THE ADMINISTRATION OF JUSTICE IN CONFLICT CASES INVOLVING REFUGEES

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I. THE REFUGEE AND THE LAW

1. The total population of Sweden on January 1, 1957, was estimated at 7,341,122.[1] The total number of aliens residing in Sweden on April 1, 1957, was approximately 250,000.[2] A certain proportion of the aliens in Sweden are refugees and some of these are stateless. A statute of 1954 governs the status of aliens with respect to matters of public law, such as the right of entry into the country and the right to take up residence, to work, etc. Swedish citizenship may, at the discretion of the proper authorities, be granted to aliens who apply for it, but one of the prerequisites for naturalization is domicile (or residence) in Sweden for at least seven years.[3] This rule, in conjunction with the steady flow of refugees from abroad, explains why a relatively large number of persons residing in Sweden are aliens who have escaped from a country of which they are still citizens but who have no intention of returning to it in the reasonably near future.

2. Many of the problems brought about by the influx of refugees during and since the second world war and their admission to and settlement in Sweden are of a legal nature, and some of them are conflict problems, i.e. problems concerning the choice of law, jurisdiction and enforcement of foreign judgments. The present paper will deal with some conflict problems in the field of family law which the Swedish courts have had to face in recent years, and

[1] *Statistisk Årsbok för Sverige* (Statistical Abstract of Sweden) *Årg. 44, 1957*. Statistiska Centralbyrån (Central Bureau of Statistics), Stockholm 1953, p. 8.

[2] *Op. cit.*, p. 84.

[3] Swedish internal law does not make any distinction between "domicile" and "residence". Legal texts use the term *hemvist*, which refers to the place (or home) where a person permanently lives. In Swedish conflict of laws (statutory texts, cases and legal writing) the term *hemvist* is likewise used, although the term *domicil* may be found here and there in Swedish legal writing. It is sometimes assumed that the presence of *hemvist* or residence in Sweden in the municipal-law sense does not necessarily involve *domicil*, which would require, in addition, an intention to remain in Sweden. On the other hand, *hemvist* in itself imports a quality of permanence, distinguishing it from mere sojourn or stay. The question of the meaning or, rather, the employment of the various terms is not important for the discussion in the present paper, where the terms "residence" and "domicile" are used alternatively and merely denote the fact that a person is living permanently in Sweden.

with the judicial process by which solutions of these problems have been sought.[4]

In contemporary Swedish private international law the "personal law" of an individual is the law of the country of which he is a citizen.[5] In legal texts that country is referred to as his home country *(hemland),* to which the individual is said to "belong". If he is stateless, the personal law is the law of the country of his domicile or of his residence.[6] The so-called scope of the personal law cannot be explained by any overall definition but will be established by an analysis of the various choice-of-law rules in force. For instance, a person cannot marry in Sweden if his personal law contains a prohibition against his marrying; he cannot obtain a divorce in Sweden for a cause not recognized as a cause for divorce by his personal law; a third-country divorce contrary to this requirement will not be recognized in Sweden; questions concerning the matrimonial property are governed by the personal law of the husband at the time of the marriage; an alien can adopt or be adopted only if a Swedish decree of adoption would be recognized by his personal law; a deceased person's property will be distributed in accordance with the law of inheritance in the country of which he is a citizen at the time of his death, etc.

The "principle of nationality" thus prevailing is embodied in some statutory texts.[7] At the same time recent cases show an inclination on the part of the courts to substitute domicile for nationality as a connecting factor, when this can be done without violating statutory provisions; this tendency might also be described as a gradual limitation of the scope of the personal law. There is also a widespread feeling amongst lawyers that the domicile principle is more suited to modern conditions than the na-

[4] Conflict problems in the field of property law caused, *inter alia*, by the influx of refugees have been discussed by Hjerner, "The general approach to foreign confiscations", *Scandinavian Studies in Law* 1958, pp. 177 ff.

[5] The author is reluctant to use the term "personal law" as it, and even more the corresponding German and French terms *(Personalstatut; statut personnel)*, hinder rather than help the understanding of legal relations. Cf. *infra*, pp. 51 f. But as this paper does not purport to be an *exposé* of the existing law but contains a discussion of principles and ideas expressed in the opinions of courts and by legal writers, who employ the traditional language, it follows the same line. Quotation marks are sometimes used as a warning against the uncritical acceptance of conflict slogans.

[6] *Orell* v. *Kristofferson*, 1939 N.J.A. 96. See also Eek, *Om främlingskap*, Stockholm 1955, pp. 153 ff. Cf. Schnitzer, *Handbuch des internationalen Privatrechts*, Vol. 1, 3rd ed. Basel 1950, pp. 166 ff.

[7] Cf. Schmidt, "Nationality and domicile in Swedish private international law", *The International Law Quarterly* 1951, pp. 43 ff.

tionality principle is. However, the situation is not only that the courts are bound to apply the statutes in force. In addition, Sweden is under an international obligation to apply the conflict rules of the Hague conventions based on the principle of nationality, so long as she continues to be a party to those conventions.[8] The fact that in principle the personal law in Sweden is determined by the citizenship of the *propositus* forced Sweden, in ratifying the 1951 Convention relating to the status of refugees, to make a reservation with respect to its Article 12, which provides that "the personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence".

3. Such is the law. However, the fact that a great number of political refugees live in Sweden, marry, give birth to children, divorce (or want to divorce), work, eat, trade and die has put the courts in difficult positions.[9] The personal law of a former Estonian is the law of the country to which he "belongs" as a citizen, that is to say, as a rule, the U.S.S.R., and the personal law of a refugee from Poland or Hungary is Polish or Hungarian law, as the case may be. As will be demonstrated later on, this fact has from time to time, but not necessarily always, made it extremely repugnant to decide some cases concerning refugees who reside in Sweden in accordance with the Swedish choice-of-law or jurisdiction rules in force. The courts have sought for means of correcting, for the sake of justice, the results of a strict application of the Swedish conflict rules and of the foreign *lex causae* to which they refer.

[8] Cf. *ICJ Reports* 1958 p. 55. Sweden adhered in 1958 to (i) the Convention of 1902 regulating the validity of marriages; (ii) the Convention of 1902 on guardianship; (iii) the Convention of 1905 on interdiction; and (iv) the Convention of 1905 regulating the effects of marriage. The Swedish government has, however, denounced the two 1902 conventions and ceased to be a party to these conventions as from June 1, 1959. A Swedish Act of 1904 governing certain international relations concerning marriage, guardianship and adoption contains provisions from the three conventions mentioned first, while the conflict rules from the Convention regulating the effects of marriage are contained in a statute of 1912. The Act of 1904 includes, in Ch. 3, provisions which partly correspond to the rules of the Hague Convention of 1902, on divorce and separation, from which Sweden withdrew in 1934. On that occasion, some amendments to the Act were adopted, but on the whole the Hague rules still govern divorce and separation in Sweden although Sweden is not internationally bound to apply them.

[9] Out of 250,000 aliens in Sweden on April 1, 1957, 56,919 were holders of residence permits. Of these, about 9000 were Estonians, Latvians and Lithuanians, 2509 were Polish citizens and 5848 Hungarian citizens. *Statistisk Årsbok för Sverige 1957*, p. 64.

