INDETERMINACY IN THE CONFLICT OF LAWS*

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TWO MAJOR difficulties impede scientific progress today in the field of conflict of laws. The first I call *formal* indeterminacy; the second, *material* indeterminacy. Formal indeterminacy results from a persistent habit of regarding the subject matter of conflicts as essentially paradoxical. One example of this is the so-called paradox of characterization which takes the form of a vague feeling that whereas characterization must precede choice of law; equally, choice of law must precede characterization. Another is the alleged "fallacy" of renvoi. A third can be put as follows: the law of the place of making of a contract must be known before one can ascertain the law by which the place of making is chosen. A fourth asks how the place where a tort has been committed can be determined before that law is chosen which determines the place where the tort was committed. A fifth is the objection raised against *giving effect to the intention* of the parties in choosing the law applicable to their agreements because of the possibility that the law chosen will declare their commitments invalid, that is, *defeat their intention*. A sixth wants to know how "foreign law" can be enforced in a forum which has competence to enforce only "domestic law"; and so on and so on. In this view, no definitive solutions are thought possible in the conflict of laws because of the peculiar nature[1] of the subject. Its fundamental problems are regarded as essentially insoluble, and, it is thought necessary in theoretical discussions to keep constantly in mind this inherent structural or formal indeterminacy.

The second difficulty arises from an equally entrenched belief that while *formal* problems are of little consequence, the very *material* out of which conflict rules are made is so variegated, so complex, and so impregnated with "conflict" that the only rational course is to give up the struggle for

* Without making references in detail thereto, this paper leans rather heavily upon Professor Rabel's discussion of conflict rules in Rabel, 1, The Conflict of Laws (1945) 42–98.

[1] On present advantage of discussions of the *purpose* of conflict rules rather than their *nature*, see Freund, "Chief Justice Stone and the Conflict of Laws" (1946) 59 Harv. L. R. 1210.

rule or system and resort to "free choice of law" in conflicts determinations. Indeterminacy here is material.

The first sort of indeterminacy, formal indeterminacy, then, supposes that conflicts rules and systems are subject to incurable theoretical defects. The latter sort of indeterminacy believes that the very process of rule-making or systematization is a vain pursuit.

Now indeterminacy in itself is neither good nor bad for the progress of science. In physics[2] and mathematics[3] at present, for example, indeterminacy is a powerful impetus to new and fruitful developments. But in the field of conflict of laws where a consensus of informed opinion is a desperate necessity, indeterminacy is an almost unmitigated nuisance.

FORMAL INDETERMINACY

As has been indicated, formal indeterminacy in the conflict of laws is based on the belief, widely held, that no consistent body of theory is capable of being formulated in conflicts because of the *nature* of the subject. This belief exerts a constant pressure against all attempts to whip conflicts into a fairly consistent body of opinion. On those interested in theory it acts as a corroding doubt of the ultimate feasibility of the project; for the practical fellows it lies ready at all times as a tempting two-edged sword with which to slit theorists' throats. If formal indeterminacy could be removed from the arena of conflict of laws, one seriously annoying obstacle to the formation of a consensus of opinion would disappear. Obviously, the job is a big one and I shall content myself here with noticing only two of the main sources of formal indeterminacy in the conflict of laws, namely, characterization and renvoi.

Characterization

To begin with characterization. As long ago as 1897, Bartin in his famous paper *De l'impossibilité d'arriver à la suppression définitive des conflits de lois*[4] showed, or thought he had shown, that because courts

[2] For a readable and authoritative account of this subject, see L. de Broglie, Matter and Light (1946) trans. by W. H. Johnston; see also, Phillips, M., Quantum Mechanics, Philosophy for the Future, edited by R. W. Sellars V. J. McGill, and M. Farber (1949) 180-201.

[3] Gödel, "Über formal unentscheidbare Sätze der *Principia Mathematica* und verwandter Systeme," 38 Monatshefte für Mathematik und Physik (1931) 173. See brief discussion of incompleteness in formal systems of arithmetic by Church, Formal Logic, Dictionary of Philosophy (1942) 178; Tarski, "On Undecidable Statements in Enlarged Systems of Logic and the Concept of Truth," 4 Journal of Symbolic Logic (1939) 105.

