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LOCAL AND MORAL DATA IN THE CONFLICT OF LAWS: TERRA INCOGNITA

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SPOUSES John and Mary Doe, domiciliaries of the state of Domicilium, are involved in an automobile accident in the state of Delictum. Mary sues John in Delictum for injuries sustained as a result of John's careless driving. In accord with the Second Restatement of the Conflict of Laws[1] and recent judicial authority,[2] the Delictum conflicts rule calls for the application of the law of Domicilium which has maintained the common law rule of interspousal immunity. John, however, fails to plead that law and the court of Delictum admits the suit under its own statute which has abolished the immunity rule. The court thus ignores, properly I believe,[3] a presumably "applicable" foreign rule as not relied on by either party. Can it properly do so with regard to all unpleaded foreign rules?

The answer is clearly in the negative since there are such rules that must be applied *ex officio*.[4] The line to be drawn is doubtful. The present study deals with one category of such rules that will be analyzed as data of the forum rule.

Let us assume that Delictum has exempted from its anti-immunity statute those foreign spouses whose domiciliary state would apply to this issue the personal law of foreign domiciliaries. In that case, whether or not John has pleaded immunity under the law of Domicilium, Delictum will dismiss Mary's suit under that law, provided Domicilium, notwithstanding its own common law immunity rule, would permit interspousal suits between domiciliaries of Delictum under the latter's anti-immunity statute. Thus, the Delictum anti-immunity statute becomes inapplicable in Delictum by virtue of a Domicilium rule which, whether pleaded or not, is part of the Delictum statute as a datum. Here the Domicilium rule is not a foreign rule of decision which, only if pleaded, would displace the forum rule as a matter of choice of law, as would the immunity rule of Domicilium in our first example. I have chosen the datum of reciprocity to introduce this study, in grateful recognition of the fact that it was Arthur Lenhoff who gave us the most incisive and comprehensive analysis of reciprocity as a "problem of conflict of laws."[5]

Currie must be credited with having added to American parlance the new concept of datum.[6] But this terminology, like other legal terms, including

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1. Restatement (Second), Conflict of Laws § 390g (Tent. Draft No. 8, 1963).

2. Johnson v. Johnson, 216 A.2d 781 (N.H. 1966).

3. Ehrenzweig, Conflict of Laws [hereinafter cited Treatise] §§ 127-29 (1962).

4. Treatise §§ 127-29. See, *e.g.*, Gevinson v. Kirkeby-Natus Corp., 26 A.D.2d 71, 270 N.Y.S.2d 989 (1st Dep't 1966).

5. Lenhoff, *Reciprocity in Function: A Problem of Conflict of Laws, Constitutional Law, and International Law*, 15 U. Pitt. L. Rev. 44, 61-68 (1953).

6. See, *e.g.*, Currie, Selected Essays on the Conflict of Laws 67-71, 178 (1963). The use of the term "datum" in other meanings is older. See Judge Learned Hand's "mediate

characterization[7] and renvoi,[8] would have gained greater usefulness had it been offered with an awareness of older European learning and experience.[9] This paper is designed to establish the relationship between Currie's new concept and its European antecedent, the "preliminary question." It also undertakes to re-analyze Currie's concept as one concerning what I would like to call "local data" in juxtaposition with the "moral" data of my own coinage which I have dealt with more fully elsewhere. Finally this paper attempts to show that both the European concept of the preliminary question and its American counterpart should be approached in what I shall propose as a relative datum theory.

I have spoken of moral data in those cases where forum law is automatically applied (typically without discussion), notwithstanding the presence of foreign elements which otherwise, under accepted rules of choice, would call for the application of a foreign rule. Those cases apply domestic rules which are phrased in *terms* of justice and equity. I have given as examples rules concerning actions committed with "unclean hands" or "fraudulently"; actions entailing an estoppel; rules calling for a piercing of the corporate veil on equitable grounds; and, more generally, certain rules of restitution and much of the law of admiralty.[10] It is with this automatic reliance on the law of the forum as a moral datum that I wish to juxtapose the seemingly automatic reference to foreign rules as local data.

To illustrate his concept of (local) data, Currie states the case of a New York woman claiming workmen's compensation in New York as the widow of a deceased employee whom she married in an Italian ceremony which was invalid under Italian law.[11] If the New York compensation statute, in terms or by virtue of judicial interpretation, refers to the *lex celebrationis* as determining "widowhood" for the purposes of that statute (the widow qualified as such under the law of the state where the alleged marriage ceremony took place), the pertinent Italian law must indeed be ascertained *ex officio* as a datum of the forum statute.

