CHAPTER 16

Illegitimate Children

I. MOTHER AND CHILD

A WOMAN and her child born out of wedlock are considered to be in blood relationship; in the legislations of the French type, however, no claim can be based upon it before the mother recognizes the child. The relationship is characterized either as "illegitimate" and of a special nature or assimilated to the regular mother-child relation constituted by wedlock. Differences exist also in almost every particular. They are mirrored by the multiplicity of the conflicts rules.

1. Contacts

The law of the forum is applied in the United States and under the present Montevideo Treaty.

1 Comparative substantive law:
   FREUND, Illegitimacy Laws of the United States and Certain Foreign Countries, U. S. Dep't of Labor, Children's Bureau, Publ. No. 42 (1919).
   Illegitimacy, Standards of Legal Protection for Children Born out of Wedlock, Report of Regional Conferences, U. S. Dep't of Labor, Children's Bureau, Publ. No. 77 (1921).
   LUNDBERG, Children of Illegitimate Birth and Measures for their Protection, U. S. Dep't of Labor, Children's Bureau, Publ. No. 166 (1926).
   TOMFORDE, DIFENBACH, WEBLER, Das Recht des unehelichen Kindes und seiner Mutter im In- und Ausland (ed. 5, 1953).
2 U. S. Restatement § 454.
3 Treaty of Montevideo on international civil law (1889), art. 18: The rights and duties resulting from illegitimacy are governed by the law of the state in which they are claimed to be exercised.
   Nicaragua: C. C. Tit. Prel. art. VI (10).
   Código Bustamante art. 63 as to the declarations of maternity.
Most countries refer to the personal law of the mother, tested by her domicil \(^4\) or nationality.\(^5\)

Minority solutions refer to the child's personal law \(^6\) or resort to the so-called distributive application of both parties' laws, so as to determine the duties of either party by his or her law.\(^7\)

The English law is *sui generis*. Only English law is applied, and then only if the child is born in England or, if born abroad, of English parents.\(^8\)

2. Scope

The applicable law covers the questions:

Whether the mother enjoys a power analogous to that of a legitimate father;

What other rights she may have over the child's person and property; \(^9\)

\(^4\) Denmark: Borum and Meyer, 6 Répert. 220 no. 53; Borum 126. Also Bar, § 204 was of this opinion.

\(^5\) Austria: Decree of Oct. 15, 1941, § 11.

\(^6\) Germany: EG. art. 20 with regard to Germans but generally extended to foreigners. RG. (May 13, 1911) 76 RGZ. 283; KG. (July 9, 1924) 50 Z. Ziv. Proz. (1926) 337; OLG. Karlsruhe (Nov. 26, 1926) 37 Z.int.R. (1927) 388.

\(^7\) Greece: C. C. (1940) art. 19: last common national law; in absence of such the national law of the mother at birth.

\(^8\) Italy: C. C. (1942) Disp. Prel. art. 20 par. 1.

\(^9\) Poland: Law of 1926, art. 20: Where the laws of mother and child differ, the last common national law; conforming Czechoslovakian law on private international law of 1948, §§ 25, 26.

\(^{10}\) Siam: Law of 1939 on private international law § 30 par. 2.

\(^{11}\) Benelux-Draft, art. 9 par. 2, 3 (but child's law if more favorable).

\(^{12}\) The Netherlands: Rb. Amsterdam (April 17, 1936) W. 1936, no. 721 (speaking of a case where both parties were of the same foreign nationality at the time of birth of the child).

\(^{13}\) Finland: Law of December 5, 1929, § 20.

\(^{14}\) Código Bustamante: art. 64 as to the name of the child.

\(^{15}\) Japan: Law of June 15, 1898, art. 18; China: Law of Aug. 5, 1918, arts. 16, 17. For details see infra p. 659.

\(^{16}\) 2 Halsbury (1938) 583 no. 804.

\(^{17}\) Rh. Haag (Nov. 29, 1934) W. 1936, no. 652 (authority of the mother acknowledged under German law, while under Dutch law a guardian ought to have been appointed).
Whether the child bears the name of the mother;¹⁰ and whether the mother's husband may give his name to the child;¹¹

Whether it shares her domicil by force of law;¹² and The question of alimentary duties of each party.

As the above-mentioned conflicts rules differ greatly from those on legitimacy, a court may have to consider a person an illegitimate child of his mother under one law and a legitimate child of his father under another law, as, for instance, by German conflicts rules, where the father is of Finnish nationality and the mother a German.¹³ This split result approaches American principles.¹⁴ Equally surprising is the outcome in a French case where a Polish man and an Italian woman both recognize their child. By the father's recognition the child acquired Polish nationality, and consequently Polish law was applied; under Polish municipal law the mother had authority to act in the name of the child, while under her own Italian law this authority would have belonged to the father.¹⁵

The inclination of French courts to apply French law against all their own principles has inspired one of the most objectionable decisions of the Court of Cassation. A French mother recognized her illegitimate daughter, after the latter's marriage to an Englishman had made her a British subject, and sued for support. Although a reciprocal action of the daughter would have been determined (and denied) by

¹⁰ Código Bustamante art. 64 (law of child).
¹¹ German courts and prevailing doctrine, see RG. (Nov. 23, 1927) II9 RGZ. 44; NUSBAUM, IPR. 175; RAPE 497 ff.
¹³ Contra: the Czechoslovakian Law of 1948 on private international law, § 28, referring to the national law of the child.
¹⁴ Supra pp. 601–603.
English law, the mother's claim for aliments was granted under French law, which, in the court's conception, conferred upon the mother "an imprescriptible right of recognizing the child." 16 The fact that the affection of this mother for her daughter was evidently discovered only after about twenty years when wealth had come to the latter should exclude any equitable considerations that might otherwise move a court.