It was not easy to find such means. The maid-of-all-work in this field of the law, *ordre public,* is rarely—perhaps too rarely—called upon in Swedish court practice. Moreover, to apply *ordre public* means to disregard a rule or a set of rules in the *lex causae* because the foreign rules are found to be incompatible with fundamental principles of the *lex fori.* But the rules of family law in contemporary Russia or Poland or Hungary, though differing from the corresponding Swedish rules in one respect or another, are certainly not incompatible with fundamental Swedish principles of law. Furthermore, the doctrine of *ordre public* does not explain why a Swedish court should take jurisdiction in a matter which, according to a Swedish statute, is outside Sweden's international jurisdiction, and this is precisely one of the issues involved. In passing, it should be mentioned that the Swedish courts do not seem to have deviated in refugee cases from the principle that a reference to a foreign law means a reference to a law in force according to its own intertemporal provisions. In other words, if, for example, a marriage was contracted in Riga in 1938 it is not the Latvian law in force at that time that decides whether there is a cause for divorce but the Soviet law of to-day, as long as the spouses retain the Soviet citizenship they acquired in 1940. The Swedish courts have not, in order to solve refugee problems, tried to achieve what Makarov calls a *Versteinerung* (petrification) of a previously applicable foreign law.[1]

Some other device had to be looked for. We shall relate the facts in a series of cases and discuss the reasoning of the Supreme Court of Sweden in those cases. We shall also discuss the usefulness of the principles expressed or implied in the decisions for solving the special problems of the refugee.

4. Before doing so we must, however, protect the reader against misunderstandings, and the writer against accusations of unwarranted criticism of the Supreme Court, by making a few remarks relating to the rôle and the functioning of the Court. An essential point to remember when studying Swedish case law is that the doctrine of *stare decisis* is not a part of Swedish law. The Supreme Court is not bound by its own previous decisions, nor are lower courts legally obliged to apply, in their decisions, a "law" previously laid down by the Court in a similar or even identical case. The Supreme Court is, of course, anxious to be consistent and the

[1] Cf. Makarov, "Postmortale Änderungen der Sachnormen des Erbstatuts", *Zeitschrift für ausländisches und internationales Privatrecht* 1957, pp. 202 f.

lower courts normally follow its decisions.[2] But the very fact that it is not the task of the Supreme Court to develop or elucidate the law by distinguishing cases from one another but only to decide the case actually *sub judice,* explains why the Court shows reserve towards "unnecessary" comments on the law bearing upon matters outside the case.

A Danish writer has said that whereas in doubtful cases courts outside Scandinavia often formulate their grounds as a syllogism in which both the applicable rule of law and the facts subsumed under the rule are established, Scandinavian courts often do not mention the rules of law they have had recourse to. They seem to mention only the facts that seem relevant. "The reader is left to find out for himself which contact is decisive *prima facie,* which rule applies."[3] Even such far-reaching reticence can be explained with respect to the courts in a country where the "need for certainty", which according to Goodhart is both the cause and the justification for the English doctrine of precedent,[4] is satisfied by the system of codification. But in the very special field of private international law, where statutory regulation is less complete than in the field of private law in general and where the existing written rules are to a large extent outmoded and difficult to construe, a less reticent attitude on the part of the courts would be desirable. Some of the cases which will be presented below seem to bear out this statement.

II. THE LOHK CASE. PROTECTED AND UNPROTECTED CITIZENS

1. In Sweden an Act of 1904 governs certain international relations concerning marriage, guardianship and adoption (in the present paper called *the Act of 1904*).[4a] According to Ch. 3. sec. 1,

[2] It could be said of Sweden today, as was said by Baron Hume of Scottish law at the end of the eighteenth century: "The authority of precedents as a part of our law certainly is not established but ... they ought to have much weight. ... A judge on this account will often decide according to precedents in preference of his own opinion, though he will not be guilty of a breach of duty if he swerves from them." Quoted from T. B. Smith, *The Doctrine of Judicial Precedent in Scots Law,* Edinburgh 1952, pp. 9 f. Cf. Schmidt, "Construction of statutes", *Scandinavian Studies in Law* 1957, p. 167.

[3] Lando, "Scandinavian conflict of law rules respecting contracts", *The American Journal of Comparative Law,* Vol. 6, pp. 7 f.

[4] Cf. Goodhart, "Precedent in English and continental law", *The Law Quarterly Review,* Vol. 50, pp. 40 ff.

[4a] Cf. *supra,* p. 25 footnote 8.

subsec. 1, of the Act, an action for separation or divorce between foreign subjects is admissible provided that the defendant spouse has a domicile in Sweden or that the spouses formerly had a common domicile in Sweden and the defendant has deserted his spouse or has left the country after grounds for divorce arose.

2. The case *Elmar Lohk* v. *Ilse Lohk* (1948 N.J.A. 805) concerns a former Estonian citizen who, through the incorporation of Estonia into the U.S.S.R. in August 1940 and a subsequent Soviet decree of the same year, had acquired Soviet citizenship. He arrived in Sweden as a refugee in 1944. Three years later he applied for a divorce in Sweden on the grounds that his wife had been missing for at least the preceding three years and was not known to be alive. The Supreme Court decided to accept jurisdiction in spite of the provisions cited above. The Court held that the Act of 1904 did not provide for those who "hold no citizenship or, though possessing a citizenship, do not enjoy the protection of their home country". There were two hurdles to jump. Mr. Lohk had a nationality. The Court, however, put him in the same category as a stateless person because he was said not to be subject to the protection of the country whose nationality he held. The second obstacle related to the fact that (regardless of the status of the applicant) the defendant spouse must be or have been domiciled in Sweden. This jurisdictional hurdle could be cleared only by putting forward the argument that the Act of 1904 did not provide at all for matters relating to persons who were stateless or otherwise without diplomatic protection. We shall return to this jurisdictional issue later (*see infra,* p. 41 and p. 44).

The reasoning of the Court involved the idea that stateless persons and another category of persons, such as Mr. Lohk, were to be regarded and treated as identical by the law. The stateless person "belongs" to his country of domicile and his personal law is the law of that country. The same should be said of persons in the other category. The absence of protection should be the relevant criterion, making some people "*quasi*-stateless", the term that will be used in this paper. In order to enable an assessment of the usefulness of this criterion to be made, it will be necessary to refer to some basic rules of law relating to nationality.

3. According to a well-established rule of the Law of Nations, each state has the exclusive power to determine who are its nationals. In consequence, it is universally accepted as a principle of

private international law that "the question whether a given person is the citizen of a certain state can only be decided by the law of that state".[5] The Hague Convention of 1930 on certain questions relating to the conflict of nationality laws, signed and ratified by Sweden among a number of other countries,[6] embodies both rules:

> *Article 1.* It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.
>
> *Article 2.* Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.

The determination of citizenship referred to in Article 1 is normally achieved by municipal legislation adhering to the *lex soli* or the *lex sanguinis* or to combined principles and providing for naturalization and for loss of citizenship. Special problems occur when the territory of one state, or part thereof, becomes the territory of another state; the prevailing opinion is that the citizens inhabiting a ceded or annexed territory become citizens of the state which acquires the territory.[7] In other words, it is not contrary to international custom that an annexing state should extend its nationality to the inhabitants of an annexed territory. But it may be argued that under the Law of Nations a successor state is not entitled to claim as its nationals persons born in an annexed territory but not resident therein at the time of annexation. Estonians, for example, who had left Estonia at the time of its incorporation in the U.S.S.R. in 1940 might be regarded as truly stateless, since they have lost their Estonian citizenship and not subsequently accepted the Soviet nationality conferred upon them by the Russian enactment to this effect. The "recognition" of municipal nationality legislation spoken of in Article 1 of the 1930 Hague Convention means, *inter alia,* that states must admit that other states are entitled to exercise their *jus protectionis* in favour of persons whom they qualify as their nationals. According

[5] Wolff, *Private International Law,* 2nd ed. Oxford 1950, p. 126. Cf. Batiffol, *Traité élémentaire de droit international privé,* 2nd ed. Paris 1955, pp. 60 and 73 ff.

[6] *League of Nations Treaty Series* Vol. CLXXIX, pp. 89 ff.

