THE OBJECTIVES OF PRIVATE INTERNATIONAL LAW

HESSEL E. YNTEMA

Ann Arbor

It has been proposed elsewhere\(^1\) that the prevalent eclecticism in private international law, fostered by relativistic notions of positive law, has led to an untenable impasse. Application as a rule of this branch of law in national courts and the supersession of the conception of an international community of justice, such as Story envisaged,\(^2\) by the notion that private law is to be ascribed exclusively to recognized territorial authorities have given an apodictic appearance to the idea that civil cases of an international complexion should be governed by a localized, and not, as formerly supposed, by a common international law. The prevalent postulate that law is a formal expression of political power easily leads to the axiomatic corollary that the municipal law to which reference is to be made in the solution of a conflicts case must be the positive law of some state or states. It is a short step, though not so inevitable, to the further conclusion, which it has been the conspicuous service of the local-law theory of Walter Wheeler Cook to expose, that, if law is conceived as an authoritative expression of state power, the law applied in a conflicts case by a judicial officer of a state must be the law of that state—the *lex fori*. This primitive idea that jurisdiction implies the applicable law, or in other words that a court can apply only the rules prescribed by its hierarchic superior, universally prevailed in ancient times, until about 1200

\(^\text{1}\) See the writer's article, The Historic Bases of Private International Law (1953), 2 Am. J. Comp. L. 297.

\(^\text{2}\) In 1834, Story wrote that, despite differences in laws and doctrines, "it is manifest, that many approximations have been already made towards the establishment of a general system of international jurisprudence, which shall elevate the policy, subserve the interests, and promote the common convenience of all nations. We may thus indulge the hope that, at no distant period, the comity of nations will be but another name for the justice of nations..." Commentaries on the Conflict of Laws (1834) § 645.
the genial equitable conception was introduced that the more convenient and useful law should furnish the rule of decision conformably to the nature of the case. This was a significant advance in the conception of the judicial function: it enabled tribunals, appointed by particular political authorities, to apply the appropriate foreign law to foreign cases and thus gave birth to conflicts law. The local-law theory is that this refinement in the administration of justice, indispensable to avoid discrimination and insecurity in the adjudication of cases arising from international commerce, is inconsistent with the accepted principle of sovereign power as the sole source of legislation. In formal theory, the notion that a local court is confined to its domestic legislation for international as well as domestic purposes reverts in this respect to the *status quo ante* 1200.

It needs scant reflection to remark that this notion has driven the logic of exclusive, ultimate legislative authority vested in the sovereign state to an impractical conclusion, for which the local-law theory itself affords no relief. As the history of private international law evidences, and as Savigny and others have observed, there is no known system of legislation that completely disregards foreign law in the adjudication of foreign cases. Even before the technique of conflicts law was discovered, a variety of institutions were developed—arbitration, reciprocal treaty arrangements, special courts for foreign litigation—to do justice in cases involving aliens. Indeed, the local-law theory has been employed by its chief protagonists as a means to destroy doctrines that they regarded as inimical to the proper solution of conflicts cases according to social needs, but they unfortunately have provided no effective substitute for the doctrines discarded to guide the selection of the proper law. For the idea that a court is exclusively bound to apply its own law can furnish no solution for cases in which the essential problem is to ascertain what its conflicts law should be; this requires departure from the postulate on grounds that must be sought elsewhere to define how far in certain cases some foreign law or laws should be referred to in decision. This also was pointed out by Savigny in 1849. In sum, the local-law theory presents a truism that does not aid and may prejudice the solution of conflicts cases. In a strict sense, the theory contravenes the conception of territorial sovereignty from which it derives; each court is instructed to apply exclusively the law of his sovereign, even to the affairs of another. It portends a species of anarchy, supportable if at all in the relativistic heaven of formal jurisprudence.

---

The fact that the historic logic of private international law has thus been reduced by the local-law theory to a sterile truism, indifferent and even hostile to the needs of international commerce, makes it possible and even imperative to begin anew. This opportunity has not gone unnoticed. The recent proposal of an eminent internationalist, for example, revives the view of Story and Savigny that private international law should be envisaged in terms of the world community and advocates “transnational law” to enable international situations, involving private as well as public interests, to be resolved in the light of international needs. Previously, from the standpoint of municipal law, a distinguished reviewer of Cook’s work advertised the need, not for more weeders, but for gardeners to plant useful vegetables in the conflicts garden. This is not to say that the effect of Cook’s destructive critique of the conventional dogmas has been effectively recognized in all quarters. In Continental Europe, for example, an eminently qualified observer has criticized the mechanical and nationalistic character of the more radical current European doctrines, which, premising the sovereign lex fori as the ultimate criterion of justice, propound new formal “constructions” of the nature of conflicts rules. In these doctrines, the classical conception that conflicts rules delimit the respective competence of the existing systems of territorial law without regard to their substantive content is opposed, whether on the ground that such rules “incorporate” the applicable domestic rules of foreign law, or because they delimit the application, and form part, of the local substantive law, or because they refer to foreign law as “fact”. These views obviously exhibit certain affinities with the local-law theory, but they do not reach its basic point, namely, that the rules of law themselves are relative. This is perhaps because in Continental Europe there has been no real exposure to Cook’s arguments; at least this possibility is suggested by the circumstance that, in cautious English circles where Cook’s views have recently become known, there seem to be echoes. Whether on this account, or since they have developed a certain immunity to the basic tenets of the local-law theory, to which they have been exposed by Wächter since 1841, Continental jurists pose the problem of conflicts law in terms more subtle and less stark than Cook’s formulation.

