THE PRELIMINARY QUESTION AND THE QUESTION OF SUBSTITUTION IN CONFLICT OF LAWS

BY

TORBEN SVENNÉ SCHMIDT

Lecturer, Faculty of Law,
University of Aarhus

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I. When a judge is adjudicating in a specific case he may first of all have to decide on a *"preliminary question"*, i.e. to consider in law another situation than the one the case is really about ("the main issue"). Usually this is so because the rules of law the judge intends to apply as far as the main question is concerned indicate as the circumstances to which they tie legal effects not only such circumstances as are purely factual but also legally qualified concepts, e.g. a specific legal situation or a certain legal status. If one of the parties questions before the court the legality of such a situation or such a status, the judge must, before adjudicating, consider the preliminary question. As examples may be mentioned the *"pater est* rule" of the Danish Children Act, sec. 2, subsec. 1, according to which a child that could have been conceived during the marriage of the mother is presumed to be the child of her husband. One condition which must be fulfilled before such a rule is applied is that a valid marriage shall exist, cf. the Danish Marriage Act, sec. 38. If there is any doubt as to the validity of the marriage in a case concerning the status of a child, the judge must decide on the question of validity before he can apply the *pater est* rule.

If a case before the judge is *purely "national"*—in the sense that there are no foreign elements present—there will be no difficulties involved in the decision of such preliminary questions. Then, the judge applies[1] the substantive rules that his national law prescribes.

In cases involving conflict of laws there are two kinds of preliminary questions. Such a question may arise, in the first place, when conflict of laws rules of the *lex fori* are applied, as such rules normally describe the relevant situation with the help of

[1] The term "apply" is not used here to imply any specific legal technique and I do not intend to analyse the discussion which, during 1954–56, took place between Torsten Gihl and Alf Ross in *T.f.R.* concerning the term "application of law".

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legally qualified concepts.[2] Secondly, a preliminary question may arise when substantive rules of the *lex causae* are applied and the substantive rules of the *lex causae* contain legally qualified concepts.

When the judge has to decide whether the prerequisites of such concepts are fulfilled, the question arises: *According to which law* is he to decide? The problem is whether he should turn to the *lex fori* or to the *lex causae,* or perhaps to the law indicated by certain conflict of laws rules of the *lex fori or* of the *lex causae* which deal with such questions. For preliminary questions are in such cases normally within the realm of conflict of laws.

I will also deal with another problem, which—borrowing the term from Lewald[3]—I have chosen to call *the question of substitution*. This latter question, which has not been dealt with in Danish works on conflict of laws, arises only *after* the judge has found out which law is applicable to the preliminary question, and concerns the problem whether a legally qualified concept of this law can be *subsumed* under the concepts of the law which governs the main issue.

II. The preliminary question was treated for the first time during the thirties by three German writers, *George Melchior, Wilhelm Wengler* and *Leo Raape*.[4] Since then there has been considerable discussion of the problem among writers on conflict of laws—German and French writers, especially, have dealt with the matter.[5] In Scandinavia, however, writers have only rarely mentioned the problem.[6]

[2] Cf. Borum, *Lovkonflikter,* 4th ed. 1957, p. 37, and my own work *Kvalifikationsproblemet i den internationale privatret,* 1954, pp. 125 and 133.

[3] H. Lewald in "Règles générales des conflits de lois" in *Recueil* 69 (1939–III), pp. 130 ff.

[4] G. Melchior, *Die Grundlagen des deutschen internationalen Privatrechts,* 1932, pp. 245–65; Wengler in *Z.A.I.P.R.* 1934, pp. 148–251; Raape, "Les rapports juridiques entre parents et enfants" in *Recueil* 50 (1934–IV), pp. 485–95. In German theory the problem is generally termed the "Vorfrage" problem.

[5] Apart from authors mentioned in the preceding note the following writers should be mentioned: E. Balogh, *Studien aus dem Gebiete der Rechtsvergleichung und des internationalen Privatrechts,* vol. 2, 1934, pp. 165 ff.; J. Maury, "Règles générales des conflits de lois" in *Recueil* 57 (1936–III), pp. 558 ff.; W. Breslauer, *Private International Law of Succession,* 1937, pp. 18 ff.; A. H. Robertson in *L.Q.R.* 1939, pp. 565 ff., and in *Characterization in the Conflict of Laws,* 1940, pp. 135 ff.; H. Lewald, *op. cit.,* pp. 63 ff.; A. Nussbaum, *Principles of Private International Law,* 1943, pp. 104 ff.; A. Makarov in *Zeitschrift für vergleichende Rechtswissenschaft* 1944, pp. 251 ff. (also published with further comments in *Revue* 1955, pp. 451 ff.); M. Wolff, *Das*

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From preliminary questions we must distinguish those rather frequent occasions where in the formulation of conflict of laws rules a division has been made whereby an otherwise coherent question of law has been split and specific conflict of laws rules provided for certain sub-questions which thus are governed by a different law from the one which regulates the main issue. As an example it may be mentioned that it is normally accepted also in Danish law that there are special conflict of laws rules concerning the capacity of a person or concerning the form of a legal act (the law of the domicile and the *lex loci actus* respectively) and such rules do not necessarily lead to the application of the law of the state whose law governs the validity of the legal act or its legal effects in general.[7] These sub-questions cannot be called preliminary questions and their treatment in conflict of laws does not cause any special difficulties, as the judge applies conflict of laws rules provided by the *lex fori* for such sub-questions. A hallmark of these sub-questions—a criterion by which these can be distinguished from preliminary questions—is furthermore that the sub-questions cannot be main issues in a case, whereas preliminary questions may well be such main issues in another case than the actual one the judge has to consider.

In a case where a *preliminary question arises concerning the application of a conflict of laws rule of the* lex fori, I have sub-

internationale Privatrecht Deutschlands, 3rd ed. 1954, pp. 79 ff., and *Private International Law*, 2nd ed. 1950, pp. 206 ff.; W. Niederer, *Einführung in die allgemeinen Lehren des internationalen Privatrechts*, 1954, pp. 214 ff.; F. Rigaux, *La théorie des qualifications en droit international privé*, 1956, p. 444; P. Louis-Lucas in *Revue* 1957, pp. 153 ff.; Dicey-Morris, *Conflict of Laws*, 8th ed. 1967, pp. 34 ff.; Ph. Francescakis, *La théorie du renvoi*, 1958, pp. 203 ff.; Gerhard Kegel, *Internationales Privatrecht*, 2nd ed. 1964, pp. 114 ff., and in Soergel-Siebert, *Kommentar zum B.G.B.*, vol. 5, 9th ed. 1961, pp. 520 f.; P. Lagarde in *Revue* 1960, pp. 459 ff.; M. A. Jagmetti, *Die Anwendung fremden Kollisionsrechtes durch den inländischen Richter*, 1961, pp. 120 ff.; W. Wengler, "The General Principles of Private International Law" in *Recueil* 104 (1961–III), pp. 371 ff. and 410 ff.; L. Raape, *Internationales Privatrecht*, 5th ed. 1961, pp. 116 ff.; P. H. Neuhaus, *Die Grundbegriffe des internationalen Privatrechts*, 1962, pp. 237 ff.; M. H. van Hoogstraten in *De conflictu legum, Essays presented to R. D. Kollewijn and J. Offerhaus* (offprint of *Nederlands Tijdschrift voor internationaal Recht*), 1962, pp. 209 ff.

