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FOREIGN EXCHANGE RESTRICTIONS AND PUBLIC POLICY IN THE CONFLICT OF LAWS: PART II*

Evsey S. Rashba†

(The first part of this article dealt with the international implications of foreign exchange regulations, the test of public policy, the confusion in international jurisprudence and the causes of that confusion. In the present installment there will be discussed the application of the test of public policy to foreign exchange restrictions, the impediments involved, and the American and other approaches to the problem.)

VI

APPLICATION OF THE TEST OF PUBLIC POLICY TO FOREIGN EXCHANGE REGULATIONS

A. "Political Laws"

"Political Laws" have been the subject of a much disputed doctrine. It has been stated by Dicey, and by other authoritative writers in various countries, that a court has no jurisdiction to entertain an action for the enforcement of a "political law" of a foreign state.165 The term "political law" is not limited to the field of public law. It is, of course, only exceptionally that rules governing the relations between a state and its citizens are given extraterritorial effect. The doctrine goes further. It holds that rules which are technically a part of private law, but which are designed to supplement the commands and prohibitions of public law, be regarded as "political" and treated on the same basis as public law.166

Among the classical cases to be mentioned in this connection were those arising from the French Association Laws of July 1, 1901, which provided for the liquidation of religious orders. The trademark Chartreuse, denoting a world famous liqueur traditionally made by the Carthusian monks in their monastery in France, was transferred,

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without their consent, to a new owner. The monks, resettled in Spain, disputed the new owner’s right to the trade-mark. In litigation which ensued in many countries and which ended, in most instances, in favor of the monks, the political character of the French law played a large part.  

Some writers speak of laws inspired by “political motives”; others of laws which make exceptions to the ordinary principles and rules with a view to favoring a state, a party, a class or even particular creeds or ideas. Still others have suggested the concept of “bellicose laws” (lois belliqueuses), that is to say, laws which are enacted as weapons in the struggle for power in domestic or international politics. Whatever particular definition is adopted, the term “political laws” is used to refer to enactments which do not have for their object the equitable adjustment of private relationships but which are designed to further particular governmental interests. Such laws are, therefore, outside the limits within which a state may expect its enactments to be enforced abroad on the principle of comity.

Some courts have, under the doctrine of “political laws,” disregarded the foreign exchange restrictions of other countries without enquiring whether or not, or to what extent, the particular restrictions may be at variance with the public policy of the forum. The Cour d’Appel of Paris, for example, referring to foreign exchange restric-

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167 See Pillet, “La Marque des Chartreux et les Prétentions du Liquidateur,” 3 Rev. Droit Int. Privé 525 (1907) ("The question is whether a claim to property based on the French law of 1901 can be asserted in a foreign country"), and his comment on Argentinian, Swiss, Dutch, German, American and English decisions in Sirey 1908.IV.9.

168 Pillet, supra, 3 Rev. Droit Int. Privé at 530.


171 Additional examples may be cited. “Both the Trading with the Enemy Act and the restrictions of transfers are wholly political acts having no extraterritorial operation.” Jansen, van den Oever & Cie. v. Maiani, (Trib. Civ. Zurich, Apr. 23, 1937) 1938 Blätter fuer Zuercherische Rechtsprechung 225, 4 Nouv. Rev. 627 at 633 (1937). “Stamp acts of foreign countries are disregarded in respect of negotiable instruments.” Dicey, Conflict of Laws, 4th ed., 29, note i (1927). “This measure [an act which, for dynastic reasons, deprived the Duke of Brunswick of his property and some of his civil rights], in view of its form, the authority by which it is issued, the person to which it applies, the attending circumstances, and the motives on which it is based, is essentially a political act.” Cambridge v. Brunswick, (Cour d’App. Paris, Jan. 16, 1836) Sirey 1836.II. 70 at 78.
tions which had been enacted by Russia in 1917, while that country was an ally of France, said "these laws ... constitute regulations of an exclusively political import ... whose application can consequently be territorial only, and ... since they have no other object than to protect the foreign [i.e. Russian] currency, they are without effect in a French court even in disputes between nationals of Russia." Again, the Cour d'Appel of Colmar, speaking of the German foreign exchange laws, emphasized that their "fiscal, monetary, and political character is beyond doubt" and stated that "laws of that kind cannot be applied in France." In other countries, too, foreign exchange restrictions, particularly those of Germany, have been denied enforcement by the courts simply on the ground of their character as "public law," "political law," or "administrative" or "procedural" rules.

The concept of political laws is somewhat vague. It is difficult to circumscribe it with precision. In the case of many important statutes, political motivation has not in itself impaired their extraterritorial recognition. It should be added that the doctrine of political laws, although it is upheld by some authorities, is rejected by others.

For the purpose of this paper it is not necessary to inquire whether the concept of political laws may be applied to laws which do not appear obnoxious to the public policy of the forum. It will suffice to


175 Consider, for example, the provisions of the Code Napoleon designed to bring about wider distribution of holdings of real property or any statutes of a more revolutionary character which have been enacted in various countries.

176 Arminjon, "La Notion des Droits Acquis en Droit International Privé," 44 RECUEIL COURS 1933.II.I at 96; 1 ARMINJON, PRÉCIS DE DROIT INTERNATIONAL, 2d ed., 271 (1927); STÄAL (comment) in 31 REV. CRITIQUE 748 (1936); 4 NEUMEYER, INTERNATIONALES VERWALTUNGSRECHT 243 (1936); MEZGER, "Les Mesures du Contrôle des Changes et les Principes du Conflit de Lois," 4 NOUV. REV. 527 at 545 (1937).

177 See CONFLICT OF LAWS RESTATEMENT, § 610 (1934), and, for the notion of so-called territorial laws, Arminjon, supra, 44 RECUEIL COURS 1933.II.I at 84 et seq.
suggest two lines of reasoning concerning certain foreign exchange restrictions which, because of their political character, conflict with the public policy of other countries.

One line of reasoning would proceed from the fact that foreign exchange restrictions are frequently disclosed to be egoistic laws designed to advance a country's economic interest unilaterally and recklessly at the expense of other countries. The sense of justice of right-minded persons does not permit support to be given to forcible measures thus taken by a foreign country for its enrichment. Moreover, economic self-defense affords in itself a valid ground, though it has scarcely been recognized as such, for the application of the doctrine of public policy.\textsuperscript{178}

The second line of reasoning emphasizes that feature of the foreign exchange regulations of most countries which makes the validity of business transactions depend on permits issued by administrative authorities. The doctrine of political laws should, it is submitted, be given broader scope, so that a court, in examining the foreign exchange regulations of another country, may include in its examination, and may appraise from the viewpoint of public policy the rules and practices governing the issuance and denial of permits.

That such rules and practices may be crucial is apparent from the German system,\textsuperscript{179} which was examined for the purpose of illustration, in the first part of this article.

The German Richtlinien require in unequivocal terms that, in the interpretation and application of the regulations, the necessities of the state must, "in the order of their urgency," be given unconditional

\textsuperscript{178} The first clear presentation of this view is contained in a notable decision of the Swiss Federal Court, Feb. 1, 1938, Allgemeine Elektrizitaets Gesellschaft and Siemens & Halske v. Journaliag A. G. (Swiss Osram case), 39 BULL. INST. JUR. 111 (1938). Cf. (Swiss Fed. Ct., Oct. 8, 1935) R. O. 61.II.242 (at 4); (Ct. Amsterdam, Mar. 22, 1935) 1935 NEDERLANDSCHE JURISPRUDENCE 590, and (Ct. Amsterdam, June 23, 1939) 32 REV. CRITIQUE 474 (1937). Recognition of foreign laws which are prejudicial to the rights of the nation or its citizens would "annihilate the sovereignty and equality of every nation which should be called upon to recognize and enforce them; or compel it to desert its own proper interest and duty to its own subjects in favor of strangers, who were regardless of both." STORY, CONFLICT OF LAWS, 7th ed., § 32' (1872). "American courts cannot be indifferent when protection for a foreign economy is thus sought at the expense of American creditors." 47 YALE L. J. 451 at 459 (1938). Cf. Blanchard v. Russell, 13 Mass. 1 at 6 (1816).

