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STATES WITH MORE THAN ONE LEGAL SYSTEM AND UE REM REGULATION

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I.- Preliminary remarks. The different existing system to address the issue of states with more than one legal system

There are certain states with more than one legal system, this is the case of UK or Spain. When a diversity of legal systems coexist in one single state, two different criteron are considered to define the scope and application of each legal system: a territorial or a personal criterion. Each different law is applied in certain part of the territory (UK english, scottish or irish law), or a different law applies in consideration to certain personal quality of the subject, which normally is refered to religious or ethnical features.

When an international Instrument refers to the law of those states, the Issue of which of the different national legal system in force in that state is applicable must be adressed. In order to solve the problema derived from multilegal states the International private law deals with this question in different manners.

Following profesor Quinzá[1] the IPL`s scholars, based on international conventions, autonomous conflict of law systems and EU regulations acknowledge these main systems: direct system, indirect system , subsidiary system and mixed system.-

a) Direct system:

The direct method, draws inspiration in the fiction of considering each teritorial unit as a state itself. This method prevails in most Hague conventions and in some EU Regulation, like Rome I (art. 22) and Rome II (art. 25)

The conflict of law rules from the International instrument directly apply to the international legal situation, in such a way that the International instrument rules designates directly the law of one specific legal system from those exisiting in the multilegal state ,

b) Indirect system:

[1] Jacinto Pablo Quinzá Redondo, "Regimen económico matrimonial , aspectos sustantivos y conflictuales", pag 381, Ed Tirant lo Blanch, Valencia 2016

The classic or continental system, based on an indirect method, which is the oldest, refers the designation to the internal conflict of law rules of the designated ste, is most respectful with national legal systems, enabling a proper coordination of the internal conflict of law rules with the international conflict of law system. This is the case of the spanish system according to art. 12. 5 of the Civil code. But this system fails when the connection is based in nationality. In these cases, often the nationality connection factor is replaced by the closest connection factor. This system still remains in some international conventions like the hague Conventions of 1961 protection of infants, 1965 adoptions or 1973 about maintenance obligations.
The International instrument refers the problema to the internal law of the state designated by the applicable law.So it will be for the internal conflicto of law rules to determine which if the existing legal sysyem is to be applied.

c) Subsidiary method.-

The subsidiary method, which contains features from both the direct and indirect method, calls in first instance the interregional conflict of law rules existing in the national legislation of the state (indirect system) , but in case there are not rules to solve the conflict(or If the existing rules are not suitable for a direct application) then the international instrumrent applies its own conflict rules which identify directly one specific territortial unit of the state. , by means of referring the connecting factor habitual residence to the terrotorial unit where the habitual residence of the spouses is loocated, or in the case the connecting factor is nationality, adressing the case to the law of the terotorial unit where the spouses have the closest connection

d) Mixed system:

Finally this author, acknowledges another system in the internacional instruments which he names as mixed method, consisting on a combination between the direct and the indirect method, depending on the nature of the connecting factor. For those connections inspired on a territorial criterion (habitual residence, lex rei sitae…), it applies directly the rules of the instrument to identify the law of the specific terrotorial unit, while for those connections based on a personal connection (nationality), refers the issue to the internal conflict of law rules or when there are no such rules, ir applies the law of the closest connection.

II. The system envisaged by the Commission proposal Regulation -.

The first draft presented by the Commision opted for a direct method to determine the applicable law in those states where more than one legal system coexist, by referring directly the applicable law to the relevant territorial unit. However, the final text of the regulation adopts an hibrid system, by using the so called subsidiary method.

The system envisaged by the Commission proposal Regulation when it first came out, back in 2011 was very much in line with the Rome I and Rome II regulation, and its main features were the following:

1º It only envisage a rule to solve the conflicts of law derived from territorial based different internal legal systems, omitting any reference to the personal based multi legal systems

2º It established a direct method based in the fiction to consider every territorial unit as a state, so the regulation identifies directly which of the existing laws in the designated state was to be applicable[2].

3º it does not contain any specific provision for the application of the regulation to purely internal conflicts of law which may arise in those states with more than one legal system.

III.- The system adopted by the final text of the Council Regulations 1103 / 2016 and 1104/16 1103/2016 .-

However the final text of the Regulations adopted a totally different system, aligned with the one established by arts 36, 37 and 38 of the 650/12 Sucession Regulation, what is of most importance in order to enhance coordination between the applicable law designated in both instruments, since there is a very narrow link between the matrimonial property regime and the succession rights of the spouses.

The main features of the final framework established by the Regulations are:

1º It contains provisions referred to both personal and territorial conflict of law internal legal systems, bringing solutions for each case in arts 33 and 34 respectively.

2º It moves from a direct method to an hybrid method, which, according to the previous classification would be include in the subsidiary system, consisting on:

-first the Internal national conflicts of law rules apply (art. 33 paragraph 1)

- second, in case there are no internal rules. Art. 33 paragraph 2 of the regulation provides for direct application of the conflict of law rules of the Regulation , but with the necessary adaptations. Three different solutions depending on the connecting factor, as we will see afterwards.