*Change of status.* As a rule, a change of the personal law on which the choice of law depends is determinative, the relationship between mother and child, of course, being determined originally according to the law applicable at the time of the birth. Yet, the German Code (EG. article 20) reserves application of German law in the case where the mother becomes a foreigner and the child remains a German. This contrasts unfavorably with the Dutch conceptions under which a foreign child retains what rights it acquired by birth, although the mother may acquire Dutch nationality and not recognize her child according to Dutch law. 17

II. FATHER AND CHILD 17a

1. Classification

Today in the domestic laws, some right of a child to support by his illegitimate father is universally known. The nature of the claim varies greatly, however; it may be based on a natural obligation, a liability to exonerate the public relief organizations from avoidable charges, tortious acts accompanying the cohabitation (rape, seduction, *et cetera*), the simple fact of cohabitation itself, or the fact of impreg-

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17 Van Hasselt, Supplement 32.
nation. In Norway and Finland, an obligation to pay alimony is imposed on any man who has cohabited with the mother during the critical period (so-called pay-father), the liability being entirely severed from any presumption of paternity.

In addition to the support for the child, if a man is assumed to be the true father, other incidents may be included in the relationship between the parties, such as those concerning the name of the child, care and education, marriage impediments, inheritance rights of the child, alimentary rights of the father, et cetera. The municipal laws acknowledge more or fewer of such incidents, and some of them establish a gradation according to different situations. For instance, the Swiss Civil Code includes, besides the ordinary protection of children born out of wedlock, the award of “status” to a child either by recognition or, in certain cases such as seduction, by judgment (art. 323). A special kind of “illegitimate relationship” is created with effects on name, care and education, and nationality; courts may even confer parental power on the father. Also, the ordinary lawsuit for support may vary in correspondence with the varying structure of the rights allotted. The child may be provided with a simple action for payment of money, or with an action seeking a formal declaration of paternity, or, combining these two types of remedy, with a petition for incidental declaration of paternity constituting res judicata and for adjudication of payments.

Many other differences of the municipal regulations have made the corresponding conflicts rules a field of utter confusion, often deplored; public policy, playing a dominant role, adds complication.

In most countries, the conflicts rule is unsettled. Where statutory provisions exist, they are imperfect or need construction. As a typical example, article 21 of the German Introductory Law refers to the mother’s national law only for
the purpose of determining the support duty of the father. Extension of this rule to the entire relation between father and child was assumed for a time and embodied in the Polish Law of 1926 (article 21, paragraph 1).\textsuperscript{17b} Opinion prevailing now prefers for substantial reasons, to take the limitation of the rule literally and to reserve all problems other than those related to support to the father's personal law.\textsuperscript{18} An action for support, however, although combined with a demand for a preliminary declaratory statement of paternity, is considered to fall under the enacted rule.\textsuperscript{19}

Recent legislators are aware of the broader sphere of the problem. The Finnish Law of 1929 establishes different rules, the mother's personal law governing generally, while the illegitimate father's law determines inheritance rights.\textsuperscript{20} The \textit{Código Bustamante} assigns to the personal law of the child the rules concerning its right to a name, determining the proofs of filiation, and regulating the child's inheritance (article 57), but applies the \textit{lex fori} to the right of maintenance (article 59).\textsuperscript{21} Also, a draft of the Greek Civil Code made similar distinctions; the Code rejecting them is clearly intended to cover the entire ground, like the Polish law.\textsuperscript{22} A similar distinction follows from the Swiss statute, which subjects status questions, especially of domiciled foreigners, to the national law (NAG. article 8), but purely alimentary

\textsuperscript{17b} Greece: C. C. art. 20.

\textsuperscript{18} See Lewald 145 no. 203; Raafe 529 ff. and IPR. 345; M. Wolff, IPR. 218; LG. Königsberg (May 30, 1934) IPRspr. 1934, no. 66; OLG. Frankfurt am Main (August 15, 1953) StAZ. 1953, 253; OLG. Düsseldorf (March 1, 1957) Ehe und Familie 1957, 182. \textit{Contra}: Nussbaum, D.IPR. 176 n. 4, against whom 4 Frankenstein 108 n. 2.


\textsuperscript{20} Hernberg, 7 Z.ausl.PR. (1933) 107.

\textsuperscript{21} In the French and English translations, 86 League of Nations Treaty Series (1929) No. 1950, pp. 137, 270, article 59 is incorrectly restricted to legitimate children. The French translation of article 57 is mistaken in rendering "legitimidad" by "paternité," 86 ibid. p. 137.

