modest form, the idea of preventing discrimination between persons through private international law rules is certainly true, but with equal certainty unhelpful. It can be stated that respect for the principle requiring unequal treatment of unequal situations (equality in the *Thlimmenos v. Greece* sense, to express it in terms of ECtHR jurisprudence) is the very basis for the existence of conflict rules, in that it justifies, and requires, the non-application of the law of the forum to situations with a preponderant foreign element.⁷ This general and abstract idea even found a sympathetic reception in a case decided by the Bavarian Constitutional Court in 1956. The Court said, in an *obiter dictum*, that the uniform application, without exception, of forum law to all cases to be adjudged in a State would be a violation 'to the highest degree' of the principle of equality⁸ – but it also held, as shall be seen, that no concrete consequences, in favour of this or that conflict rule, could be drawn from that concept.⁹ And indeed, the concept thus expressed is too general to justify the adoption, or the non-adoption, of any specific conflict rule. It would appear to be of moderate interest only, even to theoretically inclined minds.

The position would be otherwise if other proposals were to be followed. Equality has been a prime reference in the advocacy for the radical reform of the traditional conflict of laws rules. The basic idea will inevitably be that multilateral conflict rules that point away from, say, forum law, or the law of the habitual residence, or another preferred law are potentially discriminatory because their operation will deny, to the individuals concerned, the benefits that would have resulted from the application of the preferred law.

To some, non-discrimination on grounds of nationality – as required by Article 14 of the ECHR – is an essential argument for the displacement, in matters of personal status, of conflict rules which use as the connecting factor the nationality of persons. Professor Andreas Bucher comes to mind in this respect. He advocates the adoption of the habitual residence of persons as the connecting factor, and views with suspicion the application of the national law which distinguishes between persons living in a given community, by reference to their national origin.¹⁰ Others go further, and advocate the replacement of traditional multilateral conflict rules concerning matters of status by the uniform application of the *lex fori* as the supreme remedy against inequality before the law.¹¹ Outside the field of personal status, there has been Brainerd Currie's suggestion, in the 1960s, that anything other than the application of his own preferred method for dealing, for instance, with out of state torts – applying the law of the forum to the fullest extent compatible with the objectives of forum law, in particular in the protection of accident victims who are forum residents – might be a violation of equal protection. Currie's (brilliantly written) contributions start out acknowledging that interest analysis, with its bias in favour of forum residents, can 'encounter problems of discrimination' and can therefore call for a measure of constitutional restraint. But, if we are to believe Currie, the same is even more true of the traditional conflicts rules with a territorial bend: denying 'the benefit of the law of the forum' to forum residents on grounds with as little true relevance as the place of the tort, without support in a specific policy of forum law, is 'latent discrimination by conflict-of-law-rules'. 'Analysis in terms of governmental interests will reveal ... that many conventional conflict-of-laws rules discriminate arbitrarily against residents and citizens of the state adhering to and applying the rule.'¹² The question remains a matter of (limited) debate in American literature, but one that is unlikely to be resolved by the courts, since the United States Supreme Court has all but given up the constitutional scrutiny of conflict of laws rules.¹³

Whatever the intrinsic merits of a given reform proposal may be – and some of them do have merit –, to the extent that its authors seriously rely on non-discrimination as a true human rights norm (or a constitutional norm), they are probably mistaken. A multilateral conflict rule as such does not operate to deny specific benefits to anyone. It has no substantive content,¹⁴ and if a benefit is denied to a person the true reason will not lie in the forum's multilateral conflicts rule – this is supposed not to be interested in the conferring or denying of substantive benefits –, but in the content of the applicable (foreign) law which happens to differ from the forum's own substantive law. This analysis is admittedly rather formal, but as an answer to the equally formal invocation of the general principle of equality before the law it will, in the present author's view, be sufficient at least as long as the connecting factors used are not arbitrary.

