

Michigan Law Review

Volume 65 | Issue 1


1966

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Recommended Citation

Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9 (1966).

Available at: <https://repository.law.umich.edu/mlr/vol65/iss1/3>

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THE COMITY DOCTRINE†

Hessel E. Yntema*

THE doctrine of comity, as developed in the Netherlands during the last quarter of the Seventeenth Century, for the first time posed in stark simplicity the basic dilemma of conflicts law in modern times to mediate between the pretensions of territorial sovereignty and the needs of international commerce. As *Ulrik Huber*, the most influential exponent of the doctrine, observed: "*Exempla, quibus utemur, ad juris privati species maximè quidem pertinebunt, sed judicium de illis unicè juris publici rationibus constat, & exinde definiri debent.*"¹ ["The examples which we shall use belong principally to the category of private law but their treatment rests exclusively on principles of public law, and they must be defined accordingly."] In this summary account, it is proposed to sketch the background, to restore the meaning—still too frequently misunderstood—and to consider the relevance at the present time of the basic principle in this historic doctrine. It is hoped that a modest excursus of this nature in a field of special interest to the Max-Planck-Institut für ausländisches und internationales Privatrecht, founded by *Ernst Rabel*, may be accepted in acknowledgement of the signal contributions to the advancement of comparative legal science, for which we are indebted to the distinguished jurist, who has directed the Institut since 1945, *Hans Dölle*.

I

In the evolution of the theories developed by Western legal science to resolve the problems presented by the diversity of laws, characteristic of medieval and modern times, there have been two turning-points of fundamental significance. The first was the genial invention of the glossators towards the end of the Twelfth Century, A.D. that foreign law, in appropriate instances, should be applied to foreign cases. Originally, in the early Middle Ages, the regime of personal law prevailed, a system in which the rights and duties of

† Reprinted with permission from 2 VON DEUTSCHEN ZUM EUROPÄISCHEN RECHT, *Festschrift für Hans Dölle* 65 (von Caemmerer, Nikisch, and Zweigert, eds., 1962). Unless otherwise indicated, English translations are by Dr. Vera Bolgár, University of Michigan Law School, in consultation with Professor Roger A. Pack, Department of Classical Studies, University of Michigan.—Ed.

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1. *Ulrik Huber*, *De Jure Civitatis*, Lib. III, Sect. IV, Cap. I., 14, at p. 607 in the 3rd edition of 1968.

individuals were derived from the customary laws of the respective ethnic groups to which they belonged. For the communities in a sedentary agricultural society, each cloistered in its separate vale, this simple conception expressing the instinctive attachment of the individual to his group, doubtless seemed obvious and, with infrequent litigation between members of different groups, sufficed to determine the applicable law, which was identified by the forum of the defendant, or in other words, of his group.

With the progressive development of orderly, centralized government and the expansion of commercial relations, various causes conspired to undermine the regime of personal laws. The original Germanic tribes were mixed by intermarriages, and new ethnic groups appeared; the memory of the ancient customary laws faded with the passage of time; and in the kingdoms that were formed, centralized legislation, in England implemented by an effective organization of royal courts, overrode the local laws. As a result, the principle that each man was governed by his own law—the law of his ethnic group—became increasingly burdensome as soon as it was recognized that the law of each party, plaintiff or defendant, should be respected and the instances multiplied in which account had to be taken of diverse customary laws. The celebrated complaint of *Saint Agobard* against the *lex Gundobadi* of Burgundy, cited by *E. M. Meijers*, depicts the situation: "*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.*"² ["Such a diversity of laws exists not only within certain regions or cities but even in many households. Indeed, it frequently happens that five men get together or meet with each other and none of them has a law in common with any other."] This situation was still further complicated by the spread of feudalism, under which, along with the personal law, not only the tenure of land but all questions relating to inheritance were governed by the law of the land—the *consuetudo patriae*. Under these conditions, there was an obvious need to harmonize the multiplicity of local customs and laws on a more rational basis.

The solution of this problem was precipitated by the revival of Roman law studies in Italy during the Twelfth and Thirteenth Centuries. The discovery of the manuscripts of the Code and Di-

2. *E. M. Meijers*, *L'Histoire des Principes Fondamentaux du Droit International Privé à partir du Moyen Âge, spécialement dans l'Europe Occidentale: Recueil des Cours de l'Académie de Droit International* vol. 49 (1934-III) 543-68 b (561-62).

gests of *Justinian*, on which legal instruction in the nascent universities was primarily based, made it necessary for *Imerius* and his followers not only to establish the texts but also to determine their meaning and scope of application. The volume and complexity of the imperial laws of Rome, reflecting the development of Roman law during a thousand years and enacted, not like a modern code as a systematic statement of legal principles, but as an imperfectly organized compilation of constitutions of the emperors and opinions of the classical jurists relating to particular problems and cases, in which the refined conceptions of Roman jurisprudence were embodied along with a variety of antinomies and apparent contradictions—the so-called emblemata of *Tribonian*—necessarily posed, as an essential aspect of their interpretation, the question of their relation to the existing customary laws and the growing body of enactments of the autonomous cities in Italy and elsewhere, known as *statuta*, not to speak of legislation by other secular authorities and the canon law. The question must have pressed with singular actuality on the attention of the “*doctores*” of Bologna in view of the international complexion of their audience—by 1200 A.D. in the time of *Azo*, we are told, there were 10,000 students at Bologna, the majority from foreign parts, who had come to study the laws of imperial Rome. It was customarily elaborated in the exposition of the famous initial text in the Codex of Justinian, the *lex Cunctos Populos* (C. 1. 1. 1.).

In resolving this fundamental problem of the hierarchy of legal orders, the glossators and their successors made two contributions of central importance for the future development of conflicts law. In the first place, they established the civil law of Rome, as adapted to current conditions, as the common law of Western Europe. This remarkable achievement, however incomplete in acceptance or practice the doctrine of the preeminence of the law of Rome as the criterion of positive justice might be in particular times or places, may be attributed not merely to the superiority of the ancient jurisprudence over the more primitive and incomplete customary laws, but more especially to the persistence of the idea that the Holy Roman Empire survived and that accordingly the *Corpus Iuris Civilis* obtained as the general law. The success with which this pre-conception was inculcated in those who came to the universities to learn the civil law, was doubtless due to the fact that, as *Maitland* observed, taught law is tough law. However this may be, this principle served to provide criteria for the recognition of local customs and particular enactments, to delimit their respective spheres of

application, derogating from the *ius commune*, and to supply a basis for unification, to the extent that they did not apply. The conception that there is a common subsidiary body of legal doctrine, in the first instance elaborated in the learned studies of those versed in the civil law and eventually to be evolved in comparison with the developments in national legal systems, has been the first and essential postulate to provide a degree of unity in the diversity of local laws.

