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PROTECTION OF PRIVATE INTERESTS IN THE CHOICE-OF-LAW PROCESS: THE PRINCIPLE OF RATIONAL CONNECTION BETWEEN PARTIES AND LAWS*

by

Amos Shapira**

I. THE "JUSTICE IN THE PARTICULAR CASE" DILEMMA

The overwhelming "policy" overtones of current American conflicts theories tend to overshadow the basic fact that in every choice-of-law case one encounters at least two individual parties whose conflicting claims need to be justly adjudicated. More specifically, an approach strictly focusing on governmental socio-economic interests is prone to overlook or underplay a fundamental problem present in many choice-of-law situations: the reasonableness or fairness of a proposed appraisal of human conduct by foreign legal norms. This dilemma, typical of conflicts contexts, emanates from a general jurisprudential reluctance to engage in what may sometimes be regarded as an unfair process of judging conduct according to the legal standards of a foreign community. The degree of unfairness might depend directly on the size of the gap between the cultural philosophies, social structures, and moral precepts of the implicated jurisdictions. In a federal union like the United States, constitutional guarantees—such as those embodied in the due process, equal protection, and privileges and immunities clauses of the Constitution¹—are designed to protect the individual parties from gross unfairness in the application of a foreign standard. The same function must be fulfilled in the transnational arena by the very method adopted for choice of law in conflicts adjudication.

The idea of "justice in the particular case" has served as a cliché for many conflicts writers, the bulk of whom, however, have failed to transform this desideratum into a workable choice-of-law methodology. Thus, *e.g.*, "justice" has been pointed to as an underlying principle of English private international law. Cheshire, an outstanding contemporary English authority on the subject, predicates English conflicts law theory on the principle of "justice."² Another leading authority, Graveson, follows suit and offers the proposition that "rational justice" is "the principal basis of the English conflict of laws."³ The very same concept of justice has been repeatedly invoked by English judges in support of their decisions in conflicts cases, particularly in areas not dominated by compelling precedent.⁴

* This Article is based on a section of a book by the author, entitled *The Interest Approach to Choice of Law*, recently published by Martinus Nijhoff, N.V., in the Hague, Netherlands.

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¹ See U.S. CONST. amend. XIV, § 1, and art. IV, § 2.

² See Graveson, *Philosophical Aspects of the English Conflict of Laws*, 78 L.Q. REV. 337, 348 (1962). See generally G. CHESHIRE, *PRIVATE INTERNATIONAL LAW* (7th ed. 1965).

³ Graveson, *supra* note 2, at 355.

⁴ *Id.* at 354.

On the American scene, Cavers' famous 1933 article⁵ is habitually cited—whether in tones of praise or, more often, of denunciation—as a classic expression of the “justice in the particular case” aspiration in the choice-of-law process. In that article Cavers reiterates his conviction that a court of law, when adjudicating a domestic as well as a conflicts controversy, is obliged to consider all the pertinent aspects of the case before reaching a final decision, even where the dispute lacks any important social significance.⁶ Such judicial responsibility is not exhausted unless and until the forum evaluates the probable impact of any proposed resolution in terms of justice to the private litigants before it. It goes without saying that judicial justice can only be administered with a view to particular issues and individual parties.⁷

Many hostile critics interpreted Cavers' 1933 utterances as flatly advocating “Khadi justice,”⁸ leaving no room for choice-of-law rules of any sort. Ehrenzweig's is a characteristic attribution to Cavers of a “counsel of despair” to the effect “that traditional choice of law rules be completely discarded and that the choice be made in each case with a view toward doing *justice* between the parties.”⁹ Such a regime of uncontrolled, unguided sense of justice, he warns, can only lead to confusion and anarchy.¹⁰ It must be conceded that Cavers' sweeping and rather vague formulations could in fact reasonably be understood to import such a conception of particularized justice.¹¹ Cavers himself realized it, and in his recent monograph he is eager unequivocally to disavow any such “impractical pursuit of the elusive will-o'-the-wisp of justice in the particular case.”¹² Instead, he advances the criterion of “fairness to the parties” to rank equally with the “policy” factor in the choice-of-law process.¹³ The author urges decision-makers in the conflicts sphere to seek solutions which not only provide a reasonable accommodation for governmental policies, but which also secure fair treatment to the private parties, lest they be unjustly exposed to surprise and entrapment.¹⁴

In the writings of various conflicts scholars one is apt to come across basically similar references, albeit with varying degrees of explicitness and elaboration, to this dichotomy between governmental policies and fairness to the individual litigants. Thus, Lorenzen in 1924,¹⁵ Harper in

⁵ Cavers, *A Critique of the Choice-of-Law Problem*, in *SELECTED READINGS ON CONFLICT OF LAWS* 110 (compiled by the Association of American Law Schools 1956).

⁶ *Id.* at 111.

⁷ See Harper, *Policy Bases of the Conflict of Laws: Reflections on Reading Professor Lorenzen's Essays*, 56 *YALE L.J.* 1155, 1174 (1947).

⁸ *I.e.*, an unstructured, open-ended exercise of judicial discretion.

⁹ A. EHRENZWEIG, *CONFLICT OF LAWS* 346 (1962) (emphasis in original).

¹⁰ *Id.* at 347.

¹¹ In a later publication Cavers again invokes the consideration whether in a particular case “resort to the other state's law [would be] more just to the parties . . . than [would be] resort to the forum's own law.” Cavers, *The Conditional Seller's Remedies and the Choice-of-Law Process—Some Notes on Shanahan*, 35 *N.Y.U.L. REV.* 1126, 1139 (1960).

¹² D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 14 (1965).

¹³ *Id.* at 31, 32, 66, 67, 89, 122, 162 n.31.

¹⁴ *Id.* at 80, 121. Cavers admonishes judicial tribunals sitting in choice-of-law cases “to assess the respective policies and equities bearing on the issue before the court.” Cavers, *Comment on Babcock v. Jackson*, 63 *COLUM. L. REV.* 1219, 1220 n.5 (1963).

¹⁵ See Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 *YALE L.J.* 736, 748 (1924).