[6] The first Scandinavian author to deal with this problem appears to be N. P. Madsen-Mygdal, who dealt with it in his *Ordre public og territorialitet*, vol. 1, 1946, pp. 385 f. Cf. also T. Gihl in *T.f.R.* 1950, pp. 140 ff., and Hilding Eek, *Internationell privaträtt*, 1962, pp. 177 ff., and his *The Swedish Conflict of Laws*, 1965, pp. 178 ff. Since the present author in 1964 published himself in Danish the subject has been extensively dealt with by Lennart Pålsson in his thesis *Haltande äktenskap och skilsmässor*, 1966.

[7] Borum, *Lovkonflikter*, pp. 24, 82 ff. and 98 ff.; see also Ole Lando, *Kontraktstatuttet*, 1962, pp. 348 ff. and 353 ff.

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mitted, when dealing with the problem earlier,[1] that this question can only be solved by using the rules of the law which are indicated by the conflict of laws rule provided by the *lex fori* which concerns the actual prejudicial situation. I referred in this context to the fact that the judge at this stage of the case—when he is actually concerned with finding a suitable conflict of laws rule —does not yet know which law is to govern the main issue.

In support of my thesis it can furthermore be said that when a preliminary question arises in this way it is really *a part of the characterization to which the judge must proceed in order to find the conflict of laws rule which has to be applied to the case at bar.* In the view of the present author the object of conflict of laws rules cannot be legal relationships but only the relevant factual circumstances and certain disputed questions arising therefrom.[2] For technical reasons, however, conflict of laws rules indicate that their object involves legally qualified concepts. In order to subsume factual circumstances under a conflict of laws rule of the *lex fori* the judge may have the task of producing a legal characterization of such legal concepts or—what amounts to the same thing—of interpreting them with a view to establishing what factual circumstances they cover. This characterization or interpretation can only be carried out on the basis of the *lex fori.* If, therefore, a preliminary question arises in the course of interpretation it must be solved according to the *lex fori,* or, if it involves foreign elements, according to the law which is pointed to by the relevant conflict of laws rule of the *lex fori.*

Because of the normal structure of conflict of laws rules it is only rarely that preliminary questions arise concerning the application of a conflict of laws rule; but this can happen, as the following example will show.

It is firmly established that in Danish law there is a conflict of laws rule that the question whether a child is born in wedlock shall be decided according to the law of the husband's domicile at the time of the child's birth.[3] This rule appears to presuppose that there is a valid marriage, i.e. that the judge, if there is any doubt on this point, must first decide on that issue. It is also in this way that Danish as well as Swedish writers have inter-

[1] The present author's study in the Danish language *Kvalifikationsproblemet i den internationale privatret*, Copenhagen 1954, pp. 213–14.

[2] *Ibid.*, pp. 124 ff.

[3] Cf. Borum, *Personalstatutet*, 1927, p. 499, *Lovkonflikter*, p. 119, and *U.f.R.* 1949, p. 1049 ØLD.

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preted the rule. Thus, Borum[4] argues that the question whether there exists a valid marriage between the child's mother and the man who is alleged to be the father must be decided according to the law which governs the question whether they have entered into a valid marriage both as far as the conditions and the form of marriage are concerned. This means, according to Danish law, the *lex loci celebrationis;* yet, if one or both parties were domiciled in Denmark when they entered into marriage, one must also examine whether the marriage is voidable under the Danish Marriage Act secs. 42–44. If the marriage then turns out to be deficient in a way which makes it voidable, Borum argues that it must be left to the law of the domicile of the father to decide whether the child of such a "marriage" is nevertheless legitimate. By no means all countries regard—as Denmark does—a child born in a marriage which is voidable as being born in wedlock. In some countries, e.g. France (*Code civil* art. 201) and also England after the Legitimacy Act of 1959 entered into effect, children born of a voidable marriage are considered legitimate only if at least one of the spouses was in good faith as to the validity of the marriage (a so-called putative marriage).

Similarly, the Swedish author Hult[5] argues that in Sweden the preliminary question concerning the validity of the marriage must be decided according to Swedish conflict of laws rules which deal with the question when a marriage, both substantively and formally, is validly concluded. If the marriage is valid according to these rules the children must be considered to have been born in wedlock, even if the national law of the husband (Sweden adheres to the principle of nationality) at the time of birth of the children does not recognize the validity of the marriage. Hult furthermore argues that even if the marriage is not valid according to Swedish conflict of laws rules the child is nevertheless to be regarded as born in wedlock if the national law of the husband at the time of the child's birth recognizes the legitimacy of the child—whether this recognition results from the fact that the law in question regards children born in void or voidable marriages as legitimate or from the fact that the national law regards the marriage as valid.

[4] Borum, *Personalstatutet,* pp. 498 ff.

[5] Cf. Ph. Hult, *Föräldrar och barn enligt svensk internationell privaträtt,* 1943, pp. 61 ff. Se also W. Michaeli, *Internationales Privatrecht,* 1948, pp. 210 ff., and H. Karlgren, *Kortfattad lärobok i internationell privaträtt,* 3rd ed. 1966, pp. 138 ff., who both adhere to Hult's theory.

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However, it may be questioned whether the judge ought in all cases concerning legitimacy of children to apply the conflict of laws rule just mentioned and, thereby, have recourse to the law of domicile of the husband (respectively his national law). This rule has been formulated only for the situation where the man in the case at bar did not deny that he was married to the mother of the child, but denied that he was the father of the child. In such a case the judge has to decide according to rules, corresponding to the Danish *pater est* rule, provided by the law of domicile of the husband (his national law) at the time when the child was born.

If, on the other hand, the defendant does not deny that he is the child's father but questions the child's status in so far as he argues that there was no valid marriage between him and the child's mother, there is much to be said for another solution: instead of applying the previously mentioned conflict of laws rule concerning children born in wedlock the judge should apply only the conflict of laws rule relating to the valid contraction of marriage. If—after such examination—the marriage proves to be valid, the case is decided.[6] Assume, on the other hand, that the marriage was invalid, e.g. because the rules of form prescribed by the *lex loci celebrationis* have not been respected, or because it is voidable according to the *lex loci celebrationis* or when one of the spouses was domiciled in Denmark at the time of the marriage, possibly, according to Danish law. In that case the judge will have to decide—according to the law which provides for the invalidity or the voidability of the marriage—whether or not children of such a relationship nevertheless are to be regarded as legitimate. By using that law the effect is that all children of such a "marriage" acquire the same status, whereas the strict application of the law of domicile (or, as in Sweden, the national law) of the husband may lead to different results if the husband has changed his domicile (or nationality) between the births of two (successive) children.[7]

[6] If a polygamous marriage is valid according to the *lex loci celebrationis* a Danish judge should not invalidate it because of *ordre public* if the question concerns the legal status of children born in such a marriage, cf. Borum, *Lovkonflikter,* pp. 76 f., and Hult, *op. cit.,* p. 63. Only if the spouses, or one of them, were domiciled in Denmark, may the marriage be invalidated as contrary to sec. 42 of the Danish Marriage Act; but then the children are, nevertheless, regarded as legitimate under Danish law.