The second contribution, a natural corollary of the first, was to establish a rational basis for choice of law among competing local customs or municipal enactments according to the nature of the case. This involved abandonment of the idea that laws are exclusively personal in their application and, after a brief period of initial dispute, rejection also of the view attributed to *Azo*, which doubtless in some degree reflected current practice, that the *lex fori* should apply. The initial justification for a more reasonable basis of decision was found in equity, which, it may be recalled, the *Constitutio Placuit* of *Constantine* of 314 A.D. (C. 1. 14. 1.) ordained should prevail over strict law. This genial suggestion was made in a *glossa* of the last quarter of the Twelfth Century, ascribed to *Aldricus*, a highly esteemed younger contemporary of the four "doctores," to the effect that, if men from different provinces, with different customs, litigate before one and the same judge, on the question which of these the judge should follow, according to *Aldricus*, "*respondeo eam quae potior et utilior videtur. debet enim iudicare secundum quod melius ei visum fuerit.*"³ ["I reply, the one that seems better and more useful. He should pass judgment in accordance with what seems better to him."] It is of interest, as *Neumeyer* points out,⁴ that the concluding sentence in the *glossa* recalls the clause in the judicial oath prescribed in *Justinian's* Eighth Novel: "*et omnem aequitatem servabo, secundum quod visum fuerit mihi iustum.*" ["I shall serve above all equity, following what seems just to me."] With the acceptance of this view, presumably early in the Thirteenth Century, the science of private international law was founded—on the ground of equity. It remained to define in this context what equity requires.

This has been the task of succeeding generations, in the execution of which it has not always been borne in mind that the problem of choice of law is essentially to determine what is fair; too

3. Cited by *Karl Neumeyer*, *Die gemeinrechtliche Entwicklung des internationalen Privat- und Strafrechts bis Bartolus*, Pt. 2 (1916) 67.

4. *Ibid.*, 68, n. 2.

often, equity has been subordinated to strict law, inexorable logic, or provincial policy. For the present purpose, it is not possible nor necessary to follow in detail the subsequent evolution of doctrine, but only to sketch the background, on which the comity doctrine appeared in the Seventeenth Century. For this, it must suffice to indicate the chief positions that were taken to delimit the spheres of application of particular laws, or *statuta* as the local enactments of the municipalities were termed. This involved a flexible process of statutory interpretation, in which not only the subject matter of the statutory dispositions but also considerations of equity and convenience, particularly as evidenced by the practice of important courts, and the few pertinent Roman texts, were taken into account. In effect, as a review of the salient principles that came to be accepted will suggest, the sphere of the personal law, conceived not as a quality of attachment to a group with which each individual is born but as subjection to a local political power, was severely restricted but not entirely abandoned. Indeed, in the scheme of the statisticians, the most important and disputed distinction was between the statute personal and the statute real.

In a brief enumeration of these principles, we may take as a guide the classic commentary of *Bartolus* on the *lex Cunctos Populos* (C. 1. 1. 1.), in which the doctrines developed by the middle of the Fourteenth Century are systematically summarized, and which for two centuries thereafter enjoyed undisputed authority. The exposition is concerned with two inter-related questions: the application of statutes to those not subjects, and the effects to be given statutes without the territory of the enacting authority. As will appear, in this scheme the application of the commonplace, *statutum non ligat nisi subditos*, which was originally posed to restrict the application of the *lex fori* to aliens, was limited to the personal law. The chief propositions enunciated by *Bartolus* may be listed as follows:

1. In setting forth the law applicable to contracts, a threefold distinction is made, whether the statute concerns the form (*solennitatem*) of the contract, procedure (*litis ordinationem*), or performance of the contract (*jurisdictionem ex ipso contractu evenientis executionis*).⁵

2. Questions relating to *ordinatio litis* are referable to the place of litigation, i.e., the *lex fori*.⁶

5. *Bartolus*, Ad legem Cunctos Populos (C. 1. 1. 1.) No. 13.

6. *Ibid.*, No. 15.

3. Questions concerning *solennitas* of a contract are to be referred to the place of the contract.⁷

4. Questions relating to *decisio litis*, i.e., the merits as distinguished from *ordinatio litis*, are further distinguished. Those arising with respect to the nature of the contract itself, at the time of contracting, are decided by reference to the place of contract, namely, where the contract is celebrated; those arising *ex post facto*, from negligence or default, by reference to the place of performance, where the negligence or default occurs.⁸ An exception is made in the case of dotal contracts; these are governed by the husband's law.⁹

5. In the case of delicts, the statute applies within the territory, not only to subjects but also to foreigners, unless they may be deemed to have been ignorant of the statute, *e.g.*, if the statute does not accord with the *ius commune* and there has been an insufficient period of residence to presume knowledge of the statute.¹⁰ Such statutes, if they so provide, also apply to offenses committed outside the territory by subjects.¹¹

6. On questions relating to wills, *Bartolus* holds that a statute relating to form, *e.g.*, reducing the number of witnesses normally required, unless restricted to subjects, also applies to aliens in the territory on the principle *locus regit actum*,¹² but not as respects their testamentary capacity.¹³

7. The distinction between real statutes (*circa rem*) and personal statutes (*circa personam*) is recognized. Questions regarding rights relating to a thing itself are referred to the place where the thing is situated.¹⁴

8. A personal statute applies only to subjects: *statutum non ligat nisi subditos*.¹⁵ As respects the extraterritorial effects of a personal statute, a distinction is made between permissive and prohibitive statutes, the latter being again subdivided into "favorable" and "odious" statutes; only prohibitive statutes, which are "favorable," have extraterritorial effect.¹⁶

Two observations may be made on the system of conflicts law de-

7. *Ibid.*, Nos. 14, 32.

8. *Ibid.*, Nos. 15, 16.

9. *Ibid.*, Nos. 17, 19.

10. *Ibid.*, No. 20.

11. *Ibid.*, No. 48.

12. *Ibid.*, Nos. 24, 25.

13. *Ibid.*, No. 25.

14. *Ibid.*, Nos. 27, 32.

15. *Ibid.*, Nos. 25, 26.

16. *Ibid.*, Nos. 32-34.

veloped in Italy, as thus summarized by *Bartolus*. In the first place, it provided a more flexible basis to satisfy the needs of international commerce than either the primitive regime of personal laws or the system introduced by feudalism, in which the law of the land was paramount. In effect, other categories of statutes, neither real nor personal, were recognized, as exemplified by the rule *locus regit actum*. The second is, as *E. M. Meijers* has pointed out, that the scheme in the last analysis rested on three conceptions; the sovereign power of legislation, the existence of a common law, and the autonomy of the will of the parties, the relative consideration of which has ever since been of concern in this field of law.¹⁷

The influence of *Bartolus* was most extensive in regions where the Roman law was received, but in the *pays de droit coutumier*, in northern France and Flanders, its effect was limited. Here the regime of realty prevailed; the law of the land governed not only rights directly affecting immovables but all transactions relating thereto. *Argentré* recognized in addition to the real and personal statutes a third category of mixed statutes, both real and personal, but these were treated exactly as real statutes. As stated in his celebrated treatise *De Donationibus*:

*Quae realia aut mixta sunt, haud dubiè locorum & rerum situm sic spectant, ut aliis legibus quàm territorii iudicari non possint, terminos quidem legislatoris populi non excedunt, sed nec vicissim exceduntur ipsa & ut infinita sit commerciorum libertas iure Romano, contractibus, testamentis, negotiationibus, tamen ea sic infringitur, ut moribus & legibus locorum cedat.*¹⁸

[Those statutes which are real or mixed are determined without doubt by the situs of the land and things, inasmuch as they can not be governed by laws other than those of the state. These laws, of course, do not apply beyond the legislator's boundaries and neither are they, in turn, applied; and though by Roman law the freedom of transactions regarding contracts, wills, and commerce is unlimited, this freedom is thus nevertheless infringed to the extent that it yields to the customs and laws of the state.]

