Private International Law and Public Policy:

TWO RECENT DUTCH CASES

(Written May 1969)

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Throughout the history of Private International Law courts have resorted to the concept of “public policy” in order to limit the undiscriminating invocation of foreign law which could be applicable. In questions of marriage and divorce, especially, foreign law is more often denied application on account of “public policy” than is the case in most other fields of law. This result is frequently achieved by resorting to the lex fori; in states following the lex domicilii and lex patriae principles, there is a marked tendency not to apply a foreign marriage or divorce rule which conflicts with the lex fori. According to Rabel, however, “(i)nternational literature, long critical of unlimited local policy, has encouraged the trend towards restricting its influence”. 

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1In contrast to Interregional Law and Intergentile Law, Conflict of Laws being the embracing concept. See e.g., Ehrenzweig, Private International Law (1967) 19, who says: “(i)nternational and interregional conflicts have been intertwined in the entire history of private international law; in the both ideological and real interdependence of sovereignties in Bartolus’ Upper Italy and d’Argentré’s France, in the jealous and yet yielding independence of Huber’s Dutch provinces, in the conscious and sub-conscious dependence of Savigny’s and Mancini’s new nations on the international community, in the United Kingdom’s unique attempts to combine but not to identify its inner and outer ‘conflicts’, and in today’s hope to reconcile a self-centered nationalism with the exigencies of international ‘co-operation’ and ‘peaceful coexistence’.” See also Lemaire, “De betekenis van de woonplaats volgens ons (Nederlands) interregionaal privaatrecht”, in De Conflictu Legum (1962) 299. Concerning Intergentile Law see, e.g., Kollewijn, Verzamelde opstellen over intergentioneel privaatrecht (1955); van Rouveroy van Nieuwaal, “Verkenning in het intergentioneel recht”, (1968) Nederlands Juristenblad 457. See, in general, also Hahlo and Kahn, The South African Legal System and its Background (1968) 129 - 130.

The old authorities are not very clear on the scope of this "public policy". South African Private International Law on the question is scanty, and Kahn believes that our courts would prefer the restrictive scope of the Anglo-American legal systems to the wider Continental-European approach; indeed, in regard to marriage and divorce, South African Law does not even go as far as English Law. Variety, however, is also the spice of the Continental-European "public policy" life. The French "ordre public", Italian "ordine pubblico", German "Vorbehaltsklausel", Dutch "openbare orde en goede zeden", etc., could very well lead to different Private International Law viewpoints on the same question.

See, e.g., Kollewijn Geschiedenis van de Nederlandse wetenschap van het internationaal privaatrecht tot 1880, (1937); Meijers, Bijdrage tot de geschiedenis van het internationaal privaatrecht en strafrecht in Frankrijk en de Nederlanden (1914); Kahn, "Conflict of Laws", in Hahlo and Kahn, The Union of South Africa: The Development of its Laws and Constitution (1960) 729, at 732, 758; van Rooyen at 197.


See, e.g., Ehrenzweig at 154; Kosters-Dubbink at 327 ff.; Szászy, International Civil Procedure: A Comparative Study (1967) at 176 ff. On "public policy" in English Private International Law, see, e.g., Cheshire, Private International Law (7th ed, 1965) 134 ff.; Morris, Dicey and Morris on the Conflict of Laws (8th ed, 1967) 72 ff.; Graveson, Conflict of Laws (5th ed 1965) 568 ff. Section 128 of the "Principles of Civil Legislation" of 1961 of the USSR provides that no foreign law may be applied if such application would be repugnant to "the fundamentals of the Soviet system", while section 30 of the Einführungsgesetz of the Deutsche Demokratische Republik precludes the application of foreign law if it infringes "boni mores or the purpose of a German law". See, e.g., Szászy at 180 ff.; Grzybowski, Soviet Private International Law (1965) 153. In Koster-Dubbink's terminology (at 343), "(d)ie eisen van de openbare orde zijn variabel naar plaats, tijd en intensiteit", and according to Szászy (at 179), "(I)n French judicial practice and generally in that of Latin states the principle of public policy comes into play over a very wide range, whereas in German, Scandinavian and Anglo-Saxon as well as Swiss practice it asserts itself to a relatively smaller extent".
In spite of the fact that the Continental-European states have been commended for their codified legal systems, Private International Law has remained largely uncodified in these states. In the Netherlands, for example, the bulk of its Private International Law does not consist of legislation, but is made up of international treaties, court decisions and opinions of jurists (i.e., "ongeschreven recht").