1947,¹⁶ and Nadelmann in 1963¹⁷ are respectively inclined to analyze choice-of-law issues in terms of both governmental interests and individual justice. Still others, notably Rheinstein, ardently cling to an extreme "justice to the parties" conception of conflict of laws: "the primary policy, indeed the very *raison d'être* of conflicts law, is the policy of mitigating for individuals the inconveniences and problems that can arise through the actual or potential conflict of differing states' norms of judicial decision."¹⁸ This being so, it naturally follows that any choice-of-law system which builds on the concept of governmental policies must be deprecated if it fails to secure equitable adjustment of the interests of private litigants entrapped in a conflict-of-laws turmoil.¹⁹ Such a system is deplorable for attempting to promote states' interests at the expense of private parties unfairly caught in surprise due to the invocation of an un contemplated law.²⁰

At the opposite end of the spectrum, one finds Currie thundering that "vested rights and reasonable expectations may be disturbed when the public interest demands that result."²¹ Completely overtaken by strictly pragmatic "policy" thinking, he declines to account for the "fairness to the private parties" aspect of the choice-of-law process in any meaningful manner. Currie evidently adheres to the dichotomy between state policies and the interests of the individual parties involved in litigation, and places a predominant, if not indeed exclusive, emphasis on the former.²² His professed conviction is that the choice-of-law process should serve as a tool for a consistent effectuation of governmental policies, which he usually frames in narrowly-conceived socio-economic terms. But even in Currie's writings one comes across scattered, frequently obscure, utterances urging courts to reach results which are not only rational, but also just. Judges ought not to subject the rights of a party to exploitation, nor sacrifice them in exchange for some governmental policy gains.²³ At one point he is prepared to concede a secondary, residuary role to the "justice between the parties" consideration: it may be invoked as a decisive judicial criterion in situations which do not present any ascertainable conflict of states' interests.²⁴ At another point, he

¹⁶ See Harper, *supra* note 7, at 1161, 1174.

¹⁷ "[T]he governmental interest analysis can . . . be used . . . when, in the case before the court, the parties' expectations and other otherwise pertinent considerations must be overridden on public policy grounds strong enough to justify such non-consideration." Nadelmann, *Marginal Remarks on the New Trends in American Conflicts Law*, 28 LAW & CONTEMP. PROB. 860, 861 (1963).

¹⁸ Rheinstein, Book Review, 32 U. CHI. L. REV. 369, 375 (1965). This approach runs parallel to what seems to be a rather popular contemporary European view of the function of conflicts law. Kegel, e.g., intimates that "in conflicts law . . . the interests at stake are private and the aim is justice between individuals." Kegel, *The Crisis of Conflict of Laws*, 112 RECUEIL DES COURS 95, 207 (1964-II).

¹⁹ Rheinstein, *supra* note 18, at 376.

²⁰ See Rheinstein, Book Review, 11 AM. J. COMP. L. 632, 658 (1962).

²¹ B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 621 (1963).

²² One of Currie's followers, Baxter, expressly subscribes to such a view: "[Choice-of-law] cases can be decided by viewing them as instances of conflicting state interests rather than of conflicting private interests." Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 22 (1963).

²³ See B. CURRIE, *supra* note 21, at 596-97.

²⁴ *Id.* at 65.

actually allows the surprising admission that "[i]n the field of international private law, fairness to the litigants ought to be the primary consideration."²⁵

Such concessions to the "justice" desideratum, somewhat grudgingly made by Currie, serve to support the proposition rejecting in the first place a rigid policy-fairness dichotomy. Such a dichotomy, accepted by him as well as by many of his critics, presupposes a calculus of public interests which is jurisprudentially distinct from the assessment of private interests. Conversely, the thesis advanced herein conceives of the process of public and private interests analysis as a unitary, coherent entity. Considerations relating to the fairness of judging a party's conduct by foreign legal prescriptions do form an integral part of the forum's own public interests and are inseparable from the general process of interest analysis.

II. THE PRINCIPLE OF RATIONAL CONNECTION BETWEEN PARTIES AND LAWS

A widely recognized jurisprudential principle calls for rational connection between the parties to a dispute and the legal standards by which their conduct is to be judged as a threshold guarantee of elementary justice in the judicial process.²⁶ This, in fact, is a major idea encompassed by the familiar American constitutional concept of due process of law.²⁷ The criterion for the ascertainment of such a proper connection is ultimately derivable from the sense of reasonableness and fairness possessed by the tribunal adjudicating the cause. It follows that so far as the assessment of the private interests of the parties in the fair application of a duly connected law is concerned, the only relevant notions of appropriateness are those prevalent at the forum. Hence, the calculus of the private interests at stake should not ordinarily entail an encounter with foreign legal conceptions.

Under the traditional conflicts approach, with its territorialist quest and rigid choice-of-law rules, almost no consideration is devoted to an analysis of rational connection between litigants and "governing" laws. A similar attitude, though stemming from an altogether different methodological foundation, is taken by Currie. The whole issue of rational connection is dealt with in a single brief footnote, where he poses the question "whether the power of an interested state to apply its law is qualified if the party adversely affected has not in some fashion 'subjected' himself to that law," only to maintain that "it is not so limited . . ."²⁸ Contrariwise, such criteria as "fair reliance," "reasonable expectations,"

²⁵ *Id.* at 122.

²⁶ The judicial process requires "some reasonable connection between the individual and the prescription asserted and some notice that he is subject to the prescription." Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1094 n.30 (1956).

²⁷ See *id.* at 1132-33; cf. Briggs, *The Need for the "Legislative Jurisdictional Principle" in a Policy Centered Conflict of Laws*, 39 MINN. L. REV. 517, 532 (1955).

²⁸ B. CURRIE, *supra* note 21, at 266 n.294.

"foreseeability," and "calculability" are deemed paramount in Ehrenzweig's²⁹ and Rheinstein's³⁰ conflicts philosophies.

Various concepts have been used to try to convey the rational connection idea, with varying degrees of success. Some of these concepts are partially overlapping. The following are the most familiar.

