A FEDERAL NATION AND THE CONFLICT OF LAWS

ELLIOTT E. CHEATHAM
Professor of Law, Columbia University School of Law, New York City

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THE TITLE, *A Federal Nation and Conflict of Laws*, might well lead American lawyers to believe that my subject is confined to this nation, for we are naturally preoccupied with the problems of our own federation. The error of such an assumption was illustrated on my first visit to the General Assembly of the United Nations. Knowing that the delegations were seated alphabetically, I was puzzled for a moment to observe that the delegations of four countries were seated in the order, Russia, Great Britain, the United States, and South Africa. Then I remembered that the official names of all these countries begin with the same word "Union" or "United," indicating their federal structure.

Federalism is a common form of national organization. One of the oldest of the nations, Switzerland, and one of the newest, Yugoslavia, are federations. So are most of our American neighbors, as, Canada, Mexico, Brazil, and Argentina. There is today, indeed, an inappropriateness in our name, *The* United States of *America*, for there are several united states of America. The assumption of the name was justified in 1776, for we were then the only independent nation in the Western Hemisphere, and it was nearly fifty years later before revolutions created similar nations in Middle and South America.

The great nations now emerging, India and Indonesia, are to have a federalism of a type as yet undetermined. The transforming nations, as, the French Union and the Dutch Commonwealth, are trying out new forms of federalism. The British Commonwealth of Nations, preserving itself through its constant transformations, is the most complex of all, politically and legally. A solicitor sitting in his London office can picture to himself a series of legal problems involving wider and wider circles of law: England and Wales which legally are one; other parts of the British Isles with their diverse positions, Scotland, Northern Ireland, the Isle of Man, the Channel Islands; the colonies of various kinds; the mandates; and finally the members of the Commonwealth of Nations most of which, as Professor Cowen's discussion of Australia reminded us, are themselves federations.

If we look to the past in our subject, there is an interesting parallel. Conflict of laws had its early development in countries which were federal in a sense, for the legal conflicts with which the jurists were concerned were primarily what may be called intranational. It was so with the Italy of Bartolus, with France when she took over the leadership, and with Holland whose writers became so important for the countries of the common law.

I have neither the knowledge nor the time to discuss these various systems. I must confine myself to the federal system I know best. But the general problems indicated by the title, though discussed only in their American context, are common to all federal nations.[1] The aspect of the American situation to be considered is the complexity in determining the authoritative sources of law.

Let me make plain what is meant by "the authoritative sources of law." Federalism by its nature gives rise to the laws of the component states and to the law of the central nation. As a part of the price paid for federalism a question presses insistently, particularly in the field of private interstate and international matters of which conflict of laws is a part. The question is, what law applies to any given case,—the law of the several states or the law of the nation? The difficulty in giving an answer is enhanced in conflict of laws because of the different bodies of law inherent in such a case. There is, first, the pointing or choosing law, that is, the rule of conflict of laws designating the state or nation which has the decisive connections with the case for the purpose in hand and whose law should be applied. Then there is the applied law, that is, the local or internal law of the state or nation so designated which is applied to fix the rights of the parties.

Now in our federation it may be necessary to determine whether each of these kinds of law—the law applied and the rule of conflict of laws—is to be found in the national law declared ultimately by the Supreme Court of the United States; or in the law of a particular state, say Michigan, interpreted and declared by the Supreme Court of Michigan; or, perhaps, in a special body of law of the federal courts used only for cases in those courts.

The difficulties are increased further by the changing character of our federal system, for matters once governed by state law have come to be governed by national law, and occasionally it has been the other way around. They are increased, too, by the growing realization that the gov-

[1] For a discussion of the problems of another nation, see Schoch, "Conflict of Laws in a Federal State: The Experience of Switzerland" (1942) 55 Harv. L. Rev. 738.

erning law in the interstate area may not be the same as the law in the international area to which this conference is devoted.

I will begin the discussion with the beginning of our present government. I will remind you of some of the shortcomings of the Articles of Confederation and of the measures the framers of the Constitution adopted to correct them.

One of the shortcomings under the Articles of Confederation was that the nation lacked the power itself to make and carry out its law directly for the individual citizens, but was under the necessity of appealing to the states to implement desired action. A second one was that the states could discriminate against one another, and local jealousies were so serious in economic matters that they gave rise to the Annapolis Convention preceding the one in Philadelphia. A third one was that there was no adequate legal protection for the individual against government,—a protection which was to come a little later through the first ten amendments and still later through the Civil War amendments. The measures taken to correct each of these shortcomings had important effects in the field of private interstate and international cases.

