1-1-1930

Pan-American Code of Private International Law

Ernest G. Lorenzen
Yale Law School

Follow this and additional works at: http://digitalcommons.law.yale.edu/fss_papers

Part of the International Law Commons

Recommended Citation
http://digitalcommons.law.yale.edu/fss_papers/4578

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
THE PAN-AMERICAN CODE OF PRIVATE INTERNATIONAL LAW

ERNEST G. LORENZEN.

I.

From early times there has been a strong movement in Latin-American countries to codify their rules relating to international law, both public and private.\(^1\) As regards private international law, a general treaty was elaborated at a congress held at Lima in 1878 and signed by representatives from Argentina, Bolivia, Chile, Costa Rica, Ecuador, Peru and Venezuela, Guatemala and Uruguay adhering somewhat later. This treaty, however, was not ratified by any of the states.\(^2\)

The references are to the following editions of the Civil Codes:

Argentina (1927), Bolivia (1924), Brazil (revision of 1919), Chile (1912), Colombia (1926), Costa Rica (1916), Cuba (1924), Dominican Republic (1901), Ecuador (1889), Guatemala (1886), 1st part (1926), Haiti (1892), Honduras (1906), Mexico (1928), Nicaragua (1912), Panama (1927), Paraguay (see below), Peru (1920), Salvador (1911), Uruguay (1925), Venezuela (1923).

Paraguay adopted the Civil Code of Argentina in 1889. For this reason references to the law of Paraguay have generally been omitted.

\(^1\) As early as 1826 a motion was made at the Congress of Panama for the preparation of a draft code of international law. Bustamante, La Commission des Jurisconsultes de Rio de Janeiro et le Droit International (1928) 1.

\(^2\) Concerning this treaty see Octavio, Le Droit International Prive das La Legislation Bresilienne (1915), p. 235; Conflict of Laws in Brazil (1919), 28 Yale L. J. 463.
A more successful effort in the same direction took place at a congress which met at Montevideo from August 25th, 1888, to February 18th, 1889, at which Argentina, Bolivia, Brazil, Chile, Paraguay, Peru and Uruguay were represented. At this Congress various treaties were concluded, one relating to international civil law, consisting of 71 articles, another relating to international commercial law, consisting of 52 articles, a third relating to international criminal law, consisting of 51 articles, and a fourth relating to procedural law, consisting of 16 articles. Contrary to the proposed treaty of Lima, which had adopted the law of nationality, the law of domicil was made at Montevideo the basis of the treaty for the determination of personal rights. The treaties of Montevideo were ratified by and are in force today as between Argentina, Bolivia, Paraguay, Peru and Uruguay. Brazil and Chile rejected them because of the principle of domicil.  

Further efforts in the direction of the unification of the rules of private international law were made at the Second Pan-American conference, which convened in the City of Mexico late in 1901. 4 By an international agreement of August 23rd, 1906, a commission of jurists was appointed for the elaboration of codes on public and private international law, which began its labor in Rio de Janeiro in 1912. 5 The World War interrupted the work of codification, but it was resumed in 1924, when the American Institute of International Law at an extraordinary meeting, held at Lima, appointed a commission composed of four of its members, including Dr. Antonio S. de Bustamante of Cuba, to draw up a code of private international law. 6 In 1925 the Pan-American Union associated itself with this work of codification, and on March 2nd of that year its board of directors requested the American Institute of International Law to prepare a draft or a series of drafts on private international law.

---

3Concerning this treaty see Segovia, El Derecho Internacional Privado y El Congreso Sud-Americano de Montevideo (1889).
5Bustamante, La Commission supra note 1, at 14 et seq.
6Bustamante, La Commission, supra note 1, at 64; Le Code, supra note 4 at 8.
law, with a view of their submission to the commission of jurists of Rio de Janeiro, the reorganization of which had been decided upon in 1923 by the Fifth Pan-American Conference at Santiago, Chile.

The draft of a code of private international law, prepared by Dr. Bustamante, was examined by a commission appointed by the American Law Institute, at a meeting of the Institute held in Havana in December, 1925. The draft was approved by the Institute and was thereupon transmitted to the President of the Board of Directors of the Pan-American Union, and through the latter to the governments represented in the Union. The draft was discussed at Rio de Janeiro in 1927 by the Commission of Jurists which had been convoked by the Government of Brazil in agreement with the Pan-American Union, and recommended for adoption. It was finally approved by the Sixth Pan-American Conference held in Havana in 1928.

The Code is in force today (April, 1930) between the following states: Brazil, Costa Rica, Cuba, Dominican Republic, Guatemala, Haiti, Honduras, Nicaragua, Panama and Peru.

II.

The Pan-American Code of Private International Law contains a Preliminary Title (Articles 1 to 8) and four books, entitled respectively International Civil Law (Articles 9 to 231), International Commercial Law (Articles 232 to 295), International Criminal Law (Articles 296 to 313), and International Law of Procedure (Articles 314 to 437).

The present article will confine itself to a consideration of the provisions contained in the first book, relating to International Civil Law.

The following constitutes a summary statement of the rules adopted by the Code.

PERSONS.

The status and capacity of persons are governed in general by the "personal" law. This law applies likewise to the determination of majority. Each contracting state is free to apply as "personal" law either the law of domicil or the law of nationality.

7BUSTAMANTE, LA COMMISSION, supra note 1, at 65.
8BUSTAMANTE, LE CODE, supra note 4, at 17.
9CODE, art. 27.
10CODE, art. 101.
11CODE, art. 7.
The personal law governs "capacity" without reference to the subject-matter to which it may relate, including dispositions of real property, either *inter vivos* or upon death.\(^{12}\)

**Marriage.**

As regards formality, the law of the place of celebration will govern under the code.\(^{13}\) States whose legislation prescribes a religious ceremony may refuse to recognize the validity of a marriage entered into by their nationals abroad without the observance of such form.\(^{16}\)

The capacity of the parties to marry is determined by their personal law; which law governs also with respect to the parents’ consent or advice, to impediments to marriage and their dispensation.\(^{15}\) However, the local law of the place of celebration applies with respect to absolute impediments, with respect to the form of consent, and with respect to the binding or non-binding force of betrohals.\(^{16}\)

Article 8 of the Code contains a general provision that rights acquired under the rules of the Code shall have extraterritorial effect in the contracting states, except where their effect will conflict with a rule of international public order. In connection with the subject of marriage it was deemed advisable to lay down more specific rules and this is done in Article 40 of the Code, which reads as follows: "The contracting States are not obliged to recognize a marriage cele-


\(^{13}\)Code, art. 38.

\(^{14}\)Code, art. 41.

\(^{15}\)Code, art. 36.

\(^{16}\)Code, art. 38.

Liability or non-liability for breach of promise of marriage is governed by the common personal law of the parties and in the absence thereof by the local law. Code, art. 39.
brated in one of them by their nationals or by foreigners which is in conflict with their provisions relative to the necessity of dissolution of a former marriage, to the degree of consanguinity or affinity with respect to which there exists an absolute impediment, to the prohibition of marriage regarding those guilty of adultery by reason whereof the marriage has been dissolved, to the same prohibition in respect to the one guilty of an attempt against the life of one of the spouses for the purpose of marrying the survivor, and to any other cause of absolute nullity.'

**Divorce.**

According to the Code the right to separation and divorce is regulated by the law of the matrimonial domicil. If such separation or divorce is asked on a ground that arose prior to the acquisition of the matrimonial domicil, the petition can be granted only if the personal law of both spouses at the time the cause occurred authorizes the relief sought.

The causes of divorce and separation are determined in general by the law of the *lex fori et domicilii*.

The judicial consequences of divorce and the terms of the judgment in respect of the spouses and children are governed by the law of the forum.

Article 53 of the Code provides: 'Each contracting State has the right to permit or recognize, or not, the new marriage of persons divorced abroad, in the cases, with the effects, and for causes which are not admitted by their personal law.'