Other examples of (local) data are foreign laws referred to in such reciprocal inheritance statutes as that of California,[12] which permits only those aliens to

data . . . from whose existence may be rationally inferred the existence" of an ultimate fact. The Evergreens v. Nunan, 141 F.2d 927, 928 (2d Cir. 1944).

7. See Ehrenzweig, *Characterization in the Conflict of Laws: An Unwelcome Addition to American Doctrine,* in XXth Century Comparative and Conflicts Law 395 (1961).

8. Treatise § 116.

9. Conversely we may regret the reluctance of European theory to avail itself of its American counterparts. See, *e.g.,* C. David, La loi étrangère devant le juge du fond (1965) who, though otherwise inclined to take Currie's theory as most representative of American doctrine, ignores his datum theory. See *id.* at 70-73, 100.

10. See Ehrenzweig, Conflicts in a Nutshell § 22 (1965). See, by the same author, Report, Uppsala Congress on Comparative Law (mimeo. ed. 1966). Another summary of what I have there called the "lex aequitatis fori," will appear in Akrothinia, a volume honoring the memory of Petros Vallindas; and an essay on the pertinent conflicts law of admiralty in a volume honoring Charalambos Fragistas.

11. Currie, *op. cit. supra* note 6, at 70-71.

12. Cal. Prob. Code § 259; see, *e.g., In re* Estate of Larkin, 416 P.2d 473, 52 Cal.

take whose countries offer equivalent rights to American citizens and whose succession laws are thus an essential element, a datum, of the claimant's case;[13] or in the related rules of some countries which will grant only those adoptions entitled to recognition in the country of nationality;[14] or in a rule excusing performance on the ground of impossibility whose application may depend on foreign prohibitions to trade with the enemy.[15] Also, there is the case of a law suit based on a Saudi-Arabian automobile accident, recovery for which was contingent on the breach of a Saudi-Arabian rule of the road;[16] the suit for cancellation of a deed on the ground that a Mexican divorce was invalid under Mexican law;[17] and the New York defamation suit based on the accusation of a Brazilian crime.[18]

Finally, whenever we hope to find good doctrine unencumbered by the ballast of centuries, we should look to the law of admiralty. And, indeed, we find admiralty courts applying such foreign rules as speed limits or pilotage requirements as a matter of course, as data without recourse to choice of law rules. Where these data are sought in the law prevailing on the high seas, they are supplied by treaties or customary international law. Thus "carrying a white light [and] carrying it on deck instead of [the] masthead" was determined to be a violation of maritime law under "the law of nations" resting "upon the common consent of civilized communities."[19] And though in cases involving collisions in territorial waters[20] forum law may in effect prevail, it will do so only because American courts "will take judicial notice that the other maritime nations have adopted Rules similar to ours."[21]

Awareness of the application, in certain cases, of foreign rules as data of the domestic rule rather than as foreign rules of decision is particulary important at this juncture in the development of American doctrine. Courts tend increasingly to abandon imperative rules of choice purportedly governing certain general categories such as contracts or torts, in favor of fragmentized decisions of individual issues under all-serving facile formulas. Elsewhere I have tried to show that this tendency, if carried too far, may yet cause a "counter-revolu-

Rptr. 441 (Cal. 1966); *In re* Estate of Chichernea, 244 Adv. Cal. App. 727, 53 Cal. Rptr. 535 (1966).

13. See Kay, *Conflict of Laws: Foreign Law as Datum,* 51 Calif. L. Rev. 47, 62 (1965). For a similar example in French law, see Batiffol, Traité Elémentaire de Droit International Privé No. 188 (3d ed. 1959); David, *op. cit. supra* note 9, at 181; and for Swedish law, Eek, The Swedish Conflict of Laws 183 (1965).

14. Eek, *op. cit. supra* note 13, at 56-60. See also *id.* at 101, 155-58.

15. Kegel, The Crisis of Conflict of Laws, [1964] Recueil des Cours II. 249.

16. Walton v. Arabian American Oil Co., 233 F.2d 541 (2d Cir. 1956), *cert. denied,* 352 U.S. 872 (1956). See generally Currie, *op. cit. supra* note 6 at 3.

17. *Cf.* Simpson v. Simpson, 387 S.W.2d 717 (Tex. Civ. App. 1965).

