A SHORT CRITIQUE ON THE "GOVERNMENTAL-INTERESTS" ANALYSIS

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With the publication of Sedler's work on Ethiopian conflict of laws[1] it looks as if the storm generated by the theoretical controversy on choice-of-law problems in the United States may soon engulf the defenceless continent of Africa. It is not the purpose of this short essay to review Sedler's valuable work as the present writer is not conversant with Ethiopian law. All we intend to do is to examine briefly the very premise—governmental-interest doctrine—from which Sedler has chosen to analyse and discuss Ethiopian law. It is hoped however that our discussion will throw some light on the relative worth of this doctrine.

A discussion of the "Governmental-interest" analysis may justifiably be based on an appraisal of Currie's works[2] as there has been hitherto no significant development on this theory as fashioned by Currie. The most widely discussed and probably the most controversial theory of choice of law in recent years in Currie's "governmental-interest" analysis. Like Ehrenzweig's "basic lex fori" doctrine, Currie's theory is supposedly a general approach to choice-of-law problems. According to Currie, the central problem of conflict of law is to find the appropriate rule of decision when the interests of two or more states are potentially involved.[3] In other words, its object is simply to determine which interest shall yield.[4] Consequently, he insists that a court should normally apply the forum law in cases where the forum has a "legitimate" interest in the application of its law. But when a court is asked to apply the law of a foreign state:

> it should inquire into the policies expressed in the respective laws and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies. In making these determinations the court should employ the ordinary process of construction and interpretation.[5]

Having determined which state may "reasonably" assert an interest, the court should apply the law of that state if it is the only state with a reasonable interest. But

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1. R. A. Sedler, *The Conflict of Law in Ethiopia*, (1965, Faculty of Law, Haile Sellassie I University, Addis Ababa).
2. Most of Currie's works are now compiled in his *Selected Essays in the Conflict of Laws* (1963) which consists of fourteen essays written in the course of a period of twenty years. In addition to this work the following are relevant to the present discussion: B. Currie "The Disinterested Third State," *Law and Contemporary Problems*, vol. 28 (1963), p. 754; "Comments on *Babcock* v. *Jackson*," *Columbia L. Rev.*, vol. 63 (1963), pp. 1233-1243.
3. *Selected Essays*, cited above at note 2, pp. 66, 178.
4. *Id.*, p. 163.
5. *Id.*, pp. 183-184; "Comments on *Babcock* v. *Jackson*," cited above at note 2, p. 1242.

where foreign states disclaim interest or where more than one state asserts an interest the court must apply the forum law whether or not the foreign states have equal or greater interest in the application of their laws than the forum state has.[6] To Currie, it is inappropriate to ask a court to weigh and choose between the conflicting interests of the forum and some other states.[7] To do so is to dabble into "a political function of a very high order."[8] Consequently, the choice between the conflicting interests of foreign states must be left to the legislature while the court should supply the forum law until the legislature gives guidance as to how the conflict should be resolved.[9]

It follows that the material contents of law are the dominant factors in the determination of states' interests and of the choice of law rule.[10] However, Currie conceded that some independent factors may reveal a state's interest in having its law applied. For example, in "guest statute" cases, Currie suggested that the state where the accident occurred would have an interest in "deterring wrongful conduct within its borders and in providing a fund for the protection of local medical creditors."[11] Currie gave little or no indication as to when a state's interest should be regarded as "reasonable" or "legitimate" in having its law applied. He seems however to have assumed that a state will be reasonably interested in having its law applied to its people. These "people" are variously defined as those who have their "domicile",[12] "domicile and residence"[13] in the state and as "residents,"[14] "citizens,"[15] "resident-citizens,"[16] "citizens or residents,"[17] "locals,"[18] or as persons who may be entitled on the "basis of considerations of decency and farsighted self-interest to equal treatment with local citizens."[19] Sometimes the forum state,[20] and sometimes "experts"[21] on the particular branch of law involved (as opposed to conflict lawyers) have been claimed by Currie as the competent authority to determine state's interests whereas Currie himself devoted most of his writings to the "probing" of state's interests in the application of their laws in particular cases.[22]

