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THE CONCEPT OF “COMITY” IN ULRICH HUBER’S CONFLICT DOCTRINE²

This article investigates the concept of “comity”, discussed by Ulrich Huber (Dutch scholar of the XVIIth century). This author is the most typical representative of the Dutch theory of the conflict of law. Huber’s writings primarily reflected the doctrine of comity, which is the basis of the Dutch school statutes. This article concludes that all Huber’s axioms have entered modern doctrine and court practice (especially in common law countries). Huber is the founder of the “national theory” of conflict rules and, at the same time, the founder of “international theory” in the private international law.

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The Dutch school of private international law (PIL) of the XIXth century is known for the names Paul Voet, his son John Voet and Ulrich Huber. Huber, an outstanding scientist,³ the most influential author of the Dutch school of the conflict of law,⁴ and one of the most famous Dutch legists⁵ deserves special study.

Huber was descended from a Swiss family. His grandfather entered military service in the Netherlands. Huber was born at Dokkum in 1636. He studied at the universities of Franeker and Utrecht. In 1657 he became professor of law at the University of Franeker. He was twice offered the chair of law at Leyden, but refused both times. He was later appointed as a member of the Provincial Court at Leeuwarden, but shortly before his death he returned to Franeker. He died in 1694.

Huber was regarded as one of the first rank in the Dutch school of law. His principal works are “De Jure Civitatis”; “Praelectiones Juris Civilis”; “Digressiones Justinianae”; “Eunomia Romana”; and the “Hedendaegse Rechtsgeleertheyt zoo elders als in Frieslandt gebrukelyk”. In addition to these works he wrote a considerable number of works on theological and philosophical subjects.

Of the vast number of treatises on the conflict law, Huber’s “De Conflictu Legum Diversarum in Diversis Imperiis” is the shortest, covering only ten pages. The practical tone of Huber’s treatise, is illustrated by cases which the writer recollected from his experience as a judge of the Frisian court. Huber contents himself with a brief statement of the principal rules and their application. This eminent jurist laid down three maxims (see below), which he considered sufficiently comprehensive to evolve a system for the reconciliation of conflicting laws.⁶

“De Conflictu Legum” gained world fame and had a profound influence on the development of the science of the conflict of law (especially in England and the United States, far more than the work of another author).⁷ It was the topic of heated scientific debate, with fundamentally opposed assessments and views expressed for nearly 250 years. “De Conflictu Legum” is a typical expression of the Dutch theory.⁸

In a short preamble to “De Conflictu Legum” Huber states the facts that give rise to a conflict of laws. He emphasizes the connection of the most significant legal properties with

³ *Cheshire G.C.* Private international law. Oxford, 1961.

⁴ *Alex Mills.* The private history of international law // International and Comparative Law Quarterly. Vol. 55. January 2006 // URL: <http://login.westlaw.co.uk/wluk/app/document?rs>

⁵ Голландская правовая культура / Отв. ред. В.В. Бойцова и Л.В. Бойцова. М., 1998.

⁶ *Cheshire G.C.* Private international law. Oxford, 1961.

⁷ *Lorenzen Ernest G.* Huber’s de conflictu legume // Illinois Law Review. 1918–1919. V. 13.

⁸ *Мандельштам А.Н.* Гаагские конференции о кодификации международного частного права. Т. I. СПб., 1900 // СПС Консультант+

different laws. He notes the contrast between and the variety of laws in different countries and focuses on the mutual independence of the peoples: “It often happens that transactions entered into in one place have force and effect in a different country or are judicially decided upon in another place. It is well known, furthermore, that after the breaking up of the provinces of the Roman Empire and the division of the Christian world into almost innumerable nations, being not subject one to the other, nor sharing the same mode of government, the laws of the different nations disagree in many respects. It is not surprising that there is nothing in the Roman law on the subject inasmuch as the Roman dominion, covering as it did all parts of the globe and ruling the same with a uniform law, could not give rise to a conflict of different laws.”⁹

Huber “fairly”¹⁰ argues that Roman law does not address the problem of the conflict of laws. In Rome, one law applied to all parts of the Empire and there was, in principle, no conflict. Simultaneously Huber expresses “two controversial” opinions¹¹ – basic rules on the matter must still be derived from Roman law, but the issue of the conflict of laws arises rather from *jus gentium* than from the civil national law: “The fundamental rules according to which this question should be decided must be found, however, in the Roman law itself. Although the matter belongs rather to the law of nations [*jus Gentium*] than to the civil law, it is manifest that what the different nations observe among themselves belongs to the law of nations.”¹²