\textsuperscript{22} Draft, art. 25 par. 2 (Revue Crit. 1938, 348); see Maridakis, 11 Z.ausl.PR. (1938) 124; C. C. (1940) art. 20.
suits, according to general principles, to the law of the defendant's domicil.\(^{23}\) The courts classify the above mentioned action for declaration of "status" as a status in the sense of the first group, and they therefore treat it as belonging to exclusive Swiss jurisdiction.\(^{24}\) The Dutch *Hof den Haag* recognized in 1937 an ordinary Swiss judgment condemning a Dutchman as illegitimate father to pay alimony, although he would have been able to prove the defense of *plurium concumbentium* (several cohabitants), exonerating him under Dutch, though not under Swiss law; the problem was thought to concern the status of the child, determinative in the opinion of the Court.\(^{25}\) The Dutch Supreme Court, however, subsequently held that support is not relative to status, because a preliminary declaration of paternity is no more than a mere fact; hence, the law of the defendant Dutchman was applied.\(^{26}\)

Without doubt, a conflicts rule limited to the duty of support is insufficient to cover the field, and it may well be that the contacts should be chosen differently for support and the other incidents of illegitimate parenthood.

2. Contacts

The rule applying the law of the place of conception was originated by the tort idea in European common law prac-

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\(^{23}\) BG. (Oct. 22, 1919) 45 BGE. II 503; BG. (May 15, 1925) 51 BGE. I 105; BG. (March 24, 1927) 53 BGE. II 89, 92.

\(^{24}\) The action is available only against Swiss nationals before Swiss courts; see BG. (July 6, 1916) 42 BGE. II 332; BG. (Oct. 22, 1919) 45 BGE. II 503; BG. (Nov. 22, 1934) 60 BGE. II 338. Where the defendant is an Italian, Italian law governs, and an action for declaration of status, if any, must be instituted in Italian courts, Cour de Justice, Genève (June 21, 1928) 36 SJZ. (1939-1940) 203 no. 141.

\(^{25}\) Hof den Haag (April 26, 1937) W. 1937, no. 538.

\(^{26}\) H. R. (April 1, 1938) W. 1938, no. 989. For criticism see van der Flier, Grotius 1939, 190 and citations. An analogous decision: Hof Arnhem (Nov. 15, 1938) W. 1939 no. 299 (illegitimate child born in Czechoslovakia, and of Czech nationality, defendant of Dutch nationality; the alimentary duty belongs to the patrimonial law; the personal law includes, at the most, the declaration of paternity); recently, H. R. (Dec. 2, 1955) N. J. 1956 no. 33.
tice \(^{27}\) and was until recently applied in Sweden.\(^{28}\) Sometimes, the birthplace replaces the less practical place of conception.\(^{29}\)

Numerous rules subject the entire matter to the law of the forum,\(^{30}\) either because the matter is regarded as of imperative policy or because it lacks a convincing classification.

Personal law is applied in very different conceptions, as determined by:

The domicil of the mother at the time of the conception or birth;\(^{31}\) the domicil of the man\(^{32}\) at the time of conception.


\(^{28}\) Swedish Sup. Ct. (Högsta Domstol) (Aug. 18, 1915) 2 Z.ausl.PR. (1928) 871 (Swedish defendant, cohabitation in Hamburg; exceptio plurium c oncumbentium admitted according to German law), overruled by H. D. (April 13, 1946) 15 Z.ausl.PR. (1949/50) 502 (lex fori).


\(^{30}\) SAVIGNY § 374 at p. 279; tr. by GUTHRIE p. 254.

United States: Restatement § 454: “No action can be maintained on a foreign bastardy statute.” Código Bustamante art. 59 (for aliments).

Austria: OGH. (Feb. 19, 1924) 6 SZ. no. 66; OGH. (March 4, 1937) 19 SZ. no. 70; WALKER 815 and in KLANG’s Kommentar 328. But see infra n. 35, 38.

Denmark: Sup. Ct. (Højesteret) (June 22, 1915) 2 Z.ausl.PR. (1928) 865; Criminal and Police Court Copenhagen (May 4, 1897) 10 Z.int.R. (1900) 293.

Finland: Law of 1929, § 21 sentence 1 (for aliments); § 21 sentence 2 (for all claims against Finns).


The Netherlands: Rb. Amsterdam (June 29, 1925) W. 11424; but contra Hof den Haag (May 20, 1927) W. 11814; Rb. Maastricht (April 28, 1932) W. 12684 and almost all other decisions; see infra n. 38.

The Treaty of Montevideo (1889) art. 18, Treaty of Montevideo (1940) art. 22 provide that the rights and duties concerning illegitimate filiation are governed by the law of the state in which they ought to be “effective.”

Similar, Nicaragua C. C. Tit. Prel. art. VI (10). It is highly obscure as to what this means.

\(^{31}\) Domicil of the mother:

(a) At the time of birth: older Prussian practice, see Gebhardsche Materialien 216.

