Conflict of Laws: A Critical Survey of Doctrines and Practices and the Case for a Policy Oriented Approach

(FIRST INSTALLMENT)

By

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The arbitrary division of the world into different territorial or district units, each with its own system of law, based on its peculiar norms and standards, implemented by its own scheme of law enforcement and administration, is the operative fact giving rise to problems in what is currently and conventionally called 'private international law' or 'conflict of laws'.[1] A transaction, a set of facts, or better still, an event producing changes in values, may touch two or more states. If an event or transaction, say a 'tortious act', occurs in State A, takes effect in State B, and a problem respecting the liability of the alleged actor arises in either of the two states or in a third state, the officials of the latter, whether judicial or administrative, are confronted with a two-fold problem: first, whether to entertain the case, partially or completely, or dismiss it altogether; and second, if the case is entertained, to make or not a 'choice of law', or to decide, as stated by one writer, "which of several simultaneously valid legal systems is applicable to a given set of facts."[2]

Some of the events described in typical conflict of laws problems have effects across national boundaries; other may even have occurred within other national boundaries. The important question is what are the limitations imposed by a state on its factual power with respect to value events whose effects transcend the boundaries of a single state. Other questions immediately suggest themselves:

1. what recognition, if any is offered of the interests of the other affected state or states?
2. are there any limitations imposed by public international law doctrines?

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1 Cf. Westlake, Private International Law (1880) 1, 2; Cheshire, G.C., Private International Law (3rd ed. 1948) 3, 4; Rabel, E., Chapter I, Vol. I, The Conflict of Laws: A Comparative Study (1945); Wolf, M., Private International Law (1945) 1-18; Falconbridge, Essays on the Conflict of Laws (1947) 1-18; Cheatham, Dowling, Goodrich, and Griswold, Cases and Materials on Conflict of Laws (1941) 1.

2 Wolff, op. cit., 4.

3. are there any limitations imposed by private international law doctrines? Incidentally, one may pose the question whether the dichotonomy established by traditional writers between 'public international law' and 'private international law' in that one affects states, and the other individuals, is valid.

There are two ways of dealing wih conflict of laws problems. The methodology followed by many writers is to treat the subject matter in terms of institutions, such as 'contract', 'tort', 'property', 'marriage', 'divorces', 'succession' and so forth. Here, an attempt is made to treat the subject matter in terms of values. Briefly stated, the doctrines and practices of private international law are viewed as attempts to mark out the limits nation-states or district units impose upon themselves in the use of power, and the pertinent inquiry is made regarding the effects of such use upon the values with which a free, democratic society is concerned: respect, wealth, congenial personal relationships, rectitude, skill, enlightenment, and well-being.[3]

As a brief and general proposition, a state has effective control over persons and things within its borders. Couched in traditional language, one might perhaps say:

> "A sovereign is supreme within his own territory, and, according to the universal maxim of jurisprudence, he has exclusive jurisdiction over everybody and everything within the territory and over every transaction that is there affected. He can, if he chooses, refuse to consider any law but his own." [4]

Of course, in so far as federations are concerned, there may exist some constitutional limitations, such as the due process clause, the full faith and credit provision, and the interstate commerce clause in the United States Constitution, which may restrain, formally and effectively, the power of a state to take hold and dispose of any judicial problem it sees fit.[5] Beyond this, however, no authoritative doctrine in public international law, excepting that which concerns the immunity of sovereigns, public vessels, and diplomatic officials, has been widely applied and recognized in the effort to delimit the control exercised by a state over persons and things within, or conceived to be within, its 'jurisdiction'.[6]

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[3] These values are spelled out in detail in Lasswell and McDougal, Legal Education and Public Policy: Professional Training in the Public Interest, 52 Yale Law J. 203 (1943).

[4] Cheshire, op. cit., at 3.

[5] See Dodd, the Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws, 39 Harv. L. Rev. 533 (1926); Hilpert and Cooley, The Federal Constitution and the Conflict of Laws, 25 Wash. U.L. Rev. 27 (1939); Cheatham, Sources of Rules for Conflict of Laws, 89 U. of Pa. L.R. 430, 437, (1941); cf. Crowin, The Full Faith and Credit Clause, 81 U. of Pa. L. Rev. 371 (1933) 260.

[6] Cf. Nussbaum, op. cit. at 206, where he says: "One cannot even maintain that a local judiciary would violate the law of Nations by adjudicating rights in rem on foreign land; highest courts have assumed that power without any adverse reaction in the diplomatic field

As stated earlier, one appropriate role of the technical doctrine in conflict of laws is to set out, by a process of self-imposition on the part of the territorial units concerned, the limits within which they are to use the control and power they possess on persons, things, and events in the distribution of values with respect to events having effects transcending national boundaries. From this perspective, one sees the relevance of such notions as 'domicile', 'nationality', 'territoriality', 'situs', 'locus', and the various derivations from contract, tort, or property, however imperfectly such notions may have been applied in concrete fact situations.

