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ЮРИДИКА ИЛИМДЕРИ

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Юаньи Вен

ЧЫР-ЧАТАК СОТ АКЫЙКАТЫ ЖАНА МАТЕРИАЛДЫК СОТ АКЫЙКАТЫ: МЫЙЗАМДАР ЧЫР-ЧАТАГЫНДАГЫ БИРГЕЛЕШКЕН ӨНӨКТӨШТӨР

Юаньи Вен

КОНФЛИКТНОЕ ПРАВОСУДИЕ И МАТЕРИАЛЬНОЕ ПРАВОСУДИЕ: СОВМЕСТНЫЕ ПАРТНЕРЫ В КОНФЛИКТЕ ЗАКОНОВ

Yuanyi Wen

CONFLICTS JUSTICE AND MATERIAL JUSTICE: THE COOPERATIVE COUNTERPARTS IN CONFLICT OF LAWS

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Коллизиондук укук жаатында чыр-чатактар менен байланышкан маселелер боюнча сот акыйкатына умтулуу көп себептерден улам рационалдуу жана негизделген болуп саналат, маанилүү болгон укукту тандап алуу маселесинен тарта мамлекеттер ортосундагы эл аралык жеке өз ара таасир этүү прагматикалык керектөөгө чейин. Ал укукту тандоонун эрежелериндеги айрым байланыштыруучу факторлорду колдонуп, чечимдин нейтралдуулугун белгилеп турат, ал эми материалдык акыйкаттык конкреттүү шарттарды карап чыгууну талап кылып, натыйжаларды баалайт. Булар бири биринен айырмаланса да, алар башынан коллизиондук укукта кызматашуу боюнча өнөктөштөр катарында катар жашап келет жана ар түрдүү методдор менен байланышкан ар кайсы маселелер менен алектенет. Коллизиондук укуктун өнүгүшү менен алардын статусу менен функциялары өзгөрөт. Коллизиондук сот акыйкаты мурдагыдай эле коллизиондук укуктун негизи болгон учурда , өзгөчө жергиликтүү маданият менен тарыхтын терең таасиринде болгон тармактарда, мамлекеттин зарыл кызыкчылыктарына ээ же эл аралык коомдоштуктун жалпы кызыкчылыктарын бөлүшкөн тармактарда коллизиондук укуктун негизи болгон учурда мыйзам чыгаруучулар ар түрдүү жолдору бар материалдык сот акыйкатынын багыты менен болгон колдонулуучу укукту тандоону каалашат.

Негизги сөздөр*: укуктук ченемдердин коллизиясы, чыр-чатактар сот акыйкаты, материалдык сот акыйкаты, коомдук тартип, сот, жеке укук, адилеттүүлүк, колдонулуучу укуктар*

В области коллизионного права стремление к правосудию по вопросам, связанным с конфликтами, является рациональным и оправданным по многим причинам, начиная от решения важнейшей задачи выбора права и заканчивая удовлетворением прагматических потребностей содействия международному частному взаимодействию между государствами. Он подчеркивает нейтральность решения, применяя определенные связующие факторы в правилах выбора права, в то время как материальная справедливость требует рассмотрения конкретных условий и оценивает результаты. Хотя они и отличаются друг от друга, они с самого начала сосуществуют в качестве партнеров по сотрудничеству в коллизионном праве и занимаются различными вопросами, связанными с различными методами. С развитием коллизионного права меняется и их статус и функции. В то время как коллизионное правосудие по-прежнему остается основой коллизионного права, особенно в тех областях, которые находятся под глубоким влиянием местной культуры и истории, в областях, имеющих важнейшие интересы государства или разделяемых общими интересами международного сообщества, законодатели предпочитают выбирать применимое право с направлением материального правосудия различными путями.

Ключевые слова: *коллизия правовых норм, конфликтное правосудие, материальное правосудие, общественный порядок, судья, частное право, справедливость, применимое право.*

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In the field of conflict of laws, the pursuit of conflicts justice is reasonable and justified for many grounds, ranging from the accomplishing the essential task of choice of law to meeting the pragmatic needs of promoting international private intercourses among nations. It emphasizes the neutrality of the solution by applying certain connecting factors in choice-of-law rules while material justice asks for the consideration on the specific conditions and values the results. Although they are different, they have been co-existing as cooperative counterpart in conflict of laws from the very beginning and deal with different matters involved through different methods. With the development of conflict of laws, their status and functions change as well. While the conflicts justice still remain the basis pursuit of conflict of laws especially in those fields deeply influenced by parochial culture and history, in areas with crucial interests of forum state or shared common interests of the international community, legislators prefer to choose the applicable law with the direction of material justice by various ways.

