

**DISCREPANCIES ARISING
OUT OF THE RUSSIAN-GERMAN CONSULAR CONVENTION
OF 1958**

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Adjustment (Anpassung / Angleichung) is an institute of Private International Law which means non-application or modified application of substantive rules of applicable law. The method is mostly used in German scholarly writing and court practice. The need for adjustment is usually generated either by a lack of rules 'Normenmangel' or by an abundance of norms (Normenhäufung). It occurs if the conflict of law rules refer to the applicability of substantive law pertaining to two or even more legal orders which, when applied together, produce a result which is either contradictory or which is unintended by any of the applicable legal orders. The need for adjustment is deemed to be justified by the doctrine for grounds, such as the requirement for unity of legal order, the requirement for elimination of normative contradictions which are sometimes logically untenable, etc. The modern approach to the need for adjustment is depicted as accidental discrimination which contradicts the principle of equality before the law. By relying on provisions contained in the Russian-German Consular Convention of 1958, the author demonstrates that any method of adjustment violates the right to a fair trial and vested rights as well.

Keywords: adjustment; accidental discrimination; equality before the law; the right to a fair trial; vested / acquired rights; ECHR.

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1. Introduction: The Purpose and Limits of the Work

The prevailing doctrine in Europe agrees on fundamental features and the purpose of using the adjustment. Adjustment (*Anpassung / Angleichung*) means the conscious non-application or the modification of applicable rules.¹ The need for adjustment is generated by the analytical method of Private International Law [hereinafter PIL].² In fact, the application of such an analytical method has,

¹ See Georg Dannemann, *Die ungewollte Diskriminierung in der internationalen Rechtsanwendung: Zur Anwendung, Berücksichtigung und Anpassung von Normen aus unterschiedlichen Rechtsordnungen* (= 78 Beiträge zum ausländischen und internationalen Privatrecht) 419 (Mohr Siebeck 2004) [hereinafter Dannemann, *Die ungewollte Diskriminierung*]; Jürgen Basedow, *Qualifikation, Vorfrage und Anpassung im internationalen Zivilverfahrensrecht*, in *Materielles Recht und Prozessrecht und die Auswirkungen der Unterscheidung im Recht der internationalen Zwangsvollstreckung: Eine rechtsvergleichende Grundlagenuntersuchung* 131, 151 (Peter F. Schlosser, ed.) (Gieseking 1992); Jan Kropholler, *Die Anpassung im Kollisionsrecht*, in *Konflikt und Ordnung: Festschrift für Murad Ferid zum 70. Geburtstag* 279, 282 (Andreas Heldrich et al., eds.) (C.H. Beck 1978) [hereinafter Kropholler, *Die Anpassung*].

² Basedow, *supra* n. 1, at 153; Dannemann, *Die ungewollte Diskriminierung*, *supra* n. 1, at 265; Bernd von Hoffmann & Karsten Thorn, *Internationales Privatrecht* (= 18 JuS-Schriftenreihe / Studium) 232 (with further references) (9th ed., C.H. Beck 2007); Jan Kropholler, *Internationales Privatrecht* 235 (6th ed., Mohr Siebeck 2006) [hereinafter Kropholler, *Internationales Privatrecht*].

as a consequence, that a uniform life event should be disassembled into separate components, whereby each of them is to be submitted to a different conflict-of-law rule. For this reason, it is not rare that rules stemming from different legal systems be applied to an international case. If the substantive rules of two or more legal orders invoked by conflict-of-laws rules of *lex fori* are not harmonized, a 'contradictory norms situation' (*Normenwiderspruch*) may occur.³

It is generally recognized today that all grounds generating an untenable substantive outcome in an international case, especially 'contradictory norms,' must be overcome.⁴ However, doctrinal concordance regarding when there is a need for adjustment and how to adjust does not go further than this. From this point on, all issues relating to adjustment are disputable, unstable and tinged with a lower or higher degree of arbitrariness.⁵

Since no legislator provides for adjustment, the problem is transferred to judges who are left to be guided by various doctrinal opinions. For this reason, the crucial question that arises is whether and to what extent it is possible to deviate from the constitutional demand that all judicial decisions must be rendered *stricti juris* only.⁶

Essentially, the whole doctrine of adjustment has the following deficiencies:

1) there is no clear answer as to in which cases (*Anpassungslagen*) judges must or may resort to adjustment: in fact, the adjustment doctrine has not succeeded *bis dato* in providing convincing reasons for precise determination of cases which require adjustment;

2) there is no convincing answer to the question, what are grounds, which would dogmatically justify the application of adjustment;

3) finally, one wonders, what the solution is for resolving situations where a final abhorrent substantive result is to be preferred.⁷ Since firmly established rules for fixing the cases which require the application of adjustment have never existed, one

³ Cf. Gerhard Kegel & Klaus Schurig, *Internationales Privatrecht* 307 (9th ed., C.H. Beck 2004). However, there is no unity in the doctrine regarding the real meaning of 'contradicting norms' and whether such cases must be resolved by adjustment. See also Georg Dannemann, *Accidental Discrimination in the Conflict of Laws: Applying, Considering, and Adjusting Rules from Different Jurisdictions*, 10 Yearbook of Private International Law 113, 131 (2008), available at <http://www.iuscomp.org/gd/accidental_discrimination.pdf> (accessed Dec. 6, 2015) [hereinafter Dannemann, *Accidental Discrimination*].

⁴ Dirk Looschelders, *Die Anpassung im Internationalen Privatrecht: zur Methodik der Rechtsanwendung in Fällen mit wesentlicher Verbindung zu mehreren nicht miteinander harmonisierenden Rechtsordnungen* 31 (with further references) (C.F. Müller 1995) [hereinafter Looschelders, *Die Anpassung*]; Kropholler, *Die Anpassung*, *supra* n. 1, at 282; Dannemann, *Die ungewollte Diskriminierung*, *supra* n. 1, at 341 ff.

⁵ Cf. Kropholler, *Die Anpassung*, *supra* n. 1, at 283, 284.

⁶ See, e.g., Art. 120(1) of the Constitution of the Russian Federation; Art. 145(2) of the Constitution of the Republic of Serbia (as of 2006); Art. 97(1) of the German Constitution; Art. 191c of the Swiss Federal Constitution of 1999 (as of 2011).

⁷ In such cases there is agreement in the doctrine that no one method is more correct than another. Cf. Max Keller & Kurt Siehr, *Allgemeine Lehren des internationalen Privatrechts* 454 (Schulthess 1986); Hoffmann & Thorn, *supra* n. 2, at 233; Kropholler, *Internationales Privatrecht*, *supra* n. 2, at 237.

must admit that there is a risk of arbitrary decision making. An equity judicial decision is in no case a *stricti juris* decision⁸. To decide in equity is, however, only allowed, if one explicitly and voluntarily waived the right to a fair hearing, by accepting, *e.g.*, the jurisdiction of an arbitration tribunal.⁹

In this sense, there have already been warnings in the doctrine¹⁰ that the application of adjustment implies the risk of arbitrary manipulation as regards both conflict-of-law rules and governing substantive law.

This work must be limited to the essentials. Firstly, one must shed light on cases which require adjustment (Ch. 2). Furthermore, one must clarify whether there is any dogmatic justification for applying adjustment (Ch. 3). Finally, it remains to determine the extent to which the application of adjustment interferes with vested rights (Ch. 4), in particular when they are protected under Art. 1 of the Additional Protocol No. 1 to the European Convention on Human Rights [hereinafter ECHR] (Ch. 5). All procedural questions are excluded.

2. Adjustment Cases

2.1. Basics

2.1.1. Lack of Norms and Abundance of Norms

The majority of doctrine agrees¹¹ that adjustment is linked either to 'a lack of norms' (*Normenmangel*) or to an 'abundance of norms' (*Normenhäufung*). Both cases could result in either a teleological or a logical contradiction with respect to the final substantive result of an international case. The clearest manifestation of cases requiring adjustment is 'existential contradiction' (*Seinswiderspruch*), in which the application of norms pertaining to one legal order necessarily excludes, as logically impossible, the application of norms of any other legal order invoked to be applied by the conflict-of-law rules of *lex fori*.¹²

⁸ Dirk Looschelders, *Anpassung und ordre public im Internationalen Erbrecht*, in Grenzen überwinden – Prinzipien bewahren: Festschrift für Bernd von Hoffmann zum 70. Geburtstag 266, 267 (Herbert Kronke & Karsten Thorn, eds.) (Giesecking 2011) [hereinafter Looschelders, *Anpassung und ordre public*] assumes that one must determine whether deviations from domestic cases are justified due to the international nature of the case in hand. The yardstick for this would be the substantive values of applicable legal orders.