[7] German wrtiers used to suggest the application of the law of domicile of the husband in such cases (cf. Borum, *Personalstatutet,* p. 115, and Wolff, *Das internationale Privatrecht,* p. 213); nowadays, however, a new theory

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In the two situations that now were described no preliminary question ever arose as to the application of conflict of laws rules. In the first case, where the defendant's capacity as father alone was contested, the judge had first, before applying the conflict of laws rule concerning children born in wedlock, to establish that there was a marriage; but as this was never contested there was no preliminary question, properly so called. It is, to the judge, rather a fact put forward during the case. If, on the other hand, the defendant not only contests that he is the father of the child but also questions the validity of the marriage, then the judge must first, before he can apply the conflict of laws rule concerning children born in wedlock, establish whether there has been a valid marriage. This must, of course, be decided according to the *lex loci celebrationis*. If the marriage is then regarded as valid, the question whether the defendant is to be considered as the child's father must be decided according to his personal law. If, on the other hand, the marriage is invalid or voidable according to the *lex loci celebrationis,* the judge has to consider, in the first instance, whether children of such an invalid marriage are considered to be legitimate by the *lex loci celebrationis*. If this is the case, the judge must be able to apply the conflict of laws rule with regard to children born in wedlock in so far as the legitimacy is concerned. If, on the other hand, the *lex loci celebrationis* does not recognize the legitimacy of children born of a void or voidable marriage, it is impossible to apply this conflict of laws rule, and the judge must then, as far as the question of paternity is concerned, apply the conflict of laws rule which governs the paternity of children born out of wedlock.

When the judge proceeds to the interpretation of the connecting factor of his conflict of laws rule he rarely encounters any preliminary questions. If, however, the connecting factor consist in a person's nationality—although this is not often so in Danish conflict of laws—such preliminary questions may arise, e.g. concerning the legitimacy of a child. According to the general rule that every state decides, autonomously, what persons are to be recognized as its nationals, all such preliminary questions must be solved according to the rules of the state concerned, the conflict of laws rules of that state inclusively. Thus, these situations con-

advocates that the status of the children should be determined according to the law of "Ehenichtigkeit", cf. Balogh, *op. cit.*, p. 169; Kegel, *op. cit.*, pp. 270 f. and 307; Soergel-Siebert, pp. 741 and 824, and Raape, *Internationales Privatrecht,* pp. 343 f.

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stitute exceptions from the general rule that preliminary questions concerning the application of a conflict of laws rule must be solved according to the law which is indicated by the conflict of laws rules of the *lex fori*.

III. In the international discussion there are few writers who have treated the above-mentioned problem concerning preliminary questions in the application of a conflict of laws rule. Most of the discussion has dealt with preliminary problems that may arise in the application of a *foreign substantive law* which as indicated by a conflict of laws rule governs the main issue. A striking example of this is that the foreign *lex causae* in a successional matter provides that the deceased's spouse is to inherit. Then there could possibly arise a question as to whether there has been a valid marriage between the deceased and the person who claims to have been his spouse or whether the marriage had been dissolved before his death by divorce or separation. Another example is the contracting of marriage when conditions of entering into marriage have to be ascertained according to a foreign law.[8] Then, a preliminary question may arise whether one of the spouses has validly been divorced from his former spouse, i.e. whether a foreign divorce can be recognized.

Melchior and Wengler assume in their basic treatises that such preliminary questions should, as a rule, be solved according to the law which is indicated by the conflict of laws rules of the *lex causae*. Both these writers recognize, however, that, in certain cases, exceptions may be made from this rule. Raape, on the other hand, argues that the judge, in considering these questions, should apply the conflict of laws rules of the *lex fori* and thus consider the preliminary questions separately. In his latest writings, however, he has allowed certain exceptions from this rule. Most authors who have dealt with the problem appear to have taken the first or the second view exposed here,[9] but some writers

[8] When a marriage is contracted in Denmark, the conditions of marriage are usually never ascertained under a foreign law as Denmark follows the principle of the *lex loci celebrationis*, i.e. applies Danish law. If one of the spouses is a Scandinavian who has not been domiciled in Denmark for two years the conditions of his marriage may, however, be examined according to his own national law by virtue of the Nordic Convention on Marriage (1931), art. 1. Questions of recognition of foreign divorces may, naturally, also arise before Danish authorities.

[9] Apart from Melchior and Wengler the following writers adhere to the *lex causae* theory: Robertson, Wolff, Gihl, Lagarde, Jagmetti, Neuhaus and Eek. Among those who, like Raape, advocate the *lex fori* theory are Balogh, Maury, Madsen-Mygdal, Niederer, Pålsson, Rigaux, Kegel and Hoogstraten.

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have taken an intermediate position, arguing that it is impossible to establish any general rule and that it ought to be left to the judge to find a suitable solution in each specific case.[1]

Finally, Nussbaum has argued that there is only an apparent problem; in practice one would never have to face such questions.[2] It may be admitted that it is only rarely that we come across the "pure" problem, as this would presuppose the presence of the following three conditions:

1. *The* lex causae *is a foreign law.* If the case, regardless of certain foreign elements, is to be adjudicated according to substantive rules of the *lex fori,* then there can be no problem, as the judge will have no choice but to apply the conflict of laws rules of his own country.

2. *The connecting factor of the foreign conflict of laws rule must indicate another country than does the connecting factor of the domestic conflict of laws rule.* Otherwise it will, irrespective of which conflict of laws rule is applied, be left to the substantive rules of the same country to solve the preliminary questions, and in such a case there is no need to choose between the conflict of laws rules.

3. *The substantive rules of the country indicated by the conflict of laws rules of the* lex fori *must deviate from the substantive rules indicated by the conflict of laws rule of the* lex causae. If the substantive rules of the two countries are identical it is obviously of no importance whether the judge chooses the law of one country or that of the other.

These conditions are, obviously, seldom fulfilled; and there is little case law. But it is not justifiable to presume that the problem would never arise in practice. Some examples will show this.

In its judgment of February 20, 1953,[3] the Landgericht of Cologne considered the question whether a child born out of wedlock by a German mother was legitimated by the subsequent marriage of the mother to a Belgian officer. The marriage took place in Germany before an administrative officer of the Belgian forces. According to the Promulgation Act of the B.G.B., art. 22, the question of legitimation of a child born out of wedlock is to be solved according to the national law of the father, thus, in the

[1] Thus, cf. Breslauer, Lewald, Makarov, Dicey-Morris and Louis-Lucas.

[2] Nussbaum, *op. cit.*, pp. 105 f. Cf. also Rigaux, who puts forward a similar view. This is probably also what makes Eek refer to the problem as a "show-off piece", *op. cit.*, p. 177.

[3] *IPRspr* 1952/53, p. 360, cf. *Revue* 1955, p. 112, comments by Wengler.

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specific case, Belgian law. According to the *Code civil belge,* art. 331, such children are legitimated by the subsequent marriage between their parents, if the parents before or at the time of the marriage recognize them, which had happened in this case. The question was, however, whether there was a valid marriage. According to German law this was not the case, as the form of marriage, according to the Promulgation Act of the B.G.B., art. 13, subsec. 3, is governed exclusively by German law and this law (cf. German Marriage Act 1946, sec. 11) recognizes only the validity of a marriage performed before German civil authorities. According to Belgian law (*Code civil,* arts. 88 and 89), however, the marriage was valid, even though it had been contracted in Germany, as one of the spouses was a member of the Belgian armed forces. Even though there was no valid marriage under German law the court held that the children in question had been legitimated by the subsequent marriage.

In this case the preliminary question concerned the validity of the marriage. If it had been examined in the light of the conflict of laws rules of German law it would have been void (*Nichtehe*) and the children would have retained their illegitimate status. The Cologne Court, however, decided the case according to the conflict rules of the *lex causae* which was competent to regulate the main issue (Belgian law). The marriage was valid and the children legitimated by the marriage.[4]

Another example can be found in a case decided by the Swiss Supreme Court.[5] An Italian citizen, Caliaro, had married a Swiss woman. She had subsequently obtained a divorce before a Swiss

[4] In a judgment of September 18, 1954—published in *IPRspr* 1954/55, p. 341, and in *Clunet* 1958, p. 208, comments by Wengler—the OLG Hamm had to adjudicate in a similar case. A Spaniard had married a German woman before German civil authorities. By this woman he had previously had a child born out of wedlock. According to Spanish law a child is legitimated by the subsequent marriage of the parents, but the present marriage was invalid under Spanish law as there had been no ecclesiastical wedding. It was, however, valid under German law. The situation as to the validity of the marriage was thus the reverse of that in the example just mentioned concerning the Belgian citizen. The Hamm Court also held that the child had been legitimated, expressly rejecting the rule applied by the Cologne Court in the Belgian case and found that the preliminary question should be settled according to German conflict of law rules (the Promulgation Act of B.G.B., art. 13). But the two judgments need not be considered incompatible; see further below.