Key words: *conflict of laws; conflicts justice; material justice; public order; the judge; private law; justice; applicable law*

The compelling rationale behind private law lies in justice. Also, acting as the ultimate goal of judicial process, it contains requirements and standards originating within certain communities. As Friedrich Carl von Savigny points that the law has "attained a fixed character, peculiar to the people, like their language, manners and constitution,"[1,p.24] The concept of justice, especially in private law field, varies from different places and times in order to correspond to distinctive social situations and historical backgrounds. It also may change according to the different tasks and functions of certain legal subjects.*

Things become even more complex when we come to the field of conflict of laws* which particularly aims to deal with choice-of-law issues in transnational civil or commercial disputes through domestic rules. A tricky question appears naturally that what is the justice of the selection of applicable law among several equal jurisdictions shaped with various ideas of justice? Should the judge conduct with his or her habit like that in domestic cases? Or should he or she follow some new directions required by other ideas of justice? Answers to these questions reflects the basic philosophy of conflict of laws, which influence the frames and contents of choice-of-law rules.

However, conflict of laws is full of conflicts. Until now, the debate over the justice pertaining to conflict of laws is still ongoing and likely to continue into the future. Actually, confronted by emerging ideas of justice, conflict of laws has been rendered even more complicated and sophisticated. So far, the uniqueness of justice issue in the field of conflict of laws has been widely accepted. "Conflicts justice", as a novel term to other legal subjects, has been introduced and frequently used in academic PIL research (usually accompanied with "material justice"). Although it gains popularity in scholarship, there is lack of clear identification and explanation, which frustrates the ambitions to reduce the ambiguity of our subject. [2-9]. The "dismal swamp" [10] of conflict of laws is becoming even more mysterious with such "strange and incomprehensible jargon[s]."[10]

Therefore, a theoretical analysis focusing on unsolved questions concerning "conflicts justice" and "material justice" is necessary. This article will start with "conflicts justice" by exploring reasons and basis of its appearance from the review of the basic functions and features of conflict of laws. Then part II will focus on the changing forms and status of its counterpart, namely "material justice" during the historical development of conflict of laws, which will also reflect the changing relationship between these two ideas of justice within our subject. Finally, a detailed comparison between "conflicts justice" and "material justice" from various perspectives will be discussed in part III.

I. "Conflicts justice" as a distinctive justice of conflict of laws

Each legal subject is designed and developed with certain ideas of justice. Conflict of laws has been attached with the tag of "uniqueness", so dose its justice issues. Although not described as "conflicts justice" at the very beginning, the special part of justice considerations of PIL not only shaped the basic ideas and philosophy of multilateral choice of law theory, but also leaded to the birth and existence of our legal subject.

A. Requirement for a distinctive justice for conflict of laws

Like substantive justice for substantive law, formal justice for procedure law, conflict of laws, as a unique kind of legal rules, requires guidance from a unique kind of justice which complies with its features and characteristics for several reasons.

First of all, the lack of common authority and inevitable diversity in ideals of private laws of different communities make it clear that there will never be a unified concept of justice in private law all over the world[11]. Conflict of laws should adapt to the existence

* For example, the justice in tort law which emphasizes the corrective justice is different from that in contract law which designed according the idea of distributive justice. Also, *e.g.* difference also exists between substantive law and procedure law.

* In this paper, the terms "conflict of laws", "choice of law" and "private international law(PIL)" will be used synonymously.

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of the reality of "transnational communities of many kinds"[12].

Secondly, since the subject founder Bartolus came up with his conflict of laws theories around the thirteenth century, the primary function and task of conflict of laws has been located in solving the problems of conflicts of different legal systems, namely making the proper selection of governing law for foreign-related disputes. It is too unique to find its justification in any existing ideas of justice adopted and developed in other legal subjects which directly allocate rights and obligations issues.

Thirdly, the involvement of foreign state(s) breaks the ordinary two-angled-structure of private law litigations [court-litigants] and changes it into a three-angled-structure [court-litigants-foreign state(s)] in multistate private cases. Obviously, more unfamiliar difficulties showed up in the latter situations when the judges try to reach the balance of interests of all involved parties. Also, operating in a world constituted of independent sovereign nations, judges cannot adopt the normal comparing and measuring approaches which would seriously frustrate the principle of equity in international society as well as the efficiency of judicial process [13].

Fourthly, conflict of laws is a branch of national law system which aims to regulate international private disputes. On the one hand, being a part of domestic law, it should comply with the basic ideas of justice rooted in its own jurisdiction; on the other hand, as a branch of international law, it has to consider the cooperation among independent legal jurisdictions with different ideals of justice. Such combined essence adds more difficulty in balancing different justice requirements during the judicial process.