Huber’s contrast between the law of nations and civil law shows that the basis of its legal constructions is based on the theory of Hugo Grotius. In his famous treatise “On the Law of War and Peace” (“*De jure belli ac pacis*”, 1625), Grotius divided all law into natural (*jus naturale*) and positive (*jus voluntarium*). Positive law is divided into divine (*jus divinum*) and human (*jus humanum*). Human law is divided into civil (*jus civile*) and international (*jus gentium*). Civil law is the national law of each nation, which, together with the natural, forms the internal law of a sovereign state. International law “is the law which is valid in relations of nations and sovereigns” (*jus gentium est jus, quod inter populos populorumque rectores intercedit*).¹³ Grotius separated the concept of “international law” from the Roman concept “*jus gentium*”. *Jus gentium* is not an ideal, universal law of all peoples, it is the actual law of a specific people, the public international law.

Grotius argued that because states were sovereign, the law of nations was part of what he classified as “voluntary law”, not part of the natural law realm, and that international law “must

⁹ Ulrici Huberi Praelectionum Juris Civilis. Pars Altera. Liber I. Titulus III. Leipzig, 1707. Cited: Lorenzen Ernest G. Huber’s de conflictu legume.

¹⁰ Laine A. Introduction au droit international privé. P., 1888.

¹¹ Laine A. Introduction au droit international privé.

¹² Ulrici Huberi Praelectionum Juris Civilis. Pars Altera. Liber I. Titulus III. Leipzig, 1707. Cited: Lorenzen Ernest G. Huber’s de conflictu legume.

¹³ See: Никольский Д.П. Международное право. СПб., 1903.

have its origin in the free will of man”. He identified the will and practice of states as a “source” of law, operating distinctly to natural law – exposing it to the possibility of a positivist methodology. Grotius borrowed the term *jus gentium* to describe this law of nations, importing with the term its universal, natural law, legitimating implications from Roman law. The *jus gentium* became, under Grotius, not the Roman (ideal) “law of people”, but a new (factual) “law of the peoples”.¹⁴

Many authors have noted the scholastic theorizing of Grotius.¹⁵ However, the division of the law by a natural and positive distinction between “internal” and “external” law, was a statement of two separate legal systems – an internal (national) legal system of sovereign states, based on natural law, and an external (international) legal system, based on the actions and wills of states. However, in his analysis of law Grotius made the conceptual distinctions which facilitated a positivist approach. In particular, in his analysis of international law, he expedited the rise of positivism by emphasizing the conceptualization of its formation as the product of voluntary human action. Modern writers call the positivist Grotius a pioneer of rationalist (nationalist) natural law.¹⁶

Huber, like Grotius, was a strong supporter of positivism and natural law.¹⁷ Following Grotius, and accepting the law of nations as a distinct, voluntary system of law, Huber argued that it was capable of detached logical analysis, separate from the political questions which concerned matters internal to each state. Huber used the terms *jus naturale*, *jus civile* and *jus gentium* in the sense proposed by Grotius – both domestic and national laws and international public law. He includes the problem of the conflict of law within the scope of international law: “It follows, therefore, that the solution of the problem must be derived not exclusively from the civil law, but from convenience and the tacit consent of nations.”¹⁸ Huber (like Grotius) considered private international law¹⁹ as part of the *jus voluntarium* and considered it a consequence of the positive (voluntary) concept of international law. In this respect, Huber denied the theory of statutes, whose representatives have argued that the rules of private international law apply to natural law (that they are part of the universal order, including all branches of the law).

¹⁴ Alex Mills. The private history of international law.

¹⁵ See: Аннерс Э. История европейского права. Пер. со швед. М., 1994; Никольский Д.П. Международное право. СПб., 1903.

¹⁶ Аннерс Э. История европейского права. Пер. со швед. М., 1994.

¹⁷ “Huber – ein Mann des Naturrechts”. See: Raape L. Deutsches Internationales Privatrecht. Berlin, 1938.

¹⁸ Ulrici Huberi Praelectionum Juris Civilis. Pars Altera. Liber I. Titulus III. Leipzig, 1707. Cited: Laine A. Introduction au droit international privé.

¹⁹ Huber at first in the doctrine of private international law used of the term “conflict of laws”. See: Alex Mills. The private history of international law.