There is another conflicts-related aspect to the use of the idea of non-discrimination in the advocacy of reform. This is the converse of the proposal to end the perceived 'discrimination through the application of foreign law' and to guarantee to all persons the advantages resulting from forum law. The starting point here is the recognition in the forum of a status acquired abroad otherwise than in conformity with the forum's own law. Cases of that kind are frequent: it may be possible to obtain abroad – from a foreign court or otherwise – a benefit (such as adoption by single or same-sex parents, or the legal validity of surrogate motherhood contracts) which would be unobtainable in the forum, and yet to have the benefit obtained abroad recognised under the forum's rules of recognition which can be more liberal than its rules on the

7 E. Lorenz, *Zur Struktur des internationalen Privatrechts*, Berlin: Duncker & Humblot 1977, pp. 60, 64 et seq.; see also H.-P. Mansel, *Personalstatut, Staatsangehörigkeit und Effektivität*, Munich: C.H. Beck 1988, pp. 47 et seq., and the discussion by G. Beitzke, *Grundgesetz und Internationalprivatrecht*, Berlin: Walter de Gruyter 1961, pp. 17 et seq.

8 'Die ausnahmslose und unterschiedslose Anwendung des eigenen Rechts auf alle in einem Staat zu beurteilenden Rechtsfälle würde ... dem Gleichheitssatz im stärksten Maße zuwiderlaufen', BayVerfGH 13 March 1956, *IPRspr.* 1956-1957, No. 124, p. 399.

9 *Infra*, text at n. 18.

10 A. Bucher, 'La famille en droit international privé', *Recueil des cours (Collected Courses of the Hague Academy)* (283) 2000, pp. 46-49; but see Bucher, 'La dimension sociale du droit international privé (Cours général)', *Recueil des cours* (341) 2009, pp. 201-202, for reasoning grounded on considerations of expeditiousness rather than of human rights.

11 G.P. Romano, 'Is Multilateral Conflict Rule on Capacity to Marry in Line with the Italian Constitution?', *YbPIL* (7) 2005, p. 205. In fairness to the author, it should be noted that his advocacy of the general applicability of the *lex fori* relies less on constitutional, or human rights, arguments than on a theoretical analysis of the potential scope of application of legal norms and on empirical findings in the family law field, where the application of the law of the forum is rather common. See Romano, 'La bilatéralité éclip-sée par l'autorité', *Rev. crit. d.i.p.* 2006, p. 457.

12 B. Currie and H.H. Schreter, 'Unconstitutional Discrimination in the Conflict of Laws: Equal Protection', *University of Chicago Law Review* (28) 1960, p. 1, reprinted in *Selected Essays on the Conflict of Laws*, Durham: Duke University Press 1963, p. 572. See also Currie and Schreter, 'Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities', *Yale Law Journal* (69) 1960, p. 1323, reprinted in *Selected Essays on the Conflict of Laws*, p. 445.

13 See, among others, D. Laycock, 'Equal Citizens of Equal and Territorial States', *Columbia Law Review* (92) 1992, p. 249 at pp. 257-258.

14 This may be problematic (and it explains why there are other, more substantively-oriented, conflicts methods around). But the problems involved are not problems of constitutional or human rights law.

applicable law.¹⁵ It could be argued, then, that it would be impermissible ‘reverse discrimination’ for the substantive law of the forum not to provide for the same kinds of advantages that result from foreign law, once the result of the application of foreign law (e.g. an adoption order) is recognised in the forum.¹⁶

This is an argument which inherently bears a potential for more than reform: a potential to destabilise the system of private law, which in many fields is a body of rules that are supposed to be binding, not optional, for individuals. The tendency to render private law optional is to some extent characteristic of modern private international law, but a combination of that phenomenon with the idea of ‘reverse discrimination’ would entail, in every field, the instant and judge-made harmonisation of the private law of the forum with the most liberal laws on earth – which may sound somewhat unreasonable. The ‘reverse discrimination’ argument can be rejected as being unfounded, as long as it remains clear that there is a fundamental difference between a foreign-created right that is merely recognised in the forum by reference to the real and substantial connection between the situation and the foreign legal system, and a right that is claimed to be directly created under the forum’s own legal system.