Fifthly, out of pragmatic needs of promoting international private intercourses among nations, conflict of laws has to make necessary compromises and equally treats all legal systems involved to some extent to maintain the basic order of international society. Thus, the notion of choice-of-law justice is independently developed with a natural preference for neutral standards and values without complete reliance on material ones.

Therefore, "the same degree of justice usually cannot be given in matters that concern more than one societies as is provided in matters that concern only one society and its legal order."[14]. Classical conflict of laws theories, perhaps due to the "juristic inevitability"[14] found in this legal subject, are strictly centered in accomplishing the primary goal of finding the governing law with a certain indifference to the result of multistate litigations, which also allows them to skip the problematic step of directly measuring interests of involved groups. In those theories, the selection of *lex causae* and application of the *lex causae* are treated as relatively independent steps in the judicial process of multistate cases. Conflict of laws only needs to focus on the former to accomplish its goal. Either starting with the forum rules and deciding their application ranges (Bartolus) or focusing on the facts of disputes and finding their naturally linked "seats" (Savigny), those theories basically aim to reach uniformity and foreseeability of application of legal rules by establishing objective connections between legal system and legal facts of certain cases or *vice versa*. Once the connection is affirmed, the applicable law is on the table. Most of the connections are established by relying on geographic factors with only one exception of the appearance of "odious statutes", [15,p.15] no more material issue is directly concerned during the selecting process. Because such is sues are supposed to be handled in the next step relating to the application of the governing law.

B. Creation and adoption of term "conflicts justice"

With the sober observation of such uniqueness in justice of conflict of laws, German professor Gerhard Kegel introduced the term "conflicts justice" to describe the "*specific justice of conflict of laws*" around the 1960s. "[j]justice demands an evaluation of interests." Also, "[t]he interests of order play a vital role in the determination of legal rules. In conflict of laws, moreover, there are special interests of legal order". In conflict of laws, there are interests of individual, of *commerce* and of *legal order*. Namely "the interest in substantive uniformity (homogeneity) of result" and "the interest in international (or interstate) uniformity of result" [14,pp.186-188]. His analysis proceeded from the angle of interests' protection and attributed the specialty of justice of conflict of laws to the existence of conflicts interests in multistate cases, which demands a corresponding "conflicts justice" as "distinguished from the justice of substantive law."[14].

According to Kegel, "conflicts justice is the aim of conflicts law" [14,p.201]. On the one hand, the ignorance of spatial connection and solely reliance on the substantive issues as same as that in dealing with domestic cases will lead to injustice in multistate cases. * On the other hand, "practical" criteria like spatial connection, instead of other fluctuating and unstable ones, should be

* Kegel points out that injustice will be caused if the judges only take the content of law into consideration. For example: Application of the substantively more just foreign law to decide the marital rights of a married couple who is temporarily living in the foreign country and intend to return to their mother country where the lawsuit is undergoing will lead to injustice. See [14], p.184.

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taken into consideration to establish a "not overramified" choice-of-law system[14,p.186]. Therefore, in the field of conflict of laws, "[w]hat is considered as the best law according to its content, that is, *substantively*, **might** be far from the best *spatially*." [14,p.184]. Thus, Kegel concluded that "traditionally, these are entirely distinct things: substantive law aims at the materially best solution, PIL [private international law] aims at the spatially best solution."[16]. Meanwhile, Kegel also admitted that "justice is really indivisible". "Conflicts justice" is not the whole picture of justice of conflict of laws. Substantive justice is also contained in conflict of laws but in a less important position. "Normally, conflicts justice has priority, and only exceptionally substantive justice" [14,p.185]. In other words, in Kegel's opinion, the term of "conflicts justice" refers to the unique part of the justice of conflict of laws which relies on considerations from a spatial perspective and is used as a counterpart of "substantive justice", which requires considerations of content of substantive laws.

After its appearance, the term vastly spread across Europe as a popular tool to scrutinize the choice of laws[17]. However, Kegel didn't give a direct definition of "conflicts justice" . Most of conflicts scholars frequently mention "conflicts justice" without definition or further explanation[2,4,5]. Only some of them had tried, among which the American scholar Simenon C Symeonides discussed to some extent the so called "more philosophical and less methodological dilemma"[18]. Inspired by Kegel, he mentioned:

"Should the selection be one of the proper law, i.e., the law that has the most pertinent connections to the case but without regard to the quality of the result it produces ('conflicts justice'), or should it be a selection of the proper result, i.e., a result that produces the same quality of justice in the individual case as is expected in fully domestic, non-conflicts cases ('material justice')?" [19,20].