To be sure, there are many circumstances upon which a state bases the competence of its officials, whether judicial or administrative, in assuming 'jurisdiction'[7] over persons and things. Though not exhaustive, the following factors have been invoked:

1. the ownership of property, whether 'movable' or 'immovable', in the forum by one or both parties to a proceeding. The American Restatement subjects tangible personalty within a state to the jurisdiction of its courts in the same way as realty.[8] The civil law principle of **forum rei sitae** performs the function of subjecting claims to land to the jurisdiction of the forum of the place where it is situated. Here, the base value of power is used to affect the distribution of such other values as wealth, well-being, and respect, depending on the particular issue involved in the proceeding.

2. the factor of connection between some or all aspects of the transaction, act, or event, and the place of the forum. Thus, the acts of Z in State A may subject him, in respect to the consequences of his acts, to A's jurisdiction, though he may not be a national or domiciliary of A. The arbitrarily determined, because generally not sub-

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of having followed. . . Quite preponderantly the grounds of jurisdiction are determined by inherited legal conceptions and techniques and, in the international or interstate area, frequently by a desire to grant preferential treatment, directly or indirectly, to local citizens or residents over foreign parties." One might, however, mention the vague, abstract concept of 'minimum standards of international justice' in the treatment of aliens as an additional limitation, however theoretical it might be.

[7] Prof. Beale defines jurisdiction as "the power of a state to create rights such as will be recognized by other states as valid" and distinguishes it from "the power to act as it pleases within its own territory." To him, there are three types of jurisdiction (a) executive jurisdiction, which is the power of carrying out and enforcing the laws, including the general administration of government; (b) legislative jurisdiction, which is the power to govern legal relations by law, whether by common law or statute; (c) judicial jurisdiction, which is the power of the state over judicial matters. See Beale, The Conflict of Laws (1935), Chap. III, 273. Nussbaum considers that "legislative jurisdiction" is not a Conflict conception at all, and would define jurisdiction as the state's power over judicial matters. "It is the self-limited power (i.e. to take hold of any judicial matter as the state sees fit) which is ordinarily envisaged in the Conflict discussions of 'jurisdiction'. (Nussbaum, op. cit. at 192). It is in this sense that the term 'jurisdiction' is used here.

[8] See Restatement, Conflict of Laws, sec. 102; 1 Beale, Conflict of Laws (1935) sec. 102.1.

ject to any compulsive public international law doctrine, by the forum's positive law, in accordance with its notion of the interest involved.

3. the factor of domicile, residence and at times even mere presence in the forum. This is particularly true where it is the defendant's domicile, residence, or presence in the forum which is the operative factor. Italian law, for instance, subjects foreign residents personally served with process within the realm of Italian jurisdiction in respect to obligations incurred outside Italy.[9] In one-oft-cited American case,[10] the defendant, a non-resident enroute from Nova Scotia to New York, was served with process while he was on a British steamer in Boston harbor after she had reached her dock but before she was moored to it, and on the issue of jurisdiction, the Massachusetts court held: "When the party is in the state, however transiently, and the summons is actually served upon him there, the jurisdiction of the court is complete, unto the person of the defendant."

4. the factor of nationality. French courts, for example, have competence in every case where the plaintiff is a French national, although the defendant is not a resident or domiciliary, or is not even present in France.[11] Italy has similar rules,[12] inspired mainly by Mancini's rhetorical insistence that the personality of the individual is determined by his nationality only, and that "recognition of a personality is possible only by way of a recognition of his nationality." To a very limited extent, the United States uses the fact of membership in the body politic as a basis for jurisdiction. In Blackmer v. U.S.,[13] for example, it was held that the United States possessed the power inherent in 'sovereignty' to require the return to that country of a citizen, resident elsewhere, where the public interest required it, to be witness in a criminal suit or by order of a legislative committee, and to penalize him in case of refusal by attaching his property in the United States.

5. the factor of submission to the jurisdiction of the court, i.e., where parties to a case, before or after the dispute, agree to have their case decided by a particular court which, otherwise, might have no competence to entertain the action.

6. the factor of public policy or ordre public,[14] a concept which

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[9] Art. 106, Italian Code of Civil Procedure.

[10] Peabody v. Hamilton, 106 Mass. 217 (1870).

[11] Article 14 of the French Civil Code: "The alien even when not resident in France. . . . can be brought before a French tribunal with regard to obligations contracted by him in a foreign country towards Frenchmen." Art. 15, ib., provides: "A Frenchman can be brought before a French tribunal with regard to obligations contracted by him in a foreign country towards an alien." See Wolff's criticism, op. cit. at 60.

[12] Arts. 105, 106, Italian Code of Civil Procedure.

[13] 284 U.S. 421 (1932).

[14] For a comparative study of the notions of 'public policy' and 'ordre public', see Husserl, Public Policy and Ordre Public, 25 Va. L.R. 37 (1938), and Healy, Theorie General de l'Ordre Public, 9 Rec. Ac. Dr. Int. 407 (1925); see also Knapp, La Notion de L'Ordre Public Dans les Conflits de Lois (Thesis, Neufchatel, 1933).

may or may not be exaggerated depending on the forum's appreciation of what value events or factual transactions are sufficiently invested with public interest as to warrant community intervention.