---

7 E. Balogh, Einige neue Theorien über das Wesen des Internationalen Privatrechts und sein Verhältnis zum Völker- und Fremdenrecht (Athens, 1939), in Mélanges Streitz 71, at pp. 93ff.
Thus, the recent and illuminating study of the philosophic aspects of private international law by the leading French authority orients the subject matter as an "order of legal systems". As such, apparently for the first time, the existing positive private international law, primarily of France, is systematically analyzed in philosophic terms. The subject is assumed to be a branch of positive national law; consequently, the basic question of qualification is classified under the *lex fori*. But the essential objective is to coordinate the incidence of legal systems in conflicts cases by reference to general ideas of natural law, social facts and doctrinal conceptions of the ends of justice as defined by individual, national and international values. In this balanced account of contemporary trends in positive law, the humanitarian, nationalistic and international motives of conflicts law are nicely harmonized, but within the orbit of positive state legislation. The emphasis laid in this exposition of the subject matter upon rational systematization through the dialectic of learned discussion as the chief technique by which private international law has been developed and the recognition of its international, as well as utilitarian and national, objectives are highly instructive. At the same time, the philosophic analysis is faithful to the prevalent tradition that identifies law as state legislation: it starts from *la loi* of the national sovereign.

In the United States, the implications of the fact that the local-law theory has challenged, or as some believe demolished, the logical foundations of the traditional doctrines, as embodied in the Restatement of the Law of Conflict of Laws, are more acutely appreciated. There is apparent agreement that the situation calls for more intensive study of specific cases or types of cases. It is perhaps less clearly understood how the study should be prosecuted. Over a quarter of a century ago, in reference to the vested-rights doctrine adopted in the Restatement, I ventured to observe that:

> The important problem in the conflict of laws is not the formulation of the rule but the ascertainment of the cases to which, and the extent to which, it applies. And this, even if we are seeking solely uniformity in the administration of justice, will lead us again to the circumstances of the concrete case, and to the careful study of foreign practices. The reason why the general principle cannot control is because it does not inform.\(^\text{10}\)

This suggests two possible approaches to the problem, the compar-

---

10 The Hornbook Method and the Conflict of Laws (1928), 37 Yale L.J. 468, at p. 480.
The Objectives of Private International Law

The Objectives of Private International Law

ative and the practical, both of which unfortunately still remain too largely programmatic. It is noteworthy, for example, that, in the preparation of the Restatement, the most ambitious undertaking of legal science in the United States in the present century, these possibilities of research as a means to improve the legal system, if they were at all seriously considered, were discarded for want of time and money. And perhaps, also, because it was desired to restate the law "as it is". Parenthetically, it is to be hoped that in the elaboration of the codes to which the energies of the American Law Institute are now primarily committed, these possibilities may be more effectively explored.\(^\text{11}\)

Of the two suggested approaches, the comparative seems the more obvious and immediate, both because information on the foreign laws is especially needed in the conflicts field and, more particularly, because comparison of the respective legal systems may provide a possible basis to reduce the deplorable diversity in the conflicts rules themselves. With these considerations in view, in 1939, the late William Draper Lewis, then director of the American Law Institute, initiated a plan to supplement the Restatement of the Law of Conflict of Laws with annotations to the principal foreign legal systems. It may be recalled with some satisfaction that this project developed into the pioneer, comprehensive survey of the existing systems of conflicts law, equally significant as an exemplar of the comparative method, undertaken by Ernst Rabel, the leading comparatist of his generation.\(^\text{12}\) However, the eminent author of this survey was the first to urge that additional intensive researches are needed, even in the topics covered in his treatise.\(^\text{13}\) It may be anticipated that the growing interest in comparative legal studies will stimulate contributions of this character.\(^\text{14}\)

\(^{11}\) On these aspects of the programme, see the writer's article, The American Law Institute (1934), 12 Can. Bar Rev. 319, and later references in the Spanish translation, El Instituto Americano de Derecho (1952) at pp. 75-79.

\(^{12}\) Ernst Rabel, The Conflict of Laws: A Comparative Study. Three volumes of this work have been published, under the auspices of the University of Michigan Law School, in 1945, 1947 and 1950, respectively. The fourth volume, which various circumstances conspired to delay, was fortunately completed by the author before his death in 1955 and is to appear shortly. In addition, new editions of the first two volumes are in course of publication.

\(^{13}\) Thus, the author's preface to volume I of the work cited in the preceding footnote 12, at pp. xxi ff. and especially Rabel, Deutsches und Amerikanisches Recht (1951), Zeitschrift für ausländisches und internationales Privatrecht 340, at pp. 341, 358; Rabel, The Hague Conference on the Unification of Sales Law (1952), 1 Am. J. Comp. L. 58, at p. 67.