3. The reality: the courts’ approach to the question

Here is a truly empirical finding: the cases do not support radical inferences drawn from the principle of non-discrimination, whether under the ECHR or under a national constitution. The courts seem to find multilateral conflict rules acceptable – not necessarily a surprise, by the way.

3.1 A case in the ECtHR: *Johnston v. Ireland* (1986)

Johnston v. Ireland was a case which arose out of the prohibition of divorce as it prevailed in Irish law until the Family Law (Divorce) Act 1996. Among the arguments relied on by Mr Johnston – an Irishman domiciled in Ireland and thus unable to obtain a divorce and to remarry – was that other Irishmen could have their divorces obtained abroad recognised in Ireland. The condition for recognition was, under the general rules of Irish private international law, that the parties to the marriage dissolved by the foreign court were domiciled abroad, within the jurisdiction of the divorcing court. According to the applicant, this difference in treatment was discriminatory on grounds of domicile and, even more perniciously, on grounds of ‘financial means’: Mr Johnston could not obtain a divorce because he was too poor to obtain a divorce abroad, after a change of domicile. This argument thus closely resembled the ‘reverse discrimination’ argument considered above (and also tended to attack the differentiation, operated by Irish private international law, between persons according to their domicile). The ECtHR gave it remarkably short shrift:

‘The Court notes that under the general Irish rules of private international law foreign divorces will be recognised in Ireland only if they have been obtained by persons domiciled abroad. ... In its view, the situations of such persons and the ... applicants cannot be regarded as analogous. There is, accordingly, no discrimination, within the meaning of Article 14.’¹⁷

3.2 Analogous cases under German and American constitutional law

Cases in the national courts have proven equally disappointing to those who hoped to have the ordinary conflict of laws rules invalidated.

The Constitutional Court of Bavaria held in 1956, as we have seen, that the application, without further ado, of the *lex fori* to all cases regardless of their connections to foreign States would violate the principle of equality before the law¹⁸ – a holding, incidentally, that is contrary to the radical idea that all multilateral conflict rules are inherently suspect of discrimination. Be that as it may, the same judgment went on to hold that no specific conflict of laws rule could be derived from this idea: the application of the national law of the mother to the minor child’s right of maintenance against the father could not be said to be unreasonable and discriminatory, in the absence of a rule singling out nationality as an unacceptable connecting factor, but neither could the application of the law of the domicile of an individual.

The German Constitutional Court decided in 1988 that it was precisely *because* it provided for the application of the national law of a person that a conflict rule could not be considered as discriminatory.¹⁹ It also held, in an important case in 2006 involving a claim by foreign transsexuals residing in Germany to have their change of sex registered there, that differentiation by choice-of-law rules between persons on ground of their nationality is not prohibited by the constitutional rule of non-discrimination. The German conflict rules that use nationality as the connecting factor are described in the Court’s decision as being based on respect for foreign legal systems and on the legitimate consideration that the application of their national law is in the best interest of foreigners: in general, the Court held, nationality corresponds to a continuing personal bond between persons and the State of their nationality, and the application of the national law is in the interest of the individuals concerned on account of their greater familiarity with the law of their own nationality.²⁰ The reason why the application of foreign law could be problematic was not that it was the law of the transsexuals’ nationality, but that if it denied the possibility of a change of sex, it infringed the applicants’ personality rights. That, however, was a matter pertaining to the content of the foreign law and to the application of the (fundamental rights-influenced) pub-

15 See the discussion by Kinsch, ‘Recognition in the Forum of a Status Acquired Abroad – Private International Law Rules and European Human Rights Law’, in: *Liber Amicorum Kurt Siehr*, The Hague: Eleven International Publishing 2010, p. 259.