In the case set forth earlier in this discussion, the officials of State A or of State B, or of a third state, may, by reason of the presence of one or more of the factors just noted, decide to assume 'jurisdiction' of the case which, as stated touches States A and B. Which law will they apply in determining the rights and obligations of the parties to the case? As previously stated, the officials, in assuming that the community should intervene in the case, may choose to apply only its internal rules, that is to say, those rules which they would apply to a similar but purely domestic case. Despite the stubborn insistence of noble-intentioned internationalists, particularly in the 19th century,[15] who maintained that judicial jurisdiction among states is and should be regulated by some international law rules, there is nothing to show that if the officials of State A for example, apply A's internal rules to a conflict of laws problem a violation of some international law doctrines will thereby result.

Fortunately, no such arbitrary application of internal rules in every conflict of laws problem has been systematically carried through, though one may probably be warranted in making the general observation that nation-states have not gone very far in overcoming the tendency to decide problems in the conflict of laws according to the internal rules of the particular forum.[16] At times, the tendency is professed in no uncertain terms. Thus in Austria, the rule of nationality as the "test factor" in assigning rights and obligations has been adopted only for citizens of that state, whereas aliens within the same country are subject to the law of their domicile,[17] or as in Russia, even to its own territorial law.[18] Anglo-American law has not been as blunt. The subtlety lies in the degree of lip-service paid to laws (that is, the interests) of the other state. The one-way renvoi doctrine portrays

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[15] For the great Savigny, e.g., there "was no doubt about the suprastate nature" of conflict of laws rules. Rabel, The Conflict of Laws: A Comparative Study (1945) 7; cf. Fiore, Elementi di dritto Internazionalle Private (1869); Broocher, Theorie du droit internale prive, Revue 1871, 412, 540. See also Nussbaum, op. cit., at 241, where he says: "In the nineteenth century, the Law of Nations school of thought even undertook to gather internationally binding principles of jurisdiction, direct and indirect, from the Law of Nations. With later writers, the objective is rather to prepare rules which, on the strength of inherent reasonableness and convenience, might be found universally acceptable, but even these effects have so far met with little success. Through their common use of the wholesale notion of 'jurisdiction', they are apt to obliterate the essential diversity of direct and indirect jurisdiction."

[16] Many writers in the field regard uniformity in the treatment of conflict of laws problems, regardless of the place of the forum, as the major function of private international law, a matter which we shall inquire into later.

[17] See ss. 4, 34 of the Austrian Civil Code (1811) and the views of Unger, System des Osterr. Privatrechts, 1876, I 164, Pfaff and Hoffman, Escurse, I 106.

[18] See Audinet, Repert. VII 653, no. 117. Similar to the Russian law on this point is the Mexican Code of 1928.

how, when considered proper, a mechanism for arriving at the application of the internal law of the forum can be manipulated with combined finesse and effectiveness. Many American courts reject the renvoi theory because of the logical fallacies thought to underlie it, but as pointed out in one artilce,[19] it could very well be used for utilitarian purposes. Similarly, the excessive application in Continental countries of the conception of ordre public, which has evoked widespread criticism from jurists of every school and creed, has found somewhat sustained growth in the Anglo-American phrase 'public policy'. Concededly, both the use of the renvoi mechanism and of this slippery phrase has in many cases served to attain some goal in view. What is being suggested in this paper, by way of an anticipatory remark, is merely to define and clarify whatever relevant policies a forum should endeavor to uphold, and thereby induce intelligent thinking in the handling of whatever mechanism or doctrine there is to attain those policies.

In spite of the avalanche of criticism, some valid and others frivolous, which have been leveled against such concepts as 'comity', 'vested rights', 'renvoi', 'incorporation of foreign law', and 'legislative jurisdiction', one should not overlook the consideration that all these doctrinal propositions and the legislative enactments they inspired, are but manifestations of a conscientious, intelligent awareness that the application of the internal rules of a forum—whose competence may, by objective standards, be considered under certain circumstances purely fortuitous—upon a conflict of laws problem would be unwise, irrational, and unjust. If the citizens or domiciliaries of State A enter into an agreement of sale, valid and binding by A's law, respecting a movable situated in State A, why should State X (through its officials), not having any connection with the case save for the appearance of the parties to the proceeding in X's forum, hold the agreement invalid merely because it does not comply with the requirements of its Statute of Frauds? Likewise, a socially grotesque situation would result if Z, who is required to prove in an intestate proceeding his legitimate relationship to his parents before a court in State X, is considered illegitimate merely because the marriage ceremony of Z's parents in State A, though regular by State A's law and therefore valid, does not conform to the formal requirements of State X's internal rules.