On the other hand, the ancient customary rule, *mobilia ossibus inhaerent*, persisted from the regime of the personal law, and some advance was made by removing from the regime of the statute real, statutes not directly related to land, concerning marriage, majority, guardianship, and the like, which were classified even by *Argentré* as purely personal—*quae pure de statu personarum agunt*. A further development was the acceptance, relatively late, of the prin-

17. *Op. cit.*, *supra* n. 2, at 635.

18. Art. 218, Glossa 6, No. 9.

ciple *locus regit actum* to determine the form of acts, such as testaments. The most important reform, however, was accomplished by the ingenious doctrine of *Dumoulin*, which was designed to secure unity in the regime of matrimonial property by circumventing the application of the local real statute to each separate holding of the spouses. For this purpose, instead of directly attacking the regime of *realité*, he resorted to the conception of the autonomy of the parties, on the ancient principle that the intent of contracting parties, express or tacit, is a source of law that in its sphere of application transcends the mere authority of a statute as such, limited to its territory. But with these exceptions the *lex terrae* applied, and the delimitation of its application in cases where it did not coincide with the personal law, i.e., of the domicile, had become confused by so many conflicting opinions that, to quote *Argentré* again, *ea recudere valde esset operosum, & pugnantes componere, aut comparare impossibile*.¹⁹ On this background, the contributions of the jurists in the Netherlands during the Seventeenth Century are to be considered.

II

The revolt of the Netherlands, precipitated in 1568 by the repressive measures taken by the Duke of Alva as vicegerent of Philip II of Spain to "reconquer" and subject the seventeen Provinces in the Low Countries to Spanish domination, opened an eventful page in the history of modern Europe. The transient hope of unity under the Pacification of Ghent of 1576 broke on the issue of religion; within four years, the Catholic Provinces in the south, the Spanish troops having been withdrawn, made peace on advantageous terms, leaving the seven northern Provinces that in 1579 had formed the Union, the "*eeuwich Verbondt ende Eendracht*," of Utrecht to continue the unequal and bitter contest with the then greatest power in Christendom. The Eighty Years' War, as it has been called, was not concluded until 1648 by the Peace of Munster on terms highly favorable to the United Netherlands. The cause for which the war was fought was liberty, not as conceived two centuries later by Rousseau, but in the more conservative sense of the Sixteenth Century: freedom from political oppression and the inquisition, maintenance of the traditional rights and privileges of the Provinces, their nobles, cities, and inhabitants, and tolerance of religious belief and worship, against a foreign tyrant. The price paid to vindicate these liberties was high, but the fact that they were won was

19. *Ibid.*, No. 1.

of momentous consequence to Holland and to humanity. More immediately, the revolution ushered in the Golden Era of the Netherlands.

Within a generation, the United Netherlands became the most progressive and, with the collapse of Philip's grandiose plans for world empire and internal disorders in France, Germany, and England, a major power in Europe. The protracted conflict with Spain released unsuspected energies and evoked a remarkable expansion of commerce, culture, and industry in the Low Countries. At the beginning of the Seventeenth Century, if we may believe the accounts of English voyagers, Dutch ships in number were treble those of England; they sailed the most distant seas, established trading stations and colonies in Africa, Asia, and the Americas, and for an interval became the most successful competitors for the carrying trade of the world. Coincidentally, the mainstreams of European culture concentrated in Holland and the sister Provinces along the mouth of the Rhine. Humanism, science, literature, art, architecture, theology, philosophy, and jurisprudence, all found here notable and in some cases consummate expression. The Netherlands became the chief mart of world commerce, not only in goods but also in ideas, the relatively free atmosphere offering asylum to those who had to flee other countries on account of their ideas and beliefs—to Huguenots and Jews, Pilgrims and Cavaliers—the spirit of Athens again resurgent at the threshold of the modern world. A portentous scene in the progress of constitutional government it was, advertising the advantages of freedom over absolutism. As *Figgis* has remarked: "To estimate our debt to Holland is hard; to overestimate it is harder."²⁰

In this scene, various factors favored reconsideration of the doctrine of conflicts law. First and foremost was the polity of the Netherlands, federated in the Union of Utrecht. By this, the Provinces bound themselves, "as if they were one Province," in a perpetual, indissoluble Union for their defense not only against Spain but also against any princes or powers, foreign or domestic, seeking to use force to make war upon any one of them, even if it were to restore the Catholic religion. It was also expressly provided in Article I of the Treaty that the traditional privileges and rights of the Provinces, their cities, constituent members, and inhabitants, should not be diminished: on these principles, the *Corte Vertoonighe* issued by the States of Holland and West Friesland declared in

20. *Figgis*, *Studies of Political Thought from Gerson to Grotius, 1414-1625* (Cambridge 1907), at 197.

1587, they had been governed and, never conquered, had preserved their freedom for eight hundred years. Provision was made for meetings of the States General, the deputies of the Provinces, with undefined powers in matters affecting the general interest, except that certain questions of special importance, such as peace, truce, and war and the imposition of general contributions, should be determined by common advice and consent. Originally, it was not contemplated that the Union should be without a sovereign; but the successive efforts to procure a successor to Philip II after the *Afzweering* in 1581 to aid in the war against Spain were unavailing, and upon the termination of the disastrous governorship of the Earl of Leicester in 1588, they were abandoned. Thus, the Republic crept in unawares, as Robespierre later said of the French Republic. Perhaps, if William the Silent had not been assassinated in 1584, he might eventually have accepted the crown; as it was, the indelible loyalty of the Dutch to his memory and to his House had to suffice during the Republic as a source of national unity. Until 1795, the Union of Utrecht remained the basic constitution of the Netherlands, exemplifying the observation of *Grotius* that, while the *summum imperium* is a thing one and in itself indivisible, it may nevertheless be divided into parts, subjective or potential, i.e., by co-sovereignty of several rulers or by division of powers.²¹ The consequences of this decentralized regime were chronic weakness in the central authority and pronounced independence of the Provinces—a fertile field for conflicts of laws.

More specifically, while the jurists in the Netherlands, indoctrinated in the civil law, were acquainted with the teachings of their predecessors in Italy and France concerning statutes real and personal, notably as related in the works of *Burgundus* and *Argentré*, two factors compelled reconsideration of the traditional doctrines and indeed led to a second turning-point of fundamental significance in the history of conflicts law. The first was the elaboration of the theory of territorial sovereignty by *Bodin* in 1576 in *Les Six Livres de la République*, more widely disseminated in the Latin version of 1584; this theory justifying the independence of the national states emerging in Europe, was promptly accepted in the Netherlands early in the Seventeenth Century. Consistently with their constitutional principles, the Dutch jurists sought on various grounds to reconcile with the rule of law the conception that in each independent state there is an ultimate source of authority, a *summa potestas*, subject to no superior; at the same time,

21. *Grotius*, *De Jure Belli ac Pacis* (1625) lib. I, cap. 3, § xvii, I.

they accepted without question the principle definitively established by Justinian, that the first attribute of the *imperium* is the power of legislation. The assumption that this power is limited to the territory of the sovereign necessarily attracted attention to the grounds on which the extraterritorial application of personal statutes might be justified.