Being a logical positivist, Huber emphasized the sovereignty and independence of each state, emphasizing the sovereignty and territorial basis rather than a rigid boundary between internal and external policies of states.²⁰ In his view, international law should limit intervention in the sovereign affairs of the state, especially regarding territory. Conflict rules can also be considered as a means of protecting state sovereignty from interference. Huber based his theory of private international law on the idea of territorial sovereignty.

According to Huber's view, three logical statements can be derived from the concept of territorial sovereignty:

1. The right of sovereignty can be effectively implemented only if there is territorial sovereignty, but sovereign rights cannot exceed territorial sovereignty.
2. The sovereign right has priority over foreign legal systems of territorial sovereignty.
3. Each state must act in the common purpose, to observe the rights which the state has granted its subjects. This can be considered as a way of separating the internal and external functions of the state. The authority of another state, its citizens and laws are to be taken as part of the state.

Based on these three postulates of territorial sovereignty, Huber formulates three maxims, which should always be followed in cases of conflict of laws and which form the legal basis of conflict rules. According to him, if these axioms are all followed, they solve all the difficulties resolving conflicts of laws: "For the purpose of solving the subtlety of this most intricate question, we shall lay down three maxims which being conceded as they should be everywhere will smooth our way for the solution of the remaining questions."²¹

Huber formulated his views concerning the legal basis upon which, in his opinion, the rules of the conflict of laws rest in the following three maxims:

1. The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.
2. All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.
3. Sovereigns will so act by way of comity (*comitas*) that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the powers or rights of such government or of their subjects.

Huber argued that his three rules are not only a logical corollary from the theory of sovereignty, they are also developed with the tacit consent of the nation's positive norm. These

²⁰ Donald Earl Childress III. Comity as Conflict: Resituating International Comity as Conflict of Laws // <http://www.google.ru/url?sa=t&rct=j&q=Donald+Earl+Childress+III.+Comity+as+Conflict%3A>

²¹ Ulrich Huber Praelectionum Juris Civilis. Pars Altera. Liber I. Titulus III. Leipzig, 1707. Cited: Lorenzen Ernest G. Huber's de conflictu legume.

rules are based on international law (*jus gentium*) with its adherence to the Roman legal tradition of natural and universal law. However, it should be emphasized that the understanding of private international law proposed by Huber was significantly different from the understanding of natural law in the period of the Roman Empire and the Renaissance. He put in the center of his argument no natural universal laws, but the will and actions of individual states. Huber's concept of private international law primarily reflected his approach to territorial sovereignty.

The first two principles, according to Wolf, embody the pure doctrine of territoriality: according to strict rules, legal norms can only be used within the country in which they are in force.²² The first axiom, on Huber's view, is beyond question. All laws are territorial in nature and do not have power and influence outside the jurisdiction of their own legislature, the law is reflected in all aspects related to a particular territory.

The second axiom follows from the first, but some scientists (according to Huber) will not accept it: "As for the second maxim, some persons seem to be of a different opinion and to deny that foreigners are subject to the law of the place in which they act. I consider this to be true in certain cases, as we shall see below. But the proposition that all within the boundaries of a government are to be deemed subjects thereof is nevertheless perfectly correct, for it is in conformity not only with the nature of a state and the custom of subjecting all found therein to its sovereignty, but also with the doctrine accepted by almost all nations."²³ Thus, the rule that "lieges" of the state should be any located on its territory, generally corresponds to the natural law and is common in the world. They who enter into a contract on the territory, in which they are located, as a temporary entity are subservient to local law. In support of his second axiom Huber refers to Grotius: "Grotius [...] says that he who contracts in any particular place subjects himself as a temporary subject to the laws of such place ... [It] can be justified only on the grounds that the sovereignty is deemed to extend over all found within the territory."²⁴

Huber arguments are based not so much on the theory of Grotius, but on the postulate of the French scientist Bertrand d'Argentre (XVIth century) that "all customs are real". XVIIth century Dutch lawyers vigorously supported d'Argentre under which rule of law is a sanction, so its effect is limited to a certain territory. The rule of law is intimidation (the term "territory" d'Argentre deduced from the word "terrere" – intimidate), accordingly, the law is all within its territory, and nothing out of it, because there it cannot intimidate. For Huber this idea is expressed in the axiom: "The laws of each state have force within the limits of that government

²² Вольф М. Международное частное право. М., 1948.

²³ Ulrici Huberi Praelectionum Juris Civilis. Pars Altera. Liber I. Titulus III. Leipzig, 1707. Cited: Lorenzen Ernest G. Huber's de conflictu legume.