⁹ See instead all Aleksandar Jakšić, *Arbitration and Human Rights* (= 59 Studien zum vergleichenden und internationalen Recht / Comparative and International Law Studies) 97 ff. (Peter Lang 2002) (with references to the case-law of the European Court of Human Rights).

¹⁰ Hoffmann & Thorn, *supra* n. 2, at 38. This admits also Dannemann, *Accidental Discrimination*, *supra* n. 3, at 130.

¹¹ Basedow, *supra* n. 1, at 151; Kropholler, *Die Anpassung*, *supra* n. 1, at 280; Klaus Schurig, *Kollisionsnorm und Sachrecht: Zu Struktur, Standort und Methode des internationalen Privatrechts* (= 23 Schriften zum Internationalen Recht) 234 (Duncker & Humblot 1981); Kegel & Schurig, *supra* n. 3, at 308 ff.; Hoffmann & Thorn, *supra* n. 2, at 231 ff.

¹² Schurig, *supra* n. 11, at 234.

When performing adjustment it is crucial that the substantive outcome of a case is not intended by any applicable rule¹³ or that 'the co-existence of two legal systems must not lead to a result that contradicts the identical intentions of both legal systems.'¹⁴ The 'intention' of applicable legal orders should be determined by comparing the outcome of international cases with identical cases connected only to one of the legal orders involved.¹⁵

In order to carry out such a comparison, one has to create a hypothetical, identical or comparable case with reference to a sole legal system. The aim of such a hypothetical construction is to examine what the substantive outcome of an international case would be if resolved as a purely domestic case.¹⁶

The doctrine offers no clear criteria for determining cases constellations which should be resolved by applying the method of adjustment. This is especially true of unilateral contradictory norms (*einseitige Normenwidersprüche*). So, for instance, Kegel includes unilateral teleological contradictory norms to the cone of cases requiring adjustment. According to him, such a contradictory substantive result may be tolerated if the purpose of the invoked German norm is not failed.¹⁷ In contrast to Kegel, Dannemann finds that such one-sided teleological contradiction does not represent a case requiring adjustment.¹⁸

This uncertainty is fastened through the adoption of hypothetical contradictory norms. This is the situation in which, due to *dépeçage*, a party has a claim which the other party could not invoke in an identical situation.¹⁹

2.1.2. *The Failed Purpose of a Norm*

In their excellent studies Looschelders and Dannemann expressed some new approaches to the issue. So, in order to make a preliminary assessment of cases requiring adjustment, Looschelders²⁰ examines whether the application of norms linked to two or more legal orders to a uniform life event provokes an outcome which misses the purpose of the substantive norms invoked. According to him, it is always necessary to adjust, if, *in casu*, the application of substantive law connected

¹³ Hoffmann & Thorn, *supra* n. 2, at 231; Schurig, *supra* n. 11, at 235; Dannemann, Die ungewollte Diskriminierung, *supra* n. 1, at 225.

¹⁴ Looschelders, *Anpassung und ordre public*, *supra* n. 8, at 266.

¹⁵ Hoffmann & Thorn, *supra* n. 2, at 231; Kegel & Schurig, *supra* n. 3, at 309, 310; Dannemann, Die ungewollte Diskriminierung, *supra* n. 1, at 164, 209.

¹⁶ Basedow, *supra* n. 1, at 152; Dannemann, Die ungewollte Diskriminierung, *supra* n. 1, at 164.

¹⁷ See Kegel & Schurig, *supra* n. 3, at 312; see also in this sense Looschelders, Die Anpassung, *supra* n. 4, at 121; Jochen Schröder, Die Anpassung von Kollisions- und Sachnormen 47 (De Gruyter 1961).

¹⁸ Dannemann, Die ungewollte Diskriminierung, *supra* n. 1, at 252, 263.

¹⁹ Regarding the meaning see Looschelders, Die Anpassung, *supra* n. 4, at 391 ff.

²⁰ See also *id.* at 114 ff.

to only one of the legal systems involved provokes an outcome which is unintended by either of the legal systems. Moreover, in such a case the purpose of the *lex fori* conflict-of-law norm is also failed.²¹

In order to determine whether the achievement of purpose of the substantive law is failed, Looschelders makes use of construing comparable national cases, *i.e.* cases which are linked to only one legal order.²² His *per se* complex formula is based on the comparison of a result obtained by applying norms linked to two or even more legal systems to an international case with an outcome, which could not have been reached if the case was subject to the application of norms of only one of the legal systems invoked. Therefore, there is a need to adjust, if the partial applicability of any of the legal systems invoked changes the situation governed by PIL interests to the extent that the purpose of substantive norms cannot be achieved.²³

Looschelders does not tell us on which criteria one should rely to determine whether the substantive norms invoked to be applied failed to attain their essential purpose. Besides, he fully accepts as tenable the 'deviations of lower degree' from the originally expected substantive outcome of an international case.²⁴ It remains, therefore, unclear, according to which criteria one should determine whether the substantive norm failed to achieve its purpose. This problem does not disappear even when the applicable substantive norm falls under *lex fori*, whereby its purpose should be interpreted and determined in view of this law.

The situation is even more difficult, if the domestic judge must interpret and reveal the purpose of norms pertaining to foreign legal orders. How one could conceive whether there has been a failure to achieve the purpose of a substantive norm, if the judge should resolve a dispute by applying the rules which allocate the burden of proof or if the foreign legislator provides, in the sphere of matrimonial property, *praesumptio juris* that both spouses living, for example under the communal property system, become co-owners of the property acquired.

2.1.3. Accidental Discrimination

It seems that Dannemann²⁵ has significantly narrowed the circle of cases requiring adjustment in comparison with the conventional doctrine of adjustment. According to him, cases which need adjustment arise only by accidental discrimination. This occurs when an international case is treated differently or unequally to a comparable purely domestic case, *i.e.* a case connected solely to one legal order. Besides, such

²¹ Looschelders, *Die Anpassung*, *supra* n. 4. at 125 ff.

²² *Id.* at 97.

²³ *Id.* at 97, 164.

²⁴ *Id.* at 115.

²⁵ About criteria for determining the cases which need adjustment *see further* Dannemann, *Die ungewollte Diskriminierung*, *supra* n. 1, at 155 ff.

an unequal treatment of an international case is not intended by any applicable rule.²⁶ So, if one follows Dannemann's sequence of thought, the detection of cases requiring adjustment matters only if the legislator wanted to treat international cases differently just because they are international.²⁷ Only in this last case is there an 'accidental discrimination' which, if not justified, requires adjustment.²⁸

Dannemann developed his theory also by relying on comparisons between international cases and purely domestic cases. According to him, however, the need for adjustment only arises when conflict-of-law rules of *lex fori* make reference to two applicable legal orders which would have the same intended substantive outcome at least about in part, if they were applied separately.²⁹ For example, the substantive rules of both legal systems invoked must agree that the surviving spouse would be given more than he / she receives by cumulative application of the matrimonial property statute and the inheritance statute.³⁰

Therefore, Dannemann's teaching is based on the comparison of the substantive outcome of an international case, which is produced by reference to the conflict-of-laws rules of *lex fori*, with the substantive result which would govern a hypothetical comparable domestic case. In cases in which the substantive outcome of the case is derived from the allocation of burden of proof, one must be even more hypothetical, in order to determine what the accurate substantive outcome would be for otherwise hypothetical case with no connection to any other legal order. Even Dannemann recognizes this to be the case when one encounters a legal gap in the applicable legal system.³¹ In such a case he wants to distance himself from the application of *lex causae* in order to determine autonomously what would be the predictable substantive mode of filling the gap in the applicable legal system.³²

Finally, Dannemann puts forward that his assessment proposes a new understanding of the conflict of laws.³³

²⁶ Dannemann, *Die ungewollte Diskriminierung*, *supra* n. 1, at 153.

²⁷ *Id.* at 193.

²⁸ The idea was primarily put forward by Egon Lorenz, *Zur Struktur des internationalen Privatrechts: Ein Beitrag zur Reformdiskussion* (= 6 Schriften zum Internationalen Recht) 60 ff. (Duncker & Humblot 1977). Lorenz opinions that the purpose of PIL is to ensure such an outcome of international cases which would comply with the principle of equality before the law.

²⁹ Dannemann, *Die ungewollte Diskriminierung*, *supra* n. 1, at 156.

³⁰ *Id.* at 175.

