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2000

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On Mapping the Conceptual Battlefield of Private International Law

*Nikitas E. Hatzimihail**

This essay forms part of a broader examination of conceptual 'maps' utilized in the discourse of private international law. This project is motivated by the hypothesis that these maps have had an impact on the consciousness of our discipline. By helping us to conceptualize the choices we are faced with, as well as by providing us with a version of the history of private international law, which is supposed to validate that conceptualization, these 'maps' have had a – mostly unacknowledged –normative effect on the very identity and operation they purport to describe. Two closely related questions, to which this essay will offer a preliminary response, is the extent to which the field and its development have been accurately portrayed in the existing maps (Sects. I, II), and the ways in which we could come up with a better map, if need be (Sects. III, IV).

I. Perhaps the most known such conceptual opposition is the one between the *universalist* aspiration toward a uniform conflict of laws system and the *particularist* assertion of national interests and sensitivities through a distinct national conflicts system.¹ Especially in recent years, we have also seen references to the opposition between a *nationalist* and an *internationalist* mode of [* 58] conflicts reasoning,² as well as the notion that private international

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¹ See e.g. Yvon Loussouarn & Pierre Bourel, *Droit international privé*, 6th ed., Paris 1999, pp. 86 ff.; G. van Hecke, « Universalisme et particularisme des règles de conflit au XXe siècle » in *Mélanges Jean Dabin*, vol. II, Brussels 1963, pp. 941 ff. Cf. Bernard Audit, *Droit international privé*, 3rd ed., Paris 2000, pp. 1 ff., who uses the two terms in illustrating the "fundamental antinomy" within private international law.

² For a working definition see Pierre Mayer, *Droit international privé*, 6th ed., Paris 1998, p. 50: 'nationalist' private international lawyers "attach more importance to the 'national interest' than to the ideal vision of a world where one's own State has to be treated on a strict footing of equality with the others"; up to 1991 (4th ed., p. 58), Mayer used as the defining characteristic of nationalism the giving of preference to one's own law over foreign laws and consenting with unease to the application of those latter; internationalism, linked with universalism, was in contrast characterized by the principle

law has moved from conceiving the conflict of laws as essentially a conflict between state sovereignties to conceiving it as a conflict of private interests.³ All these *conceptual pairs* indicate, when considered together, a longstanding effort to capture the tension most characteristic of the field: Private international lawyers find themselves – or at least their subject matter – situated *within* specific legal systems, while at the same time they feel the need to have recourse, as a foundation for their doctrines, to something external to and transcending those systems. In the process, they come to invoke specific visions *of / for* the structuring of what is usually called the *international society* and *of / for* the role of private international law in it – a simultaneous claim of passive neutrality and active participation, which one could describe by speaking of *images* of an *international governance* aspect of private international law.⁴ It must not evade our attention however that this “international” governance is only one, albeit distinct, dimension within a broader disciplinary identity (and operation “on the field”).

[* 59] Last but not least, all these conceptual pairs locate the opposition in a historical moment or at best context. It is thus history we will use as ground for their critical appraisal.

of State equality. François Rigaux, « Rapport de synthèse: Pour une relecture de François Laurent en 1987 », in *Liber Memorialis François Laurent*, Brussels 1989, p. 668, invokes simultaneously – but in rather more restrictive versions – both conceptions to define internationalism. See also Johan Meeusen, *Nationalisme en Internationalisme in het Internationaal Privaatrecht: Analyse van het Belgische Conflictenrecht*, Antwerp 1997.

³ See Mayer, *op.cit.*, pp. 46-47. The distinction, described in terms of a shift of paradigms, was conceptualized during the Interwar process of doctrinal reconstruction / counter-attack against the particularists. The invocation of Savigny in French doctrine (see e.g. Bernard Audit, « A Continental Lawyer Looks at American Choice-of-law Principles », *27 Am. J. Comp. L.* 589 (1979), where Savigny is invoked by means of genealogizing the teleological interpretation of choice-of-law rules), has similar origins.