A. *The "Submission and Consent" Fallacy*

The concepts of "submission" and "consent" are quite popular in the realm of traditional conflicts doctrine, particularly with regard to questions of jurisdiction. In the choice-of-law sphere it is sometimes asserted that one should not regard as unreasonable or unfair a determination of the juridical consequences of a party's activity by the more exacting legal standards effective at the place of conduct, even though the law of that party's home state is more lenient with respect to such operations. This is allegedly so because the party in question had the option not to engage in activities at the place of more stringent legal standards. Once he elects to pursue such activities there, he has thereby declared his "consent" or "submission" to be governed by whatever prohibitions and regulations are in force at the place of conduct. The actor "subjects" himself to or "assumes the risk," so to speak, of a possible enhanced liability by virtue of the very fact of acting in a foreign environment. Moreover, he can normally take some measures to alleviate the risk, *e.g.*, by acquiring liability-insurance coverage.³¹

It is submitted that a conceptualization of the rational connection principle in terms of submission and consent is often mechanical and at times nothing but fictional. After all, wrongdoers, for instance, do not ordinarily go around consciously and willingly "submitting," prior to committing a wrong, to the legal standards prescribed by the place of conduct. Any meaningful invocation of the concepts of consent, submission, or assumption of risk presupposes some noticeable measure of conscious awareness and subjective act of will on the part of the allegedly "submitting" party. Such psychological conditions are notoriously wanting in many conflicts situations. However, in some distinct instances it does make sense to reason in terms of submission and consent. This is the case, *e.g.*, where a commercial enterprise explicitly undertakes to be regulated by the corporation laws of a foreign jurisdiction as a formal prerequisite to the granting of permission to do business there.

B. *The "Foreseeability" or "Vindication of Justified Expectations" Desideratum*

The protection of the "justified expectations" of the private parties to a legal relationship is a much-acclaimed goal habitually reiterated

²⁹ See, *e.g.*, A. EHRENZWEIG, *supra* note 9, at 451, 453.

³⁰ See, *e.g.*, Rheinstein, *Ehrenzweig on the Law of Conflict of Laws*, 18 OKLA. L. REV. 238, 241 (1965).

³¹ See Wengler, *The Significance of the Principle of Equality in the Conflict of Laws*, 28 LAW & CONTEMP. PROB. 822, 840-41 (1963).

throughout traditional legal writings, with special emphasis in the conflicts sphere. It is commonly said to lie "at the bottom of most of our private law and a good deal of our public law too."³² It supposedly constitutes "the *raison d'être* for the existence of our entire law of contract."³³ It is often praised as a highly ranking principle of justice which "permeates the whole body of rules of conflict of laws."³⁴ It is frequently endorsed as a paramount expression of the assumption upon which the entire administration of law is predicated: that people will investigate the law as it affects their activities and plan their conduct accordingly.³⁵ Hence, it would seem manifestly inapt and unjust to subject a litigant to legal standards which could not reasonably be expected to have been considered by him prior to undertaking the course of conduct in question. Elementary justice is inextricably interwoven with considerations of foreseeability and predictability.³⁶

The customary juristic enthusiasm about the "vindication of reasonable expectations" desideratum, which on the face of it is nothing but admirable, often proves unwarranted when scrutinized in pragmatic terms. Many of those committed to the parties' foreseeability goal tend to ignore the crucial fact that in order to merit legal protection such expectations ought not only to be justified, but in the first instance they should be actual, existing in fact, and capable of realistic identification.³⁷ The compulsive inclination to infer or impute private expectations to individuals implicated in a legal controversy, even where the expectations in point of fact do not exist or are not appropriately evidenced, could obscure legal reasoning. Such a juristic indulgence in the assessment of subjective expectability as to the governance of legal rules may readily provide an ideal ground for frequently fictitious speculations.³⁸ Time and again judges and writers undertake an extremely speculative analysis of the presumed expectations of parties engaged in some sort of a legal interaction. The assumed hypothesis seems to be that, as a rule, individuals can and do in fact form conscious expectations as to the identity of the normative criteria by which their involvements may be tested. Far from being axiomatic, the tenability of such a hypothesis is highly dubious.

Further, the vast bulk of the "promotion of justified expectations" proponents have usually given little or no attention to the implications of a possible interplay of conflicting "reasonable expectations" of the two or more parties to a dispute. Also, such proponents have generally assumed as a matter of course that the time during which expectations are relevant culminates and terminates with the consummation of the occur-

³² Rheinstein, *supra* note 30, at 241.

³³ *Id.*

³⁴ Neuner, *Policy Considerations in the Conflict of Laws*, 20 CAN. B. REV. 479, 482 (1942).

³⁵ Hancock, *Choice-of-Law Policies in Multiple Contact Cases*, 5 U. TORONTO L.J. 133, 142 (1943).

³⁶ See 2 E. RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 304 (2d ed. 1960).

³⁷ Cf. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 297 (1966).

³⁸ "Foreseeability has been misused and misapplied in many areas of the law . . ." Childers, *Toward the Proper Law of the Tort*, 40 TEXAS L. REV. 336, 347 (1962).

rence at hand. All other arguably-pertinent expectations created at some later stage are automatically brushed aside without deliberation. Thus, for instance, parties' reasonable foresights and calculations once a dispute has arisen with regard to the desirability of commencing a lawsuit in one court or another, submitting to arbitration, seeking some administrative relief, or negotiating a private settlement are invariably rejected out-of-hand as irrelevant.

It is willingly conceded that the vindication of genuine and reasonable private expectations is, in and of itself, a valid public interest in any free society. No one can seriously dispute the desirability of a general community goal calling for the fulfillment, rather than the frustration, of individuals' actual and legitimate expectations wherever possible, in conjunction with other pressing public interests.³⁹ Furthermore, one may even refer to the entire legal process in terms of a constant flow of community expectations derived from past trends, expounded in present claims, and tuned to pertinent social values. Though not necessarily ideal, such a conception is not implausible, provided the term "community expectations" is understood to encompass the community's moral precepts and social conventions. What is firmly objected to is the notorious readiness, characteristic of many traditionalists, to reason in terms of specific expectations of individual adversaries as to the applicable law, irrespective of whether the concrete factual context admits of such reasoning. The incongruous nature of such a process of reasoning is manifest in a host of purely domestic situations and, a fortiori, in transnational controversies where the parties "often live under different legal systems and therefore have no common legal or extra-legal customs and expectations."⁴⁰

Consensual Arrangements. It is fairly obvious that considerations pertaining to the foreseeability, predictability, and fair expectations of a party to a dispute may vary immensely in their intrinsic validity, from the trivial to the crucial, from one particular type of legal interaction to another. Thus, in the sphere of consensual arrangements, and most notably commercial transactions, the factors of private ordering and individual planning, which depend heavily on predictability, are indeed of substantial significance. In the great bulk of consensual involvements, negotiated transactions in particular, one can fairly assume that the participants ordinarily interact within a consciously acknowledged atmosphere of law and with a general awareness of the relevance of legal prescriptions. If the participants negotiate in good faith against such a background, one can further assume that they normally contemplate the forming of a