In the second place, a more subtle and pervasive factor was also present. The Netherlands had become a commercial, sea-faring nation with a more liberal attitude towards foreigners who came to the Netherlands or with whom they traded than prevailed in countries such as France and England where landed interests were still predominant. It was characteristic that, in Article XVII of the Union of Utrecht, for example, the Provinces, Cities, and Inhabitants of the Netherlands, in order to avoid all occasion of war with foreign powers, had solemnly undertaken "*soo wel den Uyttheemschen als Inghesetenen van voorz Provintien t'administreren goet recht ende Justitie*", ["to administer good law and justice to foreigners and citizens alike,"] a generous provision in its time, answering to the needs of commerce for peace as well as "good law and Justice" for aliens equally with citizens, in which perhaps the idea of comity may be implicitly discerned.²²

The concern in the present article is a limited one: to review the reorientation of the basic doctrines of private international law in the Netherlands in the light of the conditions briefly sketched above. For this purpose, it is not necessary to examine the solutions of particular conflicts problems; these have been treated by more competent hands, more particularly in the summary of the "*doctrine hollandaise*" in the magistral lectures of the late *E. M. Meijers* at the Hague Academy of International Law in 1934²³ and in more detail in Professor *Kollewijn's* history of the Netherlands literature on private international law to 1880, completed in 1935 and published in Dutch in 1937.²⁴ As *Meijers* has observed,²⁵ neither the problems nor the solutions to be found in this literature are original—all were anticipated in France; the new departure is "*comitas*." Fortunately for the present purpose, this conception was developed in a few well-known works published before 1700, and their consideration will suffice. It is hoped that such a review of a topic, often

22. In this connection, for a summary of the legal position of foreigners in the Netherlands in 1619, see *Grotius*, *Inleidinge*, I, 13.

23. *Op. cit.*, *supra* note 2, pages 653-672.

24. *Kollewijn*, *Geschiedenis van de Nederlandsche Wetenschap van het Internationaal Privaatrecht tot 1880* (Amsterdam 1937).

25. *Op. cit.*, *supra* note 2, at 654.

ventilated but even today too frequently misconceived, may be of interest, not only since the materials are in Latin and Dutch texts of the time, not widely known and little read, but also since, as *Meijers* has remarked,²⁶ the doctrine of comity originated and still expresses the current presuppositions of private international law. In this enquiry, the chief points to be considered are the positions taken in the works in question as regards (1) the conception of territorial sovereignty, (2) the traditional statutory doctrine, and (3) the grounds on which the extraterritorial effects of foreign judgments and statutes are rested.

Despite the diversity of the laws and customs of the Provinces and the frequency of conflicts of laws, often deplored, in the Netherlands, no systematic treatise on the subject matter appeared until after the middle of the Seventeenth Century. In 1625, the epochal work of *Grotius*, *De Jure Belli ac Pacis*, was published, laying the foundations of public international law for the modern world of independent, national states, but not including private international law. Nevertheless, certain seminal conceptions were demonstrated in this work, significant in the later development: the absolute conception of territorial sovereignty, covering all things, all persons, including *subditi temporarii*, and all transactions within the territory, and the conception that the independent sovereign states form a *universitas*, a community governed by the common law of nature and of nations—*jus illud quod inter populos plures aut populorum rectores intercedit, sive ab ipsa natura profectum, aut divinis constitutum legibus, sive moribus & pacto tacito introductum*.²⁷ [“—that body of law which is concerned with the mutual relations among states or rulers of states, whether derived from nature, or established by divine ordinances, or having its origin in custom and tacit agreement.”]*

The first work to appear in the Netherlands, specifically treating conflicts of laws, was published in 1653, the *Tractatus de Jure Conjugum* of *Christian Rodenburg*, a member of the Supreme Court of Utrecht, in which, to avoid repetition, the author included the celebrated preliminary treatise, *De Jure quod Oritur ex Statutorum, vel Consuetudinum Discrepantium Conflictu*. This follows the French statutory doctrine as expounded by *Argentré* and *Burgundus*, and its merits are attested by the fact that a century later it was translated by *Boullenois* to serve as the text for the “observa-

26. *Ibid.*, at 667.

27. *Grotius*, *op. cit.*, *supra* note 21, Prolegomena, I.

* As translated in GROTIUS, THE LAW OF WAR AND PEACE 9 (Kelsey transl. 1925).

tions" in his well-known *Traité*.²⁸ However, there are improvements on the doctrine of *Argentré*. By legal construction, moveables are deemed to be located at the domicile of the owner and therefore are classified as real. More important, the category of mixed statutes is rejected, restoring the traditional dichotomy of statutes real and statutes personal in the older doctrine and enlarging the scope of the latter to include the determination of capacity even for transactions affecting land in another jurisdiction. It is recognized that the effect of real statutes is limited to the territory—*illa in res scripta territorii sui concludantur metis*.²⁹ At the same time, the extraterritorial effect of personal statutes concerning capacity is explained on the ground that they do not have direct effect on things. This conclusion is justified in a famous passage by the very nature and necessity of the case (*ipsa rei natura ac necessitas*), which suggests that, in the conceptions of the time, the extraterritoriality of personal statutes has a legal basis.³⁰ This explanation of what pre-

28. L. Boullenois, *Traité de la Personnalité et de la Réalité des Loix, Coutumes, ou Statuts* (Paris 1766).

29. Rodenburg, *Tractatus de Jure Conjugum* (Utrecht 1653), at 21.

30. "Quid igitur rei in causa est, quod personalia statuta territorium egrediantur? unicum hoc ipsa rei natura ac necessitas invexit, ut, cum de statu ac conditione hominum quaeritur, uni solummodo judici, & quidem domicilii, universum in illa jus sit attributum: cum enim ab uno certoque loco statum hominis legem accipere necesse esset, quod absurdum earumque rerum naturaliter inter se pugna foret, ut in quot loca quis iter faciens, aut navigans delatus fuerit, totidem ille statum mutaret aut conditionem; ut uno eodemque tempore hic sui juris, illic alieni futurus sit, uxor simul in potestate viri, & extra eandem sit, alio loco habeatur quis prodigus, alio frugi; ac praeterea quod persona certo loco non affigeretur, cum res soli loco fixae citra incommodum ejusdem legibus subjaceant, summa providentia constitutum est, ut à loco domicilii, cui quis larem fovendo se subdiderit, statum ac conditionem induat: illis legislatoribus, pro soli sui genio, optime omnium compertum habentibus, qua iudicii maturitate polleant subditi, ut possint constituere, qui eorum ac quando ad sua tuenda negotia indigeant auctoritate. Haec igitur personarum qualitas ac conditio ubi venerit applicanda ad res aut actus alterius territorii, jam indirectè ac per consequentiam vis illius personalis statuti extra statuentis pertinet locum: cum & alias non insolitum sit multa indirectè permitti & per consequentiam, quae directe & expressim non valerent." *Ibid.*, at 23-24. ["What, therefore, is the reason that personal statutes are effective beyond their territory? This was introduced uniquely by the very nature and necessity of the case, that whenever the status and condition of persons are to be determined, all the applicable law should be referred to one judge and, in fact, to the judge of the domicile: now, assuming that it were necessary to apply to the status of a person the law of one certain place, this would be absurd and would naturally lead to conflicts, so that a person would change his status or condition whenever he arrived at a different place in the course of a journey or a voyage; thus a person might be at one and the same time legally independent here and legally dependent there, a wife might be simultaneously within or without her husband's legal control, and someone might be a spendthrift in one place and a frugal man in another; and further, in order that a person be not tied to a certain place, even though real property attached to a place is, without inconvenience, subject to the laws of same, it was very providently established that his status and condition be assumed from the domicile, the place to which he submitted himself by setting up his home: the legislators, in keeping with the spirit of their own land, regard it as the best solution