\textsuperscript{179} Some German enactments are by their own terms described as "political," e.g., measures taken in occupied Austria "for the prevention of the political flight of capital." DEUTSCHER REICHSANZEIGER, March 15, 1938, No. 62.
priority even over established rights of the parties. This principle is stressed and elaborated at various points in the *Richtlinien*. ¹⁸⁰

Decisions of the foreign exchange offices are not subject to review by the courts. ¹⁸¹ Otherwise, according to the German view, inconveniences would arise, the courts being bound by norms of a generally obligatory character, particularly statutes, whereas the action of the foreign exchange offices is often based on unpublished orders which remain unknown to the courts. The administrative decisions depend on “peculiar considerations of expediency, regard for commercial policy and the like.” ¹⁸²

How the regulations are administered becomes still clearer from the German reports and legal literature.

Thus, the question has been discussed whether licenses should be granted for the payment of judgments for damages recovered against Germans by foreigners. ¹⁸³ The position was taken by some that, where the German was unquestionably liable under private law, it seemed “expedient” to approve such payments “if payments may be expected to flow in the opposite direction.” These writers also pointed out the consequences of having the law of performance of contracts subjected to “arbitrary conditions.” The prevailing opinion, however, seems to be that the German balance of payment “must not be burdened with remittances for which there is no immediate counter-performance.” ¹⁸⁴

German importers frequently were unable to obtain permits to pay for goods already ordered abroad. In such cases the seller in the foreign country, after selling the goods for the German importer's account, often brought action there or availed himself of an arbitration clause in the contract to recover the difference between the amount thus realized and the contract price; generally, he could show that the German importer had assumed the risk of procuring the required permit. When it came to enforcing in Germany a judgment or arbitration award which had been thus obtained abroad, the principle that

¹⁸⁰ See *Richtlinien*, I, 3, RGBl. 1938 I. 1855.
¹⁸² 1938 DEv. ARCH. 351.
¹⁸³ According to an unpublished order of Jan. 16, 1935, permits for the payment of damages to foreigners are never to be granted if the damage was caused by some measure taken by the exchange authorities. See also 1937 DEv. Arch. 1503. “No wrong is done to the foreign creditors. The foreign countries have been advised often enough of the principle of the ‘New Plan’ that payment by a German can safely be counted on only when a license has been granted.” RE 29/37 D. St.
duly rendered foreign judgments and awards should be recognized came into conflict with the governmental policy underlying the management of foreign exchange. The latter was held paramount. Permits which were necessary for the enforcement of the foreign decisions were denied on the ground that, since the decision ignored the German foreign exchange regulations, it could not be given effect in Germany.\footnote{185 Thode, “Schiedsverfahren und Devisenrecht,” 1938 Dev. Arch. 289 at 349; (Landgericht Dortmund, Jan. 8, 1936), 65 JUR. WocH. 1550 (1936); (Oberlandesgericht Hamburg, Nov. 25, 1936), 66 JUR. WocH. 1251 (1937) and comment by Berghold, id. 1252. In (Oberlandesgericht Celle, Apr. 24, 1937) 66 JUR. WocH. 2834 (1937), relied on by Nussbaum, Money in the Law 493, note 29 (1939), a permit had been granted only for a partial payment into an account of the Deutsche Verrechnungskasse because of a particular clearing agreement with the Netherlands.\footnote{186 The maxim, “Law can be only what is to the advantage, not to the disadvantage, of the German people,” is already to be found in German decisions, e.g., (Landgericht Schneidemuehl, Jan. 14, 1939) 68 JUR. WocH. 420 (1939).\footnote{187 18 N.Y.S. (2d) 497 at 499 (Sup. Ct. 1939). Cf. also Branderbit v. Hamburg-American Line, 29 N.Y.S. (2d) 488 (Mun. Ct. 1941), revd. 31 N.Y.S. (2d) 588 (Sup. Ct. 1941); Werfel v. Boehmische Escomptebank und Creditanstalt, (App. Div.) N.Y.L.J., July 20, 1939, p. 161, where Carew, J., sought in vain for a satisfactory solution. “... laws and regulations [of another country] may be unjust, partial to citizens, and against foreigners; ... they may be, and the decisions of courts founded on them, just cause of complaint against the supreme power of the State where rendered. To adopt them [foreign judgments or decrees] is not merely saying that the courts have decided correctly on the law, but it is approving the law itself.” Smith, C. J., in Bryant v. Ela, Smith (N. H.) 396 at 404 (1815). “If a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations, and the principles of public and national law in the administration of justice.” Story, J., in Bradstreet v. Neptune Insurance Co., (C. C. Mass. 1839) 3 F. Cas. No. 1,793, p. 1184 at 1187:2.}}

There was no suggestion that this made for a better administration of justice; individual rights were deliberately subordinated to what were conceived to be the superior rights and interests of the Reich.\footnote{188}

Outside of Germany decisions can already be found seeking a way to meet these new phenomena which have arisen in the application of foreign exchange restrictions. The Supreme Court of New York, in *Loeb v. Bank of Manhattan Company*,\footnote{187} held that “A capricious or fanciful refusal [to grant a permit] is entitled to no recognition in a forum administering justice.” The *Gerechtshof* of Amsterdam, in a judgment which was affirmed May 26, 1939, by the *Hooge Raad* of the Netherlands, observed that the German foreign exchange restrictions “are frequently applied by the German authorities in a manner” which makes them appear “to be inconsistent with the Dutch concept
of public policy." The Cour d'Appel of Paris, in a case which arose from the denial of a permit, declared that the denial was "contrary to French public policy" and that "the fact that a debtor could not obtain a permit from the German authorities to pay his debts in France cannot be considered."

The law of conflicts is based on the conviction that it is in the general interest for one state to co-operate with another in the field of private law. There is, however, no reason why a court should, contrary to the principles which are cherished in its jurisdiction, permit the rights of the parties, due process, and justice itself to be sacrificed to the transient political aims of a foreign nation.

B. Retroactive Laws

A law which disregards the rule pacta sunt servanda and "takes away or impairs vested rights acquired under existing law" is termed retroactive or retrospective.

Ordinarily laws are not retroactive. Vested rights are, by their very definition, rights which new laws will respect. Regard for vested rights is founded on a twofold basis. First, it would outrage the sense of justice to deprive a person of rights which he has acquired at the cost of goods or effort. Second, no kind of social order would be possible if established relationships could at any moment be disregarded or overthrown.

The rule against retroactive legislation is a basic principle of jurisprudence which is embodied in the constitutions of many countries. It is "declaratory of the common sense and reason of the most civilized

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188 Appeldoorn v. Osram (Dutch Osram case), (Gerechtshof Amsterdam, June 30, 1938; Hooge Raad of the Netherlands, May 26, 1939) 41 BULL. INST. JUR. 291, 90 (1939).
192 Ripert, "Les Règles du Droit Civil Applicables aux Rapports Internationaux," 44 RECUEIL COURS. 1933.II.569 at 634.
states, ancient and modern." The rule is internationally recognized. As the Permanent Court of International Justice has repeatedly stressed, it is part of the "international common law."

Courts which apply this rule to laws of their own country may with at least equal propriety apply it to laws of another country. "Effect will not be given by the courts of a state to foreign laws in derogation of the contracts . . . of citizens." In dealing with foreign exchange restrictions, as well as in other connections, courts thus have frequently held with respect to a foreign legislative, administrative or judicial act that its enforcement would be against public policy because it violated vested rights.

In recent years, however, the reasoning on this subject has become somewhat confused and the decisions inconsistent.

The rule against retroactive legislation has never been one which demanded unqualified observance. It has been universally recognized that there may be laws which, though impairing vested rights, operate for the benefit of the community, and that it is, therefore, not feasible to exclude retroactive laws altogether. Vested rights, moreover, are subject to regulation in the public interest, and it is not always easy to determine in what cases they are unduly infringed or disturbed by such regulation.