³¹ *Cf.* Dannemann, *Accidental Discrimination*, *supra* n. 3, at 130.

³² Dannemann, *Die ungewollte Diskriminierung*, *supra* n. 1, at 164.

³³ *Cf.* Dannemann, *Accidental Discrimination*, *supra* n. 3, at 113, 118.

3. Critique: The Application of the Russian-German Consular Convention of 1958 and Its Impact on Russian Inheritance and Family Law

The cases which require adjustment will remain, as long as there are different legal systems which are not identical. Even a reference to legal orders with the same roots ('Continental Law'), which contain almost negligible differences in substantive law, can lead to both a lack of norms or an abundance of norms and trigger a situation of contradictory norms. For example, if a Russian-German couple whose last place of habitual residence is Germany has a child and the Russian husband dies intestate,³⁴ German substantive law shall be applicable to the allocation of his real estate located in Germany, whereas Russian law govern succession of tangible assets.³⁵ Article 28 (3) of the Consular Convention³⁶ concluded between Germany and the former USSR in 1958³⁷ provides for a system of separated estate (*Nachlassspaltung*), i.e. the *lex rei sitae* is to be applied to intangible assets, whereas the conflict-of-law norms of the States that are party to the Convention govern the succession of movable property.

As to the tangibles,³⁸ Art. 25 of the Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche* [hereinafter *EGBGB*]) refers to the law of the State under which the deceased had his habitual residence at the time of death.³⁹ Hence, it refers to the Russian conflict-of-law norms law which accepts such a referral.⁴⁰

³⁴ Let us suppose that the he moved to Russia some time before his death and established his place of residence.

³⁵ Let us suppose that the estate of the deceased consists of a house located in Germany and savings deposited in a German bank.

³⁶ Konsularvertrag zwischen der Bundesrepublik Deutschland und der Union der Sozialistischen Sowjetrepubliken, v. 25.04.1958 (BGBl. II S. 233).

³⁷ The Russian Federation as the main successor state on the territory of the dissolved Union of Soviet Socialist Republics issued a Diplomatic Note on December 24, 1991, by which it stayed committed to international treaties of the former USSR (see Heinrich Dörner, in J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Einführungsgesetz zum Bürgerlichen Gesetzbuche / IPR. Artikel 25, 26 EGBGB (Internationales Erbrecht) Rn. 488 (13th ed., C.H. Beck 1995)). Therefore the said Convention of 1958 binds both Russia and Germany.

³⁸ The jurisdiction of German Courts to administer the whole estate located in Germany is given under § 343(3) of the Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* (*FamFG*)). See also Hannah B. Gesing, *Der Erbfall mit Auslandsberührung unter besonderer Berücksichtigung hinkender Rechtsverhältnisse* 81 (Peter Lang 2011).

³⁹ Gesetz zum Internationalen Erbrecht und zur Änderung von Vorschriften zum Erbschein sowie zur Änderung sonstiger Vorschriften (IntErbRVGEG), v. 29.06.2015 (BGBl. I S. 1042). In fact, the said article is identical to solutions set forth in the Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession, 2012 O.J. (L 201) 107.

⁴⁰ Article 1224(1) of the Civil Code of the Russian Federation (with the additions and amendments of February 20, August 12, 1996, October 24, 1997, July 8, December 17, 1999, April 16, May 15, November 26, 2001, March 21, November 14, 26, 2002, January 10, March 26, November 11, December 23, 2003) provides that succession relations shall be determined by the law of the country where the testator had his last place of residence.

On the other hand, German law governs all the matrimonial property issues.⁴¹ This being the case, the surviving spouse shall, in principle,⁴² receive her inheritance share increased by one quarter under § 1371(1) of the German Civil Code (*Bürgerliches Gesetzbuch* [hereinafter *BGB*]).⁴³

Hence, the combined application of German and Russian substantive law shall result in the surviving spouse receiving one half of the immovable property and three quarters of tangible assets.

If the Russian substantive law was the only law applicable to both issues, the surviving spouse would receive more, *i.e.* three quarters of both the immovable and movable property. If the spouses did not conclude a marriage contract, the surviving spouse, would receive half of the goods acquired during the marriage,⁴⁴ due to the existing legal presumption in Russian matrimonial property system on community of goods.⁴⁵ The residual, personal, property of the deceased will be administrated in equal shares to the surviving spouse and the child.⁴⁶

⁴¹ See Art. 15(1) which refers to Art. 14(1)(2) of the *EGBGB* (the law of the country of the last habitual residence of spouses, provided that one of them is still resident in the said country).

⁴² In principle, because there is neither consensus in the doctrine nor in the practice as to what the real meaning and impact of § 1371 *BGB* is. For example, the following questions remain unanswered: 1) should § 1371 be applied in a case in which the inheritance is governed by a foreign law; 2) how should one qualify the increase of a hereditary share: a) as a matter of matrimonial property law, b) as a matter of inheritance law, c) as a matter of both the inheritance and matrimonial property law (the so-called '*Doppelqualifikation*'); 3) in which cases, if any, should adjustment be applied? For more details see further Karsten Thorn, in Palandt *Bürgerliches Gesetzbuch* Art. 15 *EGBGB*, Rn. 26 (71st ed., C.H. Beck 2012) [hereinafter Palandt / Thorn]; Der Internationale Erbfall: Erbrecht, Internationales Privatrecht, Erbschaftsteuerrecht 54 ff. (Hans Flick & Detlev J. Piltz, eds.) (C.H. Beck 1999) [hereinafter Der Internationale Erbfall]; Kegel & Schurig, *supra* n. 3, 764; Looschelders, *Anpassung und ordre public*, *supra* n. 8, at 272, 273.

⁴³ According to prevailing practice and doctrine in Germany the norm contained in § 1371(1) is to be qualified as an issue pertaining to matrimonial property law (at least if the German law is not applicable to succession). See BGH, 13.05.2015 – IV ZB 30/14, NJW 2015, 2185; OLG Schleswig, 19.08.2013 – 3 Wx 60/13, NJW 2014, 88; *cf. also* Palandt / Thorn, *supra* n. 42, Art. 25 *EGBGB*, Rn. 25 (with references to different doctrinal opinions); Kegel & Schurig, *supra* n. 3, 853; Der Internationale Erbfall, *supra* n. 42, at 54–56.

⁴⁴ According to Art. 1150 of the Civil Code of the Russian Federation, the right of inheritance that the surviving spouse of the testator has by will or by operation of law shall not diminish the spouse's right to the portion of property gained during the period of marriage with the testator and deemed their common property.

⁴⁵ Family Code of the Russian Federation (with the amendments and additions of November 15, 1997, June 27, 1998, January 2, 2000, August 22, December 28, 2004, June 3, December 18, 29, 2006, July 21, 2007, June 30, 2008) provides as follows: 'The legal regime of the spouses' property shall be the regime of their joint property. The legal regime of the spouses' property shall operate, unless stipulated otherwise by the marriage contract' (Art. 33(1)); '[w]hen dividing the spouses' common property and delineating the shares in this property, the spouses' shares shall be recognized as equal, unless stipulated otherwise by the contract concluded between the spouses' (Art. 39(1)).

⁴⁶ According to Art. 1142 of the Civil Code of the Russian Federation, legal heirs of the first category are the children, spouses and parents of the testator. They inherit equal shares, except for the heirs who inherit by right of representation (Art. 1141).

One can argue that this is a clear case of abundance of norms, which must be eliminated by applying adjustment.⁴⁷ In contrast thereto, if one relies on the formula used by Dannemann, the present case does not represent a case requiring adjustment. Because, it assumes that the case needs adjustment only when the substantive law of two of the invoked legal orders match at least on one point. In our case, according to Dannemann, both substantive laws involved, *i.e.* the Russian and the German must contain an identical solution, *i.e.* that the surviving spouse should receive less than she would receive under the combined application of matrimonial property law pertaining to one and the inheritance law pertaining to the other legal order.⁴⁸

But that would not be the case. As demonstrated above, the consequence of exclusive application of Russian substantive law to both issues would be that the surviving spouse would receive more than she receives under the combined application of different legal systems. On the other hand, if the German law governs both the hereditary and matrimonial property issues, the surviving spouse would receive less than she receives in the case of combined application of German and the Russian law.⁴⁹

Therefore, there is a need to carry out the adjustment,⁵⁰ since the surviving spouse receives less than she would receive if there were no discrepancies as regards the substantive contents of both the legal orders involved.⁵¹

All this confusion in the area of adjustment is deeply rooted in the methodology of conflict of laws. The role and structure of conflict of law rules differ significantly from the substantive law.⁵² A conflict-of-law rule is not intended to decide a case on its merits. In contrast thereto, the substantive norm decides the case itself.⁵³

The task of PIL consists of determining, clarifying and coordinating jurisdictions of different legal systems,⁵⁴ even the civilizations.⁵⁵ PIL carries out this task by using the

⁴⁷ Cf. Hoffmann & Thorn, *supra* n. 2, at 232; Kegel & Schurig, *supra* n. 3, at 310; Kropholler, *Internationales Privatrecht*, *supra* n. 2, at 237.