---

17 Art. 11 of the Convention of Montevideo on International Civil Law applies the *lex loci* both to formalities and capacity.

Concerning the law of the individual states apart from the Convention of Montevideo, see ARGENTINA, art. 2 of law of Nov. 2, 1888; Roger, op. cit. supra note 12, at 680; 2 ALCOSTA, CURSO DE DERECHO INTERNACIONAL PRIVADO (3 vols., 2nd ed., 1927) at 128; BOLIVIA, art. 14 CIV. CODE; BRAZIL, arts. 8-9 INTR. CIV. CODE; BEVILAQUA, op. cit. supra note 12, at 166-167; 1 CODIGO CIVIL DOS ESTADOS UNIDOS DO BRASIL (2nd ed., 1921) 119-120; OCTAVIO, op. cit. supra note 2, at 152; (1919) 23 YALE L. J. 469; 1 CALANDRELLI, CUESTIONES DE DERECHO INTERNACIONAL PRIVADO (3 vols. 1911-1915), at 149; CHILE, art. 119 CIV. CODE; COLOMBIA, art. 365 CIV. CODE; RESTREPO-HERNANDEZ, op. cit. supra note 12, at 121-122; COSTA RICA, art. 3 CIV. CODE; CUBA, arts. 91, 100 CIV. CODE; DOMINICAN REPUBLIC, arts. 170-171 CIV. CODE; ECUADOR, art. 115 CIV. CODE; GUATEMALA, arts. 144-146 CIV. CODE, arts. 51-64, LAW CONCERNING FOREIGNERS, of Feb. 21, 1894; MATOS, CURSO DE DERECHO INTERNACIONAL PRIVADO (1922) at 250-251, 283-287; HAITI, art. 155 CIV. CODE; HONDURAS, arts. 137-139, 298 par. 2 CIV. CODE; MEXICO, art. 15, 161 CIV. CODE; NICARAGUA, art. VI-6, 102, 104, 106 CIV. CODE; PANAMA, art. 109, par. 4 CIV. CODE; PERU, arts. 158-159 CIV. CODE; SALVADOR, art. 15 CIV. CODE; URUGUAY, arts. 101-102 CIV. CODE; VENEZUELA, arts. 129-137 CIV. CODE.

18 CODE, art. 52.

19 CODE, art. 52.

20 CODE, art. 54.

21 CODE, art. 55.

22 Article 13 of the Convention of Montevideo on International Civil Law
HUSBAND AND WIFE.

The personal relations between husband and wife are controlled in the Code by the personal law of the spouses and if they are subject to different personal laws, by that of the husband.23 This law determines also the disposition and administration of their joint property, and all other special effects of marriage.24

Matrimonial property rights depend, according to the Code, in the first place upon the marriage settlement which may have been made by the spouses. This settlement is governed by the personal law common to the parties, and, in the absence of a common personal law, by the law of the first matrimonial domicile.25 These rules determine also the rights of the parties in the absence of a marriage settlement,26 no distinction being made between personal and real property.

The rights of the parties are on principle not affected by a change in the personal law. However, any rule forbidding provides as follows: "The law of the matrimonial domicile shall govern: a) legal separation; b) dissolution of the marriage, provided that the ground alleged is sufficient under the law of the place where the marriage took place."

Concerning the law of the individual states apart from the Convention of Montevideo, see ARGENTINA, art. 7, Law of Nov. 2, 1888; ROGER, op. cit. supra note 12, at 679-860; 2 ALCORTA, op. cit. supra note 17, at 142; BRAZIL, art. 8-9 Intr. Civ. Code; OCTAVIO op. cit. supra note 2, at 167; 28 YALE L. J. 471; BEVIAPA, op. cit. supra note 12, at 167; 1 CÒDIGO CIVIL, supra note 17, at 120-121; CALANDRELLI, EL DIVORCIO ANTE EL DERECHO INTERNACIONAL PRIVADO (1923); CHILE, arts. 120-131 Civ. CODE; COLOMBIA, RESTREPO-HERNÁNDEZ, op. cit. supra note 12, at 137-142; ECUADOR, arts. 116-117, CIV. CODE; GUATEMALA, arts. 209-210, 218 CIV. CODE; arts. 48 and 66 of LAW CONCERNING FOREIGNERS; MATOS, op. cit. supra note 20, at 305, 312, 317; NICARAGUA, art. 108 Civ. CODE; URUGUAY, arts. 103-104 Civ. CODE.

23CODE, art. 43.
24CODE, art. 44.

The Convention of Montevideo on International Civil Law applies the law of matrimonial domicile. The law of the new domicile controls upon a change of domicile. Art. 12. Urgent measures are governed by the law of the place of residence. Art. 24.

The Convention of Montevideo provides that in the absence of a marriage settlement the law of matrimonial domicile selected by the parties by common consent prior to the marriage shall control. If no matrimonial domicile has been selected prior to the marriage, the law of the husband's domicile at the time of the marriage governs. A change of domicile will not affect the rights of the parties, without reference to the fact whether the property was acquired prior or subsequent to the change of domicile. Arts. 41-43.

Concerning the law of the individual states, apart from the Convention of Montevideo, see ARGENTINA, art. 3 of Law of Nov. 2, 1888; ROGER, op. cit. supra note 12, at 680; 2 ALCORTA, op. cit. supra note 17, at 133; BRAZIL, arts. 8-9 Intr. Civ. Code; BEVIAPA, op. cit. supra note 12, at 680; 1 CÒDIGO CIVIL, supra note 17, at 122-133; CHILE, art. 15 Civ. CODE; COLOMBIA, RESTREPO-HERNÁNDEZ, op. cit. supra note 12, at 129; CUBA, art. 9 Civ. CODE; GUATEMALA, art. 66, LAW CONCERNING FOREIGNERS; MATOS, op. cit. supra note 17, at 288-290.

25CODE, art. 187, par. 1.
26CODE, art. 187, par. 2.
the making of marriage settlements during wedlock or the modification of the property régime in case of a change of nationality or domicile after the marriage was celebrated, is one of international public order. This is true also of all laws that are mandatory or relate to good morals, as well as of those governing the effect of marriage settlements with respect to third persons, or requiring a solemn form.

Parent and Child.

1. In General.

The paternal power, which in continental and Latin-American countries confers upon the parent a right to the income of the child's property, is governed by the personal law of the child.

The code regards the paternal power as a family institution organized for the welfare of the child and demanding a certain unity. The personal law of the child applies, therefore, without respect to the nature of the property as real or personal, or its location. Excepted from the above rule are the rights of third parties which may be granted by the law of the situs and the provisions of such law relating to the registration of mortgages.

The limits of the parental right to punish are recognized to be subject to the local law.

2. Legitimacy and Legitimation.

The rules concerning the presumption of legitimacy and its conditions, those conferring a right to the family name,

27Code, art. 188.
28Code, art. 189.
Concerning the law of the individual states apart from the Convention of Montevideo, see Argentina, art. 4-7 Law of Nov. 2, 1888; Roger, op. cit. supra note 12, at 681-682; 2 Alcosta, op. cit. supra note 20, at 135; Brazil, arts. 8-9 Intr. Civ. Code; Bevilacqua, op. cit. supra note 12 at 168-169; 1 Código Civil, supra note 17, at 123-124; Octavio, 23 Yale L. J. 470; Chile, art. 2484 Civ. Code; Costa Rica, art. 7, par. 3, Civ. Code; Guatemala, arts. 174-175 Civ. Code; arts. 65-65, Law Concerning Foreigners; Nicaragua, art. 105 Civ. Code.
29Code, art. 69.
30Bustamante, La Comisión, supra note 1, at 124.
31Code, art. 70.
32Code, art. 71.
33Code, art. 72.

Regarding the rules concerning support, see Code, arts. 59, 67-68, 76, 93.