In his essay « Le mouvement des idées dans le droit des conflits de lois », *Droits* 1985/2, pp. 129 ff., Mayer opposes to the "conflict of sovereignties" the conception of conflict of laws as a "logically necessary choice of the applicable law to a relation between private persons" – drawing a matrix between state and private interests on the one hand, and the consideration or not of the content of substantive rules on the other. This is a more complete framework, which broadly corresponds to the evolution from *classical* conflict of laws to what could be called *modern* conflict of laws.

⁴ David Kennedy, « New Approaches to Comparative Law: Comparativism and International Governance », 1997 *Utah L. Rev.* 545, p. 549 n.4, defines governance as "the complex of more or less formalized bundles of rules, roles and relationships that define the social practices of state and non-state actors interacting in various issue areas". I would also stress the dimension of governance as *process*, and the merging of a normativist and an institutionalist perspective into something broader than each.

II. A century ago, another conceptual opposition reigned. In the Introduction of his *Digest on the Conflict of Laws*, Albert Dicey distinguished between a *theoretical* and a *positive* method of treating the “subject of the conflict of laws”. Adherents to the former “consider private international law as constituting in some sense a ‘common law’, tacitly adopted by all civilized nations”; they do “of course” concede that whatever force this common law possesses in a certain country is derived from the authority of the sovereign thereof, but their primary objective is to discover the general principles of this ‘common law’ and to judge how well the local rules in force correspond to them. While those adopting the positive method “treat the rules of private international law in the main as part of the municipal law of any given country ... where they are enforced”, adherents to the theoretical or *a priori* method look for what these rules *ought* to be (often committing, in the process, the error of treating as being law what (they think) ought to be).⁵

Two decades before Dicey, it was François Laurent who wondered if private international law is a “theoretical” or a “positive” law. “There is no science without an ideal, just as there is no science without facts serving as basis to the idea”, concluded the Belgian Liberal, who sought to merge the “positive” science of history and the “theoretical” science of philosophy in constructing the *science* of – private and public – international law. In the name of Principles and Justice, he dismissed the invocation of ‘utility’ and ‘interests’ (“l’intérêt n’est pas un principe”), and by consequence comity and diplomacy. At the same time, Laurent’s jurisprudential positivism made him consider treaties as the only serious source of – private as well as public – *international* law, and his pragmatism, made *private* international law the most feasible ground for the construction of a first branch of the law of nations.⁶

Laurent epitomizes the consciousness of the private international lawyers of the second half of the 19th century: represented in our collective memory by the imposing figures of Savigny and Mancini, who are associated respectively with a private-law and an international-law pillar,⁷ they are characterized by a

⁵ A.V. Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, London, 1896, pp. 28 ff.

⁶ François Laurent, *Droit civil international*, t. I, Brussels-Paris, 1880, pp. 65 ff.

⁷ The most characteristic force of the period was the ‘Latin’ school, whose founder though not the major doctrinal exponent was Pasquale Mancini: usually remembered for the ‘principle of nationality’, the Latin school’s most important contribution to the field came through their association of private with public international law, their involvement with the *Institute of international Law* (est. 1873) and, more generally, their Liberalism. Savigny (one to two generations older than the founders of the Institute) was on the contrary much less “activist” in the pursuance of an international legislative agenda, and much less keen on the elaboration of a distinct legal discipline.

belief [* 60] in the feasibility, indeed inevitability, of ascertaining a uniform system of solutions, through one or at most a handful of general principles applied through a limited number of legal categories. Their political and economic liberalism, admittedly coming in many varieties, reflects on the doctrines deriving from the time and the strong focus on the individual and on legal certainty. This early *classical* doctrine must be credited with the formation of private international law as an autonomous doctrinal field with a distinct subject matter and ideology – a *discipline*, one might say.⁸ In their effort to achieve a uniform conflict of laws through international treaty initiatives, they offer the best example of universalist conflicts doctrine. However, their jurisprudential premises and governance agenda left them exposed, by the turn of the century, to allegations of neglecting [specific kinds of] substantive national policies and the very relativity of the legal categories upon which they were building their castles. It is that movement of criticism that has been primarily associated with the notion of ‘particularism’ and has more recently been accused of “legal nationalism”.⁹