viously had been taken for granted leads *Meijers* to regard *Rodenburg* as the real founder of the Dutch doctrine.³¹

In 1661, the *De Statutis eorumque Concursu* of *Paulus Voet*, Professor at the Academy of Utrecht, appeared, a monograph of 200 pages, couched in a concise and sometimes crabbed style in the form of a catechism of questions and answers, each supported by citations displaying wide acquaintance with the civil law literature. Of the twelve Sections in this work, the fourth, after defining a statute as a particular law (*Jus particulare*), enacted by a legislator other than the Emperor, presents a classification of statutes in the traditional pattern, following the more polished exposition of *Rodenburg*, but with two important differences. First, while *Voet* agrees with *Rodenburg* in rejecting the category of mixed statutes, as conceived by *Argentré* and *Burgundus*, he proposes that certain statutes principally relate not to things nor to persons, but to the mode and form (*de modo vel solemnitate*) of all transactions and causes, judicial and extrajudicial; in their effects, these are mixed statutes, like real statutes binding all within the territory and like personal statutes extending to all goods (*bona*) wherever located.³² The second difference is of special interest in the present connection. *Voet* apparently is perplexed, in his treatment of personal statutes, by the dissenting opinions of the "*doctores*," which he faithfully notes but is unable to reconcile, and also seems to be concerned that Articles 1 and 16 of the *Novellae Constitutiones* of Utrecht, on April 14, 1659, expressly decreed the prohibitions on gifts between husband and wife and on testation by minors, respectively, to be real, not personal as he deemed proper.³³

In consequence, *Voet* concludes with the enunciation of four rules, not too well conceived, applicable to all personal statutes, and then proceeds to state that, in his opinion, no statute according to the civil law (*de ratione juris civilis*), whether in rem or in personam, directly or indirectly, extends beyond the territory of the legislator. This opinion, supported by texts in *Justinian's Digest*,³⁴

that the subjects should be able to decide in accordance with their best judgment which of them needs and when do they need their authority for the protection of their transactions. Therefore, when this quality and condition of persons is applied to things and acts in another territory, then indirectly and as a consequence the validity of these personal statutes will extend beyond the territory of the legislator: particularly because it is not uncommon that much is permitted indirectly and by inference which would not be valid directly and expressly."]

31. *Op. cit.*, *supra* note 2, at page 666.

32. *Voet*, Sect. IV, Cap. II, 4.

33. *Ibid.*, Sect. IV, Cap. III, 2-5, 12, 13. Cf. *A. à Wesel*, *Commentarius ad Novellas Constitutiones Ultrajectinas*, etc., in *Opera Omnia* (Amsterdam 1701) at pp. 1, 229.

34. D.2.1.20; D.26.5.27.pr.; D.26.7.47.7.; D.42.5.12.1.

is followed by a list of nine exceptions in which statutes have extra-territorial effect. Among these it may be noted, the principle of party autonomy is recognized; if a contract or convention of the parties is entered into pursuant to the statute of the territory, even if conceived in rem, it will extend to goods (*bona*) located elsewhere—it does not affect the goods as such, but the person in respect thereof.³⁵ Finally, at the end of the list, it is observed that at times, when a people wishes to observe the customs of a neighboring people in comity (*comiter*) and in order that many valid transactions may not be disturbed, it is customary for statutes to apply beyond the territory of the legislator.³⁶ For this, a fragment in *Justinian's Digest*, attributed to the epistles of *Proculus*, is cited, stating that a people federated with another people, *alterius populi maiestatem comiter conservaret*, and that the clients of Rome, *qui maiestatem nostram comiter conservare debent*, are freemen.³⁷ Thus, the authority of *Justinian* was adduced by *Paulus Voet* to support the absolute conception of territorial sovereignty and to exemplify the principle of comity in his new doctrine.³⁸

The doctrine of comity was restated in its final form in the tractate, *De Statutis*, that *Johannes Voet* inserted as an Appendix in the middle of the first Book of his celebrated *Commentarius ad Pandectas*, first published in 1698. Before considering the works of *Ulrik Huber*, which had previously appeared, it is convenient to

35. *Voet*, *ibid.*, Sect. IV, Cap. II, 15, 16.

36. "Denique nonnunquam, dum populus vicinus vicini mores comiter vult observare, & ne multa bene gesta turbarentur, de moribus, statuta territorium statuentis, inspecto effectu, solent egredi 1.7, § *fin.D.capt.&Postlim.*" *Ibid.*, Sect. IV, Cap. II, 17. ["Finally, whenever a people wishes to observe the customs of a neighboring people in comity and in order that many valid transactions may not be disturbed, after considering their effect, statutes are customarily extended beyond the territory of the legislator."]

37. "Liber autem populus est is, qui nullius alterius populi potestati est subiectus: sive is foederatus est item, sive aequo foedere in amicitiam venit sive foedere comprehensum est, ut is populus alterius populi maiestatem comiter conservaret. hoc enim adicitur, ut intellegatur alterum populum superiorem esse, non ut intellegatur alterum non esse liberum: et quemadmodum clientes nostros intellegimus liberos esse, etiamsi neque auctoritate neque dignitate neque viri boni nobis praesunt, sic eos, qui maiestatem nostram comiter conservare debent, liberos esse intellegendum est." D.49.15.7.1. ["That nation is free which is not subject to the power of another nation. If they are federated, whether the federation is based on friendship or on a treaty, one nation will observe through comity the sovereignty of the other nation. It should be added that it may be understood that one state holds a position of superiority but not that it may be understood that the other state is not free. Just as we understand that our clients are free men, even though they are not our equals in respect to authority, standing, and legal status, so it must be understood that those are also free who are under obligation to maintain our prestige through comity."] The well-known discussion of this fragment in *Grotius*, *De Jure Belli ac Pacis*, Lib. I, Cap. III, § 21,2, very possibly suggested the reference to it by *Voet*.