[7] Cf. Kelsen, *Principles of International Law,* New York 1952, pp. 250 ff. and O'Connell, *The Law of State Succession,* Cambridge 1956, pp. 245 ff.

to Article 4 of the Convention, a state may not afford diplomatic protection to one of its nationals against a state whose nationality such a person also possesses. Recognition may, however, be limited by other considerations too, relating to conventions, custom and general principles of law. It has been argued that under international law the exercise of protection presupposes a "genuine connection" between the individual and the state claiming the *jus protectionis*.[8] The *Nottebohm case*[9] is sometimes cited as an authority for such a rule. In that case it was held that it is international law which determines whether a state is entitled to exercise protection. This statement is not controversial. But the case concerned the international recognition of an allegedly fraudulent or "insincere" naturalization, and different opinions have been expressed on the advisability of drawing conclusions from this case when other kinds of doubtful or unusual state/individual relations are concerned and the *jus protectionis* is in question.[1]

However, in the Lohk case and the following cases to be discussed below, the Supreme Court did not deny that the *propositus* held a foreign citizenship, nor did it question the right of the U.S.S.R. to afford diplomatic protection under the rules of international law. It did only what a national court must be free to do under international law; it decided to what extent foreign nationality should play a rôle in conflict rules. In English law, where the principle of domicile prevails, it may be natural to distinguish between "political status" based upon nationality and "civil status" founded upon domicile, as explained by Lord Westlake in *Udny* v. *Udny*.[2] To a system of law where the principle of nationality prevails the same distinction may not present itself as *prima facie* important, but it might be reasonable to say that foreign nationality may be "re-defined" or "qualified".[3] There is no rule of general international law[4] by which in Sweden, for instance, na-

[8] Cf. Schwarzenberger, *International Law*, 3rd ed. London 1957, pp. 357 ff.
[9] *ICJ Reports* 1955, pp. 4 ff.
[1] Cf. Jones, "The Nottebohm case", *The International and Comparative Law Quarterly*, Vol. 5 (1956), pp. 239 ff.
[2] (1869) L. R. 1 Sc. & div. 441, 457. Cf. Schmitthoff, *The English Conflict of Laws*, 3rd ed. London 1954, p. 69.
[3] Nussbaum, *Principles of Private International Law*, New York 1943, p. 139, n. 25: "Nevertheless a state is free to redefine, for its own administrative purposes, foreign nationality." It is submitted that the purposes need not necessarily be "administrative".
[4] The treaty-law aspects are omitted in this paper. They prevent, however, "re-definition" with respect to countries which are parties to the same conventions as Sweden.

tionality must prevail as the denominator of the "personal law", and the country must also be free to decide the extent to which one or another denominator is accepted.

4. In the Lohk case the Swedish Supreme Court tried to re-define or qualify nationality by making it inoperative as a denominator of the personal law if the *propositus* did not "enjoy the protection of his home country". The Court did not define the meaning of "protection", but it seems safe to assume (as lower courts have done) that the intention was to refer to the terms used in international law, such as *jus protectionis,* and in municipal public law dealing with the individual's right to receive diplomatic protection from the government of his country. International law does not provide the answer to the question whether a particular person is entitled to diplomatic protection or whether he actually "enjoys" it in the sense that his government is prepared to afford protection in case of need. Evidently the test cannot be whether diplomatic action has actually been taken on behalf of the *propositus* by the authorities of his home country; such action would prove that a person "enjoys" protection, but the absence of action would not prove that he is not subject to protection. The test must concern the right of protection of the *propositus* under the law of his home country.

The legal situation with respect to protection varies from country to country. In some countries the import of protection has recently been debated with some intensity.[5] The point of departure is the old dictum *protectio trahit subjectionem et subjectio protectionem;* this means that the duty of allegiance implied by citizenship and the duty of protection on the part of society are reciprocal obligations resulting from the very nature of society.[6] This view has the authority of Vattel: "... ceux qui composent une nation se sont unis pour leur défense et leur commun avantage: nul ne peut être privé de cette union et des fruits qu'il en attend, tant que de son

[5] Cf. Geck, "Der Anspruch des Staatsbürgers auf Schutz gegenüber dem Ausland nach deutschem Recht", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* Vol. 17 (1956–57), pp. 476 ff.; Katsarov, "Hat der Bürger ein Recht auf diplomatischen Schutz?", *Österreichische Zeitschrift für öffentliches Recht,* Vol. 8, pp. 434 ff.; Sørensen, "Om retten til diplomatisk beskyttelse", *Festskrift til Professor, Dr. juris Poul Andersen 12. juni 1958,* København 1958, pp. 398 ff.; and, concerning the discussion in Switzerland, Guggenheim, *Traité de droit international,* Vol. 1, Genève 1953, pp. 310 ff.

[6] Cf. the United States case *Luria* v. *United States,* cited in Hackworth, *Digest of International Law,* Vol. 3, Washington 1942, p. 6.

coté il en remplit les conditions".[7] The question is, however, whether the right of protection is to be regarded as a constitutional right automatically belonging to everybody as a citizen (citizens being at the same time presumably bound by the duty of allegiance) or whether this right is limited in one way or another. If there are limitations, another question is whether a refusal on the part of the government to afford protection constitutes the last word in the matter, or whether a governmental decision can be challenged by court action against the government. In some countries the right of protection is explicitly mentioned in the written constitution as a fundamental right of the citizen. An example is Bulgaria, whose Constitution of December 7, 1947, provides (Article 83): "All Bulgarian citizens abroad enjoy the protection of the People's Republic of Bulgaria". In Sweden, K. H. Blomberg (Professor of Public Law in the University of Uppsala 1891–1909) has claimed that the individual, as a citizen, is entitled to protection.[8] A similar view was voiced in Switzerland by some writers but denied by others. The prevailing view to-day seems to be, however, that the state must afford the Swiss citizen protection abroad only when the interests of the state do not conflict with the individual's interest in protection.[9] This explains a statement by Guggenheim: "Pour la Suisse, la délivrance d'un passeport suisse n'entraine pas nécessairement la protection diplomatique".[1] Where the law of a foreign country reserves to the government such or similar discretion in deciding whether to afford diplomatic protection, the legal situation may vary from case to case even though the same foreign country is concerned, and a Swedish court would have to look into the niceties of the foreign law. But a claim of the foreign government that it affords diplomatic protection to a particular individual could hardly be disregarded except under special circumstances, for instance such as were present in the Nottebohm case.[2] But would a Swiss business-

[7] Vattel, *Le droit des gens*, Vol. 1, Chap. II, § 17.

[8] Blomberg, *Svensk statsrätt*, Uppsala 1904, p. 129. Cf. Wistrand, *La diplomatie et les conflits de nationalités. Principes et méthodes*, Paris 1923, pp. 30 and 42 f.

[9] Cf. Giacometti-Fleiner, *Schweizerisches Bundesstaatsrecht*, Zürich 1949, pp. 230 ff.

[1] Guggenheim, *op. cit.*, p. 324 footnote 3.

[2] In 1950, the Soviet Embassy in Stockholm in a note to the Swedish government complained against the treatment of a Soviet citizen, a passenger on the Soviet ship "Beloostrov", who was said to have gone for a walk in the streets, while the "Beloostrov" was in port in Stockholm, and to have been seized by the Swedish police and kept in jail for two months. The Swedish Ministry

man residing in Sweden be regarded as *quasi*-stateless because he claimed that he did not enjoy the continued protection of his government or because he proved the absence of such protection? Or should a refugee from Poland be regarded as protected because the diplomatic representative of his country in Sweden claimed that he was subject to diplomatic protection and even proved this claim by offering him a passport? In the *Chruszez case* (see *infra*, pp. 39 f.) the Swedish Ministry of Foreign Affairs was asked by the court of first instance its opinion as to whether the *propositus* enjoyed the protection of the Polish government. The Ministry, evidently aware of the fact that this was a question of Polish law and Polish governmental policy, declared itself unable to furnish a reply, and the court ruled that it was not proven that the *propositus* did not enjoy Polish protection.