\(^{14}\) For a useful bibliography of the increasing number of such publications in English, see Szladits, Bibliography on Foreign and Comparative Law (1955) pp. 418 ff., and the supplement (1956) in 5 Am. J. Comp. L. 341, at p. 387.
On the other hand, so far as the practical approach to the problems of conflicts law is concerned, based upon detailed investigation of these problems, with reference to their actual, vital context and in the light of the policies to be served, as we have been admonished by the distinguished reviewer of Cook's work to whom allusion has just been made, there has been little advance beyond the negative conclusions of the local-law theory, a gap that Cook himself did not fill. As a result, the ancient jurisdictional dogmas often appear to rule us from the graves in which they have been logically buried. In part, this situation is doubtless due to the Herculean difficulties involved in practical or realistic legal research: it is no easy matter to project significant inquiries into the social factors that do or should control the choice of law in more or less fugitive interstate or international transactions; indeed, the effective prosecution of the research must depend upon the general development of adequate studies of the socio-economic aspects of law. Unfortunately, progress along these lines, after the brave start made in the twenties, has been seriously interrupted by the conditions resulting from the depression of the thirties and the later allocation of resources to the ends of war. Thus, the task of systematic, practical research in conflicts law remains largely an aspiration. In lieu of achievement, we have to consider certain proposals that have been made on how the study of this subject should be conducted under existing conditions.

The first of the techniques proposed for the purpose, which may be described as eclectic individuation, makes virtue out of necessity. This viewpoint has recently been adumbrated, it would seem, in the programme of "transnational law", to which reference has been made earlier; pending effective study of the subject matter, freedom is sought from traditional conceptions to allow the "lex conveniens" to be selected in cases of an international complexion from among the positive laws concerned, with recourse to general ideas of justice when the laws are silent or national jurisdiction is excluded. This general approach, accenting the individual treatment of particular cases but starting from the problems of domestic litigation rather than of the world community, has however been most conspicuously advanced in an influential article by Cavers, published in 1933. The position there taken, it should be added in justice to the author, has been somewhat qualified by doubts later expressed in

The Objectives of Private International Law

the review of Cook’s work to which we have referred. The central argument is that, in a case involving the possible application of two or more alternative laws, the prevailing conception of conflicts rules as prescribing the jurisdictional competence of substantive legal rules without reference to their content forces the court to engage “in a blindfold test”, in which the court in reaching decision is supposed to ignore the result which the law indicated by its conflicts rule “may work in the case before it”. To be sure, conflicts law provides certain escapes from the difficulty—rules of alternative reference, public policy, intention of the parties, “procedure”—allowing the court to take into account the effect of the particular rule of domestic law to be selected, but these expedients are either limited in scope or serve to perpetuate the quest for artificial conflicts rules that will do justice equally in two situations where the applicable substantive rules of law are contradictory, which seems a manifest impossibility. Consequently, it is urged that conflicts cases should be considered with the detailed care given in other fields of law to situations in which there are two competing lines of authority available as alternative bases of decision; the facts relevant in determining what law is to be applied should be scrupulously appraised “to determine what their effect upon the choice of the competing laws should be”, and the choice should be the result not of “the automatic operation of a rule or principle of selection but of a search for a just decision” in the case. In sum, the proposal is to employ the “free law” technique generally in the conflicts field.

The programme thus thoughtfully presented has certain attractions, particularly from a pedagogical viewpoint. It ascribes to conflicts law the exciting aspect of a dynamic, intellectual frontier, where the more acute and sensitive problems of current legal doctrine, which are bound to produce conflicts situations, will be subjected to an incisive critique, calculated to guide the proper choice of law in specific cases. It emphasizes—and this is most important—that these cases involve the adjustment of practical human situations. And examination of the precedents in terms of their end results rather than of the formulas employed, as contemplated by the author, supplies a means to obviate the selection of inconsequential factors to control choice of law; indeed, if it were supplemented by comparative study, it could also be employed to identify obsolescent rules and to expedite their burial. All this is salutary; it provides a desirable palliative for the Restatement; and, as the author observes, it is quite in the Anglo-

American tradition of judicial legislation, pricking out the ever-evolving and ever-fragmentary law from precedent to precedent. Undoubtedly, the conflicts garden needs more of the wide-ranging inquiry that is so persuasively advocated; the struggle with the weeds of undue formalism, hasty inference and shallow observation is perennial.

In spirit if not in substance, the hope that realistic analysis of the cases with regard to the justice of the final result will in time produce a better law advances beyond the local-law theory, which still conceives law in jurisdictional terms. But meanwhile, as the author is apparently aware, the technique of critical individuation does not offer to harassed counsel or burdened judiciary the grateful guidance of a systematic formulation, be it even such as the Restatement. From this somewhat mundane point of view, in addition to more general questions respecting the propriety of extending the area of conscious discretion in adjudication, the proposal involves certain special risks. In the absence of more specific direction, to predicate choice between alternative rules of different legal systems upon evaluation of the respective justice of the results that they would reach in a given case may induce the busy and not always duly informed individuals who have to make such choices to do so in terms of prepossessions imbibed from the legal system with which they are familiar, typically the lex fori. In short, the proposed technique of individuation is not self-sufficient; it must be supplemented by the necessary conceptual apparatus to formulate its results, and the criterion of justice to which it refers should be somehow defined. This is the more necessary as the evaluation of foreign law in the terms contemplated would substantially increase the complexity of the factors to be taken into account in conflicts cases.