Several writers have, therefore, put forward the thesis that the primary reason for recognizing 'foreign law' is to avoid "injustice".[20]

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[19] Griswold, Renvoi Revisited, 47 Harv. L. Rev. 1165 (1938).

[20] See Wolff, Private International Law (1945) 1; Cheshire, Private International law (1948) 4; cf. Sohn, New Bases for Solution of Conflict of Laws Problems, Harv. L. Rev. 978, 988 (1942); Cavers, A Critique of the Choice of Law Problem, 47 Harv. L. Rev. (1933) 173; Harper, Policy Bases of the Conflict of Laws, 56 Yale Law J. 1155 (1947).

The verbal symbol 'injustice' is, in a manner of speaking, a top-level abstraction, but one pressed for an operational specification of what he means by 'injustice' might perhaps state that injustice results whenever there is an undue deprivation of, or an exclusion from access to, the basic social values.

The concept of values in conflict of laws has disturbed some authorities. One eminent writer, for instance, has expressed the fear that "subservience to subjective and local values would be dangerous and unsound as a general policy."[21] If the concept of values is disturbing to them, they may take some comfort in the thought that the chaos existing in the conflict of laws, admittedly unparalleled in any other department of law,[22] is caused by the stealthy smuggling by judges of their own value preconceptions even as they decide cases within the narrow, unrealistic framework of technical myths. What is being pointed out here is that such unbecoming disorder in a field avowedly consecrated to the mission of arrangement and order, is bound to continue and flourish, unless:

1. the values at stake in every representative transaction, relationship, or event (conventionally dealt with as 'tort', 'contract', 'domestic relations', 'property', 'succession', 'business units') and the varying degrees of community interest are brought out and continually clarified;

2. efforts are exerted to discover and increase common perspectives, identifications, and demands among the peoples of every territorial unit.

When common values are cherished on a broader level, arbitrary boundaries will serve only a limited purpose; and the fact that in one legal system, institutional structures and practices seem to be unique will not militate against having a truly private international law. It may be hoped that the vast areas of international intercourse and the variety of beyond-the-border transactions, induced by rapid technological developments in the field of travel and communication, will render obsolescent many legal systems based on sentimental parochial ism.

This brief discussion attempts to examine into the practices of representative nation-states or—to use a less ambiguous word not

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[21] Rabel, op. cit., 89, 91.

[22] "The deplorable state of this branch of law was worse than the experts would acknowledge. A few overrated controversies were endlessly discussed. Other problems, often involving the simplest questions of daily occurrence, were neglected. Few things were certain, and there were more incongruities than in any other field of law. It needed the unspoilt mind of a newcomer to conflict of laws to be appalled at the maze of confusion and injustice." Rabel, op. cit. 19; Cook, in the same vein, and speaking of American law, says: "* * * In the field of conflict of laws and the state decisions are hopelessly contradictory and chaotic, even on the simplest questions; far more so than in the field of contracts, torts, etc." Logical and Legal Bases of Conflict of Laws (1942) 136.

encumbered with a variety of connotations—district units, in deciding conflict of laws problems. There is a decided merit in comparing and contrasting ways of solving similar, if not identical, problems; for, however inaccurate the terms 'private international law' or 'conflict of laws' may be—indeed, a professional foible among experts in the field is the intractable practice of displaying the particular label attached to the subject as an anachronistic oddity—and may not escape the suggestion of the ideal suggested, namely, that the conflict rules of different district units should possess a cosmopolitan outlook, free from the costly burden of sentimental provincialism. The statement is very often heard that the world has grown smaller through the fruitful exploits of technology. But that social control through law has advanced coextensively is a point of dubious validity. The present study seeks to show that many of the generative concepts of the past have served their term, that their inconsistencies hamper our thinking, and that there is a need for asking new questions, if only because we have a different set of answers.

It is unfortunately true that involvement in meticulous detail with a particular topic in the conflict of laws has the disadvantage of isolating one's self from the central problem of the whole subject; on the other hand, there is the danger of being superficial when the attempt is made to reduce the entire subject to some convenient, handy generalizations to serve one's own purpose.

Hence, the method here adopted in treating the whole subject is:

1. to present a factual picture of the representative controversies one is apt to deal with in conflict of laws, although on account of the limited space and time, only a very brief attempt shall be undertaken here;
2. to determine how the different communities, through their institutions, practices, and doctrinal propositions, intervene in these controversies;
3. to inquire into the effects of this intervention, both in the light of the interests of the community and the long-term interests of the parties to the transaction;
4. and if the conclusion is that the present state of the law invites some change, to suggest the kind of approach that should be made, in the light of our preferences. This would imply an examination of present trends and the factors that affect those trends. It will likewise necessitate the formulation of alternatives which might be considered in an effort to make more rational the practices of nation-states.