5. The introduction of the criterion of the presence or absence of diplomatic protection in refugee cases does not solve the very special legal problems dealt with in this paper, which are caused by the influx of refugees. The last word would rest with the law and the government of the home country of the *propositus*. It is necessary to find some criterion which should relate not to law but to the facts that characterize the refugee cases. It might be argued, though the argument would be weak, that the Supreme Court did not mean to refer to diplomatic protection as a conception of public law but to the purely factual relations between a refugee and the country from which he had escaped and where he was not properly "protected". But can it be said that the Estonian refugee living in Sweden has as a rule been less benevolently dealt with by the Soviet government than the Estonian who has not managed to escape? The truth is that in contemporary life the fact that a person is a refugee is generally not the result of any specific act on the part of his government, such as banishment. It is the refugee who does not wish to be "protected"

of Foreign Affairs did not claim that the Soviet government did not have the right of diplomatic protection with respect to the person concerned (if such a person existed) and made an investigation. The note was rejected on substantial grounds as "unfounded and therefore calumnious". See *Aktstycken utgivna av Kungl. Utrikesdepartementet, Ny serie I: C: 1*, Stockholm 1952, pp. 155 f. The Soviet policy since the second world war has been to claim the right of protection with respect to all citizens, including persons who live abroad and regard themselves as *de facto* stateless. Cf. Ginsburgs, "The Soviet Union and the problem of refugees and displaced persons 1917–1956", *The American Journal of International Law*, Vol. 51 (1957), pp. 344 ff.

in any form; therefore by his flight he has himself created the breach between himself and the government of his country. This breach is one of the relevant facts of all the cases.[3]

III. THE LAURINE CASE. CITIZENSHIPS OF A PURELY FORMAL NATURE

1. According to Ch. 3, Sec. 2 of the Act of 1904 a prerequisite for granting separation between aliens is that separation should exist as a legal institution in the law of their home country and that there should be grounds for separation according to that law (as well as according to Swedish law). The same rules apply to proceedings for divorce (cf. *infra,* p. 48). Separation does not exist as a legal institution in Soviet law.

2. In the *Laurine Case* (1949 N.J.A. 82) two former Estonian citizens, husband and wife, residing in Sweden jointly applied for separation. They had escaped to Sweden in 1944; prior to that they had acquired Soviet citizenship. The Supreme Court removed the obstacle to the granting of a separation by deciding that Swedish law alone was applicable. Two judges out of five stated as their reason for the decision that the Laurines did not enjoy the protection of their home country and that accordingly the Act of 1904 did not apply. But a majority (three judges) gave a joint opinion in which the absence of protection did not play a predominant rôle. They referred to the legislative history of the Swedish rules of law, which embody the principle of nationality, and they claimed that the legislative history did not support the idea that a citizenship "of a purely formal nature" should be used as the connecting factor in matters such as those dealt with in the Act of 1904; the legislator had evidently not envisaged the occurrence of a citizenship of that nature. They recalled that the Laurines had arrived in Sweden as refugees, that they did not enjoy Soviet protection and that they did not intend to return. But the "purely formal nature" of the citizenship appears as the decisive reason in

[3] Cf. footnote 5 *infra*. It should be remembered that, while banishment (expulsion, ostracism) of citizens is an outmoded form of punishment, expatriation has been used with some frequency, particularly against refugees who have not returned to their home country within some prescribed period of time. By expatriation they become truly stateless. Cf. *A Study of Statelessness,* United Nations publications, Sales No.: 1949. XIV. 2., pp. 140 f.

this opinion for not applying Sec. 2 of Ch. 3 of the Act of 1904. In addition, a statement was made with respect to the rules to apply instead of those of the Statute: "Rather, the arguments leading up to the idea that stateless persons ought to be subject to the law of their domicile must on important points be considered applicable also to foreigners who hold the status referred to, and who consequently have no real connection with their native country". Here, "real connection" is contrasted with citizenship of "a purely formal nature".

3. The majority of the Supreme Court might have intended only to add arguments to those referred to by the Court in the Lohk case. But, it is submitted, what the Court did in the Laurine case was to "re-define" or "qualify" foreign nationality in such a manner that only effective or real (not formal) citizenship would be relevant when the choice-of-law rules concerned are applied. In the absence of a real connection with the *lex patriae,* the *lex domicilii* should take its place. While the criterion "absence of protection" is not defensible referring as it does to the very national law which is supposed to be avoided, the criterion of effectiveness refers to facts and constitutes a possible device, if not necessarily one which it is advisable to use. The doubts with respect to its usefulness are brought about by the difficulties involved in drawing the line between what is "real" and what is "formal". The reasoning in the Laurine case does not directly indicate that the Soviet citizenship of the former Estonian spouses was "formal" because it had been forced upon them after the annexation. Some later cases, however, create the impression that the citizenship of refugees from the former Baltic states is regarded as more "formal" than the citizenship of Hungarian or Polish refugees.[4] It is true that their original acquisition of citizenship is as a rule entirely unobjectionable. But if this difference is the decisive factor according to the Court, there must be a residuary of possible cases involving refugees from various countries of the world, cases in which justice cannot be administered.[5]

[4] Note, however, the case *Gnot* v. *Gnot* reported in *Sv.J.T.* 1957, Court of Appeal Cases No. 34, which concerned a former Polish citizen who had acquired Soviet citizenship when part of Galicia was ceded to U.S.S.R. in 1945. His Soviet citizenship was regarded as purely formal. For other cases cf. Fischler, "Das internationale Privatrecht Schwedens 1949–1955", *Zeitschrift für ausländisches und internationales Privatrecht,* 1957. p. 286.

[5] A "re-definition" might be contemplated on the basis of the distinctions of the 1951 Convention relating to the status of refugees. Article 1 describes as

IV. SWEDEN'S LOWER COURTS AS "DIVORCE MILLS"

1. There is support for the belief that lower courts did not understand the import of the Lohk and the Laurine cases. According to Ch. 7, Sec. 2, subsec. 1, of the Act of 1904, in cases concerning divorce or separation, where the spouses do not hold the same nationality, they are to be regarded as citizens of the state of which they, jointly, last were citizens, or if they never were citizens of the same state, as citizens of the state of the husband's nationality. Therefore the opinion expressed in the Lohk case, that the Act of 1904 did not provide for such situations as the Court had to face, presupposes that not only Mr. Lohk but also the missing wife was regarded as a *quasi*-stateless (or truly stateless) person. Nevertheless, lower courts have also disregarded Sec. 1 of Ch. 3 of the Act of 1904 even in cases where the defendant spouse (the wife) did hold a "real" citizenship, once shared by the husband, and "enjoyed protection" of the home country. This misunderstanding may be explained by the fact that, according to subsection 2 of Ch. 7, Sec. 2, of the Act of 1904, a Swedish citizen domiciled in Sweden for at least one year is always free to initiate proceedings for separation or divorce in Sweden against a foreign spouse domiciled abroad. The subsection does not confine itself to the question of jurisdiction. It also makes an exception from the choice-of-law rule according to which a cause for divorce must be present in the law of the home country of the spouses; the presence of a cause for divorce under Swedish law suffices. Lower courts

a refugee a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country". Such a person is a refugee even if he is entitled to protection under the law of the country of his nationality. If a person can plead valid reasons, based on a well-founded fear, for not availing himself of the protection of his home country, he might be regarded as "belonging" to his country of domicile.