In fact, without denying the impact of *revanchisme* and nationalism on the European and especially French intelligentsia throughout the Third Republic, it would be wiser to read the particularists into a broader wave of their time against objective conceptions of law and meta-law such as those espoused by the *école de l'exégèse* and the founders of the Institute of International Law. This “wave” – in the sense that it did not constitute a single coherent, let alone institutionalized, movement – emphasized the creative role of case law and the search for the *end (télos)* of the legal rule, and called for an appraisal of the role of law in society. It must be understood that, while often passionate and sometimes politicized, the ‘particularist’ critique was for the most part relying on pragmatic grounds. The young continental scholars did in a sense evoke Dicey’s distinction, but they were not on the same boat with the venerable Englishman. Dicey was indeed among those Victorians who tried to keep Britain at some distance from the emerging “continental” private international law, preferring to look for answers to the Common Law and English political / legal theory, but his jurisprudential premises and worldview definitely locate him within the

⁸ It is in this sense that we can differentiate “classical” private international law as a discipline from “pre-classical” conflict of laws as interpretative method. Classical doctrine or perhaps better *consciousness* emerges in the mid-19th century and is challenged in the mid- to late 20th by a modern consciousness characterized by a plurality of methods and disciplinary approaches (see the separation of international business law and the mobilization of comparativism, uniform-law, as well as the role of international economic law across the Atlantic).

⁹ See e.g. Jean-Louis Halpérin, *Entre nationalisme juridique et communauté de droit*, Paris 1999.

classical legalism of the late 19th century, and his own system of solutions is 'universalist', even if oriented more towards pragmatism than cosmopolitanism. On the contrary, the young continental scholars espoused a different, less "formalist" jurisprudence, were – initially – skeptical of grand, "Digest" projects *and* had to deal with the disciplinary ideology and concerns they inherited along with their university chairs. This might explain why most critics of the early-classical paradigm, [* 61] and even more so their leading students, soon turned into reconstructive projects of the discipline they had attempted to reconfigure; many did commit themselves – eventually if not from the beginning – to an admittedly more subtle version of an “internationalist” agenda, based on a more solid jurisprudence; tools such as the comparative *study* of law, that had formed part of the antiformalist awakening, were reconfigured by the next generation into tools for "supra-national" law-making.

The transformation taking place in continental Europe has a strong parallel with what happened – later, faster and more brutally – across the Atlantic. At the beginning of the 20th century, Dicey's long-distance pupil Joseph Henry Beale sought to construct a comprehensive doctrinal edifice in a manner similar to Laurent's comrades. His own critics invoked Dicey's distinction of theoretical v. positive method in crusading against the "aprioristic" thinking which sought to impose a fundamental principle by recourse to the nature of concepts or "self-evident theories": the acceptance of *a priori* theories, according to Ernest Lorenzen, the foremost doctrinal rival of Joseph Beale, would lead to the sacrifice of local policies without achieving any uniformity.¹⁰ Especially after World War II,¹¹ the Americans went much further than the "continental" rest of the world, in the pursuance of substantive policies and empowerment of the *forum*: in fact, U.S. doctrine comes closer to fitting the ideal types projected by both terms, although the very “top hats” that have shaped it – located in “national” law schools,

¹⁰ See especially Ernest G. Lorenzen, « Territoriality, Public Policy and the Conflict of Laws », 33 *Yale L.J.* 736 (1924). The – more celebrated today – Walter Wheeler Cook took the further step of opposing in terms of theoretical v. positive the very notion of inductive (as opposed to deductive) legal reasoning.

¹¹ One thing evading contemporary stories is how marginal the realist critiques were in the field of U.S. conflict of laws until after World War II (and Beale's death). Likewise, while none should underestimate the impact of jurisprudence in its contemporary conflicts doctrine, scarce attention is paid in the developments in the U.S. constitutional law – exemplified by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) – which not only killed Justice Story's "general" federal common law but also made redundant the discussion of U.S. Supreme Court control of choice of law in state courts; the way the U.S. came to view the outside role and their own role facing it might also be paramount; last but not least, "material" developments such as the advent of the automobile, the explosion of tort litigation and temporary migration, &c.