16 Cf. O. Cachard, *Droit international privé*, Orléans: Paradigme 2010, para. 36; see also a remark tinted with irony (perhaps of the bitter variety) by a social conservative, H. Fulchiron, ‘Le mariage entre personnes du même sexe en droit français: refus et/ou reconnaissance?’, *Rev. int. dr. comp.* 2010, p. 245 at p. 272: ‘il ne manquera pas de bons esprits pour prétendre qu’accepter de reconnaître un mariage valablement célébré à l’étranger et refuser de le permettre à deux Français constitue une discrimination ... fondée sur la nationalité.’

17 Judgment of 18 December 1986, *Series A*, no. 112, §§ 60-61.

18 BayVerfGH 13 March 1956, *IPRspr.* 1956-1957, No. 124 (above, text at n. 8).

19 BVerfG 30 November 1988, *BVerfGE* 79, 203: ‘In der Anwendung seines Heimatrechts kann gerade keine Diskriminierung des Beschwerdeführers gesehen werden.’ The case concerned the impossibility, for an Algerian domiciled in Germany, to proceed to have his German-born child legitimised.

20 BVerfG 18 July 2006, *BVerfGE* 116, 243, 261.

lic policy of the forum,²¹ not to the conflict rule used in German private international law.

A similar indifference towards the incidence of the general principle of equality on choice-of-law rules has been shown in the United States. In the well-known case of *Goodridge v. Department of Public Health*, the Supreme Judicial Court of Massachusetts had held that equal protection, as understood under the Massachusetts Constitution, implied a right of same-sex couples not to be denied the right to marriage.²² This drew, unsurprisingly in the United States, a number of out of State residents to Massachusetts to enter into a marriage there with a view to settling as married spouses not in the State of Massachusetts but in their home States. A problem arose out of a statute enacted in 1913 for the implementation of the Uniform Marriage Evasion Act (which Massachusetts had been one of the few States to enact):

'No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and any marriage contracted in this commonwealth in violation hereof shall be null and void.'²³

Was this rule, which operates similarly to a rule subjecting the capacity to marry to the law of the spouses' residence,²⁴ a clear-cut case of discrimination on grounds of residence? That, indeed, was the view of a number of same-sex couples residing in Vermont, New York, Connecticut, Rhode Island, Maine and New Hampshire but wishing to marry in Massachusetts, who brought a case to challenge the law. Yet in *Cote-Whitacre v. Department of Public Health*, it was held by the same Supreme Judicial Court that the denial of the right to celebrate a same-sex marriage in Massachusetts to residents of States that do not recognise such marriages is not a violation of equal protection:

'It is rational for Massachusetts to take precautions that marriages performed here be considered legally binding and not merely aspirational. Put another way, it is rational for the Legislature to take steps to ensure that marriages performed here will hold up elsewhere, and that they will not be ignored by other States.'²⁵

The rule in question was repealed in 2008 on grounds of inexpediency,²⁶ not of unconstitutionality.

There seems to be no case upholding a challenge, based on the general prohibition of discrimination, to the use of nationality, domicile or residence as a connecting factor in private international law.

4. The compromise: a limited application of the principle of non-discrimination

So far, it has been attempted to show that the general principle of equality before the law is tolerant towards any multilateral conflict rule that a given legal system may reasonably wish to maintain. Reform (of the content of conflict rules, or of the substantive civil or commercial law) can be called for, but it is a matter for the political process – or, in appropriate cases, for the ordinary courts in changing their case law –, not for the ECtHR or the constitutional courts. The simplest (formal) justification for this is the absence of a substantive content of the forum's conflict rules. The position can be otherwise where the premises are different. This can be the case either where the rule being invoked is no longer the general principle of equality or where it is no longer the operation of multilateral conflict rules that is at stake.