Switzerland: BG. (Oct. 5, 1956) 82 BGE. II 570, 575, overruling the reference to the law of the man’s domicil at the time of conception, infra n. 33.
tion; 33 the domicil of the man as defendant at the time of the commencement of the action; 34 the national law of the mother; 35 of the child; 36 of both cumulatively; 37 the national law of the man; 38 of the man and of the child, cumulatively. 39

(b) At the time of conception: last Prussian practice before 1900 following the thoroughly considered Plenary decision of the Obertribunal (Feb. 1, 1851) 37 Entsch. no. 1; Foerster-Eccius 1 Theorie und Praxis des Preussischen Privatrechts (ed. 5, 1887) 64; alleged Norwegian practice, but controversial, see Christiansen, 6 Répert. 576 no. 128 and now supra n. 30.

32 Domicil of the man:

England: Coldingham Parish Council v. Smith [1918] 2 K. B. 90, per Salter, J.; Westlake 105 § 58a concludes convincingly that “the liability of a father to maintain his son is determined solely by the law of the father’s domicile.” But Beale 1433 § 457.2 infers the primary importance of the place “where support is needed,” meaning probably the domicil of the child.

Norway: Sup. Ct. (1918) 2 Z. ausl. PR. (1928) 873 no. 52.

33 Switzerland: BG., Civ. Div. (March 24, 1927) 53 BGE. II 89, 92, following BG., Constitutional Division (May 15, 1925) 51 BGE. I 105; Bern 47 ZBJV. 663, no. 43; BG. (April 3, 1952) 78 BGE. II 200. See Schnitzer I 429. Overruled by the decision supra n. 31.


35 National law of mother:

Germany: EG. art. 21.

Austria: Decree of Oct. 15, 1941, § 12.


36 National law of the child:

Brazil: Sup. Trib. (Aug. 29, 1900) 84 O Direito 547 (inheritance by will).

Czechoslovakia: Law on private international law of 1948, § 27 (except where both father and mother are domiciled in Czechoslovakia, sentence 2).

Finland: Law of 1929, § 21 in fine (claims other than for aliments against foreigners).


The Netherlands: Hof Amsterdam (May 2, 1913) W. 9557, Clunet 1920, 765 (child born in the Portuguese colony of Loanda, Dutch father, Portuguese law); Rb. Rotterdam (June 25, 1934) N. J. 1935, 960 ("constant prac-
3. Public Policy

(a) After having produced every possible opinion on the subject, the French doctrine now struggles to keep a balance between the personal (national) law of the child, which is applicable in theory, and the French law which is applied on many grounds. In the first place, French law prevails where French nationality depends on filiation, since it ought never to be based on a foreign law. 40 "The question of filiation is
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absorbed by the higher one of nationality." Only once, in a decision of the Court of Paris, does the private law question seem to have been duly isolated. Where a child is born in France, it is thought invested with a provisional French nationality and, for this reason, subject to French law; moreover, it cannot lose this provisional nationality except by French law or a foreign law similar to the French.

(b) In an analogous way the law of the forum prevails in some other countries, when one party or the defendant is a subject of the forum, or both parties dwell within the forum. The Polish law declares Polish law applicable (instead of the common nationality of mother and child at the time of birth), if both father and mother are domiciled in Poland at the time of birth and Polish law is more favorable to the child. German law refuses to impose upon a German defendant a duty of support beyond what the internal law grants. These exceptions to the personal law do not leave

41 Trib. Nancy (Feb. 13, 1904) D.1904.2.249.
43 Cour Paris (July 2, 1926) D. H. 1926. 441, Clunet 1927, 77.
44 Austria: OGH. (1938) 20 SZ. 265, no. 128 (dictum).
45 Denmark: Sup. Ct. (Højesteret) (June 22, 1915) 2 Z. ausl. PR. (1928) 865 and Western Court (Vestre Landsret) (Oct. 4, 1928) 7 Z. ausl. PR. (1933) 924 (mere residence of the father at the commencement of the action suffices for application of Danish law).

The Netherlands: often, although not consistently, see VAN HASEL'T 79 and Supplement 31 ff.
48 Germany: EG. art. 21 last clause: "No greater claims, however, can be enforced than what have been constituted by German law." Understood as merely protecting Germans, RGR. Kom., n. 2 before § 1705; LG. Bartenstein (Nov. 18, 1929) IPSpr. 1930, no. 79. What is the equivalent of an award under the German law? See for illustration cases in IPSpr. 1930, nos. 80–83.
Siam: Law of 1939 on private international law, § 36 par. 2.
much space to the pretended principle. There are yet others.

(c) Where, as between foreign parties, their national law excludes suits involving the question of paternity, the action is dismissed as a rule by courts following the nationality principle. Thus, the Italian provision before 1939, that no actions lay on the ground of paternity except in the cases of abduction or rape, was observed in Germany,\(^{49}\) France, \textit{et cetera}. On the other hand, the action is also rejected where the national law allows but the municipal law of the forum refuses the claim. So long as the famous maxim of the \textit{Code Napoléon} (article 340) was in full sway that "\textit{la recherche de la paternité est interdite}," foreign children were unable to sue their foreign parents in France,\(^{50}\) and the same prohibitive policy operated in Italy,\(^{51}\) the Netherlands,\(^{52}\) Guatemala,\(^{53}\) \textit{et cetera}.