³⁹ "[A] basic interest in our social and economic and political system . . . is that wherever possible, without undue sacrifice of other equally basic interests, our legal system should endeavour to make certain that the normal, reasonable, legitimate expectations of persons are achieved instead of frustrated." Kramer, *Interests and Policy Clashes in Conflict of Laws*, 13 *RUTGERS L. REV.* 523, 561 (1959). Kramer goes further to propose a general presumption in favor of this key interest in the interpretation of statutory language. *Id.*

⁴⁰ Neuhaus, *Legal Certainty Versus Equity in the Conflict of Laws*, 28 *LAW & CONTEMP. PROB.* 795, 803 (1963).

binding relationship. But such a commonly-postulated state of mind of parties to consensual arrangements does not exclude an equally sound assumption as to their reliance on legal protection which extends not only to the transaction as such, but also to the individual interests of each of them respectively. Hence, a party to an agreement usually contemplates, although in most cases merely in an unsophisticated way, that "the law" will shield him from a possible mistake, fraud, duress, or any other instance of gross unfairness. Incidentally, upon such a view of the psychological background of consensual interrelationships, the whole conception of a basic "rule of validation" so vigorously espoused by Ehrenzweig⁴¹ as a first and foremost choice-of-law principle assumes a somewhat different dimension. This "basic rule" is a plausible formulation of a legitimate public interest, *i.e.*, to promote the security of transnational transactions by according them, wherever reasonably possible, validity and effect. On the other hand, such a validation principle cannot always, and under any condition, be said to reflect accurately a generic state of mind of contracting parties as a group to engage in binding transactions only.

The psychological environment of a general legal perception ordinarily surrounding consensual engagements has led many conflicts writers to designate the parties' "expectations" or "intentions" as a paramount choice-of-law criterion in the sphere of commercial transactions. Thus, for instance, the "subjectivist" school of the "proper law of the contract" doctrine in English conflicts law adheres to a "party autonomy" concept and vests the parties with a substantial power to choose (or to "intend") the governing law, whether by express stipulation or otherwise.⁴² In the absence of an explicit choice, judges are encouraged to "infer" or "presume" the intention of the parties with the aid of such intellectual tools as common sense, presumptions, and fictions. In fact, in a mass of cases where any express, or otherwise ascertainable, choice of law by the parties is lacking, they probably never considered the matter at all and hence could not possibly have formed any common intention with regard to it. In such instances, by purporting to give effect to a nonexistent "implied" intent, judges are really using a cover-up gimmick designed to disguise their attempt to reach results deemed desirable on grounds not frankly articulated. There is ample support for the view that by overtly striving to uphold parties' "inferred" intentions or "presumed" expectations, judges have in reality only sought to rationalize their own choice-of-law preferences.⁴³

Any conception of parties' intents vis-à-vis applicable legal rules must start from the premise that participants in consensual transactions normally have in mind some specific prescription or system of law which

⁴¹ See generally A. EHRENZWEIG, *supra* note 9.

⁴² See A. DICEY & J. MORRIS, *CONFLICT OF LAWS* 691-712 (8th ed. 1967). The "autonomy of the parties" principle is currently endorsed by many conflicts systems including France, Switzerland, and Germany. See Kegel, *supra* note 18, at 190 n.12.

⁴³ See Harper, *supra* note 7, at 1164; James, *Effects of the Autonomy of the Parties on Conflict of Laws Contracts*, 36 *CHI.-KENT L. REV.* 34, 35 (1959).

is to be resorted to in case of future differences of opinion. In other words, given the general atmosphere of law within which consensual involvements are usually framed, what is left for judicial ascertainment is the rather subsidiary question of identifying the particular jurisdiction whose law the parties intended to govern the transaction. To be sure, where the controlling document contains an express choice-of-law stipulation—a practice which is currently tolerated, indeed encouraged, in many conflicts systems—such an hypothesis may appear to be well-founded. Nonetheless, in the great bulk of instances where no party-sponsored choice of law is discernible, its inner logic can rather easily be challenged. On the basis of common sense and practical experience, it seems far more plausible to assume that, though generally perceptive to the legal setting of the interaction, ordinary participants usually do not form any definite intention as to which specific law would apply in the event of a prospective controversy. This is particularly true insofar as routine arrangements and every-day participants are concerned. Big enterprises conducting transnational operations can be expected to act with more sophistication and precision. But then the legal instruments drawn by such parties are apt in the first place not to be silent on the choice-of-law question. It may further be suggested that even the active participation of professional legal experts in the shaping of a transaction does not necessarily guarantee any crystallization of common expectations as to the applicable law. The absence of an explicit choice-of-law stipulation in a legal instrument drafted by lawyers and pertaining to a transnational transaction may mean one of at least four things: (1) that counsel on both sides just happened to overlook the matter; (2) that no unanimity of opinion was reached on this score; (3) that it was frankly resolved to leave the issue open for a future third-party adjudication, should there be one; or (4) that one or both counsel consciously refrained, for one reason or another, from bringing the matter to the negotiations table.

Torts. Once we shift from the sphere of consensual transactions to the tort area, the profound overstatement of the "protection of parties' expectations" desideratum becomes much more evident. Viewed realistically, many traditional torts—whether liability is conditioned on some wrongful intent, is fault-grounded, or is strict or absolute—do not ordinarily admit of reasoning in terms of subjective expectations as to the applicable legal standards. An excited groom who drives his car at excessive speed in order not to be late to his wedding and thereby causes a traffic accident, a middle aged executive who finds the feminine charms of his young secretary irresistible and proceeds to sexually assault her, and an overzealous magazine editor who gives vent to a flood of infamous utterances thereby defaming a political rival—these and the like do not ordinarily have any clear-cut, prior expectations regarding applicable legal standards. It is true, of course, that "a person has a legitimate interest to know whether conduct upon which he is to embark is apt to expose him

to damage claims.”⁴⁴ But how many ordinary tortfeasors are disposed consciously to consider, let alone laboriously to investigate, the matter? Also, in tort instances, as contrasted with many consensual engagements, one is likely to encounter litigants who were not direct participants in the tortious occurrence which gave rise to the controversy. Litigants may include insurers, employers, parents, spouses, administrators and other representatives of an estate, co-enterprisers, receivers, guardians, custodians, survivors, dependents, and others. Such litigants could not possibly foresee any applicable law at the time of the occurrence, since they simply did not take any part in it.