4.1 Distinguishing between the general principle of equality and specific rules of non-discrimination

Specific rules of non-discrimination (say the rule that there must be no discrimination on grounds of gender) are, in strictly logical terms, nothing else than applications of the general principle of equality: gender, to take that example, is – with very few exceptions – not a relevant criterion in conferring or denying the benefit of any rule of law. If logic were the life of the law (but we know of course, since the demise of *Begriffsjurisprudenz*, that it is not), it would follow that a multilateral conflict rule could not be invalidated as being discriminatory between men and women, any more than it can be invalidated for discriminating between persons on grounds of their nationality or residence.

That, in fact, was the reasoning of the German *Bundesgerichtshof* during the 1950s and 1960s, when the rules of the old conflicts codification of 1896 came under attack. The old conflict rules had been based on the concept that the husband's position in the family was a position of pre-eminence – hence the rule that the various incidents of the matrimonial relationship, in case of difference in the nationalities of the husband and the wife, were governed by the law of the husband's nationality. After the new German Constitution entered into force – and the transitory period for the full application of the rule of non-discrimination between men and women expired in 1953 –, the *Bundesgerichtshof* was called upon to decide whether the Constitution invalidated the old conflict rules. No, was the Court's initial answer, maintained for many years: the conflict rules have as their sole function a mere *Ordnungsfunktion*, to determine the applicable law, not to decide on the substantive rights and obligations of husbands and wives; and the substantive content of the law of her husband's nationality can very well prove to be more favourable to the wife than the application of her own national law.²⁷ That this reasoning might be logical, but was not in line with the intention behind the specific rule of non-discrimination on grounds of gender was understood in 1982, when the problem again came before the *Bundesgerichtshof* (two factors

21 See below, the text at n. 42.

22 798 N.E.2d 941 (Mass. 2003).

23 Mass. Gen. L., c. 207, § 11. In addition § 12 directed municipal officers to satisfy themselves, before issuing a marriage licence, that the prohibitions of the law of the spouses' residence were complied with.

24 Perhaps cumulatively with the law of the State of celebration, which would be applicable under the usual American conflicts rule for marriage.

25 *Cote-Whitacre v. Department of Public Health*, 844 N.E.2d 623, 657 (Mass. 2006).

26 M. Levenson, 'Governor Signs Law Allowing Out-of-State Gays to Wed', *The Boston Globe* 31 July 2008. For a different, economically inspired (which does not necessarily mean a more accurate) perspective on the repeal, see E. O'Hara and L. Ribstein, *The Law Market*, New York: Oxford University Press 2009, pp. 166-167. – The repealing statute is St. 2008, c. 216, Sect. 1; incidentally, § 10 of c. 207 was not repealed in 2008 ('If any person residing and intending to continue to reside in this commonwealth is disabled or prohibited from contracting marriage under the laws of this commonwealth and goes into another jurisdiction and there contracts a marriage prohibited and declared void by the laws of this commonwealth, such marriage shall be null and void for all purposes in this commonwealth with the same effect as though such prohibited marriage had been entered into in this commonwealth').

27 BGH 18 January 1954, NJW 1954, 837. See also BGH 29 April 1964, BGHZ 42, 7; BGH 22 March 1967, BGHZ 47, 324, 236; BGH 17 September 1968, BGHZ 50, 370, 373; BGH 18 June 1970, BGHZ 54, 123, 126; BGH 18 June 1970, BGHZ 54, 132.

may have helped that Court to change its mind: a *dictum* in a case by the Constitutional Court that had thrown doubt on the concept that a conflict rule had a mere, constitutionally harmless, *Ordnungsfunktion*;²⁸ and the fact that the 1982 case was handed down by a new generation of judges). Then, the Court recognised that among the functions of the rule of non-discrimination was the aim of changing the traditional view of the marital relationship; the rule giving pre-eminence to the husband's nationality in private international law was a reflection of the same 'patriarchal view of marriage' that characterised the substantive rules that were adopted at the same time, in 1896; therefore, the conflict rule was incompatible with the new value system of the Constitution.²⁹ The same reasoning, which relies on equality as a structural principle and on its symbolic value rather than on its usual function to restore justice among individuals, has inspired later rulings by the Italian³⁰ and the Spanish³¹ constitutional courts – as well as legislative reform in those States that had a conflict rule similar to Germany's.³²