He also simplified the aims under "conflicts justice" as "proper law «and "material justice" as "proper result" which were cited in many scholarly articles. [18,p.397; 21, p.246]. * Nevertheless the guidance and evaluation principles with reliance on geographic connections and ignorance of content of rules in choice-of-law process are commonly accepted as distinctive features of "conflicts justice", which offer simple and practical solution to multistate issues and have been regarded as the dominant pursuit in PIL for quite a long time until challenged by U.S modern PIL scholars.

II. "Material justice" as a growing counterpart to "conflicts justice"

Unlike "conflicts justice" only found in conflict of laws, "material justice", also described as substantial justice, although in different forms and extents, exists in every legal subject as society's inevitable primary expectation towards just legal results. In multistate choice-of-law cases, "material justice" aims to reach "proper result" with "same quality of justice in the individual case as is expected in fully domestic, non-conflicts cases"[18]. It has never been "wholly absent from conflict of laws"[22].

Actually, as early as fourth century B.C., the idea of "material justice" had once appeared in Ancient Greece as a primary guidance to deal with multistate problems even before the appearance of conflict of laws[15,p.6]. Until now, its forms and status have evolved a lot during the development of conflict of laws. Generally speaking, "material justice" has changed from being an egoistic "material justice" as a subordinate and implicit part in PIL to a more altruistic "material justice" which, during the Conflicts Revolution in the United States, even replaced "conflicts justice" and gained the dominate position in several result-oriented theories

A. Egoistic "material justice" born with conflict of laws

Conflict of laws, of which basic sole purpose is to serve its home state like other legislations,[14]* cannot tolerate if the application of foreign laws that bring harm to crucial domestic principles and interests. Thus, although started from practical and neutral "conflicts justice", conflict of laws was born with necessary exceptions in response to the requirement of "material justice" in certain extreme situations.

The most convincing example lies in the *order public*. Since the establishment of PIL, judges are able to refuse to apply a "odious foreign law". And this was widely accepted by subsequent PIL scholars in their theories, such as Urich Huber[18, p.18]*[6] and Friedrich

* I have to say that, simplifying the aims under "conflicts justice" as "proper law", even though as simple as it can be, is easily lead to misunderstanding. "Conflicts justice" and "material justice" are both kinds of justices in choice-of-law field, both of which aim at find the suitable applicable law for multistate cases. In other words, they both searching for proper applicable law by holding different standards of deciding the propriety: one emphasis on the proper link between the facts and the applicable law while the other focus on the better results the law will produce. If simplifying is necessary, "proper link" for "conflicts justice" and "proper result" for "material justice" seems more appropriate.

* Kegel points that "[Legislators and government] serve only the home state, no other."

* According to Urich Huber's "three axioms" of conflict of laws, a sovereign may refuse to recognize rights acquired aboard if they would prejudice the forum's power or rights.

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Carl von Saving[18, p.32]* *Order public,* working as a "safety valve", still plays important role in current choice-of-law systems. Also, judges can refer to the content of potential applicable laws when they apply those attaching tools like classification, mandatory rules and evasion of laws. It is obvious that "material justice" inwardly guides the choice-of-law process out of the need of self-protection of the forum state. Besides, in a more indirect way, "material justice" also influence the selection of connecting factors of choice-of-law rules. For example, once during the battle between domicile and habitual residence, states with more immigrants usually preferred to adopt habitual residence in order to increase the chances of application of its own law, while those nations as original states are likely to choose domicile instead for the same purpose. Of course, those expressions of "material justice" in classical theories are egoistic, they are designed and adopted only from the perspective of protection of parochial forum state interests. States treat the most results of litigations as a matter of indifference except for cases relating to overriding public policy[23].* It may explain why so many scholars still regard traditional choice-of-law rules as "content-blind jurisdiction-selecting rule(s)"[21, p.283].

The reasons for the existence of such pro-forum "material justice" are easily to be understood with reference to the domestic law nature of conflict of laws. Justas Kegel described, "conflicts justice", out of the need for self-protection, should "retreat in serious cases behind substantive justice"[16,p.632] in multistate controversies. Even though the subject has emerged as a response to the pragmatic need of private international intercourse in the modern world which requires an equal and neutral guidance on international issues, the starting point of conflict of laws is nothing but the practical need of the forum state. Therefore, while the legislators and scholars are working on simplifying the choice-of-law problem by avoiding the direct allocation of different parties' interests and obligations, they cannot totally ignore the natural duty of the court to protect the basic orders and interests of its home state. To some extent, the adoption of those exceptional "material justice" tools not only meets the natural need of the forum state, but also accelerates the promotion and development of conflict of laws worldwide by helping the forum sate overcoming the anxiety arising from the possibility of applying unknown alien laws

B. Altruistic "material justice" added during the Conflicts Revolution

Promoted by classical choice-of-law theories, "conflicts justice" acted as a foundation for justice in PIL but gradually was incapable of meeting the changing needs of modern private international intercourses. As David F Cavers questioned: "How can [a court] choose wisely without considering how that choice will affect that controversy?"[24]. As a solution, a more positive and broader idea of "material justice" was introduced and adopted to modernize conflict of laws system in different ways.