These current efforts to pierce traditional horizons imposed on legal thinking by the dogma of territorial legislative sovereignty, like the significant survey of the philosophic aspects of private international law that has been cited, betray a sense of dissatisfaction with the basic tenets in this field. It is only natural that the cures proposed should reflect types of inquiry familiar to their authors. The internationalist advocates a global approach with the broad range and flexibility of diplomatic discussion and international arbitration, where national laws as such do not control; the common lawyer regards conflicts situations as presenting issues basically of the same cloth as those resolved by the courts in the well-tried process of private litigation; the civilian, discip-
lined in the modern codes, looks to the systematic construction of rational doctrine, checked and confirmed by legislation and judicial decision, as the distinctive technique to develop private international law. There is no need in this connection to compare the respective merits of these viewpoints; only to note three inferences. First, each implies the essential similarity of conflicts situations to those in related fields of law, "transnational", "common", or "civil", and hence proposes solution by the means typically employed in these fields. Secondly, each seeks to enlarge the scope of inquiry to include considerations of convenience and justice, transcending the typical formalism in the conflicts field. Thirdly, while each thus recognizes the need to evaluate the complex social and economic factors involved in conflicts cases, the objectives to guide evaluation in a degree are left at large, overtly so by the technique of individuation as a means to escape the dilemma posed by local-law theories.

A second and more satisfactory solution is to restore the conception of the common law as the criterion of justice. To do so requires recognizing that positive enactments—all the multifarious technical regulations of modern society—are not necessarily the law that should dictate decision, but have to be manipulated to avoid absurd or obnoxious consequences, and that long experience rationally crystallized in doctrines generally accepted in the civilized world is a valid touchstone to ascertain the law by reference to which positive legislation should be construed and supplemented. The objections to this well-known conception are obvious, but they all spring from the ideology of national autarchy as developed in the past century. Yet it deserves emphasis that, in days before law was identified with power, the theory of a universal common law was the aegis under which the two significant legal systems of Western culture developed, and it has formed the primary postulate of international law. The revival of this postulate in the field of private international law under the guise of "transnational law" is a hopeful sign; much more so the wide interest in comparative law, which is indispensable for its realization on an international basis. This consequently is the first avenue to be explored by systematic rational analysis of general legal experience. It is salutary that attention recently has been directed

\[1\] This suggestion is more fully developed in the writer's lectures at the Inter-American Academy of Comparative Law in Havana, February-March, 1956, The Crossroads of Justice, which is to appear shortly; see also the observations in Rabel's article, cited ante in footnote 13, Deutsches und Amerikanisches Recht, especially at pp. 358-359.

to the central significance of doctrine comparatively formed by rational analysis, if only for national purposes, in the survey of the philosophic aspects of private international law, earlier several times cited. This has been the historic technique by which the doctrines in this field have been formed; it presupposes that common doctrine reflects common experience.

A third technique is more directly designed to bring practical socio-economic considerations to bear upon the solution of conflicts problems, namely, the technique of policy analysis. In fact, this possibility was adumbrated by Lorenzen almost contemporaneously with the launching of the local-law theory. In 1924, in an article in which he associated himself with Cook's views, Lorenzen remarked that the "actual facts" show that "the adoption of the one rule or the other depends entirely upon considerations of policy which each sovereign state must determine for itself". While this suggestion was not systematically developed by either Cook or Lorenzen, it presaged various subsequent essays by Goodrich, Heilman, Neuner, Hancock and Harper, among others in this country, and the more elaborate proposals recently set forth by Wengler in Germany and Batiffol in France, to define the controlling policies in conflicts law. But these as yet offer not much more than an inchoate programme that needs to be developed by intensive investigation of the incidence of socio-economic factors in conflicts cases; to quote a leading proponent of this type of approach, "Policy analysis is a science as yet in its infancy in our jurisprudence". Even so, it claims attention as a systematic effort to refer to practical considera-

---

25 Torts in the Conflict of Laws (1942) Chap. 3, Choice of Law Policy, pp. 54-62; Hancock, Choice of Law Policies in Multiple Contact Cases (1943), 5 U. of Toronto L.J. 133, at pp. 135ff.
27 Die allgemeinen Rechtsgrundsätze des internationalen Privatrechts und ihre Kollisionen (1943), 23 Zeitschrift für öffentliches Recht 473.
28 Op. cit., ante, footnote 9, at pp. 171 ff., especially at pp. 188-195. Reference should also be made to the recent article by Siesby, Retropolitiske Hensyns Betydning for Udviklingen av den Interlegale Soret (1957), 3 Arkiv for Sjørett, hefte 3, which appeared while the present article was in the press.
29 Harper, op. cit., ante, footnote 26, at p. 1157.
tions dealing with conflict of laws situations—the most definite and detailed that has thus far been offered to fill the logical vacuum left by the local-law doctrine.