Among the purposes of the Constitution stated in the Preamble were the determination "to form a more perfect Union," which envisaged a stronger nation; and also to "secure the Blessings of Liberty to ourselves and our Posterity," which in the light of 1787 meant principally to preserve local (state) self-government. The legal methods used then were twofold. One of them called for national unity through a single national law where that was advisable. The other method continued state diversity where local self-government was more important, but this state diversity was a controlled diversity.

In dealing with the old shortcoming that the nation could not give its laws directly to the citizens, the Constitution provided that as to some matters the nation could make the law for the whole. This law was to be "the Supreme Law of the Land," as Article VI provides and "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The language of Justice Sutherland gives the conclusion as to international affairs:

"In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist."[2]

[2] United States v. Belmont (1937) 301 U. S. 324, 331.

In these matters turned over to the national government, then, the United States is a unit legally. "State lines disappear," and with them disappear intranational conflict of laws as to such matters.

"The law of the land" has steadily encroached on the areas of interstate conflict of laws. A Michigan-Illinois occurrence which was once a conflict of laws case may have ceased to be such because it has come under the control of a single national law. Familiar illustrations are given by the effect of the Federal Employers' Liability Act, and by the Pomerene Act dealing with bills of lading.[3] The encroachment will doubtless continue with increasing centralization. In the past the development has been principally through statutes enacted under the interstate commerce clause. A method of development now becoming more common is that of a national common law,—a common law developed by the Supreme Court of the United States in areas from which the state laws have been ousted and in which national legislation is not specific.[4] It, too, is a part of "the law of the land" applied by all courts, and it correspondingly cuts down the area of interstate conflict of laws.

Turning from the areas of a single national law, we come to those where state local laws continue. At once we confront the question, where do we find the rules of conflict of laws for adjusting the conflicts between local laws? Do we find them in national law or in state laws? In part, at least, the answer is found in national law. One reason for the Constitution, it will be remembered, was the discriminations among the states. The Constitution dealt with discrimination in the legal field principally by the Full Faith and Credit Clause and the Privileges and Immunities Clause, and later by the Due Process Clause. The purpose of the first clause has been stated by Justice Jackson in an illuminating lecture:

"By other articles of the Constitution our forefathers created a political union among otherwise independent and sovereign states. By other provisions, too, they sought to integrate the economic life of the country. By the full faith and credit clause they sought to federalize the separate and independent state legal systems by the overriding principle of reciprocal recognition of public acts, records, and judicial proceedings. It was placed foremost among those measures which would guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence, but without aggrandizement of federal power at the expense of the states."[5]

[3] Employers' Liability Act, 1908, 35 Stat. 65, ch. 149, U. S. C. tit. 45 § 51–60; Pomerene Act, Act of August 29, 1916, 39 Stat. 538, ch. 415, U. S. C. tit. 49 §§ 81–124.

[4] D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp. (1942) 315 U. S. 447; Clearfield Trust Co. v. United States (1943) 318 U. S. 363.

[5] (1945) 45 Col. L. Rev. 1, at 17.

The effect of these provisions, the Full Faith and Credit Clause and the Due Process Clause, on choice of law is still uncertain. Do they merely set limits on what the state rules prescribe, without attempting to take the place of those rules? Or do they oust state rules of conflict of laws and supplant them with national rules of conflict of laws? In two other areas of conflict of laws the answers are clear, though divergent. In jurisdiction of courts, the national law only sets wide limits of reasonableness and within these limits the states may have such rules for the exercise of jurisdiction as they desire. In the enforcement of sister-state judgments, on the other hand, the Full Faith and Credit Clause and the statute under it have given directions which leave little or no room for state rules of conflict of laws.

The answer as to choice of law was so uncertain at the time the *Restatement of the Law of Conflict of Laws* was drafted that the American Law Institute left open the question whether "every question arising in the Conflict of Laws" was "a question of Constitutional Law which the Supreme Court of the United States would have the power finally to determine."[6] The possible methods and the present stage were indicated by Justice Jackson in the address already quoted:

"That the Supreme Court should impose uniformity in choice-of-law problems is a prospect comforting to none, least of all to a member of that body. I have not paid any exaggerated tribute to its performance thus far in this complex field. But the available courses from which our choice may be made seem to me limited. One is that we will leave choice of law in all cases to the local policy of the state. This seems to me to be at odds with the implication of our federal system that the mutual limits of the states' powers are defined by the Constitution. . . . A second course is that we will adopt no rule, permit a good deal of overlapping and confusion, but interfere now and then, without imparting to the bar any reason by which the one or the other course is to be guided or predicted. This seems to me about where our present decisions leave us. Third, we may candidly recognize that choice-of-law questions, when properly raised, ought to and do present constitutional questions under the full faith and credit clause which the Court may properly decide and as to which it ought at least to mark out reasonably narrow limits of permissible variation in areas where there is confusion."[7]

The more drastic operation of national law, which Justice Jackson put aside four years ago, cannot be ignored. The 1949 amendment to the full faith and credit statute has presented a new basis for the possibility that

[6] Restatement of the Law of Conflict of Laws (1934) Sec. 43, Caveat and Comment to Caveat.