It should be added that in 1954 a Swedish statute of 1938 dealing mainly with social benefits for stateless and *quasi*-stateless persons was amended in order to bring its terminology into agreement with the 1951 convention and the principal Swedish statute of 1954 which governs the status of aliens. The amendment of 1954 substituted the words "persons who hold a citizenship but are political refugees" for the words "persons who hold a citizenship but do not enjoy the protection of their home country." According to Bill No. 260 submitted to the 1938 Riksdag the latter term was intended to designate particularly persons who were not able to secure a passport from their home country.

seem sometimes to have assumed that the decision in the Lohk case meant that a *quasi*-stateless person was to be granted the same exceptional privileges as those which a Swedish citizen enjoys under the provisions just mentioned.[6] The legislative history of the provision clearly indicates, however, that this reasoning is not defensible.[7]

A second assumption on the part of the lower courts related to the criterion for *quasi*-statelessness. Absence of "protection" seems to have been regarded as the decisive factor in spite of the reasoning in the majority opinion in the Laurine case.

2. In the case *Zofi Gajdas* v. *Frans Gajdas* (1951 N.J.A. C 733) Frans was granted a divorce in Sweden. Zofi got to know about this only after a while. The writ had never reached her. She applied for nullification of the divorce decree. The Court of Appeal appreciated the procedural objections and decided that the case should be tried *de novo* by the court of first instance. Appeal against this decision was made to the Supreme Court, which decided that the divorce decree was null and void, but that the case should not be tried again as it did not fall within Swedish jurisdiction. Frans had lived in Sweden as a refugee since 1945. He was a Polish citizen but did not intend to return to Poland. It might be argued that his citizenship was only "formal". The Supreme Court was, however, not concerned with his status and it held that "such circumstances" were not present in the case as would allow Frans to start proceedings.

3. Some other cases which have been reported from the Supreme Court justify one in believing that after the 1948 and 1949 cases lower courts came to function as "divorce mills" for refugees.[8] The

[6] See for example the opinion of the court of first instance in the *Szwabowics case,* 1956 N.J.A. 337.

[7] Cf. N.J.A. 1934 *II* p. 423 and *infra,* pp. 40 f. The amendments were originally proposed by the 1933 Riksdag which suggested that Sweden withdraw from the Hague Convention on separation and divorce and that the text of the Act be revised. Among the arguments for this suggestion, which are to be found in Report No. 41 of the First Legal Committee of the Riksdag was a series of examples relating to Swedish-American, Swedish-British and Swedish-Italian marriages. Stress was put upon the fact that the convention made it impossible for a Swedish wife to obtain a divorce from an Italian husband even if she had not lost her Swedish citizenship by the marriage or had got back her Swedish citizenship after the marriage.

[8] 1954 N.J.A. C 546 and 1954 N.J.A. C 547 It has not been possible to make, for the purpose of this paper, a study of the divorce practice of the courts of first instance during the years following the Supreme Court cases of 1948

pattern was that jurisdiction was accepted on the basis of the plaintiff's assertion that he did not enjoy the protection of his country of nationality. Courts "assumed" that this was the case; as explained above, the presence or absence of protection is not easy to prove. The next step was a statement of the plaintiff to the effect that he did not know where his wife lived and could not produce information concerning her whereabouts. In such a case the writ will not have to be served by delivery to the defendant in person; publication in Sweden will suffice (Code of Procedure, 1942, Ch. 33, Sec. 12). With this procedure divorce proceedings would start against a spouse who had no opportunity to appear in court and to defend his or her interests. The procedure gives a refugee in Sweden a better chance of getting rid of a spouse than that granted to a Swedish citizen; and there are, of course, many other arguments against this procedure. It is, for instance, very doubtful to what extent divorce decrees thus obtained would be recognized abroad. Moreover, proceedings of this kind do not take into account the reasonable interests of the part of the family that still lives abroad. They are "humanitarian" only if attention is focused exclusively on the refugee, his happiness and that of his possible new connections in Sweden. Justice, however, must balance her scales and that is not what happens in cases such as those now described.

The decision in the Gajdas case shows the awareness of the Supreme Court of the danger to justice involved in the practice that followed the 1948 and 1949 decisions. As, however, the Gajdas case was only very briefly reported in N.J.A., the warning may not have been generally noticed until a new case was reported in 1955.

and 1949. However, in the years 1949–1955 the following number of divorces was granted by the Swedish courts on the same grounds as those advanced in the Lohk case, i.e. that the defendant spouse was missing and not known to have been alive during the last three years (the Marriage Code Ch. 11, sec. 6):

1949	1950	1951	1952	1953	1954	1955
97	105	119	68	56	50	50

The figures for the following years have not yet been published. The corresponding figures for the preceding years are as follows:

1941	1942	1943	1944	1945	1946	1947	1948
7	7	11	8	6	7	17	29

The average number of divorces under Ch. 11, sec. 6, of the Marriage Code in the years 1931–1940 inclusive was 12. See *Befolkningsrörelsen* (Vital Statistics), an annual series published in Stockholm by the Swedish Central Bureau of Statistics.

V. THE JURISDICTIONAL ISSUE: TWO ADDITIONAL CASES

1. The case *Wladyslaw Chruszez* v. *Anna Chruszez* (1955 N.J.A. 571) was initiated by a former Polish soldier, Wladyslaw Chruszez, who in 1939 had been taken prisoner by the Germans and brought to Norway in 1942. He escaped to Sweden the same year and had been residing in Sweden since that time. He had not lost his Polish citizenship. In 1946 he had sent his passport to the Polish Legation in Stockholm for renewal. The legation had informed him that his passport could not be renewed but offered him a new passport. He refused to accept a new passport and was, in 1947, granted Swedish documents as a refugee alien. In the proceedings he claimed that he did not enjoy Polish protection. Wladyslaw and Anna had married in Poland in April 1939. As in the Lohk case, the husband stated that his wife was missing and that she was not known to have been alive during the last three years. He applied for a divorce. The first question was that of jurisdiction: Should a Swedish court accept jurisdiction in spite of the prohibition in Ch. 3, Sec. 1, subsec. 1, of the Act of 1904 (see *supra* pp. 27 ff.)?

The court of first instance attempted a summing up of the law, evidently based on the principles laid down by the 1948 and 1949 decisions. It stated that jurisdiction would be acceptable in a case where the plaintiff was either stateless or, though holding a foreign nationality, did not enjoy the protection of his home country, if he had been living in Sweden under conditions which made it possible to regard Sweden as his home country and the defendant spouse was missing. It may be assumed that the latter prerequisite was added in order to assimilate the defendant spouse also into the category of *quasi*-stateless or stateless persons. After summing up the law the court stated that Wladyslaw held Polish citizenship. The court, which had consulted the Ministry of Foreign Affairs on the protection issue and received a non-committal reply (see *supra* p. 33), went on to declare that it had not been proven that Wladyslaw's relations to the Polish state were of such a nature that he could be said not to enjoy its protection. Therefore, the court declined to accept jurisdiction.

Both the Court of Appeal and the Supreme Court concurred in this decision. The Court of Appeal, however, did not accept the opinion of the court of first instance. It gave as its reason only

that Wladyslaw was a Polish citizen and that he had not proved "such circumstances" as could make jurisdiction acceptable in spite of the fact that he held a foreign citizenship. The Supreme Court did not disagree.

2. According to Ch. 3, Sec. 1, subsec. 2, of the Act of 1904 Swedish courts must recognize a claim for exclusive competence of divorce or separation asserted by other countries, including Hungary. The case of *Björg von Schuppler* v. *Erik von Schuppler* (1956 N.J.A. 601) was concerned with this prohibition. Björg wanted a divorce from Erik, who had committed adultery. The couple had married in Germany in 1945. Erik was at that time a Hungarian citizen and Björg acquired Hungarian citizenship through the marriage. Erik had not been in Hungary since 1945 and Björg had never visited that country. They had both been living in Sweden for about eight years. They had evidently not lost their Hungarian citizenship, but Björg declared that she and Erik did not enjoy Hungarian protection. Erik pleaded that he was on the verge of being granted Swedish citizenship. The couple had two children living with Björg in Sweden. The court of first instance stated that the spouses were Hungarians and that Hungary asserted a claim for exclusive competence. "Such circumstances" were not shown as could make it possible for the court nevertheless to accept jurisdiction. The Court of Appeal confirmed the decision and the right to present the case on appeal to the Supreme Court was not granted.[8a]

3. We have now arrived at the point where the question may be put as to the status of the present law, as stated by the Supreme Court, with respect to the two jurisdictional issues involved, the first relating to subsec. 1 of Sec. 1 of Ch. 3 of the Act of 1904 and the second relating to subsec. 2 of the same section.