Theoretically, around the middle of twentieth century, pioneering U.S. conflict of laws scholars sharply attacked the traditional "empty and bloodless"[23], choice-of-law rules and triggered a vigorous Conflicts Revolution. New theories with an attitude shifted towards "material justice" were created and spread all over the world, such as Brained Currie's "governmental interests analysis", William F. Baxter's "comparative impairment" theory, Leflar's "choice influencing considerations", and Reese's Restatement (Second) of Conflict of Laws, Friedrich Juenger's "substantive-law" approach, and Luther McDougal's "best law" approach, etc. Those theories, although seldom adopted in legislations, * successfully paved a new path for conflict of laws and offered alternative or brand-new choices for legislators[23,p.183]*. Practically, inspired by modern choice-of-law theories, legislators have adopted multiple skills to embody the ideas of "material justice" in some areas as a positive response towards social needs. Modifications or creations aiming at reaching certain legal results continuously appeared in conflict of laws with clear preference for specific results. One example would be, the adding of parallel connecting factors in rules concerning formality issues which favors validity. Such as the formal validity of transnational marriage. Another example is the adoption of "favorable" connecting factors in some areas to protect the interests of weak parties, especially in the cases involving the under-ages or elders. A third example is the new requirement of the application of overriding mandatory rules of a third country[25], which also implies necessary consideration to the content of foreign rules as "material justice" requires.

Obviously, as for the "material justice" at current stage, not only the contents and results relating to key interests of forum state are included, but also those of related foreign states in multistate litigations are taken

* Friedrich Carl von Savigny recognized the "strictly positive, mandatory rules" which express a moral, political or economic policy. They are "strong enough to resist displacement by foreign law".

* Currie points that "actually, instead of declaring an overriding public policy, it proclaims the state's indifference to the result of the litigation."

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into account. Take Currie's "governmental interests analysis" for an example: judges need to conduct an analysis on both local and foreign rules to compare the interests contained. Thus, the conflict of laws has moved a big step forward to get rid of its parochialism and get itself more involved in construction of harmonious international rules with more respect for other sovereignties. Besides, the motivation of the adoption of "material justice" had also changed from negative protection of parochial interests to positive guarantee of reasonable expectations of each party and showing respect to foreign legal systems, especially in those areas with internationally-shared values and interests.

Thus, supported by modern legal theories and advanced legislative skills, driven by a practical need to maintain order of contemporary international interactions, encouraged by more censuses reached in international society, a more positive and broader "material justice" which places the domestic law and foreign law in more equal positions and pays more attention to the substantive aspects of multistate controversies is gaining power and sharing more space with its counterpart, namely the "conflicts justice" in current conflict of laws systems.

III. The comparison between "conflicts justice" and "material justice"

As discussed before, considerations of "conflicts justice" and "material justice" have been co-existing since the very beginning of conflicts of laws. After years of development, their positions in PIL have changed in some ways but neither of them has been completely replaced by another. They have been incorporated in different theories and influence different areas through different means, which add more complexity to conflicts of laws. Therefore, in order to gain a clear understanding of the inner logic of modern conflict of laws which is characterized as "mishmash approach"[26] as a result of mixture of "conflicts justice" and "material justice", it is necessary to break them up again and figure out the differences from multiple angles.

Firstly, "conflicts justice" and "material justice" are introduced to meet different goals of conflicts of laws. Driven by the pragmatic needs of international dealings, the choice of law system was established primarily to offer workable principles for choosing *lex causae* among jurisdictions of equal sovereignty for multistate controversies. Under the pressure of the absolute power of sovereignty and worried about diverse practice in other courts which may build barriers for international private intercourse, some of PIL pioneers came up with principles based on a group of spatial factors, such as domicile, location of immovable, place of action, etc., which expanded neutrality and stability as much as possible and moderately discouraged from unauthorized judging of substantive rules from other jurisdictions. Therefore, spatial considerations complied with "conflicts justice" successfully offered the basic guidance to locate the *lex causae* in a convenient way. Without any better choice, "conflicts justice", as a compromised but practical justice in the international law field, became predominant and gradually accepted by nations.

