Two Legal Processes in Conflicts Law (summary)

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It has recently in Japan been more seriously considered what is the ideal method of the discipline on conflicts law. Some scholars have suggested a flexible operation of conflicts law rules. The possibility of the flexiblization is one of the important issues in conflicts law studies today. When we are positive about the flexiblization, however, we also should draw a line somewhere. The flexible operation of conflicts law rules might fuse conflicts law into substantive law and detract from the unique value of conflicts law with overly looking about the result of the application of applicable substantive law. In this article, I will discuss mainly Perry Dane's theory which criticizes the American conflicts law revolution and tries to set up criteria for making too sharp a distinction between conflicts law and substantive law. The American conflicts law revolution based on legal realism. Some modernists attacked not only details but also the jurisprudential core of traditional Vested Rights theory. Dane criticizes the revolution and modern theories which based on legal realism and utilitarianism and denied individual rights in process of conflicts law, and tries to regenerate Vested Rights theory by building up the new jurisprudential core. He defends the norm-based view of law and offers the concept of "Vestedness."

According to Dane, traditional Vested Rights theory consisted of seven principles. He redefines one of the principles as Vestedness. Subject to various interpretive glosses, Vestedness can be defined as a principle of law requiring that the court of any forum should, in selecting the criteria governing the substantive elements in an adjudication, apply conflicts law criteria that could be expected to generate the same set of substantive criteria if they were applied by any other forum in an actual adjudication. Thus, on the one hand, a conflicts law rule requiring a court in an auto collision case to apply "the law of the place of the crash" is consistent with Vestedness principle because any other forum, if it employed the same conflicts law rule, could be expected to find the same crash-site and apply the same substantive law. On the other hand, a rule requiring a court

to apply, either as a first or last resort, "the law of the forum" is not consistent with the principle, because the application of exactly the same rule by other forums would lead each forum to apply its own, possibly very different, substantive law.

Dane furthermore proposes the dichotomy between a second-order and a first-order view of conflicts law as criteria for making too sharp a distinction between conflicts law and substantive law. A legal system's impulse to tackle conflicts law can take two different forms. First, it might reflect a forum's effort to rise above itself, so to speak, and decide, by its own lights but from a neutral perch, which law properly applies to a given issue in a jurisdictionally complex case. This view treats conflicts law as a second-order legal process, which is to say as a law about the division of legal authority. Second, conflicts law might not arise out of a position of neutrality at all. Instead, it might be an effort by a legal system to work out its own substantive doctrine in the light of the sheer fact of jurisdictional complexity. This view treats conflicts law as a first-order legal process. It represents not the allocation of prescriptive jurisdiction, but its exercise.

It has been still need that we try to discern the difference between conflicts law and substantive law and make too sharp a distinction between the two laws. For the preservation of private international legal order, conflicts law should not exclusively undertake all roles as well as substantive law. Counting towards present and future conflicts law theories, we must elaborate the details of the interpretation and the philosophy of conflicts law and expressly verbalize the concept of conflicts law justice which has been understood sub silentio by conflicts law scholars.