There is a recent case in the ECtHR, *Losonci Rose and Rose v. Switzerland*, which is to the same effect. It concerns a complicated form of discrimination between men and women (or husbands and wives), and the interplay between the Swiss conflict rules and the rules of Swiss substantive law on the attribution of names following marriage. What was at stake was the name of Mr Losonci, a Hungarian citizen domiciled in Switzerland, after his marriage to a Swiss citizen, Ms Rose. Both spouses wished to maintain their own names. Under the Swiss civil code, this is not permitted: a family name – normally the name of the husband, exceptionally, if the spouses opt for that solution, that of the wife – has to be borne by both spouses. The couple had chosen to adopt the wife's name as the family name. Now, Article 37 of the Swiss Act on Private International Law provides that the name of a person domiciled in Switzerland is determined by Swiss law, save that he may choose to have his name determined by his national law. Mr Losonci (or Losonci Rose, as he now was) intended to use this option: by choosing Hungarian law, he could escape the obligation to bear the family name chosen by the spouses and could continue to be called Losonci. This procedure would have been entirely feasible if the wife had been Hungarian and her husband Swiss, for the only option that would then have been necessary would have been the option for the application of the wife's national law to her name. But in Mr Losonci's case, it was held by the Swiss courts that an option – the option for exceptionally adopting the wife's name as the family name – had already been exercised, and that this precluded Mr Losonci from exercising a second option, the option for the application of his national law to his name. The ECtHR considered that to deprive Mr Losonci of the possibility to choose the applicable law was discriminatory on grounds of gender, and 'very weighty reasons have to be brought forward before a difference of treatment based on the ground of sex alone can be regarded as compatible with the Convention'.³³

Another specific rule of non-discrimination – non-discrimination on grounds of religious affiliation – has sometimes been mentioned as having the potential to invalidate the traditional solution to the problem of the law applicable to the personal status of persons who are nationals of Middle Eastern (or similar) States, where status is a matter of religious law.³⁴ There, it is usual to follow the lead of the national law of the individuals concerned and to apply the law of their religious affiliation – simply because there is no neutral, State, law on personal status in those countries. To apply the concept of non-discrimination on grounds of religion would not appear to be particularly helpful: the only possible outcome would

be the application of the law of the forum, in a situation where the application of a religious law would seem to be in conformity with the legitimate expectations of the parties. There is no real reason to invalidate that solution – provided, of course, that the substantive content of the religious law is not against the (possibly ECHR-inspired) public policy of the forum.

A final instance of incompatibility between a conflict rule and a specific principle of non-discrimination is very speculative, and it may be that it never materialises. Within the context of the European Union – and only there, so that the ECHR is not really concerned with this – non-discrimination on grounds of nationality, and the concept of a 'European citizenship' (whose incidents are still under construction in the case law of the European Court of Justice) have special weight, and have been successfully invoked in the past against the traditional operation of the multilateral conflict rules of Belgium and Germany subjecting personal status to national law.³⁵ But up until now, what has been considered contrary to the Treaty has not been the conflict rule as such. It has been, rather, its inflexible application which takes no account of the effect of the different conflict rules that are in force in another Member State and of the parties' preferences as to the applicable law – a very different problem.³⁶ Whether the Court will ever go

28 BVerfG 4 May 1971, BVerfGE 31, 58, 78 et seq. ('Spanierbeschluss').

29 BGH 8 December 1982, BGHZ 86, 57, 62-63. See further: BVerfG 22 February 1983, BVerfGE 63, 181; BGH 8 June 1983, BGHZ 87, 359, 362; BVerfG 8 January 1985, BVerfGE 68, 384; BVerfG 3 December 1985, BVerfGE 71, 224; BGH 17 September 1986, NJW 1987, 583 (unconstitutionality of the Hague Convention of 17 May 1905); BGH 8 April 1987, IPRax 1988, 100; BVerfG 18 December 2002, NJW 2003, 1656.