However, "material justice" is added to complete necessary quality evaluations of *lex causae* during the choice-of-law process. Even though the involvement of international factors makes multistate cases even more complicated, judges, as the protectors and carriers of certain standards and values of justice, naturally refuse to totally sacrifice the interests involved in PIL cases. Actually, since the initial stage, the single-minded pursuit of equal treatment of all legal systems promoted by "conflicts justice" agitated legislators and scholars, especially when it divided legal systems into civilized legal systems and uncivilized ones[27,p.16]. Rigid neutral Choice-of-law rules might put interests required by "material justice" at risk, among which the interests of forum state require exceptional protection base don reasonable self-protection. Then due to the gradual advancement of society and legal science, the fields of protection was broadened to interests of individuals who were directly influenced by the *lex causae*. And until then, the material justice cast off its parochial egoism and became "altruistic material justice" aiming for just and fair results in multistate cases.

Second, "conflicts justice" and "material justice" are separately employed to separately comply with the international and domestic aspects of conflict of laws. Conflict of laws is a unique legal subject with combining two aspects that of international law and that of private law. On the one hand, conflict of laws is a branch of international law. As such, it must respond to certain requirements relate to international law, such as the requirement of maintaining the basic order of transnational private intercourse as well as easing the tensions caused by co-equal sovereignties. Out of equality principle of the international world, it is provocative and unacceptable to directly interfere with substantive law issues of a foreign country without its consent. Besides, unlike domestic juridical process which could endorse a unified authorized understanding of justice, choice-of-law process needs to be conducted without the power of central authority or the guidance of unanimous justice. When multistate disputes appeared, the pressing matter was to overcome the barriers caused by (potential) conflicting decisions delivered by different courts of different systems and to establish "a common obligatory behavior pattern in international intercourse" [28, p.308]. Thus, an indirect but neutral and relatively stable choice-

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of-law system rooted in spatial considerations is workable at the international level. On the other hand, conflict of laws also need to carry out missions as a sub-area of private law which aims at a fair and just arrangement of obligations and rights. "Doing justice" is a natural duty of judges [29,p.51]. Even though being restricted by sovereignty concerns in choice-of-law process, judges still pay necessary attention to the content of *lex causae* and develop available tools to passively guard the bottom line of justice in multistate cases. Thus, "material justice" was also applied in a self-restrained way and gradually became more and more important while the private international intercourse had infiltrated the daily life of individuals with the tremendous movement of globalization.

Third, "conflicts justice" and "material justice" offer select in principles for choice-of-law process with different horizons. Connected to the purpose of maintaining the normal order of international intercourse, "conflicts justice" values decisional uniformity and prefers to offer macro-level solutions for multistate litigations. It allows conflict of laws to properly avoid the troubles of direct evaluation of substantive rules of foreign nations and to establish an overall structure through classifying legal disputes into various kinds and dominating spatial connecting factors for each, by which all multistate litigations can find answers within the conflict of laws. In other words, "conflicts justice" is searching for the *lex causae* by a way of generalization. While "material justice" regards fair and just decision of individual cases as a crucial matter and struggles to offer micro-level solutions for each case, it asks judges to evaluate matters like content and result in each case and to make the decision according to justice as in domestic cases. Apparently, "material justice" is more ambitious for international society which is full of independent legal systems with different or even contradictive values and standards. So, it cannot function as an overall principle for all kinds of multistate controversies, instead, it occupies specific areas especially in which nations share common interests. From the initial presentation as self-protection of the forum state to other expressions of international views, "material justice" has gained more and more power with the expanding of common interests of international society. Example of this would be the freedom to marry or divorce, the free movement of commercial elements, the protection of weak parties, and so on. "Material justice" offers multiple specifically-designed tools for guarding the basic values and interests of human society. Also only in those areas, the adoption of "material justice" can be accepted by jurisdictions spreading all over the world, which is extremely essential for the proper functioning of choice-of-law system as a whole.

Fourth, "conflicts justice" and "material justice" are expressed in different forms by using different legislative skills. "Conflicts justice", which is famous for its reliance on spatial connecting factors, is well-incorporated in traditional choice-of-law rules. Rules containing spatial connectors are widely spread and known as *lex fori, lex domicilii, lex patriae, lex loci delicti, lex situs, lex loci celebrationis*, etc. Of course, "conflict of justice" also faces risks during the legislative or judicial practice because of the different selection of spatial factors for the same controversy or the different concepts of the same factors in different legal systems. But the choice of spatial factors is relatively objective and it is easier to reach a consensus among nations. Most of the PIL codifications and the USA Restatement (Second) of Conflict of Laws have adopted classical choice-of-law rules but differ slightly in the selection of connecting factors for certain kinds of controversies. Accordingly, the developments or changes in "conflicts justice" are usually reflected by the changing of connecting factors in certain legal areas. It is the selection of connecting factors that directly shows the requirement for "conflicts justice" of the legislative state. And it also brings benefits for lawyers, judges and litigants with clear and simple directives, which allow them to foresee or reach the possible result.