The French courts have transferred this doctrine to their mitigated provision, as it has stood since 1912.\(^{53a}\) No action is admitted, unless the precautions and conditions precedent provided in the present article 340 are fulfilled, i.e., unless paternity appears manifest by written evidence or recognition. In this opinion, foreign laws more liberal than the French offend the public order aiming at "the honor and peace of families."\(^{54}\) Laws which render paternity actions still more difficult than the French have free play.\(^{55}\)


\(^{50}\) \textit{Contra}, 2 Fiore 272 no. 733, 279 no. 739, 283 no. 741.

\(^{51}\) FedoZZI 496.

\(^{52}\) BW. art. 342 par. 1. In accordance, Benelux-Draft, art. 9 par. 4.

\(^{53}\) Matos 324 ff. nos. 271, 272.

\(^{53a}\) The law of July 15, 1955 has further amended the Code civil, especially by granting a claim for support to adulterous and incestuous children.


\(^{55}\) See the criticism of Batiffol, Revue Crit. 1934, 618; \textit{ibid.} 1935, 617.
To illustrate special points, domestic provisions respecting the time limit within which the child’s conception is presumed are often held to be imperative. The old Prussian practice did not follow this view; whether the European common law, determining the time as running from the 300th to the 182nd day, or the Prussian Landrecht, fixing it from the 285th to the 210th day should be applied, was determined according to the domicil of the mother. But the courts of Austria and France refused to deviate from their own rules. Also, whether a defendant whose cohabitation is proved may raise the defense of several cohabitants is decided by contradictory rules, according to the personal law or the lex fori, et cetera.

Reasonably, the Swiss Federal Tribunal has stated that the exception allowed the defendant cohabitant under article 315 of the Swiss Code, that the child’s mother led a frivolous life, does not imperatively operate against a foreign national law, since such dissimilarities are to be borne under the principle of territorialism (meaning domicil) dominating the Swiss international private law.

Finally, the award of alimony often is either simply con-

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56 Prussian Obertribunal, 54 Striethorst 47, no. 12.
57 OGH. (March 4, 1937) 19 SZ. no. 70, applying Allg. BGB. § 163.
58 France: after the time determined in C. C. art. 340, a suit is not taken in hand, even though the child acquired French nationality only after the end of it; Cass. (req.) (July 15, 1936) Revue Crit. 1937, 151; Cass. (civ.) (May 27, 1937) Revue Crit. 1938, 82. Cf. Niboyet, Revue Crit. 1934, 135; Batiffol, Revue Crit. 1935, 622; ibid. 1938, 83; see also the criticism by Coste-Floret, 7 Giur. Comp. DIP. 129 no. 64. Contra: Cour Paris (March 14, 1952) Revue Crit. 1952, 325.
59 Personal Law: Also on this point the Prussian courts constantly applied the domiciliary law of the mother; see 1 Rehbein 84, no. 23. Germany: personal law of the mother against foreign defendants, see Lewald 144, 146 ff.; Raape 513. Lex fori: Austria: OGH. (Feb. 19, 1924) 6 SZ. 152 no. 66, and Walker 818 n. 59, declaring the rejection of exceptio plurium concumbentium (Allg. BGB. § 163) as imperative, contra: OGH. (Sept. 21, 1946) ÖJZ. 1947, 110, 15 Z. ausl. PR. (1949/50) 466; OGH. (March 3, 1948) 21 SZ. (1946-48) no. 77, 15 Z. ausl. PR. (1949/50) 467.
60 BG. (March 24, 1927) 53 BGE. II 89, 94.
trolled by the law of the forum, or, even if the personal law is primarily applied, the usual amounts of support are considered as the maximum or, conversely, the minimum. By the latter consideration, a foreign law granting little or no support is eliminated as inhuman or scandalous.

What persons may be liable to support the child, or in what circumstances the right to institute the action is forfeited or lost by limitation, has been held subject to the personal law.

4. Time Element

If the law of the place of birth or the mother's personal law at this date obtains, it is implied that a pregnant girl who, before confinement, changes her nationality by marriage or otherwise, or changes her domicil, respectively, will thereby affect the fate of the child she gives birth to afterwards, unless the child acquires a nationality of its own by jus soli. On the other hand, a change in the local connections

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61 The lower Dutch courts applied the personal law of a natural father or of the minor child to the question who had to sue for the child; but the Supreme Court, H. R. (June 13, 1924) W. 11295 declared the appointment of a special curator under art. 344h of the Dutch BW. indispensable.

62 France: Most decisions take it for granted that French law is applicable; Trib. Seine (June 18, 1934) Clunet 1935, 619. BATIFFOL, Revue Crit. 1937, 431 praises the prudence of Cass. (civ.) (July 20, 1936) Gaz.Pal.1936.2.696, 7 Giur. Comp. DIP. 135 no. 65, Revue Crit. 1937, 694 because the court specifies the characteristics of § 1708 of the German BGB. which make the section inapplicable in France.

Germany: RAAPE 521 contends that an award under foreign law which would ruin the defendant should not be given. Contra: Italy: FEDOZZI 496.

