K. Lipstein

PRINCIPLES OF THE CONFLICT OF LAWS, NATIONAL AND INTER-NATIONAL

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by

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PREFACE

The present volume reproduces with slight changes the course of lectures given at The Hague in 1972 under the title of "The General Principles of Private International Law". The substance of these lectures has remained unaltered, but a number of insertions serve to corrected some formal mistakes and misprints, added references to literature, some older, some more recent, without attempting to be exhaustive, and modified and supplemented the former exposition in two respects, where subsequent criticisms called for a review. The first concerns the place of public policy in Public International Law, the second deals with spatially-conditioned or self-limiting rules in the light of recent research.

I am grateful to the Academy of International Law and its Secretary-General for their permission to re-publish the lectures as a separate volume.

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One of the editors of *Dicey's Conflict of Laws*, 6-8 ed. 1948, 1958, 1967.
One of the editors of Leske-Loewenfeld, *Das Eherecht der europäischen Staaten*, 2 ed.
Editor of Volume III (Private International Law) of the *International Encyclopaedia of Comparative Law*.
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PART I. THE NATURE AND FUNCTION OF PRIVATE INTERNATIONAL LAW

Section 1. Introduction

1. "Gentlemen, this subject is very important. I have earned 15000 ducats by opinions given in this matter" (Baldus); [1] "the nature of the conflict of laws is a dismal swamp, filled with quaking quagmires and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court or lawyer is quite lost when engulfed or entangled in it." [2]

Unlike Baldus, I do not promise you golden rewards, but unlike Dean Prosser I hold out the prospect of exciting journeys into areas of great practical and intellectual interest. The general and specific aspects of this subject have been explored many a time in the Hague Lectures,[3] sometimes by speakers who relied exclusively on their own law, but also by those who took into account those other legal systems which are most representative in this field. For reasons which will become clear later on, the present discussion will not be confined to one legal system only and will attempt to weave into a pattern ideas and practices as they have left their mark over the centuries.

2. Private International Law or the Conflict of Laws comprises that body of rules which determines whether local or foreign law is to be applied and, if so, which system of foreign law. Both names are imprecise and misleading. This branch of the law is neither international nor private in character [4] and any conflict is notional only.[5] According to some, mainly continental, writers it also includes the law of nationality.[6] According to Anglo-American notions it comprises the rules which delimit the jurisdiction of local courts and determine the recognition and enforcement of foreign judgments. The reason is that formerly jurisdiction and choice of law were coextensive at common law.[7] The definition raises as many questions as it answers. Firstly, why should foreign law rather than local law be applied at all? The answer is that it is, of course, possible to disregard foreign law altogether, but the result is frequently inconvenient or unjust if a factual situation which has certain legal consequences in the country where it occurred originally, is treated differently in another country merely because the *lex fori* takes a different view.[8] Again, the application of the *lex fori* to situations involving strong foreign elements may lead to what may seem an un-

necessary and often ineffective extension of domestic law to matters which are outside the ambit of the *lex fori*. Secondly, are those rules of choice of law common to all countries, or does every legal system include its own rules of Private International Law? If they are common to all countries, are they common in virtue of certain rules of Public International Law? If they are not common to all countries, what is the purpose of applying foreign law if not even a semblance of uniformity can be attained by this process? These are the basic questions which must be answered at some stage for the following reason. Modern Private International Law is only of comparatively recent growth, and gaps in the law manifest themselves frequently. Moreover, the solution of a particular question of choice of law raised by the introduction of a claim or defence according to a particular system of foreign law may have to be restricted to the particular case and may not provide guidance in another case based upon an identical set of facts, but involving a claim or defence based upon the law of another country. Nevertheless, Private International Law is capable of development on a firm basis of principle more than any other branch of law.

Domestic law is the creation of national, territorial or religious units which desire to regulate in detail the social life of the community in accordance with certain social imponderables and conditions, with moral convictions and varying policies. Tradition, certainty and development are its driving forces. Private International Law, whatever its underlying purpose, has no material content. It does not offer any immediate solution for a particular dispute but operates indirectly. It only indicates the legal system which is to provide the rules to be applied in determining the particular issue.[9] It is a technique and not a system of substantive rules. Its philosophy is international or may be national, according to the view which is taken of the function and ambit of domestic law [10] and of the existence of rules of Public International Law in this matter.[11]

Because it is a technique, Private International Law, more than any other branch of the law, has been particularly susceptible to influence from abroad. Italy in the 12th, 13th and 14th centuries, France in the 14th, 15th and 16th centuries, the Netherlands in the 17th century, the United States in the first half of the 19th and the second half of the 20th century, France, Italy, Germany and England in the second half of the 19th century, have each contributed to the common technique, and it is impossible to ignore the literature and practice of foreign countries. For the same reason, the influence of writers has been more

marked in this sphere of law than in any other; [12] indeed it would be possible to identify the various stages in the development of Private International Law with the names of one or a small number of persons and to trace its growth by describing the writings of various authors. A different course will be attempted here. The nature and function of Private International Law will be established by analysing the process whereby these rules were obtained over the course of centuries.