I

Probably the most typical problem in conflict of laws respecting domestic relations are those relating to marriage and divorce. It is in this field where we encounter one of the most extreme manifestations of an ethnocentric tendency not only to regard domestic rules as matchless in their moral justification but also to draw a line of distinction between the in-group and the out-group. Despite formal claims made by every court in a territorial unit that it will exert every effort to sustain the validity of a marriage relation, there is almost unanimous acquiescence in practice in the proposition that "marriage is an institution which closely concerns the public policy and the social morality of the state."[23] The question, therefore, which presents itself is: which territorial unit, when a set of facts supposedly constitutive of a marital relation touches two or more territorial units, is entitled to exact compliance with its code of morality?

Let us take a concrete case,[24] decided by the Supreme Court of Tennessee. A white man was indicted for living with a colored woman as his wife. The facts disclosed they were married in a state where marriage between colored and white was valid. Sometime after the marriage ceremony, they removed to the State of Tennessee, where the indictment was presented. The doctrine, still prevailing in this country, is that a marriage good where celebrated is good everywhere. The court held that the doctrine did not apply to this particular case. Said the court:

> "Each State is sovereign, a government within, of, and for itself, with the inherent and reserved right to declare and maintain its own political economy for the good of its citizens, and cannot be subjected to the recognition of a fact contravening its public policy and against good morals as lawful, because it was made or existed in a State having no prohibition against or even permitting it.
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> "Extending the rule to the width asked for by the defendant, and we might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a State or country where they were not prohibited. The Turk Mohammedan, with his numerous wives may establish his harem at the doors of the capital, and we are without remedy. Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us."

We are left in the dark as to the basis of the comparison; and the apprehension that sister-and-brother, father-and-daughter, mother-and-son marriages can be validly contracted in any legal system, or that

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[23] Cheshire, op. cit. 267.
[24] State vs. Bell, 7 Baxt. 9 Sup. Ct. Tenn. 1882.

a Mohammedan will establish his harem at the doors of Tennessee, may be left as an exclusive prerogative to those who overestimate the capacity of other legal systems and of other peoples.

In the United States, the rule is that a marriage valid where celebrated is valid everywhere. This is substantially the position of the American Restatement.

> "Sec. 121. Except as stated in Secs. 131 and 132 (relating to polygamous and incestuous marriages), a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with."

This, to be sure, is in keeping with the doctrine of the statutists, according to which the lex loci actus governs not only the form of any contract but also its essence. The rule is accepted by a number of Latin American states, notably Argentina, Paraguay, Mexico, Venezuela, Guatemala, and has been adopted by the Montevideo Convention.

Walter Wheeler Cook's contribution in this field is to show not only the indefensibility of the application of the rule but also its sad lack of any concern for social policy, although he does not tell us in detail what that policy should be. The consequence of the rule was to promote, in many instances, evasion of the statute of the domicile by effecting the marriage ceremony in another state, and later returning to the state of the domicile.[25] If subsequently the validity of the marriage is called into question in the state of the domicile, or in a third state, the forum is confronted with the choice of sustaining the marriage or of enlarging the content of the verbal symbol 'public policy' in order to strike down a marriage valid where celebrated. The decisions of the different courts in the United States vary from one extreme to the other, and many writers have therefore given up the task of making any valuable categorization of the cases. To make a realistic appraisal of the extent and scope of the rules of lex loci celebrationis, as applied in the United States, one should perhaps consider:

1. the particular forum where the validity of the marriage is in question;
2. who are the parties, their domiciles, and their nationalities;
3. the factual context of the case, which should include an inquiry into:

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[25] The Uniform Marriage Evasion Act tried to remedy this, but it has been accepted only in a very few states, and its application is restricted, because of the insertion of the qualification that the party should intend to continue to reside in the state of the domicile.

a. the respective claims of the parties to the case.
b. what was the particular issue involved, since it is now clear that while a marriage may be declared 'void' in order to discourage further cohabitation, it may still be 'valid' for purposes of descent and succession, support, and similar purposes.
c. whether there was any element of evasion of the law of the domicile and the degree of importance attached by the particular forum to the requirements imposed by that law in the particular case.

One might probably arrive at the conclusion that there is no consistent policy towards marriage, and that the so-called prevailing doctrine of lex loci celebrationis, while compulsive to some judges concerned with what has been rhetorically called 'legal symmetry' is only adhered to in other instances at the forum's pleasure. No doubt, there are those who would assert that American conflict rules may be summed up thus: that fundamental disabilities are controlled by the law of the domicile, and that non-fundamental disabilities are governed by the law of the place of celebration. The observation, however, begs the question and only serves to preserve confusion. What is 'fundamental' and what is 'non-fundamental'? Indeed, one may well ask if we are any wiser by the use of these labels.

In some countries of continental Europe, where the prevailing test factor is not domicile but nationality, the same tendency is observable. There is the doctrine of disparitas cultus, which prohibits marriages between Christians and non-Christians, such as we find in Austria, Spain, Poland, Bulgaria, and formerly in Greece.[26] Striking back as if in vengeance, a mixed tribunal held the marriage of a foreign Christian to an Egyptian woman who, under Moslem law was forbidden to marry him, as internationally invalid.[27] The Italian Civil Code of 1865[28] reserved to the local law every prohibition contained therein, and was rightly considered by many critics as an excessive and irrational rule.

