COMPARATIVE COMMENTARIES

ON

PRIVATE INTERNATIONAL LAW

OR

CONFLICT OF LAWS

BY

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PREFACE

THE present work is an endeavor to present in a critical manner, and within reasonable compass, the legislation and jurisprudence of common-law jurisdictions relating to Private International Law, in parallel comparison with the principal systems of Europe and Latin America. The similarities of doctrine thus brought to light will often be found striking. The divergencies should also be frankly recognized. In the field of personal and family relations, many countries have adopted the principle of national law, which is foreign to English and American jurisprudence as a source of private law applicable to citizens abroad. Efforts to arrive at a compromise by international agreement are not likely to prove fruitful in an era of nationalism. Yet the world continues to grow smaller as the speed of travel and communication is accelerated and the science of jurisprudence must find ways for a just determination of the rights of private individuals where their transactions are subject to the competing laws of two or more states or countries.

The promulgation of the Restatement of the Law of Conflict of Laws by the American Law Institute in 1934, after a decade of research and discussion, was an event of great significance. It would be most unfortunate, however, if this step toward national uniformity in solving conflicts of law in jurisdictions of the United States were made the occasion for exaggerating the differences between the principles of English and American law and the principles recognized in this field in countries of the Roman tradition. English separatism is sometimes so greatly accentuated by legal commentators as to lead one to believe that the common law was evolved upon a different planet! This view is particularly unfortunate in respect to Private International Law because this branch of legal science is of comparatively recent origin and still in a formative stage. Story, recognized as a classical authority both in England and the United States, constantly referred to the Continental authorities of the seventeenth and eighteenth centuries and founded many of his doctrines upon their discussions.

The present work is designed to be useful both to the student and the practitioner. The comparative study of other systems must be the foundation of any further approaches toward international regulation. Even assuming that Private International Law continues to rest wholly upon a national basis, the practitioner must know the rules of conflict in foreign jurisdictions as well as in his own, because upon these rules may depend the choice of the forum and the application of the law. The principles of some of the most important foreign systems are here presented, parallel with the discussion of the English and the American law. It is needless to say that not all the foreign systems are referred to, nor could any single foreign system be presented with completeness. To attempt to do so would have unduly extended the scope of the present work. In adopting the comparative method, we have followed the example of the great master, Story, a century ago, with this difference, that where Story referred principally to the writings of foreign commentators, we have based the comparative comments also upon specific foreign legislation and the decisions of foreign courts.

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A. K. K.

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Chapter 1

HISTORICAL DEVELOPMENT

Nomenclature. Private International Law or The Conflict of Laws is that branch of legal science which seeks to determine the application of law when the administration of justice requires a choice between two or more systems of law. Objections have been raised to both the title "Private International Law" as well as to "The Conflict of Laws." However, both terms have now become too widely accepted to discard their use even in favor of some other term more scientifically accurate.[1]

The Ancient World. The obligation of determining the scope and application of laws confronted even the lawgivers and judges of tribes and peoples of the ancient world. Law was frequently considered to be of divine origin, with no clear line of demarcation between laws having to do with religious observance and those designed to regulate purely human relationships. And yet the peoples of the ancient world did not enforce the commandments of their own laws indiscriminately upon strangers within the gates. Grotius, always a scholarly commentator of the Scriptures, points out in his great work, *De Jure Belli ac*

[1] We have selected "Private International Law" as the principal title because of the obvious advantage, in a comparative work, of employing the term commonly accepted in most of the countries of the world. In the United States, the term most commonly used is "The Conflict of Laws," with the recognition of the term "Private International Law" as the alternative. Story adopted the former term doubtless through the subtitle used by Ulric Huber: *"De conflictu legum diversarum in diversis imperiis."* English writers, Phillimore, Foote, Westlake and Cheshire, use "Private International Law" without adding the alternative "Conflict of Laws." American writers, Wharton, Minor and Beale (in the preliminary volume of 1916), employ "Private International Law" as an alternative title. Among French writers, the term *Droit international privé* is employed as a comprehensive term, whereas *Conflits des lois* is commonly used as a subtitle to embrace the vast field of problems in which the possible application of foreign law is indicated for reasons other than the foreign status of a person or party. *Cf.* Pillet, *Traité pratique de droit int. privé* (1923), i, p. 7.