38. Cf. the additional passages in *Voet's* work, cited by *Meijers*, *op. cit.*, *supra* note 2, at page 664, footnote 1.

notice this contribution in which *J. Voet* elaborated and perpetuated the doctrine of his father, *Paulus*, in a refined exposition of the *nobilissima statutorum divisio*, as real, personal, and mixed, more comprehensive and elegant in substance and in style, but without essential change. Certain points nevertheless deserve mention. First, the absolute theory of legislative sovereignty is broadly declared for all kinds of statutes, but with special reference to res within the territory;³⁹ *Rodenburg's* conception of *rei natura ac necessitas*, as the basis of the extraterritorial effects of personal statutes respecting capacity, is expressly refuted on the ground that there is no such necessity.⁴⁰ Second, the applicability of mixed statutes concerning the *solemnia* of contracts and other acts is defined in detail,⁴¹ and it is urged that, when these concern things without the jurisdiction, such statutes may be deemed facultative and not mandatory.⁴² Third, the principle of private autonomy is extended to tacit as well as express agreements, allowing private individuals to create exceptions to statutory provisions, except when these concern the public welfare.⁴³ Finally, the extension of statutes without the territory of the legislator, allowed one nation by another *ex comitate*, is not constrained by any law.⁴⁴ In the absence of settled practice as in the common application of the domiciliary law to universal successions as respects moveables,⁴⁵ or as may be established by treaty or inveterate custom in the reciprocal execution of judgments,⁴⁶ exceptions to the strict right of the territorial sovereign with respect to things within the jurisdiction are not defined by any certain rules nor can they be deduced from any universal principles commonly approved or tacitly received by the mutual consent of nations, but are to be treated case by case.⁴⁷ Thus, under the influence of the theory of territorial sovereignty, the doctrine of comity restored the primacy of the statute real, subject to such concessions as might be made by one nation to another, not as of right but on the grounds of utility by custom or treaty.

In the interval between the works of *Paulus* and *Johannes Voet*, above noted, a new analysis of the problems of the conflict of laws

39. *Johannes Voet, Op. cit.*, i, xi.

40. *Ibid.*, viii.

41. *Ibid.*, xiii-xv.

42. *Ibid.*, xv.

43. *Ibid.*, xviii-xxi.

44. *Ibid.*, i.

45. *Ibid.*, xii, xiii.

46. *Ibid.*, xvii.

47. *Ibid.*, xvi.

was presented by *Ulrik Huber*, one time member of the Supreme Court of Friesland (1679-1682) and Professor at Franeker in that Province (1655-1679, 1682-1694).⁴⁸ This appeared in three versions: in the *De Jure Civitatis* in Part III added in the second edition of 1684; in the same year, also in the *Beginselen der Rechtskunde gebruikelijk in Frieslandt*; and in 1689, in the *Praelectiones Juris Romani et Hodierni, Pars Secunda*, which was re-edited in 1700 as Volume II of the *Praelectiones Juris Civilis*.⁴⁹ Through this last work, of which there were numerous later editions, *Huber's* concise "digression," entitled *De Conflictu Legum Diversarum in Diversis Imperiis*, inserted midway in Liber I of the Volume, became widely known. The three versions differ in detail but not in substance; for example, that in the *De Jure Civitatis* includes a discussion of judicial jurisdiction, which in the other versions is in part distributed elsewhere, while the word "comiter," the stigma of the *doctrine hollandaise*, appears twice in the final version in the *Praelectiones* but not in the two earlier versions of 1684, in which, as *Kollewijn* notes, equivalent expressions are used in the formulation of the third rule.⁵⁰

The original explanation of *Huber's* conception in the *De Jure Civitatis*, the first work as he claimed to treat the law of the State, *sive Juris publici universalis*, so as to supplement the monumental work of *Grotius* concerning the law among States, is in various respects the most illuminating.⁵¹ In this work, the problem of conflicts law is viewed in a different perspective than by *Rodenburg* and the *Voets*—not in the tradition of the statutists but as an aspect of the law governing the administration of public affairs. From this point of view, the question is what those from different countries (*exteri*) reciprocally owe to each other. Hence, among their mutual obligations, after considering those postulated by necessity, the observance of foreign laws in other jurisdictions is appropriately included; even

48. The Academy of Franeker was founded in 1585, the second university to be established in the Netherlands. It was dissolved by Napoleon in 1811.

49. For the bibliographical details, see *Kollewijn, op. cit., supra* note 24, at page 131, footnote 1; *Meijers, op. cit., supra* note 2, at pages 653-4, footnote 3; *G. de Wal, Oratio de Claris Frisiae Jureconsultis* (Leeuwarden 1825) at pages 253 ff. Unfortunately, for want of time and available editions, it has not been feasible to reconcile certain minor inconsistencies, not significant for the present purpose, in the above works. The editions used are: *De Jure Civitatis. Editio Tertia* (ex officinâ Leonardi Strickii, a reprint of the last edition revised by the author), Franeker, 1698; *Hedensdaegse Rechtsgeleertheit. Fifth Edition*. Amsterdam, 1768. In this work, according to *Kollewijn*, the treatment of the subject in the *Beginselen* is reproduced "bijna ongewijzigd"; *Praelectiones Juris Civilis. Volume II, Second Edition*, Franeker, 1698.

50. *Op. cit., supra* note 24, at page 142.

51. *De Jure Civitatis*, Lib. III, Sect. IV, Cap. I, Nos. 11ff.

if not required by treaty or by reason of subordination, the reason of the common practice among nations (*promiscui usus ratio inter gentes*) nonetheless compels mutual indulgence in this respect. For if one nation were to refuse to recognize in any way the laws of another, an infinite number of acts and contracts would each day become of no effect, nor could commerce by land and by sea subsist.

In this subject matter, it is observed—the conflicts of laws occasioned by the division of Europe into numberless States, not mutually subject to each other—the Roman juriconsults are not qualified authorities, nor did they treat it, since under the Roman Empire such conflicts could scarcely arise. Since diverse peoples do not have a common civil law, i.e., a law introduced or excogitated by the authority of a certain people, and the law of nature is in no wise applicable, the question must be resolved by reference to the law of nations (*è ratione juris gentium*). This difficult matter, made more involved and perplexed by the dissensions among the most learned jurists, *Huber* undertakes to explain as simply and briefly as possible, premising as a basis three “positions” or axioms,⁵² which he thinks are not subject to question.

These express two fundamental ideas: the principle of absolute sovereignty applying within the territory to all subjects, including *subditi temporarii*, or in other words to all persons found within the territory; and the conception that, in international practice, the laws of each nation exercised within its territory, are effective everywhere, insofar as the interests of another State or its citizens are not prejudiced. The application of these postulates is illustrated by examples drawn from the practice of the courts in the Netherlands, for the most part in Friesland, and also, in the *Praelectiones*, by two additional “positions.” The first of these is that all transactions and acts, judicial or extrajudicial, *mortis causa sive inter vivos*, are valid when duly celebrated in accordance with the law of a certain place,

52. “I. Leges cujusque imperii vim habent intra terminos ejusdem Reip. omnesque ei subjectos obligant, nec ultra. per l. ult. ff. de Jurisdic. II. Prò subjectis imperio habendi sunt omnes, qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorentur, per l. vii. §. 10. in fin. d. Interd. & Releg. III. Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium praejudicetur.” *Huber*, *Praelectiones Juris Civilis*, Lib. I, Tit. III. De Conflictu Legum, 2. [“I. The laws of each state are valid within the boundaries of this state and bind all its subjects, but not beyond. . . . II. All persons who are found within the boundaries of a state are held to be its subjects, whether they dwell there permanently or temporarily. . . . III. The rulers of states arrange it by comity that the laws of each nation which are enforced within its boundaries maintain their validity everywhere, to the extent that the power or the laws of the other state and its citizens are not prejudiced.”]