6. *Ibid.*
7. *Ibid.*
8. *Selected Essays*, cited above at note 2, pp. 121, 122, 124, 165, 187, 278.
9. "Politicians and not lawyers are to resolve true conflicts," *Law and Contemporary Problems*, vol. 28 (1963), p. 789.
10. "... conflict of laws is a branch of domestic law—indeed, it is nothing more than the construction and interpretation of domestic law in the light of possible conflicting foreign interests." *Ibid.*
11. "Comments on *Babcock* v. *Jackson*," cited above at note 2, p. 1237.
12. *Selected Essays*, cited above at note 2, pp. 61, 103, 145.
13. *Id.*, pp. 103, 322.
14. *Id.*, pp. 86, 91, 103, 120, 145, 149, 154, 253, 503.
15. *Id.*, pp. 103, 514.
16. *Id.*, p. 417.
17. *Id.*, pp. 103, 488.
18. *Id.*, pp. 89, 450.
19. *Id.*, p. 417.
20. Or the "voice adopted by" it. *Id.*, pp. 443-444.
21. "Experts in mortgage law and real-estate finance" are the competent authority to resolve conflict of "purchase-money mortgages." *Id.*, p. 430.
22. "In my own researches," Currie wrote, "I have encountered an actual case of the disinterested third state only once." *Law and Contemporary Problems*, vol. 28 (1963), p. 773. See also "Comments on *Babcock* v. *Jackson*," cited above at note 2, pp. 1233-1242;

Currie himself only saw his approach as a means of eliminating "false" conflicts. "The clearest contribution of governmental interest analysis to conflict-of-laws methods is that it establishes the existence of... false problems and provides a workable means of identifying them."[23] In the cases of "real" conflict, the courts were originally instructed not to indulge in weighing or balancing competing interests. They were to rest content with the application of the forum laws. But in reconciling his theory with the American Constitutional provisions,[24] Currie felt compelled to concede that the forum court may apply foreign law even where the forum state has a reasonable interest if that interest could be eliminated by a process of restrained and moderate construction as a long-range "enlightened self-interest," altruistically inducing regard for another state's competing interests.[25]

In any event, Currie appears to have shifted ground in his final writing where he proposed that a disinterested third state must either decline jurisdiction or, where such a solution is foreclosed, it must attempt to determine the interest that the legislature would have preferred if it had directed its attention to the issue.[26]

Currie has brought great learning and scholarship to bear on the problem of resolving conflicts between states' laws. His writings are particulrly vigorous, lucid and very detailed even if tedious. Their influence on legal thinking is tremendous. Currie probably has more disciples than any other modern theorist in this field of law.[27] The "interest" of a state's government is increasingly being alluded to by American judges in recent decisions.[28] Currie has undoubtedly made a positive contribution to the issue as to when foreign laws should be applied in contradistinction to the negative contribution of the "local law" theorists. But his proposed solution is vulnerable almost at every turn.[29] It is hardly practicable or convenient to make more than a brief comment in the present context.

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23. *Law and Contemporary Problems*, vol. 28 (1963), p. 762.

24. Particularly the "full faith and credit" clause. Currie claimed support for his theory in the "full faith and credit" clause, the "equal protection" clause and the "due process" clause of the United States Constitution.

25. *Selected Essays*, cited above at note 2, pp. 53, 94, 186, 280, 297 and Chapters 10 and 11.

26. According to Currie, a disinterested federal court "should frankly avow a purpose not to divine the governing law by a pseudo-judicial reasoning but to put itself in the position of Congress and decide which interest Congress would sub-ordinate if it were to consider the conflict from the point of view of national interest." See *Law and Contemporary Problems*, vol. 28 (1963), p. 788.