[4] 24 Clunet (1897) 225, 466, 720.

would always have to apply legal conceptions whose material contents must differ with the different systems of law applicable to the case, the hope for a consistent body of determinations in the conflict of laws was a phantasy. It was based, he thought, on a failure to apprehend the nature of conflicts rules. For inasmuch as the problem of characterization must constantly recur, consistent determinations could only be supposed possible on the assumption that the contents of the various legal systems could be made substantially identical. And if this happy event should ever be consummated, then the conflict of laws as a subject matter would disappear.

We know what a pernicious effect this skeleton in the theorist's closet has had through the years. For herein lay the germ of a paradox which has been made to grow prodigiously by the efforts of later writers on the subject of characterization. For if one could suppose an end to conflict only on the supposition of a universally identical body of private law, one could likewise suppose that at any point short of unanimity, rational choice might be defeated because the difference in the content of *legal conceptions* would have to be eliminated by choice of one or another *system of law*, but the choice of a *legal system* could not be made until choice among *legal conceptions* had first been exercised. Thus we have the famous paradox of characterization. Pillet in 1903 thought this difficulty logically insoluble;[5] Robertson in 1940 agreed and for himself said "It is the conviction of the present writer that the difficulty of primary characterization is insoluble on logical grounds."[6] Arminjon in 1927 wrote to the same effect: "To make qualification depend upon choice of law is impossible, and even inconceivable, for how can we choose a law applicable to something which has as yet no juristic existence?"[7] Actually, the very reverse of Arminjon's proposition could be argued with equal speciousness. We might say: "To make *choice of law* depend upon *qualification* is impossible and even inconceivable for how can we *qualify* something which has as yet no *law applicable to it.*"

As might be expected this supposed logical impasse, this problem of determining which comes first, the legal chicken of choice of law or the egg of characterization, has had its practical consequences.

Arminjon and a host of other writers, including Cheshire, think the logical impasse can only be surmounted by characterizing according to the *lex fori*. Wolff says of this argument "[Classification by *lex causae*] would possibly have found more adherents if it had not been repeatedly crit-

[5] Principes de droit international privé (1903) 103.

[6] Characterization in the Conflict of Laws (1940) 75.

[7] 1 Précis de droit international privé (2nd ed. 1927) 136.

icized in respect of the vicious circle in which it seems to be caught up."[8] [citing Cheshire].[9] Rabel uses the supposed logical difficulty as an argument for rejecting characterization by either *lex fori* or *lex causae*,[10] leaving his comparative method as an alternative for handling the characterization problem—a dubious argument in support of a sound position.

Professor Harper, turning his attention to the difficulty says just in passing in a footnote:

"This chasing oneself around a circle results from a failure to recognize that the question of determining where a contract is made is a legal problem upon which the laws of the various states may differ to an extent quite as great as in respect to any other problem. The problem, therefore, is itself a problem of the Conflict of Laws although one which is *logically preliminary* to other problems which may arise in a dispute over such a transaction."[11] (Emphasis supplied.)

That is, to get out of the characterization circle, Professor Harper suggests that characterization must be undertaken as an investigation "logically preliminary" to other problems. But as a matter of logic, this will not do. Unfortunately, we know what usually happens in the history of formal science to the pursuit of the "logically preliminary," or first principle or fundamental starting postulate. Upon demand, the "logically preliminary" must substantiate its claim to priority by virtue of a principle more fundamental, and that by one still more fundamental, and so on, *in secula seculorum*. In the terms of modern logical theory, Professor Harper has exchanged a vicious circle for an infinite regress.

What is the way out? If we follow the example of modern formal systems of logic and mathematics the way out for the jurist at least is simple. In a formal system such as a system of symbolic logic, it is well recognized that such a problem of first beginnings cannot be solved within the system of logic itself. Consequently, systems of metalogic or metalanguage which analyze symbolic forms in general are invented and the problem is generalized.[12] The problems of logic are seen to be special cases of a wider field of

[8] Private International Law (1945) 155.

[9] "It is reasonably clear that [the question of primary characterization] cannot be submitted to the *lex causae*, for the *lex causae* is unknown until the process of primary classification is complete." Cheshire, Private International Law (3rd ed. 1948) 64.

[10] Rabel, 1 The Conflict of Laws 45–47.

[11] "Policy Bases of the Conflict of Laws" (1947) 56 Yale L. J., 1155, n. 13 at 1158.