According to the Convention of Montevideo on International Civil Law the paternal power, so far as it relates to the personal rights and duties, is governed by the law of the place where it is to be exercised. Art. 14. Rights acquired by virtue of the paternal power in the property of the children is
those which determine the evidence of filiation and regulate the child’s inheritance (i.e., rights of inheritance with regard to the child’s estate) are governed by the personal law of the child.\textsuperscript{34}

Capacity to legitimate is governed by the personal law of the father, and the capacity to be legitimated, by the personal law of the child. Legitimation can take place only upon compliance with the conditions prescribed by both the personal law of the father and that of the child.\textsuperscript{35}

Rights of inheritance on the part of legitimated children are subject to the personal law of the father.\textsuperscript{36}

The consequences of legitimation and the action to assail it are governed by the personal law of the child.\textsuperscript{37}

A prohibition in a state against the legitimation of children not simply natural,\textsuperscript{38} is one of international public order.\textsuperscript{39}

The rights of inheritance of illegitimate children are determined by the personal law of the father, and those of illegitimate parents, by the personal law of the child.\textsuperscript{40}

governed by the law of the place where the property is situated. Art. 15.

Concerning the law of the individual states apart from the Convention of Montevideo, see ARGENTINA, ROGER, \textit{op. cit. supra} note 12, at 680; 3 ALCORTA, \textit{op. cit. supra} note 20, at 157; BRAZIL, BEVILAQUA, \textit{op. cit. supra} note 12, at 168; OCTAVIO, 28 \textit{Yale L. J.} 473; GUATEMALA, art. 69 of Law Concerning Foreigners; MATOS, \textit{op. cit. supra} note 20, at 330; NICARAGUA, art. VII-7, Civ. Code.

\textsuperscript{34}CODE, art. 57.
\textsuperscript{35}CODE, art. 60.
\textsuperscript{36}CODE, art. 58.
\textsuperscript{37}CODE, art. 62.

Latin countries frequently classify illegitimate children into natural, incestuous and adulterous children. See, for example, ARGENTINA, arts. 311, 324, 338-339 Civ. Code. Simple natural children are those whose parents could have intermarried. Incestuous children are born of parents whose intermarriage would have been regarded as incestuous. Adulterous children are children born of parents, one of whom was already married.

\textsuperscript{38}CODE, art. 61. Regarding the meaning of this article, see infra, p. 526.

Art. 16 of the Convention of Montevideo on International Civil Law provides that the law governing celebration of the marriage shall determine legitimacy and legitimation by subsequent marriage.

Art. 17 provides that questions concerning the legitimacy of the filiation which do not refer to the validity or nullity of the marriage, are governed by the law of the conjugal domicil at the time of the child’s birth.


\textsuperscript{39}CODE, art. 65.

Art. 18 of the Convention of Montevideo on International Civil Law provides that the rights and duties incident to illegitimate filiation are governed by the law of the state where they must be exercised.

See also NICARAGUA, arts. VI-10 Civ. Code.
3. **Adoption.**

The capacity to adopt and to be adopted and the conditions and limitations of adoption are subject to the personal law of each of the interested parties. The effects of adoption are regulated by the personal law of the adopting party, so far as the rights of inheritance of the adopted person are concerned, and by the personal law of the adopted person in respect to the family name, the rights and duties which he retains regarding his natural family, as well as the rights of inheritance of the adoptive parent.

Provisions in a state establishing solemn forms for the act of adoption and conferring a right to support, being rules of international public order, apply to all without respect to the personal law of the parties.

The provisions given above do not apply to states whose legislation does not recognize adoption.

**Guardianship.**

1. **Of Minors.**

In accordance with the continental point of view, the rules governing guardianship in the Code were designed to give unity to the institution. As the object of guardianship is protection, the personal law of the minor, or of the person under disability, is preferred, which law applies irrespective of the fact whether the guardian is one of the person or of property, and irrespective of the nature of the property or its location.

A guardianship established at the domicil of the person under disability or in the state of which he is a national has extraterritorial effect. Contracting states which have as a personal law that of domicil may demand, however, in case the person having a guardian takes up his domicil in the state, that the guardianship be ratified, or that the guardian be reappointed.

---

41*Code*, art. 73.
42*Code*, art. 74.
43*Code*, art. 76.
44*Code*, art. 77.
45*Code*, art. 84-85.
46*Code*, arts. 84-85.

The Convention of Montevideo on International Civil Law does not deal with the subject of adoption.

Concerning the law of the individual states see *Argentina*, *Roger*, *op. cit. supra* note 12, at 683; *Alcopta*, *op. cit. supra* note 17, at 184; *Brazil*, Octavio, (1919) 28 *Yale L. J.* 472; *Colombia*, Restrepo-Hernandez, *op. cit. supra* note 12, at 145; *Guatemala*, art. 70, Law Concerning Foreigners; *Matos*, *op. cit. supra* note 17, at 329.
The rules for the exercise of guardianship are governed by the personal law of the minor, as is also the guardian’s duty to account.\textsuperscript{47}

The personal law of both guardian and ward is applied with regard to the rules governing disqualifications or excuses for not serving as guardian.\textsuperscript{48}

2. Guardians of Insane Persons and Deaf Mutes.

Similar rules govern guardianships of adults.\textsuperscript{49} The rules of a state establishing the consequences of guardianship of adults are of an international public order.\textsuperscript{50}

The incapacity resulting from the appointment of a guardian has extraterritorial force and effect.\textsuperscript{51}


The appointment of a guardian for a spendthrift and the effect thereof are subject to the personal law of the spendthrift.\textsuperscript{52}

A guardian cannot be appointed in accordance with the spendthrift’s domiciliary law if his national law does not allow the appointment of such a guardian.\textsuperscript{53}

\textsuperscript{47}Code, arts. 87-88.
\textsuperscript{48}Code, art. 86.

The Convention of Montevideo on International Civil Law has the following provisions:

“Art. 19. The appointment to a guardianship and curatorship shall be governed by the law of the place of domicil of the persons who are legally incompetent.

“Art. 20. A person appointed as guardian or curator in one of the contracting states shall be recognized as such in all the others.

“Art. 21. Guardianship and curatorship shall be governed by the law of the place of appointment as regards the rights and duties incident to the office.

“Art. 22. The authority of guardians and curators over the property of persons legally incompetent, located elsewhere than their place of domicil, shall be exercised according to the law of the place where such property is located.

“Art. 23. A legal hypothec given by law to persons legally incompetent shall have effect only when the law of the state in which the duties of guardian or curator are discharged is in accord with the law of the state in which the property affected is located.”

Concerning the law of the individual states apart from the Convention of Montevideo, see Argentina, arts. 409-410 Civ. Code; Roger, op. cit. supra note 12, at 682-683; 2 Alcorta, op. cit. supra note 17, at 202; Brazil, arts. 8-9 Inte. Civ. Code, Bevilacqua, op. cit. supra note 12, at 168; 1 Código Civil, supra note 17, at 122; Octavio, (1919) 28 Yale L. J. 473; Guatemala, art. 70, Law Concerning Foreigners; Matos, op. cit. supra note 20, at 336; Nicaragua, art. VI-11, 13 Civ. Code.

\textsuperscript{49}Code, arts. 84-89, 97.
\textsuperscript{50}Code, art. 91. Regarding the meaning of this article, see infra, p. 526.
\textsuperscript{51}Code, art. 92.
\textsuperscript{52}Code, art. 98.
\textsuperscript{53}Code, art. 99.
A spendthrift decree made in one of the contracting states shall have extraterritorial force and effect in respect to the others so far as the local law may permit it. 54

Property.