We are not dealing with marriages between Swedish citizens or cases where the spouses by virtue of Ch. 7, Sec. 2, subsec. 1 (see above pp. 36 f.) are to be regarded as Swedish citizens. We are concerned with marriages, where both the spouses are aliens (including stateless aliens), and with mixed marriages where, by the statutory rule just cited, the spouses are to be regarded as if they were both nationals of a foreign country. The fundamental rule

[8a] Cf. *Melnyk* v. *Melnyk*, reported in Sv.J.T. 1958, Court of Appeal cases No. 1.

to apply is the one in Ch. 3, Sec. 1, subsec. 1, of the Act of 1904 by which jurisdiction is to be accepted in principle only if the defendant spouse resides in Sweden. From this rule we have one statutory exception: Swedish courts are always available if the plaintiff (i) is a Swedish citizen and (ii) has been domiciled in Sweden for at least one year (see *supra* p. 36 f.). But if the plaintiff is stateless or *quasi*-stateless the Act still prevents him from initiating an action for separation or divorce against a spouse residing abroad and holding a "real" citizenship, at least if both spouses were once nationals of the same country, or, if that is not the case, if the husband holds a "real" citizenship. In other situations, exceptional no doubt, the Act of 1904 may, according to the Supreme Court, be said not to apply. This is implied by a series of decisions: the Lohk case, the Gajdas case and the Chruszez case. In the Chruszez case the Supreme Court could have made a new effort to explain the crucial point, that is to say under what circumstances an individual should be regarded as *quasi*-stateless, taking into account the fact that the matter would have to be examined with respect both to the plaintiff and to the defendant in that case. But it chose not to do so.[9]

If the Act of 1904 does not apply, which law governs jurisdiction? A Swedish citizen may circumvent the provisions of Ch. 3, sec. 1, subsec. 1, of the Statute of 1904 only if he has been domiciled in Sweden for at least one year. If that is the case, he may always initiate divorce proceedings. One would assume that by analogy a stateless person or a person designated as a *quasi*-stateless person must be closely connected with Sweden as his adopted home country in order to be allowed to initiate divorce proceedings. But the cases do not elucidate this point.

4. The jurisdictional issue in the von Schuppler case is different, as it concerns the provision in Ch. 3, sec. 1, subsec. 2, according to which jurisdiction must not be entertained if the country to which the spouses "belong" has reserved to its own authorities exclusive competence of divorce or separation. Here, the problem only concerned the interpretation of the term "belong". Did the von Schupplers "belong" to their country of nationality or to their country of domicile? The courts paid no attention to the question of effectiveness or to the presence or absence of protection. They

[9] It is not safe to assume, as Fischler does (*op. cit.*, p. 287), that the husband Chruszez was not regarded as stateless and "die Klage daher wegen Unzuständigkeit abgewiesen".

only stated, borrowing the language from the previous Gajdas and Chruszez cases dealing with a different issue of jurisdiction, that no "such circumstances" were shown as could support the claim that jurisdiction should be entertained in spite of the fact that the parties were Hungarian citizens. In the Laurine case, too, the question was as to whether the family "belonged" to their country of nationality. They were found not to "belong". The elements of the case differ from the von Schuppler case mainly in the fact that the Laurines were former Estonians holding a Soviet citizenship which had been forced upon them, while the von Schupplers were Hungarians who had acquired their citizenship by birth and marriage.

VI. THE JURISDICTIONAL ISSUE: A POSSIBLE SOLUTION

1. In the introductory part of this paper it was stated that the problems to be discussed were brought about by the fact that sometimes, though not necessarily always, the result of applying in cases concerning refugees the ordinary Swedish conflict rules would be repugnant. The Lohk case is a typical example. The husband had been living in Sweden for three years. The wife had been missing since the troubled days of the incorporation of Estonia into the U.S.S.R. and she was supposed to be dead. The husband wanted a divorce and the question in the case was whether Swedish courts should entertain jurisdiction or not, i.e., whether they should agree or refuse to look into the case, to consider his application. If the question had been put to a layman, he would probably have said that it would be silly not to hear what the husband had to say. The case did not involve an assessment of the virtues or the faults of a possibly applicable foreign law. The issue was not whether the principle of nationality is preferable to the principle of domicile, or *vice versa,* or how to determine, in principle, the "personal law" of a refugee. No broad problems of legal policy were involved. The court had to deal with a question concerning the administration of justice, the judicial process. Common sense spoke in favour of a decision according to which jurisdiction should be entertained. But jurisdiction was prohibited by the language of the Act of 1904.

The Supreme Court evidently did not like to accept jurisdiction simply *ex misericordia*.[1] It was prepared to accept jurisdiction, but it wanted to explain in objective terms why that could be done in the Lohk case, and consequently in other cases identical with it. But the reasoning in the Lohk case (and in some later cases) was weak and the *quasi*-legislative effects of the cases were unsatisfactory. Our contention is that the fact that really distinguished the Lohk case was not that the plaintiff was a person living in circumstances which justified his being treated in the same way as a stateless person, nor that the defendant also might be assumed to hold a similar status.

2. Let us imagine that Mrs. Lohk at the time of the case had been living at a known address in Tartu, Estonia. In such circumstances the question might have been raised why the husband did not initiate divorce proceedings in Soviet Estonia. The reply to that question might have been that jurisdiction would be accepted or the case taken to a conclusion only if the plaintiff appeared in person in Tartu, or that an Estonian court would in no circumstances entertain jurisdiction. In the latter case it might be argued that Mr. Lohk as a matter of fact did not enjoy "protection" by the legal order of his home country, regardless of whether he was subject to protection in the diplomatic sense. In the former case it might be said that if Mr. Lohk did go to Tartu in order to initiate or pursue divorce proceedings he would quite possibly be punished as a political offender because of his flight from the country, and the punishment might be severe. But if, on the other hand, divorce proceedings could be initiated in Tartu through lawyers and if the Estonian courts would accept jurisdiction, it might very well be argued that this would be the course to take and, moreover, the course envisaged by the Act of 1904. A counter-argument might be raised according to which the Estonian court might not grant a divorce. This is a possibility: but why, in a matrimonal conflict between Mr. X, who has escaped from Ruritania and now lives in Sweden, and Mrs. X, who has stayed on in Ruritania, should Mr. X's *ex parte* interest in winning the case be used as a criterion for the acceptance of Swedish jurisdiction?

[1] Cf. concerning the shifting attitudes of English courts in cases where the problem was raised whether to give relief to a deserted wife by relaxing the general principle of jurisdiction, Cheshire, *Private International Law*, Oxford 1952, 4th ed., pp. 360 ff.

Now, in the Lohk case, the husband lived in Sweden and the wife was missing under circumstances which made it comparatively safe to assume that no forum in the world other than a Swedish court would contemplate accepting jurisdiction. This fact, it is suggested, is the real reason why jurisdiction was entertained. What distinguishes the Lohk case must, in spite of the opinion of the court, be the fact that it could reasonably be assumed that no forum outside Sweden was available or could be reached without extreme hardship to the plaintiff.