[5] Judgment of the Bundesgericht of November 11, 1954, in *Entscheidungen des schweizerischen Bundesgerichtes,* vol. 80 I, p. 427, in *Revue* 1957, p. 52. (comments by Wengler), and in *Schweizerisches Jahrbuch für internationales Recht* 13 (1956), p. 237 (comments by Pierre A. Lalive).

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court and had reacquired her Swiss citizenship. Caliaro then married another Swiss woman in London and the main issue before the Swiss Supreme Court was whether this second marriage was valid. Such a question has, under Swiss conflict of laws rules, to be decided according to the national law of each of the spouses at the time of the marriage. As far as Caliaro was concerned this would mean Italian law. According to Italian law it is a prerequisite for a valid marriage that the person in question shall not have been married before (*Codice civile,* art. 86) and thus there arose a preliminary question as to whether Caliaro's previous marriage had validly been dissolved by the divorce. The Swiss Supreme Court decided this question according to Italian law, which does not recognize any foreign divorces involving Italian nationals. The Supreme Court found, consequently, that Caliaro was not competent to remarry as long as his first wife was alive, as, under Italian law, he was permanently bound by this marriage. This result was not thought to be incompatible with Swiss *ordre public,* even though a Swiss court had delivered the divorce decree.[6]

Finally, a hypothetical example: a married Danish man permanently resident in England, has an illegitimate son; he acknowledges that he is the child's father. After having obtained a divorce from his wife he marries the mother of the child in 1955 and a few years later the family moves to Italy. At his death he leaves property in Denmark and, in accordance with the Danish Probate Act it is left to a Danish court to divide this property between the heirs. As the latest domicile of the deceased was Italy the court will have to apply Italian rules of succession in the matter. According to Italian law a child who has been

[6] There are some German cases concerning the present problem, i.e. whether a foreigner who has obtained a divorce by a German judgment may remarry in Germany although his national law does not recognize the divorce. Formerly (e.g. the KG judgment of March 13, 1911, in *Zeitschrift für internationales Recht* 1913, p. 331), courts tended to allow a new marriage to be contracted by applying the principle of *ordre public.* Later, however, courts appear to have favoured the opposite view, see e.g. KG judgment of October 17, 1930, in *IPRspr* 1931, p. 128, and judgment of OLG Hamburg of August 5, 1955, in *IPRspr* 1954/55, p. 262, also published in *Revue* 1957, p. 50, with comments by Wengler. Among those who question this later approach we may mention Ernst Rabel, *The Conflict of Laws,* 2nd ed., vol. 1, 1958, pp. 559 f., and Kegel in Soergel-Siebert, p. 726 with references. To remove any remaining doubts the German Commission on the Law of Marriage has proposed the adoption of a rule that in case a marriage has been dissolved by a German judgment, each party is permitted to marry again even if the judgment is not recognized outside Germany, cf. *Vorschläge und Gutachten zur Reform des Deutschen internationalen Eherechts,* 1962, pp. 1 and 12 f.

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legitimated by marriage inherits from its father—but if there is any doubt as to whether the child was legitimated by marriage the Danish court will have to decide on this preliminary question. According to the conflict of laws rules of Danish law (the *lex fori*) this question has to be decided by the law of domicile of the father at the time of the marriage, i.e. by English law, which, at the time, did not recognize legitimation of children by subsequent marriage of its parents if one of its parents was married to another person at the time of its birth.[7] If, on the other hand, the Danish court applies the conflict of laws rules of the *lex causae,* i.e. Italian law, it will have to apply the national law of the father at the time of the contracting of marriage, i.e. Danish law; thus, the son will be regarded as legitimated by marriage. In this context we may note that Italy does not recognize the principle of *renvoi.* Consequently, an Italian judge applying an Italian conflict of laws rule would disregard the fact that Danish law refers the question to English law.[8]

Wengler is one of the main representatives of the school which holds that the judge ought to solve preliminary questions by applying the law indicated by the conflict of laws rules of the *lex causae.* In dealing with this problem[9] he at first examines the question why foreign law should be applied in suits with international elements. He argues that the real reason why foreign law ought in certain cases to be applied is that by applying foreign law in suits implying elements related to other countries, we may achieve an "international harmony of laws" ("uniform solution"); this would mean that courts in countries where the suit may be brought will all reach the same result, as they will all apply the substantive rules of the law of the same country. It is unnecessary to argue that such a "harmony of laws" is desirable —especially as the parties will then know beforehand their situa-

[7] By the Legitimacy Act of 1959 the rule was changed so as to provide that a child is legitimated even if one of its parents has committed adultery.

[8] If the Dane had settled in Germany instead of Italy the preliminary question would have been solved in the very same way whether one had applied the conflict of laws rules of the *lex fori* or those of the *lex causae.* In both cases we arrive at English law. The German conflict of laws rule of the Promulgation Act of B.G.B., art. 22, refers, it is true, as does the Italian rule, to the national law of the father; but German conflict of laws accepts the reference from Danish law to English law as the law of domicile at the time of the marriage.

[9] Cf. Wengler in *Z.A.I.P.R.* 1934, pp. 196 ff. See also his later article in *Revue* 1952, pp. 595 ff., and 1953, pp. 37 ff., as well as his lectures in *Recueil* 104 (1961–III), pp. 354 ff.

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tion in law. Wengler is obviously aware that at present it is not possible to achieve such harmony, as each country provides its own conflict of laws rules; but he holds that in formulating rules on conflict of laws legislators should be guided by what he calls the "principle of economy", i.e. reducing the number of possible conflicts to a minimum.[1]

Considering the choice between the conflict of laws rules of the *lex fori* or those of the *lex causae* Wengler argues, by analogy, that there can be no doubt as to the priority of the conflict of laws rules of the *lex causae;* these appear to be the ones best adapted to promote the international harmony of laws. As a rule, the result of such priority will at least be that in an actual litigation the decision of the court will not differ from a decision by a court in the country which provides the substantive law that is to govern the main issue. The application of the conflict of laws rules will also contribute to the effect that courts in other countries will decide in a similar way. On the other hand, the application of conflict of laws rules of the *lex fori* would increase the number of possible conflicts. This latter fact is for Wengler the main reason why the judge ought to consider the preliminary question according to the system of law indicated by the conflict of laws rules of the *lex causae*.

Wengler does not, on the other hand, disregard the fact that the application of conflict of laws rules of the *lex causae* will contravene what he calls the "harmony of laws with regard to substance", but which could perhaps more appropriately be termed the "national harmony of laws". This means that the courts of one country deal with a question in the same way whether the question arises as a main issue of one suit or as a preliminary question in relation to one or another main issue which is governed by a different system of law. Thus, the question of the validity of a marriage may arise before a court as a main issue which according to the conflict of laws rules of the *lex fori* should be solved under the law of country A. The validity of the same marriage may, however, also present itself as a preliminary question, e.g. in a succession suit or in a suit concerning legitimacy. It could then well happen that the conflict of laws rules of the *lex fori* provide that these two main issues shall be considered according to the rules of country B or the rules of country C. The national harmony of laws can obviously be achieved by solv-

[1] Cf. Borum, *Lovkonflikter*, p. 35.