1. In General.

Rights in property as such are subject to the law of the situs, no distinction being made between real and personal property. 55 For the purpose of this rule, tangible property and documents representative of debts of any kind are regarded as located in the place of their ordinary or normal situation. 56 The situs of debts is deemed to be in the place where they are payable, and if the place of payment is not specified, at the domicil of the debtor. 57 In the absence of any other rule and in the cases not provided for in the Code, movables of every description shall be deemed located at the domicil of the owner, or, in the absence thereof, at the domicil of the person in possession. 58 However, property pledged is deemed to be located at the domicil of the pledgee. 59

It should be noted that the law of the situs applies only to property rights as such. It does not apply where the right belongs to the law of domestic relations or to the law of inheritance, 60 nor does it apply where the right results from some juristic act of the parties. 61

54CODE, art. 100.  
55CODE, art. 117.  
56CODE, art. 106  
57CODE, art. 107.  

Art. 29 of the Convention of Montevideo on International Civil Law provides that the claims of creditors shall be deemed to be in the place where the contract out of which they arose is to be performed. Cf. CARBIO, op. cit. supra note 12, at 133-135.  
58CODE, art. 110.  
59CODE, art. 111.  
60BURSTAMANTE, LA COMMISSION, supra note 1, at 129.  
61Art. 26 of the Convention of Montevideo on International Civil Law provides the following: “Property of whatever nature shall be exclusively governed by the law of its situs in so far as regards its nature, possession, absolute or relative alienability, and with respect of all legal relations of a ‘real’ (property) character of which it is capable.” Article 30 provides: “The removal of personal property shall not affect the rights acquired according to the law of the place where it was at the time of their acquisition.” Article 31 provides: “The rights acquired by third parties with respect to the same property according to the law of the place to which it is removed, after removal and before complying with the said requirements, shall take
2. Servitudes.

The law of the situs is applied to the concept and classification of servitudes, to the non-contractual modes of acquiring and extinguishing them, and to the rights and obligations of the dominant and servient land. Servitudes of a contractual or voluntary origin are governed by the law applicable to the "act or juridical relation" creating them.

3. Usufruct.

The law of the situs defines the usufruct and the form for its establishment. It determines also the causes for its extinguishment and the limits of time for which it can be established.

Apart from these questions, the rights of the parties depend upon the way in which the usufruct was created. If it was created by contract, it is governed by the rules relating to contracts, and if by will, by those relating to wills.

A parent has a usufruct in the child's property in accordance with the personal law of the child, irrespective of the nature of the property or its location, which law determines also whether the parent must give security.
Whether the surviving spouse entitled to a usufruct is under a duty to give security is governed by the law applicable to the succession. 68


The Code provides that the following provisions are territorial:

1. The provisions forbidding the creditor to appropriate to himself the chattel received by him as pledge or mortgage. 69

2. The provisions fixing the essential requirements of the pledge contract. Such provisions must be complied with when the thing which is pledged is taken to a place where the requirements are different from those laid down by the state in which the contract was made. 70

3. The provisions which require that the pledge remain in the possession of the creditor or of a third party, that, as against strangers, the date be established by a public instrument, and which fix the procedure for the sale of the pledged object. 71

4. The provisions fixing the object, conditions, extent and recordation of the mortgage contract. 72

The word "territorial" used in the above articles refers to the law of the situs.

5. Vessels.

Concerning vessels the Code provides as follows:

Article 275. "The law of the flag governs the forms of publicity required for the transfer of the property in a ship."

Article 276. "The power of judicial attachment and sale of a ship, whether or not it is loaded and cleared, shall be subject to the law of the place where it is situated."

Article 277. "The rights of the creditors after the sale

68 Code, art. 128.
69 Code, art. 214.
70 Code, art. 215.
71 Code, art. 216.
72 Code, art. 218.

of a ship, and their extinguishment, are regulated by the law of the flag.'"

Article 278. "Maritime hypothecs and 'real' privileges and guaranties, constituted in accordance with the law of the flag, have extraterritorial effect, even in those countries, the legislation of which does not recognize nor regulate such hypothecs or privileges."

**Modes of Acquiring Ownership.**

a. *In General.*

Article 140 of the Code provides that the law of the situs shall control the mode of acquiring title to property, real or personal, regarding which there are no provisions to the contrary in the Code. The acquisition of title by occupation and accession is thus governed by the law of the situs.

It should be noted that as regards conveyancing the ordinary rules applicable to contracts control in the absence of rules of an international public order existing at the situs of the property. The capacity of a person to convey, dependent upon whether he is of age, is governed therefore by his personal law. On the other hand, if the law of the situs restricts capacity as the result of a policy regarding the holding of property, it will apply to everybody. So, if the law of the situs prescribes that the contract must be executed in a "public" instrument, it must be satisfied as one of international public order. As regards requirements for registration the law of the situs will also control.

b. *Adverse Possession.*

The law of the situs controls. With respect to movables whose location has been changed during the period of adverse possession, the law of the state in which they are at

---

73 The Convention of Montevideo on International Civil Law has the following provisions:
Art. 27. "Vessels in non-territorial waters shall be considered as situated at the place of the register."
Art. 28. "The cargo of vessels in non-territorial waters shall be considered as being at the port of destination of the goods."
74 Accord: BRAZIL, Supreme Court of San Paulo, December 3, 1910, 21 REVISTA DO DIREITO 194.
75 Accord: ARGENTINA, art. 10 CIV. CODE.
76 Accord: BRAZIL, art. 13, single paragraph CIV. CODE; (1919) 28 YALE L. J. 466.
77 Code, art. 227.
the time of the completion of the period governs. 78 By this is meant no doubt that the law of the last state determines the prescriptive period.

c. Gifts.

Gifts inter vivos are governed by the general rule governing contracts. 79

The capacity of the donor and donee are subject to their respective personal laws. 80

Gifts which are to take effect on the death of the donor partake of the nature of testamentary dispositions and are governed by the rules governing succession. 81

d. Succession.

1. In General.

Succession, both intestate and testamentary, including the order and rights of succession, the intrinsic validity of the provisions, shall be governed, except as hereinafter provided, by the personal law of the decedent, whatever may be the nature of the property and the place of its location. 82 The Code thus adopts the unitary principle with respect to testamentary and intestate succession.

2. Wills.

The personal law of the testator governs his capacity to make a will and the intrinsic validity of the will. 83 Excepted from the operation of the personal law are the following:

Provisions forbidding a joint, holographic or noncupative will, being of international public order, apply to all wills made in the state. 84

---

78Code, art. 228.

The Convention of Montevideo on Int. Civ. Law provides that the law of the situs controls both as to moveables and immovables, art. 54. If the movable has changed its situs, adverse possession is governed by the law of the state, in which the time necessary for adverse possession has been completed. Art. 55.

Concerning the law of the individual states apart from the Convention of Montevideo, see Argentina, Roger, op. cit. supra note 12, at 633; Nicaragua, art. VI-19 Civ. Code. 78

79Code, art. 141.

80Code, art. 142.

81Code, art. 143.

See Colombia, Restrepo-Hernandez, op. cit. supra note 12, at 310-312;

Nicaragua, art. VI-21 Civ. Code. 82

82Code, art. 144.

83Code, arts. 144, 146.

84Code, art. 148.
The rules of a state relating to the validity of a will made under duress, or force, deceit or fraud, being of international public order, apply to all wills made in the state.85

The rules of a contracting state regarding the formalities with which wills must be executed, being of international public order, apply to all wills made in the state. Excepted from this provision are wills executed in a foreign country, and military and maritime wills when made abroad.86

The procedure, conditions and effect of the revocation of a will are subject to the testator's personal law, but the presumption of revocation is determined by the local law.87

3. Intestate Succession.

The capacity to inherit by will or upon intestacy is regulated by the personal law of the heir or legatee.88

Any incapacity to inherit which the contracting states regard as such is of an international public order.89

The appointment and substitution of heirs is governed by the personal law of the testator.90 But the local law is to be applied to the prohibition of fideicommissary substitutions beyond the second degree or in favor of persons not

---

85Code, art. 149.
86Code, art. 150.
87Code, art. 151.