The outcome in the Lohk case was satisfactory. The same cannot be said about the Chruszez case. There, nothing was done to find out whether any opportunity existed for Mr. Chruszez to initiate divorce proceedings in Poland against his missing wife. If that was legally impossible under Polish law or if it would have involved his personal appearance before a Polish court, there would have been good reasons for a Swedish court to entertain jurisdiction. Similar arguments could be advanced in favour of a different decision in the von Schuppler case. On the other hand, where there are two parties and a trial can be carried out without personal danger or other hardship to any of the parties, the rule *audiatur et altera pars* should be respected, and there is no reason to deviate from the jurisdictional prohibition in the Act of 1904. A Pole in Sweden may not necessarily be barred from initiating divorce proceedings in Poland in order to be free to marry again in Sweden. A Polish divorce decree would automatically be recognized in Sweden, whereas a Swedish decree would not be recognized in Poland and probably not in third countries either. Moreover, a Polish forum might be more useful, when the wife and children live in Poland, for ensuring, for instance, that the Polish family was granted adequate alimony from the refugee husband; a Polish judgment concerning alimony can be made effective in Sweden. This is the orderly procedure in international society, and the nature of a foreign *régime* and the refugee's relations to it are not, as such, reasons for discriminating against persons who have not chosen or have not managed to escape from the foreign country concerned. But if jurisdiction was refused in Poland, there would be good reasons for a Swedish court to accept jurisdiction, if the plaintiff were a refugee with domicile in Sweden.

3. The arguments presented above in favour of the acceptance of jurisdiction in some cases, distinguished from others by the fact

that no forum outside Sweden is available, must, as it were, be translated into legal language. If that cannot be done they will not be acceptable to the lawyer.

All lawyers will agree that every court case presents, at least to some extent, aspects of its own and contains facts that are peculiar to it. In the judicial process the facts present should be compared with the whole set of rules that it is possible to apply. It should not be presupposed, therefore, that the Act of 1904 is the exclusive source of legal rules with respect to Swedish jurisdiction in cases concerning divorce between spouses of foreign nationality. On the other hand, the Act was undoubtedly meant to settle fully the problems of divorce jurisdiction, even if, as the Supreme Court said in the Laurine case, the legislator of 1904 had not envisaged the occurrence of a situation such as the one the Court had to deal with in that case. Now, the plaintiff in a case may claim that the strict application of the Act would be iniquitous. One example is a Swedish woman living in Sweden separated from her husband who is a citizen of a Catholic country, where divorces cannot be obtained, and who lives in that country. Before 1934 Swedish courts would not accept actions for divorce against a husband residing abroad. The wife used to plead that this meant that she was excluded from getting a divorce, but the court had to consider that the wording of the Act of 1904 prohibited it from entertaining jurisdiction and that, according to the basic principle of legal policy embodied in the Act, the substantial question of the right to a divorce was to be decided by a court which was competent in the international sense and whose decision would be recognized abroad.[2] As this must be the Swedish court's decision, it fell to the legislator to intervene *ex misericordia;* by an amendment to the Act, jurisdiction was, as an exception from the general rule, made possible if the plaintiff was a Swedish citizen with a *bona fide* domicile in Sweden. In a case such as the Lohk case, the plaintiff would also plead that the strict application of the Act would be iniquitous. But to accept jurisdiction in such a case would not conflict with the basic principle of legal policy embodied in the Act, as its rules were based on the assumption that a forum is normally available in the country of which the spouses are citizens and that therefore the courts of other countries have reason to accept jurisdiction in "foreign" matters only when the defendant has a domicile outside his or her home country. It is

[2] Cf. 1934 N.J.A. *II* p. 423 and *supra* p. 37.

precisely because no other forum is available that the Lohk case and similar cases differ from the situations which the legislator of 1904 envisaged. If this line of reasoning is not good enough to convince a lawyer that jurisdiction should be accepted in such cases—not because the Act of 1904 does not apply, but because it must be construed not to apply—there are additional sources of law to consult. Statutory rules may always be conditioned by rules or standards expressed in, for instance, "general principles of law", or the constitution of the country, or the Law of Nations. It is contrary to general principles of law that a court should refuse to entertain jurisdiction in cases which cannot be accepted by any other court in the world and which concern the personal status of the plaintiff. Moreover, one of the basic rules of the Law of Nations obliges states to treat aliens in accordance with the minimum standards of civilization. These standards require, amongst other things, that aliens shall be given access to the courts. To refuse access to the courts would be a denial of justice, because as Anzilotti has stated, very much to the point, such refusal "comporte toujours et nécessairement une méconnaissance de la personnalité, dont la première manifestation consiste précisément dans la possibilité de demander et d'obtenir la protection légale contre tout droit subjectif".[3] When in the Lohk case or a similar case the legislator's assumption that a foreign forum is available proves wrong, it is reasonable to take into account when construing the Act the relevant rules of the Law of Nations as being complementary or, rather, superior to those of the Act. This kind of reasoning has led to the acceptance of jurisdiction by courts outside Sweden in exceptional cases, and has been described by Rabel as having "universal validity". He refers to French practice: "The French courts have proclaimed the doctrine that they must refuse to entertain jurisdiction over parties who are both of foreign nationality, at least if they have not their common domicil in France. However, in practice jurisdiction is exercised when the defendant does not prove that he has maintained a foreign domicil at which he can be actually sued or, in another version, when there is no foreign jurisdiction in which the suit can be prosecuted without hardship. The desire to avoid what would look like a denial of

[3] Cf. Anzilotti, "La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers", *Revue de droit international public*, Vol. 13, pp. 285 ff.

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[3] Cf. Anzilotti, "La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers", *Revue de droit international public*, Vol. 13, pp. 285 ff.

justice, is a legitimate one among the many impulses for entertaining causes presented."[4]

4. The "Law of Nations theory" outlined in the previous section seems to have influenced a recent decision by the Stockholm Court of Appeal *(Re Varsányi)*.[5] The Court held a divorce decree issued in Austria in respect of two Hungarian refugees to be valid in Sweden, where the former wife, the claimant, was living. According to the Act of 1904 and the von Schuppler case, a Swedish court would have been prohibited from entertaining jurisdiction if the spouses had been living in Sweden. Furthermore, the language of the Act prohibits the recognition in Sweden of a foreign divorce decree, when the foreign court was not competent to entertain jurisdiction according to the Swedish rules governing international jurisdiction. The Court of Appeal expressed doubts as to whether political refugees, who can be assumed to have no intention of returning to Hungary, may be regarded as not being subject to protection by their home country. But in spite of this and of the statutory prohibition the Court decided that the Austrian divorce decree was valid. Among the arguments put forward by the Court in favour of this decision was the fact that it appeared to be practically impossible for the claimant to obtain a divorce in Hungary. (The former husband was now living in Brazil and was said to have remarried.) The decision was final.

VII. THE CHOICE-OF-LAW ISSUE: THE "PERSONAL LAW"

1. In Swedish legal writing all the cases previously dealt with have sometimes been referred to as dealing with the "personal

[4] Rabel, *The Conflict of Laws*, Vol. 1, Chicago 1945, p. 406. Like considerations presumably govern Article 16 of the Convention of 1951 relating to the status of refugees, providing *inter alia* that "a refugee shall have free access to the courts of law of the territory of all Contracting States" and that "a refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*". It must be added, however, that the legal import of these undertakings with respect to jurisdictional matters is questionable. Article 16 was accepted by Sweden after some amendments to statutory rules concerning only legal assistance and exemption from *cautio judicatum solvi*.

[5] The case was reported in Sv.J.T. 1958, Court of Appeal cases No. 27. The reporter makes reference to the present writer's paper in *Sv.J.T.* 1957, pp. 529 ff., where the "Law of Nations theory" was advocated.

law" of refugees. It is true that from the point of view of legal history the statutory rules governing jurisdiction are closely linked to those dealing with the choice of law, and the problems are therefore related. They concern the scope of the general principle of nationality in private international law. But the jurisdictional and the choice-of-law problems can be solved along different lines and the issues involved differ in many respects.