“forumless” in a way many cosmopolitan Europeans could never be, and for the most part convinced of the universal applicability of their theories – should be accused of neither particularism nor nationalism in the conventional sense (insofar at least as intrastate disputes are concerned).

It is therefore questionable whether terms such as "particularist" or "nationalist" are the most appropriate to describe even theories such as Ehrenzweig's "proper law in a proper forum" or Brainerd Currie's opting for the *lex fori* in any “real conflict” in the choice of law in order to satisfy the – perceived – intentions of the forum legislature: there is no *substantive* bias against foreign law, only a certain appraisal of the practicalities of adjudication and/or a certain vision of the institutional division of legal labor within a state. Albert Ehrenzweig was much less a "nationalist" or a "patriot" in the general sense of the words than [* 62] e.g. Mancini or André Weiss. In their turn, these latter definitely displayed doctrinal internationalism, which, interestingly enough, flowed through their adherence to the “principle of nationalities” as foundation of the world order.

In conclusion: Even without considering the hidden ‘local’ biases of “international” and “a-national” visions, it appears that terms such as "particularist" and "nationalist" are likely pejorative and probably ineffective in showing the real dividing lines.

III. A more impassioned mapping exercise should begin by acknowledging, first that stakes can be found on both sides of each issue, and second that there will always be tension, and probably secular coexistence, between opposing perspectives. Lea Brilmayer has in that sense captured better the tension of ‘private international’ governance, by speaking of the conceptual opposition between an *external* and an *internal perspective*, the former locating itself with reference to a normative system external to – and more important than – the authority of the forum, the latter on the contrary treating choice of law as a matter of interpretation of the forum’s own positive law (whose own authoritative status, if not content, is not in doubt).¹² Much of the tension in the doctrine is created because, on the one hand, it is often difficult to explain the legitimacy of the external normative system being invoked, and, even more so, to locate pertinent and authoritative norms within it. On the other hand, while the *forum* might have the norms or at least the capacity to generate them, it has problems justifying the [fact and impact of the] exercise of its authority vis-à-vis the other States. Additionally, the specter of an external system may come back to haunt the forum through invocations by writers who find themselves in the minority within the “internal” discourse while advocating a position prevailing in other legal systems or validated by an “external” system.

¹² Lea Brilmayer, *Conflict of Laws*, 2nd ed., Boston, 1995, pp. 1 ff.

In fact, it is not possible to locate a purely external or a purely internal perspective in conflict of laws doctrine: as long as there exists a plurality of normative systems, the two perspectives will coexist in a sense. The most extreme cases would be, on the one hand, to view the forum as one of several districts in the administration apparatus of the “external”, and, on the other, the outside world as a dog-eats-dog environment where the only external rule is survival. Even then, in the first case an “empirical” perspective will notice differences from district to district, and in the second the ‘law of survival’ will generate a certain normative conception, and eventually rationalist or behavioral theories of coexistence.

It is indeed through the tension generated by the *coexistence* of the two perspectives, and the different image and weight accorded to each by different theories, that private international law discourse has emerged. Accordingly, rather than *a priori* denouncing ‘apriorism’, we should examine the ‘theoretical’ element in positive conceptions: it is likely that neither is achievable in pure form, and that in effect all doctrinal descriptions contain a – more or less [* 63] explicit – ‘theoretical’ superstructure. Such an enterprise is even more interesting now that private international law has moved away from theory and from thinking about its foundations, and toward technique (often dressed as method discourse) and a certain kind of doctrinal isolationism.¹³

A study of superstructures invoked in the discourse will demonstrate an opposition between two tendencies: one ‘*cosmopolitan*’ or ‘*scientific*’ relying on *learned authority*, on the “community of law” or of scholars, or on the spontaneous normativity of transactional ethics and activity, and one more ‘*metropolitan*’ or *political* using as reference the Holy Roman Empire, the Federal Constitution, or the traditional general international law.¹⁴ There seems often to be an alternation of discursive dominance between the representatives of each tendency: broader sensibilities and the surrounding

¹³ It is interesting that this is a trait shared by two seemingly opposing streams of modern conflicts doctrine, Conflict of Laws as Public Policy, and Conflict of Laws as Technocracy. The former has often missed the forest for the tree in the pursuit of specific policy goals, a situation the latter has attempted to deal with through the proliferation – and de-politicization – of techniques, devices and methods unique to the discipline. It has also often taken for granted, and thus abstained from the examination thereof, a certain version of the “big picture”.