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ing questions according to the conflict of laws rules of the *lex fori*. For in that case the questions will be solved according to the same substantive rules, irrespective of their character as main issues or preliminary questions. Wengler does not mean that the national harmony of laws is of the same importance as international harmony. But he recognizes that the application of conflict of laws rules of the *lex causae* may, in certain cases, lead to undesirable or even absurd results and in such cases the judge should be allowed to apply, as an alternative, the conflict of laws rules of the *lex fori*. It would carry us too far to analyse in detail such exceptional cases, especially as the criteria established by Wengler for such exceptional cases do not appear to be particularly well defined.[2]

Wengler is no doubt right in so far as the conflict of laws rules of the *lex causae* are better suited to promote the international harmony of laws than are those of the *lex fori*. The question is, however, whether Wengler's reasoning can justify the solution he recommends. By applying the conflict of laws rules of the *lex causae* we may in many cases achieve harmony between a decision arrived at in the country where the court is situated (country A) and a possible later decision by a court in the country of the *lex causae* (country B). But this presupposes that the court of country B agrees that its own law shall be applied to the main issue. One can never be certain that a court of another country will arrive at the same result as, here too, it depends on what connecting factors are considered relevant to the main issue by the conflict of laws rules of this country, i.e. whether the connecting

[2] Cf. Wengler in *Z.A.I.P.R.* 1934, pp. 213 ff., where he examines different types of situations. Melchior (cf. his *Die Grundlagen*, pp. 273 ff.) also recognizes that there may be occasions where the judge should apply conflict of laws rules of the *lex fori*, but he defines these cases in a different way from Wengler. According to Melchior's view there is a "main issue" when the case concerns the disputed legal situation or a "conceptually essential part" thereof. Thus, the validity of a marriage is a "conceptually essential" condition of the claim in actions concerning personal relations between spouses or marital property relations. This means, according to Melchior, that the question of the validity of the marriage in such a case must be regarded as a "main issue" which is to be decided according to the conflict of laws rules of the *lex fori* and not according to the conflict of laws rules of the law which is to govern the personal and property relationship between the spouses. Another example given by Melchior is that a "conceptually essential" condition of a claim for compensation because a right has been violated is that the plaintiff has this right. It appears, however, to be difficult to draw a line between what is a conceptually essential part of the main issue and what is not.

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factors suggest that the law of country B or the law of some other country shall be applied.[3]

Those favouring the *lex fori* theory attach paramount importance to the national harmony of laws. In his lectures at the Hague Academy Raape summarizes his views in the following words:

> Si une femme a été, du vivant du mari, sa femme légitime, si elle a eu tous les droits d'une épouse mais a aussi rempli fidèlement tous ses devoirs, deviendra-t-elle soudain, après la mort du mari, sa concubine, parce qu'un autre statut de conclusion du mariage, celui qui est indiqué par l'Etat du statut successoral, décide maintenant de la validité de son mariage différemment du statut appliqué jusqu'à présent? C'est un résultat impossible ... Ce qui a été lié antérieurement ne doit pas être séparé par l'application soudaine d'un statut différent. Le statut régissant la validité du mariage doit toujours être le même statut, *inter vivos et mortis causa*.[4]

Against this particularly eloquent support of the *lex fori* theory some writers have—in my opinion quite validly—argued[5] that it is only through a misunderstanding that some have believed that the judge who, by the application of a foreign legal rule, e.g. a rule relating to succession, is faced with a preliminary question as to the validity of a marriage also makes a decision on this question. If in such a situation the judge considers the problem in the light of the conflict of laws rules of the foreign *lex causae,* it only means that as a pure fact he establishes whether this marriage is valid or not under the *lex causae.* Even if, in a previous case where this question constituted the main issue, he established that the marriage was valid under the *lex fori,* he may now arrive at the result that the marriage is invalid under the *lex causae;* but this does not imply any inconsistency, as we are merely concerned with an examination of the validity of the marriage in relation to various systems of law.[6] Quite another question—which we shall

[3] Compare with this Hoogstraten, *op. cit.*, p. 217, and Lagarde, *op. cit.*, p. 467.

[4] Raape in *Recueil* 50 (1934–LV), pp. 492–93.

[5] Cf. Robertson in L.Q.R. 1939, pp. 572 ff.; Gihl, *op. cit.*, p. 149, and Jagmetti, *op. cit.*, p. 125.

[6] Pålsson attempts, at p. 155, to argue against the opinion put forward by me. He finds that it would lead to the following result: a previous decision —which has acquired legal force—taken in the country of the court in a case where the validity of the marriage was the main issue will not have greater "authority" than if the previous decision concerning the validity of the marriage had merely been a preliminary decision which, it is assumed, does not acquire legal force. To this I may observe that a decision possessing

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come back to later—is that the incongruence of the validity under different laws may in some cases lead to such absurd results, incompatible with justice, that the judge should be allowed to apply the *lex fori* as a subsidiary alternative.

Even though Wengler's reasons in support of the *lex causae* theory are hardly convincing—as I have explained earlier—I think it can be shown, in a different and more persuasive way, that *preliminary questions should, as a rule, be decided on the basis of the substantive rules of the system of law which is pointed to by the conflict of laws rules of the* lex causae *applicable to the main issue.* For the problem arises precisely because a foreign legal rule, which is to be applied as far as the main issue is concerned, states its object (the factual situation which shall entail certain legal effects) as a legal relationship or a specific legal status. It must then be more appropriate to leave to the substantive rules of the foreign legal system in question or to the rules of the country which is pointed to by the conflict of laws rules of the foreign legal system to decide whether that relationship or specific legal status was validly created, so that the substantive rule of the *lex causae* concerning the main issue may be applied. When the conflict of laws rules of the *lex fori* leave it to the judge to decide upon a matter according to the rules of a foreign legal system it is precisely the intention of the legislator that the case should, as far as possible, be adjudicated in the same way as by a judge in that particular foreign country. And, naturally, there can be no doubt that the foreign judge, by applying the legal rule (which from his point of view forms part of his own legal system), will consider the preliminary question raised by the legal rule according to the substantive rules of the legal system pointed to by the conflict of laws rules of his own country.

Opposing these views Pålsson[7] has argued that to ensure a "loyal" application of the foreign *lex causae* it would not be necessary to solve preliminary questions in the light of the conflict of laws rules of the *lex causae.* He submits that when the legislators of a foreign law on succession use the term "marriage" they really have in mind only what their own substantive law under-

legal force has, of course, full "authority" in all cases where the effects in law of the marriage are to be examined according to the substantive legal rules of the country of the court. Where, on the other hand, the validity of the marriage is a preliminary question to the application of the legal rules of a foreign law it is not contradictory that the previous judgment is not binding, as it merely states how the country of the court looks at the validity of the marriage.

[7] Pålsson, *op. cit.*, pp. 140 ff.

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stands by this concept. The conflict of laws rules of the law of succession may, however, point to some other legal system; consequently marriages which are valid under such other foreign legal systems would entail successional rights of the spouses even if such rules on marriage of foreign legal systems are radically different from the marriage statutes of the country which provides the law of succession. From these arguments Pålsson draws the conclusion that from the standpoint of legal policy there is no premeditated connexion between the effects in law—in this specific case rights to inherit—which under the law of succession follow from the concept of marriage, and the conditions which determine whether there is a valid marriage. From this it would then follow that the *lex causae* is not distorted, provided that the preliminary question concerning the validity of marriage is solved under the law indicated by the conflict of laws rules of the *lex fori*, instead of by the law indicated by the conflict of laws rules of the *lex causae*.

