

THE INTERNATIONALISATION OF THE LAW OF PERSONS

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« The internationalisation of the law of persons » : this is a vast topic and we have to cover it in a short time, which is perhaps a wager lost in advance. However, we shall try to do so, having first traced the boundaries of a subject which requires some definition. Some of those boundaries seem to be dictated by the very context of this meeting

- *since this is a Colloquy on « current problems in the law of persons in the ICCS States », the study of the phenomenon of « internationalisation » will be confined to the aspects which are common to those States*
- *since, according to the Colloquy programme, questions such as registered partnership, the maternity and paternity of children born out of wedlock and adoption will be dealt with, we shall proceed on the basis that the concept of « law of persons » can or must be broadly interpreted so as to include the law of the family.*

It then remains to define more precisely what is meant by « internationalisation of the law » and here things are less clear. Taking a broad view, it can be said that the law becomes internationalised when its national particularities are lost or at least attenuated, and when the differences between domestic laws tend to become blurred. But in the latter case it is more appropriate to speak of « harmonisation », which can be the result of a more or less spontaneous progression of the various domestic laws towards a common state of evolution – what my colleague and very dear friend Alfred Rieg called harmonisation by evolution (L'Harmonisation européenne du droit de la famille, mythe ou réalité, Mélanges Von Overbeck, pp. 486 et seq.) – and also of the intervention in our field of international sources of law. This short presentation will be confined to this latter aspect of the matter, the internationalisation of the law of persons by virtue of the internationalisation of its sources. We shall try first of all to describe this phenomenon by analysing its causes (I) and then to identify certain of its consequences (II).

I. THE CAUSES

The first cause of the internationalisation of the law of persons is obviously to be found in the internationalisation of situations and legal relationships of a personal nature : greater mobility of persons, migratory flows, mingling of populations, etc. – all that is well known and is even tending to become commonplace.

The initial, classic response to the problems posed by these situations is provided by private international law and its rules on the conflict of laws. However, this response remains national, because private international law itself is national. And finally on top of conflicts between substantive laws there come conflicts between the conflict rules themselves. The latter conflicts can be resolved only by an agreement between States, that is to say an international convention, and so we see appearing a first variety of the internationalisation of the law of persons, deriving from the internationalisation of the private international law of persons.

here one can cite the numerous Hague conventions, those dating from the beginning of the century being very general (marriage, divorce, guardianship) and those concluded after the Second World War being more restricted in scope but more technical (maintenance obligations, protection of minors, celebration and recognition of marriages, etc.). One can also cite a sign of a future Community private international law of persons in the shape of the so-called « Brussels II » Convention of 20 May 1998 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters.

However, even if private international law is harmonised or unified by means of its internationalisation, it always leads at the end of the day – as a result of its very method, consisting of rules of conflict of laws – to an international situation being governed by a national law. That law may very well not be suited to the kind of problem to be resolved, so that it is necessary to create an ad hoc law, specially designed and drafted to apply directly to situations of an international character falling within the domain of personal status. This ad hoc law consists of the conventions on material or substantive private international law which, in their field of application, totally replace not only the Contracting States' rules of conflict of laws but also their domestic, internal law of persons.

here, we can cite the numerous ICCS conventions of this kind, or also some recent Hague conventions, such as the Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption.

Yet, the law of persons has also been internationalised as a result of a second factor, the consequences of which are much more far-reaching because it is going to affect purely internal situations as well as those having an external element. This factor is the internationalisation of fundamental rights. These rights affect the law of persons in very different respects, be it the right to respect for private or family life, non-discrimination on the ground of sex, rights of the child, etc. And these rights, which initially had been proclaimed in declarations or texts of a national origin or derived from general principles enunciated in national case-law, are today enshrined in international legal instruments having either universal scope, such as the Universal Declaration of Human Rights of 10 December 1948 or the United Nations Convention of 20 November 1989 on the Rights of the Child, or a regional nature, such as the European Convention on Human Rights. The sources of fundamental rights have thus been internationalised and, with them, those aspects of the law of persons on which those sources make a particular impact.

What are the consequences of this phenomenon of internationalisation sketched out above ?

II. CONSEQUENCES

The immediate and, moreover, desired consequence is obviously a measure of harmonisation, if not unification, of the law of persons, together with the technical and practical advantages which this can bring in its train, notably when international situations are involved. It is especially in this direction that the ICCS is endeavouring to work.

Beyond these primary effects, the internationalisation of the law of persons also brings about, more or less progressively and more or less imperceptibly, the expression of a certain unity of view on the fundamental issues of life in society and a certain socio-cultural solidarity that leads to the introduction of a community of law and civilisation. Clearly, all this is much to be welcomed.

On the other hand, however, internationalisation is also a source of problems, or at least questions, due to

- *the proliferation of these international sources, and the difficulty of incorporating them into national legal systems
see, for example, the much-debated case-law of the French Court of Cassation on the direct applicability of the New York Convention on the rights of the child.
or, again, the criticisms expressed by Yves Lequette in his course at The Hague (T. 246, 1994-II) on « private international law of the family confronted with international conventions »*
- *the inflexibility introduced by the sources into the law of persons and of the family, with a risk of blocking or at least retarding its evolution, which occurs much more easily when one remains at the level of domestic law alone. A convention cannot be modified in the same way as a law can be amended or case-law distinguished*
- *the scope of the sources, which is often difficult to gauge, and the uncertainty about the resulting legal rule : as has been shown in an ICCS study, what is there that has not been extracted from some Articles of the European Convention on Human Rights (notably Articles 8, 12, and 14) ; and who could have dreamt that Article 52 of the Treaty of Rome on freedom of establishment would have repercussions on the rules on the transliteration of family names (CJEC, 30 March 1993, Case C-168/91, Konstantidinis, Vol. 1, 1191) ? Besides, a tendency to litigate is at once encouraged, and this could « judicialise » the law of persons to an excessive degree. Will not a dispute relating to the law of persons finish by being considered as conducted without proper consideration if reliance has not been placed at least once on this or that international convention, together with Article 55 of the Constitution and then the threat of an application to the Strasbourg Court ?*

CONCLUSION

That being said, these difficulties are not insurmountable and these drawbacks are not major ones. It is perhaps inappropriate to insist on them at an event organised to celebrate the anniversary of an organisation one of whose statutory objects is, after all, « the drawing up of ... draft conventions aimed at harmonising [in the matter the law of persons] the provisions in force in the member States ». In any event, internationalisation is a fact, and that fact is there, even if some may find it unfortunate. The essential thing is to be aware of that fact, to act in such a way as to keep it under control and, each time that we advance down the road of the internationalisation of law in general and of the law of persons in particular, to weigh carefully the advantages to be gained against the price to be paid. This, it seems to me, is what the ICCS has done in its policy on conventions in recent years, and it is to be congratulated on that account.