[12] Church, Semantical Truth, Dictionary of Philosophy (1942) 322; Tarski, Der Wahrheitsbegriff in den formalisierten Sprachen, 1 Studia Philosophica (1935) 261. Of the latter work, Church says: "(The) paper of Tarski cited below is devoted to the problem of finding a definition of semantical truth for a logistic system *L*, not in

investigation, formal semantics. So with conflict of laws problems. The legal systems themselves are only a part of a larger field, the socio-legal matrix out of which legal rules arise. Perhaps we should call this sociology of law, following Rheinstein's suggestion.[13] The fact situations should be examined in their socio-legal setting without any question of "logical priority" and thus treated could serve as the material premises for legal conclusions in the conflict of laws.[14] The separation of the main problem of conflicts into characterization first and choice of law later, or vice versa, is thus seen to be analytically objectionable [15] since it is bound to lead to theoretical and practical difficulties. There is, in fact, only one central problem of conflicts and that is choice of law. And it is natural and convenient to divide the problem into two parts: all the material considerations, whether rules of law or fact situations, which Rabel calls the operative facts,[16] and the conclusion which is the rule of law chosen to decide the issue, that is, the conflicts rule proper. Primary and secondary characterization are relics of the jurisprudence of conceptions, the theory that jural conceptions have autonomous existence and that from them are deduced the legal consequences governing the case. In a sense, to be sure, all legal determinations involve characterization, but the attempt to introduce a *methodological* distinction between legal conceptions and legal rules has proved elsewhere in the law to lead to insuperable difficulties. For when the distinction between conceptions and rules is insisted upon as fundamental to the process of decision then the temptation to deduce rules from conceptions proves irresistible.

Renvoi

Renvoi is the second instance of formal indeterminacy to be noticed in this paper. Empiricists enjoy theorists' discomfiture at the antics of

L itself but in another system (metasystem) containing notations for the formulas of *L* and for syntactical relations between them." Dictionary of Philosophy 322.

[13] Rheinstein, "Comparative Law and Conflict of Laws in Germany" (1935) 2 U. of Chi. L. Rev. 232, 269.

[14] On the dilemma of being imprisoned in one's own "logical" constructs, see Yntema, "Review of Robertson, Characterization in the Conflict of Laws" (1941) 4 Toronto Law J. 233.

[15] Contrary to Cheshire's view, for example, "[Primary classification] is a classification that whether consciously or unconsciously must always be made, for unless the question before the Court is allocated to its correct legal category it is impossible to take any step towards a solution of the case." Private International Law (3rd ed.) 63–4.

[16] Rabel, 1 The Conflict of Laws 42; Rheinstein, "Comparative Law and Conflict of Laws in Germany" (1935) 2 U. of Chi. L. Rev. 232, 261, and following.

this little monster. Beginning in an apparently harmless contretemps such as occurs when two people try simultaneously to yield the right-of-way at a narrow door, it seems to grow and expand into an infinite nightmare. Characteristically, the empiricist analyzes this situation as a pseudo-problem, as a case of a verbal symbol taken for a reality by the worried theoretician, or (boldest stroke of all) the empiricist simply denies that any actual case of renvoi has ever existed.

Some ten years ago, the present speaker went to a great deal of trouble to attempt to show on the basis of modern logic that renvoi does not involve a logical fallacy,[17] but, for his pains, succeeded only in getting himself thoroughly misunderstood. That analysis, in brief, concluded that the renvoi difficulty is a special instance of what logicians call the paradox of self-reference. This paradox is apt to arise whenever propositions are taken to refer to themselves or when classes are regarded as including themselves. The logician for good and sufficient reasons characterizes such self-reference as illegitimate.[18] That renvoi is an instance of such paradoxical self-reference or self- inclusion is easily seen. A conflicts rule of New York is taken to refer to or to include a conflicts rule of France, which in turn is taken to refer to or to include the original conflicts rule of New York. Thus the conflicts rule of New York is taken to refer to or to include itself. This is illegitimate (for reasons that cannot be examined here). Hence, logic, modern logic, forbids a re-reference to the original conflicts rule of the forum, though of course it does not forbid a reference back to any other rule of the forum.

In the literature on renvoi the direct converse of this position is asserted. It is usually said that if the forum refers to a foreign conflicts rule then *logic* insists that the foreign conflicts rule refer back to the original conflicts rule of the forum. I know of no rule of logic which would conceivably make such a demand. This is in reality a psychological demand for symmetry. Modern logic, on the contrary, forbids this instance of psychological symmetry since it leads to illegitimate infinite regress. The conclusion to which the writer came in the above-mentioned article was that reference back to the domestic law of the forum is a perfectly legitimate device from the point of view of logic. Whether it should or should not be adopted, therefore, must be determined on juristic grounds alone.