However, the expression of "material justice" has gone through a change from indirect and underlined forms to direct and evident ones. Since the beginning, with the limited level of acceptance "material justice", the choice-of-law system is born with a cautious and restrained requirement of "material justice", which is incorporated in the *public ordre* and mainly aims at protection of parochial interests. Besides that, a judge, if it is necessary, can make use of other "tricks" to actually influence the final result. Such "tricks" exist in many elements of conflict of laws, like *renvoi*, classification, mandatory rules, etc., which offer judges a chance to abandon the pre-fixed choice-of-law rules and search for amore satisfactory result they wish to reach. Then, "material justice" attracts attention from PIL scholars and also gains more power from the fast development of international law (e.g. especially the human right law[30, pp.856,870]). There are more common interests in conflict of laws for nations possibly involved and many methods have been introduced to reflect the stronger requirement of "material justice" in a more direct way. They can be separated into two kinds of method: one is the modification of classical choice-of-law rules, such as the softening connecting

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factor with open-ended result [31]* or the composition of connecting factors in a single choice-of-law rule[32]. In these choice-of-law rules, although they still rely on the spatial connecting factor(s), they are obviously modified with a preference for certain results. New methods are also introduced. For example, there are guiding principles incorporating "material justice" requirements[33], or rules with expressed favor for certain weak party* or certain result*, etc. In these ways, "material justice" becomes direct and clear and its accomplishment will more heavily rely on the judge's discretion in single cases.

To sum up, "conflicts justice" and "material justice" are adopted in different areas through different methods to meet different needs and goals in the field of conflict of laws. After hundreds of years of development, their co-existence in current choice-of-law systems is not a coincidence but an inevitable result of the combined nature of conflict of laws. And also, it is an eclectic and practical response to the different needs of individuals, of states and of international society as a whole. Those who are searching for further advancement of current conflict of laws should focus on the promotion of a more efficient and workable pattern of cooperation for "conflicts justice" and "material justice" according to the respective characters of the two justices.

Conclusion

"Conflicts justice" and "material justice" are two kinds of distinctive justice co-existing within the field of conflict of laws from the very beginning. And due to the combined nature of choice-of-law itself, such combination of values and standards of different justice is inevitable and will last as long as the subject subsists.

"Conflicts justice", corresponding to the aspect of international law of PIL, and ideally aims at reaching decisional uniformity and regards the law of the proper state as the proper law for multistate controversies. Since the establishment of our subject, it has been shaping the basic structure of conflict of laws by introducing a series of spatial connecting factors and offers an unanimously acceptable solution for international society. "Material justice", rooted in the natural desire for justice in the field of private law, values just and fair results and aims to locate the *lex causae* individually. It is becoming more and more acceptable while the development of international law brings more censuses among nations and the vast spread of modern choice-of-law theories offers various methods and skills.

Thus, in order to meet the changing needs of international intercourses, legislators from all nations need to improve conflict of laws by setting proper arrangement of "conflicts justice" and "material justice" in different areas through different legislative skills, instead of quarreling with the superiority of a certain kind of justice back and forth and ignoring their cooperative function within the system. Generally speaking, it is better to apply "material justice" for areas relating to crucial interests of the forum state and with shared common interests of the international community and keep "conflicts justice" in areas rooted in the parochial culture and history of nations where it is impossible to reach consensus.

Bibliography:

1. FK von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence.* Abraham Hayward translated, London: Littlewood, 1831.
2. See DF Cavers, "*Cipolla* and Conflicts Justice" (1971), 9 *Duquesne Law Review* 360, 360.
3. See AT von Mehren, "Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology" (1977), 88 *Harvard Law Review* 347,349&359.
4. See B Posnak, "The Restatement (Second): Some Not So Fine Tuning for a Restatement (Third): A Very Well-Curried Leflar over Reese with Korn on the Side (Or Is It Cob)"(2000), 75 *Indiana Law Journal* 561, 568&572// http:// ilj. law. indiana.edu.
5. See HH Kay, "Currie's Interest Analysis in the 21 Century: Losing the Battle but Winning the War" (2001), 37 *Willamette Law Rev*iew 123, 124.
6. See C Roodts, "Reflections on Theory, Doctrine and Method in Choice of Law" (2007), 40 *Comparative and International Law Journal of Southern Africa*76, 92.
7. See V Scott, "Access to Justice and Choice of Law Issues in Multi-jurisdictional Class Actions in Canada*"* (2013) , 43 *Ottawa Law Review* 233,255-256.
8. See A Mills, "The Identities of Private International Law: Lessons from the US and EU Revolutions"(2013), 23 *Duke Journal Comparative and International Law* 445,458-459.
9. See J Hill and MN Shúilleabháin, *Clarkson & Hill's Conflict of Laws* Oxford: Oxford University Press, 5th edition, 2016, 9.
10. WL Prosser, "Interstate Publication" (1953), 51 *Michigan Law Review* 959, 971. *"*The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon."
11. AT von Mehren, "American Conflict of Laws at the Dawn of the 21st Century" (2000), 37 *Willamette Law Review* 133, 133-134. He mentioned that "[T]he difficulties posed for instrumental or teleological analysis are far greater when

* A "substantially more appropriate" law will be applied even it is not comply with the general principle for choice-of-law rules in tort cases.