⁴⁸ Dannemann, *Die ungewollte Diskriminierung*, *supra* n. 1, at 175.

⁴⁹ By applying the German law, the surviving spouse would receive half of the estate. See § 1931(1) in connection with § 1371(1) *BGB*.

⁵⁰ The adjustment would not be necessary if the inheritance share of the surviving spouse would be equal under both Russian and German law. See BGH, 13.05.2015 – IV ZB 30/14, *supra* n. 43, § 7.

⁵¹ Kegel & Schurig, *supra* n. 3, at 262 (*Sollenswiderspruch*).

⁵² Cf. instead many Andreas Bucher, *Grundfragen der Anknüpfungsgerechtigkeit im internationalen Privatrecht (aus kontinentaleuropäischer Sicht)* (= 22 Schriftenreihe des Instituts für Internationales Recht und Internationale Beziehungen) 28 (Helbing & Lichtenhahn 1975).

⁵³ Schurig, *supra* n. 11, at 58.

⁵⁴ Henri Batiffol, *Aspects philosophiques du droit international privé* 19 (Dalloz 1956); Schurig, *supra* n. 11, at 53.

⁵⁵ Cf. Vincent Heuzé, *Preface*, in Khalid Zaher, *Conflit de civilisations et droit international privé* 13 ff. (L'Harmattan 2009).

conflict-of-law rules. The conflict-of-law rules have no specific addressees.⁵⁶ They are mandatory commandments addressed to the judge, which explain how the judge should determine the applicable law.

In order to be able to coordinate different legal systems, PIL fully respects the differences between various legal orders.⁵⁷ The respect for such differences is given when all involved legal systems invoked to resolve an international case are treated on an equal footing, as if the case was treated only within the realm of domestic law.⁵⁸

By taking into account the task and purpose of PIL, Kegel developed his theory of justice in PIL.⁵⁹ If foreign law is being applied, he ranks the justice in PIL (application of the local better law) before the substantive justice (application of *lex fori*, i.e. substantive better law). Thereby, the purpose of substantive law must be disregarded.⁶⁰ Kegel argues correctly,⁶¹ that it would be essentially wrong to determine applicable law by choosing such a law which brings the better substantive outcome.⁶²

In the last two decades of the last century, the above basic methodological premises of PIL were increasingly refuted or even rejected. It is assumed that there was only one indivisible justice.⁶³ Accordingly, by applying the conflict-of-law rules and resolving an international case one must search for the best substantive solution.

In fact, nobody has *bis dato* clarified, in a plausible way, the meaning of 'indivisible justice' and how the conflict-of-law rules can ensure substantive justice.

As far as the application of adjustment concerns, the postulate of indivisible justice requires that the judge must always take into account the contents of legal systems involved and finally revise the substantive result, when such a result is inconsistent with substantive values protected by *lex fori*. Such a treatment of international cases does not deviate much from either the '*lex fori* approach' or the

⁵⁶ Contrary Dannemann, *Die ungewollte Diskriminierung*, *supra* n. 1, at 366 who bases his theory of accidental discrimination on this presumption.

⁵⁷ Erik Jayme, *Menschenrechte und Theorie des IPR*, 1991–92 Internationale Juristenvereinigung Osnabrück 8, 10. In this sense also Dirk Looschelders, *Die Ausstrahlung der Grund- und Menschenrechte auf das internationale Privatrecht*, 65 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (RabelsZ) 463, 469 (2001) [hereinafter Looschelders, *Die Ausstrahlung*].

⁵⁸ Schurig, *supra* n. 11, at 53; Axel Flessner, *Interessenjurisprudenz im internationalen Privatrecht* 49 (Mohr Siebeck 1990); Ulrich Ehrlicke, *Auswirkungen der EMRK auf das deutsche Kollisionsrecht*, 1993 *Europäische Grundrechte-Zeitschrift* (EuGRZ) 113, 114.

⁵⁹ See further Gerhard Kegel, *Begriffs- und Interessenjurisprudenz im internationalen Privatrecht*, in *Festschrift für Hans Lewald zum 70. Geburtstag* 259, 259 ff. (Max Gerwig et al., eds.) (Helbing & Lichtenhahn 1953).

⁶⁰ Kegel, *supra* n. 59, at 268; cf. also Flessner, *supra* n. 58, at 48.

⁶¹ One can consider 'new American theories' in connection therewith. Their common goal is to apply *lex fori* to an international case.

⁶² Kegel, *supra* n. 59, at 270.

⁶³ Cf. Schurig, *supra* n. 11, at 22; Bucher, *supra* n. 52, at 27. Kegel also admits this (see further Kegel, *supra* n. 59, at 270).

'governmental interest approach',⁶⁴ on the basis of which the substantive laws of all the participating legal systems are subject to interpretation with the final aim being to determine which of these produces the better substantive outcome.

In order to be able to determine the better law for resolving an international case, one must invent a purely hypothetical domestic case that is as similar as possible to the international case. By doing this, all inherent aspects and features of PIL must be completely ignored. In contrast thereto, the fair treatment of an international case requires that its internationality must be taken into account. It is not treated fairly if one puts it on equal footing with a purely unequal national case.⁶⁵

The hypothetical equating of an international case with a 'comparable' national case is unknown to any legal system. On the contrary, in all national legal systems there are standards which conspicuously regulate international cases in a different way than comparable purely domestic cases. It is not only about the exercise of rights, which are reserved only for native citizens. Even case law develops the rules which treat internationally tied up circumstances in a different way from domestic cases in order to facilitate international legal transactions. A good example of this is the capacity of the State to conclude an arbitration agreement, in international cases but not in purely domestic cases.⁶⁶

Dannemann also admits that it would be allowed, from the point of view of the Constitution, to treat internationally tied up circumstances in a substantially different way from purely domestic cases.⁶⁷ Indeed, one must, for example, invoke connecting factors contained in conflict-of-law rules, such as citizenship or domicile, to guarantee the cultural identity of an individual in order to ensure the respect for private life as provided for in Art. 8 of the ECHR.⁶⁸

Moreover, when the European Court of Human Rights [hereinafter Eur. Ct. H.R.] examines whether there has been an unequal treatment of comparable circumstances within the framework of the application of the objective legal order of the ECHR, it does not rely on hypothetical comparison between the factual situations tied up

⁶⁴ See *thereabout also* Gerhard Kegel, *The Crisis of Conflict of Laws* (= 112 (1964-II) *Recueil des Cours / Collected Courses of the Hague Academy of International Law*) 95 ff. (Springer 1964); Henri Batiffol, *Le pluralisme des méthodes en droit international privé* (= 139 (1973-II) *Recueil des Cours / Collected Courses of the Hague Academy of International Law*) 79 ff. (Springer 1973); Edoardo Vitta, *Réflexions sur quelques théories récentes aux Etats-Unis d'Amérique en matière de conflits de lois*, 47 *Revue de droit international et de droit comparé* (Rev. dr. int. et comp.) 201, 201 ff. (1970).

⁶⁵ Cf. Bucher, *supra* n. 52, at 28.

⁶⁶ Cass. 2^e civ., May 2, 1966, J.C.P., 1966, II, 14798, note Ligneau.

⁶⁷ Cf. Dannemann, *Die ungewollte Diskriminierung*, *supra* n. 1, at 298 who refers to the decision of the German Constitutional Court (*Bundesverfassungsgericht*) (BVerfG, 10.01.1995 – 1 BvF 1/90, IPRspr 1995, 55). In accordance with the said decision, the reference to the foreign law, whose substantive rules are less favorable to the parties than those of *lex fori* represents no discrimination.

⁶⁸ Jayme, *supra* n. 57, at 10, 11.

internationally with purely domestic cases. Quite the contrary.⁶⁹ According to the case law of the Eur. Ct. H.R., a different treatment caused by application of the law of nationality or⁷⁰ of the law of place residence⁷¹ can be justified in certain conditions.