It is therefore submitted that the concept of “reasonable and fair expectations of the parties” in the tort choice-of-law process often lacks empirical foundation. Hence, in the tort sphere, the validity of Ehrenzweig’s endeavor to formulate “true” choice-of-law rules principally in terms of the parties’ foreseeability as to that law which will have a probable impact on the occurrence⁴⁵ is questionable.

However, in one currently expanding problem-area within the tort sphere, that is, the law of enterprise accidents, the factors of reasonable predictability and calculability do play a significant role. The ability of large-scale enterprises to rely on reasonable expectations as to the juridical implications of a planned and insurable activity is universally recognized as a meritorious goal.⁴⁶ Though an instance of, *e.g.*, damage resulting from a defective food product is accidental by its nature, the commercial engagement in food processing is a planned activity. This activity can be fashioned upon an informed evaluation of pertinent legal standards. Transnational transporters, insurers, manufacturers, bankers, suppliers, distributors, and the like are normally capable of foreseeing contingencies of involvement with foreign legal institutions and prescriptions. Hence, they can take them into account when deciding on a particular course of action, like determining prices and acquiring adequate insurance coverage. Therefore, it would not ordinarily be unfair, *e.g.*, for a jurisdiction adhering to a strict liability rule to apply its own law in a case involving a local resident injured by a defective product of a foreign manufacturer regularly marketing its products there. This will be so even if the latter’s home state subscribes to the traditional fault criterion of liability. The plainly-foreseeable added financial burden is nothing but a supplementary cost of doing business in that jurisdiction which can be taken into account by the enterprise.⁴⁷ The manufacturer can protect itself with appropriate insurance.

Even conceding that “foreseeability” is relevant in the field of enterprise accidents, the forum ought not to speculate about the subjective, actually-held expectations of the implicated enterprise regarding the ap-

⁴⁴ Rheinstein, *supra* note 20, at 659.

⁴⁵ See, *e.g.*, A. EHRENZWEIG, *supra* note 9, at 555.

⁴⁶ See Katzenbach, *supra* note 26, at 1122 n.123.

⁴⁷ See Note, *Products Liability and the Choice of Law*, 78 HARV. L. REV. 1452, 1462 (1965). See generally Ehrenzweig, *Products Liability in the Conflict of Laws—Toward a Theory of Enterprise Liability Under “Foreseeable and Insurable Laws”*, II, 69 YALE L.J. 794 (1960).

plicable law. It should rather turn to objective criteria relating to whether the enterprise could reasonably have foreseen an involvement with, e.g., the stricter standards of conduct or compensation prescribed by the foreign jurisdiction in question.⁴⁸ Naturally, the larger the enterprise's volume of business and the more sophisticated its operations, the more likely the forum would be to find objective foreseeability.

For the rest of the traditional tort field, outside the area of enterprise-accident law, I would propose the abandonment of the whole lot of abstract juridical speculations as to the "inferred," "presumed," or "assumed" expectations of the parties. The conception and terminology of individual expectations are essentially inapt in this context of social interaction. Instead of shedding light, they tend to obscure the real issues. In lieu of a futile endeavor to reason in terms of vindication of subjective expectations, one should invoke an objective and functional test of rational connection as a fair criterion of justice to private interests.⁴⁹

C. *The "Equitable Responsibility To Ascertain Foreign Law" Consideration*

In certain instances, the rational connection idea can be formulated in terms of an equitable responsibility, imposed on a party to a legal involvement, to acquire prior knowledge of a relevant legal standard and comply with its requirements. In such cases, one assumes that that party knew the substance of the relevant law or, more accurately, one charges him with a duty to become familiar with it and abide by its directives. Actual knowledge of the content of the relevant standard is not a prerequisite to the existence of a rational connection linking it with the party so charged. The criterion is again an objective one—the reasonableness of an imposed burden of ascertainment and compliance. A party who fails to discharge such equitable responsibility assigned to him cannot complain at the later stage of litigation that the assessment of his conduct according to that particular standard unduly interferes with the principle of rational connection.

Which participants in legal involvements may properly be charged with such responsibility? Generally speaking, it is the more resourceful, experienced, enlightened, and sophisticated party on whom the obligation of familiarity may fairly be imposed. The stronger parties to "adhesion," "standard form," or "ticket" contracts; governmental agencies; public institutions; big private corporations and other enterprises like public carriers, products manufacturers, banks, and insurance companies; businesses with a large volume of international operations; promoters and initiators; and otherwise the soliciting or more organized and active partners to transactions can usually be regarded as being far more knowledgeable, experienced, and legally sophisticated than the individual parties with whom they engage in various transactions.⁵⁰ Therefore, it would be

⁴⁸ Cf. Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215, 241 (1963).

⁴⁹ See section III *infra*.

⁵⁰ See Katzenbach, *supra* note 26, at 1127.

more fair to hold the former to a duty of ascertaining in advance and adhering to whatever regulatory prescriptions may be relevant in the circumstances.

A secondary guide to the identification of the party equitably chargeable with such responsibility lies in the reasonable foreseeability of forthcoming litigation by one or the other party at some pertinent point in time. Thus, if party A could contemplate a prospective lawsuit as likely to emanate from a given occurrence well before party B, the former may occasionally be burdened with the duty to ascertain and fulfill relevant legal requirements.

D. *The "Reasonable Reliance" Criterion*

Situations may arise where a litigant can advance a sensible argument to the effect that he has acted in a certain socio-legal atmosphere and in reliance on its specific notions and institutions. Hence, it would be unfair to measure his conduct by the differing conceptions of an alien environment.