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[2] *Article 36*

Relations with existing international conventions

Brussels, 16.3.2011 COM(2011) 126 final 2011/0059 (CNS)

Proposal for a COUNCIL REGULATION on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

Article 25 States with two or more legal systems — territorial conflicts of laws.

"Where a State comprises several territorial units each of which has its own system of law or its own rules concerning matters governed by this Regulation:

(a) any reference to the law of that State shall be construed, for the purposes of determining the law applicable under this Regulation, as a reference to the law in force in the relevant territorial unit;

(b) any reference to habitual residence in that State shall be construed as a reference to habitual residence in a territorial unit;

(c) any reference to nationality shall refer to the territorial unit determined by the law of that State, or, in the absence of relevant rules, to the territorial unit chosen by the parties or, in absence of such a choice, to the territorial unit with which the spouse or spouses has or have the closest connection."

3º When the conflicts of law are exclusively internal, the regulation does not provide for specific solutions, but refers the issue to the internal conflicts of law system, although it allows the national authority to apply the regulation system of conflict of law rules. (art. 35 REM) .

IV .- States with more than one legal system territorial conflicts of laws (art 33)

Let us exam briefly the system establish by the Regulations and some questions and problems which derive from it.

a) First step: The national conflict of law rules must be applied.-

As we said before, the regulation's first step refers the issue to the national law of the designated state, which must apply its own conflict of law rules to designate the concrete applicable legal system. So it is stated in paragraph one of article 33:

1.Where the law specified by this Regulation is that of a State which comprises several territorial units each of which has its own rules of law in respect of matrimonial property regimes, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply.

aa) This means that this internal conflict of law rules, not only must be applied by the national authorities, but also should be applied by any UE authority dealing with an issue under the REM regulation (following art 2 of the Regulation), when the applicable law established under art 22 or 26 of the regulation refers to a multi-legal system state.

bb) The call for the application of the internal conflict-of-law rules is a solution most respectful with the national systems which enables a better coordination between the Regulation and the national legal systems. However this call for the application of the internal conflict of law system poses some questions which might occur:

+ the internal conflict-of-law rules could be or not a non unified system, For instance in Spain, the conflict –of-law rules system is unified according to art. 149.1.8 of the spanish Constitution, when establishes the exclusive competence of the State to enact these conflict of law rules. On the contrary, certain States , like United States of America for example, confer the competence to draft conflict-of-law rules to the different states of the Union not to the federal authority, so it could happen that the applicable law might be the one of certain state of the Union, or the law of another state designated by the conflict of law rule.

+ Even in those countries where the Constitution keeps for the central law the competence to enact conflict-of-law rules, some regional civil systems contain certain rules that may refer the validity of their dispositions beyond its territory so they would be applicable in a territorial unit with a different regional law. Some others contain a set of conflict-of-law rules which might renvoi to a different

territorial unit. More over, it could happen that even being respectful with the exclusive competence stated in the Constitution, the regional civil law does not contain conflict-of-law rules, but define the meaning and extensión of the connecting factor.

Some academics, like profesor Iriarte from Navarra University consider that although this regional conflict of law rules could not be applied to interregional conflicts of law, due to the constitutional provision, there is always rule for its application to the local conflicts of law situations presented inside that particular región.[3]

On the contrary, professor Santiago Alvarez, from Santiago de Compostela University considers that not only this regional conflict of law rules but also the rules defining the content of the connecting factor breaches constitutional rules and thereof should not be applied[4]. A single conflict of law rule which refers to the law of the regional citizenship, for instance, may derive in a diversity of applicable laws when it comes to the definition of the concept of regional cigtizenship. Spanish Constitutional Court had already stated that it is part of the exclusive competence of the Central State not only to settle the conflict of law rules, but also to define the connecting factor (STC 156/1993)

cc) But even when a centralized or unified conflict-of-law rules exist in the designated state, still problems might appear derived from the following situations:

+ when the international rule directs to the internal conflict of law rules, two different legal systems are applied successively, just the same as the renvoi case. This might bring solutions which are incompatible with the spirit of the regulation. This happens when the internal conflict of law rules follow the dual system for the REM`s applicable law, which is the case in most common law systems whose conflict of law rules establish the lex rei sitae for the immovable property and the law of the habitual residence for the movable properties. This dual system is against the unity principle of the applicable law established in art 21 of the REM regulation.

+ Renvoi is excluded in the Regulation (art 32), but art. 36 becomes an exception to this rule, so the interstate conflic of law rules might referr to a different law other than the chosen law by the spouses (in case they have used the right to choose the appliclable law following art 22)

+ It also could happen that the internal conflict of rule laws, are referred to unknow legal institutions, which therefore prevent the application of the

[3]Iriarte Angel, José Luis. Internal Conflicts of law in the field of Matrimonial economic regime, pag 565 and the following , from the book Matrimonial property regimes and succession, Thomsom Civitas, Pamplona 2008

[4] Santiago Alvarez González, Derecho interregional en dos escalones? From the book Estudios de Derecho Interregional, pag 31, De Conflictum legem, Santiago de Compostela 2007.