Therefore, the theory of adjustment starts from a false assumption. After that thesis, an international case should be arbitrarily converted into a comparable domestic case and treated indiscriminately as a purely domestic case.⁷² Thereby the purpose of PIL is missed.

4. Dogmatic Justification of Adjustment

4.1. Consideration of Interests in PIL

The majority of doctrine generally agrees that cases which require adjustment must be properly resolved. In contrast thereto, there is no consensus to the question of which rule it requires.

Kegel, for instance, relies on his teaching on consideration of PIL interests. In accordance with the difference invented by him between 'existential contradictions' (*Seinswidersprüche*) and 'normative contradictions' (*Sollenswidersprüche*) Kegel argues that partial application of two different legal orders to a case should produce a substantive result which should not deviate from the common contents of the legal systems applied *in casu*. In a few cases, the consideration of interests in PIL requires the judge to search for a just substantive outcome of a case. Thereby, however, both of the legal systems involved must intend to attain the just solution by applying the method of adjustment.⁷³

4.2. Unity of the Legal System

Schröder and Kropholler⁷⁴ want to justify the need for adjustment by the unwritten requirement for the unity of a legal system. This principle should be valid also in cases in which different legal systems are partially applied to an otherwise uniform international case. On this ground, the judge is not only entitled, but also obliged to eliminate situations which provoke the application of contradictory norms.

⁶⁹ Cf. Ehrlicke, *supra* n. 58, at 116 (with further references to the case law of the Eur. Ct. H.R.); Christoph Engel, *Ausstrahlungen der Europäischen Menschenrechtskonvention auf das Kollisionsrecht*, 53 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (RabelsZ) 3, 25 (1989) (with further references to the case law of the Eur. Ct. H.R.).

⁷⁰ *Gaygusuz v. Austria*, ¶ 46, no. 17371/90 (Eur. Ct. H.R., Sep. 16, 1996).

⁷¹ *Darby v. Sweden*, ¶ 33, no. 11581/85 (Eur. Ct. H.R., Oct. 23, 1990).

⁷² In this sense also Ehrlicke, *supra* n. 58, at 114. One can leave the question open if the principle of equality before the law also encompasses the right to unequal treatment (cf. Looschelders, *Die Ausstrahlung*, *supra* n. 57, 470 (with further references)).

⁷³ Kegel, *supra* n. 59, at 278.

⁷⁴ Schröder, *supra* n. 17, at 78 ff.; Kropholler, *Die Anpassung*, *supra* n. 1, at 279.

4.3. Equality before the Law

Looschelders⁷⁵ brought, for the first time, the principle of equality before the law guaranteed by the Constitution to the game. According to him, as already shown, is necessary to carry out adjustment in cases, in which the attainment of the purpose of a substantive norm has failed in either of the legal systems involved. The purpose of the conflict-of-law norm of *lex fori* is also missed here. All these, taken together, violate the constitutional principle of equality before the law. The principle of equality before the law reconciles the tension between material justice and justice in PIL.

Dannemann convincingly explained and elaborated the meaning of the principle of equal treatment before the law (Art. 3(1) of the German Constitution) and its impact on the necessity for carrying out adjustment.⁷⁶ According to him, the principles of equality before the law and the principle of the rule of law prohibit the acceptance of the 'accidental discrimination' caused by a combined application of norms pertaining to disharmonized legal systems.⁷⁷

According to Dannemann,⁷⁸ the reference of the conflict-of-law rules of *lex fori* to the applicable legal systems can cause the fragmentation of otherwise uniform international cases. In so far as the German legal system contributed to the fragmentation by making or accepting the reference to or from other legal systems, then the German legal system is responsible for such a fragmentation. In fact, the principle of equality before the law also encompasses the final substantive outcome. In this sense, Dannemann determines the cases of accidental discrimination which violate the principle of equality before the law.

There is no a general justification for different treatment of international situations in comparison with purely domestic cases.⁷⁹ The legal systems want to achieve the same result but fail to do so due to an inability to coordinate.⁸⁰

4.4. The Real Ambit and Scope of the Equality Principle

Whether the general principle of equality before the law may be extended so far as Dannemann states, is doubtful. The prevailing doctrine argues that general equality before the law forbids to treat that which is essentially the same unequally or to treat equally that which is essentially unequal.⁸¹ The question as to which facts

⁷⁵ Looschelders, *Die Anpassung*, *supra* n. 4, at 82, 83.

⁷⁶ The principle is provided in all modern European constitutions (*see, e.g.*, Art. 19(1) of the Constitution of the Russian Federation, Art. 21 of the Constitution of the Republic of Serbia and Art. 8 of the Swiss Federal Constitution of 1999).

⁷⁷ Dannemann, *Die ungewollte Diskriminierung*, *supra* n. 1, at 341, 352 ff.

⁷⁸ *Id.* at 357 ff.

⁷⁹ Dannemann also admits this (*see* Dannemann, *Accidental Discrimination*, *supra* n. 3, at 128).

⁸⁰ Dannemann, *Die ungewollte Diskriminierung*, *supra* n. 1, at 366.

⁸¹ Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* Rn. 438 (20th ed., C.F. Müller 1999); Christoph Grabenwarter & Katharina Pabel, *Europäische Menschenrechtskonvention* 421 (5th ed., C.H. Beck; Helbing Lichtenhahn; Manz 2012); Theodor Maunz & Günter Dürig, *Grundgesetz: Loseblatt-Kommentar Art. 3*, Rn. 331 (69th ed., C.H. Beck 2013).

are equal, similar, and comparable or even the same belongs to the most difficult areas of the principle of equal treatment.

In contrast to the starting points of the doctrine of adjustment, the question of unequal treatment, in the context of the application of the principle of equality before the law, does not appear in relation to unknown or hypothetical addressees, *i.e.* not *in abstracto*, but always in regard to specific circumstances. It is, therefore, to be concluded that the general principle of equality prohibits that an international situation be treated unequally, when compared *in concreto* with another essentially equivalent international case. The artificial construction, after which an international issue is compared to a domestic case, which is allegedly identical in its basic features, cannot be supported by application of the principle of equality.

The general principle of equality before the law ensures only the '*égalité en droit*,' but not '*égalité en fait*.'⁸² Already on this argument fails the assumption Dannemann's, that discrimination exists when an international case is treated differently, *i.e.* unequally, to an identical, but not comparable, domestic case.⁸³ One can even state that the equating an international case with a purely domestic case represents an arbitrary and meaningless logical construction.⁸⁴

It is, in fact, difficult, if not impossible, to determine the real scope of the equality principle. However, it is even not necessary for determining which cases require the application of the method of adjustment.

5. Vested Rights

The term 'vested right' should be understood as a right belonging so absolutely, completely and unconditionally to a person that it cannot be defeated by the act of any private person or subsequent legislation.⁸⁵ It is normally protected as a constitutional guarantee.⁸⁶ Scholars and case law distinguish between two groups of vested rights.⁸⁷ However, the distinction is irrelevant for the purpose of this work.

⁸² Maunz & Dürig, *supra* n. 81, Art. 3, Rn. 140.

⁸³ When it is asked, what the hereditary share of the surviving spouse would be, if there was no defragmentation of applicable law, *i.e.* combined application of matrimonial and hereditary statute, then such a question does not represent any comparison. There is nothing to be compared with. In such a case, one, in fact, tries to determine the main features of an international case. One wonders what the surviving spouse would get if all the characteristics of an international case were the same as those of a purely hypothetical domestic case. *Cf.* Maunz & Dürig, *supra* n. 81, Art. 3, Rn. 331.

⁸⁴ In this context, it is not clear how one should understand the opinion of Looschelders when he says that it would only be possible to adjust the dispositive of the substantive rule (see Looschelders, *Die Anpassung*, *supra* n. 4, at 168; see also Dannemann, *Die ungewollte Diskriminierung*, *supra* n. 1, at 431).

⁸⁵ See for the meaning instead all Merriam-Webster's Dictionary of Law 239 (Merriam-Webster 2011).

⁸⁶ Alfred Kölz, *Das wohlverworbene Recht – immer noch ein aktuelles Grundrecht?*, 74 *Schweizerische Juristen-Zeitung / Revue Suisse de Jurisprudence* 65, 66 (1978).

⁸⁷ *Cf.* Arthur Meier-Hayoz, 4 *Berner Kommentar: Kommentar zum schweizerischen Privatrecht: Sachenrecht, 1. Abteilung: Das Eigentum, 1. Teilbd.: Systematischer Teil und Allgemeine Bestimmungen* (Art. 641–654) 447 (5th ed., Stämpfli 1981); Alfred Kolz, *Intertemporales Verwaltungsrecht*, 102-II *Zeitschrift für schweizerisches Recht* 101, 178 (1983).

