TRENDS OF PRIVATE INTERNATIONAL LAW

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SCIENTIFIC EDITORS

Prof. Dr. Štefan Luby
Dr. Otto Kunz

PAVEL KALENSKY

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"La théorie en droit international privé . . . : c'est un combat de nègres, le soir, dans un tunnel."

/M. Gutzwiller, *Rabels Zeitschift*, 1937, p. 326./

". . . Deutsche, Franzosen, Engländer und Amerikaner, stehen sich oft sehr schroff gegenüber. Alle aber vereinigen sich in einem gemeinsamen lebhaften Interesse an den hier einschlagenden Fragen, in dem Bestreben nach Annäherung, Ausgleichung, Verständigung, so wie es sich in keiner anderen Rechtslehre findet."

/Savigny, *System des heutigen Römischen Rechts*, Vol. VIII /1849/, Foreword, p. IV./

FOREWORD

In the course of the close to twenty years that I have devoted to practical and theoretical work in the field of private international law and the law of international trade, I have been repeatedly and increasingly bothered by the three questions which I am trying to answer in the present study, namely What?, Why? and How?, that is questions concerning the object, reason and method, which are essential in any field of study.

I am fully aware of the fact that it is probably impossible to provide a complete, exhaustive and unequivocal answer to these three questions in the sphere of private international law, and that such an answer should not even be expected in the foreseeable future. I do not say this as an excuse for the shortcomings that undoubtedly exist in my study, but I believe that the considerate and understanding reader will realize the difficulties with which any work concerned with basic, theoretical study of such a complex subject-matter as modern-day private international law must necessarily meet.

Private international law, as a phenomenon of the social superstructure, forms in a way a part of social reality, which calls for a certain juridico-sociological analysis as a starting point. This is contained in the first part of the present study.

Seeking the answer to the three basic questions of contemporary private international law, I also deemed it essential to outline to the reader the historical development of the different concepts of this particular branch of law, for without the knowledge of this history it is impossible to understand the contemporary problems.

The fact that private international law oscillates between public international law and substantive municipal law as it is applied in individual countries creates considerable problems in both theory and practice. I have tried to deal with these problems in the third part of my study, concerning "universalism" and "nationalism" in the doctrine of private international law, as well as in its fourth part, which is devoted to the object and nature of this law and its place in the overall system of law.

The character of private international law, ensuing from the plurality of municipal laws — which also characterize the origin and existence of comparative jurisprudence — inspired me to produce the fifth part of this study, which primarily tries to explain the theoretical problems of comparative jurisprudence but does so — defining its objectives and possibilities — in order to underline at the same time its role in private international law and in the law of international trade.

The sixth and final part of my study is concerned with the substance and nature of application of foreign law, which, in its consequences, represents something of a "culmination" of the conflict rules and which is of utmost importance for the private international law and the general law of every state because the application of a foreign law — even when it is based on a rule of municipal law — disturbs the homogeneity and exclusive character of the municipal law of any country; therefore, I have tried to provide an answer as to the mutual relationship between the municipal law of a state and the applied foreign law.

This structure of my study thus necessitated the consideration of certain problems from different aspects; however, I have done so only to the essential extent called for by the outline of my work.

This book is not an attempt to provide a "legal philosophy" of private international law as a comprehensive system, although I realized that the basic questions I had posed to myself would lead to a study in legal philosophy rather than to a purely juristic treatise; nevertheless, I feel that the reader will understand that this work is concerned with an analysis and explication of the positive rules of private international law only to the extent essential for keeping the scope of the book within reasonable bounds.

My study could not have been produced without the kind and patient understanding and support of all my colleagues and friends from the Institute of Legal Science of the Czechoslovak Academy of Sciences and the Faculty of Law of Charles University, to whom I hereby convey my deepest gratitude.

Prague, October the 9th, 1968.

Pavel Kalenský

PART ONE
Private International Law as a Social Phenomenon

CHAPTER 1
A General Survey

Private international law (both as a branch of law and as a branch of jurisprudence) occupies in certain aspects a special and unique position among other branches of law and jurisprudence.