In the economic and financial field, retroactive laws and regulations have in recent years increased tremendously in importance. Various countries have had to resort to them, though in far different degrees. There have been currency devaluations, invalidation of contractual gold clauses, other interferences with the rights of creditors and, above all,

194 Kent, J., in Dash v. Van Kleeck, 7 Johns. Ch. 477 at 507 (N. Y. 1811).
196 Dyke v. Erie Ry., 45 N. Y. 113 at 118 (1871).
197 "The application [of the German rules] would have the result that, to the prejudice of the basic principle underlying Dutch law and deeply rooted in Art. 1374 of the Dutch Civil Code, a promise binding according to Dutch Law would be annulled or impaired by a foreign sovereign. This is a result not to be tolerated by Dutch public policy." Dutch Osram case, 41 Bull. Inst. Jur. 90 at 94 (1939). Cf. also the cases concerning revaluation of debts paid off in depreciated currency, (Sup. Ct. Norway, Feb. 2, 1934) 1934 Norske Rettsstende 152 (citing § 97 of the Norwegian Constitution), Batifol in 34 Rev. Critique 127 (1939) commenting on Stadtsische Sparkasse v. Werner, (French Cass. Civ., Oct. 19, 1938) and cases cited by Nussbaum, Money in the Law 295, note 56 (1939).
198 Goshen v. Stonington, 4 Conn. 209 (1822); Boston & Gunby v. Cummins, 16 Ga. 102 (1854).
various measures for the control of foreign exchange with which we are here particularly concerned.

This tendency to relax the rule against domestic retroactive legislation has been reflected also in the attitude of the courts towards foreign legislation.

An American judge who in an earlier day might have refused to enforce a retroactive foreign law has remarked, by way of dictum, that "what we deem right for the preservation of our financial structure cannot be wrong when employed by others." 199 A French court suggested that, since deviations from the great principles of the law have occurred in all countries in consequence of the universal economic crisis, one would not be on firm ground who urged the objection of public policy against a deviation of this kind by a foreign law. 200 The Cour de Bruxelles, in holding that application of the American Joint Resolution of June 5, 1933, to bonds issued by the City of Antwerp could not be deemed violative of the Belgian concept of public policy, said: 201

"... the numerous rules of analogous import issued in this country since the outbreak of the war forbid the Belgian courts from holding that the prohibition of gold clauses or gold value clauses, or the retroactive invalidation, entirely or in part, of stipulations lawfully entered into, is actually inconsistent with that concept." 202

What are the merits of this argument?

Legislatures, even though they may digress from the rule against retroactive laws, never repudiate this rule, which, as Justice Story has observed, stands upon "the fundamental laws of every free government," upon "the principles of natural justice," and upon "the deci-


202 See also Sack und Meyer, Gold und Valutaklausel in Deutscher und Niederlandischer Gerichtspraxis 294 (1937); (Sup. Ct. Austria, Sept. 5, 1934) 1934 RECHTSprechung, HERAUSG. VOM VERBAND ÖSTERREICHISCHER BANKEN UND BANKIERS, No. 300, p. 178.
sions of most respectable judicial tribunals.”

The Reichsgericht, at the very time when the retroactive German legislation on exchange control was in full swing, again proclaimed:

“The debtor’s fidelity to his promise is the fundamental basis of all commerce; not only is the present German law of contracts based on it, but it is likewise demanded by the sound ideas of the German people; consequently its extinction in relations between Germans for reasons not resulting from the position of the parties or the superior interests of the nation would be peculiarly subversive of the security and continuity of German economic life.”

When the German or some other legislature impairs vested rights or permits the nonperformance of lawful contracts, it invokes a real or pretended national exigency in justification of its disregard of long established principles. “Any private right, no matter to whom it belongs, be it personal or in rem, must in any nation yield to the necessities of that nation,” asserts Dietrich, a German advocate of the international recognition of the German foreign exchange legislation.

“Whether or not the right is thereby stripped of its value,” he adds, “cannot be decisive, since above the sphere of the individual is the welfare of the entire nation.”

If a legislature thus feels warranted in subordinating basic principles of justice to the superior interests of its nation, it does not follow that courts of other countries must recognize or give effect to its enactments.

There is no rule of conflict of laws which prescribes that a court must refrain from scrutinizing the reasons which prompted foreign legislation. In respect of the necessary balancing of social values there exists nothing analogous to the doctrine of renvoi which would require resort to foreign judges; and the considerations which led a government to enact legislation have no claim to being recognized as valid beyond its borders. Justice and expediency may on occasion require that a foreign retroactive law be given effect. But it will not suffice

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203 Story, J., in Terrett v. Taylor, 9 Cranch (13 U. S.) 43 at 52 (1815).
206 But even here it depended on the circumstances on which the retroactive law had been enacted and the manner in which it had been framed. Cf. the cases cited.
for this purpose that, in view of the special conditions prevailing in the foreign country, its extraordinary law did not in itself arouse adverse criticism. Extraordinary reasons and extraordinary measures do not have the same weight within and without a country. Reasons which within the country may appear sufficient or even imperative may, because of their local character, be wholly inadequate to prompt the courts of another country to abandon fundamental and traditional principles of their own.\(^{207}\)

The rule against enforcing retroactive measures should, therefore, in the absence of special and affirmative reasons to the contrary, prevail with respect to legislation of another country, even though the country of the forum may itself be occasionally compelled to resort to such measures. And, in so far as retroactive foreign exchange restrictions are concerned, generally no valid reason will be found for giving them extraterritorial effect.\(^{208}\)


\(^{201}\) Cf. De Bataafsche case, supra note 206, and the case concerned with the dollar loan of the City of Rotterdam of 1924, Vereeniging voor den Effectenhandel v. Fortuyn, (Gerechtshof Hague, Dec. 24, 1936) 36 BULL. INST. JUR. 315 (1937), affd. by the Hooge Raad of the Netherlands, Feb. 11, 1938, 38 BULL. INST. JUR. 282 (1938); de la Marnière (comment) in D.P. 1935.II.12 at 14; Karl Wahle, "Die Wirksamkeit ausländerischer Devisensperren nach Oesterreichischem Recht," 9 ZEITSCHRIFT FUR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT (Heymann) 779 at 783 (1935) ("The fact that the country of the forum has for the protection of its interests enacted an analogous law does not in itself require recognition of a foreign law").

\(^{208}\) The author is indebted to Professor Karl N. Llewellyn for the following paragraph from the Revised Uniform Sales Act, tentative third draft as recently approved by the subcommittee for presentation to the joint committee in charge:

"SECTION 71. SUBSTITUTED PERFORMANCE ON FAILURE OF PRESUPPOSITION.

"Between merchants . . .

"(2) If the agreed manner of payment fails because of foreign governmental regulation, the seller may withhold [or stop] delivery unless the buyer provides a manner of payment which is commercially a substantial equivalent. If [the] delivery has already been made [taken], payment in the manner provided by the regulation discharges the buyer's obligation unless the regulation constitutes oppressive or predatory discrimination."

Concerning the second sentence of this paragraph (compare supra, at notes 45,
C. Confiscatory Measures

Confiscation offers an especially flagrant example of retroactive measures. That it is in principle inconsistent with an orderly social system is universally recognized. It is "condemned by the enlightened conscience and judgment of modern times" and is "contrary to the practice of civilized nations." Nevertheless, confiscatory measures have frequently been adopted in our time. Generally, however, they have been concomitant with revolutionary upheavals. Examples are the Soviet nationalization decrees with their far-reaching repercussions, the expropriation of oil properties in Mexico, and the expropriation of merchant vessels and industrial enterprises during the Spanish Civil War. The authors of such measures have rarely claimed that they should be enforced in other countries and, with the revolutionary movement on the wane, the protection of property has, as a rule, been re-established.

Determination of the attitude to be taken towards foreign confiscatory measures is beset with a twofold difficulty.

In the first place, interferences of this kind not infrequently have "actually attained such effect as to alter the rights and obligations of parties in a manner we [the courts] may not in justice disregard." 211

46, 47, and infra at note 278) the following observations may be made.