Pacis, that the Israelites did not consider all their laws to be equally applicable to sojourners or foreigners; and that only certain laws were considered to be of universal application.[2] The ancient Israelites distinguished two classes of aliens, the resident alien (*Ger Toshab*) and the sojourner or alien of passage (*Nochri*).[3]

The Egyptians often allowed foreign merchants to avail themselves of local judges of their own choice, and even of their own nationality, to regulate questions and settle differences arising out of mercantile transactions in accordance with their own foreign laws and customs.[4]

A special system of jurisdiction for aliens was developed in ancient Greece. The resident aliens (*Metoikoi*) were under the jurisdiction of special magistrates (*Zenodikai*) who tried civil suits in which such aliens were litigants. The principle of *lex loci contractus* was sometimes applied in settlements of conflicting claims due to differences of domicil or origin; at other times the defendant's domiciliary law was followed. The former principle seems to have been preferred. Frequently both jurisdiction and law were fixed by treaty.[5]

In the Roman world, the inhabitants of conquered territories were, in large measure, left in possession of their local institutions, laws and customs. Commerce was maintained on a wide scale among the various peoples of the Mediterranean basin, especially after the conquests of Lucullus. In the early days, down to the middle of the third century B.C., aliens had no legal capacity in the absence of a treaty of friendship between Rome and the nation of their origin. As commerce increased, the number of non-privileged aliens likewise multiplied. Beginning with 242 B.C., a special judge for aliens, a *praetor peregrinus*, was appointed, whose jurisdiction extended to disputes between aliens *inter sese* and between citizens and aliens. In his judicial capacity, he possessed unlimited authority for shaping and working out the law for transactions in which foreigners were interested.[6] The various edicts of the *praetor peregrinus* had the force of law and thus was developed the *jus gentium*, applicable to a special class of cases. This body of law was developed largely from foreign and pro-

[2] Bk. i, chap. 1, no. xvi, relying upon passages of both the Old and the New Testament and the classic commentators of both.

[3] Kassan, "Extraterritorial Jurisdiction in the Ancient World," in (1935) 29 Amer. Jour. of Int. Law 243.

[4] Coleman Phillipson, The International Law and Custom of Ancient Greece and Rome, (1911) i, p. 193.

[5] *Ibid.*, i, pp. 192–3, 200.

[6] Sohm, The Institutes (Ledlie's trans., 2nd ed., 1901) p. 80.

vincial sources and in the course of time exercised a powerful influence upon the *jus civile* itself.

The *jus gentium* of the Romans was not a system for solving conflicts of law. It was a special body of rules and customs applicable where alien litigants were involved. Its influence, however, extended further, and it soon became a vehicle by which the civil law itself could be reformed and liberalized. Its original function grew less important with the wider extension of Roman citizenship to the provinces. In the reign of Caracalla (A.D. 212–217) citizenship was extended to every inhabitant who was a member of a political community within the Empire. This development vastly reduced but did not entirely eliminate the field of probable conflicts.

The Justinian codes contain many passages in which a diversity of laws constitutes part of the problem to be solved. Roman jurisprudence developed rules for limiting the application of personal law in certain cases. In other cases the diversity grew out of differences between local customs rather than differences of personal status.[7] These local conflicts of law or of custom approach in some measure the problems of our own day, but the manner of their solution in the Roman world is still wrapped in obscurity. The reception of the Roman law in Europe caused certain of the Roman texts of the Justinian codes to be relied upon by those learned in the civil law, but the interpretation of the texts themselves became a source of dispute among judges and legal scholars for centuries.

The Medieval Tribal Period. When the northern European tribes succeeded in overrunning the western part of the Roman Empire, they did not attempt to impose their own laws upon the conquered territories. The reason for this is not far to seek. The laws of the conquerors were tribal in origin and the tribes had been migratory over a long period. A migratory group, of necessity, will carry with it the usages and customs common to the life of the tribe. The respect which it pays to the usages and customs of other tribes in dealing with the individuals with which it comes in contact is but another method of enforcing the application and the limits of its own law. Law thus becomes personal rather than territorial.