27. See, for example, R.A. Sedler, cited above at note 1; Baade, *Tax L. Rev.*, vol. 46, p. 141; H. H. Kay, Book Review, *J. Leg. Ed.*, vol. 18 (1965-66), p. 341. Currie's theory is supported, to some extent by Traynor, Hancock, Cheathan, Scole, Leflar and probably Cavers who prefers the world "purpose" to "policy".

28. Currie probably derived his theory from the opinions of Justice Stone in workmen's compensation cases such as to be found in *Alaska Packers Association* v. *Industrial Accident Commission*, 294 U.S. 532. Among the most famous cases claimed in support of the governmental-interests theory are: *Bernkrant* v. *Fowler*, 55 Cal. 2d 588, 360 P. 2d 906 (1961); *Lilienthal* v. *Kaufman*, 239 Ore. L. 395, P. 543 (1964); *Dym* v. *Gordon* 16 N. Y. 2d 120, 209 N. E. 2d 792 (1965) and the celebrated case of *Babcock* v. *Jackson*, 12 N. Y. 2d 475, 191 N. E. 2d 279 (1963). [Editors' note: These cases unfortunately cannot all be found in the Library, Faculty of Law, HSIU, but they are discussed in books on Private International Law available there; *e.g.*, D. F. Cavers. *The Choice-of-Law Process* (1965).]

29. For a critical appraisal of Currie's theory see Kegel, "The Crisis of Conflict of Laws," *Recueil des Cours*, vol. 11 (1964), pp. 95-207; Reese "Discussion of Major Areas of Choice of Law," *Recueil des cours*. vol. 1 (1964), pp. 329-334; A. A. Ehrenzweig, *Treatise on the Conflict of Laws*, Sec. 122; Cavers, *Choice-of-Law Process*. pp. 98-112.

The very premise of Currie's syllogism is of doubtful validity. A state is merely a political abstraction and as such, one cannot meaningfully speak of state's interest separate and distinct from the individual or collective interests of the people within its borders. Currie's theory is grotesque insofar as it has had the effect of reducing individuals to mere state-interest-carrying automata.

Even if "states" have separate interests, the process of ascertaining such interests, as demonstrated by Currie,[30] is at best fictitious if not wholly unworkable. Surely, some domestic laws may express certain policies but it may be very difficult to ascertain such policies. It certainly will be perplexing to determine the policies expressed in all potentially applicable foreign laws. Speculation as to the purposes or policies of common law rules must, doubtless, involve an excursion into the realm of legal history.[31] There are certainly many laws which help to further policies but can scarcely be said to have expressed them.[32] Moreover, the purposes of a given domestic rule are not the only policies of the state that may bear on the question of its spatial application.[33] Furthermore, the domestic purpose of a rule may throw little light on the basic question as to whether that purpose will be materially advanced by its application to out-of-state situations.[34]

Surely, in order to balance states' interests accurately, the Court must be sure it properly formulates the interests to be weighed. Both interests must be at the same level of conceptual abstraction. The interests must be expressed in equivalent terms. There are certainly no judicial standard for the evaluation of these imponderables. How the Court will be able to accomplish that task staggers the imagination. Again, analysis of domestic law may yield multiple purposes some of which may point to different directions on the issue as to whether it should be applied to an out-of-state situation.[35] The unguided "calculus" of formulating, combining, and permutating states' interests is at best a belated product "of a highly speculative and attenuated attribution of purposes to a given law."[36] It has a tendency to make everything depend on the particular judge. It has thus substituted a discretionary system of equity for a system of rules and we are thus back to the medieval beginning of private international law.[37]

Currie's theory is unconvincing insofar as it assumes that a state has an interest in the application of its private law. The application of foreign private law does not derogate or run counter to the interest of the forum state in most cases.[38] It is simply a step in the search for justice. No state has or would wish to have a monopoly of justice. In the conflict of law field, we are not usually concerned with the interests of government but almost always with the interest of private