Regulation. Or perhaps systems which combine a territorial with a personal criteriorn to establish the applicable law. This is the case of Spain , where the regional conflicts of law are solved following the IPL system as it is stated in art. 16.1 of the Civil Code, which is based on nationality as the main connecting factor, being replaced that connecting factor by the concept of regional citizenship, which is an unknown concept according to the IPL conflict of law rules, which therefore can not be applied to non national citizens.

b) Second step: The regulation designates directly the applicable law of certain territorial unit

In the absence of an internal conflict of law rules, the regulation establish a set of rules to be applied.

In my opinion, this rules would apply not only in the case of absence, but also when some other cases , as we have seen above, impede the application of the internal conflic-of-law rules, like the case of the foreign spouses who can not have regional citizenship, or when the connecting factor, like the habitual residence is located in another MS, for instance, or even when the internal system brings solutions which are incompatible with the regulation: breach of Unity of applicable law or reenvoi to a third state.

In these cases , applicable law according to the regulation will directly designates the law of an specific territorial unit from those existing in the referred state, but in this case the Regulation contains certain rules to adapt the IPL conflict of law rules to the internal situation, in particular in the definition of the connecting factor, and so it establish in paragraph two of art. 33

"2.In the absence of such internal conflict-of-laws rules:

(a) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the habitual residence of the spouses, be construed as referring to the law of the territorial unit in which the spouses have their habitual residence;

When the connecting criterion is a territorial one, like habitual residence, the regulation refers the applicable law directly to the territorial unit as it were a state itself.

(b) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the nationality of the spouses, be construed as referring to the law of the territorial unit with which the spouses have the closest connection;

When the connecting criterion is a personal one, like nationality , the regulation replace that personal connection for the closest connection, which is a classical and most extended solution.

(c) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to any other provisions referring to

other elements as connecting factors, be construed as referring to the law of the territorial unit in which the relevant element is located."

When other connecting factor are considered, the regulations designates the law of the territorial unit where the relevant connecting factor is located (for example in the case of Lex rei sitae, the territorial unit where the immovable property is located).

V.- States with more than one legal system; inter-personal conflicts of laws (art. 34)

There are some states with more that one legal system which are applied depending on the personal circumstances which are usually connected to religious or ethnic qualities of the subjects involved in the legal situation. For these reason these systems are not to be found within the EU members, but since the regulation has a Universal application according to art 20, there is an specific provision fo those systems in art 34.

The method established in that provision follows the path set up in the previous one. In a two steps system, first refers the question to the internal conflict-of-law rules, and in the absence of such a rules, it designates directly one applicable legal system from those coexisting in the designated state.

"In relation to a State which has two or more systems of law or sets of rules applicable to different categories of persons in respect of matrimonial property regimes, any reference to the law of such a State shall be construed as referring to the system of law or set of rules determined by the rules in force in that State. In the absence of such rules, the system of law or the set of rules with which the spouses have the closest connection shall apply. "

Here again the regulation refers to the closest connection factor to determine the applicable legal system.

VI.- Non-application of this Regulation to internal conflicts of laws.-

As a general principle, the Regulation does not apply to purely internal conflicts-of-law which might exist in the states with more than one legal system. This is clearly stated in art 35.

A Member State which comprises several territorial units each of which has its own rules of law in respect of matrimonial property regimes shall not be required to apply this Regulation to conflicts of laws arising between such units only.

+ This provision, as professor Santiago Alvarez has explained, does not creates specific problems to foreign authorities when applying the regulation but it might bring hard issues when it comes to national authorities from states with more than one legal sistems, in particular those whose conflict-of-law rules system difers from the one set in the

regulation. Lets imagine the Spanish system, based in nationality (replaced by regional citizenship for inter regional conflicts of law) a personal criterion, a territorial one.

For those national authorities it is of paramount importance to qualifiy the legal relationship as purely internal or international, since consequences can be totally different (In the case of spain, the regional citizenship of the spouses could be other than the one of their habitual residence). However the determination of when a legal relationship becomes international or purely internal is not clear, since there are both expansive and restrictive theories in order to qualify as international a legal situation.

+ Although the regulation states that regulation must not be applied to internal conflicts of law, the wording of the 36 provision does not exclude the application of the regulation to internal conflicts:" *shall not be required to apply this Regulation".*Then, It will be for the MS to decide whether the national or the european conflict-of-law rules prevails.

IPL and interstate conflict-of-law rules are closely linked so frequently the latter are established by reference to the former. What would happen if the IPL rules change by means of an international instrument convention, like it is the case, while the rules of internal conflict become incompatible with the new system. Spain conflict of law rules are based in the Nationality as connecting factor (replacing nationality by regional citizenship in the internal conflict of law system) which is a connecting factor different and incompatible with the habitual residence.

When the case of certain states refer the solution of the internal conflicts to the IPL rules contained in their national legislation, a question arises when this IPL national legislation has been repeal by the regulation. In these situations it could be useful to apply regulation to the internal conflict of laws, but this interesting issue will be presented in deep by profesor Quinzás .