When the Goths, Burgundians, Franks and Lombards founded kingdoms in the countries formerly subject to the power of Rome, they continued the system under which they had formerly lived. Tribal custom remained the source of rights and obligations and adhered to

[7] Coleman Phillipson, (1911) p. 301.

the members of the tribe wherever they might go. Savigny informs us that the system did not originally include any duty of respect to the customs of the tribes of other individuals. This developed only after the various tribes were blended in more populous settlements. As kingdoms were set up, the internal condition of each then produced what could never have been brought about by any supposed benevolence toward foreigners. Curiously enough, recognition of the law of the vanquished Romans came before that of the other conquering Germanic tribes. But as one Germanic tribe succeeded another in establishing itself over a given territory, as for example, when the Franks succeeded the Lombards in Northern Italy, the recognition of personal law as such became an established institution. It was to this system that the well known statement of Bishop Agobardus referred when he said: "It often occurs that five men walking or sitting together are each under a different law." [8]

The Statutes of the Italian Cities. The rise of free municipal commonwealths in Italy from the tenth century onward brought a check to the system of personal laws. A very flourishing trade grew up between the cities after the wreck of the Roman civilization, for the regulation of which the rules of personal law, which dealt principally with family life, were ill adapted. Furthermore, the greater precision of the Roman law promulgated by Justinian in its codified form from the Byzantian center in the East, lent itself much more readily to the needs of the times. A gradual disappearance of the reign of race law then set in in favor of the Roman as the common law. The nobles were being attracted to city life. The cities enjoyed wide legislative autonomy. Their municipal laws, called *statuta*, differed materially one from another, and numerous conflicts of law arose between the various *statuta*. By the twelfth century, we find the whole people subject to Roman law, with the variants from that law contained in the statutes of the cities. Jurisdiction was based on domicil.

Here, for the first time, we are face to face with conflicts of law comparable to those of the modern world. For they arose, as now, from conflicts of positive law having a limited territorial application before courts of restricted territorial authority. Here was a new condition not envisaged by the Roman law of either the republican or the imperial era. As the known texts of the Roman law were the only sources acknowledged as common to all the cities, it was natural that the glossators of that law should seek some analogy from within, to

[8] See Savigny, *Geschichte des römischen Rechts im Mittelalter*, I, p. 115.

solve the conflicts which the variants from it, namely the statutes, were producing. This analogy they seemed to find in the relation of the citizen to the *peregrinus* in the Roman state. Westlake intimates that the glossators might have been able to develop such an analogy had they possessed the fragments of the pre-Justinian law in which the position of the citizen is marked so much more clearly than by anything in the Digest or the Code.[9]

It is difficult to see how the most detailed knowledge of the relative status of the Roman citizen and the *peregrinus* could change our opinion of the underlying cause for the differentiation. The intent of the Roman lawgiver was to create a *political* privilege whereas the conflicts of the Italian city-states arose from the assumption of an equality of *legislative* authority. This was never conceded to the provinces of the Roman world.

The Trinitarian Doctrine and the Statutes. Whatever the basis for the analogy, all agree that the text selected for determining the application of statutes could never have been adopted with a view to anything like the situation to which they were now to be applied. This text was the first law of the Code by which Gratian, Valentinian and Theodosius enjoined upon "the peoples joined together" under the imperial authority, to profess the Trinitarian doctrine.[10]

As the religious dogma accepted by the ruler did not extend beyond the peoples subject to his rule, it was concluded by the commentator that the application of all positive laws was likewise determined by political subjection. Accordingly, the Justinian codes were interpreted as applicable only to the parts of the empire in which the Trinitarian doctrine had been accepted. The scope of application of the Roman law was thus limited by the words *"cunctos populos quos."* Later jurists, especially from the time of Bartolus (1314–1355), continued to discuss the local application of the laws in connection with this *lex* of the Code and it thus became the focal point of that branch of the legal science of the times known as the "statutory theory," or the "theory of the conflict of statutes." It must be remembered that the term "statute" was applied to all positive laws of the cities, whether derived from usages and custom or from direct executive or legislative enactment. The authority of the *lex* not only limited the application of

[9] Westlake, Private International Law, 7th ed., (1925) p. 11.

[10] *Lex 1, C., de summa trinitate et fide catholica et ut nemo de ea publice contendere audeat; 1, 1: "Cunctos populos quos clementiae nostrae regit imperium in tali volumus religione versari quam divinum Petrum apostolum tradidisse Romanis."*

the Roman law to cities in which the Roman imperial authority was accepted, but also gave a local application to the laws of the cities when in conflict *inter sese*.