Perhaps the clearest instance of a "reliance" case is when a person is affirmatively required by a law in effect at the place of his presence to act in a specified way. For a foreign forum to hold him liable for the effects of such legally compelled action, or to order the execution of a pattern of conduct in a place where it is suppressed, would ordinarily be grossly unfair.⁵¹ But even short of a clear-cut mandatory obligation, an actor's assertion that he was stimulated, authorized, or privileged to model his involvements on the legal schemas in force at the place of conduct ought not to be lightly brushed aside. People are initially entitled to carry out their affairs with a view to the normative order prevailing at the place of behavior, even though these same affairs may prove to have repercussions of some sort in other jurisdictions.⁵²

However, such a concession in favor of the validity of an argument whereby a litigant seeks to demonstrate that he truly acted in reliance on the law of the place of conduct must not be overstated. It may easily mislead the unwary into making unwarranted generalizations, such as: "where the tort is based on fault, the law of the place of that act has some claim to controlling the penalty. For it seems unfair to punish the defendant for an act that was not a tort or wrong under the law under which he acted."⁵³ Equally dubious as a general truth is the somewhat obscure "reliance" assertion made, e.g., by a pedestrian-resident of state X injured there by a driver-resident of state Y to the effect that the more liberal compensation standard of X should invariably control because he,

⁵¹ See Kegel, *supra* note 18, at 252; Weintraub, *A Method for Solving Conflict Problems*, 21 U. PITT. L. REV. 573, 582 (1960).

⁵² One example of such an affair is a person inflicting an injury on an alien coming from a jurisdiction with a more stringent standard of liability: "By entering the . . . nation, the [injured] visitor has exposed himself to the risks of the territory and should not expect to subject persons living there to a financial hazard that their law had not created." D. CAVERS, *supra* note 12, at 147.

⁵³ A. EHRENZWEIG, *supra* note 9, at 569.

the injured plaintiff, "relied" on it. His rights, so runs the argument, ought not to depend on the fact that the defendant happens to come from a foreign jurisdiction subscribing to a less exacting compensatory policy on which the former never "relied." The tenability of any reliance contention is first dependent on a showing that the party concerned actually, reasonably, and in good faith acted in pursuit of some particular legal provision. Only when conduct was shaped in specific reliance on some legal prescription may its subsequent appraisal according to a different index result in unjustified hardship to the actor.⁵⁴ One can hardly imagine any convincing "reliance" allegation in regard to, e.g., a rule of interspousal immunity or abatement of civil injury actions.

The legitimacy of a "reasonable reliance" argument in the choice-of-law process is grounded in two related considerations: the value of legal guidance and the reluctance to allow unfair surprise. Many rules of law may fairly be said to serve the useful purpose of providing guidance to parties in ordering their affairs. This is particularly evident in the area of planned activities, like commercial transactions. If such a value of guidance is to be fostered, people ought to be encouraged to seek informed familiarity with legal provisions bearing on their prospective engagements in those spheres of human endeavor where legal planning plays a conduct-affecting role. By the same token, a judicial tribunal should normally be loath to invoke a legal prescription where its application would in fact unreasonably surprise or unfairly prejudice a party.

III. A PROPOSED INCLUSIVE "FAIR NOTICE" RATIONALE

The foregoing analysis of the notions of "submission," "expectations," "responsibility," and "reliance" demonstrates that they can, at best, offer but a partial rationalization for the principle of rational connection. It is therefore proposed to rest this principle on an inclusive and objective concept of fair notice as to the potential foreign law connotations of a given occurrence. In other words, the test for the assessment of private interests in choice-of-law litigation should be the following: *can one justly charge a party with a timely prior notice regarding the potential transnational ramifications of the relationship at bar?*

Objective Fair Notice. It is emphatically pointed out that the suggested criterion is an *objective* one and grounded in the familiar legal precept of reasonableness under all pertinent circumstances. Hence, actual knowledge of the specific tenor of the ultimately controlling rule, whether domestic or foreign, is not a necessary component of fair notice. Moreover, since in many instances people do not pattern their involvements with any particular standard of law in mind, it would not make much sense generally to equate fair notice with reasonable contemplation as to the applicability of a concrete legal standard. Rather, the decisive consideration should be whether a party could have perceived at the

⁵⁴ See B. CURRIE, *supra* note 21, at 47; Drion, *The Lex Loci Delicti in Retreat*, in Festschrift für Otto Riese 236 (1964).

proper time a potential contact with persons, property, relationships, institutions, or occurrences in which a given jurisdiction may claim a legitimate interest. Within a purely domestic arena of interactions, one usually charges the participants with fair knowledge of the legal standards at stake. This commonly accepted premise, on which the very administrability of the legal order is dependent, loses its routine quality once foreign parties or occurrences enter the picture. In such instances, a complex question may arise as to whether a particular litigant could reasonably have contemplated an involvement with matters falling under the legal management of a foreign jurisdiction. Thus, an issue may evolve as to whether a merchant from state X doing business with a woman resident of state Y could be charged with fair notice respecting the incapacity-of-married-women rule in force in Y;⁵⁵ or whether a bartender selling liquor in state X to a car driver en route to immediately neighboring state Y should reasonably have anticipated a possible involvement with Y's dram shop act;⁵⁶ or whether an automobile renting agency can fairly be held vicariously liable for its patrons' operations in foreign jurisdictions.⁵⁷

If the forum is satisfied that fair notice thus defined does in fact exist, an allegation of undue violation of private interests must usually fail. This is true irrespective of the subjective contemplations the party in question has formed. But even a convincing showing of a lack of fair notice, *i.e.*, rational connection, of itself and without more does not automatically warrant a finding of unjustified interference with private interests. The party concerned must prove in addition that the absence of such fair notice really operates to his detriment and unjustly encroaches upon his rights.⁵⁸ Thus, in various instances of planned activity, where there is specific reliance on particular regulatory schemes, it will probably be easy to show that lack of fair notice did result in actual harm to justifiably-held interests. By contrast, in a host of situations where people normally act without any perception of concrete legal standards, it may well prove to be difficult to make up a successful interference-with-private-interests argument. Consider, for example, the following hypothetical case: A, an automobile-renting enterprise doing business in country X, rents a car to B, an X resident, for use in X during a specified period of time. B, without permission, takes the car to a neighboring country, Y, where he negligently harms C, a resident of Y. Under Y's law, automobile-renting enterprises are absolutely liable for injuries occasioned by their patrons, whereas X does not impose any such specific liability on the car-renting industry. C institutes action for damages against A in a Y court. Suppose that the forum wishes to apply its strict

⁵⁵ See *Milliken v. Pratt*, 125 Mass. 374, 28 Am. R. 241 (1878).

⁵⁶ Cf. *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957).

⁵⁷ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 174 (Prop. Off. Draft, pt. II, 1968).