The conception that legal problems, including those arising in conflict situations, should be studied in terms of social policies, and not as mere exercises in deductive or intuitive manipulation of abstract principles of justice, represents a basic modern insight into the nature of law. In 1881, this idea that law is the product of social interests and purposes was given classic expression in one of the great books in American legal literature, Holmes’ *The Common Law*. In a celebrated passage amplifying the seminal idea that law is not logic but experience, he stated, after remarking that in external form the development of law is logical:

On the other hand, in substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.\(^{30}\)

Parenthetically, it would be an interesting speculation whence Holmes derived this basic premise of his legal philosophy, envisaging the development of law not as an autonomous Hegelian unfolding of abstract legal ideas but as the formal deposit of social purposes and policies. This may have been the perceptive response of an original and profound student of Anglo-American legal history to the world in which he lived, and in particular to the pervasive democratic struggle since the Industrial Revolution to realize more fully through social legislation the objectives promised by the American and French revolutions at the end of the eighteenth century. But it is interesting to recall that in 1881, when Holmes wrote, the view that the substance of law is a function of social conditions had been anticipated, both more radically in economic theory and more profoundly in legal doctrine. In 1867, Karl Marx, who, influenced by Feuerbach’s humanism, had publicly recanted the Hegelian philosophy in 1844, published the first volume of *Das Kapital*, applying the idea that legal relations and political forms

\(^{30}\) Holmes, The Common Law (1881) p. 35.
are not autonomous phenomena or manifestations of the unfolding of the human spirit but are rooted in the material conditions of life. More directly anticipating the path taken by Holmes' conception was the epochal work published by Ihering in 1877, *Der Zweck im Recht*, which emphasized the purposive nature of law regarded as a struggle of competing interests and policies. This established the dynamic, social reformulation of Bentham's principle of utility, which Ihering had reached in the course of the studies published in the monumental, but incomplete, historical analysis of Roman law, the *Geist des römischen Rechts*, upon his abandonment of the Savigny-Puchta "jurisprudence of conceptions", and opened new and prophetic vistas in legal doctrine.

Irrespective of the possible influence of these ideas in forming Holmes' views, what Roscoe Pound has described as the social utilitarian "conception of law as a means toward social ends, the doctrine that law exists to secure interests, social, public and private", has become fundamental in current thinking about law. Pound himself has most fully elaborated Ihering's theory of interests as a central part of sociological jurisprudence, which has been perhaps the most representative and influential legal philosophy of our time. The basic idea that law is an instrument of social policy and not an end in itself, that legal formulas derive significance only from their vital context, runs like a common thread through the variegated lucubrations of those who have been at times carelessly lumped together under the misleading device of legal realism. And, today, the most progressive programme in legal education, which has been charted in detail and urged with persuasive vigour notably by McDougal, contemplates a fundamental reorientation in the legal curriculum "from legal realism to policy science in the world community". The "contemporary confusion" in legal thinking, due in some measure to the failure of legal realism through destructive analysis to reform the study of law in effective, instrumental terms of social objectives, and the inadequacy of lawyers during this crucial era in the history of the United States to realize their opportunities and obligations in the determination of policy, it is conceived, imperatively demand central emphasis upon the clarification and implementation of democratic values in legal instruction. It is a...

---

33 *The Law School of the Future: From Legal Realism to Policy Science in the World Community* (1947), 56 *Yale L. J.* 1345, at p. 1355.
The Objectives of Private International Law

Tribute to the enduring significance of the conception of law as social purpose elaborated by Ihering three quarters of a century ago, and no less a commentary upon the slow progress of institutionalized thinking, that this programme has thus to be advocated as the most vital and hopeful current development in legal education in the United States today.

Turning from this historical interpolation to inquire what policies have been proposed to direct the application of foreign law to foreign cases, we should first of all recall the basic conditions of conflicts law, namely, the existence of a federal structure in which the diverse laws of more or less autonomous territorial communities are mutually admitted and unified in larger federal or international communities and, in the absence of federal or uniform law, are employed in the determination of the concrete problems arising in the course of interstate or international commerce. The specific concern in this inquiry, therefore, is with the policies that should guide decision under these conditions.

Accordingly, on the one hand, assertions that conflicts law is merely a branch of public international law may be discarded as unrealistic; this much at least the local law theory has demonstrated. It clouds the issues to present them only in the artificial terms of interests of state. Typically administered in national courts, conflicts law concerns questions that arise in the course of private commerce across state lines and not the grave matters most bruited in the high channels of diplomacy, except as these are concerned with such commerce. Conflicts law is private law, but with international or federal orientation and objectives.

On the other hand, autarchic assertions of national policy, also conceived in terms of the ultimate sovereign power of Leviathan, are not germane to the present inquiry. Undoubtedly, some play must be allowed in any federal scheme for considerations of this nature, but they delimit, and do not exemplify, the policies of conflicts law. Accordingly, we are not concerned here with the special category of local or public policy, as employed in this subject matter to denote situations in which the lex fori precludes the application of foreign law on the ground that the political interests of a state require application of its own imperative laws or that the results of reference to the foreign law are so repugnant to domestic ideas or interests that exception must be made to a conflicts rule. A simple illustration may serve to clarify the distinction: Suppose two Ruritanians participate in an ecclesiastical marriage ceremony in Ruritania, in which it is established (a) that, as a matter of public
policy, only ecclesiastical marriages are recognized as valid and (b) that the validity of a marriage as respects form is to be decided according to the *lex loci actus*, the law of the place of celebration. It is obvious that the second proposition rests on grounds of a different order than the first, although it may be described as a conflicts rule in the sense that it prescribes for a court in Ruritania the law governing the validity of marriages wherever celebrated, really reflects some exclusive national or local attitude. The question of the extent to which such unilateral considerations are admissible to restrict reference to foreign law may therefore appropriately be reserved for separate analysis in conjunction with other doctrines that similarly delimit the scope of conflicts rules. It is a mere semantic question whether such doctrines are part of conflicts law; as Savigny has remarked, being extraneous to the normal policies operative in this field, they should be set aside.