63 Germany: LG. Hamburg (Oct. 13, 1932) IPRspr. 1932, no. 94; LG. Frankfurt (July 30, 1934) JW. 1934, 2644, IPRspr. 1934, no. 7 (English mother and child); AG. Kehl (Sept. 22, 1935) 6 Giur. Comp. DIP. 298 no. 242 (Luxemburg); LG. Hamburg (Sept. 2, 1936) JW. 1936, 3492 (Old Rumania).


64 German LG. Bartenstein (Nov. 18, 1929) IPRspr. 1930, no. 79 (paternal grandfather liable under Swiss law).

65 Swiss BG. (Oct. 22, 1919) 45 BGE. II 503, 505.
of the person whose personal law at birth is decisive does not affect alimentary duties as once established or denied. The Polish law generalizes this rule so as to include all relations between father and child.

French courts followed this rule until the first World War and occasionally later up to 1920. As, however, the cases became more frequent where a child changed its nationality between its birth and a judgment for alimentation, the highest Court developed a peculiar doctrine amounting to the following rules: A foreign child acquiring French nationality is subjected to French law. A child of French nationality changing to foreign citizenship is also subject to French law on the ground of the theory of vested rights. This theory "turns so as only to protect the lex fori," a purpose which seems disproportional to the fact that the French law is backward on this point and puts the child at a disadvantage.

No such questions arise in this country, as each court applies its own state statute.

5. Renvoi

In this particular field, the German statute has omitted to provide for renvoi. It has been applied nevertheless, against some opposition.

66 Swiss BG. (March 24, 1927) 53 BGE. II 89.
Germany: RAAPA 514; same, 50 Recueil 1934 IV 405, 454 ff.
Poland: Law of 1926, art. 21.
68 VALERY 1145 no. 807; BATIFFOL, 8 Répért. 410 no. 35; 3 ARMINION 55 no. 47. Cf. J. DONNEDIEU DE VABRES 381.
69 Cour Paris (Dec. 22, 1920) S.1921.2.97.
72 J. DONNEDIEU DE VABRES 499.
73 AG. Stuttgart (Oct. 22, 1930) JW. 1931, 157, IPRspr. 1931, no. 87 (Amer-
III. Recognition of a Child

In the French system, adopted in many countries, acknowledgment of a child by father or mother must precede any claim of rights on the ground of illegitimate relationship and moreover is a condition of legitimation. In another phase, recognition may improve the situation of an illegitimate child without reaching full legitimation (Greece, the Netherlands, Switzerland, and others) or only exclude the exceptio plurium concumbentium (Germany). We are dealing therefore not with one but several distinguishable institutions of private law.

1. Formalities

Formalities, which greatly differ, would be expected to suffice if complying with the place where the act of recognition occurs. But the rule "locus regit actum" is challenged by the personal law. Dominant opinion in France, in particular, requires a formal "authentic" declaration such as is usual in France when a Frenchman recognizes a child abroad and lets the local regulation determine only what solemnity "authentic" documents ought to have.

In the Restatement, § 140, the law of the parent's domicil...
seems to extend to all questions including formalities. Probably, this is the actual law. 78

2. Substantive Requirements

The personal law seems to be universally applied. It does not have to be the same law, however, that governs the alimentary obligation. Prevailingly, the domicil 79 or the nationality 80 of the recognizing parent is determinative, since

78 Cf. Richmond v. Taylor (1913) 151 Wis. 633, 139 N. W. 435, and 2 BEALE 711, § 140.1.

79 U. S. Restatement § 140; Pfeifer v. Wright (1930) 41 F. (2d) 464; In re Forney (1919) 43 Nev. 227, 184 Pac. 206, 186 Pac. 678; Eddie v. Eddie (1899) 8 N. D. 376, 79 N. W. 856; 2 BEALE 711 § 140.1. (the laws of mother and child are not to be consulted, because the act is beneficial for the status of the child).

Former Prussian law: Prussian Obertribunal (April 11, 1856) 32 Entsch. kgl. Ob. Trib. 401 no. 51 (recognition by a minor domiciled at a place under Prussian law executed in a territory of French-Rhenish law was invalid according to Prussian law. The court notes, at 406, as singular that the rec­ognition would have been valid according to Rhenish law, and would have bound the minor as a confession of impregnation under Prussian law, if executed in a territory of the latter law; it regrets a hardship caused “by the conflict of heterogeneous legal systems.” This adds an argument to the adop­tion of the lex loci actus. But, today a court would establish an extraterritorial confession, although the declaration was made abroad).


Germany: RAPE 523, III 3 (a).


Switzerland: BG. (Dec. 22, 1909) 35 BGE. I 668, 675; Just. Dep., BBl. 1939, II 283 no. 11 (a former Swiss national, naturalized in Canada, cannot adopt children in Switzerland complying with Swiss law only). Correspondingly, the BG. (Dec. 19, 1940) Praxis 1941, no. 9 at 23 has applied NAG. art. 28 to the recognition by a Swiss father domiciled in France, thus determin­ing the effects by renvoi under Swiss law.
the conditions of an act burdening its author and particularly his capacity should depend upon his law. Hence, even courts which subject the alimentary action to the law of the child or consider this law cumulatively proclaim the rule. Nevertheless, sometimes the law of the child, or the cumulated laws of the parent and child, or the child’s law limited to the capacity and consent of the child, have been adopted or advocated. In the only American case that is known to be in point, Italian law, being that of the child’s domicil, was applied, and on this basis the court held it sufficient that the father, newly immigrated, had executed a power of attorney in Philadelphia and sent it to Italy, whereupon his agent recognized the child formally in Italy. The fact that the man had been domiciled in Italy, at least until a short time before, and for the time being perhaps was merely resident in this country, may have influenced the decision. But it would be reasonable to recognize the validity of a recognition sufficient by the child’s law where, as in this case, the parent practically makes an appearance in the child’s country. Still more can be said in favor of giving the child those remedies for opposing a recognition, or for contesting its validity, which the child’s own law provides.