⁵⁸ Thus, in a rather paradoxical manner, we might find ourselves drawing upon the familiar, and now quite discredited, idea of "vested rights" in the sense of "protecting reasonable expectations from attrition . . . [and] stabilizing private relations . . ." Katzenbach, *supra* note 26, at 1107.

liability rule. *A* may object on the ground that at the relevant time, *i.e.*, the renting of the car, it did not and could not reasonably have had fair notice to the effect that *B* would venture an unauthorized trip to *Y*. As proof of this it might show that special procedures, always followed in the renting of cars for out-of-state usage, were not followed in this case. At first blush it may seem that *A* has convincingly established a lack of rational connection. Assume, however, that the rental charged and insurance coverage acquired by *A* is uniform, irrespective of the intended local or foreign usage of the rented vehicle, and that the differences between the two kinds of operations actually represent inconsequential administrative routine. Under such an assumption, the court may plausibly conclude that the absence of fair notice, in the circumstances, does not frustrate any substantial interest of *A*, because had it had fair notice it would not have acted any differently. Contrariwise, *A* may come forward with evidence to the effect that its renting of a car for driving in any country other than *X* involves a varying scale of rental charges, calculated on the basis of the particular liability standards prevalent in each such country and the specific insurance coverages taken out accordingly. In that case, one may decide that the defendant has successfully pointed to a sufficiently significant disruption of justified interests.

For the sake of clarity, it should be noted that the proposed notion of objective fair notice as the underlying rationale of the rational connection principle does not exclude the possibility of an occasional resort to the concepts of "submission," "foreseeability," "responsibility," and "reliance." Any of these concepts may indeed be invoked in order to illustrate more concretely relevant private interests in particular circumstances. In fact, they actually constitute integral components of the more comprehensive notion of objective fair notice.

Identification of Relevant Time. The identification of the proper point in time when a rational connection should exist is naturally a crucial step in the process of private interests analysis. Again, the only seemingly feasible criterion for the determination of the decisive temporal phase is of the familiar, objective type: *reasonableness in the light of all pertinent circumstances*. Fair notice, in order to be meaningful, must be ascertainable at a stage when it could presumably affect the course of conduct undertaken by a party. Thus, the time of entering into a contract, of establishing a marital relationship, of purchasing property, of making a will, of renting a car, of selling liquor to an intoxicated driver, of deciding on the pricing of marketed products and services, and of determining whether, when, where, or how to litigate a dispute would ordinarily be regarded as pertinent to the rational connection issue. It is perhaps tempting for the sake of simplicity to summarize the temporal factor by an exclusive designation of the "time of conduct" as invariably material. But if the implied reference is only to the operative facts constituting the original cause of action, it may on occasion prove to be unacceptable. Acts or decisions pertinent to fair notice considerations may well take

place at an earlier or later time. For instance, the financial calculations undertaken by an industrial enterprise when deciding on its pricing policy, long before the concrete harmful impact in question has occurred, may be deemed eminently relevant to the question of rational connection. Likewise, the reasonableness of parties' actions after injury has been sustained, in a sophisticated atmosphere of anticipated litigation in a particular forum, can play a dominant role in the resolution of certain issues. Thus, the issue of compliance with formal requirements relating, e.g., to a modification of a contractual stipulation or a waiver of an agreed immunity may be evaluated in view of the understanding attributable to parties already benefiting from legal advice and seriously contemplating adjudication of their differences.⁵⁹ In sum, the question of the relevant time must be determined with an eye to the particular issue under all the relevant circumstances.

Territoriality. At this point it would be useful to comment briefly on the significance of territoriality to the idea of fair notice. One can readily detect in contemporary American conflicts thinking, most notably in Currie's writings,⁶⁰ an understandable reaction against anything reminiscent of the now-discredited concept of territorialism. Governmental interests, in this view, are "neutral" or "functional," rather than "territorial" or "personal" in essence. Though by no means denying the plausibility of this modern approach, it is nonetheless submitted that the concept of territoriality may still have some practical relevance as a helpful tool in the resolution of the fair notice issue in particular cases. Categorical statements to the effect that "in this territorially divided world . . . we have come to accept as fair the application of territorial law except in some unusual situation . . .,"⁶¹ or that "the significance of territoriality is present to the minds of most people"⁶² do indeed seem far too sweeping in their terms. It is nevertheless true that, at times, residents of a country X travelling in or acting in or otherwise associated with affairs in country Y actually are or should reasonably be mindful of potential involvements with Y's legal order.⁶³ It follows that the very extraterritorial nature of an occurrence may often have a significant bearing on the issue of fair notice, at least on the international, in contradistinction to the interstate, scene.

Application of the Rational Connection Principle to Different Prescriptions. Finally, a rather complex problem may evolve as to whether the rational connection principle applies with equal force, or indeed at all, to different kinds of legal prescriptions. For instance, it is commonly asserted that as to matters of judicial procedure, the parties' contempla-

⁵⁹ Cf. *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189 (2d Cir. 1955).

⁶⁰ See generally B. CURRIE, *supra* note 21.

⁶¹ D. CAVERS, *supra* note 12, at 303.

⁶² G. CHESHIRE, *PRIVATE INTERNATIONAL LAW* 278 (6th ed. 1961).

⁶³ Cf. Katzenbach, *supra* note 26, at 1145. *But cf.*, with regard to American interstate engagements, Baxter, *supra* note 22, at 1: "[M]embers of our society, in both their personal and business activities, increasingly disregard the existence of state boundaries."

tions are, at best, a negligible concern.⁶⁴ This is again an oversimplified proposition. Suppose a case implicating *A*, a resident of state *X*, and *B*, a manufacturer based in state *Y* but doing business through an agency in *X*. *A* purchases in *X* one of *B*'s products and subsequently suffers an injury resulting from a latent defect in the product. *A* considers commencing a suit for damages in an *X* court but as a preliminary step engages, through counsel, in negotiations with *B*'s representatives in an attempt to reach an amicable settlement. Both *X* and *Y* subscribe to rather short limitations periods of only six months during which a lawsuit may be brought in such instances. However, under *X*'s law this limitations provision may be stipulated away by the parties' filing with the court a duly executed waiver to that effect. *Y*'s corresponding rule is mandatory and inescapable by any device whatever. *A*'s counsel, anticipating a lengthy process of negotiations and reasonably contemplating the invocation by an *X* forum of its own limitations law, procures from *B*'s representatives an appropriate waiver and files it with the competent court in *X*. Settlement not having been reached within six months, *A* proceeds to trial. The *X* forum rather unexpectedly considers applying *Y*'s compulsory limitations rule in deference to the supposedly more pressing interests of *B*'s home-base and center of activity. In such an eventuality, *A*'s assumed lack of fair notice, albeit concerning an arguably procedural prescription, should be weighed as a material, perhaps overriding, counter-consideration against resort to *Y*'s law. In sum, the relevance of private interests must not be automatically dismissed as a result of applying generalized labels like "procedure." Rather, it ought to be empirically and fairly analyzed in the light of the specific features of each particular case.