30. See *Selected Essays*, cited above at note 2, Chs. 2, 3 & 5.
31. "Common Law itself," according to Currie, "is an instrument of social and economic policy;" *Selected Essays*, cited above at note 2, p. 65.
32. Cavers, *Choice-of-Law Process*, p. 98.
33. See *Id.*, p. 101.
34. *Id.*, p. 108.
35. Cavers, cited above at note 28, p. 108.
36. *Id.*, p. 100.
37. See A.E. Anton, *Private International Law*, p. 40.
38. It has been suggested that Currie's assumption can only be valied in relation to Admiralty, tax and currency matters. See Ehrenzwing, *Private International Law*, p. 63.

parties. As argued elsewhere, the duty of the court "is not wholly or even primarily to give effect to state interests but rather to balance these interests with such private interests as seek recognition."[39] Currie's assumption that a state is only interested in having its law applied to its "residents, citizens, etc." is not borne out by practice and is certainly bound to produce injustices and absurdities if adopted. His further assumption that differences between states' laws can be resolved by ordinary process of interpretation and construction is, to some extent, a hypocritical concealment of the emergence of rules and principles that are distinctive to conflict of laws.[40]

Even if these assumptions were valid, the economy of modern adjudication demands that the law be fairly certain or reasonably ascertainable. This requirement precludes speculations into the policies expressed in foreign statutes and the determination of interests that will be materially advanced by enforcing such policies in out-of-state situations. In any event, a judge who goes behind the express provisions of a statute to discover the underlying policies and the interests that will be advanced by its inforcement in a particular situation has only conjured up a phantom law. He would be applying as law only what, in his fancy, is the policy behind the statute. To adopt this approach is to utilize statutory laws for a purpose for which they were never designed and for which they are singularly unsuited.[41]

Granting the validity of its postulates, the 'governmental-interests' analysis is at best an auxiliary rule. It is inadequate as an all-pervasive principle of choice of law. The process of 'interpretation and construction' of any state's statute can only begin after the particular state has been ascertained. The ascertainment of the appropriate jurisdiction is what the traditional choice-of-law rules have sought to achieve. The 'governmental-interest' analysis must therefore remain a super-structure on normal choice-of-law rules.

The 'greatest contribution' of Currie's theory may not prove so great when critically examined. For prediction about 'false' conflicts in a situation where the result of litigation will depend upon where the issue has been determined is, in our view, an exercise in logic not in law. Furthermore, in the particular circumstances of many African states, the 'governmental interest' theory can only succeed in advancing the interests of the former Colonial Powers as most of the existing statutes in these states reflect their policies. Like Ehrenzweig, Currie appears to have slipped into the 'single-jurisdiction' fallacy. There is no reason of policy or social convenience why the interests or policies of more than one state cannot be mutually accommodated in resolving a legal dispute.

Currie has obviously exhausted his resources before addressing his mind to the basic problems of resolving 'real' conflicts between states' laws.[42] Consequently, his theory is limited to inter-state situations since no legislature is available in the international level, outside the treaty spheres, which can resolve 'real' conflict. Even within the inter-state areas, Currie's theory is inadequate as it makes no room for

39. Anton, cited above at note 37, p. 41,

40. Cavers, cited above at note 28, p. 97.

41. Identical laws, according to Currie, do not mean identical policies. *Selected Essays*, p. 153.

42. On this issue, Currie wrote: "I have been unable to visualize a satisfactory system" see "Comments on *Babcock*", cited above at note 2, p. 1242.

the protection or advancement of national interests. A union in which each state seeks for the protection and advancement of its own policies and interests to the exclusion of all others will surely be confronted with the disintegrating influence of parochialism in jurisprudence. Moreover, as between states where conflict practice is not subject to constitutional restraint the theory can yield intolerable consequences.

Our experience with the 'vested interest' dogma, the theory of 'territorial sovereignty' and the doctrine of 'comity' has revealed the danger and the undesirability of deriving specific choice-of-law rules from a general theory about the nature of conflict of laws. As convincingly argued by a distinguished author:

> The imperfections of conflict of laws do not result solely from the special character and complexity of the question which Private International law has for its object to resolve, but also from the defective method which has been used in its elaboration. The authors which have formulated its rules have almost always attempted to deduce them from a very general and very abstract notion; inter-territorial sovereignty, personal sovereignty, community of laws between states, international courtesy — maintenance of rights vested under the law of a foreign state etc.