30 Corte cost. 26 February (5 March) 1987, no. 71, *Foro it.* 1987, I, 2316; RDI 1987, 417; Corte cost. 25 November (10 December) 1987, no. 477, RDI 1988, 220.

31 TC (*Tribunal Constitucional*) 14 February 2002, cited by J. González Campos, 'The Spanish Constitution and Private International Law in Constitutional Jurisprudence', *Spanish Yearbook of International Law* (9) 2003, p. 1, para. 22.

32 See the comparative material collected by K. Kreuzer, 'Internationales Privatrecht und Bundesverfassungsgericht', in: *Festschrift für Ernst Benda*, Heidelberg: C.F. Müller 1995, p. 153 (citing, at pp. 174-176, Portugal and Greece).

33 Judgment of 9 November 2010, no. 664/06, § 41. This rather atypical case illustrates both the strength of the rule against gender discrimination and the interaction between conflicts rules and the deprivation of substantive benefits.

34 Cf. W. Wengler, *Internationales Privatrecht*, Vol. I, Berlin: Walter de Gruyter 1981, p. 128. *Contra*: P. Gannagé, 'Le principe d'égalité et le pluralisme des statuts personnels dans les Etats multicommunautaires', in: *Mélanges François Terré*, Paris: Dalloz 1999, p. 431.

35 In two well known cases involving the attribution of a family name to children: Case C-148/02, *García Avello*, [2003] ECR I-11613, NIPR 2004, 2; Case C-353/06, *Grunkin and Paul*, [2008] ECR I-7639, NIPR 2008, 253. An earlier case was Case C-430/97, *Johannes*, [1999] ECR I-3475 on the law applicable to the apportionment of pension rights in divorce proceedings, but there it was held that the subject-matter of the dispute (the private international law of divorce) did not fall within the scope of the Treaty. Things have changed since then.

36 So that certain instances of the recognition of situations created otherwise than in conformity with the forum's conflict rules can rely on EU law. The European Court is prepared to accept exceptions to this principle where considerations of public policy of sufficient weight are brought forward against recognition: see, for the non-recognition in Austria of a title of nobility acquired in Germany, Case C-208/09, *Sayn-Wittgenstein*, paras. 81 et seq. (judgment of 22 December 2010).

further, and truly invalidate conflict rules which use nationality as a connecting factor, is uncertain. At any rate, at least in political terms it is now clear that it is not nationality, but habitual residence which is the principal connecting factor in the field of private international law in the European Union.³⁷

4.2 *Distinguishing between multilateral choice-of-law rules and rules of private international law denying substantive advantages to certain classes of persons*

Where a rule of the private international law of the forum operates not merely by designating the applicable law (as a multilateral choice-of-law rule does), but by denying substantive advantages to a class of persons, it can be discriminatory, even if it is merely confronted to the general principle of equality before the law, not to a specific rule of non-discrimination.

Private international law mechanisms with substantive law aspects include – and historically, it has been the first example of this – public policy; after all, public policy is both part of the choice-of-law process and an expression of the forum's view of the minimum of substantive justice that makes a law, even a foreign law, acceptable as a mode of social regulation.³⁸