18. Crashley v. Press Pub. Co, 179 N.Y. 27, 71 N.E. 258 (1904).

19. The Scotia, 81 U.S. 170, 187-88 (1871).

20. See Restatement, Conflict of Laws § 407 (1934). The Second Restatement excludes maritime law; see Restatement (Second), Conflict of Laws, Note to Institute at 194 (Tent. Draft No. 9, 1964). But see Restatement, Foreign Relations Law, ch. 2 (Proposed Official Draft, 1962). On port regulations, see, *e.g.,* Sleeper v. Puig, 22 Fed. Cas. 321 (No. 12941) (1879); and generally 3 Rabel, Conflict of Laws 281-83 (2d ed. 1964).

21. Gilmore and Black, The Law of Admiralty § 7-3 (1957).

tion" that would threaten the gains achieved by yesterday's revolution against ossified dogma.[22] This threat is enhanced if the indispensable applicability of certain foreign rules as data is questioned on the same grounds as the improper claim to imperative application of foreign rules of decision under over-generalized formulas of choice of law. Leading courts have vaguely felt the need for a distinction. Thus, when the New York Court of Appeals in *Babcock v. Jackson*[23] proclaimed the return, as against a foreign guest statute, to forum law, in rejection of the allegedly generally applicable rule of decision of the fortuitous place of wrong, it found it necessary to reserve cases involving "standards of conduct" for the continued regime of the *lex loci delicti.* Such vague formulas can only create new confusion.[24] As Judge Van Voorhis persuasively stressed in his dissenting opinion,[25] the very guest statutes involved in that case could well be treated as setting standards of conduct which under Judge Fuld's majority opinion are to remain subject to the *lex loci.* What matters, and what must have been in the court's mind, is the distinction between rules of decision which, like the rights of an automobile guest, may or may not be those of a foreign state according to the policy of the forum rule governing the particular issue (here found to relate to the parties' reliance on the domiciliary law), and such foreign rules as speed limits or other rules of the road which are fixed data needed for the application of the forum rule of decision concerning liability for negligence. European writers have drawn similar distinctions by juxtaposing foreign rules referred to by the forum's conflicts rule with those constituting "conditions" for the application of a domestic rule[26] or with those appearing as "facts."[27] Similarly, English doctrine has contrasted conflicts rules with "primary rules of construction" which are said to arise when "the choice of law is completed."[28]

In drawing such distinctions we must keep in mind, however, that they are not absolute determinants but the "relative" result of the phrasing and inter-

22. Ehrenzweig, *A Counter-revolution in the Conflict of Laws? From Beale to Cavers,* 80 Harv. L. Rev. 377 (1966).

23. Babcock v. Jackson, 12 N.Y.2d 473, 484, 191 N.E.2d 279, 285, 240 N.Y.S.2d 743, 752 (1963). See Cavers, Cheatham, Currie, Ehrenzweig, Leflar & Reese, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws,* 63 Colum. L. Rev. 1212 (1963). See also Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964).

24. See Ehrenzweig, *The "Most Significant Relationship" in the Conflicts Law of Torts: Law and Reason versus the Restatement Second,* 28 Law & Contemp. Prob. 700 (1963). For subsequent distressing vindications of my scepticism, see Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965) (Fuld, J., dissenting); Long v. Pan American World Airways, Inc., 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1966), per Fuld, J.; and Cashman v. Evans, 249 F. Supp. 273 (S.D.N.Y. 1966).

25. Babcock v. Jackson, 12 N.Y.2d 473, 485-87, 191 N.E.2d 279, 285-87, 240 N.Y.S.2d 743, 752-54.

26. See, *e.g.,* Morelli, Elementi di diritto internazionale privato § 45 (6th ed. 1959).

27. See, *e.g.,* Morelli, Il diritto processuale internazionale § 33 (1954); Pau, *L'attuazione processuale delle norme italiane di DIP,* 2 Scritti Perassi 187 (1957); C. David, La loi étrangère devant le juge du fond 72-74, 180, 184 (1965).