even if, were they concluded in the same manner where the law is different, they would be invalid.⁵³ On the other hand, transactions and acts, invalid *ab initio*, are nowhere valid, whether as respects those domiciled or those temporarily present in the place of contracting. In another passage, the doctrine of party autonomy is adumbrated; if the parties to a contract celebrated in one place have another place in view for performance, the latter place is deemed the *locus Contractus*.⁵⁴ The second "position" is that a personal quality, such as minority, lawfully impressed on a person in a certain place, follows the person, so that he is treated elsewhere like persons of like quality.⁵⁵ In sum, as *Huber* states and holds, the foundation of this entire doctrine is the subjection of men to the laws of each territory in which they act, with the consequence that an act *ab initio* valid or null must elsewhere be the same.⁵⁶ But this doctrine is subject to the important exception, which *Huber* is at pains to explain in various instances on grounds anticipating the conceptions of *fraude à la loi* and *ordre public*, that the general rule does not apply in case it is prejudicial to the interest of the forum to give effect to a foreign law. Thus, for example, the laws restraining alienation of immoveables are indelibly impressed on the land in certain Provinces and cannot be altered by dispositions under the laws of other States, without great confusion and prejudice to the Republic in which they are located.⁵⁷

This superficial review of the chief works on conflict of laws that appeared in the Netherlands during the second half of the Seventeenth Century after the doctrine of absolute territorial sovereignty of modern states became generally known, notably through the *De Jure Belli ac Pacis* of *Grotius* (1625), may be resumed as follows:

1. The doctrine of territorial sovereignty is premised but with different accents: upon things by the *Voets*, consistently with the feudal *régime de la réalité*; upon persons by *Huber*, following *Althusius* and *Grotius*, and more especially upon their acts. It does

53. "Cuncta negotia & acta tam in judicio quam extra judicium, seu mortis causâ sive inter vivos, secundum jus certi loci rite celebrata valent, etiam ubi diversa juris observatio viget ac ubi sic inita, quemadmodum facta sunt, non valerent." *Ibid.*, 3.

54. *Ibid.*, 10.

55. "Qualitates personales certo loco alicui jure impressas, ubique circumferri & personam comitari, cum hoc effectu, ut ubivis locorum eo jure, quo tales personae alibi gaudent vel subjecti sunt, fruuntur & subjiciantur." *Ibid.*, 12. Cf. *Meijers, op. cit.*, *supra* note 2, at page 657, footnote 1. ["The personal qualities impressed on a person in a certain place by law are carried everywhere and accompany the person wherever he goes, with the effect that he should enjoy and be subject to the same law in every place which like persons enjoy and to which they are subject."]

56. *Ibid.*, 15.

57. *Ibid.*

not appear that *Rodenburg* in 1653 had considered the implications of the doctrine for conflicts law.

2. *Rodenburg* and the *Voets* start from the traditional classification of the statutes; this is not mentioned by *Huber*.

3. The extraterritorial effects of statutes are explained by *Rodenburg* on the ground of the *ipsa rei natura ac necessitas*; by the *Voets ex comitate*; by *Huber* as a fundamental axiom of the *jus gentium*.

The agreement of these authorities on the principle of territorial sovereignty marks the second turning-point of fundamental significance in the evolution of the doctrine of conflicts law.

III

On the cardinal point of territorial sovereignty, there has been no essential change since 1700; today as then, it is assumed that it is for each State to determine, as a matter of domestic law, the extent to which effect is given to foreign laws and judgments. It would be a fascinating task, far too large for this essay, to trace the later variations on the solutions summarized above. But a few observations on their differences may be added in conclusion.

The first is whether *Huber* may justly be regarded as an apostle of the *doctrine hollandaise*, of which it has been stated that the *comitas gentium* and the tripartite division of statutes, real, personal, and mixed, are the most characteristic traits.⁵⁸ Neither suits *Huber's* view of conflicts law: the *nobilissima statutorum divisio* is not considered—as he expressly states, the law of Caesar, upon which this was predicated, is not relevant for a plurality of sovereign States—and his fundamental principle to resolve conflicts of laws is not comity but a rule of law based on practice. Doubtless, this is why *Huber* appears to *Kollewijn*, who has examined the literature of the Netherlands in this subject with most care, an isolated, paradoxical figure, whose works, highly reputed in other countries, have had negligible influence in his own.⁵⁹ The reason is the same: in the Netherlands, where the hand of customary tradition lies heavy on the evolution of legal doctrine, as *Meijers' lectures* at the Hague Academy have so amply shown,⁶⁰ such iconoclasm was ignored; to other countries, where the problem of conflicts of laws awaited serious attention, the solution presented in *Huber's Praelectiones*, stated in three unquestioned axioms without the ancient luggage, clear, concise, practical, and modern, could not but appeal. It is of

58. Thus *Meijers, op. cit., supra* note 2, at page 670.

59. *Op. cit., supra* note 24, at page 132.

60. *Op. cit., supra* note 2.

incidental, if piquant, interest that this, and *Huber's* other expositions of the topic, sparing of unnecessary citations, do not refer to *Paulus Voet*, while the Appendix *De Statutis* of *Johannes Voet*, more generous in this respect, with filial reciprocity fails to mention *Huber*. Is it too much to suggest that the Netherlands in the Seventeenth Century produced two doctrines of conflicts law: the *doctrine hollandaise* of comity and the *doctrine frisonne* that in this field "*goet recht ende Justitie*" should prevail?

In the second place, it is not to be supposed that the seeming simplicity of *Huber's* formulation, as compared with that of *Johannes Voet* for example, betokens naïveté. It is recalled that *Huber* was one of the leading jurists of his day—thrice appointed professor at Franeker and thrice called to Leiden—versed not only in the civil law but also in the practice of the courts, and in addition, through his special interest in public law, conversant with the literature available in the Seventeenth Century on the nature of law and government. The experience of the Netherlands had impressed on him the need of a central authority as well as of constitutional government. With this background, he understood the difficulty, in the field of conflicts law, of reconciling the existence of a plurality of sovereign legislators with the security of transactions necessary to maintain international commerce, and was the first to propose a rational solution. For this he took the *jus gentium*, substantially as conceived by *Grotius*⁶¹—a general customary law analogous to the law maritime and the law merchant—as the basis for the recognition of foreign laws and judgments. But this involved the difficulty, which *Huber* carefully considered in three of his works,⁶² that in

61. That this conception is not identical with that of *Grotius* seems to have been understood by *Huber*, cf. *op. cit.*, supra note 51, Lib. I, Cap. V, 4. For the present purpose, the difference between the two conceptions, which *Kollewijn* has pointed out, *op. cit.*, supra note 24, at pages 135ff., does not seem of importance; in fact, the two views do not seem conclusively irreconcilable.