The Convention of Montevideo on International Civil Law provides that the form of a will shall comply with the law of the situs of the property. But a will executed by public instrument in any of the contracting states shall also be regarded as valid. Art. 44.

Art. 45 of the Convention provides that the lex loci shall govern (a) testamentary capacity; (b) the capacity of an heir or legatee to inherit; (c) the validity and effect of the will; (d) the title and rights in the inheritance of relatives and the surviving spouse; (e) the existence and amount of the “legitimate” portion; (f) the existence and amount of property that may be reserved; (g) in brief, everything relating to intestate or testamentary succession.

Wills. Concerning the law of the individual states apart from the Convention of Montevideo, see Argentina, arts. 3611, 3613, 3634-3638, 948, 3612 CIV. CODE; 2 Alcorta, op. cit. supra note 17, at 454, Roger, op. cit. supra note 12, at 686; Brazil, arts. 11, 14 Intr. CIV. Code; Devilaqua, op. cit. supra note 12, at 173-175; 1 Codigo Civil, supra note 17, at 127-141; Octavio, 28 Yale L. J. 474; Colombia, arts. 1084-1086 CIV. CODE; Restrepo-Hernandez, op. cit. supra note 12, at 221-224, 230-231, 239-240, 250-261, 287-288, 298-299; Costa Rica, art. 7, par. 2 CIV. CODE; Cuba, arts. 10, par. 2, 11, 732-734 CIV. CODE; Dominican Republic, arts. 999-1000 CIV. CODE; Ecuador, arts. 1017-1018 CIV. CODE; Guatemala, arts. 18, 797 (789) CIV. CODE; Matos, op. cit. supra note 17, at 427-429; Haiti, arts. 805-806 CIV. CODE; Honduras, arts. 1011-1013 CIV. CODE; Mexico, art. 15, 1593 CIV. CODE; Nicaragua, art. VI-15, 1067-1068 CIV. CODE; Panama, arts. 7, 765-770 CIV. CODE; Peru, art. 679 CIV. CODE; Salvador, arts. 1021-1022; Uruguay, art. 828 CIV. CODE; Carrio, op. cit. supra note 12, at 171; Venezuela, art. 11 CIV. CODE.

88Code, art. 152.
89Code, art. 153. Regarding the meaning of this article, see infra, p. 527.
90Code, art. 154.
living at the time of the testator's death, and of those involving a perpetual prohibition against alienation.\textsuperscript{91}

The appointment and powers of testamentary executors depend upon the personal law of the deceased and must be recognized in each of the contracting states in accordance with that law.\textsuperscript{92}

The formalities required for the acceptance of the inheritance with benefit of inventory or for the purpose of exercising the right of deliberating are subject to the law of the place where the succession opens, and shall be sufficient to produce extraterritorial effect.\textsuperscript{93} The rule regarding the unlimited undivided preservation of the inheritance or providing for the provisional division of the estate, being of international public order, is governed by the law of the state in which the property is situated.\textsuperscript{94}

The capacity to ask for and carry into effect the division of the estate is subject to the personal law of the heir.\textsuperscript{95}

The appointment and powers of the liquidator of the estate depend upon the personal law of the deceased.\textsuperscript{96}

In accordance with the unitary principle adopted by the Code in matters of succession, the payment of the hereditary debts is subject to the personal law of the deceased, instead of to the law of the situs of the property. Lien creditors may realize on their liens in accordance with the law of the situs.\textsuperscript{97}

\textsuperscript{91}CODE, art. 155.
\textsuperscript{92}CODE, art. 156.
\textsuperscript{93}CODE, art. 159.
\textsuperscript{94}CODE, art. 160.
\textsuperscript{95}CODE, art. 161.
\textsuperscript{96}CODE, art. 162.
\textsuperscript{97}CODE, art. 163.

The Convention of Montevideo on International Civil Law provides as follows:

Art. 46. "Debts payable in one of the contracting States shall be a first lien upon the assets therein situated at the time of the decedent's death."

Art. 47. "Should said assets be insufficient for the payment of the aforesaid debts, the creditors shall share pro rata in the assets located in other places, without prejudice to the preferred rights of local creditors."

Art. 48. "When the debts are payable in any locality where the decedent has left no assets, the creditors shall exact pro rata payment from the assets located elsewhere, subject, however, to the limitation established in the preceding article."

Art. 49. "Bequests of property designated by kind, no place being indicated for payment, are governed by the law of the testator's domicile at the time of his death; they shall be paid from property that he may have left in said domicile and in default thereof, or in case of insufficiency, pro rata out of all the other property of the decedent."

Art. 50. "The duty of collating is controlled by the law governing the succession.

"Should the collating concern real or personal property (other than money) it shall be limited to the estate of which such property is a part. "When it is with respect to a sum of money, the amount shall be
OBLIGATIONS.

1. Contracts.

   a. In General.

Capacity or incapacity to give consent depends upon the personal law of each contracting party.98

The territorial law governs mistake, violence, intimidation and fraud in connection with consent.99

The rules of a state prohibiting contracts, clauses and conditions as contrary to the law of morality and public policy, are of an international order.100

The law of the place where the contract is made and is apportioned among the several estates in which the heir is interested, in proportion to his interest in each."


98Codé, art. 176.
99Codé, art. 177.
100Codé, art. 175. Regarding the meaning of this article, see infra, p. 527.

The Convention of Montevideo on International Civil Law has the following provisions:

Art. 33 provides that the law of the place where contracts are to be performed shall govern (a) their existence; (b) their nature; (c) their validity; (d) their objects; (e) their consequences; (f) their performance; (g) in short, everything relating to contracts in any respect whatsoever.

Art. 34. "Consequently, contracts made concerning things certain and definite are governed by the law of the place of their location at the time the contracts were made."

"Those concerning things determined by kind are governed by the law of the place of the debtor's domicil at the time the contracts were made."

"Those relating to fungible things are governed by the law of the debtor's domicil at the time they were made.

"Those providing for the rendering of personal service: (a) if they have reference to things, by the law of the place where these existed at the time they were made; (b) if the services are to be rendered in any specified state, by the law of the place where they are to be rendered; (c) in all other cases, by the law of the place of the debtor's domicil at the time the contract was made.


HeinOnline -- 4 Tul. L. Rev. 516 1929-1930
to be performed applies simultaneously with regard to the question whether a contract must be reduced to writing or executed in a public instrument.\(^{101}\)

Contracts by correspondence are said to be "complete" only when the conditions prescribed by the legislation of all the contracting parties have been complied with.\(^{102}\)

The nature and obligation of contracts is governed by the personal law common to the parties. If they have no common personal law, the law of the place where the contract

---

\(^{101}\)CODE, art. 180.

According to art. 32 of the Convention of Montevideo on International Civil Law the law of the place where a contract is to be performed determines whether it must be in writing and the character of the proper instrument.

The form of public documents is governed by the law of the place where they are executed. Private documents are governed by the law of the place of performance of the contract in question. Art. 39.

Concerning the law of the individual states apart from the Convention of Montevideo, see ARGENTINA, arts. 12, 950, 1214-1216 CIV. CODE; 2 ALCOSTA, op. cit. supra note 17, at 255, 322; ROGEE, op. cit. supra note 15, at 676-677; BOLIVIA, art. 36 CIV. CODE; BRAZIL, art. 11 INTR. CIV. CODE, BESILLAGU, op. cit. supra note 12, at 170-171, 1 CODIGO CIVIL, supra note 17, at 129-130; OCTAVIO, 28 YALE L. J. 465; CHILE, art. 17 CIV. CODE; COLOMBIA, arts. 20-21 CIV. CODE, RESTREPO-HERNANDEZ, op. cit. supra note 12, at 356-359; COSTA RICA, art. 8 CIV. CODE; CUBA, art. 11 CIV. CODE; ECUADOR, art. 16 CIV. CODE; GUATEMALA, art. 18 CIV. CODE; HONDURAS, art. 15 CIV. CODE; ELION, op. cit. supra note 12, at 452-453; MEXICO, art. 15 CIV. CODE; NICARAGUA, art. VI-14 CIV. CODE; PANAMA, art. 7 CIV. CODE; SALVADOR, art. 17 CIV. CODE; URUGUAY, arts. 6, 1579 CIV. CODE; CARBIO, op. cit. supra note 12, at 198-199; VENEZUELA, art. 11 CIV. CODE.