This further defines the problem of policy analysis in conflicts law. In cases where all the facts, except the circumstance that suit has been commenced in the court of another state, are related to a single system of justice, the conflicts policies to be considered all point to the foreign law concerned. The only question in such instances is whether foreign law is applicable at all in view of local policy or analogous requirements, which, among other things, may exclude the foreign law on the ground that the results of its application are deemed unjust. In consequence, the situations with which we are here concerned are multiple contact cases, as they have been usefully distinguished by Hancock—situations in which the facts, apart from the place of suit, are connected with two or more legal systems and there is question to which of these reference should be made.

For the subject matter thus defined, the objectives that have been proposed are somewhat heterogeneous and in part artificial. They include, for example: uniformity of legal consequences, minimization of conflicts of laws, predictability of legal consequences, the reasonable expectations of the parties, uniformity of social and economic consequences, validation of transactions, relative significance of contacts, recognition of the "stronger" law, co-operation among states, respect for interests of other states, justices of the end results, respect for policies of domestic law, internal harmony of the substantive rules to be applied, location or nature of the transaction, private utility, homogeneity

---

*34* Torts in the Conflict of Laws (1942) pp. 171 ff.; Choice of Law Policies in Multiple Contact Cases (1943), 5 U. of Toronto L. J. 133.
of national law, ultimate recourse to the *lex fori*, and the like. The last of these, the common idea that the local law should be preferred in case of doubt, is essentially a corollary of the local policy doctrine; it is evidently a counsel of despair, which should be ignored in formulating the policies of conflicts law. It is obvious that many of the remaining conceptions overlap, some are of subordinate significance, and some beg the question or perpetuate superannuated jurisdictional modes of analysis. Thus, criteria turning on the justifiable expectations of the parties, a conception necessarily limited to situations where such expectations deserve satisfaction, or on the nature or location of the transaction, do no more than state the problem, while criteria depending upon recognition of the interests of foreign states do so in terms of an elliptical conception, the real purpose being to promote uniformity. Instead of attempting to consider all these formulations in detail, it is suggested that the essential policy considerations peculiar to conflicts law can be subsumed under two heads: *security*, which is the first principle of utility in Bentham’s and most other schemes of legislation, and *comparative justice* of the end result, namely, its consonance with the results of comparative research, an objective that derives from the basically equitable purpose of conflicts law to individualize the treatment of foreign cases. These are obviously intermediate standards, the purpose of which is to ensure effective realization of more basic human interests and values in conflicts situations.

The principle or policy of security is simply that, so far as possible and proper, a given situation should have equal legal treatment everywhere. Security in law has two faces: on the one hand, it implies the rule of law, or in other words the orderly settlement of disputes in accordance with general rules; on the other hand, it implies equality in the application of the rules, so that the same case will receive the same treatment everywhere. For the purposes of conflicts law, the objective of security seeks to maximize uniformity in defining the legal and socio-economic consequences of transactions and events by the selection and application of the corresponding law. Looked at from a jurisdictional viewpoint, which it may be repeated is in a degree fictional in the present context, the principle implies reciprocity and respect for the interests of the states concerned; in particular, it requires deference to the effective law, namely, that of the state which is in position to control. Without such co-operation in regard to the policies the respective states enforce, there will be anarchy in the
choice of law instead of the certainty that business and commerce demand. Looked at from the viewpoint of the individuals affected, regularity in the application of law is needed to ensure the protection of their just interests and to enable them to anticipate the consequences of their conduct, so that they can plan their affairs accordingly. In specific areas of legal regulation where security is especially important, for example, with respect to commercial instruments, legal rates of interest on loans, marriage contracts, the form of testamentary dispositions, and the validity of trusts, special techniques have been developed by reference to the more favourable law to ensure validation of transactions. In sum, the first purpose of conflicts law, as of all law, is to introduce order, or at least that minimum which is necessary if basic human values are not to be unduly sacrificed or subjected to discrimination.

The attainment of security in conflicts law will only be relative. For one thing, the administration of justice, particularly in a field such as conflict of laws typically presenting competitive domestic policies in situations that require individual evaluation, is by no means an automatic process. This is not to subscribe to a popular philosophy of twenty years ago, which, ignoring evident probabilities in the application of law, rashly argued that, since justice is not always or ever wholly certain, it is essentially uncertain. But, apart from the fact that conflicts law, like other branches of private law, involves the application of more or less flexible general conceptions to specific cases by fallible human individuals, invested with a degree of legislative discretion, and in addition, as already noted, is subject to various exceptions in favour of the lex fori, the maximization of certainty in this field is attended by special difficulties, which are occasioned by variations in the conflicts rules in different jurisdictions and in the conceptions they connote. In other words, only where the conflicts rules are relatively uniform and are understood in sufficiently similar terms is it possible to anticipate a reasonable degree of regularity in the results of their application.