²⁴ Ulrici Huberi Praelectionum Juris Civilis. Pars Altera. Liber I. Titulus III. Leipzig, 1707. Cited: Lorenzen Ernest G. Huber's de conflictu legume.

[...] but not beyond”. Foreign law is a statute, just “released” for the territory, but at the same time preserving its power.

The Dutch school of lawyers not only took the doctrine of d’Argentre as the starting point of their conclusions, but gave examples of the practical implementation and application of this doctrine. However d’Argentre’s doctrine is just a starting point for the concept of Huber, the merits of his views are an anathema to the basic principles of the doctrine of territorial law. Huber’s statements regarding some of the unboundedness of all laws suggest that in the study and development of the conflict of laws he went beyond the traditional views of his predecessors. The essence of Huber’s position was to ensure that the rule “law *ipso jure* cannot be extraterritorial in nature” is not absolute, and must recognize and take into account the existence of any exceptions to this rule. The extraterritorial application of laws is based on natural law, but in reality it is based only on courtesy, respect, and mutual comity of sovereigns. The total advantage to individual nations encourages them to mutual concessions (*comitas nationum ob reciprocam utilitatem*), therefore the force of a local law in some cases is recognized in a foreign country (*statute valent extra statuentis territorium*).²⁵

The third principle (reciprocity, courtesy, politeness (*comitas gentium*)) is the quintessential doctrine of Huber. Huber’s third maxim indicates that the “sovereignty” of a state may “by way of comity” recognize rights acquired under the laws of another state. Huber was the first writer who made it clear that the recognition in each state of so-called foreign created rights was a mere concession which such a state made on grounds of convenience and utility, and not as the result of a binding obligation or duty. From the wording of the maxim it would appear that Huber conceived of comity as a political concession which might be granted or withheld arbitrarily by the sovereign. He adds, however, that the solution to the problem is to be derived “not exclusively from the civil law but from convenience and the tacit consent of nations”. What convenience and the tacit consent of nations might prescribe was evidently a question for the courts. In support of his third maxim Huber’s case is as follows: “Although the laws of one nation can have no force directly with another, yet nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law. And that is the reason for the third maxim concerning which hitherto no doubt appears to have been entertained.”²⁶

²⁵ «Ob reciprocam enim utilitatem in disciplinam juris gentium abiit ut civitas alterius civitatis leges apud se valere partiatur». See: Ulrici Huberi Praelectionum Juris Civilis. Pars Altera. Liber I. Titulus III. Leipzig, 1707. Cited: *Иванов Н.П.* Основания частной международной юрисдикции. Казань, 1865.

²⁶ Ulrici Huberi Praelectionum Juris Civilis. Pars Altera. Liber I. Titulus III. Leipzig, 1707. Cited: *Lorenzen Ernest G.* Huber’s de conflictu legume.

Priority in the development of the idea of *comitas* belongs to an older contemporary Huber's, Paul Voet, who in 1666 claimed that "no statute, regardless of its subject matter, does not extend, directly or indirectly, outside the territory of its carrier [...] when people want to be polite to a neighboring country and this is not problematic, the statutes may have effect outside the area where they were issued".²⁷ Huber was not the author of the theory of comity, but he was the first who made this idea widespread through his axioms, and it was he who first used the phrase *comitas gentium*, literally the "civility of nations", to describe the justification for applying foreign law.²⁸ According to Dodge the genuine history of international comity doctrine begins with Huber ("...Huber, the father of comity").²⁹

During the XIV–XVI centuries all authors concerned with the issue of conflict law, devoted their attention to one question – which laws are always only territorial in nature and which can operate outside the authority of the legislator. However, almost no one could explain why the state had the power to prevent action on its territory of foreign laws. Response was limited to a brief and "exhaustive" postulate – because certain laws (personal statute) are extraterritorial in nature. Essentially, Huber was the first author who has attempted to clarify this most controversial and uncertain point – why a foreign sovereign in his state authorizes the action of foreign law: "... it is not by reason of the immediate force and operation of a foreign law, but in consequence of the sanction of the supreme power of the other state, that effect is given to foreign laws exercised upon property within its territory, out of respect for the mutual convenience of the nations, provided, however, that no prejudice is occasioned to a sovereignty or to the rights of its citizens, which is the foundation of the whole subject".³⁰

Huber never claimed that the foreign sovereign must accept the action of foreign laws on its territory. He wrote about the "recognition in every state of so-called foreign created rights".³¹ The idea that extraterritorial recognition should have rights based on foreign law is a cornerstone of the "fundamental idea on Huber's theory of acquired rights".³² Extraterritorial effects can only be achieved by means of "international comity". In this case, the laws of each nation shall remain in force everywhere, after they have been applied within the boundaries of their own country and "if the power or rights of another sovereign or its citizens are not infringed".³³

²⁷ Paul Voet. *De Statutis eorumque concursu*. Bruxellis, 1715. Cited: *Arminjon P. Précis de Droit international privé*. Paris, 1925.