The concept arises, *inter alia*, in property and inheritance law. When the right, interest, or title to the present or future possession of a legal estate can be transferred to any other party it is called 'a vested interest.'

The courts in Europe have always protected the vested rights by referring to the constitutional property guarantee, namely with the consequence that an individual can always invoke such a right successfully either against any other third person or the State. If the vested right is subject to any kind of denial or significant curtailment, then its bearer has to be awarded compensation.⁸⁸ Thus, vested rights stand under the protection of the property guarantee prescribed in all the constitutions of European countries, as well as in the ECHR.

In PIL both the meaning of 'vested right' as well as its scope, *i.e.* especially transnational effects of such a right, are extremely controversial.⁸⁹ However, it is at least maintained that once a right is wholly created in a locale in the sense of the 'completed facts' (*abgeschlossene Tatbestände*), then its existence, but not necessarily its whole effects, should be recognized everywhere.⁹⁰ Hence, if a conflict-of-law rule refers to the applicable inheritance statute,⁹¹ then the applicable law tells us whether its substantive rules generate a valid inheritance right. If this is the case, then the so created right is deemed to be acquired or vested.⁹² From this flows the consequence that a vested right must not be defeated by subsequent application of rules of non-applicable law.

The majority of European legal systems provide that almost all of the bequests, including the property rights, vest immediately *ex lege* upon the death of the testator.⁹³

⁸⁸ Kathrin Klett, Verfassungsrechtlicher Schutz wohlerworbener Rechte bei Rechtsänderungen, anhand der bundesgerichtlichen Rechtsprechung (= 491 Abhandlungen zum schweizerischen Recht (ASR)) 10 (Stämpfli 1984).

⁸⁹ See *closer* instead of many Pierre Arminjon, La notion des droits acquis en droit international privé (= 44 (1933-I) Recueil des Cours / Collected Courses of the Hague Academy of International Law) 105 (Springer 1933); Horst Müller, Der Grundsatz des wohlerworbenen Rechts im internationalen Privatrecht: Geschichte und Kritik (= 26 Hamburger Rechtsstudien) 224 (Friedrichsen; De Gruyter & Co. 1935); Werner R. Wichser, Der Begriff des wohlerworbenen Rechts im internationalen Privatrecht (= 21 Zürcher Studien zum internationalen Recht) 9 (Schulthess Polygraphischer Verlag 1955); Kropholler, Internationales Privatrecht, *supra* n. 2, at 149; see especially Ralf Michaels, *EU Law as Private International Law? Re-Conceptualising the Country-of-Origin Principle as Vested Rights Theory 1*, 18 (Duke Law School Legal Studies Research Paper No. 122, August 2006), <http://papers.ssrn.com/abstract_id=927479> (accessed Dec. 6, 2015).

⁹⁰ Doctrine agrees thereon. Cf. instead of many Hoffmann & Thorn, *supra* n. 2, at 524; Kropholler, Internationales Privatrecht, *supra* n. 2, at 189; Kegel & Schurig, *supra* n. 3, at 666.

⁹¹ The referral of the conflict of law rules of *lex fori* to applicable law makes the traditional objection against the doctrine of vested rights meaningless. According to this traditional objection the term 'acquired right' is useless, without specifying a foreign law according to which a subjective right was effectively acquired. See in that sense Kurt Siehr, Internationales Privatrecht Deutsches und Europäisches Kollisionsrecht für Studium und Praxis 449 (C.F. Müller 2001); Kropholler, Internationales Privatrecht, *supra* n. 2, at 147; Müller, *supra* n. 89, at 223 ff.; Wichser, *supra* n. 89, at 73; Arminjon, *supra* n. 89, at 27, 32.

⁹² See Siehr, *supra* n. 91, at 450; Wichser, *supra* n. 89, at 89.

⁹³ See Art. 1100 of the Civil Code of the Russian Federation; §§ 1922, 1942(1) of the *BGB*; for the French law see *Les successions et les libéralités après la réforme: Loi du 23 juin 2006 n° 431* (Editions Francis Lefebvre 2006); Peter Tour et al., *Das Schweizerische Zivilgesetzbuch* 613, 614 (13th ed., Schulthess 2009).

So, at the time of the case of succession, an heir becomes the owner of inherited assets and, therefore, enjoys the protection of the property guarantee established in the Constitution. The property is usually protected against any withdrawal and impairment.⁹⁴ The same is true with respect to the property rights, which the spouses have acquired under the applicable regime of community of goods.

Hence, if an international inheritance case is partially subject to Russian (movables) and partially to German law (immovable), the heirs become owners on the basis of applicable Russian and German substantive law. Since German law governs all the matrimonial property issues, the surviving spouse shall *ex lege* receive her inheritance share increased by one quarter under § 1371(1) of the *BGB*. The final substantive outcome may indeed appear as unsatisfactory or inequitable. Disharmony between the inheritance and matrimonial statutes can indeed produce abhorrent results.

If the judge under such circumstances recognizes a case which justifies adjustment, then he must eliminate the discrepancy between contradictory norms. If he opts to use the 'conflict-of-law solution' in order to overcome an abhorrent substantive outcome,⁹⁵ he must consequently determine *ab ovo* the applicable law for the international case regarded in its unity. If he does so, then he artificially creates, a *conflit mobile*, although the facts on which the initial connecting factor was based, have not changed in the meantime.⁹⁶

Therefore, the elimination of cases requiring adjustment significantly affects the completed facts and results in the deprivation of vested rights.

Such a solution for eliminating contradictory norms or accidental discrimination runs counter to the 'interests of legal certainty' in PIL, which originates from the higher principle of good faith.⁹⁷ The last mandates due, loyal and trustworthy behavior of parties in mutual relationships. The artificial creation of a *conflit mobile* is certainly a breach of good faith. Because, if one willingly produces changes as regards the natural determination of applicable law and consequently denies the vested rights, then one sweeps aside the earlier warranties of the legislator on which the parties relied in good faith without any dogmatic justification.

Such considerations are to be found in several decisions rendered by United States and French Courts.⁹⁸

⁹⁴ Cf. instead of many Hesse, *supra* n. 81, at 193.

⁹⁵ More about this see by Looschelders, *Die Anpassung*, *supra* n. 4, at 195 ff.; Dannemann, *Die ungewollte Diskriminierung*, *supra* n. 1, at 437.

⁹⁶ See about the term instead all Henri Batiffol & Paul Lagarde, *1 Droit international privé* 371 (7th ed., L.G.D.J. 1981); Kropholler, *Internationales Privatrecht*, *supra* n. 2, at 187; Siehr, *supra* n. 91, at 444.

⁹⁷ See further Kegel & Schurig, *supra* n. 3, at 120 ff.

⁹⁸ See, e.g., *Goos v. Brocks et al.*, 117 Neb. 750, 223 N.W. 13 (1929). The court emphasized: 'It is a well-established rule that wherever the rights of individuals have vested under provisions of a treaty they will not be affected by its suspension or abrogation.' For more decisions of U.S. courts see Michaels, *supra* n. 89, 33, 36. Already CA Aix-en-Provence, March 21, 1882, *Clunet* 1882, 541. The court was of the opinion that *conflit mobile* should not interfere with already acquired rights (cited after Dannemann, *Die ungewollte Diskriminierung*, *supra* n. 1, at 9 (fn. 2)).

Any party can appeal the judicial decision and invoke an infringement of law due to a *conflit mobile* artificially and arbitrarily created by a judge. In addition thereto, any party to the proceedings may lodge a remedy with the Constitutional Court due to the violation of its property rights. As has already been said, vested rights can only be interfered with by legislator fulfilling of strict conditions provided by the law.⁹⁹ Therefore, the judge is not allowed to determine the contents of property rights or to bar or limit their enjoyment, even if he finds that the substantive outcome of an international case cannot withstand scrutiny from the viewpoint of substantive justice.

6. The ECHR and the Changes of Method in PIL

6.1. The Meaning of Discrimination

Dannemann states that accidental discrimination amounts to an infringement of human rights¹⁰⁰ and the rule of law. However, it seems to us that the situation is completely the opposite: the use of adjustment doctrine violates human rights and clearly runs counter to the provisions of the ECHR.