81 Código Bustamante art. 57.

Among French writers, recently, Ninoyet 769 no. 650 and Traité 478 (but French law if only one party is French!); Lerebours-Pigeonnier 380 no. 349; Batiffol, Revue Crit. 1938, 655 and Traité 531 (insists on this opinion even after the decision of the court of cassation of March 8, 1938). See supra n. 80.


France: Some decisions and writers, see Weiss, 4 Traité 46, 3 Arminjon 53 no. 44 ff., Audinet, Note S.1920.2.65.

Belgium: Poullet 466 no. 392; Novelles Belges, 2 D. Civ. 619, no. 587.

Italy: Anzilotti, 2 Rivista (1907) 115; Diena, 2 Princ. 181; Cavagliari 244 ff.

83 Japan: Law of June 15, 1898, art. 18.

China: Law of Aug. 5, 1918, art. 13 (speaking of “recognition”).

84 In re Moretti’s Estate (1932) 16 D. & C. (Pa.) 715, commented on by Taintor, 18 Can. Bar Rev. (1940), supra n. 82, at 612.


The Netherlands: Van Hasselt, 6 Répert. 634 no. 195.
3. Scope

The personal law determines:
Who may recognize, e.g. after the parent’s death;
Under what conditions; 86
Whether before the child’s birth, and whether after its birth;
Whether the child must have reached a certain age;
Whether the child’s consent is required;
Whether adulterine children can be recognized and under what conditions; 87
Under what conditions and by whom a recognition may be contested; 88
And, as submitted earlier, all effects of recognition. 89

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86 The Netherlands: Hof Amsterdam (Jan. 27, 1913) W. 9438 and (May 2, 1913) W. 9557 (paternal recognition under foreign law during the lifetime of the mother without her consent recognized, although prohibited by BW. art. 339).


88 France: Trib. Seine (Dec. 24, 1926) Clunet 1928, 710 (Russian recognizing Italian child, Soviet Russian law); App. Colmar (Nov. 28, 1930) Clunet 1932, 470 (German law; on the person entitled to contest); Cass. (civ.) (Jan. 17, 1899) S.1899.1.177, 8 D. H. 1899.1.329, Clunet 1899, 546, and Cass. (req.) (Jan. 9, 1906) Revue 1907, 154 (case of Bourbon de Bari, Italian law); much criticized by the critics, ANZIOLITI, 3 Rivista (1908) 171, Note, and WEISS 4 Traité 73, 75; PILLET, Note, S.1899.1.177 and BARTIN, Note, D. H. 1899.1.334, among others, were of different opinions).

Germany: LG. Frankfurt a. M. (Aug. 17, 1932) JW. 1933, 191, IPRspr. 1933, no. 48 (in application of EG. art. 21, sentences 1 and 2 held that the recognition cannot be annulled but recovered as undue enrichment).


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89 Switzerland: NAG., art. 8 par. 1.

The Netherlands: Arbitration Court for maritime accident insurance (Feb. 26, 1938) 42 Bull. Inst. Int. (1940) 69 no. 10992 (recognition under German BGB. § 1718 does not constitute a relationship of the character required for a right for damages by law on maritime accidents).

France: in the case of Cass. (civ.) (March 11, 1936) Revue Crit. 1936, 714 with Note by NIBOYET (?), 7 Giur. Comp. DIP. 131 no. 66 with Note by COSTE-FLORET, recognition made in Saigon, Indo-China, by an English father was considered invalid on the ground of English law, but treated as a confir-
ILLEGITIMATE CHILDREN

The effect of acknowledgment or recognition on the problems of succession upon death, in any consistent rule, should be determined by the same rule as that governing the formation of the act, unless the inheritance statute either rejects children born out of wedlock or admits illegitimate children irrespective of recognition or irrespective of a recognition other than as specified by the statute itself.

IV. Mother and Father

Modern statutes determine expressly the law under which an illegitimate mother may sue the procreator or cohabitant for the costs of pregnancy, delivery, and support. Again, they may variously refer to the laws of the mother, the mother and child, or the defendant. Courts without express statutory provisions will incline to the law of the forum.

A problem of classification ought to be reported in this connection. French practice gives the mother an action for the natural obligation imposed on the illegitimate father in French conception. The court applied French law without considering the conflicts problems involved which are new and doubtful.