On account of these undesirable consequences, the Hague Convention of 1902 made an effort to achieve uniformity in the treatment of questions respecting marriage and divorce. It provided that all impediments to marriage existing under the national law of one of the

[26] See Rabel, op. cit. 280; cf. Kuhn, Comparative Commentaries on Private International Law (1937) 139-140. A recent Greek decision confined to Greek subjects the old prohibition of marriage between Christians and non-Christians (Court of Athens (1937) no. 2462, Clunet 1938, 902).

[27] Moharem Benachi v. Salomon Sasson, Mixed Trib. (June 11, 1913) 3 Gaz. Trib. Mixtes no. 428.

[28] Art. 102, par. 2, arts. 55-69.

parties shall be respected wherever the marriage is concluded; no state shall disregard such an impediment as contrary to its own public policy. But this rule was soon to be repudiated. Under German law "military persons" may be married only with the consent of the military authority, and this was made applicable to the numerous German deserters who escaped into France or Belgium and wished to be married there. The French and Belgium authorities were debarred by the text of the Convention from allowing the conclusion of such marriages on their respective territories. It did not take a long time for France and Belgium to withdraw from the convention.

What then are the prospects of a really private international law in respect to marriage? There are some bright spots, to be sure, though the area of confusion and conflict is still vast. In so far as the formal requirements of marriage are concerned, we may do well to consider some rules widely shared:

1. the almost general rule is that a marriage celebrated within the territory of the forum is invalid, unless the formalities prescribed by the matrimonial law of the forum are satisfied. Foreigners and citizens are equally entitled to the forms of marriage provided by the forum, and no other forms are allowed.[29]
2. practically all states, excepting those which require a religious marriage for their nationals abroad, recognize as valid a foreign marriage celebrated in compliance with the formalities prescribed by the local law.[30]

Probably, the time will not be long when a greater majority of countries will adhere to a double system, i.e., parties celebrating a marriage within the forum must comply with the domestic formalities; parties marrying abroad must observe either the formalities prescribed at the place of contracting or those of the personal law of the parties, whether that law is their national or domiciliary law.

In so far as the substantive requirements for marriage are concerned, i.e., what is known as **impediments dirimentia**, there is, as has been intimated, not only divergent rules among various territorial units, the American and Argentinian rule being that the law of the place of celebration should govern the substantive requisites of marriage and the chief rule of the civil law countries being that the national laws of the parties should govern, but also divergent notions employed by territorial units in the application of the same doctrinal formulation. There have been attempts before to harmonize these contradictory principles. An ambitious system was devised towards this

[29] See Rabel, op. cit. 216, 217.
[30] ib. 222, 223.

end by applying the personal laws of the two contracting parties and the law of the place of celebration at the same time. This was initiated by the Mancini school and embodied in innumerable codes. So insuperable were the difficulties encountered and so impractical was the administration of the system as a whole that the Prussian Ministry of Justice told the legal committee of the Diet in 1929 that the difficulties of ascertaining the capacity of foreigners to marry had increased to a disturbing extent after the first World War, strange results were occasioned by exotic religious laws, and that the principle of nationality was far from furnishing the certainty it was supposed to guarantee.[31]

Both the American rule and the nationality rule, if pressed to the limit, can produce results admittedly absurd. If A and B, visitors from Italy, stay for the minimum time required by the law of an American state to contract marriage, the question of the validity of the marriage relation will be determined exclusively by the law of the state where they happen to stay for a day or two. On the other hand, an American national may be domiciled for thirty years in Italy, but his capacity to marry at all, or to marry a certain person, will be determined by Italian authorities by looking to the law of some unremembered ancestor. As aptly said by an authority:

> "One system is as abusive as the other. A state should not want to join foreigners in marriage utterly disregarding their home laws. Nor should a state, using the dubious test of nationality, exaggerate and perpetuate its significance for the determination of civil status."[32]

In the United States, there has been an increasing awareness of the absurd consequences resulting from the blindfold, mechanistic application of the law of the place of celebration in all cases. Hence, an examination of the decisions of the courts will yield the conclusion:

1. that the courts have not made sweeping assertions on whether a particular marriage is void or valid for all purposes. Rather, the problem is narrowed down to determining whether the particular case is a question of cohabitation, or of devolution of property, or of support and legitimation;
2. in important cases, involving great differences between the public policy in the forum and the public policy in the domicile of the parties or in the state where the marriage is celebrated, the question is not whether the marriage is valid, but whether for the purpose of the particular issue involved in the trial, the marriage is valid.

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[31] Vernier, Supp. 10, sec. 16; Rabel, op. cit. at 291.
[32] Rabel, op. cit. at 293.

Thus, in one state court, the wife of a Mohammedan marriage was held entitled to the compensation of a widow under the Workmen's Compensation Act, where her husband had not taken to himself the three additional wives he was permitted to have by Mohammedan law.