Firstly, it should be stressed that, according to prevailing doctrine, the ECHR does not require its member States to have conflict-of-law norms incorporated in any way whatsoever.¹⁰¹ In fact, the provisions of the ECHR would never have been independently drawn on to resolve an international case. The law of which country was applied *in casu* is quite irrelevant for the Eur. Ct. H.R. as long as the application of substantive law causes no violation of the ECHR's guarantees.

So, in the case of *Ammjadi*¹⁰² the complaint referred to the fact that the applicant was discriminated against by the application of common *lex nationalis* of the spouses to their matrimonial-property questions. It asserted that the material rules of applicable law disadvantaged it and, as a consequence, caused discrimination. The Eur. Ct. H.R. found that the application of common *lex domicilii* to the issue would indeed be preferable. Nevertheless the judges believed that the application of the

⁹⁹ See Enrico Riva, *Wohlerworbene Rechte – Eigentum – Vertrauen. Dogmatische Grundlagen und Anwendung auf die Restwassersanierungen nach Art. 80 des eidgenössischen Gewässerschutzgesetzes* 33 (Stämpfli 2007); see also Art. 14(1) of the German Constitution, Art. 35(1) of the Russian Constitution, Art. 58(2) of the Serbian Constitution (as of 2006).

¹⁰⁰ Dannemann, *Accidental Discrimination*, *supra* n. 3, at 125. He does not specify, however, which human rights norm would be infringed.

¹⁰¹ Patrik Kinsch, *Private International Law before the European Court of Human Rights*, 13 Yearbook of Private International Law 37, 38 (2011), available at <http://papers.ssrn.com/abstract_id=2171655> (accessed Dec. 6, 2015); Ehrlicke, *supra* n. 58, at 114; Looschelders, *Die Ausstrahlung*, *supra* n. 57, at 491; Louwrens R. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law* 156, 302 (T.M.C. Asser Press 2014).

¹⁰² *Ammjadi v. Germany (dec.)*, no. 51625/08 (Eur. Ct. H.R., Mar. 3, 2010).

conflict-of-law rules referring to the applicability of the law of common citizenship of the spouses did not violate any of the ECHR's provisions.¹⁰³

The application of Art. 14 of the ECHR is focused on autonomous interpretation of the term 'discrimination'.¹⁰⁴ It assumes that comparable circumstances are treated unequally. Hence, in order to depict an occurrence as discriminatory, one must find, firstly, whether the two cases are essentially the same or similar with respect to their crucial circumstances.¹⁰⁵ In addition, discrimination in the sense of Art. 14 of the ECHR means the equal treatment of cases which are different in their essence.¹⁰⁶

On the contrary, Art. 1 of the Additional Protocol No. 12 to the ECHR provides for the principle of general equality. It refers only to those rights which are guaranteed in national legal systems of States which are parties to the ECHR.¹⁰⁷ If the right to unequal treatment¹⁰⁸ of international cases which deviate from the treatment of purely domestic cases was protected at the national level, then the right to unequal treatment would fall under the protection of Art. 12 of the Additional Protocol No. 12.

The right to unequal treatment could be achieved by conflict-of-law rules. On the other hand, as already shown by explaining the case law of the Eur. Ct. H.R., the ECHR neither requires the existence nor determines the specific contents of conflict-of-law rules. Be that as it may, determination of discrimination requires analysis of whether comparable cases are treated unequally, but not how one can put, on an equal footing, an international case with a comparable domestic case and how, accordingly, it could be treated as a purely domestic case.

In any case, the different treatment of cases which are essentially different can be justified if, *inter alia*, the differentiation pursues a legitimate aim and if the unequal treatment complies with the principle of proportionality.¹⁰⁹

¹⁰³ *Id.* pt. D: 'Therefore, even though the decisiveness of the habitual residence might arguably be considered preferable with regard to pension rights, the decisiveness of a person's nationality cannot be considered to be without "objective and reasonable justification"'

¹⁰⁴ See further instead many Grabenwarter & Pabel, *supra* n. 81, at 520; Jens Meyer-Ladewig, Europäische Menschenrechtskonvention: Handkommentar Art. 14, Rn. 5 (3rd ed., Nomos 2011).

¹⁰⁵ Grabenwarter & Pabel, *supra* n. 81, at 523; Meyer-Ladewig, *supra* n. 104, Art. 14, Rn. 9.

¹⁰⁶ See Grabenwarter & Pabel, *supra* n. 81, at 523 (with reference to the standing practice of the Eur. Ct. H.R.); see especially *Milanović v. Serbia*, ¶ 93, no. 44614/07 (Eur. Ct. H.R., Dec. 14, 2010).

¹⁰⁷ See further instead all Meyer-Ladewig, *supra* n. 104, Art. 14, Rn. 3.

¹⁰⁸ Cf. in that sense Looschelders, *Die Ausstrahlung*, *supra* n. 57, at 468. The Eur. Ct. H.R. holds that the equal treatment of essentially unequal cases gives rise to discrimination (cf. in that sense Grabenwarter & Pabel, *supra* n. 81, at 524; Meyer-Ladewig, *supra* n. 104, Art. 14, Rn. 15), refers expressly to a right to an unequal treatment. One could rely on when the State does not treat unequally persons who are put in clearly different situations.

¹⁰⁹ See further instead all Grabenwarter & Pabel, *supra* n. 81, at 526 ff.

6.2. Violation of Art. 6(1) of the ECHR

Regardless of the position of the ECHR in the internal legal order of the member States, it is necessary that each member State fully complies with its obligations arising from the ECHR.¹¹⁰ National judicial decisions are, therefore, always subject to the scrutiny of the Eur. Ct. H.R.

If a national judge applies the method of adjustment in order to eliminate accidental discrimination, the following questions arise. Firstly, whether such a procedure violates the right to a fair trial (Art. 6 (1) of the ECHR). Such question may arise if, for example, the judge carries out the adjustment by modifying substantive norms of applicable law.

When adjustment is carried out by modifying the substantive rules,¹¹¹ one uses various arbitrarily construed formula, such as:

The judge should find out what hereditary share the applicable law would remit to the surviving spouse *in casu*, if an international case was subject only to hereditary, but not to both the hereditary and matrimonial-property statutes; or

one should grant the surviving spouse the average of that, which he / she would be granted, if both the matrimonial and the inheritance regime were uniformly governed by either one or the other applicable law.¹¹²

The right to a fair trial obliges national courts, *inter alia*, to give reasons for their judicial decisions.¹¹³ The Eur. Ct. H.R. does not review whether national courts correctly apply substantive national law.¹¹⁴ Nevertheless there would always be a violation of the principle of a fair trial, if national courts made an arbitrary decision.¹¹⁵ This would be the case if the national court modifies the otherwise applicable substantive law or if the court creates a new substantive rule by ignoring the applicable substantive law.

Finally, as demonstrated above,¹¹⁶ German courts: 1) do not have a uniform practice as to when they should apply a method of adjustment; 2) use at least three different methods of qualification and interpretation of § 1371(1) of the *BGB*; 3) sometimes apply the method of adjustment and sometimes do not do so in identical situations, especially when the Austrian law is applicable to succession,

¹¹⁰ See instead all Grabenwarter & Pabel, *supra* n. 81, at 4.

¹¹¹ More about that by Looschelders, *Die Anpassung*, *supra* n. 4, at 164 ff; Dannemann, *Die ungewollte Diskriminierung*, *supra* n. 1, at 444.

¹¹² Dannemann, *Die ungewollte Diskriminierung*, *supra* n. 1, at 284.

¹¹³ See instead all Ullrich Karpenstein & Franz Mayer, *Konvention zum Schutz der Menschenrechte und Grundfreiheiten: Kommentar Art. 6*, Rn. 102 (C.H. Beck 2012).

¹¹⁴ *Id.* Art. 6, Rn. 3 (with further references).

¹¹⁵ *Kin-Stib and Majkić v. Serbia*, ¶ 97, no. 12312/05 (Eur. Ct. H. R., Apr. 10, 2010).