90 See supra p. 635 and infra pp. 700–705.
90a In re Vincent's Estate (1947) 71 N. Y. S. (2d) 165 (Irrelevance of recognition under Haitian law because illegitimate children are excluded from any inheritance under New York law).
91 United States: Moen v. Moen (1902) 16 S. D. 210, 92 N. W. 13 (since under the South Dakota law every illegitimate child inherits, it is entirely immaterial what right Norwegian law attached to the recognition).
92 Van Horn v. Van Horn (1899) 107 Iowa 247, 77 N. W. 846 (a notorious recognition suffices under the Iowa inheritance law, irrespective of the significance given the recognition in New Jersey).
93 Germany: EG. art. 21.
94 Poland: Law of 1926, art. 21.
95 Japan: Law of June 15, 1898, art. 21.
96 Czechoslovakia: Law of 1948 on private international law, § 27 par. 1 sentence 1.
96a Greece: C. C. (1940) art. 21; MARIDAKIS, Revue Crit. 1938, 347 indicates as motive of the draft, that the mother needed protection.
96b China: Law of Aug. 12, 1918, art. 16.
against the father, ostensibly on the ground of a tort consisting in the illegitimate intercourse, but actually as a substitute for the remedies of support missing in the written law. The courts award the woman, together with her own damages, alimony on behalf of the child. Under which conflicts rule should such a claim be subordinated in a non-French jurisdiction whose municipal law establishes for the analogous purposes specific family obligations? A reasonable answer should eliminate all technical legal constructions and envisage the social purpose of the claim. The adequate conflicts rule to deal with these institutions is evidently bound to be independent from tort considerations as well as from a narrow meaning of "family" law, going directly to the question of what an illegitimate mother is entitled to demand from her cohabitant. 97 It follows that, if the cohabitation took place in France, French and German courts should apply to a French mother the French remedy, and if the facts occurred in Germany, the German family law. 98

The French courts, however, oppose to the German law their "ordre public." 99

V. CONCLUSIONS

The state of chaos reported in this part could easily be reduced by a simpler, if not uniform, approach. The legitimate family ought not to be denied a unified legal regulation; it was an entirely sound idea that the law of its head should govern all relations of the family. The two main objections to this axiom raised in the last decades are unconvincing. One of these objections is associated with the nationality principle in Continental Europe. In view of the modern trend toward

97 To this extent the theory of the writer, 5 Z. ausl. PR. (1931) 265 has been approximately allowed by NEUNER, Der Sinn 110 and RAPE, 50 Recueil 1934 IV 528 to 533.
98 NEUNER and RAPE (precedent note) seem to draw more radical conclusions.
granting separate nationalities to married women and children, the conclusion is popular that the national law of the father must yield its dominant role; that it must either concur with the children's laws or even give way to them completely. This may be logical, but it amounts to a new inroad upon the nationality principle itself. This principle, then, is no longer, if it ever was, suitable as the main vehicle of conflicts law. It will be abolished some day. So long as it is maintained, however, the objection should be disregarded. The only practical method consists in determining the events affecting the life of the family according to the national law of the father and, after his death, that of the mother. The other reason for opposing the rule of the parent's law has been derived from the need of the child to be protected. We have tried to show that the benefit of the child ought to be protected by all legislatures and all courts rather than exclusively by the law and the jurisdiction to which the child belongs, often only accidentally. Conflicts law must presuppose equality among the particular national laws, statutes, and tribunals.

Consequently, it is natural that in the countries devoted to the principle of domicil the law of the domicil of the family head at the birth of the child determines the latter's legitimacy; furthermore, his law at the time of a legitimization or adoption governs the conditions and effects of such acts, as at later dates it indicates the rights and duties following from legitimate father-child relations. The inheritance law of a domicil acquired after legitimate birth, legitimization, or adoption ought not to change any of their effects, unless there is a distinct, exceptional public policy, either prohibitive or permissive, at the forum of inheritance.

The only question less definitely answerable by theoretical and practical considerations is concerned with the American peculiarity of ascribing different positions to a child with re-
spects to his father and his mother. The ideas and consequences of this peculiarity have not been fully explained, to the knowledge of the writer.

Entirely different is the nature of the problems arising from illegitimate filiation; French and other conflicts laws should not have formed a category of "filiation" comprehending all children. Of course, any act of acknowledgment or recognition by a parent is governed simply by the law of this parent. Moreover, something can be said for the personal law of the mother with respect to her relationship to the child. But the relations to the procreator which are derived from conception, birth, or cohabitation cannot be referred, without artifices, to the place where any one of the three persons involved was domiciled, or was a national, and still less to the contacts at the time of the action. As it is very important for the purpose of a serviceable conflicts rule not to base it on any special domestic construction of the liabilities or the rights of the parties, the simplest contact, viz., with the place of the birth, is the most commendable. The danger that, before giving birth, the mother may move to a locality where the law is unfavorable to her or the child, is negligible; an improvement for the child is welcome.

These suggestions are not meant, however, to supersede the system under which bastardy proceedings are now authorized in this country. Support is awarded under similar considerations throughout the country, and interstate relations are the only ones to be considered. Hence, the chief concern is with jurisdiction, which naturally is found at the father's domicil as well as where personal jurisdiction over him is obtained at the mother's domicil. Every court applies its own law.

Lex fori, as a matter of fact, can be defended in this doctrine with comparatively better justification than anywhere else. In international matters, however, it should be avoided.