²⁸ Ernest G. Lorenzen. Huber's *De Conflictu Legum*, 13 Ill. L. Rev. 375, 376 (1919).

²⁹ William S. Dodge. *International Comity in American Courts* // <http://www.asil.org/files/dodge.pdf>

³⁰ Ulrici Huberi *Praelectionum Juris Civilis. Pars Altera. Liber I. Titulus III*. Leipzig, 1707. Cited: *Lorenzen Ernest G. Huber's de conflictu legume*.

³¹ Ulrici Huberi *Praelectionum Juris Civilis. Pars Altera. Liber I. Titulus III*. Leipzig, 1707. Cited: *Lorenzen Ernest G. Huber's de conflictu legume*.

³² Kalensky P. *Trends of private international law*. Prague, 1971.

³³ Вольф М. *Международное частное право*. М., 1948.

Recognition of foreign law is a simple assignment for each state and is based on convenience and utility. Huber considered comity as a political concession, which can be granted or denied arbitrarily by the will of the sovereign. The recognition of foreign rights is not the result of binding obligations of the state, but their recognition is the basis for the comity of nations.

According to Huber, the problem of the conflict of laws is that the law of one state may be valid in another state or spread to an associated government through contact. “It follows, therefore, that the solution of the problem must be derived not exclusively from the civil law, but from convenience and the tacit consent of nations,” - politeness is based on the tacit consent of the people, due to their interests. What is meant by the convenience and acquiescence of the state, should be decided at the discretion of the courts, and so the term “comity” came soon to be understood as judicial comity.³⁴

Every state in virtue of its sovereignty builds its own system of conflict law and formulates its own conflict rules, but in fact it does not act arbitrarily. Under the principle of comity the law permits action on its territory under the rights legally acquired in another territory. Comity and the pressure of international trade require that actions in one jurisdiction be recognized in another. The idea of comity, as a basis for the application of foreign law, had primarily economic reasons: the interests of international trade.

Huber was a positivist who stated fearlessly what he believed to be the actual law. He saw that the recognition and enforcement of foreign law depended upon the assent of the state called upon to recognize or enforce the alleged right. A foreign law could have no effect *ipso jure* outside the territory of the enacting state. It must be recognized or accepted, that is incorporated, by the law of the forum. This is the essence of Huber's doctrine.

In his third maxim the limits beyond which the recognition of foreign laws cannot go are also stated. In Huber's words they can be recognized only “so far as they do not cause prejudice to the power or rights of such government or of their subjects”.³⁵ In other places he adds that such recognition will be denied if it would be illegal to accord it, or if there would be a breach of the local law. In the XVIIth century Huber introduced the concept of the public policy order as in our current understanding.³⁶

In the teachings of Huber attention is paid to the concept of evading the law.³⁷ It is possible to retreat from the principle of comity, if some countries attempt to circumvent the laws of other

³⁴ Lorenzen Ernest G. Huber's de conflictu legume // Illinois Law Review. 1918–1919. V. 13.

³⁵ Ulrici Huberi Praelectionum Juris Civilis. Pars Altera. Liber I. Titulus III. Leipzig, 1707. Cited: Lorenzen Ernest G. Huber's de conflictu legume.

³⁶ Raape L. Deutsches Internationales Privatrecht. Berlin, 1938.

³⁷ See: Мережко А.А. Наука международного частного права: история и современность. Киев, 2006.

countries or to ignore them. In particular, the state cannot allow its citizens to circumvent the law of marriage abroad (*quia sic jus nostrum pessimis exemplis eluderetur*)³⁸.

Next Huber expresses a very interesting idea – sovereigns, which in its territory of other states allow citizens to marry under local law, are “especially clearly against the law of nations” (that is, commit an international delinquency), because they are aware that the local law is contrary national law of aliens. To the XVIIth century this idea was truly revolutionary – the application of the local law to foreigners may be a violation of international law, unless such application helps foreigners to avoid the action of critical provisions of their national law. State, by virtue of comity should not only recognize in its territory rights acquired abroad, but in certain cases, to refrain from using their own laws to foreigners.