Section 2. Rome and Beyond

3. It is neither necessary nor profitable to examine whether ancient legal systems, such as those in Greece [13] and Rome,[14] possessed rules of Private International Law of the kind known to modern society. Even if they did exist—which is a matter for debate—it is certain that these rules did not influence the modern branch of this law.

Section 3. The Period After the Division of the Roman Empire—Personality of Laws

4. Choice of law became a real problem when the Roman Empire was overrun and settled by Germanic tribes.[15] These carried their own laws and customs with them, but the introduction of Germanic, especially Langobard, law in areas which formerly were part of the Roman Empire did not supersede the native Roman law, for according to the Germanic conception every person was governed by the law of the tribe to which he belonged. Thus conquerors vanquished and strangers lived according to their own laws. However, in so far as the laws of conqueror and vanquished applied within the same State, they applied not in virtue of a choice of law introducing a foreign system of laws, but because they were each of them part of the local law which was Langobard.[16] As in India and Pakistan today, so then, these personal laws constituted the local law. Matters were different where foreigners were involved. Here the difficulties in administering the law had become increasingly burdensome, as Bishop Agobard's famous complaint illustrates; commenting on the law of the Burgundians, he said:

> "Tanta diversitas legum quanta non solum in singulis regionibus aut civitatibus, sed etiam in multis domibus habetur. Nam plerumque contingit ut simul eant aut sedeant quinque homines et nullus eorum communem legem cum altero habeat." [17]

When persons, subject to different legal systems, came into contact with each other, whether through commerce or intermarriage, a cumu-

lation of laws was clearly impracticable and clear-cut solutions were required.[18] Convenience led to the device of a *professio juris* either in order to pinpoint [19] or to select, by one's own free will,[20] the law governing the transaction.

In the end, the appearance of the newly discovered classical Roman law as a common law of the Holy Roman Empire [21] reduced Langobard law, Frankish Imperial Capitularia and the customary Roman law to special local customs [22] and destroyed the personality of laws; [23] moreover, with the growth of circumscribed local law in the city states, the *lex fori* began to assume importance,[24] especially in respect of the substance of proprietary rights.[25] Nevertheless the application of what has become local customary law was not due originally to the emergence of a notion that laws are territorial; it was applied as the law applicable to all residents, but not to foreigners, who remained subject to their personal law or to the common law (which may be Roman or Langobard).[26] However, by the end of the 12th century, the law no longer attached to a person, and the same person could be subject to Langobard law, if in Florence, and to Roman law in Bologna.[27] "Thus the former tribal laws had become elements of a conflict of laws, just as any other local law".[28]

Section 4. Feudalism and the Revival of Roman Law [29]

5. Two factors contributed to mould the Private International Law of the Middle Ages into a shape which differed radically from the earlier sphere of personality of laws. In the Netherlands and France feudalism left its imprint. In Italy, the new schools for the study of Roman Law had to grapple with a situation where local laws in force in the different regions or cities claimed exclusive application in disregard of the circumstance that the reason for the exercise of jurisdiction may have been purely adventitious.

Section 5. Feudalism

6. It would be wrong to assume that in a feudal society the *lex fori* applied to all cases which came before the local courts. True, in a feudal society the court always applied its own laws, provided that the court had jurisdiction, but the court exercised its jurisdiction only because the case was somehow factually connected with its territory. The fact counted that the defendant was resident,[30] that the act had taken place, that the contract had been concluded, or the object was situated

there.[31] Jurisdiction and the application of law were co-extensive, but it was the convenience of applying the latter which determined the former and not the converse.

Thus, by the 12th century a system had been developed in the Germanic parts of France and the Netherlands which connected persons, things, contracts and torts with a particular legal system indirectly by determining jurisdiction with the help of certain localising or connecting factors, such as place of birth, permanent residence, place of contracting or situs of objects. Effectiveness was the moving consideration, and the choice of law was coincident with the choice of jurisdiction. Feudalism and the remains of the system of personal law helped to establish it, but in the end principles of choice of law emerged which bear a remarkable similarity to modern Private International Law. This was the contribution of Germanic legal thought in the 12th and 13th centuries. It has influenced the early development in England, before the Dutch school of the 17th century made itself felt, and today a similar technique has found favour with an influential American writer.[32]