(1) Foreign exchange restrictions are often enacted merely because governments in need of funds are tempted to hurt foreign creditors rather than to impose new burdens on their own people. Even if measures thus adopted fall short of being "oppressive or predatory discrimination," it seems unwarranted to require that the standard applied in one country as to what is proper and fair in this field must be accepted without question elsewhere.

(2) Adequate information concerning exchange restrictions and the manner of their administration is generally extremely difficult to obtain. The burden of showing that a regulation is not infected with substantial vices such as are frequently found should, therefore, be clearly imposed on the party who seeks the benefit of the regulation.

(3) Foreign exchange regulations, whether actually enacted or potential, have often been used by various governments as an element of their bargaining power in the negotiation of commercial treaties. This being the case, the question should be considered whether a provision such as the one quoted might not unduly hamper the executive branch of the government.

209 Hanger v. Abbott, 6 Wall. (73 U. S.) 532 at 536 (1868).
210 Even the right to seize enemy property during war is subject to limitations. United States v. Percheman, 7 Pet. (32 U. S.) 51 at 86 (1833); Ware v. Hylton, (3 U.S.) 3 Dall. 199 at 281 (1796); Brown v. United States, 8 Cranch (12 U. S.) 110 (1814); 2 Westlake, International Law, 2d ed., 46 (1913).
How, for instance, are the rights to property to be ascertained if it has changed hands since its confiscation by a foreign sovereign? The courts, in their endeavor to work out equitable and practical solutions, have had to take into account at one and the same time their traditional principles and the hard facts. This has been a difficult task and it is not surprising that the decisions in all countries have in many instances been unsatisfactory and inconsistent in their reasoning and result.\textsuperscript{212}

The second difficulty has arisen from the fact that here, as so often in the application of a general principle, there is doubt as to where the line is to be drawn at which a measure goes beyond what is permitted by public policy. The taking of property for public use, with just compensation to the owner, is permitted everywhere, as is also the restriction of individual rights by the state for the protection of the lives, health, morals and welfare of the public.\textsuperscript{218} The right of property has been appropriately compared with a rubber ball which, while tending to perfect roundness, may be indented in various ways. According to some recent theories, property rights should be accorded protection only so long as they are exercised in harmony with their social purposes.\textsuperscript{214}

One thing, however, is certain; namely, that it is the substance of an act and not the label given it that must be examined. That the foreign exchange restrictions are nowhere avowedly confiscatory is not


\textsuperscript{218} Manigault v. Springs, 199 U. S. 473, 26 S. Ct. 127 (1905).

\textsuperscript{214} “Civil rights are protected by law except in cases when their enforcement would be inconsistent with their social or economic purpose.” Sec. 1, Russian Civil Code of 1922 (translated in \textit{Russian Review}, Sept. 15, 1923, p. 5).
decision. It is for the courts to determine, in the proper exercise of their judicial function and without regard for labels, whether particular measures are confiscatory in character and should consequently be denied effect. 215

From the German example it is evident that freezing of foreign-held assets may reach a point at which a foreign creditor, though not formally divested of his claim, cannot dispose of it, except by selling it to the state, directly or indirectly, for a fraction of its face amount. Many courts, and particularly those of Switzerland, have denied recognition to restrictions of this and similar kinds on the ground that they were "spoliative interferences with the rights of creditors." 216

Some regulations, as we have seen, go even farther and explicitly deprive the owners of any vestige of right to dispose of their property. Of this character are the so-called "safeguarding injunctions" issued by the German foreign exchange offices, which have already been described. The Commercial Court of Brussels has declared, as have other courts in effect, that such injunctions "which wholly deprive an owner of his property" are tantamount to expropriation without just compensation and are thus "obnoxious to Belgian public policy." 217

215 "Confiscation has no fixed and unalterable meaning." Warren, "What is Confiscation?" 140 ATLANTIC MONTHLY 246 at 247 (1927), cited by Hale, "What is a 'Confiscatory' Rate?" 35 Col. L. Rev. 1045 (1935).

"... confiscation... must be an act done in some way on the part of the government of the country where it takes place, and in some way beneficial to that government; though the proceeds may not, strictly speaking, be brought into its treasury." Ellenborough, L. J., in Levin v. Allnutt, 15 East 267 at 269, 104 Eng. Rep. 845 (1812). "There can be expropriation when rights in a thing are taken, other than the property itself, as well as when the property itself is taken with all its attributes." (Trib. Com. Brussels, Oct. 26, 1939) 54 JOURNAL DES TRIBUNAUX, No. 3589 (1939). It is therefore impossible to concur in the view expressed in the comment in 11 FORDHAM L. REV. 71 at 87 (1942) that foreign exchange laws "have no expropriatory effect and do not deprive anyone of his ownership or right. They restrict only certain functions and this only temporarily." Cf. Weiden, "German Confiscations of American Securities," 17 N. Y. UNIV. L. Q. REV. 200 (1940).


Another example is offered by the appointment of "commissioners" for business enterprises in Germany and the occupied territories. Such appointments, like the "safeguarding injunctions," are not designed for the protection of either the business enterprise or its creditors, as in the case of a bankruptcy or an equity receivership proceeding under American law. Their sole purpose is to despoil certain classes of persons of their property. Divestment of an owner's right thus brought about has generally been disregarded by the courts. The Supreme Court of New York, in *Anninger v. Hohenberg*, declared that such a "liquidating process is sheer confiscation" and that to uphold the commissioner's claim "would mean that our courts will not only recognize but render assistance to the confiscatory, proscriptive policies of the German Reich." The District Court of Zurich stated unequivocally that the appointment of commissioners of this kind was against Swiss public policy because it abolished the recognition of private property.

The important German statute relating to the discharge of old debts (*Gesetz ueber die Bereinigung alter Schulden*) belongs in some respects in the same category. Prefaced, in an unusual way, by a pathetic preamble, it provides that, in certain circumstances, if a debtor

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218 But cf., e.g., the quite different character of the Dutch decree of May 24, 1940 (Staatsblad No. A1), as amended May 7, 1942 (Staatsblad No. C34, reprinted N. Y. Federal Reserve Bank Circular No. 2091, C.C.H. War Law Service, Foreign Supplement, §67,150). This was described as "A measure of protection not of expropriation. Its purpose is to conserve not to confiscate, to protect the rights of individuals not to destroy them." Anderson v. N.V. Transandine Handelsmaatschappij, 28 N. Y. S. (2d) 547 (Sup. Ct. 1941); Amstelbank N. V. v. Guaranty Trust Co. of N. Y., 177 Misc. 548, 31 N. Y. S. (2d) 194 (1941); Koninklijke Lederfabriek "Oisterwijk" N. V. v. Chase National Bank, 177 Misc. 186, 30 N. Y. S. (2d) 518 (1941); comment, 41 Col. L. Rev. 1072 (1941); 41 Mich. L. Rev. 706 (1943).

219 Cf., e.g., with regard to the Austrian statutes and to other similar statutes imposed by Germany and providing for the appointment of commissioners (*Kommissarische Verwalter*), Thorsch v. Thorsch, (Obergericht Zurich, Mar. 1, 1939) 42 Bull. Inst. Jur. 87 (1940) and other decisions cited in that publication: 40 id. 234, No. 10650, 251-252, No. 10701-10702a (1939); 41 id. 262-264, No. 10905-10910 (1939); 42 id. 57, No. 10954-10956 (1940) (United States, Holland, Switzerland, Sweden, Denmark, Belgium). Only Dutch Kantongericht Hilversum, Dec. 13, 1938, 40 id. 251, No. 10701 (1939), did not regard the statute invalidated as at variance with public policy.


is unable to pay, the creditor must write off the debt as worthless. According to a recital in section 1, the law was enacted principally to assist persons who had been ruined economically "because of their exertions for the Nazi movement." The German court is empowered to cancel or reduce the debts and may, "so far as appears expedient," do this without giving the creditor a hearing. A circular letter of the Reichs Minister of Economics makes it clear that where a foreigner's claim against a German is thus cancelled or reduced "for want of a voluntary release" a permit, such as must ordinarily be obtained for liquidation of a debt, is not required.