In his writing Huber does not attempt to define “*comitas gentium*”, but often as a synonym for *comitas* he uses “a more dramatic and truthful word – benefit”.³⁹ Huber did not hesitate to call a spade a spade, and his theory is all based on the pragmatic positions. Not for nothing Huber is called not just a positivist, but “fearless positivist” who openly expressed, what exactly the actual, positive law was.⁴⁰ It seems that the term “pragmatism” describes Huber’s views more accurately. He never tried to fit the doctrine and jurisprudence to the “Procrustean bed” of a literal interpretation of existing law. Huber based his theory is not so much on the requirements of positive law, but on considerations of the common good.

Sovereigns give up their absolute right and do not allow the actions of foreign laws on property located in their lands out of consideration for the common good. But what is the “common good”? This is nothing like zeal of benefit. Benefit is a “word rather discordant, its harbor under the name of politeness, but the meaning remains the same. Sure, every ruler is entitled to exclude the application of foreign coutume on its territory, but this right is conditional, which is not to dare to use because it will turn against its owner through retaliation.”⁴¹

Not for reasons of generosity, but by necessity does a sovereign open the borders of their land to foreign laws; he prefers the absolute right of supreme power to benefit and simple calculation. *Comitas* is benefit, and Huber said bluntly: “When the governor delivers benefits disregarding acts drawn up abroad, and consequently, foreign statute, he is entitled to act according to their own advantage”⁴². Politeness is justified only to the extent that it is beneficial.

³⁸ Ulrici Huberi Praelectionum Juris Civilis. Pars Altera. Liber I. Titulus III. Leipzig, 1707. Cited: Lorenzen Ernest G. Huber’s de conflictu legume.

³⁹ Laurent F. Droit civil international. Bruxelles, 1880.

⁴⁰ Lorenzen Ernest G. Huber’s de conflictu legume.

⁴¹ Laurent F. Droit civil international. Bruxelles, 1880.

⁴² Ulrici Huberi Praelectionum Juris Civilis. Pars Altera. Liber I. Titulus III. Leipzig, 1707. Cited: Laurent F. Droit civil international. Bruxelles, 1880.

The doctrine of Huber's *comitas* is the doctrine of the common good, that is, of benefit. Profit cannot be the principle basis of a legal theory: jurisprudence is not the science of the benefit, it is the science of right and wrong. Benefit cannot be considered as a principle of law, but benefit causes any state to make concessions which are unlikely to be made in the name of law. Solely for reasons of profit are states led to believe that the entry into their territory of a foreign law does not impinge on their sovereignty and agree to consider the application of the rule of foreign law. The profit motive is worthy of respect and in a situation where the application of foreign law could harm the public interest, in which case any state not only has the right but also the duty to preserve the inviolability of its sovereignty.

Comitas gentium is very similar to the idea of mutual respect. This idea can be described as "mutual forbearance" by which each state has some influence on foreign laws and decisions given against foreigners based on their own interests and feelings of goodwill.⁴³

In the XIXth century, a Belgian legal historian Laurent wrote that "there is a benefit more than the teaching of it – this is a practice almost universal among the nations," and this situation is a "justification" of Huber's theory.⁴⁴ Huber hardly needs justification, he directly and openly expressed his own conclusions based solely on practice and an assessment of the objective reality. Benefit, of course, is "a word discordant", but in the XXIth century a state's participation in any international agreements or its making of any international commitments is primarily due considerations of what benefit (or profit) it will receive. Alas, the observance of international law today is not based on the high ideals of "peace, security, justice and human rights", but is based on simple common profit.

In the XVIIth century Huber and his ideas were well known. His frank pragmatism is celebrated in many modern studies,⁴⁵ as now, no one condemns this approach. That is right, because you cannot condemn the scientist, who said let the unpleasant to the ear, but it is absolutely true words. Huber's writings are characterized by a reasoned understandable, practical approach and the complete absence of pedantry. Current practice shows his ideas have endured. One can agree with Huber's successor Joseph Story that "the true foundation on which the administration of international law must rest is, that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would

⁴³ *Arminjon P.* Précis de Droit international privé. Paris, 1925.

⁴⁴ *Laurent F.* Droit civil international. Bruxelles, 1880.