The law governing the obligation of the contract controls also with respect to their proof, BRAZIL, art. 12 INTR. CIV. CODE, BESILLAGU, op. cit. supra note 12, at 171; 1 CODIGO CIVIL, supra note 17, at 130-131; BOLIVIA, arts. 36-37 CIV. CODE. If the law of the forum requires a transaction to be proved by a public act, a foreign transaction which is to take effect at the forum must be executed in like manner. CHILE, art. 18 CIV. CODE; COLOMBIA, art. 22 CIV. CODE; COSTA RICA, art. 8 CIV. CODE; ECUADOR, art. 17 CIV. CODE; HONDURAS, art. 17 CIV. CODE; NICARAGUA, art. XV CIV. CODE; PANAMA, art. 8 CIV. CODE; SALVADOR, art. 18 CIV. CODE; URUGUAY, art. 6 CIV. CODE.\(^{102}\)

According to article 37 of the Convention of Montevideo on International Civil Law the execution of a contract by correspondence or by agent is governed by the law of the place from which the offer was sent.

The Latin-American countries differ greatly as regards the time when a contract is deemed to be concluded. Some regard the contract as completed when the offer is accepted. CHILE, art. 98 COM. CODE; COSTA RICA, art. 1009 CIV. CODE; ECUADOR, art. 142 COM. CODE; PANAMA, art. 185, COM. CODE. Or when the acceptance is dispatched. ARGENTINA, art. 1154 CIV. CODE; art. 214 COM. CODE; BOLIVIA, art. 1086 CIV. CODE; CUBA, art. 54, COM. CODE; MEXICO, art. 80 COM. CODE. Others, when the acceptance reaches the offeror. MEXICO, art. 1807 CIV. CODE; URUGUAY, art. 1226 CIV. CODE. Or only when the offeror has knowledge of the acceptance. CUBA, art. 1262 CIV. CODE; PANAMA, art. 1113 CIV. CODE. The states following the view last mentioned create a presumption that the contract was made in the state from which the offer was sent.
is made shall control. In contracts of "adhesion" there is a presumption in favor of the personal law of the party which offered or prepared them.

The law governing the nature and obligation of contracts controls also their discharge and the time within which suit must be brought.

The law of the place of performance controls the mode of payment and the money in which payment is to be made.

b. Special Contracts

In addition to the rules governing contracts in general, the Code lays down many rules, largely of an international public order, with respect to a great variety of special contracts.

2. Quasi-Contracts.

The rights and duties arising out of a negotiorum gestio are regulated by the law of the place in which the business was carried on.

The return of that which is not due is subject to the common personal law of the parties, and, in the absence of such common law, to that of the place of payment.

The other quasi-contracts are subject to the law which regulates the legal institution which gave rise to them.

---

103 Code, art. 186.
104 As to contracts relating to land see Argentina, art. 1211 Civ. Code; Brazil, Octavio, (1919) 28 Yale L. J. 467; Chile, art. 16 Civ. Code; Colombia, art. 20 Civ. Code; Ecuador, art. 15 Civ. Code; Honduras, art. 14 Civ. Code; Panama, art. 6 Civ. Code; Salvador, art. 16 Civ. Code.
105 Code, art. 185.
106 Code, art. 169.
107 Code, art. 229.
108 Art. 51 of the Convention of Montevideo on International Civil Law provides likewise that personal actions shall be barred if they are barred by the law of the place governing the obligation.
109 See articles 194-219 Code.
110 Code, art. 220.
111 Code, art. 221.
112 Code, art. 222; see also Code, art. 165.
113 Art. 38 of the Convention of Montevideo on International Civil Law provides that obligations not arising out of contracts shall be governed by the law of the place where the act, legal or illegal, out of which they arose occurred.
3. Torts, including Workman's Compensation Acts.

Obligations arising from acts or omissions involving fault or negligence are governed by the law of the place in which the negligence or fault giving rise to them occurred.\textsuperscript{113} Legislation relating to accidents of labor and social protection of the laborer is territorial. The law of the place where the injury is received therefore controls.\textsuperscript{114}

Accidental collision in territorial waters or in the national air is subject to the law of the flag common to the colliding vessels.\textsuperscript{115} If the flags are different, the law of the place of collision is applied.\textsuperscript{116}

The local law is applied to wrongful collision in territorial waters or in the national air.\textsuperscript{117}

Accidental or wrongful collision on the high seas or in the open air is governed by the law of the flag of all the ships, if all the ships or aircraft carry the same flag.\textsuperscript{118} If they have not the same flag, the collision is governed by the law of the flag of the ship or aircraft struck, provided the collision was wrongful.\textsuperscript{119} If the collision was accidental, each shall bear one-half of the sum total of the damage, apportioned in accordance with the law of one of them, and the other half apportioned in accordance with the law of the other.\textsuperscript{120}

III.

The Pan-American Code of Private International Law was approved at Havana by all Latin-American states, subject to certain reservations. The Delegation of the United States abstained from voting, but made the following declaration:

\textsuperscript{113}Code, art. 168. Accord: The Convention of Montevideo on International Civil Law, art. 38; Brazil, Octavio, (1919) 28 Yale L. J. 469; Bevilacqua, op. cit. supra note 12, at 172; 1 Codigo Civil, supra note 17, at 135; Colombia, Restrepo-Hernandez, op. cit. supra note 12, at 500-501.

\textsuperscript{114}Code, art. 198.

\textsuperscript{115}Code, art. 289.

\textsuperscript{116}Code, art. 290.

\textsuperscript{117}Code, art. 291.

\textsuperscript{118}Code, art. 292.

\textsuperscript{119}Code, art. 293.

\textsuperscript{120}Code, art. 294.

According to the Convention of Montevideo on International Commercial Law, the lex loci delicti governs collisions in territorial waters, Art. 11. If the collision occurs in the high seas, the law of the country where the vessels are registered shall control, and if the vessels are registered in different countries, the law of the country that is most favorable to the defendant, Art. 12.
The Delegation of the United States of America regrets very much that it is unable at the present time to approve the Code of Dr. Bustamante, as in view of the Constitution of the United States of America, the relations among the States, members of the Union, and the powers and function of the Federal Government, it finds it very difficult to do so. The Government of the United States of America firmly maintains its intention not to disassociate itself from Latin-America, and, therefore, in accordance with Article 6 of the Convention, which permits any Government to adhere later thereto, it will make use of the privilege extended by this Article in order that, after carefully studying the Code in all its provisions, it may be enabled to adhere to at least a large portion thereof. For these reasons, the Delegation of the United States of America reserves its vote in the hope, as has been stated, of adhering partly or to a considerable number of the Code’s provisions.¹²¹

As the subject matter of the first book of the Code, which has been outlined above, deals only with matters over which Congress has no jurisdiction, it may be taken for granted that the United States cannot adhere to this portion of the Code. Apart from this constitutional difficulty, it is obvious that the Code has adopted rules which are fundamentally at variance with the law of the United States. The Code follows the continental system of the conflict of laws rather than the Anglo-American. This is seen in the first place in the great importance attached to the “personal” law. According to the Code, “capacity” to do juristic acts is governed by the personal law, without regard to the connection in which the question may arise. It includes not only all cases of capacity in the field of domestic relations, but also those relating to contracts, to conveyances of land, or to the execution of wills disposing of real property.