The learned author went further to say:

> The *a priori* principle from which these authors have pretended to derive their theory has always proved powerless to furnish or justify a practical rule. On the contrary, it has only too often misled such author in his search for a solution.[43]

Currie appears to have lost his bearing when he ignored this warning. A 'jurisprudence of interests' as a general principle of choice of law, is logically deficient and in practice unworkable once it is recognised that conflicting interests can not be measured qualitatively. Currie knew he was navigating the proverbial Scylla and Charybdis and hence he judiciously abandoned his boat. The vessel of 'governmental-interest' theory has been left irretrievably stranded. Currie's belated efforts to salvage it by proposing that the courts must speculate on what the legislature would have done seems a clear indication of the fictitious character of the 'governmental-interest' theory.[44]

It should be admitted, however, that Currie's theory can provide useful guidance in the area of public policy decisions. But the use of public policy is generally acknowledged, at any rate under the common law, as an exception to the normal application of conflict rules and, as such, reliance on it has been rather sparing. It may nevertheless be fairly concluded as suggested elsewhere that "it does no harm to say that policy analysis is a continuing search for governmental interests provided we recognise that what we ought to do in any event is to analyse the problem in terms of all the relevant choice-of-law considerations, of which the interest behind the forum internal rule is only one."[45]

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43. Arminjon, *Le Domaine de droit international privé* (1922), 49 Clunet 905, cited from Lorenzen, *Selected Essays*, p. 12.

44. Currie's theory has a smack of Hideonistic philosophy with the interest and policy of the "State" substituted for the pain and pleasure of the "individual". Like that philosophy, Currie's theory has erected a colossal super-structure on an imaginary foundation.

45. R.A. Leflar, "Choice-influencing Considerations in Conflict Laws", *N.U.Y.L. Rev.*, vol. 41 (1966), p. 267 at 395.

ከምርምር ፡ ድርሰቶች ፡ አዘጋጅ ፡ የተሰጠ ፡ አጭር ፡ መግለጫ ።

በዚህ ፡ እትም ፡ ለጊዜው ፡ በአማርኛ ፡ ቋንቋ ፡ በቀጥታ ፡ የመተርጉሙ ፡ ዋቅም ፡ ያልታመነበትን ፡ በናይጀሪያዊው ፡ ምሁር ፡ በዶክተር ፡ አይ ፡ አሉ ፡ አግቤዴ ፡ የተጻፈውን ፡ "የመንግሥታዊ ፡ (ብሔራዊ) ፡ ፍላጎት ፡ ትንተና ፡ አጭር ፡ ትችት ፡" የተሰኘውን ፡ የምርምር ፡ ድርሰት ፡ በአጭሩ ፡ እነሆ ፡ እናብራራለን ።