⁴⁵ See: *Harold G. Maier.* The Utilitarian Role of a Restatement of Conflicts in a Common Law System: How Much Judicial Deference Is Due to the Restaters or "Who are these guys, anyway?" // <http://www.google.ru/url?sa=t&rct=j&q=Harold+G.+Maier>; *Donald Earl Childress III.* Comity as Conflict: Resituating International Comity as Conflict of Laws // <http://www.google.ru/url?sa=t&rct=j&q=Donald+Earl+Childress+III.>; *Joel R. Paul.* The transformation of international comity // URL: <http://www.law.duke.edu/journals/lcp>

result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return”.⁴⁶

By analyzing the historical development of private international law, we can see that its provisions were almost always on the basis of practical feasibility. All the authors who claimed that they built their doctrine on the basis of “general ideas” actually always used the justification “based on considerations of fairness, practicality, convenience and logic that helped legislators informed decision and to order the relevant legal norms”.⁴⁷

In the XVIIth century the basic principle of Dutch lawyers was exclusive sovereignty. The United Netherlands consisted of provinces, each of which had its own legal system. Conflicts of laws, which attracted the attention of the Dutch jurists, were not interlocal in nature, and were not (as in France in XVI–XVII centuries) a part of provincial private international law. In The Netherlands in the XVIIth century conflicts of laws were a part of the “external or federal private international law”.⁴⁸ All Dutch lawyers were interested in strengthening the territorial principle, in addressing conflict issues this principle was used for Huber’s expanding law in Netherlands’ Dutch provinces, which fought against Spanish dominion. However, if national law is applicable to all persons and things, on a given territory, the issue of conflict of laws does not arise at all. In this case, the right to something purchased in one country should not be recognized in another. This inevitable conclusion is the “weakest” position in the theory of statutes.

Huber recognized the shortcomings of the territorial approach, so essentially all of his arguments are aimed at narrowing the same actions formulated in the first postulate. Huber’s first postulate of the reality of all coutumes is amended by his third postulate – on the basis of comity, a state recognizes rights arising abroad, on the basis of the acquired foreign law.

In this connection Laine’s statement that Huber’s theory of territorial rights was just an aberration, misapplication of the principle of the right of sovereignty of legislators is completely true.⁴⁹ Huber justified the proprietary nature of the statutes based on the absolute power of the sovereign in the territory, solely on the basis of international comity.

The territorial nature of Huber’s doctrine is paradoxically reflected in his second postulate: “The foundation of all this doctrine we have said and maintained to be the subjection of all men to the laws of a country so long as they remain therein; whence it follows that an act valid or invalid from the beginning is also valid or invalid elsewhere... The territorial nature of

⁴⁶ *Joseph Story*. Commentaries on the Conflict of laws, foreign and domestic. Boston, 1834 // URL: <http://books.google.com/>

⁴⁷ *Arminjon P*. Précis de Droit international privé. Paris, 1925.

⁴⁸ *Arminjon P*. Précis de Droit international privé. Paris, 1925.

⁴⁹ *Laine A*. La rédaction du Code civil et le droit international privé // *Revue de droit international privé*. 1905. V. 1.

legislative jurisdiction stems from the rule limiting the range of subjects of his right to those persons who temporarily or permanently reside in the territory.”⁵⁰

The main principle of collision, which Huber advocates using in most cases, is *lex loci actus*, reflecting “the influence of the needs of international life ... famous law *locus regit actum*”,⁵¹ usually international in nature and initially having an extraterritorial nature. The territorial nature of the law is that everything that happens in the state is subject to its laws, and is reciprocally recognized in other states. It is widely recognized rights arising under the influence of any national law. From Huber’s view reference to *loci actus* is a manifestation of the sovereignty of the state over all legal acts on its territory and is the need to further protect the rights of foreign courts, acquired in connection with those transactions.⁵²

According to Mandelstam form acts must necessarily conform to the law where they are acting on the basis of the first Huber’s axiom, but real estate is subject to a foreign *lex loci actus* by his third axiom.⁵³ In terms of Lorenzen, to justify the actions of *lex loci actus* Huber used his second postulate (the principle of temporal authority), according to which all who are temporarily in the state, are subjects to its laws. All objects that are the subject of the transaction and the parties to the transaction must be guided by the rules and regulations of the place where they are.⁵⁴ This position seems to be more appropriate, since it is more consistent with the overall direction of Huber’s doctrine to expand the rights of Dutch provinces and to protect rights acquired abroad.

Paul Voet was the first to lay down the new Dutch doctrine although without developing it. He did not even present it as something new, and supported his statement that all laws are territorial by reference to the older writers.⁵⁵ Paul’s son, John Voet did, however, admit that an absolute application of the territorial principle would have the effect that under this principles one state would abolish acts of other states and vice versa, which would result in mutual detriment caused to subjects of the states concerned.⁵⁶ From a theoretical viewpoint the doctrines of the Dutch school were developed most by John Voet, whom Laine¹³¹ calls, on that account, the real founder of the Dutch school.