But what if this is not the case, if the conflicts rules point to different laws or are not settled? Here again the solution must be relative; the principle of security requires that a solution should be reached which, as Meijers and Wengler have suggested,
should minimize the conflict of conflict rules. This, for example, is the justification for the renvoi doctrine, namely, that when reference is made to a foreign law the conflict rules of which in turn refers to another law for the decision of the case, the court may accordingly accept the reference back to its own domestic rule or follow the reference to a third law, in order to secure a result similar to that which, it is believed, would be reached in other interested jurisdictions.\textsuperscript{38} For the present purpose, without considering the intricacies of the celebrated questions of renvoi and characterization that are here touched, it should be obvious that, in the interest of security in dealing with conflict situations, it is desirable that at least the conflict rules themselves should be uniform and interpreted in similar terms in whatever jurisdiction. This, it is clear, involves comparison of the existing laws.

Although equality is a prime ingredient of equity, it is not the only consideration to be taken into account in the administration of justice. As has been indicated, the attainment of security as a conflicts policy supposes that the conflict rules administered in the different legal systems under consideration should be sufficiently ascertained. This is by no means universally true, since the cases are sporadic and new problems constantly arise. Moreover, the elaboration of law through judicial legislation is a slow process, which frequently hovers for some time between competing theories. Meanwhile, with changes in conditions of life or in the evolution of legal doctrine, the old solutions may become inappropriate or their over-technical application may produce harsh results. In such situations, comparative justice in the individual decision, by which is meant consideration of the desirable result as indicated by comparative study of the underlying policies of the domestic substantive laws, suggests itself as a criterion for the solution of conflict cases.

In effect, the principle of comparative justice serves in part to complement the principle of security and in part to correct improper effects thereof resulting from artificial applications of stare decisis and like doctrines. Thus, as the need to satisfy the reasonable expectations of the parties argues that there should be a corresponding degree of predictability in the adjudication of conflict cases, the interests of security, comparison of the sub-

\textsuperscript{37} Op. cit., ante, footnote 27, at pp. 483 ff.

\textsuperscript{38} Cf. especially Pagenstecher, Der Grundsatz des Entscheidungs- einklangs im internationalen Privatrecht (1951).
stantive law doctrines has significance in considering what may be reasonable in such expectations. In some situations, indeed, as Hancock and others have pointed out, careful analysis of the policies embodied in the competing laws may provide a just solution. On the other hand, where choice is to be made between the application of an obsolete or misconceived law and of more modern legislation, the comparative justice of the newer and better law may outweigh considerations of security, and courts will find ways by appropriate construction to decide as seems to them right.

An illustration of this type of situation is to be found in an early case involving the interpretation of the New Jersey Workmen's Compensation Act, American Radiator Company v. Rogge. In this case, a proceeding to recover under the New Jersey act, the contract of employment had been made in New York before the enactment of the New Jersey law, and the services were to be rendered partly in New York and partly in New Jersey, where the injury occurred. Although the New Jersey act, being optional, had been construed to cover New Jersey contracts, the argument that the act therefore did not apply to a New York contract, which should be governed by the common law therein force, was rejected on the ground that "the right of recovery rests not upon the New York contract but upon the New Jersey statute". The court added:

The liability is indeed contractual in character by force of the very terms of the statute, but it is not the result of an express agreement between the parties; it is an agreement implied by the law, of a class now coming to be called in the more modern nomenclature of the books 'quasi-contracts'. We find no evidence in this case of any term in the New York contract that prohibits the applicability of the New Jersey statute. If there were, the parties could not by their agreement prevent New Jersey from regulating the conduct of its own industries and from prescribing as one of the terms upon which the performance of a foreign contract of hiring shall be permitted in this state, the implication by law of a contract for compensation to the workman. [pp. 437-438]

This analysis enabled the court to avoid the New York common law, although indicated by the contract theory which had been adopted in construing the act, so as to extend the benefits of a new and superior system of compensation to a New York employee injured in New Jersey. The "secret root" of the decision, to use Holmes' term, apparently was that the court preferred the

39 Choice of Law Policies in Multiple Contact Cases (1943), 5 U. of Toronto L. J. 133, at p. 142.
40 (1914), 86 N.J.L. 436.
more recent and the better law, without regard to whether the result accorded with the expectations of the parties.

At this point, it is appropriate to refer to two other techniques, which, like the technique of statutory construction illustrated in the foregoing case, may be employed to secure ends determined by considerations of policy. The first contemplates evaluation of the significance of the respective contacts with various jurisdictions in multiple contact cases. Corollaries of this mode of approach are, first, that the "stronger" law should be applied, namely, the law of the state which in the last analysis is in position to enforce its law in the situation—that of the state in which land is situated, for questions of title to land, is a common example—and, secondly, that reference should be made to the law of the state indicated by "cumulation" of the connecting factors, a principle elaborated by Söderqvist in 193541 and more recently espoused by Sohn42 and Harper.43

The second technique, designated by Wengler as the principle of "materielle Harmonie", seeks consistency, both in the particular case and in other suits in the same state, of reference to the foreign legal system the substantive law of which is selected as the basis of decision.44 In accordance with this principle, the so-called "preliminary question", for example, in a case involving succession by legitimate children, the question whether there has been a valid marriage, should be governed by the law applicable to the primary issue. Another and even more celebrated example is the case of the New York contract in the German courts, on which both the German and New York statutes of limitations had run. The German statute being characterized as substantive and the New York statute as "procedural", it took some time for the German courts to discover that their original exclusion of the New York, as well as the German, statute was incorrect.45

This last illustration typically suggests that the principle of consistency in the application of the chosen foreign law is a technique and not a matter of policy. Why was the failure of the German courts to apply the New York statute of limitations as a part of the New York law, which, under their conflicts rule, governed the case, to be regarded as incorrect? Simply because compara-

45 Cf. 2 RGZ (8 Mai 1880) 13; 7 ibid. (4 Januar 1882) 21; 145 ibid. (6 Juli 1934) 121.
tive examination of the domestic laws relating to prescription indicated that the result, namely, that a cause of action on which the period of limitation had expired in both the domestic laws concerned should not be barred by either law, was preposterous.