Many solutions have been put forward by writers to solve what one has aptly called the "conflicting chaos of decisions" in this field. In so far as the question of substantive requirements for marriage is concerned, Rabel [33] would have the personal law of the parties govern for a certain period after the parties change their domicile. Marrying after this time, they would be subject to the law of the place of celebration alone, with effect also in their home countries. Walter Cook on the other hand contends that it is neither the place of celebration, nor the technical domicile of the parties, that has any substantial interest in the marriage relation, but the intended marital domicile. He believes that the application of the 'law' of the intended family domicile will in all such cases "result in a solution of the problems involved which is in keeping with a sound social policy",[34] though he does not tell us exactly what is the social policy to be sustained. Cook's solution would be tenable if the parties are well advised on what is the 'law' of the future domicile, for otherwise we might well have the situation presented in the Tennessee case previously considered. Rabel's solution envisages a divining red methodology, so well assailed by Cavers, and for that reason does not come to grips with the central problem. If our declared goal is the preservation of conjugal personal relationships, we might perhaps consider an alternative reference rule, i.e., barring an essential disability, such as a previously subsisting marriage relationship, a marriage should be declared valid if by the law of any of the states which have any contract with the parties (whether that be the state of the domicile of any of them, state of celebration, or state of intended family domicile) it could be sustained. A great deal of enlightenment is perhaps needed, in order to mitigate the impact of 'public policy' considerations usually resorted to in order to strike down marriage relationships. If the recent California decision declaring unconstitutional a statute prohibiting marriage between members of different racial groups is sustained by the Supreme Court of the United States, we might well expect a change in the legislation of many states below the Mason-Dixon line. Of course, legislation is merely one step, but it is one great step that is urgently needed now.

It is in the field of divorce where we meet the acute problem of locating 'jurisdiction', in the sense of judicial competence to deal

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[33] Rabel, at 293.
[34] See Cook, Logical and Legal Bases of Conflict of Laws (1942) 454.

with a particular case. The case of **Haddock v. Haddock**,[35] although now overruled, is important if one desires to get an inkling of the earlier cases presented to the Supreme Court on the question of jurisdiction to grant divorce. That case, and the earlier cases, stood for the proposition that where the husband sued in another state after the wrongful abandonment of his wife, he did not have in that state the so-called 'marital res', and the court had therefore no competence to deal with the case, and if it rendered a divorce decree under those circumstances, the decree was not entitled to full faith and credit by sister states. In short, the Supreme Court decided that the element of fault was a jurisdictional question. If one spouse left the matrimonial domicile, and sought a divorce, the other spouse not being personally served, other states could reexamine the fact of who was the wrongdoer. If they found that the one who sought the divorce was the wrongdoer, such divorce decree was not entitled to full faith and credit. The case meant necessarily that if the husband married immediately after the grant of divorce in the state where the decree was granted, he was under the obligation to live with and support his second spouse; but elsewhere, he was under the obligation to live with and support his first spouse. This was the law until the case of **North Carolina v. Williams**,[36] decided only a few years ago by the United States Supreme Court. In that case, H-1 and W-1 (husband and wife) were domiciled in North Carolina, and so with H-2 and W-2 (likewise husband and wife). H-1 and W-2 went to Nevada, sought decrees of divorce from their respective spouses, which were granted on mere publication of notice, in each case, to the other spouse. H-1 and W-2 married thereafter in Nevada, and returned shortly to North Carolina where they lived in complete assurance that they were validly married. They were subsequently prosecuted for bigamous cohabitation, and convicted therefor. The Supreme Court of North Carolina affirmed the conviction, holding that under the rule of **Haddock v. Haddock**, North Carolina was not required to give full faith and credit to the Nevada divorces, since the finding was that H-1 and W-2 were the spouses at fault. On appeal, the United States Supreme Court held that **Haddock v. Haddock** was no longer good law, that in short, fault was not a jurisdictional question. The decision pointed out that the only jurisdictional question that North Carolina could reexamine was whether the party seeking divorce in Nevada was actually domiciled in that State. For the purposes of the first Williams case, it was assumed that H-1 and W-2 were actually domiciled in Nevada for the required length of time. The way was then left open for the North Carolina court to secure a conviction—which it did—if

[35] 201 U. S. 562 (1906).
[36] 317 U.S. 287, 143 A.L.R. 1273 (1942).