The content of public policy is determined solely by the forum, and its operation represents the last chance, entirely in the hands of the forum's authorities, to achieve substantive justice in an individual case – by this dual aspect, it differs fundamentally from the operation of a multilateral choice-of-law rule. Now, the intervention of public policy normally presupposes the existence of minimum contacts with the forum, the so-called *Inlandsbeziehung*.³⁹ The manner in which this *Inlandsbeziehung* is defined bears in itself a potential for discrimination. Thus, when the French *Cour de cassation* decided (back in 1981) that there was nothing wrong with applying Spanish law which allowed judicial separation but not divorce, except if it prevented a person of French nationality domiciled in France from obtaining a divorce,⁴⁰ it created what appears to be an irrational restriction on access to the forum's substantive justice – for what really distinguishes, *in that respect*, a Belgian domiciled in France from a Frenchman domiciled in his country? The difference between the application of a choice-of-law rule subjecting personal status to national law, which is presumably immune against invalidation by the rule against discrimination on grounds of nationality, and this definition of the limits of public policy may be tenuous, but it is submitted that it is real enough.⁴¹ That this is so is confirmed by the jurisprudence of the German Constitutional Court: in the 2006 case involving a claim by foreign transsexuals to have their change of sex registered in Germany,⁴² it was held *both* that the choice-of-law rule differentiating between persons according to their nationality was not against the constitutional rule of non-discrimination *and* that rules of German law which prevented the courts from using the public policy exception against restrictive foreign

laws applying to foreigners resident in Germany were discriminatory and unconstitutional.⁴³

A second example is the international scope of the forum's mandatory norms. Mandatory norms ('overriding mandatory provisions') are defined in Article 9 of the Rome I Regulation which emphasises the importance of defining the 'situation[s] falling within their scope': they are overriding only under the condition that the situation at hand falls within their necessary scope of international applicability. In a technical conflict of laws analysis, mandatory norms combine a substantive rule with a rule as to their international applicability (or, more accurately, a rule as to their international applicability to the extent that it derogates from the operation of multilateral choice-of-law rules). The fact that they have a substantive content means that there is no objection to the unrestricted application, to the definition of their international scope, of the general principle of equality before the law – which will be infringed if the definition of the classes of persons who enjoy, or are denied, the protection of the forum's mandatory norms is irrational or otherwise unjustified.⁴⁴

37 A recent, and spectacular, example of this is Art. 8 of Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, *OJ* 2010, L 343/10. See already the observations by P. Lagarde, 'Rapport de synthèse', in: *Les conflits de lois et le système juridique communautaire*, Paris: Dalloz 2004, p. 295 on the link between the principle of non-discrimination under EU law and the future European conflict rules.

38 'L'exception d'ordre public international est une manifestation élatante d'une préoccupation de justice matérielle': H. Gaudemet-Tallon, 'Le pluralisme en droit international privé: Richesses et faiblesses (Le funambule et l'arc-en-ciel)', *Recueil des cours* (312) 2005, p. 273.

39 There may be exceptions, in particular exceptions linked to human rights, but the mere fact that human rights are involved does not necessarily mean that no *Inlandsbeziehung* can ever be required.

40 Civ. 1^{re} 1 April 1981, *JDI* 1981, 812, with annotation by Danièle Alexandre.

41 See also the arguments given by P. Lagarde, 'Nationalité et droit international privé', *Ann. dr. Louvain* 2003, p. 205 at p. 217.

42 BVerfG 18 July 2006, *BVerfGE* 116, 243 (see above, text at n. 21).

43 See *idem*, at pp. 267-268. The German rule in question was a legislative rule denying the jurisdiction of the German courts over such cases brought by foreign nationals, which indirectly prevented the courts from giving effect to public policy. There is no doubt that the same unconstitutionality would have attached to a rule directly limiting the scope of public policy.

44 For cases involving the 'second maritime registers' of Germany and of France (where it was held that limiting the mandatory application of norms of labour law to seamen residing in Germany or in France was not unjustified, taking into account economic factors: the difference in the cost of living between, say, Germany and the Philippines, and the need to save the national shipping industry from competition by low-cost flags of convenience), see BVerfG 10 January 1995, *BVerfGE* 92, 26, 52-53 and Cons. const. 28 April 2005, no. 2005-514 DC, *Recueil* 2005, p. 78, para. 34.