In the Netherlands, as in many other states, only a minor selection of all the court decisions is published. Recently, however, two interesting decisions concerning "public policy" in Dutch Private International Law were summarized in the Nederlands Jurisprudentie. The one was decided by the First Chamber of the "Arrest-Rechtbank" of Rotterdam on the 13th of November, 1967; the other by the "Arrest-Rechtbank" of Maastricht on the 11th of January, 1968. The former dealt with the recognition of a foreign divorce order and the remarriage of a foreigner, the latter with divorce based on adultery. Both concerned so-called "permissive public policy".

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6 However, see Price, "Civil Law and Common Law: Two Ways of Thinking" (1965/1966), Acta Juridica, 47.
7 In general see, e.g., Rabel at 29 ff.; Encyclopaedia Britannica, vol. 6 (1967), s.v., "Conflict of Laws". Concerning the Netherlands see, e.g., Kollewijn, "Het ontwerp E.W. en de wetgever", (1968) Nederlands Juristenblad 698 at 698 - 699 ("Men late de ontwikkeling van het i.p.r. voorlopig aan de Haagse Conferentie, de rechter en de wetenschap over"); Sauveplan at 266, 292.
8 See, e.g., the summary by Kosters-Dubbink at 100 ff.
9 A number of conventions, for example, have been concluded as a result of the Dutch-sponsored Hague Conferences since 1893. Most of these conventions apply to a limited number of states only, e.g., the Conventions on Marriage and on Divorce and Separation of 1902. Moreover, in 1951 the governments of the Benelux states (Belgium, the Netherlands and Luxemburg) accepted a convention containing a draft of uniform rules concerning Private International Law matters; however, it has not yet become of force in Belgium and the Netherlands, since it has not been ratified by acts of parliament in these two states. See, e.g., Kosters-Dubbink at 126 ff.; Rabel at 33 ff.; Szászsy at 42 ff.; Schultsz, "De elfde zitting van de Haagse Conferentie voor Internationaal Privaatrecht: een voörbericht" (1968), Nederlands Juristenblad 818; Meijers, Verzameld privaatrechtelijke opstellen, vol. II (1955) 400.
10 In order to remedy this defect concerning cases on Private International Law, Dutch courts have been requested to inform the "T.M.C. Asser-Instituut" about all decisions which could be of interest; that institute then records and publishes such information. See, e.g., Verheul, "De ongepubliceerde vonnissen in het internationaal privaatrecht", (1968), Nederlands Juristenblad 969.
11 In view of what has been said above, it frequently happens, moreover, that court decisions are published only a considerable time after they have been decided. See, e.g., Emmering, "Publicatie van rechtspraak" (1963), Nederlands Juristenblad 549.
12 In connection with which Rabel (at 497) observes, "Divergences concerning recognition of foreign divorces are too great to allow any systematic comparison".
13 In contrast to "prohibitive public policy". See, e.g., Rabel at 279, 297, 301; Kosters-Dubbink at 341 - 342; Morris at 73 - 74.
The facts of the first case (*Ex parte M.C. and C.J.E.*, in our terminology)\(^{14}\) were as follows:

1. On the 14th of July 1965, a married couple M.C. and M.H. (both Moroccan nationals, belonging to the Jewish community of Morocco) were divorced by order of the “Grand Rabbin de la Communauté Orthodoxe de Paris” (who does not have divorce jurisdiction according to French Law), which order was subsequently recorded in the registers of the “Grand Rabbinat Casablanca”. According to Moroccan law, the formation and termination of marriage fall exclusively within ecclesiastical jurisdiction, *i.e.* within that of the Jewish authorities in the present case. Their divorce was, therefore, recognized by Moroccan law.

2. During 1967 M.C. and C.J.E., wishing to marry, approached the marriage authorities of Rotterdam. However, the “ambtenaar van de burgerlijke stand” (responsible official) refused to perform the ceremony, on the ground that the divorce of M.C. and M.H. was not recognized by French law and could, therefore, not be recognized by Dutch law. Moreover, he queried whether such a “marriage” would have been valid according to Moroccan Law, since one of them (C.J.E.) did not belong to the Jewish faith.\(^{15}\)

3. M.C. and C.J.E. applied to the court.

4. The first query concerned the recognition of the foreign divorce order; in particular, the question as to whether the rabbinical court had possessed the necessary competency to grant the divorce order.\(^{16}\) In the light of evidence that M.H. (M.C.’s former wife) remarried in the 20th “Arrondissement” of the “Prefecture de la Seine” (Paris) on the 2nd of September 1967,\(^{17}\) the three judges of the Court came to the conclusion that, although the divorce order was not granted by a competent French judicial official,
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it was apparently recognized in France. Dutch law, therefore, had to recognize it, the Court held; a different viewpoint would have been adverse to Dutch "openbare orde en goede zeden" (public policy), because it would have led to the anomalous situation of Dutch law holding a foreign divorcee (according to both his lex patriae and lex domicilii) to be still married.