28. See F. A. Mann, *The Primary Question of Construction and the Conflict of Laws,* 79 L.Q. Rev. 525 (1963), with reference to the decisions of the House of Lords in Camille & Henry Dreyfus Foundation Inc. v. Commissioners, [1956] A.C. 39 (Eng.) ("charitable" character of a New York foundation for British tax purposes); and Rae v. Lazard Investment Co. Ltd., [1963] 1 W.L.R. 555 (H.L.) (capital distribution of income from Maryland corporation).

pretation of the domestic rule whose displacement is sought, in the same manner as the various solutions proposed for that favorite topic of academic discussion, the *preliminary question* of European doctrine.[29]

Assume in our above example that the New York statute grants workmen's compensation simply to any "widow" defined as any woman claiming to have been validly married to the deceased. We are immediately faced with the classic problem of whether the preliminary question of validity is to be decided separately under a general conflicts rule of the forum relating to the validity of marriages, or under the New York compensation rule which could well be interpreted as satisfied with any marriage that would have been valid in New York. European experience should caution us against attempting to solve this problem by general, let alone "logical"[30] formulas, such as those always or usually permitting or compelling "independent" connection of the preliminary question with a general forum rule of choice,[31] or those always or usually referring to the conflicts rule of the *lex causae*. If in our example the New York compensation act had been interpreted as providing for any woman validly married under the law of celebration, there would, as we have seen, have been no preliminary question to answer, but that law would have been applied as a datum.[32]

Many other problem cases usually discussed in terms of preliminary questions can be used to explain and test the "relative" datum theory.[33] European conflicts rules referring to foreign nationality leave its determination, as a "datum," to the foreign law invoked.[34] On the other hand, we would be reluctant to apply a similar rigid principle to our connecting factor of domicile, since our conflicts rule or the policy of our domestic rule whose displacement is sought will

29. See Cavers, *The Conditional Seller's Remedies and the Choice-of-Law Process—Some Notes on Shanahan*, 35 N.Y.U.L. Rev. 1126, 1138 n.31 (1960). See also, *e.g.*, Van Hoogstraten, *Le droit international privé néerlandais et la question préalable*, in De Conflictu Legum 209, 211 (1962); Lagarde, *La règle de conflit applicable aux questions préalables*, 49 Rev. Crit. DIP 459 (1960); Voskuil, Rechtsvinding aan de hand van buitenlandse rechtsregels; vorfrage en verkregen rechten (1963).

30. Neuhaus, Die Grundbegriffe des internationalen Privatrechts 238 (1962).

31. See, *e.g.*, Kegel, *The Crisis of Conflict of Laws*, [1964] Recueil des Cours II. 95, 232, postulating this solution to secure uniformity of decision within the forum state. *Cf.* Treatise § 188. *But see* (with the exception of marriage cases) Wengler, *Die Vorfrage im Kollisionsrecht*, 8 Rabels Zeitschrift 148 (1934); Neuhaus, *op. cit. supra* note 28, at 82-89, 237-42.

32. For a pioneering study pointing in the direction of the present essay, see Kay, *supra* note 11, at 60. See also M. Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 Calif. L. Rev. 845, 873 (1961).

33. For a significant example from interstate law, see Neff v. Johnson, 391 S.W.2d 760 (Tex. Civ. App. 1965), where the Texas court in denying the duty of a Texas father to support his Ohio child under the law of Ohio, treated the question of the plaintiff's minority as one separate from the duty to support. If the Ohio statute had referred to persons of a specific age, the answer might have been different. For a confrontation of the German view, as developed particularly by Wengler [*e.g.*, *supra* note 31] with French doctrine, see Francescakis, note to Wengler, *Les principes généraux du droit international privé et leurs conflits*, 41 Rev. Crit. DIP 595, 596 n.1 (1952).

34. See, *e.g.*, Francescakis, *Les questions préalables de statut personnel dans le droit de nationalité*, 23 Rabels Zeitschrift 466 (1958); Kegel, Internationales Privatrecht § 9 II(2) (2d ed. 1964).

frequently require determination of domicile in specific relation to such rule or policy, thus referring us to either the forum or foreign rule of decision.[35]

We may well ask ourselves whether in the very rare cases of this kind in which courts have resorted to a "theory" of the preliminary question, they would and should not have reached the desired result by other means. "Gardons-nous de chercher, dans un souci de systematization éxagéré, à échafauder sur des cas isolés des constructions artificielles qui ne font qu'éloigner la vie quotidienne de son droit."[36] Like renvoi, this problem is one of the policy underlying the forum rule.[37] But it is submitted that in light of and despite this conclusion, the datum concept can assist judicial analysis.

35. See generally 1 Rabel, Conflict of Laws 156-59 (2d ed. 1958).
36. Van Hoogstraten, *supra* note 29, at 224.
37. Eek, *op. cit. supra* note 13, at 180.