[7] Note 4 *supra*, pp. 26–27.

national rules of conflict of laws have entirely supplanted the state rules. For that amendment included within the statute "public acts," which had been quite deliberately left out of the Judiciary Act of 1790.[8] There is now the same statutory basis at least for the Supreme Court taking over the unwelcome burden as to statutes which it assumed as to judgments in determining their extrastate effect.

Our federalism has another kind of control than limitations on conflict of laws. It has also a control over a state's local law. The due process clause strikes down a grossly unreasonable law in the state which passed it, so it is no law at all. This assurance that there will be no grossly unjust state law has its effect on conflict of law. It makes less important the public policy doctrine as a limitation on the enforcement of foreign-based claims. It may even end some conflicts by striking down a local law. If, for example, a state law condemning marriage of persons of different races is struck down, the conflict of laws problems it created disappear with it.

Another complexity, which must at least be mentioned, comes from the system of federal courts and the consequent question as to the law to be used in these courts. *Swift* v. *Tyson*[9] involves a conflict of laws situation between New York and Maine, but by the doctrine of a special common law for the federal courts the Supreme Court in that case avoided or obscured the question of the authoritative source of the conflict of law rules for these courts. *Erie Railroad Company* v. *Tompkins*,[10] in rejecting the doctrine, revived the question. In its wake there have been currents and countercurrents. The main current, illustrated by the *Erie Case*, calls for the use of state law by the federal courts including the conflict rules of the state of the forum. The year the *Erie* decision was handed down saw a countercurrent in the adoption of the Federal Rules of Civil Procedure under which there is a special body of procedural law for the federal courts. And always there is the possibility of a national law, made or interpreted by the Supreme Court of the United States for all courts.

So far the discussion of the authoritative source of the law has been confined to interstate cases. What of international cases? Does the national law have predominance or absolute control over the international field not yet asserted over the interstate field? The vivid statement by Justice Sutherland about foreign affairs, quoted above, might indicate it, yet in some respects the national control seems less extensive. The Full Faith and

[8] U. S. C., tit. 28, § 1738.
[9] (1842) 16 Pet. 1.
[10] (1938) 304 U. S. 64.

Credit Clause and the statute under it give their protection only to the public acts, records and judicial proceedings of the sister states and have no application to international conflicts; and the Due Process Clause in its operation on local law is of course confined to the laws of this country. The latter clause, however, has been held applicable to a state conflict of laws rule used in a private international case,[11] and a national statute regulating commerce may extend to foreign commerce as well as to interstate commerce. A treaty may regulate the rules of private international law, but none has yet assumed, it is believed, to give the rules for private interstate law.

There is in the policy inhering in Justice Sutherland's words a stronger basis for national common law rules in the international field. Consider the situation if *Hilton* v. *Guyot*[12] were again presented today, with a French judgment sued on in a federal court in New York. In determining whether the judgment should be enforced, the Supreme Court in the actual case used a rule of reciprocity. The New York state courts have rejected that reciprocity rule. But all of these decisions were handed down before the *Erie Case* and before the present strong realization of national control in international matters. Today would the federal court in New York have to follow the state rule, under the doctrine of the *Erie Case*? Or would an exception to that doctrine be created as to international conflicts? Or would the Supreme Court say that in this part of our foreign relations it is intolerable to have forty-eight different rules, and that it will lay down a national conflict of laws rule? Consider, too, the problem discussed by Professor Graveson when an obligation in foreign money is sued on in an American court and when the fluctuations of the foreign money make it necessary to determine the time of the conversion of the foreign currency into American dollars. In the past the federal courts have had one rule and the New York courts have had another. If such an obligation is sued on today in a federal court in New York, what rule will it use? With the money power vested in the national government it would seem this is an appropriate area for a single national rule to be laid down by the Supreme Court for all courts to follow, as a part of national common law.

I began this discussion by mentioning some of the numerous federal nations, and then I sketched some of the problems in our federal nation in determining the authoritative sources of law. The future bids fair to bring forth still greater federations. The Western Union, the Council of

[11] Home Insurance Co. v. Dick (1930) 281 U. S. 397.
[12] (1895) 159 U. S. 113.

European States, and the conference of Asiatic states may be a prelude to larger federations. Indeed, our welfare and our very safety may be wrapped up in the development of these larger federations which, like the present smaller ones, may lower or end the economic and political barriers hampering the world. The United Nations itself or a successor may achieve the powers of a world federation. Whatever the size of these federations, whether national or continental or globular, the problems here raised of the authoritative sources of law will confront the lawyers of the future.