62. *Ibid.*, Lib. I., Cap. V; Digressiones (Franeker, 1670) Pars II, Lib. I, Cap. IX; *Eunomia Romana* (Second Edition. Amsterdam, 1724) at pages 11-13. The question is concisely summarized by *Huber* as follows: "3. Sed removenda est objectio, quam habent validam dissentientes, quod nulla sit causa necessariae obligationis, quae ad Jus requiritur, in Jure Gentium, distincta ab eâ causâ, quae est in Jure Naturae & in Jure Civili. Nam Jus naturae nos obligare dicunt, vi dictaminis a Deo cordibus hominum impressi, Ius Civile niti imperio civitatis; Inter gentes diversas non est, quod ipsas obliget inter se nec inter eas dari superiorem sine quo lex esse nequeat. Sed ego probo, Consensum esse causam obligationis indubitatae, qui facit ipsam legem civilem in imperio populari, ubi lex est communis Reipubl. sponsio 1.1 in fin. & 1.2 de Legib. consensum vero, super institutis à jure naturae atque civili distinctis existere supra demonstravimus. Instant, Jus etiam requirit sanctionem, id est, puniendi facultatem, quae utique requirit superiorem, nec est inter diversi populos imperii. Sed negandum est, ad jus puniendi, qualitatem superioris requiri extrâ Civitatem: Sufficit paritas, ut *Grotius* bene demonstravit in lib. 3. cap. de Poenis. & nos in lib. I.c. I. de

1672 in the „*De Jure Naturae et Gentium*” Pufendorf, citing the *De Cive* (1647) of Hobbes as authority,⁶³ had attacked the Grotian conception of a *jus gentium* based on consent on the ground that customs have no binding effect as law, except as they form part of natural law or are enforced by a political superior.⁶⁴ On this crucial question, Huber concluded that the *jus gentium* applying to conflicts of laws is law, since the general utility of nations causes common usage giving effect to foreign laws and judgments to be held everywhere as laws.⁶⁵ The third axiom, in which Huber’s doctrine is epitomized, enunciates that, as a general principle and practice, the effects of competent foreign laws are everywhere admitted, except when prejudicial to the forum State or its citizens, through the reciprocal indulgence of the sovereign authorities in each State. This is a sophisticated solution, in which the extraterritorial recognition of rights acquired pursuant to the principle of territorial sovereignty, subject to the exception of public policy, forms a basic postulate of international usage inspired by comity—*Rectores imperiorum id comiter agunt*. On the other hand, if Huber thus stood with Grotius, premising a rule of law, Johannes Voet took the part of Hobbes and Pufendorf,⁶⁶ and in consequence his doctrine leaves the decision to comity. The line between the two is fine but fundamental.

A final word. The disciples of Hobbes, Pufendorf, and Voet are

Iur. Civit.” *Eunomia Romana*, at pages 12-13. [“But the objection which dissenters hold valid should be discarded, namely, [the objection] that in the law of nations there is no basis for obligations which necessarily require enforcement by law and which is distinct from that basis which exists in the law of nature and in positive law. They say that the law of nature binds us because the force of its command has been impressed by God upon the hearts of men, while positive law is based upon the power of the state; among different nations there is nothing that would bind them together, nor is one among them conceded to be sovereign, without which law could not exist. But I approve of the following principle, that consent is the true basis of obligations because it creates the positive law in a nation where the law is the common agreement of the people. . . . Indeed we demonstrated above that consent exists over and above the diverse institutions of the law of nature and positive law. They argue that law also requires sanction, that is, the faculty of punishing which surely requires a sovereign, and that there is no sovereign among the rulers of different nations. But it must be denied that the quality of a sovereign requires the right to punish outside the territory of the state: equality suffices, as Grotius has so well demonstrated”]

63. Cap. 14, 4, 5.

64. Pufendorf, *op. cit.*, Lib. II, Cap. III, § 23.

65. “. . . utilitas promiscua gentium fecit, ut ubique pro jure habeatur.” *Digressiones*, *loc. cit.*, supra note 62, X.

66. “Tale enim quid inter gentes actum, tale populorum omnium, quâ talium, commune vinculum haud deprehendo.” *Op. cit.*, supra pages 78-79 [65 MICH. L. REV. at 23-24] and note 39, Lib. I, Tit. I, XVIII. [“I can discern no such agreement between nations, nor any such common bond among peoples as such.”] [As translated in THE SELECTIVE VOET, BEING THE COMMENTARY ON THE PANDECTS, 22 (Gane transl. 1955).]

always with us, frequently in the majority, insisting that in the last analysis the solution of conflicts of laws is a prerogative of sovereign authority, in the views of some exercised primarily to protect the local governmental interest and, where it seems expedient in this interest, to satisfy the requirements of international commerce. And there even have been some who, as would *Carneades*, regard consideration of justice in this field an illusion, and law in reality an emanation of power, the dictate of the ruling class. But it is noteworthy that since 1700 the works concerned with private international law whose influence has been the most durable and extensive, those of *Story*, *Savigny*, *Dicey*, and *Niboyet* for example, directly or mediately, have followed the main lines that *Huber* marked out—the sovereign authority of the national legislator, recognition of transactions as declared by the proper law, except when unduly prejudicial to the interests of the State or its citizens, and the effort by construction of a common law, whether derived from judicial decisions or from doctrine, to provide principles enabling the questions arising from the diversity of laws and commerce with other countries to be decided on a rational basis.

The main change since 1700 has been that the legal materials in each country have become vastly more prolific and complex, and in varying degree have been codified, with the result that the *ius gentium* of *Grotius* and *Huber* tends more and more to be a plurality of national common laws, each pretending to be universal. To the extent that this basic element for the solution of conflicts of laws has thus been provincialized, it obviously becomes the less adequate to satisfy the needs of a world in which commerce is increasingly mondial, and not merely international, and in which there has been a marked expansion of trade conducted by national or international agencies. Hence, since international commerce demands an adequate international law, public and private, for transactions in which such agencies as well as individuals may participate, a need imperfectly satisfied under existing conditions, the dispute between *Grotius* and *Hobbes* whether international custom can be a source of law is today renewed between their intellectual descendants, and there is a call to resurrect the *jus gentium* of the Seventeenth Century in the guise of transnational law or the general principles of law.

To realize such conceptions and to resolve such disputes, it is evident that intensive comparative studies are indispensable. For this reason, it is but fitting to refer in conclusion to the outstanding comparative contribution in this field, the monumental survey of

The Conflict of Laws,⁶⁷ that the late *Ernst Rabel* himself prepared under the auspices of the Institut für ausländisches und internationales Privatrecht and the Law School of the University of Michigan. This is the chief among his works relating to conflicts law that herald what has been happily named a third school of private international law,⁶⁸ like the doctrine of *Ulrik Huber* mediating between *a priori* reason and positivist practice, and seeking through improved comparative inquiry to realize "*goet recht ende Justitie*."

67. *Ernst Rabel*, *The Conflict of Laws: A Comparative Study*. 4 Volumes (First Edition, Ann Arbor 1945-58).

68. *K. Zweigert*, *Die dritte Schule im internationalen Privatrecht: Festschrift für Leo Raape* (Hamburg 1948) 35-52.