In a number of instances matters are looked upon as being of an internal public order, having extraterritorial effect, which are not so regarded by our law. The question of “majority” may be mentioned as one instance, and the “status” of prodigality resulting from the appointment of a guardian, as another.

¹²¹Sixth International Conference of American States, Final Act, Havana, 1928, page 83.
The personal law is frequently applied by the Code where the law of situs would control in our law. Thus, the effect of marriage upon the property rights of husband and wife is controlled by the personal law common to the parties, and in the absence of a common personal law, by that of the first matrimonial domicil, without regard to the nature of the property as personal or real. 122 Whether a wife has a lien upon her husband’s realty to protect her with respect to the administration of her property by him depends also in the first place upon the personal law. 123 Again, the parents’ right of usufruct in the property of their minor children depends upon the personal law of the children, whatever the nature of the property or the place where it is located. 124 Whether the ward is protected by a lien upon his guardian’s realty is determined in the first place by the personal law. 125 Rights of succession are governed by the personal law of the decedent, both in the case of intestate and testamentary succession, without regard to the nature of the property as real or personal. 126 This rule is applied also in respect of the right of inheritance of legitimated 127 or adopted 128 children or to the rights of inheritance of illegitimate children. 129

In addition to the above differences of a general nature, important differences may be noted in connection with practically each of the topics dealt with in the first book of the Code. Only a few of them can be mentioned. Thus, marriage is controlled largely by the personal law of the parties, except as to matters of form, whereas the law of celebration controls generally with us. 130 A divorce will be granted only, where there has been a change of domicil, if the personal law of both spouses at the time the cause relied upon occurred recognizes it as a cause for divorce. 131 Our law in such a case looks only to the law of the state in which the petitioner is domiciled at the time of divorce. The effect of marriage upon the property rights of the spouses, in the absence of a marriage contract, is governed by the personal law of the spouses at the time of the marriage, which is common to them, and otherwise by the law of the first matrimonial

122Code, art. 187, par. 2.
123Code, art. 45.
124Code, art. 70.
125Code, art. 87.
126Code, art. 144.
127Code, art. 55.
128Code, art. 74.
129Code, art. 65.
130Code, arts. 36-38.
131Code, art. 52.
domicil. The rights conferred by this law are not affected by a change in the personal law.\textsuperscript{132} Our law distinguishes between real and personal property and applies the law of the new domicil to subsequent acquisitions of personal property. As regards guardianship, the Code does not recognize our rule that the powers of a guardian are territorial. Under the Code a guardian is appointed in accordance with the personal law of the minor and has power over all the property belonging to such minor, irrespective of its nature or location:\textsuperscript{133}

The Anglo-American conception of the Conflict of Laws differs widely from the one entertained on the continent and in Latin-America, and any attempt to bring them more closely together is beset with formidable difficulties. The Code itself, so far as one can gather, makes no attempt to adjust its provisions to those prevailing in this country, for its author had sufficient obstacles to overcome to frame a code acceptable to the Latin-American states, for which the Code was drawn up primarily. The rules of the conflict of laws obtaining in the various Latin-American countries differ considerably in and of themselves, and the provisions of the Code to which they relate, although based more or less upon continental models, show great divergencies, especially in the law of marriage and divorce and in the law of succession. In the matter of the conflict of laws, an irreconcilable conflict of long standing existed, for Brazil has accepted the principle of nationality, and Argentina that of the domicil.\textsuperscript{134} The task of drawing up a code which should meet with the approval of the Latin-American countries was therefore a task of the greatest delicacy. The unwillingness of either Brazil or Argentina to yield made it impossible to frame a

\textsuperscript{132}\textsc{Code}, art. 187, par. 2.

\textsuperscript{133}\textsc{Code}, art. 84.

\textsuperscript{134}The Latin-American states fall into three groups. One group consists of those applying the national law: \textsc{Brazil}, art. 8 \textsc{Intr. Civ. Code}; \textsc{Cuba}, art. 9 \textsc{Civ. Code}; \textsc{Guatemala}, art. 48 Law Concerning Foreigners; \textsc{Honduras}, art. 13 \textsc{Civ. Code}; \textsc{Venezuela}, art. 9 \textsc{Civ. Code}.

Another group is composed of those applying the law of domicil: \textsc{Argentina}, arts. 6-7 \textsc{Civ. Code}; \textsc{Nicaragua}, art. VI-1 \textsc{Civ. Code}; \textsc{Paraguay}, arts. 6-7 \textsc{Civ. Code}.

A third group applies mixed principles: \textsc{Chile}, arts. 14-15 \textsc{Civ. Code}; \textsc{Colombia}, arts. 18-19 \textsc{Civ. Code}; \textsc{Costa Rica}, art. 3 \textsc{Civ. Code}; \textsc{Salvador}, art. 15 \textsc{Civ. Code}; \textsc{Uruguay}, art. 4 \textsc{Civ. Code}.

The new \textsc{Civil Code of Mexico} (of 1928) pronounces itself in favor of the territorial system without any qualifications. Art. 12 reads:

"The laws of Mexico, including those which refer to the status and capacity of persons, apply to all inhabitants of the Republic, without reference to the fact whether they are nationals or foreigners, whether they are domiciled in Mexico or transients."
code of private international law which should operate uniformly in Latin-America. Dr. Bustamante was forced, therefore, to allow each state to apply as personal law, either that of the domicile or that of nationality, and Article 7 of the Code so provides.

For a proper understanding of the Pan-American Code of Private International Law one must be familiar with Dr. Bustamante's approach to the subject of the conflict of laws. A key to his views may be found in Article 3 of the Code, which reads as follows: "For the exercise of civil rights and the enjoyment of identical individual guaranties, the laws and regulations enforced in each contracting State are deemed to be divided into the three following classes:

"I. Those applying to persons by reason of their domicile or their nationality and following them even when they go to another country, termed personal or of an internal public order.

"II. Those binding alike upon all persons residing in the territory, whether or not they are nationals, termed territorial, local or of an international public order.

"III. Those applying only to the expression, interpretation, or presumption of the will of the parties or of one of them, termed voluntary or of a private order."

**Private Laws.**

By private laws, Dr. Bustamante means laws which allow individuals to arrange their legal relations to suit themselves. If the intention of the party or of the parties in question can be ascertained, effect will be given to it. If such an intention is not expressed either directly or indirectly, the law is compelled to establish certain presumptions. In such a case Dr. Bustamante himself prefers, in the matter of inheritance, a presumption in favor of the personal law of the decedent, which presumption has been adopted by the Code. In the case of contracts, it is presumed that the parties contracted with reference to their common personal law, and, in the absence of such a common personal law, with reference to the law of the place of contracting. As regards marriage settlements, the parties are presumed, in the absence of a common personal law, to have contracted with reference to the law of the first matrimonial domicile.
Private laws in the above sense are, according to Dr. Bustamante, neither territorial nor extraterritorial, but impersonal and international. They apply both to nationals and to foreigners, with and without the state or country enacting them.\textsuperscript{135}

Dr. Bustamante has developed his views relating to "private" laws fully in a volume entitled "Autarquia Personal," which was published in 1914.

Laws of Public Order.

1. Laws of Internal Public Order.

Laws of public order stand out by way of contrast with private laws, for they are mandatory and permit of no deviation therefrom. Dr. Bustamante has developed his thoughts on the subject in an earlier volume, entitled "Orden Publico," which appeared in 1893. Laws falling within the category of laws of internal public order are, according to Dr. Bustamante, those "which regulate the private juridical relations, the effect and object of which depend neither upon the territory nor upon the substantial existence of the State, but which organize the civil society of such State internally."\textsuperscript{136} These laws are binding upon all persons belonging to the civil society referred to and are obligatory upon them, but do not apply to persons not belonging to such society. They are binding upon the members of that society also when they leave the state. According to Dr. Bustamante the civil society of a state is composed of its nationals.\textsuperscript{137} In view of the compromise adopted in the Code, such society may be constituted in each state, in its choice, either of its nationals or of the persons domiciled therein.

