

American Conflict of Laws

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American Conflict of Laws¹ has been marked by a very important doctrinal work. Joseph Story, the first author to deal with the question², thought courts never were bound to apply foreign law; if they did so, it was only *ex comitas*. Dissatisfaction with this account of the choice-of-law process spawned the *Vested Rights Theory*, which was adopted by Harvard professor Joseph Beale in the *Restatement the First of Conflict of Laws* (1934). The core of the theory consists in affirming that foreign law never can operate outside the territory of the foreign sovereign. Rather, the forum's use of foreign law can only be explained in terms of creation and enforcement of vested rights. So, for contractual matters for example, the *lex loci celebrationis* ruled, and the *lex loci delicti* was used for torts as it was thought that the victim's cause of action had vested according to the law of the place where the injury occurred. However, these theoretical bases were under challenge even before the project was finished and its promulgation was followed by a devastating attack by Cook in 1942³ who defended the *American Legal Realist Theory*, which postulates that a legal right is not an object in the world that exists independently, and until a court decides there is simply no "right". It will "alive" once the court decides to raise it to life. In the same manner the school of Sociological Jurisprudence underlined that legal rules are tailored to serve societal goals, a point ignored by the vested right doctrine that did not inquire into the purpose behind the competing substantive law rules. Soon the courts too attacked the Bealean dogma, beginning with *Auten v. Auten*⁴, ruling that adopted the "center of gravity" or 'grouping of contacts" theory, which looks not to the place of creating the right but emphasizes the law of the place "which has the most significant contacts with the matter in dispute".

A couple had married in England where they lived as well. After the separation, the husband moved to New York. Years later the wife sought in New York the enforcement of the separation agreement. The Court noted that with the ordinary rule of conflict, the law of New York applied for being the place of performance. However, all the contacts were with England: the marital and family domicile were there and all the parties were British subjects. Furthermore, there was no doubt that England had a great concern in the financial well-being of its domiciliaries.

It was also at the same time that the ALI decided to draft a *second Restatement*, under the direction of professor Willis Reese of Columbia Law School. Its publication has been adopted in 1971. The core of the new system is the notion of *the most significant relationship* – sometimes also called the "proper law" approach-, as codified in Section 6 of the Restatement that enounces the factors to take into account:

- a) the needs of the interstate and international system;
- b) the relevant policies of the forum;
- c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
- d) the protection of justified expectations;
- e) the basic policies underlying the particular field of law;
- f) certainty, predictability and uniformity of result; and
- g) ease in the determination and application of the law to be applied.

¹ Richman & Reynolds, *Understanding Conflict of Laws*, 3rd ed., Lexis Nexis, 2003.

² *Conflict of Laws*, 1834.

³ *The Logical and Legal Bases in the Conflict of Laws* (1942).

⁴ 308 NY 155, 124 NE 2d 99 (1954).

In reality, Section 6 not only consecrates the most significant relationship jurisprudence but also takes into consideration other theories, which are worldwide labeled as the “American Revolution of Conflict of Laws”:

- Curries’ *Interest Analysis* that is for example applied in California postulates that law is created to serve various social goals and that’s why it is not to be applied unless applying it would achieve a policy goal sought by the sovereign which promulgated the law. This approach has first been consecrated by the New York’s courts in *Babcock v. Jackson*⁵.
- Leflar’s *Choice-Influencing Considerations*, used in Arkansas and Wisconsin in tort actions, is based on 5 main considerations that are:
 - o predictability of result;
 - o maintenance of Interstate and international order;
 - o simplification of the judicial task;
 - o advancement of the forum’s governmental interests;
 - o the Better rule of law (which is determined in the light of socioeconomic jurisprudential standards).

*Milkovich v. Saari*⁶ illustrated best the application of the Considerations.

- Ehrenzweig’s *True Rules* aimed to describe the judicial behavior and crystallizes for example the *favor matrimonii* and the *favor legitimationis* used by the family courts. Paradoxally, its theory found little application in the courts.
- Cavers’ *Principles of Preference* as illustrated in *Cipolla v. Shaposka*⁷ wants to protect territorially based party expectations. For example, a defendant acting in his non-liability state will not be submitted to the higher standard of care of an interested foreign jurisdiction.

Due to the great diversity of approach between the different American courts, it is impossible to present the Conflict of laws in a brief manner. As Richman & Reynolds write “ the scholars have destroyed the old order; but like the revolutionaries who can only unite to eliminate the existing government, they cannot agree on ht establishment of a new one”⁸.

⁵ 12 NY 2d 473 (1963).

⁶ 295 Minn 155, 203 NW 2d 408 (1973).

⁷ 439 Pa 563, 267 854 (1970).

⁸ *Op.cit.*, p. 273.