ይህ ፡ የምርምር ፡ ድርሰት ፡ በመሠረቱ ፡ ከዚህ ፡ ቀደም ፡ እ.ኤ.አ. በ፲፱፻፷፭ ፡ ዓ.ም. በቀዳማዊ ፡ ኃይለ ፡ ሥላሴ ፡ ዩኒቨርሲቲ ፡ የሕግ ፡ ፋኩልቲ ፡ መምህር ፡ በነበሩት፡ በሚስተር ፡ሮበርት ፡ አለን ፡ ሴድለር ፡ "የሕጎች ፡ ቅራኒ ፡ (ግጭት) ፡ በኢትዮጵያ" በሚል፡ ርዕስ ፡ በተጻፈው ፡ የምርምር ፡ ድርሰት ፡ ላይ ፡ የቀረበ ፡ ትችት ፡ ነው ። ሚስተር ፡ ሮበርት ፡ አለን ፡ ሴድለር ፡ በኢትዮጵያ ፡ ውስጥ ፡ የሚነሱትን ፡ ሁኔታዎች ፡ በመዳኘት፡ ረገድ ፡ በሌሎች ፡ ሀገሮች ፡ ሕጎችና ፡ በኢትዮጵያ ፡ ሕግ ፡ መካከል ፡ ግጭት ፡ (የትርጉም) ቅራኒ) ሲፈጠር ፡ ሁኔታዎችን ፡ የሚዳኙት ፡ ሕጎች ፡ የሚመረጡበት ፡ ዓይነተኛ ፡ መለኪያ ፡ የሕጎቹ ፡ የትርጉም ፡ ዝንባሌ ፡ የመንግሥቱን ፡ (የሀገሪቱን) ፡ ፍላጎት ፡ (ጥቅም)" በይበልጥ ፡ ማሟላታቸውና ፡ አለማሟላታቸው ፡ ሲሆን ፡ ስለመሾሉ ፡ ሲተ ነትኑ ፡ የዶክተር ፡ አግቤዲ ፡ የምርምር ፡ ድርሰት ፡ ትችት ፡ ሊቅ ፡ ግን ፡ በሚስተር ፡ ሮበርት ፡ ሴድለር ፡ የቀረበውን ፡ ጽሑፍ ፡ እካል ፡ ሙሉ ፡ በሙሉ ፡ ሳይተች ፡ የድርሰቱን ፡ አርስት ፡ መነሾ ፡ ማለትም ፡ በሕጎች ፡ የትርጉም ፡ ግጭት ፡ ሲፈጠር ፡ የመንግሥታዊ ፡ (ብሔራዊ) ፍላጎት ፡ ሥፍራ ፡ ምን ፡ መሆኑን ፡ በመጥቀስ ፡ በደፈናው ፡ ይተነትናል ። የዶክተር ፡ አግቤዲ ፡ ጽሑፍ ፡ ዋነኛ ፡ መግቢያው ፡ የሚስተር ፡ አለን ፡ ሴድለር ፡ የምርምር ፡ ድርሰት ፡ መንደርደሪያ ፡ ሀሳብ ፡ (ፕሬሚስ) ፡ ይሁን ፡ እንጂ ፡ የድርሰቱ ፡ እካል ፡ በተመሳሳይ ፡ መነሾ ፡ በአሜሪካዊው ፡ ኩሪ ፡ በተጻፈው ፡ ድርሰት ፡ ላይ ፡ የተመረኮዘ ፡ ነው ፤ የትችቱም ፡ ሚስመር ፡ ፍርድ ፡ ቤቶች ፡ በሚዳኝቻቸው ፡ ክርክሮች ፡ በተለይም ፡ ዜግነትንና ፡ መኖሪያን ፡ በሚመለከቱ ፡ ጉዳዮች ፡ የልዩ ፡ ልዩ ፡ ሕጎች ፤ የትርጉም ፡ ግጭት ፡ ሲያጋጥማቸው ፡ ለሁኔታዎቹ ፡ መፍትሔ ፡ ማስገኛ ፡ የሚጠቅሟቸውን ፡ ሕጎች ፡ በምን ፡ በምን ፡ መንገድ ፡ እንደሚመርጡ ፡ የሚተነትን ፡ ነው ። በመጨረሻም ፡ ዶክተር ፡ አግቤዲ ፡ የሚስተር ፡ ሴድለርና ፡ የአሜሪካዊው ፡ ኩሪ ፡ ድርሰቶች ፡ በውስጣቸው ፡ ካዘሉት ፡ ቁም ፡ ነገር ፡ ይበልጥ ፡ ለድርሰቶቻቸው ፡ መነሻ ፡ ያደረጓቸው ፡ መንደርደሪያ ፡ ሀሳቦች ፡ በይበልጥ ፡ በተለይ ፡ በዚህ ፡ መሥመር ፡ ለሚደረገው ፡ የወደፊት ፡ ምርምር ፡ መልካም ፡ አጋጣሚ ፡ እንደሚፈጥሩ ፡ በማብሰር ፡ ይደመድማሉ ።