5. After having decided this, the Court added that it had, moreover, taken into consideration the fact that preference had to be given to the legal system to which the parties were the most closely connected at the time of the divorce proceedings.

6. Concerning the second query, the Court held that a foreign legal system's prohibition on marriage between persons belonging to different religions, offended Dutch "public policy" and could, therefore, not be taken into consideration.

7. Their application succeeded.

Although the nationality principle implies that each party must be free from prohibitions to marry the other party according to his/her lex patriae, section 3 of the Hague Convention on Marriage of 1902 permits the marriage of foreigners contrary to their national laws, if such prohibition is based exclusively on religious grounds. The present case seems to have followed this section. The facts of the second case (X. v. Y., in our terminology) were as follows:

1. Mrs. X, a Belgian national, instituted an action for divorce based on the adultery of her Dutch nationalized husband Y. Although

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It must be borne in mind that since the 1905 Levinson case, French courts, in a number of cases, have held that they could not exercise divorce jurisdiction in cases where, according to the national law of the parties, divorce falls exclusively within the jurisdiction of ecclesiastical authorities; some courts and writers, however, have expressed contrary opinions. See, e.g., Rabel at 444 - 445, and the authorities cited by him. Concerning French recognition of foreign ecclesiastical divorces, Rabel (at 524) mentions two viewpoints: according to the first opinion, such divorce should be recognized even if it is not "supported by the consent of the state in whose territory" it has been granted; according to the second, such ecclesiastical court should have had authority in both the state where it sat and the state of which the parties were nationals.

Concerning religious impediments of states which have been applied by other states, see, e.g., Rabel at 293 - 294.

19(1969) Nederlands Jurisprudentie no. 64.

20According to Dutch Law, jurisdiction in divorce matters rests with the Rechtbank of the district where the defendant has his "woonplaats" (Dutch domicile), even where the plaintiff is a foreigner. See, e.g., Kollwijn, American-Dutch Private International Law (1961), 54. A convention of 1925 between Belgium and the Netherlands regulates, inter alia, the jurisdiction of Belgian and Dutch judges. See, e.g., Kosters-Dubbink at 130. According to section 6(1) of the draft Benelux Uniform Act concerning Private International Law, the law of the suing party is decisive.
she apparently based her action on Dutch law, the Court held that her claim in this regard had not been sufficiently substantiated; the possibility that Belgian Law might have been applicable was, therefore, not excluded.

2. On the facts before the Court, the plaintiff would not have been able to succeed according to Belgian law, for section 230 of the Belgian Civil Code provides that a husband’s adultery could only afford ground for divorce if he had kept his “bijzit” (mistress) in the “gemeenschappelijke woning” (common marital home). However, the Court decided that even if Belgian Law had to be applied according to the rules of Dutch Private International Law, section 230 could not be applied, because it was repugnant to Dutch “public policy”, according to which the equality of the sexes had been an accepted principle of Dutch law since 1957.

3. Without having decided whether Dutch or Belgian law should have been applied, the Court finally granted the plaintiff a divorce; in the judge’s opinion, she qualified for it according to both legal systems.

According to the Hague Convention on Divorce and Separation of 1902, the Dutch courts should refuse to grant divorces which do not comply with the national law of the parties, even if it conforms with Dutch law. However, in the leading case of Boon v. Schmidt, the

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22Dutch Private International Law differs from South African, English and some other Private International Law systems in that Dutch courts are obliged to obtain on their own motion the required knowledge concerning the applicable foreign law; they must explore the foreign law ex officio, for which purpose they may invoke the help of the parties. See, e.g., Kollwijn (American-Dutch) at 76; Kosters-Dubbink at 733 ff.; Kahn (Habb), at 559 ff.; Cheshire (Private International Law) at 115 ff.; Morris at 1110 ff.; Ehrenzweig at 184, 191; Anton, Private International Law (1967), 8 - 9. See also Kahn, Proving the Law of our Friends and Neighbours 82, SALJ (1965) 133.