* Usually favor the validity of formality of marriage, contract and testimony or support the validity of divorce. See generally in [21], pp.252-259.

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the controversies to be resolved are not localized in a single order that holds shared values and policies and thus a unified administration of justice that can authoritatively weigh competing values and decide which shall prevails when conflict arise."

12. R Cotterrell, "Transnational Communities and the Concept of Law"(2008), 21 *Ratio Juris* 1, 5.
13. See e.g. AT von Mehren, "Choice of Law and the Problem of Justice" (1977), 41 *Law and Contemporary Problems* 27, 30-31. He pointed that "[T]he only way to determine whether the concerned communities agree on values and purposes is to undertake a functional or instrumental analysis of the law of each community. The extensive comparative investigation thus required can be difficult and, on occasion, will face issues of great subtlety. In some cases, the results will be ambiguous and engender uncertainty."
14. G Kegel, "The Crisis of Conflict of Laws" (1964), 112 *Recueil des cours* 95, 185. As for "substantive law", Kegel also explained that "we do not mean in these lectures the counterpart of procedural law, but the 'domestic', 'internal' law or simply the 'law' of a state, as opposed to the conflicts law of that state". See p.185, footnote 2.
15. FK Juenger, *Choice of Law and Multistate Justice*,Ardsley: Transnational Publishers, Special Edition,2001.
16. G Kegel, "Paternal Home and Dream Home: Traditional Conflict of Laws and American Reformers" (1979), 27 *American Journal of Comparative Law* 615, 616.
17. For example, Von Mehren agrees that justice rarely can be fully achieved in multistate cases as that in domestic cases. He also uses the "conflicts justice" to describe the special justice requirements in conflict of laws and discussed several relating principles from its perspective. See von Mehren, supra n 13, 27-43.
18. SC Symeonides, "The American Conflicts Revolution: A Macro View"(2002),298 *Recueil des cours* 357, 397.
19. SC Symeonides, "American Choice of Law at the Dawn of the 21st Century" (2001) 37 *Willamette Law Review* 1,5.
20. SC Symeonides, "Material Justice and Conflicts Justice in Choice of Law" in PJ Borchers and J Zekoll (ed), *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K Juenger*, Ardsley: Transnational Publisher, 2001, 125&128-132.
21. SC Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis*, Oxford: Oxford University Press, 2014.
22. FK Juenger, "A Historical Review", in FK Juenger, *Selected Essays on the Conflict of Laws*, Ardsley: Transnational Publisher, 2001, 42.
23. See B Currie, *Selected Essays on the Conflict of Laws*, Durham: Duke University Press, 1963,52.
24. DF Cavers, "A Critique of the Choice-of-Law Problem" (1933), 47 *Harvard Law Review* 173,189.
25. See generally M Hellner, "Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles" (2009), 5 *Journal of Private International Law* 447, 447-469.
26. See generally WA Reppy, "Eclecticism in Choice of Law: Hybrid Method or Mishmash?" (1983), 34 *Mercer Law Review* 645, 645.
27. See e.g. AV Dicey, JHC Morris and L Collins, *Dicey, Morris, and Collins on the Conflict of Laws*, London: Sweet & Maxwell, 14th ed., 2006.
28. RH Graveson, "Problems of Private International Law in Non-Unified Legal System" in AG Chloros (ed.), *Comparative Conflict of Laws: Selected Essays: Volume I.* Amsterdam: North-Holland Publishing, 1976.
29. See RH Graveson, "Judicial Justice as a Contemporary Basis of the English Conflict of Laws" in Chloros, AG Chloros (ed.), *Comparative Conflict of Laws: Selected Essays: Volume I.* Amsterdam: North-Holland Publishing, 1976.
30. See e.g. JJ Fawcett and P Torremans, *Human Rights and Private International Laws*, Oxford: Oxford University Press,2016. 856&870.
31. See UK Private International Law (Miscellaneous Provisions) Act 1995, S.12 (1).
32. See e.g. Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships, Art.28: "The laws at the habitual residence of the adopter ***and*** the adoptee shall apply to the qualifications and formalities of adoption.
33. See e.g. Restatement (Second) of Conflict of Laws. (1971), § 6 (2).