Reference should be made also to the prohibitions enacted in Germany, and in many other countries as well, against re-introducing into a state its own paper money. A forceful argument that this amounted to confiscation was advanced in non-German courts which were urged to hold that despite the prohibition a tender of German banknotes was a good tender. The value of banknotes is based solely on their function as legal tender in the country in which they were issued. If, by fiat of the issuing state, they can no longer be lawfully brought back into the country where alone they are legal currency, banknotes in the hands of foreign owners must lose most of their value. The inference is that a prohibition of this kind is confiscatory.

The foregoing illustrations indicate the importance that may attach to the argument of confiscation in the field of foreign exchange restrictions.

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224 A circular letter of May 12, 1939, 1939 Dev. Arch. 718, was concerned with the fact that banks frequently hold deposits in the names of foreigners and emigrants consisting of securities which have been made practically valueless; this condition, according to the Reichsminister of Economics, should be "cleared up" (bereinigt) by the banks simply adding these deposits to their own holdings.
D. Violations of the Principle of Reasonable Classification

The principle of equality has been recognized by the courts of various countries as another of the tests applicable to the doctrine of public policy.

No judge is disposed to recognize or enforce laws of a foreign country which effect discriminations to the prejudice of the nationals of his own country.\(^{226}\) Foreign exchange restrictions frequently are of this character. It is true that usually, for technical reasons, their distinctions are based on residence rather than on nationality.\(^{227}\) This, however, qualifies but little the practical effect of their provisions, which are in reality directed against foreigners.\(^{228}\) The discriminatory character of the German laws is accentuated by the provisions which permit certain categories of persons to be wholly or partially exempted from its prohibitions and restrictions.\(^{229}\) The discretion vested in the officials in this regard is freely used by them, especially in favor of Germans living abroad, and the German authorities themselves concede that the public management of foreign exchange is, in its most important aspects, deliberately directed against other countries and their nationals.\(^{230}\)

But the principle of equality, as it has been developed from the

\(^{226}\) "... if they [laws of foreign countries] should be manifestly unjust, or calculated to injure their own citizens, they ought to be rejected. Thus, if any State should enact that its citizens should be discharged from all debts due to creditors living without the State, such a provision would be so contrary to the common principles of justice, that the most liberal spirit of comity would not require its adoption in any other State." Blanchard v. Russell, 13 Mass. 1 at 6 (1816). "Every nation ... should use its efforts to protect its subjects from foreign laws which are repugnant to its own interest and policies." Glynn v. United Steel Works Corp., 160 Misc. 405 at 408-409, 289 N. Y. S. 1037 (1935).

\(^{227}\) See supra, note 120.

\(^{228}\) "... The Devisen laws are plainly intended to discriminate against nonresident German creditors to the undeserved advantage of resident German debtors. ..." Pan-American Securities Corp. v. Fried. Krupp A. G., 169 Misc. 445 at 451, 6 N. Y. S. (2d) 993 (1938). "The German foreign exchange regulations are directed exclusively against foreign creditors and must by their very nature be directed exclusively against them. ... They constitute a conscious and deliberate injury to foreign creditors for the benefit of the German economy and the German State." Swiss Osram case, 39 BULL. INST. JUR. 111 at 119, 120 (1938). See also (Swiss Fed. Ct., Oct. 8, 1933) R. O. 61.11.242; Weiden, "Foreign Exchange Restrictions," 16 N. Y. UNIV. L. Q. REV. 559 at 577 (1939). But cf. 52 L. Q. REV. 474 at 475 (1936) and MANN, THE LEGAL ASPECT OF MONEY 263, note 1 (1938) (misleading).

\(^{229}\) See, e.g., the (old) Devisen law of 1935, § 1, par. 4: "The Reichs-Office can release particular persons either wholly or in part from the restrictions and prohibitions."

tenets of the American and French revolutions, has a wider scope than the protection of a country's own nationals. In civilized states only reasonable classifications are deemed permissible in the enactment and enforcement of laws. Whether a particular classification is reasonable can be determined only by its purpose, the policy it is intended to promote, and the relation of the resulting differentiations to those factors in practice. Undue favor and individual or class privileges, on the one hand, and hostile discrimination or oppressive inequality on the other, are not to be tolerated. Courts administering a system of law which is based on the principle of equal justice for all may thus refuse, even when persons other than their own nationals are involved, to enforce foreign laws which in their view flagrantly violate this fundamental principle.

Among the marked features of the German law and practice relating to foreign exchange are the favors they bestow on "persons of German blood," without regard to nationality or domicile. The provisions for "alleviation of hardships" (Haerteausgleich) have this primary purpose. In certain circumstances they permit, for instance, an Aryan of German blood who desires to immigrate into Germany, to dispose freely of Sperrmark which he acquired abroad at a fraction of their face value. In addition, if he brings foreign money with him, he may receive more in marks than what corresponds to the official rate. The legal procedure, as an official circular frankly puts it, "enables an immigrant to increase his fortune not inconsiderably."

In contrast to these are the regulations issued in Germany and the occupied countries affecting persons who are not regarded as possessed of rights which the law must respect. There are innumerable discriminatory orders applicable to Czechs, Poles, Jews and others. Inequali-

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282 "It is believed that the exception [to the application of a foreign law because of its injustice or detriment to the people of the forum] comprises within its scope all those for whose protection and benefit the lex fori is enacted, including not only citizens, but aliens domiciled there, and sometimes persons resident there for a temporary purpose." Minor, Conflict of Laws 17 (1901). See also Dicey, Conflict of Laws, 4th ed., 30 (1927); Vavoni v. Moineau, (French Cass. Req., July 18, 1859) Sirey 1859.I.822.

283 Wilmans, Aus- und Einwanderung 23 (1937).

284 RE 104/36 D. St.; also, e.g., RE 26/39 D. St. (at IIB2b, IIB6b).

ties have been created between various categories of persons even in respect to their right to present their claims or defenses in court.\textsuperscript{236}

Courts outside of Germany are under no obligation to enforce laws of this kind. "English courts do not recognize in England any penal (or privative) status arising under a foreign law, as, for example, the status of civil death, or civil disabilities or incapacities which may be imposed on priests, nuns, Jews, Protestants, slaves or others, by the law of the country to which they may belong. . . ."\textsuperscript{237} Shortly before the collapse of France, the Tribunal de Commerce of Paris, in a case which turned on property rights in a Czech business concern, declared that "among the principles doing honor to French law" is "the recognition of the equality of the rights of citizens, without any discrimination as to origin, race and religion."\textsuperscript{238} The foreign law being inconsistent with this principle, the court, on the ground of public policy, refused to apply it. Earlier the Cour d'Appel of Paris had asserted that "equality before the law is in France a fundamental legal principle," that it would not apply a foreign law imposing, though on a foreigner, a kind of "civil death" which had been abolished in France, and that a French court "would not embark on investigations into the racial origins and religious affiliations of litigants."\textsuperscript{239} Swiss courts, too, have adverted to "violation of equality in the law" as justifying the repudiation of a foreign rule.\textsuperscript{240}

Violation of the principle of equality and the presence of political, retroactive or confiscatory features, such as have been already discussed, have furnished potent arguments which have led courts to refuse to enforce, directly or indirectly, some foreign exchange regulations which under the general rules of conflict of laws would have been held controlling. These are not necessarily the only arguments that can be advanced. Other aspects of the public policy of the forum may in

\textsuperscript{236} When in consequence of the decree of Sept. 27, 1938, there were, e.g., no longer any Jewish attorneys in Germany, the representative of the Fuehrer, Hess, nevertheless ordered (No. 204/1938) that Nazi attorneys ought to represent Jews only "where the predominant interest of the German people requires it." According to traditional principles of free countries, it is "the paramount duty of the court, before which any suit is brought, to see to it that the parties have had a fair and impartial trial." Hilton v. Guyot, 159 U. S. 113 at 205, 16 S. Ct. 139 (1895).