¹⁴ The distinction of a “political” and a “scientific” private international law was coined, in a *non-polemical* sense, by Henri Batiffol. Given the load each expression carries today, I am also using David Kennedy's idea of contrasting a ‘cosmopolitan’ and a ‘metropolitan’ sensibility, although admittedly the terms are used in a different context and perhaps a different sense. See David Kennedy, « The International Style in Postwar and Policy », 1994 *Utah L. Rev.* 7.

world change, and the original legitimacy of the external system invoked erodes over time.¹⁵

This distinction serves to illuminate the differences as to how private international law, as well as its relationship with the world (and often the world itself), is envisaged. It does not of course imply that doctrinal foundations such as comity, Beale's general common law and civil law, or Kelsen's *grundnorm* can be characterized as exclusively political or metaphysical. Nonetheless, the perseverance of claims of private international law's a-political or even anti-political nature must be observed and examined.

IV. At this point we should consider another dimension or perhaps tension, fundamental in the shaping of private international law: its position within a *domestic / international* – and private / public – antithesis. Since the beginning of the discipline, it has for a long time been a matter of debate how much “international law” and how much “domestic law” is private international law, how much “public law” and how much “private law”. Unfortunately such a debate – which, while motivated by genuine jurisprudential and/or ‘governance’ concerns, was not always devoid of academic institutions’ internal politics – has often prevented us from appreciating the dynamic nature of the disciplinary [* 64] identity and autonomy of private international law, which derives from a balancing act evoking Martin Luther’s metaphor of riding the mule. The mule-rider bends left, then right and so on; he maintains his balance by bending a little bit, and not by standing straight, but should he bend too much in either direction he will fall. Private international law has accordingly struggled to maintain its balance by leaning toward either, or rather both, directions: dealing with domestic (private) subject matter, in the (public) international terrain, private international law has asserted a role of mediator between the two “natural” domains, themselves structurally incapable of managing each other’s concerns; downplaying its own involvement in these concerns, private international law eventually worked out elaborate claims of “neutrality”, and strong ethical convictions about the minimal requirements of fairness, justice and efficiency, similar to the respective claims and convictions observed among professional mediators. But this might occasionally have led to the opposite danger, that of taking autonomy as the natural state of things, and disregarding how often the transformation of our discipline’s fundamental

¹⁵ A careful reading of pre-classical doctrine offers some good illustrations: Bartolus bases his doctrines on a *ius commune* inherently linked to the Holy Roman Empire; by the time of Ulrik Huber the *ius commune* had lost any claim to an “external”, *ratione auctoritatis* normativity, but the idea of a “civilizational” external system allowed Ulrik Huber’s idea of comity to have a normative undertone in a way Joseph Story’s will not, 150 years later.

conceptions has been triggered by jurisprudential shifts within Private Law and International Law theory, or by changes in the society it is after all supposed to cater for.¹⁶

To avert this danger, we may need, from time to time, to take a step back from our own 'governance' projects and examine critically the broader picture and our perspective of it (including our disciplinary biases). An examination of the intellectual history of private international law, steering clear of both blind ancestor-worshipping and parricidal complexes, will allow us to face our past and its legacy serenely, and thus better appreciate our future.

¹⁶ For an excellent reminder of the role of material changes see Richard Fentiman's National Report (England) in Symeon Symeonides (ed.), *Private International Law at the End of the 20th Century: Progress or Regress? (XV International Congress of Comparative Law)*, The Hague 2000, pp. 165 ff.