IV. THE ASSESSMENT OF PRIVATE INTERESTS AS A COHERENT PART OF THE PROCESS OF INTEREST ANALYSIS

Any one adhering to a pervasive "policy"- "justice" dichotomy in the choice-of-law process must sooner or later confront a difficult dilemma. Is rational connection a mere precondition to the invocation of a law otherwise determined relevant, or is it in itself capable of constituting an independent ground for the appropriate application of a legal rule? The whole dilemma is apt to become trivial once one realizes that no such jurisprudential dichotomy between public and private interests does in fact exist. As already pointed out, the insistence on fair notice is as much a "public" concern to a given jurisdiction as, *e.g.*, the promotion of traffic safety on its highways or the securing of the integrity of its workmen's compensation system. However, it is simply convenient to designate certain interests as "private" since they are ordinarily expressed in terms of specific, immediate concerns of the individual litigants as such, rather than in terms of broad societal goals. Also, the private parties to a controversy can be expected to be more responsive to such questions as individual expectations and reliances than to general political or social

⁶⁴ This attitude explains the non-applicability to procedural matters of the presumption against retroactive application of legislative measures.

concerns. This, in turn, may affect one's thinking about the proper allocation of interest-ascertainment responsibility between the adversaries and the judge. Nonetheless, the terminological expedient of "private interests" ought not to obscure the basic fact that individuals have also a personal, "private" if you will, stake in the general socio-economic policies and principles of justice espoused by the community at large.⁶⁵

To put it differently, "justice in the particular case" emerges as a unique problem in the choice-of-law process only if that process fails to account for the fundamental coincidence of public and private interests. Under the systematics of the traditional approach to choice of law, there is, of course, no room for a coherent analysis of community interests. But even the current proponents of a functional methodology of the Currie-type constantly run into difficulties in the area of "fairness to the parties," due to their narrow conception of interests which encompasses only, or mainly, socio-economic policies. It is therefore suggested that "policy" and "justice" considerations ought not to be pitted one against the other in a way requiring a threshold allocation of priority between them. Rather, all public and private interests implicated in a given conflicts situation should be considered together as a coherent body of concerns pertinent to the choice-of-law process. Thus, when determining the proper reach to be accorded a legal standard in a conflicts instance, the forum would at once consider its general underlying purpose and the particular private interests at stake. That is, the factor of fair notice as to individuals' potential involvement with the institutional domain of a given jurisdiction must always form an integral part of interest analysis in conflicts instances. In this manner, a forum will never reach a conclusion as to a rule's appropriate scope of coverage in a conflicts situation before first accounting for the rational connection between the rule and the potentially affected party. "Impact" and "fairness" or "public" and "private" considerations alike, in no doctrinally preconceived order of preference, are always relevant criteria in the choice-of-law process.⁶⁶

It goes without saying that the relative significance to be ascribed to particular public or private interests varies immensely from case to case according to the specific circumstances. The factors relevant to such a delicate weight determination include the nature of the occurrence, the identity of the parties, and the essence of the implicated legal norms. It is undoubtedly true that "the extent to which a given law furthers the purposes of the public as a whole as distinguished from the purposes of individuals under particular conditions ranges over a spectrum."⁶⁷ Consequently, with regard to laws "which have little concern to the public except as the public is composed of individuals . . . ,"⁶⁸ e.g., rules

⁶⁵ "Just as the state is made up of and exists for individuals and groups, the individual finds fulfillment and completion as a member of organized society." A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 237 (1965).

⁶⁶ Cf. Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845, 872 (1961).

⁶⁷ D. CAVERS, *supra* note 12, at 102.

⁶⁸ *Id.*

concerning form of wills, a greater significance may frequently be attached to private interests. Conversely, in such areas as taxation and antitrust, public interests will often assume a dominant role. Also, in instances where it proves virtually impossible to determine whether one or the other public interest outweighs its rival, a decision in terms of private interests may become apt. Consider, *e.g.*, the following hypothetical: A traffic accident occurs in state X as a result of which A, a resident of X, is injured, and the tortfeasor B, a resident of Y, is killed. X law provides for survivorship of civil injury claims whereas Y is still committed to the old common-law rule of abatement.⁶⁹ A brings suit against B's estate in a Y court. Suppose that Y's abatement rule embodies a concern for the integrity of its residents' estates to the benefit of local dependents, whereas X's survivorship prescription expresses a concern for the welfare of its injured residents. Under such a supposition, the case presents a genuine conflict of public interests. The Y forum may plausibly resolve the conflict in favor of applying X survivorship law, on the ground that at the time of accident a rational connection existed between that law and both parties. The plaintiff was engaged in, *e.g.*, a legal crossing of a road intersection in his home country, and the tortfeasor driving a car in a foreign jurisdiction cannot claim a lack of fair notice as to potential involvement with matters in which the latter may have an interest. By contrast, there existed at the relevant time no possible rational connection between the plaintiff and the legal system of Y. Hence, it would be unfair to deprive him of his right to compensation safeguarded by his own home country.

In a host of conflicts instances one can reasonably anticipate relevant public and private concerns pushing in opposite directions.⁷⁰ Moreover, in one and the same case the respective fair expectations or reasonable reliances of the individual adversaries may well militate in favor of differing solutions. All these and like clashes are apt to pose hard choices to a tribunal engaging in interest analysis.⁷¹

⁶⁹ *Cf. Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953).

⁷⁰ Such a potential area of conflict between public and private interests is that of "party autonomy," *i.e.*, explicit choices of law effected by the parties themselves, in the sphere of commercial transactions. See A. VON MEHREN & D. TRAUTMAN, *supra* note 65, at 285.

⁷¹ One might, perhaps, wish to consider the feasibility of formulating some generalized indices of rational connection as useful guidelines to judicial analysis. The prospects of such standardization being successful are indeed dim, since the very essence of fair notice would ordinarily call for concrete assessment of all the pertinent circumstances of each individual case.