\textsuperscript{237} Dicey, Conflict of Laws, 4th ed., 30 (1927).


some instances provide additional arguments that are relevant and compelling.

The same line of reasoning may be applied to British, South American, Japanese and any other legislation dealing with foreign exchange. The result will not always be the same; it will vary according to the character of the legislation.

Two theories, however, which will now be discussed, seem likely to impede a satisfactory solution of the problems raised by the doctrine of public policy. 241

VII

IMPEDIMENTS TO THE APPLICATION OF THE TEST OF PUBLIC POLICY

A. Abuses of the Contact Theory

It is a natural consequence of the relative character of the notion of public policy that the doctrine based on it should be more readily applied in cases involving an act which occurred in the court's own country or which had a definite effect there than in cases whose only connection with the forum lies in the fact that the plaintiff was able there to obtain jurisdiction of the defendant. 242 But the contact theory, which for some time has been gaining ground anew, goes much farther. As formulated by Professor Nussbaum, it postulates that "Only an actual, strong and adverse interest of the forum will prompt the court to refuse the application of the foreign law that would govern under general conflict of laws rules" and that, in the absence of such adverse interests, even "a foreign law which in itself is repugnant to the forum should be accorded recognition." 243 "The closeness of the relation between the particular case and the forum" 244 and "the material interest of the forum" 245 should, according to this theory, be the decisive factors.

241 For an illustration of the confusion to which these theories can give rise, see comment in 17 Bost. Univ. L. Rev. 102 (1937).
244 Comment in 45 Yale L. J. 1463 at 1470 (1936).
245 Klein, comment in 17 Bost. Univ. L. Rev. 102 at 129 (1937). Nussbaum, Money in the Law 496 (1939), stating, "There must be a material contact of the case with the forum to warrant the use of the public policy weapon." Nussbaum, "Public Policy and the Political Crisis in the Conflict of Laws," 49 Yale L. J. 1027 at 1050 (1940), stating, "any mentionable economic interest of the forum will suffice."
Adherents to this theory assert that it is firmly established, especially in the United States. It is submitted, however, that the authorities cited do not support this contention.\footnote{The fact that courts frequently allude to the contacts involved is not in itself conclusive. See supra, at note 242. A few of the American cases which respect an objectionable foreign law can perhaps be regarded as based, at least in part, on the contact theory. See, e.g., Holzer v. Deutsche Reichsbahn Gesellschaft, 159 Misc. 830, 290 N.Y.S. 181 (1936), modified 277 N.Y. 474, 14 N.E. (2d) 798 (1938). Other American decisions are wholly inconsistent with the contact theory. See, e.g., cases cited in notes 247, 248, 249, infra. Many of the authorities cited for the theory are simply not in point. None of those relied on in 45 Yale L. J. 1463 at 1470, note 28 (1936) is even concerned with any question of contacts: Strauss & Co v. Canadian Pacific R.R., 254 N. Y. 407, 173 N.E. 564 (1930); Conflict of Laws Restatement, New York Annotations 388 (1935); 33 Col. L. Rev. 750 at 751 (1933). See also 45 Yale L. J. 1463 at 1470, notes 29, 30 (1936); Nussbaum, “Public Policy and the Political Crisis in the Conflict of Laws,” 49 Yale L. J. 1027 at 1030-1031, notes 23, 25 (1940). Among the authorities cited by the Yale comment, note 30, is Kosters, “Public Policy in Private International Law,” 29 Yale L. J. 745 at 757-758 (1920). But Professor Kosters, in the very article cited, speaks, at p. 764, of cases which should be governed by the doctrine of public policy even though “no material interests of the state or society of the judge’s country are injured,” and, at p. 758, states that “The provisions of the foreign law undoubtedly turn the scale in many cases, independent of the points of connection.”} With respect to European law, and particularly German law, Nussbaum, *Deutsches Internationales Privatrecht* (1932), remarks that “the point is much disputed” (p. 64, note 2) and cites (p. 65, note 4) judgments of the Supreme Court of Germany and other German courts which are rather at variance with the contact theory. No persuasive authorities affording support for the contact theory have been cited from countries other than Germany. For cases involving foreign exchange legislation which are wholly inconsistent with the contact theory, see, e.g., Jansen, van den Oever & Cie. v. Maiani, (Trib. Civ. Zurich, Apr. 23, 1937) 1938 Blaetter fuer Zuercherische Rechtsprechung 225, 4 Nouv. Rev. 627 (1937); Bronstein v. Banque Russo-Asiatique, (Cour d’App. Paris, June 30, 1933) 60 Clunet 963 (1933); Zenith v. Baer, Sondheimer & Co., (Civ. Ct. Oslo, Feb. 13, 1936) Sjoefartsstidende, Feb. 19, 1936 (Norway). Professor Nussbaum, supra, 49 Yale L. J. at 1032, recognizes that “it is not inconsistent with the relativity doctrine to hold certain foreign rules so repugnant to the policy of the forum that no recognition should be given to them regardless of contacts.” See, to the same effect, id. at 1030. Similarly, in his *Deutsches Internationales Privatrecht* 64 (1932), Professor Nussbaum remarked: “Such an application of foreign rules as would, according to our standards, be against good morals is to be absolutely rejected. Basic considerations may in other cases, too, make it necessary to enforce certain substantive rules.” And he refers, ibid., by way of illustration, to gambling cases where, he states, legal prohibitions of the forum should be considered “inalienable.” Gambling, however, is generally regarded as a matter of minor morals. Why, then, should human enslavement or other monstrous measures meet with greater lenity? Where is a line of demarcation to be drawn? And what remains of the contact theory if the reservations made by Professor Nussbaum are to be taken at their face value?
vested abroad, if of obnoxious origin, will not be enforced in the courts of the United States, 247 "not from any consideration of the interests of that government or any regard for its policy, but from the inherent viciousness of the transaction, its repugnance to our morality and the pernicious effect which its enforcement by our courts would have upon our people." That a cause "against good morals or natural justice . . . would be prejudicial to the general interests of . . . citizens," 248 has been repeatedly reaffirmed by the courts. 249 A departure from these clearly stated views would seem possible, only if the courts had lowered their standards of good morals and natural justice. Until the contrary is proved, it should not be assumed that "To let oneself slide down the easy slope offered by the course of events and to dull one's mind against the extent of the danger" involved 250 will be the rule of conduct the American courts will follow.

Naturally, certain contacts between the subject matter and the forum must exist in order that the court may be enabled to take jurisdiction. Also, the doctrine of forum non conveniens enables the courts to refuse to exercise jurisdiction if they feel strongly that complete justice cannot be administered in the forum or that the suit can be more equitably and conveniently disposed of in another jurisdiction. It is, however, a characteristic of courts of high repute everywhere, that, once they take up a cause on the merits, they act only on the basis of equal rights for all. It is an instance of this principle that, in the courts of the United States, aliens are, on the whole, entitled to the same protection as citizens. 251 But, under the contact theory a judge, in some

247 Oscanyan v. Arms Co., 103 U. S. 261 at 277 (1880). DICEY, CONFLICT OF LAWS, 4th ed., 29-30 (1927) states: "English courts refuse to give legal effect to transactions, wherever taking place, which our tribunals hold to be immoral. Thus . . . an agreement which, though innocent in itself, is intended by the parties to promote an immoral purpose, or a promise obtained through what our courts consider duress or coercion, is according to English law based on an immoral consideration. Such a promise or agreement, therefore, even were it valid in the country where it was made, will not be enforced by English judges."

248 See, e.g., Reynolds v. Day, 79 Wash. 499 at 503, 140 P. 681 (1914), quoting Herrick v. Minneapolis & St. L. R. R., 31 Minn. II at 15 (1883); Skillman v. Conner, 8 Harr. (38 Del.) 402, 193 A. 563 (1937), and cases therein cited.