As already mentioned, the word "belong" used in the Act of 1904, and in other Swedish statutes, as referring to citizenship has been interpreted in the case of stateless persons as referring to their country of domicile or residence. This interpretation is for practical purposes unavoidable. It is also, theoretically, possible to construe the word "belong" as referring only to an effective or "real" citizenship. But the usefulness of this construction can be doubted and it is, furthermore, not evident that the specific problems relating to the *quasi*-stateless necessitate a re-definition of all the references to the *lex patriae* in the various statutory choice-of-law rules. In some instances a reference to *ordre public* may do the trick, namely if the rule to apply, and contained in the national law of the *propositus,* is found to be incompatible with the fundamental principles of Swedish law. This device may be sufficient. Of the cases above only the Laurine case directly concerns the choice-of-law issue. There, nationality was "re-defined". The question was whether a Swedish court could grant a separation in spite of the fact that the Soviet law (the *lex causae* to which the Act referred) was only familiar with divorce. The spouses evidently wanted a separation in order to get a divorce in Sweden a year later, in accordance with Swedish law. There might not have been any cause for divorce under Swedish law without previous separation, and therefore even if the Laurines had been regarded as "belonging" to the U.S.S.R. and there was a cause for divorce under Soviet law, a divorce could not have been granted by the Swedish court (cf. the statutory text cited above. p. 34). This dilemma could have been avoided, however, without any "re-defining" of the nationality of the spouses. It could have been argued—and such was the opinion of a dissenting judge in the court of first instance—that the relevant text should be so construed as to allow the less severe encroachment upon the marriage (separation) when the *lex causae* admitted divorce. At least since Sweden ceased to be a party to the Hague convention on divorce and separation, there has been a good argument in favour of this construction.

While there may be no obvious need for a "re-definition" of the references to the *lex patriae* in the various statutory rules, other considerations speak against this method. Its usefulness has been questioned above (p. 35). In addition it should be pointed out that, as the principle of nationality is still accepted in Swedish private international law, it is extremely difficult to argue, without entering upon broad questions of legal policy concerning nationality *versus* domicile, that for instance the property of a deceased *quasi*-stateless person in Sweden should reasonably be distributed according to Swedish law and not, as prescribed by a Swedish statute, according to the rules of the *lex patriae* of the deceased. The reason for the Swedish conflict rule, namely that consideration should be given to the fact that the family is foreign, does not necessarily lose its weight because the deceased happened to live in Sweden as a refugee after having severed relations with the *régime* of his home country.

2. What has been said so far concerns the construction of statutes. In many fields, however, conflict rules have not been codified and changes of the law occur in these fields as the result of shifts in court practice. While the principle still is that the "personal law" is to be determined by the nationality of the *propositus,* the impact of this principle may be reduced either by a "re-definition" of nationality or by a limitation of the scope of the "personal law". A recent Swedish case gives evidence of the usefulness of those devices for adjusting undesirable results of a wide application of the principle of nationality.

The *Désirée Szwabowics* v. *Witold Szwabowics* case (1956 N.J.A. 337) is interesting in many respects, inasmuch as it concerns, *inter alia,* recognition of foreign judgments and jurisdiction in cases concerning guardianship, and also demonstrates the fact that the previously discussed Supreme Court decisions concerning jurisdiction in divorce cases have not brought much enlightenment to the lower courts. But in this case the Supreme Court did not have to deal with this jurisdictional issue. It had to decide the question whether Polish or Swedish law should apply in a dispute concerning the guardianship of a child who held Polish citizenship and was born in a marriage between spouses, the parties to the dispute, who were also Polish citizens. The Court held that in principle disputes concerning guardianship should be settled by applying the "personal law" of the family and that the "personal law" should be

determined by the family's nationality. The Court stated that the principles as outlined would point to Polish law as being applicable. However, Désirée, who was a former Latvian citizen, had married Witold in Germany and had only thereby acquired Polish citizenship. She had never been domiciled in Poland. Witold had during the last ten years been a resident of Germany as, in view of the political situation in Poland, he did not wish to return to that country. The mother and the child had been living together in Sweden since 1947 and the mother (who at the time of the decision had married a Swede and become naturalized in Sweden) had evidently the intention to remain in Sweden. The Court held as follows: "The general principle cannot reasonably be applied in such a special case as the present one, where the fact that forms the basis of the principle, that is, the common nationality of the family, presents itself as predominantly formal." Swedish law was applied. This, it appears, is a typical judicial approach to the choice-of-law problem involved. It might be said that nationality was "re-defined" while the scope of the personal law was left untouched. Mr. Justice Karlgren, who did not agree with the majority of the court in the *ratio decidendi,* stated in a separate opinion that even when foreign law applies in cases concerning guardianship "as the personal statute of both the parents and the child", there are reasons why Swedish courts should not go against the fundamental rule of Swedish law that the welfare of the child shall be the first consideration when the guardian is being chosen. Legal writers on conflict of laws may choose different terms for characterizing a statement of this kind, but it seems permissible to say that decisions following this line of thought would limit the scope of the "personal law"; the "personal law" is in principle applicable but it does not apply to all questions relating to guardianship, as one of the main questions involved is decided by the application of the *lex fori* (or the *lex domicilii* of the child).

3. Before concluding I shall say a few words concerning some problems of legal policy. Statutory changes may not be necessary in Sweden in order to cope with the special problems caused by the influx of refugees. But on the other hand both the refugee cases and other recent cases support the idea that domicile is preferable to nationality as the indicator of the law that should apply in a number of situations in the field of family law. At the same time, there is an evident need for international agreement on important points of conflict of laws and particularly those

concerning domestic relationships such as marriage, legitimacy, guardianship, adoption, etc.

It is not easy to reach international agreement and, for any progress to be made, negotiations over a considerable period of time would be needed. National-law reforms may appear undesirable as long as the international trend is debatable. On the other hand a switch, for instance in Sweden, from the principle of nationality to that of domicile could only be achieved after a careful study on the national level of a great number of issues. It might be argued that the urgent need for changes in the Swedish law could be achieved by repealing the Act of 1904 or some of its provisions without substituting new statutory rules for those repealed, thus leaving it to the courts to develop the law on the basis of existing case law and considering the more modern statutory rules which have come into being as the result of Scandinavian conventions in the field of private international law.[6] In the meantime efforts could be made to prepare new legislation.

But in both the national and the international field it seems important as a prerequisite for a realistic effort at reform to get rid of some of the notions, presented as axiomatic but in reality misleading, which litter legal writings in the field of private international law and might confuse the legislator just as they have confused the courts. After all, clarity is not promoted by using conceptual tools devised to explain situations which existed at the time of the postglossators, when the task is to present and make understood, and to develop, the law of the 20th century. The terms "personal law" or "*Personalstatut*" and the whole *statuta* terminology are, it is submitted, neither helpful nor realistic. In any case, the legislator should not, as so often the text-book writer does, set out first to define the "personal law" and then to delimit its "scope". His job is to study which law it is most suitable to apply in a series of questions relating to divorce, guardianship, inheritance, alimony, adoption, etc. He may suggest that concerning some relationships the *lex patriae* should apply and in others the *lex domicilii,* and there are, of course, other possible connecting factors to consider as well as combinations of various kinds. In contemporary law no conformity exists as to the scope of a personal law,[7] and therefore the usefulness of the whole concept

[6] Cf. Cheshire, *op. cit.*, p. 15; Rabel, *op. cit.*, passim, and references to legal writings p. 33, footnote 65.

[7] Cf. Schmitthoff, *op. cit.*, pp. 70 f.

may be questioned.[8] What is important to remember is that from the point of view of legal policy it might be reasonable to claim "that uniform regulation of matters of status is justified, at least with respect to the basic facts of personal life".[9]

[8] Article 12 of the 1951 Convention relating to the status of refuges (*supra*, p. 25) leaves open the meaning of "personal status" as well as the distinction between domicile and residence.

[9] Rabel, *op. cit.*, p. 108.