it found that the assumption was not correct. The Supreme Court of the United States, in the second Williams case,[37] held that the Nevada decree was a conclusive adjudication of everything except the jurisdictional facts. Since domicile was a jurisdictional fact, the North Carolina court could reexamine the question, and if it found that H-1 and W-2 were not really domiciled in Nevada, it had the perfect right to refuse recognition to the Nevada divorce decree. Mr. Justice Rutledge suggested in his dissenting opinion that the second Williams case merely led back to the rule of **Haddock v. Haddock**, and thought that the Supreme Court should lay down a rule of thumb on domicile and jurisdiction, for otherwise, overhanging reversals by sister states would continue unabated. North Carolina, by the second Williams case, could always inquire not only into the fact of domicile but into the 'state of mind' of the indiscreet unsophisticated defendants. What the first Williams case held, namely, that a divorce decree is valid so long as one of the parties is nullified by the holding in the second Williams case to the effect that sister states may inquire into the subject of 'domicile' in the divorcing state. The question presents itself: should the criterion of domicile be based entirely on the divorce forum's concept (i.e., Nevada in this case) of domicile, or should it be based on the concept of domicile by other states, which might be too severe? Here, as elsewhere, courts are able to use the same terms and come out with different results. The suggestion may be put forward that there should be an objective standard in cases of this nature. An objective standard of, say one year's residence (factual) may be made the basis for the validity of a divorce decree. This might give us a better test upon which to rely, and thus obviate the grotesque situation reflected in an article,[38] entitled. "And Repent at Leisure: An Inquiry into the Unhappy Lot of those Whom Nevada Hath Joined Together and North Carolina Hath Put Asunder." Other cases may, of course, present different situations which should be governed by entirely different considerations. A case involving the validity of a divorce decree in one state might likewise involve the question of supporting an innocent party, or of attaching the stigma of illegitimacy to the offspring of a supposedly valid marriage. Here, the critical problem of balancing conflicting interests in the light of our basic values cannot be solved by rigid adherence to a mechanistic, cavalier formula which dispenses with the necessity of discovering by "experience and reason the modes of adjusting relations and ordering conduct which will give the most effect to the whole scheme of interests with the least friction and waste."[39] As one writer aptly puts it: "The alternative to a hard and fast system of doctrinal for-

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[37] 325 U.S. 226 (1945).
[38] Powell, at 58 Harv. L. Rev. 930-1017 (1945).
[39] Pound, Social Control Through Law (1942) 134.

mulae is not anarch; the difference is not between a system and not anarchy; the difference is not between a system and no system, but between two systems; between a system which purports to have, but lacks logical symmetry, and one which affords latitude for the interplay and clash of conflicting policy factors." [40]

Let us now attempt to make a brief comparative survey of the divorce laws of different countries. The Catholic rule that marriage cannot be dissolved except by death still prevails in Argentina, Bolivia, Brazil, Chile, Columbia, Ireland, Italy, Paraguay, Spain, and in some parts of Eastern Europe and the Middle East.[41] In other places, such as New York and the District of Columbia, divorce may only be secured on the ground of adultery. This rule was modified in the cases of the Philippines, where under the old Divorce Law any of the spouses may obtain a divorce on the ground of adultery on the part of the wife, and of concubinage on the part of the husband, provided the erring wife or husband was convicted therefor in a final judgment. The recently enacted Civil Code of the Philippines does not permit absolute divorce, although it recognizes legal separation. At the other extreme, we have the rule in Soviet Russia which allows each spouse to terminate the marriage by unilateral declaration, and the kind of patriarchal repudiation in Egypt that transpired not so long ago. "The Old Testament right of a sovereign head of a household, the Soviet emphasis on freedom of marriage and the readiness of American courts to provide divorce," says one writer,[42] "are certainly heterogenous phenomena, but in common they result in permitting indiscriminately what the legislation of the first group refuse indiscriminately." The differences in laws are even aggravated by the differences in defenses and principles of procedure, and if the policy in one state is too rigid, numerous manipulative devices are resorted to by the spouses in the difficult task of obtaining emancipation, ranging from collusion by the parties to the practice of repairing to states which peddle divorces by the hundreds.

The chaos that exists in this field, particularly on the problem of recognizing foreign divorces, cannot be eliminated without a thorough reform of both domestic and conflict of laws rules, based on the reformulation of social and ethical values which should be widely shared among different territorial units. This must be done because, as stated by an acute critic,[43] "if every decree of divorce granted by a court of one state is open to question and disregard in the courts of a second state, the resulting uncertainties are certain to be socially

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[40] Harper, Policy Bases of the Conflict of Laws, 56 Yale L.J. 1155 (1947) 1158.
[41] See Rabel, op. cit. 387.
[42] Rabel, op. cit. 388.
[43] Powell, note 38, Supra, at 930.

undesirable. If every decree of divorce granted by a state court must be accepted blindly by the courts of every other state, the resulting certainties may have many unfortunate repercussions." These two polar extremes are undesirable, indeed. Exactly when the claims of countries following the national law principle will be relaxed, and the irresponsible attitude with which the lex fori is applied in other countries will be renounced, will remain for many years a question that will be hard to answer. Prof. Rabel [44] in examining the doctrines and practices of civil law countries, arrives at the same conclusion shared by American writers on the unhappy state of American law. Here is a field in which both the lawyer and the expert on social sciences can formulate rational solutions to the end that the goal of preserving congenial personal relationships, along with the maximination of the other basic values involved in every type of problem in this field, may be achieved with the least friction and waste.

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[44] Rabel, op. cit., Chapters 11 and 12.