251 "These provisions [of the Fourteenth Amendment to the Constitution] are
circumstances, would have to make different decisions on the same set of facts depending on how closely the parties are connected with the forum. If the required contacts are absent, the theory would expect a judge to do no less than enforce foreign laws or uphold legal situations, even where they are plainly contrary to his notions of honesty and decency. "This is no longer mere positivism but amounts to legal materialism."

Recent experiences have clearly shown, even in the field of international relations, to what extent the results of a one-sided concern with mere utility and expediency may turn against the intentions of its universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." Yick Wo v. Hopkins, 118 U. S. 356 at 369, 6 S. Ct. 1064 (1886); Truax v. Raich, 239 U. S. 33, 36 S. Ct. 7 (1915); Russian Volunteer Fleet v. United States, 282 U. S. 481 at 491, 51 S. Ct. 229 (1930); Hibernia National Bank v. Lacombe, 84 N. Y. 367 at 385 (1881); Hines v. Davidowitz, 312 U. S. 52 at 65, 61 S. Ct. 399 (1940).

Cf. Holzer v. Deutsche Reichsbahn Gesellschaft, 159 Misc. 830, 290 N. Y. S. 181 (1936), modified 277 N. Y. 474, 14 N. E. (2d) 798 (1938). The German Railways Corporation, in 1932, employed the plaintiff for three years as one of its directors, it being stipulated in the contract that if he became unable to perform his duties he should receive a certain indemnity. He was dismissed in 1933 under the so-called Aryan laws and, without being charged with any offense, was placed in a concentration camp. He later came to New York and there brought an action against the German corporation, alleging two causes of action, one for damages for breach of contract and the other for compensation under the contract. The case is discussed in 38 Col. L. Rev. 1490 (1938); 17 Bost. Univ. L. Rev. 102 (1937); 23 Va. L. Rev. 288 (1937); 24 Va. L. Rev. 922 (1938); 45 Yale L. J. 1463 (1936); 47 Yale L. J. 451 at 458 (1938).

"Morally, the plaintiff should undoubtedly recover, but . . . the courts should not allow moral notions, aided by an intense current feeling against the Nazi regime, to lead them to a conclusion which will plague them later, when feeling does not run so high." Comment on Holzer case in 23 Va. L. Rev. 288 at 297 (1937). "Since the action is between German nationals on a contract performable in Germany, the so-called Devisen Laws of that country must be held to apply 'however objectionable' we may consider them." Branderbit v. Hamburg-American Line, 31 N. Y. S. (2d) 588 (Sup. Ct. 1941), citing Holzer v. Deutsche Reichsbahn Gesellschaft, 277 N. Y. 474, 14 N. E. (2d) 798 (1938). But cf. supra, note 24.

"... when, as happens from time to time, the law itself presents a choice, and when it is a question whether one or other principle is to be applied, then it seems to me that it is impossible, as it is undesirable, that the decision should not have regard to the ethical motive of promoting justice." Macmillan, Law & Other Things 49 (1937). "It was one of the greatest masters of our law, Lord MacNaghten, who said: "It is a public scandal when the law is forced to uphold a dishonest act."" Id. 48. "Our civil laws must be interpreted as being based on the general principles of Christian morality, and must be deemed made to govern a Christian civilization." Sutherland v. Gariepy, 11 Revue de Jurisprudence (Quebec) 314 (1904), cited by I Johnson, Conflict of Laws 187 (1933).
authors. Quite apart from this, moreover, one may expect with confidence that, in a country where zeal for economic achievement does not exclude regard for religious and moral values, the axiom *jus est ars aequi et boni* will not become a dead letter, to be found only inscribed on the portals of law schools. Certainly, the law has not a religious or a moral, but primarily a social, purpose. A law that fails to promote morality is not necessarily bad. But, and this is the point, a law that promoted immorality would be a bad law.\(^{255}\) If wholesome conditions are to be preserved, such laws must be unreservedly banned.

Professor Thomas H. Healy, in his comprehensive lectures at The Hague on the “Théorie Générale de l’Ordre Public,” completely disregarded the contact theory.\(^{256}\) Unfortunate excesses of this theory should be checked before it is adopted on a wide scale by the American courts.

**B. Supposed Consequences of Recognition or Nonrecognition of a Foreign Government**

The other doctrine requiring mention at this point is one which relates the subject of this paper to public international law.

In the lower Anglo-American courts and even in some of the higher courts, it became almost a ritual to remark that laws of an unrecognized government cannot be given effect.\(^{257}\) A number of courts have thus for years referred to the nonrecognition of the Soviet government as the reason why, in many important litigations, they had to refuse to enforce the revolutionary Russian decrees.\(^{258}\)

Nonrecognition of another country’s government is, however, not a compelling reason for a refusal to enforce its law.

“A distinction may clearly be drawn between (1) the status of an unrecognized government in a municipal court and the power of a municipal court to deal with situations arising out of the de facto existence of the unrecognized government, and (2) the status of an unrecognized government under international law. . . . a judgment by the court upon the first point [does not commit] the court to a decision upon the second.”\(^{259}\)

256. Recueil Cours 1925.IV.411.
Foreign facts cannot always be ignored solely because they had their origin in the act of an unrecognized government. Professor Borchard and other eminent writers have thus suggested that it would have been better if the courts had based their decisions in these cases primarily on domestic public policy.

After the Soviet government had been recognized, a change took place in the attitude of many courts. Solely because of the recognition, Soviet laws were now accorded different treatment even in the field of private international law. Some courts followed the line of thought that to disregard the laws of a recognized government might vex it or that it "might well with a susceptible foreign government become a casus belli." It was also asserted that the political recognition of a foreign government necessarily, to quote the language used by Justice Clarke, "validates all the actions and conduct of the government so recognized from the commencement of its existence." Similar arguments are advanced, in actions involving foreign exchange regulations, in advocacy of the enforcement of the regulations as a corollary of the recognition of the foreign government.

Apprehension of offending a foreign government, which in any event could be rarely justified in the case of a court of justice, cannot be accorded much weight, since the court, when it refers to the principle of public policy, need not say more than that the foreign rule appears inconsistent with domestic institutions. There is, in this, no expression of censure.

On the other hand, the recognition of a foreign government, as


262 Luther v. Sagor, [1921] 3 K.B. 532 at 559. At 558, the court had stated: "...it appears a serious breach of international comity, if a state is recognized as a sovereign independent state, to postulate that its legislation is 'contrary to essential principles of justice and morality.'"

Professor John Bassett Moore puts it, "validates nothing." Professor Philip C. Jessup characterizes as "unfortunate" the dictum which has been quoted from Justice Clarke. The recognition may imply that from now on the foreign laws will have to be regarded as duly enacted laws and not as acts of usurpers or of some kind of lawless bodies. But the act of recognition should not imply approval of the country's laws, much less assure them extraterritorial effect in renunciation of the traditional check exercised by domestic public policy. Could it possibly be argued that this check should be renounced even in favor of the laws of barbarous powers, more barbarous perhaps than for instance the Barbary pirates, merely because the United States had established diplomatic relations and concluded treaties with them?

Public policy as an exclusionary device was developed in all countries with reference to perfectly regular and internationally recognized foreign enactments. This would not have been possible if the views here discussed had then prevailed.

Authoritative statements that "diplomatic recognition does not compel our courts to give effect to foreign laws if they are contrary to our public policy" can, of course, be found. But in recent years the courts have been to an increasing degree led astray "by the mistaken theory that the validity of the acts or laws of a foreign government and the extent to which extraterritorial effect must be accorded to those acts or laws, depend on political recognition." It is, therefore, highly desirable that, particularly in actions which turn on foreign exchange regulations and analogous matters, the question of the recognition of the foreign government should be eliminated from consideration as an element which may inhibit the courts from focusing their attention on public policy.

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266 One of the treaties, the treaty with Tripoli, "declared that, as the government of the United States was 'not in any sense founded on the Christian Religion' and had 'in itself no character of enmity against the laws, religion, or tranquillity of Mussulmen,' no pretext arising from religious opinions should ever produce an interruption of the harmony existing between the two countries." Moore, Candor and Common Sense 28 (1930).
American and Other Approaches to the Problem

The test of public policy in the field of conflict of laws has been applied more commonly in civil law countries than in the United States. Under the American rules governing conflicts, cases are decided with reference to foreign law less frequently than elsewhere, and there is, consequently, less occasion for determining whether a foreign law should be rejected as incompatible with the public policy of the forum.