Laws of internal public order are those relating to "capacity" to do juristic acts, to "status," and to those determining the rights and duties arising in the field of domestic relations.\textsuperscript{138}

2. Laws of Public International Order.

Laws of international public order "are those having the

\textsuperscript{135}BUSTAMANTE, LA AUTARQUIA PERSONAL (1914) pp. 138 et seq.
\textsuperscript{136}BUSTAMANTE, LE CODE, p. 12; see also BUSTAMANTE, EL ORDEN PUBLICO (1893) p. 78.
\textsuperscript{137}BUSTAMANTE, LA AUTARQUIA PERSONAL (1914) p. 101.
\textsuperscript{138}BUSTAMANTE, EL ORDEN PUBLICO (1893) p. 176.
State for their object and constituting its law, so that their violation or inapplication would injure its sovereignty and destroy or materially diminish their foundation and organization."

A law of an international public order under the Code may set aside the normal rules applicable to a given subject, as they do in the United States. Article 8 of the Code contains an express provision to this effect. It reads: "The rights acquired under the rules of the Code shall have full extra-territorial force in the contracting States, except whenever any of their effects or consequences is in conflict with the rules of an international public order." In addition to this general section there are specific provisions in the Code authorizing the contracting States to decline to recognize rights acquired under the laws of another State.

According to Dr. Bustamante and the Pan-American Code, laws of an international public order have, however, another meaning which takes from them the exceptional character which they have in Anglo-American law, and makes them apply as naturally and normally as laws of an internal public order. From this point of view a law is one of an international public order if it applies compulsorily to everybody in the state, or to everybody interested in the property located in the state, without reference to the nationality or domicile of the parties. A law of an international public order thus necessarily excludes the application of any foreign law.

Does the statement that a particular law or rule is one of international public order mean also that it has no extra-territorial operation? In his "Orden Publico," Dr. Bustamante states that some rules of international public order are "expansive," and others are "restrictive." The latter are applicable only to things or acts within the state, whereas the former apply also to acts outside. Political, administrative, criminal and procedural laws belong to the class of laws of an international public order which operate generally restrictively, that is to say, within the limits of the state enacting them. But in some exceptional circumstances, as in the case of issuing counterfeit money, they may be expansive and applicable to acts done without the state.

---

139BUSTAMANTE, LE CODE, p. 12.
140See, for example, arts. 40, 41 and 77 of the Code.
141BUSTAMANTE, EL ORDEN PUBLICO (1893) p. 104.
142BUSTAMANTE, LECCIONES DE DERECHO INTERNACIONAL PRIVADO (1893) p. 135.
143BUSTAMANTE, EL ORDEN PUBLICO (1893) p. 178.
144BUSTAMANTE, EL ORDEN PUBLICO (1893) p. 143.
Rules of an international public order relating to property are generally territorial and restrictive, applying only to property within the state. However, a rule of the situs requiring a conveyance or mortgage to be executed in a public instrument is said to be an expansive rule of public international order, because it applies to conveyances or mortgages executed in another state or country.

To those used to the Anglo-American terminology in the conflict of laws, the application of any rule of the Pan-American Code which is said to be one of international public order is often a source of embarrassment. A few illustrations will serve to indicate the nature of the difficulty. For example, Article 61 of the Code provides: "A prohibition against legitimation of children not simply natural is of an international public order." Is the term "international public order" used in the Anglo-American sense, so that the legitimacy of children legitimated under the proper law would not be recognized in a state in which such prohibition exists? According to the distinguished author of the Code, this is not its meaning, for the status must be recognized as an acquired right under Article 8 of the Code. Article 61 has reference to the laws of the state in which the legitimation takes place, and thus means only that such children cannot be legitimated in a state where such prohibition exists.

Article 91 provides: "Rules establishing the consequences of interdiction are also of an international public order." In view of the fact that the next article states that the declaration of incapacity and interdiction have extraterritorial force, the exact meaning of the article is not clear. According to Dr. Bustamante, Article 91 means that interdiction pronounced in one state shall have no effect in another state which it does not have by the law of the latter state.

Article 117 reads as follows: "The general rules relating to property and the manner of acquiring it or alienating it inter vivos * * * are of an international public order." Here the article intends to say that these matters are governed by the law of the situs.

Article 148 reads: "Provisions forbidding a joint, holographic or non-cupative will, * * * are of an international public order."

145BUSTAMANTE, EL ORDEN PUBLICO (1893) p. 139.
146BUSTAMANTE, EL ORDEN PUBLICO (1893) p. 175.
147The writer desires to acknowledge his deep indebtedness to Dr. Bustamante for his kindness in explaining to him various articles of the Code.
public order.” This article means that a will executed in a state whose laws forbid such a will is invalid everywhere.

Article 153 reads as follows: “Notwithstanding the provision of the preceding article, the incapacity to inherit which contracting States consider as such, are of an international public order.” The preceding article stated that the capacity to inherit was governed by the personal law of the heir or legatee. Dr. Bustamante states that article 153 refers to the law of the state in which the heir, under the will or upon intestacy, wishes to exercise any right, if he is declared incapable by the legislation of that state.

Article 175 provides as follows: “The rules which prevent the conclusion of contracts, clauses, and conditions in conflict with the law, morality and public policy, * * * are of an international public order.” This article, according to Dr. Bustamante, refers to the law of the place where the contract was made and to the law of the state in which the question arises. As regards matters relating to performance, it refers to the law of the place of performance. In contracts by correspondence it refers to both the law of the state of the offeror and to that of the state of the offeree.

Similar difficulties are experienced when the Code states that a particular law is “local” or “territorial.” Thus in connection with the contract of partnership Article 204 of the Code provides: “Laws requiring a lawful object, solemn forms, and inventory when there is real estate, are territorial.” Reference is here had to the law of the place where the contract is made as regards the solemn forms and inventory, and to those of any state in which it is to be performed, as regards its lawful object.”

A more intimate acquaintanceship with the Pan-American Code would without question remove many of the difficulties which a person trained in Anglo-American law encounters when he tries to understand its provisions and their application. An international code must, of course, be as brief as possible, but certainty of meaning is after all the greatest desideratum, and in this regard the Code would have gained, at least in the eyes of North American lawyers, if it had been more specific in its references whenever a provision is said to be “local,” “territorial” or one “of international public order.”

A comparison between the Pan-American Code and the Restatement of the Conflict of Laws by the American Law Institute would reveal many interesting points of difference,
both of substance and method, but such a study cannot be undertaken at this time. Attention may be called, however, to the fact that the Restatement contains 658 sections, whereas the Pan-American Code, covering a much wider field, contains only 437. And yet, it is felt by many in this country that the Restatement does not set forth our law with sufficient particularity.

A proper estimate of the Pan-American Code requires, however, that it be judged in the light of other codes, and especially of other national or international codifications of the rules of Private International Law. Measured by this standard, it is indeed a most extraordinary achievement, representing a great advance over all previous attempts at codification, and constituting a noble monument to the genius of a great Latin-American jurist, Dr. Antonio S. de Bustamante.
CONTRIBUTORS TO THIS ISSUE

LEADING ARTICLES

Ernest G. Lorenzen is professor of law at Yale University Law School.

Agustin Cruz received the degree of Doctor of Jurisprudence from the University of Havana. He is a practicing lawyer in Havana, Cuba, and is now doing graduate work in the Tulane University College of Law.

SIGNED COMMENTS

Robert H. Marr was formerly a member of the New Orleans bar. He is a former contributor to the Tulane Law Review and the Southern Law Quarterly. He is the author of several books on Louisiana law.

Eugene A. Nabors is assistant professor of law at the Tulane University College of Law.

H. Milton Colvin is a professor of law at the Tulane University College of Law.