The Effect of the Feudal System. It can readily be seen that even with the most minute analysis, the *lex* gave no clue to the solution of conflict. At most, it was the source of legal reasoning with reference to such conflicts; but in order to understand the trend of doctrine it is necessary to take account of what had been happening north of the Alps, in the principalities and kingdoms in process of consolidation in England, France and Germany. As the Frankish kings demanded an oath of allegiance from those who occupied land under their authority, the great landlords and municipalities in turn demanded it of their own tenants. The relationship of service, proceeding out of the personal obligation of military service, was later (about the tenth century) applied in a more general way to private rights. Expressed more definitely, subordinance to the law of the overlord was presumed from residence within his territory. Speaking of the later Carlovingian period, Huebner says that the principle of personal (or race) law gradually disappeared and the territorial principle took its place in ever increasing degree. "A man was no longer born into the law of his forefathers, but into the law of his home." [11] Territorial law laid hold of legal relationships within a given territory and as the great provinces split up into increasingly small and numerous districts, every court followed the legal customs of its particular district. The feudal basis of law was summed up in the doctrine *omnes consuetudines sunt reales* and thus codification of provincial laws such as by the Book of Customs of the various provinces in France, and the "Mirrors" of the Saxons (Sachsenspiegel, 1215–1235) and Suabians (Schwabenspiegel, 1273–1276) in Germany, accentuated the overthrow of what Sir Henry Maine called "tribe sovereignty" in favor of the territorial application of law.[12]

With the multiplication of fiefs and municipalities and the lack of any strong central control in Italy, in southern France, or northern Spain, a need for modification of the strictly territorial application of law became imperative. This the jurists supplied by the application of "principles of justice to be determined by reasoning," while at the same time citing numerous irrelevant texts from the Digest and Code

[11] Huebner, A History of Germanic Private Law, (Philbrick's trans., 1918, Continental Legal History Series) p. 3.

[12] *Cf.* Brissaud, History of French Public Law (Garner's trans., 1915), §210.

and basing the whole framework on the Law *"cunctos populos quos."* [18] Laurent appropriately exclaims: "What relation is there between an incomprehensible dogma and a question of jurisprudence and what connection is there between the words *'cunctos populos quos'* and the statutes?" [14]

We may say that there were two competing theories in the territories formerly within the old Western Empire. One sought to apply the law of the particular jurisdiction to every controversy determined within it, the other to apply even an external system, if the demands of justice and the particular nature of the transaction so required. It is to the triumph of the latter principle that we owe the development of a true science of the conflict of laws. Legal treatises or comments on particular texts began to make their appearance from this period onward through the activities of scholars in the law schools and universities of France and Italy. Among the most famous of these commentators, or "post-glossators," were Bartolus (1314–1355) and Baldus (1327–1400).

Bartolus. Bartolus was not the first but certainly the most distinguished of the so-called post-glossators who sought to develop a true science of the application of law. Phillimore speaks of his work as "the fountain of private international jurisprudence. Without a careful study of this commentary, nobody can be thoroughly versed in the history of the progress of the principles of private international law." [15] In his work entitled, *"In primam codicis partem commentaria,"* Bartolus attacked the problem under two heads which, in great measure, he kept separate, *viz.*, (1) whether a particular statute applied to non-subjects outside the territory of the jurisdiction; (2) what effect a statute may have beyond the territory of the jurisdiction. Under the first heading he maintained that the capacity of persons was not dependent on the law of the place in which an obligation was entered into. We have already pointed out that the jurists of this period frequently sought in sections of the Justinian codes, authority for propositions only tenuously analogous. In this way Bartolus relied

[18] Westlake, (1925) pp. 15–17; Lainé in Clunet, 1886, pp. 149–154.

[14] Laurent, *Droit Civil International* (1881) i, p. 633; Phillimore, Commentaries upon Int. Law (1889) iv, p. 19n., remarks: "Who would have expected such a treatise in a gloss on the words *'cunctos populos quos'* in a chapter *De summa trinitate?"*

[15] Phillimore, Commentaries, (1899) iv, p. 19. *Cf.* also Lainé, *Introduction au droit int. privé*, i, p. 128. Meili in *Zeitschift für int. Privat. u. Strafrecht*, iv. 258, 340; ix, 24.