Section 6. Italy—The Legists

7. While the northern countries were grappling with questions of choice between several legal systems, none of which could claim a preponderant place, and solved them by concentrating on jurisdiction, Italian legal science [33] had to face the problem that the new common law of the Holy Roman Empire—Roman Law—existed side by side with the indigenous laws and customs of cities and regions in Italy. An early instance of the problem is to be found in the writings of Carolus de Tocco (± 1200): [34]

> "Hic nota quod alios noluit ligare nisi subditos imperio suo et est argumentum infra C.3.1.14.
>
> Est autem hoc contra consuetudines civitatum quae etiam alios constringere volunt suis statutis. Et est argumentum si litigat Mutinensis contra Bononiensem in hac civitate quod statutum non noceat Mutinensi. Sed quidam contra hoc autem dicunt argumento illo quod Mutinensis hic forum sequitur conveniendo Bononiensem unde omnes leges illius fori recipiat."

The writer was not certain whether the court in Bologna must apply its own law, the *lex fori*, to all persons and cases before it, or whether an equitable solution was required. The great lawyers of that period Azo [35]

and Accursius (1228?) [36] still tended towards the application of the *lex fori*.[37] Yet this view had not gone unchallenged, and Aldricus (1170-1200) came out in favour of the "better law". He had said:

> "Quaeritur si homines diversarum provinciarum quae diversas habent consuetudines sub uno eodemque iudice litigant, utrum earum iudex qui iudicandum suscepit sequi debeat. Respondeo eam quae potior et utilior videtur. Debit enim iudicare secundum quod melius ei visum fuerit. Secundum Aldricum." [38]

Hugolinus, who expressed a similar opinion, may have limited its purport to the situation where plaintiff and defendant, being citizens of two different towns, litigate before a court in a third city.[39] Whatever its field of application, glossators and post-glossators were agreed that the clue to the solution of the problem was to be found in C.1.1.1.pr. (380 A.D.), C. Theod. 16.2.2. which provides:

> "Cunctos populos quos clementiae nostrae regit temperamentum in tali volumus religione versari quam Divinum Petrum apostolum tradidisse Romanis religio usque ad nunc ab ipso insinuata declarat . . ."

Hugolinus interpreted this passage as follows:

> "Ex ista lege aperte colligitur argumentum quod imperator non imponit legem nisi suis subditis; nam extra territorium jus dicenti impune non paretur." [40]

An inapposite text was thus employed to solve problems which it never envisaged but the principle which it interpreted was made to express was of far reaching importance. Neither the narrow application of the *lex fori*, nor the broad choice of the "better law" had in fact inspired the practice. To a certain extent the application of the *lex fori* was conditional upon the existence of jurisdiction. This could be assumed over non-residents if it was the *locus contractus, delicti, rei sitae* or in respect of counterclaims,[41] and the *lex fori* applied. Now a doctrinal basis was provided for these and other cases. Legislative power was understood to extend to all subjects, persons and objects within a particular city or State.[42] Neither the unbridled dominance of the *lex fori*, nor the uncertain operation of good sense and a feeling of justice determined the issue in the courts. An objective test, based upon personal or local allegiance (to use a modern expression), determines the choice of law. The fact that jurisdiction exists does not necessarily support the application

of the *lex fori*. A first attempt in the history of Private International Law was thus made to determine the application of local and foreign law with the help of a doctrine which claimed to be of universal validity and was based upon the ties of personal and local allegiance.

The doctrine suffered from a serious deficiency, for it failed to set out in *what circumstances* the claim to apply the *lex fori* on the ground of personal or local allegiance could be asserted. This gap was filled to a great extent during the 13th and 14th centuries. A first distinction was made by Jacobus Balduinus (± 1235), followed by Odofredus, between rules of procedure (*ad litis ordinationem*) and rules of substance (*ad litis decisionem*).[43] As regards the former, the rules of procedure of the *forum* apply always and in all suits. As regards the latter, the *lex fori* is not applicable in all circumstances and without restrictions. But Balduinus failed to show in what circumstances the local law had to withdraw [44] and his distinction was not accepted without opposition, especially on the part of Accusius.

Nevertheless, the contribution of Balduinus was of great significance. While the text of the Corpus Juris encouraged the application of law based upon a division of legislative competence, Balduinus introduced a criterion to determine which legislative competence is involved. It relies on the *difference in nature* of rules of law. They are either rules of procedure or of substance, and their application in space is to be determined by the intrinsic character of the legal rules themselves.

It will be shown below that this new test is unworkable, except in the limited circumstances which attracted the attention of Balduinus himself. In those particular instances the test is still employed in modern Private International Law, where the principle applies at the present time that, where rules of procedure are in issue, the forum must follow its own rules. It became the fundamental test in the Middle Ages when, with further refinements added to it, it became known as the doctrine of the statutists.