Dealing with such arguments we may, in the first place, state that in many cases the conflict of laws rules of the *lex causae* may demand that the validity of the marriage be examined according to its own substantive rules. Then we must admit that the connexion in "legal policy" which Pålsson is searching for is certainly there.

Secondly, I may point out that contrary to certain other supporters of the *lex causae* theory I do not include considerations of "legal policy" among reasons suggesting the priority of this theory. The reference in this context to such considerations is, in my opinion, really caused solely by a confusion of the preliminary question and the question of *substitution* (dealt with below under IV), which, as Pålsson himself recognizes, exists independently of the preliminary question.[8] Of course it is true that normally there is no premeditated congruence in "legal policy" when the conflict of laws rules on the contracting of marriage point to another law than the law of succession itself. On the other hand, it is obvious that a judge in the country which provides the law of succession will refuse to recognize that there is a marriage, in the sense contemplated by his own law of succession, if the concept of marriage under the law indicated by his conflict of laws rules is radically different from the institution of marriage under the marriage laws of his own country. In other words, the judge will in such a case refuse to *substitute* the foreign

[8] Pålsson, *op. cit.*, pp. 81 ff.

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institution of marriage for the preliminary institution of marriage of his own law of succession. The question of substitution may, furthermore, arise, if we adhere—as Pålsson does—to the *lex fori* theory, as it may happen that the concept of marriage under the law indicated by the conflict of laws rules of the *lex fori* cannot replace the concept of marriage under the substantive successional rules of the law of succession.

Thus, Pålsson's arguments do not seem to be very persuasive. Furthermore, other considerations may furnish additional arguments in favour of the *lex causae* theory. I have in mind here the doctrine of the *fragmentary character of legal rules* put forward by Ross.[9] By a legal rule Ross understands a rule which ties certain legal effects to "conditioned" circumstances (facts of law). He shows that many rules which are conceived as legal rules are mere fragments of such rules since the legislator, for technical reasons, has chosen to introduce an "intermediate concept" as a link between facts of law and legal effects ("conditioned circumstances")—a concept which is devoid of any meaning of its own or, as Ross puts it, is without any semantic reference. The technique implies that the "intermediate concept" is added as a "fact of law" in one part of the legal rule and as a "legal effect" in the other part. As an example of such an "intermediate concept" Ross mentions the concept of ownership. There are some legal rules which establish what conditions must be fulfilled before a person acquires in law the right of ownership, e.g. whether a person who has bought something becomes the owner in law. Futhermore, there is another set of rules which indicate what legal effects result from ownership, for example concerning real actions for the owner. By putting these sets of rules together we arrive at the legal rule properly so called, that is to say the rule which provides that a person who has bought a thing may reclaim it from a third party. From this it appears that we could leave out the "intermediate concept" of ownership.

Ross's theory implies that a rule which states that its object is a legally qualified concept merely constitutes a fragment of a legal rule properly so called. Such a qualified concept is identical with Ross's "intermediate concept", established only for practical reasons and replacing a set of factual—or, as Ross says, "conditioned"—circumstances; it is such circumstances which constitute

[9] Cf. Alf Ross, "Tû-Tû" in *Scandinavian Studies in Law*, vol. 1, 1957, pp. 137 ff., and *idem*, *Om ret og retfærdighed*, 1953, pp. 206 ff., and in *T.f.R.* 1954, pp. 253 ff. Cf. also Gihl, in *T.f.R.* 1950, pp. 152 ff., and 1955, pp. 28 ff.

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the real object of the rule and it is to such circumstances that the rule ties certain legal effects. The legislator has only for practical reasons (relating to the technique of formulation) chosen to use the legal concept as an abbreviated expression of certain factual circumstances. At the same time this means that where the foreign legislator had chosen another method—a technique probably more difficult to apply—by establishing factual circumstances as the object of the legal rules, no preliminary question would arise.[1] Then it may be clear that it is for the foreign legislator alone to decide what is to be understood by the legal concepts mentioned in a legal rule and what factual circumstances such a concept should cover. For example, if there were a foreign rule on succession providing that "the spouse of the deceased shall be entitled to inherit a third of the assets", then the legal concept "spouse" is an "intermediate concept" inserted for technical reasons relating to the formulation of the rule. Assume that the foreign legislator had instead inserted into the legal rule a full description of what—*in his view*—should be demanded of factual circumstances before a person can be qualified as the "spouse" of another. In such a case there does not seem to be any reason why the *lex fori* should intervene and displace the *lex causae* in favour of its own ideas as to whether the person in question is qualified as the "spouse" of the deceased.

So there does not appear to remain any doubt that preliminary questions as a matter of principle ought to be examined according to the rules of the *lex causae* or the system of law pointed to by the conflict of laws rules of the *lex causae*.

On the other hand, it may be admitted that the *lex causae* theory may in certain cases lead to results which, under the *lex fori,* appear absurd or unacceptable. The following example may show this:

A Greek citizen marries a Danish woman before the Danish civil authorities. The marriage is valid under Danish law. But under Greek law it is invalid, as a Greek citizen who belongs to the Greek Orthodox Church, may, according to art. 1367 of the Greek civil code, be validly married only by a priest of that Church. This also applies if the marriage is contracted abroad, even where the other spouse does not profess the same faith. Under Greek law a non-ecclesiastical wedding is regarded as a nullity.[2]

[1] Cf. Gihl in *T.f.R.* 1950, p. 153, and Neuhaus, *op. cit.*, pp. 241 f.
[2] On the Greek rule, see G. Maridakis in *Revue* 1952, p. 661.

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After having married in Denmark the couple reside in Greece. At the death of the wife a Danish Court of Probate proceeds to the division of her property in Denmark. According to Danish conflict of laws rules the successional rights to this property are to be ascertained according to the law of domicile of the deceased, i.e. Greek law, according to which the spouse is entitled to the estate as heir. The question is, however, whether the Danish court is to consider the man to be the "spouse" of the deceased. If the court applies the conflict of laws rules of the *lex causae* it must refuse to do so; but it appears to be unthinkable that in this case—when the marriage had validly been contracted in Denmark—the Danish court should arrive at such a result.

Melchior recognizes, as do Wengler and most other supporters of the *lex causae* theory, that such preposterous situations may arise. The problem is to establish in a clear way those situations where the conflict of laws rules of the *lex fori* should be given a priority over the conflict of laws rules of the *lex causae*.

In this connexion several theories have been put forward, but the criteria they suggest for a demarcation are generally too vague. An exception is, however, the theory expounded by Paul Lagarde.[3] He submits that one of the main reasons for the *lex causae* theory is that *lex fori* does not have any particular interest in the outcome. For it is expected that the main issue will be decided under a foreign system of law. If, however, the legal situation which constitutes the preliminary question is so closely connected with the country of the court that *its authorities have taken part in the creation of that legal situation,* the country in question has a predominating interest in the legal situation referred to. It may then insist on the application of its own law, whether or not this law is compatible with the rules of the *lex causae*. As examples of situations in law which in this way are connected with the country of the court, we may mention marriages, separations, divorces, adoptions, recognitions of paternity or judgments on paternity. The fact that one of the parties in a litigation is a citizen of or is domiciled in the country of the court does not, on the other hand, appear to provide sufficient ground for deviating from the main rule that the conflict of laws rules of the *lex causae* are to be applied.

Lagarde suggests, furthermore, that courts ought to follow the *lex fori* also when the legal relationship—which the preliminary

[3] Lagarde, *op. cit.*, pp. 480 f.