Moreover, when under the American rules a foreign law is relevant, the American courts have, more than other courts, regarded this test with doubt or have even wholly rejected it.\textsuperscript{269}

One of the principal reasons for this attitude is that the American rules have been developed largely in cases involving conflicts between the laws of the several states of the Union. Because of the common heritage and development and the close relation and connection of the American family of states, such inconsistencies in law as arise are for the most part limited to questions of "minor morals of expediency."\textsuperscript{270} This, of course, explains why Professor Goodrich would "cast out altogether" public policy in the area of interstate conflicts.\textsuperscript{271}

Weighty influence may be attributed also to the liberal traditions of the United States.\textsuperscript{272} One likes to assume that, by and large, men everywhere are governed by the same canons of logic and ethics, and that it is highly advisable to recognize and enforce the laws enacted by other countries within the scope of their sovereign power and the

\textsuperscript{269} Nussbaum, "Public Policy and the Political Crisis in the Conflict of Laws," 49 YALE L. J. 1027 at 1029 (1940).
\textsuperscript{270} Phrase from opinion of Crouch, J., dissenting, in Mertz v. Mertz, 271 N. Y. 466 at 475, 3 N. E. (2d) 597 (1936).
\textsuperscript{272} Nussbaum, "Public Policy and the Political Crisis in the Conflict of Laws," 49 YALE L. J. 1027 at 1048 (1940).
rights created by such laws. This is a pendant to what liberalism taught in the economic field. "Harmony, liberal intercourse with all nations, are recommended by policy, humanity and interest."

Unhappily, however, the assumptions on which this theory is premised are today not always borne out by facts. Political action in some countries, as they have themselves formulated it, "is nothing else nor can it be anything but the promotion of the vital interests of the people and the effective prosecution of its life struggle by every means." Foreign exchange legislation, in particular, has often been merely an instrument of aggressive activities. Juristic publications are advertised as "noiselessly exploding mines." It is a struggle for power and no longer, to use Jhering's words, a struggle for law.

"... the willingness of one state to give effect to rights gained under the laws of other states depends upon the existence of a similarity in principle between the legal and moral notions prevailing among different communities." Dicey, Conflict of Laws, 4th ed., 25 (1927). To the same effect see, e.g., I Martin, Principes de Droit International Privé 68 (1930). "The similarity ... between the moral principles prevailing in all civilized countries is now so great that the instances are of necessity rare in which English tribunals can be asked to treat as immoral transactions which in a foreign country give rise to legal rights." Dicey, supra, 30.

Washington's Farewell Address.

"... there must be full and peaceful intercourse between the people of these different states." Goodrich, "Public Policy in the Law of Conflicts," 36 W. Va. L. Q. 156 at 158 (1936).

The following observation appears today more than ever of importance. "... there are nations ... whose views and ways are so different from ours that we could not establish at all between them and us a system of private international law, by which effect might as a general rule be given in Christian states to their laws and judgments. ..." Westlake, Private International Law, 5th ed., 55 (1912).

Seeger, "Das Devisenrecht als Werkzeug der Devisenpolitik," 1937 Dev. Arch. 245 at 273, 278 (with reference to a speech of Hitler).

See supra, at note 178. Those who advocate the recognition of certain exchange restrictions often assert that there can be no postulate of unlimited freedom in the sense that individuals should be allowed to dispose freely of their goods according to their fancies. E.g., Ettore Conti, Milano, and Filippo Carli, Pisa, in the 1937 Proceedings of the International Chamber of Commerce, Exchange regulations, it is insisted, were designed as a "piece of organized thriftiness with the resources of the national economy," Schirmacher, "Devisenrecht—ein Notrecht?" 1937 Dev. Arch. 857 at 926, 933; to keep the national economy healthy as a part of the world economy, and "without hostile intent," Dietrich, "Zur Geltung nationalen Rechts im internationalen Rechtsverkehr," 67 Jur. Woch. 2606 (1938); with a view to preparing a new order of international relations to be erected "on the basis of mutual respect and helpfulness," Schirmacher, supra at 936. But this series of attractive arguments quite disregarded the actual state of affairs.

The publisher's prospectus of Prof. Carl Schmitt's Im Kampf mit Weimar-Genf-Versailles, 1923-1939.
Liberties and privileges accorded by other systems are used primarily in order the more easily to displace and supersede these systems. 280

The wisdom of thousands of years, which had been all but forgotten in this technical age, is being recognized anew. No constitution or legal formula can alone, and without the effort and good will of individuals, secure progress, justice and utility in internal or international relations. The world is eternally an arena for the struggle of conflicting human passions, of good and evil, of right and wrong.

As early as the fourteenth century, in the writings of the great Italian jurist Bartolus, 281 who was one of the first to deal with the concept of conflict of laws, we find a distinction drawn between statuta odiosa and statuta favorabilia.

American judges, approaching problems in a far less dogmatic spirit than jurists in civil-law countries, are wont to adjust the law continuously to the exigencies and changes of society. It would thus be only natural if, in these days of martial, political and social upheaval, they inquired more closely than before whether a foreign law bears evidence of being unjust, shocking, dictated by a predatory purpose or, in general, contrary to the interests and basic principles of the nation whose courts are asked to enforce it. This would, indeed, be but a logical and wholesome return to the doctrine of territoriality, which has always been the basic theory of the American law of conflicts. 282

A final observation may be added. The aspects of public policy which have been discussed in this paper are those which have made possible the rise and growth of present-day private international law. Powerful states, groups and individuals, encouraged in part by shortcomings of the democracies, have challenged the principles that have been developed and have demanded that some or all of them be revised or wholly abandoned. What is remarkable is that the abandonment of the principles here assumed as basic would not necessarily result in a greater readiness to enforce foreign exchange restrictions of other countries. A glance at totalitarian nations will suffice to demonstrate that the contrary is the case.

280 "... the problem to be solved is the measure of recognition that is due under a given legal system to the acts of another system that professes to displace and to supersede it." Cardozo, C. J., in Petrográdsky M. K. Bank v. National City Bank, 253 N. Y. 23 at 35, 170 N. E. 479 (1930).

281 Bartolus de Saxoferrato (1314-1357), "the most imposing figure among the lawyers of the middle ages." BARTOLUS ON THE CONFLICT OF LAWS, transl. Beale, 9 (1914).

282 For a continental appreciation of this American theory, see Professor Niboyet's preface to the French translation of the AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF CONFLICT OF LAWS viii (1937).
Totalitarian governments are not concerned with the maintenance of traditional legal principles. For determining whether a foreign law should be recognized, as well as for other matters, they have adopted the Nietzschean maxim, "What's good for me, that's what I call justice." Accordingly, since they ordinarily can, of course, derive no advantage from the foreign exchange regulations of other countries, they take the position, simply on this ground and without regard for any general principle of justice, that these are not to be respected. The last accessible German text book on private international law, in a special chapter on the implications of exchange control, clearly sets forth this view.

Hungarian exchange restrictions which prevented a Hungarian from discharging a mortgage on property which he owned in Germany were held, by the highest court of Prussia, not to relieve him of the consequences of his default. And the German courts have, in general, refused to give effect to exchange regulations of other countries.

In the same way, the Italian Court of Cassation affirmed a decree for the foreclosure of a mortgage on land in Italy, although the owners of the land, domiciled in allied Germany, had been prevented only by the German transfer restrictions, which are similar to those of Italy itself, from paying the mortgage.

The approaches differ but the result is largely the same, namely, disregard of a considerable part of the foreign exchange restrictions of other countries.

It is only in a repentant world of the future that the basis can be created for better and more sincere international cooperation which may come closer to what Chief Justice Stone has spoken of as "the most sacred aspiration of mankind, the aspiration for the realization of justice on earth."

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