¹¹⁶ See *supra* n. 42.

whereas the German law governs the matrimonial property regime; 4) do not have a uniform practice for adjustment. Hence, we cannot say that there is uniform court practice. Therefore, the inconsistent adjudication and judicial uncertainty entail a violation of the right to a fair trial.¹¹⁷

6.3. Violation of the Property Guarantee

Moreover, the application of any of the offered adjustment methods violates Art. 1 of the Additional Protocol No. 1 to the ECHR which contains the property guarantee. If the national court reduces, for instance, hereditary share or in any other way infringes the protected legal position of heirs, then the national court, in fact, interferes with the property interests of heirs protected by Art. 1 of the Additional Protocol No. 1.¹¹⁸ An heir is, therefore, always entitled to complain of the violation of his property rights, if he has already effectively acquired the property under the applicable hereditary statute.¹¹⁹

The need for non-application of contradictory substantive norms and the need for correction of inequitable substantive outcomes by using the method of adjustment cannot be regarded as justified from the point of view of the ECHR. Article 1 of the Additional Protocol No. 1 allows, *inter alia*, only such interferences with the proprietary positions, which are based on the law.¹²⁰ The institute of adjustment is not provided in any law, even if one interprets the term 'law' autonomously in the sense of the case law of the Eur. Ct. H.R.¹²¹

At this point it is impossible to resolve cases of accidental discrimination by adjustment, either by disregarding or modifying the conflict-of-law norms or by carrying out the corrections in applicable substantive law. Because, no national court is entitled to deprive heirs or spouses, who have acquired an effective property right under applicable law, of the right vested in them by the law. Neither, can such a right be impaired in any other imaginable way. If the national court, in spite thereof, does this, then it violates the property guarantee enshrined in Art. 1 of the Additional Protocol No. 1.

6.4. Return to the Theory of Acquired Rights: The Need for Changing the Method of PIL

The need to solve cases of accidental discrimination by applying the method of adjustment must also fail in cases in which the fragmentation of an international

¹¹⁷ See among many authorities *Vinčić and others v. Serbia*, ¶ 56, no. 44698/06 et al. (Eur. Ct. H.R., Dec. 1, 2009).

¹¹⁸ See also in that sense *Engel*, *supra* n. 69, at 15.

¹¹⁹ The standing practice of the Eur. Ct. H.R. (see *Inze v. Austria*, ¶ 38, no. 8695/79 (Eur. Ct. H.R., Oct. 28, 1987); *Zwierzyński v. Poland*, ¶ 64, no. 34049/96 (Eur. Ct. H.R., Jun. 19, 2001)).

¹²⁰ Art. 1(2) of the Additional Protocol No. 1 to the ECHR.

¹²¹ About the meaning of the term 'law' in the context of Art. 1(1) of the Additional Protocol No. 1 see instead all Grabenwarter & Pabel, *supra* n. 81, at 408.

case has, as a consequence, a 'limping legal relationship.'¹²² Considering the fact that the Eur. Ct. H.R. disregards the conflict-of-law rules, it turns¹²³ to the application or otherwise highly criticized and almost forgotten theory of acquired rights.¹²⁴ For example, the Eur. Ct. H.R. stated with respect to the adoption of a child which took place abroad in accordance with foreign law as follows:

a) the national law of a member State may not disregard a legal position which is validly created under the application of foreign law, if such an acquired right enjoys protection under the guarantee of respect for family life (Art. 8(1) of the ECHR);¹²⁵

b) an acquired right deploys its effects everywhere, if the parties have entered the legal transaction in good faith and if they could have legitimately expected that the right acquired abroad could be recognized in their home land;¹²⁶

c) the application of conflict-of-law rules has no preference over social reality. Their strict application cannot justify any limitation of the exercise of the guarantee for the respect of family life as set forth in Art. 8(2) of the ECHR.¹²⁷

Therefore, the judge is wholly deprived of any authority to solve conflicts by applying adjustment, if a subjective right is validly acquired in the law which is effectively applied to an international case.

¹²² See further Dannemann, *Accidental Discrimination*, *supra* n. 3, at 122.

¹²³ *Wagner & J.M.W.L. v. Luxembourg*, no. 76240/01 (Eur. Ct. H.R., Jun. 28, 2007); similarly *Negreptis-Giannis v. Greece*, ¶ 56, no. 56759/08 (Eur. Ct. H.R., May 3, 2011): 'Pour les besoins de la présente affaire, il lui suffit de constater que les autorités judiciaires américaines avaient émis un acte d'adoption et cet acte était censé produire des effets dans la vie quotidienne du requérant et de sa famille.'

¹²⁴ Cf. similarly Patrick Kinsch, *Recognition in the Forum of a Status Acquired Abroad – Private International Law and European Human Rights Law*, in *Convergence and Divergence in Private International Law: Liber Amicorum Kurt Siehr* 259, 260, 274 (K. Boele-Woelki et al., eds.) (Eleven Int'l Pub. 2010), available at <http://papers.ssrn.com/abstract_id=1743681> (Dec. 6, 2015); Etienne Pataut, *Le renouveau de la théorie des droits acquis*, in *Travaux du Comité français de droit international privé* (années 2006–08) 71, 80 (Édition A. Pedone 2010). As to the impact of the principle of 'country of origin' as vested right on the EU law see in detail instead all Michaels, *supra* n. 89, at 12 ff.

¹²⁵ *Wagner*, *supra* n. 123, ¶ 133 ('[T]he Court considers that the Luxembourg courts could not reasonably disregard the legal status validly created abroad and corresponding to a family life within the meaning of Article 8 of the Convention.'). *Negreptis-Giannis*, *supra* n. 123, ¶ 74 ('La Cour rappelle aussi que dans une affaire d'adoption à l'étranger mais avec des faits différents de ceux de l'espèce, elle a conclu que les juges nationaux ne pouvaient raisonnablement passer outre au statut juridique créé valablement à l'étranger et correspondant à une vie familiale au sens de l'article 8 de la Convention, ni refuser la reconnaissance des liens familiaux qui préexistaient de facto et se dispenser d'un examen concret de la situation . . .').

¹²⁶ *Wagner*, *supra* n. 123, ¶ 130 ('The first applicant therefore took steps in good faith with a view to adopting in Peru. As the applicant had complied with all the rules laid down by the Peruvian procedure, the court pronounced the full adoption of the second applicant. Once in Luxembourg, the applicants could legitimately expect that the civil status registrar would enter the Peruvian judgment on the register.').

¹²⁷ *Id.* ¶¶ 133 ('[T]he national authorities refused to recognise that situation, making the Luxembourg conflict rules take precedence over the social reality . . .'), 135 ('[T]he Court considers that the reasons put forward by the national authorities – namely, the strict application, in accordance with the Luxembourg rules on the conflict of laws, of Article 367 of the Civil Code, which permits adoption only by married couples – are not "sufficient" for the purposes of paragraph 2 of Article 8.').

7. Conclusion

The author shares the opinion of the prevailing doctrine that conflicts arising out of the contradictory norms, especially those which are logically impossible must be overcome. However, there is no magic wand being available to resolve the problem. The above analysis shows that the method of adjustment is in no way suitable for solving conflicts arising out of fragmentation of applicable law to an otherwise uniform international case. The method is above all unconstitutional. National courts must render their decisions *stricti juris*. Its application runs counter to the property guarantee enshrined in the ECHR. It also contradicts the standing practice of the Eur. Ct. H.R.

The application of methods of adjustment also entails the violation of the right to a fair trial. If the judge implements such a technique, then he decides, in fact, not only arbitrarily, but also *contra legem*. In any case, the consequence of application of adjustment is a violation of the property guarantee as provided in Art. 1 of the Additional Protocol No. 1 to the ECHR. That being the case, the aggrieved party is entitled to lodge a complaint before the Eur. Ct. H.R. with a highly secured prospect of success.

That is why the doctrine must look at other ways to resolve cases requiring adjustment.

Since the problem requiring adjustment is, in essence, a problem of characterization,¹²⁸ it seems to us that one must intervene in the phase of the genesis of the problem and prevent it by applying gradual characterization (*Stufenqualifikation*).¹²⁹

The *lex fori*¹³⁰ should not be applied as a remedy for resolving the international cases whose outcome is encumbered with substantive injustice. If the conflict-of-laws rules of *lex fori* have already referred to the applicable law and when the contents of such law has already been determined, the judge may not resort applying substantive law of *lex fori*, in order to correct the substantive outcome of the case. Because, substantive rights have already been validly acquired under applicable law and, consequently, enjoy protection under either the Constitution or the ECHR.

The attitude expressed by the Eur. Ct. H.R. which fully respects acquired rights by disregarding the conflict-of-law rules requires methodological changes in PIL.

¹²⁸ Kegel & Schurig, *supra* n. 3, at 308; Basedow, *supra* n. 1, at 153.

¹²⁹ For the meaning see instead all Michael Schwimann, *Internationales Privatrecht* 23, 25 (3rd ed., Manz 2001). Foreign legal figures which are unknown to *lex fori* require functional qualification.

¹³⁰ On the possible application of *lex fori* critical Dannemann, *Die ungewollte Diskriminierung*, *supra* n. 1, at 410.

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