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question concerns—has, been linked to the country of the court in a more artificial way, for example when the rights and duties involved were constituted by a foreign judgment whereupon the country of the court has granted this judgment *exequatur*. On this point, however, I do not think that there are sufficient reasons for adhering to Lagarde's theory from the point of view of Danish law. The fact that a Danish court has, for example, recognized a foreign divorce decree does not necessarily mean that Danish courts have, without further examination, to rely on such recognition in a later case where the validity of the marriage arises as a preliminary question and the main issue is submitted to a foreign legal system.

What has been said may also explain why the German decisions of the Hamm Oberlandesgericht and the Cologne Landgericht mentioned in footnote 4, page 102, are not incompatible. In the case adjudicated by the Cologne Landgericht the marriage had not been celebrated before German authorities and here the Court followed the *lex causae* theory. In the Hamm Oberlandesgericht case, on the other hand, it was a question of a marriage contracted before German authorities and, consequently, the Court applied the *lex fori* theory.

It may be questioned whether the subsidiary application of the *lex fori* should be excluded where the foreign legislator chooses to indicate the object to which a legal rule is to apply not by denoting a legal concept but by describing the factual circumstances covered by the concept. Thus, if the Greek legal rule concerning succession mentioned above had provided not that the surviving spouse is the heir of the deceased but that a man and a woman enjoy mutual rights of inheritance subject to the conditions that if at least one of them is a Greek citizen and belongs to the Greek Orthodox Church they should have been married by a priest of this Church, there would, in such a case, be no preliminary question. But the court of the country may—when the marriage was contracted there in accordance with its rules—for reasons of *ordre public* disregard the specific conditions established by the Greek rule on succession and grant the spouse of the deceased the right of inheritance.

IV. Preliminary questions arise, as has been shown, when a substantive legal rule, according to which the main issue is to be examined, provides that a legal (preliminary) concept is a prerequisite for certain legal effects. By applying the conflict of laws

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rules of the *lex causae*—or, in certain cases, the conflict of laws rules of the *lex fori*—the judge will find the legal system which is to decide whether the factual circumstances which underlie a preliminary concept have validly come about, i.e. whether the "contents" of the concept have validly been realized; then there may arise a secondary problem, namely whether the legal concept of that foreign system of law has such a quality that it can replace the preliminary concept of the substantive legal rule of the *lex causae*. Such a question of substitution may, of course, also arise if the *lex causae* is the court's own national law, i.e., *lex fori*.

If the substantive legal rule thus links legal effects to a legal concept, e.g. marriage, the problem is whether the concept of "marriage" in the system of law which governs the question of validity of marriage is of such a kind that it can be subsumed under the term "marriage" in the substantive law of the *lex causae*. To view the matter from another angle, we are here concerned with the problem whether the *lex causae*, which may perfectly well be the law of the country of the court, should *recognize* marriages which are valid under a foreign system of law.

One famous example from French case law may throw some light on this problem. A case decided by the Cour de cassation in 1931, *Ponnoucannammalle* v. *Nadimoutoupoulle*,[4] concerned a man domiciled in India, a British citizen, who died leaving property in French Cochin China (Indo-China). Under French conflict of laws the question of succession should be decided according to French law, as the *lex rei sitae*. The deceased had in India validly adopted a child, although he previously had some children of his own marriage. The adopted child had died before the adopter but had left a son. The question was now whether this son could make any claims on the deceased's estate on the same footing as his natural children. According to the French *Code civil*, art. 356, an adopted child has the same right to inherit the adopter as has a child to the adopter born in marriage, but art. 344 provides that an adopter must not, at the time of the adoption, have any natural heirs. According to French law the validity of the adoption has to be decided according to the national law of the adopter, i.e. here according to Indian law. But even though this law recognized the validity of the adoption, the court held that the adopted child could not present valid claims to the deceased's estate because adoption in France, when the adopter

[4] *Clunet* 1932, p. 142, with comments by Jean Perroud, and *Sirey* 1931, I, 377, with comments by Niboyet.

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has natural heirs, is devoid of any legal effects relating to succession.

In this case the main issue was to be governed by the *lex fori*. There were only doubts as to whether the foreign adoption could be put on the same footing as a French adoption, which according to art. 356 of the *Code civil* gives the adopted child the right to inherit from an adopter.

The French case was originally thought to deal with a question of characterization,[5] but it is now generally recognized that it was really a question of substitution.[6]

The question of substitution is a matter of *interpretation* of legal rules. If the legal rule which is to be applied as far as the main issue is concerned uses the concept "adoption", it depends on a preliminary interpretation of the rule whether it only covers adoptions made in the country itself or could also be thought to cover foreign adoptions. Thus an English judge has assumed that the Adoption Act of 1950, which provides that an adopted child has the right to inherit from the adopter, applies only to adoptions made in England, Scotland and Northern Ireland.[7] This judgment has been severely criticized by a number of English writers[8] and has now been overruled.[9]

Generally, however, we may assume that the existence of a substantive legal rule which indicates that its object is a legal concept does not prevent this concept from also covering corresponding foreign concepts. When formulating the rule the legislator probably thought of the concept as understood in his own

[5] Cf. e.g. E. Bartin in *Clunet* 1932, pp. 5 ff.

[6] On this point note, in particular, the following works: Wengler in *Z.A.I.P.R.* 1934, pp. 148 ff.; H. Lewald, *op. cit.*, pp. 130 ff.; F. Vischer, *Die rechtsvergleichenden Tatbestände im internationalen Privatrecht*, 1953, pp. 44 ff.; Giorgio Cansacchi, "Le choix et l'adaptation de la règle étrangère dans le conflit des lois" in *Recueil* 83 (1953–II), pp. 151 ff.; F. Rigaux, *op. cit.*, pp. 446 f. and 450 ff.; J. Schröder, *Die Anpassung von Kollisions- und Sachnormen*, 1961, pp. 99 ff.; P. H. Neuhaus, *op. cit.*, p. 240, and F. A. Mann in *L.Q.R.* 1963, pp. 525 ff. But not all writers use the term "substitution"—which, it is assumed, was introduced by Lewald. Thus, Schröder refers to the problem as "Subsumtionsanpassung" and Mann as "the primary question of construction".

[7] Cf. Re Wilby (1956) P 174 and (1956) 1 AER 27.

[8] Thus, cf. Dicey-Morris, *op. cit.*, 7th ed. 1958, pp. 468 ff.; R. H. Graveson, *The Conflict of Laws*, 4th ed. 1960, pp. 184 ff.; G. C. Cheshire, *Private International Law*, 6th ed. 1961, pp. 442 ff.; G. H. Jones in *I.C.L.Q.* 1956, pp. 207 ff.; B. D. Inglis in *I.C.L.Q.* 1957, pp. 202 ff., and P. R. H. Webb in *Modern Law Review* 1956, p. 432; cf. also H. Peter Dopffel in *Z.A.I.P.R.* 1957, pp. 220 ff.

[9] Cf. Valentiné's Settlement (1965) Ch. 831 and (1965) 2 AER 226.

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country, but this cannot prevent courts from subsuming foreign concepts under the rule. Wengler takes the view that the preliminary concept of a substantive legal rule is a "frame concept" which merely indicates its possible contents.[1]

Obviously, we should not require that the foreign concept be for practical purposes identical with that used in the country which provides the applicable law. But, on the other hand, we should normally demand that the two concepts be "equivalent", i.e. that, albeit differences as to legal technicalities, they fulfil *the same function*. What degree of equivalence shall be demanded in each individual case may vary in practice, and it may also happen that a foreign concept is recognized in one connexion but not in another. Although there may be many differences in the form and effects of a marriage, "marriages" of most countries seem to have a core in common, inasmuch as they are monogamous marriages. And it also appears that Danish courts are inclined to consider any foreign monogamous marriage as equivalent to a Danish marriage.[2] Thus, Borum assumes, no doubt rightly, that courts in Denmark recognize a marriage which under the *lex loci contractus* could be entered into *solo consensu*,[3] as well as the *de facto* marriages which could be concluded in the Soviet Union before 1944.[4]

On the other hand, in the case of adoption there appear to be basic differences in different countries. Thus it is not clear whether a foreign adoption can be thought to be equivalent to a Danish one. The *Ponnoucannammalle* judgment is one example which shows these difficulties. Another example may be found in recent Dutch case law.[5] A Belgian citizen was killed in a road accident in Holland. The question of damages should be decided under Dutch law. According to art. 1406 of the Dutch civil code

[1] Wengler in *Z.A.I.P.R.* 1934, pp. 152 and 154.