On the one hand, stress is being laid on its intricate character given by the complexity and extent of the problems it covers, which range from the sphere of public international law to the sphere of municipal, primarily civil, law; this gives private international law the character of a hybrid and extremely complicated field of law. On the other hand, we must not ignore those authors, who view such an essential part of private international law as the law of conflict of laws "only" as a technical matter which is to provide the judge, in abstract and technical formulas, independent of the existing socio-political and economic conditions, with guidance in settling particular conflicts problems;[1] this, of course, is not to detract from the complexity and subtle nature of these formulas.

However, neither opinion prevents the doctrine of private international law from being characterized — perhaps to an even greater extent than the other fields of jurisprudence — by its speculative nature which frequently leads to abstract and highly

---

[1] See, e.g., the opinion of the outstanding Swiss author M. Gutzwiller, who in his study (remarkable for its actual content) "Le développement historique du droit international privé", *Recueil des Cours*, 1929, Vol. IV, p. 376, writes: "... *le droit international privé est absolument étranger à ces considérations matérielles ... les questions des conflicts des lois civiles renferment un problème juridique, voir technique, abbandonné dans une mesure bien large aux décisions d'un petit comité d'experts.*"

complex theories. This fact, to be true, is not the result of some fancy in nurturing such theories, but reflects the very nature of private international law and ensues from its objects, its scope and the character of the social, objective reality, which private international law governs and from which it proceeds. We should bear in mind from the very beginning that in all its parts, private international law is, in a way, full of contradictions and serious problems, which in their essence ensue from the character of its subject-matter. Most complications probably arise from the fact that private international law involves the legal regulation of social relations which — due to the existence of a foreign or international element contained therein — have a specific international character but in their overwhelming majority are governed by the municipal laws of the individual states, which must give certain, but at the same time very different, regard to the international character of the regulated relationships. This fact — which undoubtedly ensues from the different class and political substance of individual states and their concrete interests — is the principal source of the disparity between individual municipal rules governing essentially the same or very similar cases or social relations; although the doctrine of private international law must respect this state of affairs, it is typical of it, that it is characterized by certain tendency towards internationality, which is, on the one hand, the heritage of a common legal development (at least a particular one) and, on the other hand, the outcome of the endeavour to obtain a harmonious settlement of the same cases in the greatest possible number of states; this — in our opinion quite natural tendency — is also greatly promoted by the international features whereby public international law influences private international law, as well as by the postulates which ensue at the level of private international law from the calls for the peaceful co-existence of states with different social systems.

Although private international law is at present primarily a part of municipal law, it should not be understood — as a branch of law — as a mere body of rules issued seemingly in an arbitrary manner by each state within the framework of its

sovereignty regardless of international links and the conclusions arising from public international law, its principles and rules as regards the definition of the jurisdiction of individual states in treating non-sovereign subjects, irrespective of whether they are their own citizens or aliens. Thus, within these bounds, private international law is considerably influenced by the idea of the international community of states, the principles of general international law, and the assumed reciprocity on the part of other members of the international community, in spite of the fact that this reciprocity does not directly affect the application of foreign law to any particular extent and that its absence does not lead to retortion in the field of the law of conflict of laws.

It may be said that private international law oscillates between the territorial nature of municipal law and the universality of public international law. Although we do not feel that it is possible to prove that private international law is a part of public international law, we cannot ignore the fact that between the two there does exist a relationship of functional connection and interaction, which is quite understandable and warranted by the nature of the social relations governed by private international law.

The private international law of every state — similar as other branches of law — expresses certain class interests and in its substance embodies the will of the ruling class isolated within national boundaries, but at the same time a will which must bear in mind the interests the ruling class within the particular state has with respect to other members of the international community, irrespective of whether states of the same or a different socio-economic character are involved.

For the present, it would probably be wrong and unrealistic to claim that the private international law of every state differs according to whether it governs the relationships of its own subjects to non-sovereign subjects from states of the same socio-economic character or to subject from states whose socio-economic character is different or contradictory. Although certain trends aiming at such a solution cannot be ignored, especially in the sphere of unification or integration of substantive law