These two instances of formal indeterminacy, characterization and renvoi, must suffice for the whole. The problems they generate are not

[17] "Renvoi Does Not Involve a Logical Fallacy" (1938) 87 U. of Pa. L. Rev. 34.

[18] Church, Logical Paradoxes, Dictionary of Philosophy (1942) 224–225 and bibliography there noted.

solely those of law. They worry other sciences as well. Equally, they will not be solved by the jurist as such. They are general problems of scientific methodology and are in the province of the formal philosophy of science. The moral for students of the conflict of laws is to set them resolutely aside for the time being and to proceed with the work of organizing the body of conflicts materials into usable shape with the blithe confidence that these problems are being adequately taken care of by the other fellow, to wit, the logician.

MATERIAL INDETERMINACY

Material indeterminacy is nothing other than the tendency which all kinds of empiricism have to disintegrate. Whenever the legal empiricist seems to be getting his own way too easily through general agreement on the primacy of factual data, the actual case, the social situation, in short, the nonlegal matrix out of which law arises, there comes to him suddenly the suspicion that he is on a downhill run with the throttle wide open and a curve at the bottom. It is at this point that the theoretician has for the empiricist that feeling of impatience tinged with contempt which the empiricist in his turn reserves for the theoretical difficulties of characterization and renvoi. The theoretician's analysis of the empirical difficulty is characteristic. He feels that the empiricist's insistence on the primacy of fact, instance, event, result is plain pigheadedness. For, even assuming that a fact, event, result could be conceived in isolation, what is the empiricist to do with it when he has it? Why, evidently, he must make a rule out of it, or use it with other cases to make a rule. However, the chief difficulty (says the theoretician) lies in the empiricist's assumption that he ever can get a case without first having a rule or an inkling of a rule. For suppose the empiricist says he has a case. What, pray, is the case a case of? Any answer to this question (and who in his right senses can avoid answering it?) must be an answer couched in general terms, that is, it must be a rule.

Naturally, the empiricist rejects this solution out of hand; to accept it would put him out of a job. So he temporizes; advises himself to be moderate; reflects upon the sound advantages of the instinctive process of muddling through; and ends by embarking with much hesitancy on the enterprise of rule-making.

As he looks back on the history of rule-making, the empiricist becomes confirmed in the impression that all systems of rules are archaic the moment they become formulated. Let them be ever so astute in providing for the foreseeable case, the unforeseen one is just around the corner.

In the history of law, all rule-making sacrifices its legal correlative, individualization. And yet, it is the fate of most empiricists, lovers of the unique, to end up as system builders. Those who build no systems are judged by their fellows to have left their work unfinished. How then, in law, build a system of rules that gives due regard to the demands of fact, and particularly that element of fact so highly prized by the empiricists, its specificity? Evidently the matter can be handled if rules can be made specific.

THE SYNTHESIS

The synthesis between the demand for rule and that for discretion can be effected if it is possible to formulate specialized rules. The empiricist's program at once takes shape. Formulate into general rules all that part of the ensemble of conflicts material that can be handled suitably by general rules; provide specialized rules for the part which demands such treatment; and for the rest, frame discretionary rules for the guidance of the judge. The test of the adequacy of each rule always remains empirical, that is, the actual effect of the rules as they operate in daily life. Thus legal empiricism gives up the struggle against rules of law and accepts as the domain of its empirical investigations the metalegal area of the social sciences. Here the empiricist can exercise to the full his penchant for fact, event, particular. But when he comes to law, the legal empiricist must be prepared to generalize. In the field of the conflict of laws the empiricist's domain of fact can be taken to include the great body of positive law as well as the social strata upon which it rests. When he comes to conflicts, however, once again he must be prepared to generalize.

The theoretician's obligation is of course the converse. He must surrender his preoccupation with system building as an autonomous activity. He must in particular curb for the present at least his temptation to indulge in speculation upon what I have called formal indeterminacy. He must be willing, so far as now concerns the conflict of laws, to allow the empiricist to range freely over the body of positive law and its social foundations, and must devote his talents mainly to the task of helping make orderly and consistent the body of conflicts rules. The joint effort of theoretician and empiricist is long overdue.