23According to section 229 of the Code, however, a single act of adultery on the part of a wife could afford ground for a divorce action. In order to remedy this inequality to a certain extent, the Belgian courts have given a wide interpretation to “gemeenschappelijke woning”. See, e.g., Dekkers, Handboek van lage- gerlijk recht, (1956), vol. 1 185 - 186.

24Rabel (at 465, 472 - 473) refers to some Belgian cases in which Belgian divorce law was substituted and divorces granted because of repugnance of foreign divorce laws to Belgian “public policy”.

25Section 2 of the Hague Convention on Divorce and Separation of 1902 reads: “Divorce may be granted only if obtainable in the particular case under both the national law of the spouses and the law of the place where the application is made, though on different grounds”. France, Belgium, Switzerland, Germany and Sweden have left this convention successively, while the Netherlands intends withdrawing as from the 1st of June, 1969. See, e.g., Rabel at 477; Schultsz at 810.

26Hoge Raad, 13th of December, 1907, W. 8636. See Van Hasselt, De Nederlandse rechtspraak betreffende internationaal privaatrecht (1936) 15.
Hoge Raad held that, inasmuch as questions of divorce involve "public policy", Dutch courts should apply only Dutch law in divorce cases, without having regard to the law of the nationality of the parties. The Second World War was followed by conflicting decisions, some of which followed Boon v. Schmidt, others having applied the law of nationality of the parties, save where such application would have violated Dutch "public policy". X. v. Y. appears to have followed the latter line of decisions.

According to the general rules of Dutch Private International Law, both capacity to marry and divorce concern personal status, which is governed by the lex patriae of the parties. However, in the two cases discussed above, "the forum's ordre public was called in as a corrective".

Had these two cases arisen in South Africa or Britain, what would their outcome have been? Both South African and English Private International Law apply the concept of domicile, and not that of nationality, as do most of the Continental-European legal systems. Applying the leading English case of Armitage v. Attorney-General, the divorce of the Jewish Moroccans would have been recognized by both English and South African Private International Law, because both Moroccan and French Law (one of the two presumably their domiciliary law) apparently recognized it; moreover,
they would have been allowed to marry both in England and South Africa. Concerning the second case, the English or South African court having jurisdiction, would have applied the lex fori (i.e. its own law), in which case the plaintiff would again have succeeded in her action for divorce.

In contrast to South African Private International Law, English Private International Law distinguishes between the formal requirements and the intrinsic validity (such as capacity to marry) of marriage; the former are governed generally by the lex loci celebrationis, the latter by the lex domicilii of the parties at the time of celebration of the marriage (subject to exceptions). See, e.g., Cheshire, Private International Law, 276 ff., 289 ff.; Graveson, 209 ff.; Morris, 254 ff. Consequently, if one or both of the parties were domiciled in England, they would have been able to marry in England; if none was domiciled in England, and M.C. in Morocco, the English courts might have disregarded his lex domicilii because of repugnancy to “public policy”. See, e.g., Cheshire, Private International Law, 288; Morris, 75, 229; Kahn (Hablo) 574. Although Cheshire Private International Law, 277 ff., argues that capacity to marry is (or should be) governed by the law of the matrimonial home which was intended and actually established, the weight of English authorities favours the so-called dual domicile principle.

Subject to a few exceptions, including considerations of “public policy”, South African Private International Law, following Roman-Dutch Law, provides that the formation of marriage is governed by the lex loci celebrationis. See, e.g., Kahn (Hablo) 563 ff., and, in particular, the cases cited by him at 566. Broadly speaking, the Private International Laws of the USA and the USSR provide the same. See, e.g., Rabel at 264, 267, 271 ff.; Grzybowski, 125 ff.; Kollewijn (American-Dutch) 45; Stumberg, Principles of Conflict of Laws (3rd ed, 1963) 279 ff.

In England, since the subject was clarified in 1895, the matrimonial domicile (if any) has been deemed to be the most suitable place for the dissolution of marriage, i.e. the sole test of jurisdiction for the purpose of divorce, subject to the provisions of the Matrimonial Causes Act of 1965. Although Kahn (Hablo) 614, submits that the lex domicilii of the parties at the time of the institution of the action should govern divorce, the South African courts having jurisdiction apply their own law. Therefore, according to both English and South African Private International Law the question of jurisdiction comes first, whereafter the lex fori is applied; this corresponds generally with the position according to “general European theory and practice” of a century ago, according to Rabel at 454. See, e.g., Cheshire Private International Law, 332 ff.; Morris, 295 ff., 307 - 308; Graveson, 240 ff.; Kahn (Hablo) 519 ff., 614 ff.; Kollewijn (American-Dutch) 49.