[2] Cf. Borum, *Lovkonflikter*, p. 110.

[3] Borum, *Personalstatutet*, pp. 447 f., and *Lovkonflikter*, p. 110. Such marriages may still be concluded in some States of the U.S.A. (common law marriages); but note that this is no longer possible in the State of New York. See on such marriages Balogh, *op. cit.*, pp. 40 ff., and Rabel, *op. cit.*, pp. 241 f. The German Reichsgericht recognized a common law marriage, see *IPRspr* 1932, p. 23; and in France the courts are inclined to recognize such marriages, cf. H. Battifol, *Traité élémentaire de droit international privé*, 2nd ed. 1955, p. 495.

[4] Cf. Borum, *Familieretten*, vol. 2, 2nd ed. 1946, p. 13, and *Personalstatutet*, p. 445, note 1. Cf. Balogh, *op. cit.*, pp. 57 ff.

[5] Judgment of the Rechtbank Rotterdam of March 7, 1958, with comments in *Clunet* 1961, p. 868, by R. D. Kollewijn; cf. also *Nederlands Tijdschrift voor internationaal Recht* 1959, p. 199.

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only the deceased's spouse, children and parents are entitled to compensation. The deceased had adopted his nephew in Belgium and the question was whether the adopted child was covered by the term "children" in the Dutch legal rule. There is no doubt that a child adopted in Holland is covered by art. 1406, as a Dutch adoption, as well as a Danish one, under the law of 1956, is a "full" adoption disrupting all family ties. According to art. 348 of the Belgian *Code civil,* however, the adopted child remains, in law, in his natural family; hence, a Belgian adopted child is not, as is a Dutch one, put on an equal footing with the adopter's natural children. In view of these arguments the Court held that art. 1406 did not cover children who had been adopted in Belgium.

When facing the question whether a foreign legal concept is equivalent to the corresponding concept of the substantive rule of the *lex causae,* it may often be reasonable to demand that the foreign legal system provides for *corresponding legal effects* as those which the material legal rule of the *lex causae* ties to its concept. If, for example, we are concerned with the application of a rule according to which an adopted child has the right to inherit from the adopter we may, in order to recognize a foreign adoption as constituting right of succession, demand that the adopted child also has the right of inheritance under the law of the country in which the adoption was made. Similarly, the Danish Ministry of Justice requires that before a Danish divorce can be granted on the basis of a foreign decree of separation it must be ascertained that the foreign law recognizes the possibility of a divorce subsequent to separation, which is not the case, for example, under English law or under Italian law.[6] Provisions may vary concerning how much time must elapse before a separation can serve as a basis of a divorce, but such variations are, needless to say, of minor importance and do not carry much weight.

However, we cannot in all cases demand that the foreign legal system shall tie to its legal concepts legal effects which are the same as or similar to those arising from the *lex causae.* If, for example, the law which governs property relations between the spouses does not grant them any mutual right of succession, it can hardly be excluded that the spouse who lives longer will inherit from the spouse who dies, if the law which is to govern the question of succession of the deceased (and which does not

[6] Cf. Borum, *Lovkonflikter,* pp. 203 f.

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have to be the same as the one which governs the marital property relations) grants such mutual right of succession. When we make this distinction between the concepts "marriage" and "adoption", this appears to result from the fact that questions of succession constitute central problems in cases of adoption whereas in connection with marriage they are rather secondary.

From Danish case law we may point to the judgment of the Copenhagen Court of Probate published in *Juristens Domssamling* 1953, p. 75. The case concerned the estate of a Danish engineer who had died domiciled in Denmark. He had previously been married in England but had obtained an English separation order under which he had paid allowances to his wife for a number of years. She claimed to have successional rights; but the natural heirs protested, emphasizing that according to Danish law successional rights of spouses are extinguished in case of *separation*. The question was thus whether the English separation order could be subsumed under the expression *separation* in sec. 22 of the Danish law of 1926 concerning successional rights of spouses. The Court proceeded to a detailed analysis of the effects in law of an English separation order. It concluded, *inter alia,* that a separation order does not give a right to subsequent divorce, that the husband loses his right to inherit from his wife whereas the wife keeps her right to inherit from the husband, and that the separation automatically ceases to have effect if the spouses resume their marital life. The Court held in its reasons: "The question is whether an English separation order may be characterized as equivalent to a Danish *separation* for the purpose of applying sec. 22 of the Act of April 20, 1926, concerning successional rights of spouses. Even if an English separation order does not form any basis for a subsequent divorce and does not disrupt all marital successional rights and consequently presents such essential differences from a Danish *separation* that a Danish divorce could not have been granted under sec. 54 of the Law of Marriage on the basis of an English separation order, it is nevertheless appropriate to consider an English separation order as equivalent to a Danish *separation* for the purpose of applying sec. 22 of the 1926 Act." The Court also pointed out that one of the central features of separation, ever since its introduction, was not that it provided a basis for divorce but that it marked a discontinuance of marital duties and in this respect there were similarities between the English and the Danish concept.

I have dealt with this case at some length because it shows

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what attitude a judge should assume when he is confronted with a problem of substitution. He should, as the Copenhagen Court did, use a comparative method, in so far as he ought to proceed to a careful examination of the foreign concept as a whole and compare it with the concept of the *lex causae*.

In other instances Danish courts have had reason to deal with the question of substitution. Two decisions of the Maritime and Commercial Court concern the construction of the rule of limitation laid down in sec. 3, subsec. 6, of the Danish Bills of Lading Act, according to which the carrier is discharged from all liability unless suit is brought within one year after the delivery of the goods.[7] The Court has held that the claimant's right of compensation is maintained not only by a Danish lawsuit—although this would mainly be the case—but also by a lawsuit brought to court in Belgium, even though the court refused to try the suit because of clauses in the bills of lading providing for Danish jurisdiction.

In another case[8] where bunker coals had been delivered in Holland to two ships belonging to a Danish shipping company, the Maritime and Commercial Court considered whether the right of priority that Dutch law gives to suppliers to ships could be substituted for the preliminary concept "maritime lien" of sec. 269 of the Danish Maritime Code concerning the hierarchy of maritime lien and mortgages in ships. The Court found that the question whether the Dutch supplier held maritime lien in the ship should be decided according to the law of the place of the contract, i.e. under Dutch law, according to which—contrary to Danish law—a right of priority had been established in favour of the supplier. As Dutch rules on such priority showed that they were essentially different from Danish rules on maritime lien, the Court refused to regard the two concepts as equivalent.

As may be clear from what has been said, it is not possible to establish any general rules concerning the degree of equivalence in individual cases. But it may at least be suggested that one should not demand too much similarity between two concepts but should rather examine whether they are functionally akin.

[7] U.f.R. 1958, p. 684, and U.f.R. 1959, p. 414.

[8] *Sø- og handelsretstidende* 1950, p. 46, *Nordiske domme i søfartsanliggender* 1950, p. 77.

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