The same observation applies to the technique of selecting the proper law by reference to the significance of connecting factors. Obviously, there are situations, as for example those in which all connecting factors except the forum of suit relate to one jurisdiction or in which the transaction has a recognized "center of gravity", where the result is dictated by ordinary commonsense. In these, the policies both of security and of comparative justice are served by following the common understanding of what is right. But when the plots thicken a more scientific analysis is needed, one that will tell us which connecting factors are significant. To say, as some suggest, that the significance of an operative fact for the purpose of selecting the proper law is measured by its relative importance in a legal system, ascertained by the declared policies of the local laws in issue, is at best an oblique variant of the technique of statutory interpretation, which may serve to disclose in particular situations, as Hancock has observed, that one or another of the competing laws was not intended to apply. But to reify the analysis in terms of state interests is to speak in a jurisdictional, parabolic fiction, which in some measure begs the issue.

Thus, the idea that the "stronger" law should govern, for example, the *lex situs* for titles to land, is intelligible not as meaning that this law is really more effective (in the forum it is not) or that the rule respects the suppositious concern in the premises of the state in which the land lies (there may be no concern; if there is enough, it will become a matter of local policy); much more simply, it may be explained as a mode to promote security of land titles.

Again, with respect to the so-called principle of cumulation of connecting factors, it is to be observed that for certain types of multiple contact cases the opposed principle of alternative reference has been recommended, notably by Lorenzen. Thus,

---

46 For a recent and informing comparative discussion of the "center of gravity" method, with particular reference to Scandinavia, see Lando, Scandinavian Conflict of Law Rules respecting Contracts (1957), 6 Am. J. Comp. L. 1, at pp. 19 ff.

47 Torts in the Conflict of Laws (1942) p. 185.

48 *E.g.*, as to formalities, Validity of Wills, Deeds, and Contracts as regards Form in the Conflict of Laws (1911), 20 Yale L. J. 427; also in Select Articles (1947) p. 228.
in a usury case, it is well established that reference may be made to the law of the place where the security for the loan is located, even though all other contacts point to another place, assuming that the parties are not in bad faith and that the result is to validate the loan. Here the principle of cumulation of contacts would suggest a different result. How should it be decided which principle should be employed? Obviously, the principles themselves do not tell, and the effective grounds for decision must be sought elsewhere.

In other words, these are technical devices that are employed to realize objectives otherwise defined, tools that cut but cannot say when or why. It is most important to mark the distinction between such techniques and the policies of security and comparative justice, which we have considered. Failure to do so too often has permitted belief that the solution to the very practical problems of conflicts law can be found in mere technique. This is the source of the mechanical jurisprudence that a recent critic has pertinently described as the "illusory syntax" of conflicts law.

Law, it has been observed, must be stable and yet it cannot stand still. The corresponding policies of conflicts law, security and comparative justice, as has been noted, are intermediate; this is true in a special sense. In a highly integrated world economy, politically organized in a diversity of more or less autonomous legal systems, the function of conflict rules is to select, interpret and apply in each case the particular local law that will best promote suitable conditions of interstate and international commerce, or, in other words, to mediate in the questions arising from such commerce in the application of the local laws. But these laws too have intermediate objectives; their policies are determined by the great variety of more concrete and more immediate ends prescribed by civilized society, ends which must also, if less obviously, be implemented by conflicts law. Law produces neither automobiles, health, wealth, nor happiness, but without peace and the security of legal order the material conditions of civilization are not provided and their enjoyment is not protected. Law cannot define the ends of justice, which must be found in the values prized by the community. Of these social and economic values, law is at once a partial idealization and an indispensable means of attainment. This is but to say, as did Ihering and his many successors, that law, including conflicts law, is not an end in itself, but an instrument of social policy.

---

In concluding this survey of the salient policies and postulates of conflicts law, there are two observations to be made. The first is that conflicts law, starting from the equitable conception that the proper foreign law should govern foreign cases, involves recognition of the idea of federalism, of unity in diversity, in employing the provisions of the different legal systems as guides in dealing with litigious issues arising in the course of international commerce. As such, it is directly dependent upon comparative legal science to provide reciprocal understanding of the respective legal systems, as well as to make sure that its conclusions tend to promote security and comparative justice. The second pertinent observation is that consideration of these formulations of policy, as well as of the logical postulates we have sought to analyze, is necessary but by no means sufficient. These are but beacons that point the way in very practical situations. Hence the need for intensive comparative investigation of the typical transactions or occurrences in the course of international and interstate commerce, in which there may be question respecting the law to be applied, investigation not merely of such general ideas as those which have been discussed but directed also, and more importantly, to the concrete conditions and necessities of that commerce. This is an enterprise far transcending the present article, to which the distinguished jurist to whom this issue of the Canadian Bar Review is dedicated has signally contributed.