Section 7. The Doctrine of the Statutists [45]

8. It is proper to connect the further development of the statutists doctrine with the French schools in Orléans, Toulouse and Montpelier, where the influence of Accursius, who favoured the unrestricted application of the *lex fori*, was less marked than in Italy. Here Balduinus' tenet [46] that the application of statutes in space depends upon their intrinsic nature is believed to have been given its final form. The achieve-

ments of the French school, its claim to originality and its function in the light of its political and historic background will be examined next.

9. *The French school.* One of the earliest French writers on this subject, Jean de Révigny (1270), in adding another choice of law rule to those already known in practice,[47] connected succession, both testate and intestate, with the law of the situs. In his own words—

"semper inspicienda est loci consuetudo in quo res sunt".[48]

This hard and fast rule was qualified by his pupil Pierre de Belleperche or Bellapertica (± 1285) when he said—

"si consuetudo est realis".[49]

Thus a second distinction had been drawn in addition to that offered by Balduinus between *leges quae ad litis ordinationem spectant* and *leges quae ad litis decisionem spectant.* Now the rules of substantive law themselves are subdivided; they are either *statuta personalia* which follow the person or *statuta realia* which are strictly local in their operation. The *lex fori* as a *statutum personale* applies only to those subject to it; as a *statutum reale* it applies to all assets situated within its jurisdiction.[50] But it does not apply to foreigners and to objects situated abroad,[51] who are subject to the *jus commune* or to the incipient conflict rule that the *lex loci* applies to contracts.[52]

The difficulty was, however, to determine whether a statute was *personalis* or *realis*; "si consuetudo non sit contra personalem obligationem inducenda sed contra realem . . ." said Lambert de Salins (± 1300).[53] The answer came from Guillaume de Cun (1315-1316): [54] *statuta realia* are those which affect directly objects, *statuta personalia* are those which affect directly persons and which affect objects only indirectly. The distinction may seem plausible at first but, as will be shown below, it is often impossible to state in any particular instance whether a statute is *realis* or *personalis.*

10. *The Historical Background of the French Doctrine.* The meaning and purpose of the new distinction, said to have been introduced in France, becomes clear if its historical and political background is examined. This was the time when the Emperor's supremacy was challenged by France and Naples. The authority of the Pope to legislate with binding effect elsewhere had been challenged some 70 years before.[55] Shortly after 1250 political thinkers in France and Naples had challenged the

principle that "everyone is subject to the Emperor without exception" by opposing to it the principle: *Rex in suo regno est imperator.*[56] According to this view, within his own territory and in respect of those subject to his allegiance, the King of France as the local sovereign can legislate with effects which override imperial legislation and the *jus commune.* The purpose of the distinction employed by the French writers is now clear. Its aim is to assert the sovereign power of France or Naples to enact exceptional legislation with regard to its own territory, but not beyond. What had been hitherto only a system of interprovincial conflict of laws, subject to the overriding common and imperial law, had become a set of inter-State rules.

Thus *statuta personalia* and *statuta realia* were not mutually exclusive, as it was held later on; they are special legislation with a built-in restriction of application comparable to a modern unilateral conflict rule. Thus understood, the distinction between real and personal statutes loses much of the importance which was attributed to it later on, but it gains in clarity and significance. Further refinements were added, such as the inclusion of formalities in *statuta personalia.*

11. *The Statutist Doctrine in Italy—14th Century.* It is commonly said that the statutist doctrine was given its final form by Bartolus (1314-1357) [57], followed by Baldus (1327-1400) [58] who took over the teachings of the French school. Drawing on the canonist and civilian writers in Italy [59] and France [60] he reaffirmed the statutist doctrine,[61] but developed at the same time what may be called the equivalent of modern conflicts rules, to govern especially contracts,[62] delicts,[63] and the form of wills, more particularly where the foreign *lex causae* is the *jus commune.* Unlike his predecessors, however, he no longer treated the qualification of statutes as real and personal as a personal or territorial limitation of the *lex fori qua lex specialis.* Instead these tests now served to determine also whether foreign special legislation in the nature of personal or real statutes are to be applied in the courts of the forum. The notion now serves a bilateral purpose [64] and conflicts between a foreign *statutum personale* and a local *statutum reale* can present themselves.[65]

At the same time restrictions upon a foreign personal statute which was otherwise applicable now became necessary. Foreign prohibitive statutes are excluded if they are a *consuetudo odiosa* [66]—a forerunner of the modern doctrine of public policy:

> "Quidquid disponitur contra naturam rel rationem naturalem illum odiosum appellabitur." [67]