But twenty years before the publication of John Voet’s great work Huber had announced the doctrine of the Dutch school in the clearest and most unmistakable language, and had made it the foundation of his treatise on the subject under discussion. Although Huber did not originate

⁵⁰ Lipstein K. Principles of the Conflict of Laws. National and international. Martinus Nijhoff Publishers, 1981.

⁵¹ Мандельштам А.Н. Гаагские конференции о кодификации международного частного права.

⁵² See: Асосков А.В. Право, применимое к договорным обязательствам: европейская реформа и российское международное частное право // СПС консультант+

⁵³ Мандельштам А.Н. Гаагские конференции о кодификации международного частного права.

⁵⁴ Lorenzen Ernest G. Huber’s de conflictu legume.

⁵⁵ Lorenzen Ernest G. Huber’s de conflictu legume.

⁵⁶ Laine A. Introduction au droit international privé.

the doctrines of the Dutch school, nor develop them, he stated the fundamental position of this school more lucidly and concisely than either of the other two writers did. The three axioms mentioned by Huber are the corner-stones of his entire discussion, expressing the viewpoint of the Dutch school in the boldest and most categorical manner.

Huber did not classify laws by status of personal, real and mixed (adopted by Paul and John Voet) and he solves all problems on the basis of his axioms. In this, the methodology of his reasoning is identical to the one which was used by later glossators: representatives of the theory of Italian and French statutes XIV–XVII centuries.⁵⁷ In support of two of his axioms he refers to Roman texts, the first axiom is justified text from the Digest of Justinian (2, 1, 20), the second in the same way (48, 22, 7, § 10 ff). Of course, the Roman texts “reinforce” Huber’s axioms, and do not and cannot objectively be directly related to the resolution of the conflict of laws.

However, I would stress that the quotes from the Digest selected by Huber, can easily be interpreted as pertaining to the regulation of international civil relations. For example, D. 2, 1, 20 is an excerpt from the writings of Paul “Comments on the edict”: “Taking legal action outside its territory can defy with impunity The same will be the case if he wants to take legal action on matters beyond the scope of its jurisdiction.”⁵⁸ Huber uses Paul’s statement to prove his axiom that the laws of each state shall be valid within that state, and oblige all actors, but do not act beyond. It certainly cannot be argued that the Roman text “dragged in by the hair”,⁵⁹ in general the maxim of Paul is well suited to support Huber’s thought within the legislative jurisdiction of the state. In any case, this text is acceptable to inform decisions on the international jurisdiction. Of course, Paul was not describing the conflict of laws, but the link to it is quite correct.

Huber refers to authority in support of his axioms – John a’Sande, Christian Rodenburg, Hugo Grotius - in the same way as his statist predecessors . On the conflict of law his favorite author is John a’Sande (who died in 1638 – 2 years after the birth of Huber). He is perhaps the most often quoted in the works of Huber, not only because his work is best known, or agrees with him the most, but also because John a’Sande was his fellow countryman, and he taught for a long time at the University of Franeker.

Although Huber formally denies the theory of statutes, it appears that the division into three categories of status is the basis of all of his arguments. In particular, he recognizes that all matters relating to real property, excluding the questions of form act, require the use of *lex rei sitae* and have real character. Personal statutes (*lex domicilii*) can have an extraterritorial effect on an agreement. *Lex loci actus* regulates any matters not directly affecting the property and the status of persons.

⁵⁷ In the Russian literature Huber quite rightly called "Dutch postglossator". See: Международное частное право: современные проблемы / Отв. ред. М.М. Богуславский. М., 1994.

⁵⁸ Дигесты Юстиниана. Т. I / Перевод с латинского. Отв. ред. Л.Л. Кофанов. М., 2002.

⁵⁹ Брун М.И. Очерки истории конфликтного права. М., 1915.

Not surprisingly, Huber says, in line with the statutes theory, that this theory in his time was the only doctrinal basis of the conflict of law. All predecessors and contemporaries of Huber used the tools of this theory and, in fact, all were statistes. There was no other theory, but there was not enough material to create a new doctrine – its regulatory framework (legislation) did not exist and judicial practice was too small.

Surely the conclusions stated by Huber cannot be derived by mere logic from the given maxims. It must not be forgotten, however, that Huber’s object was to write a practical treatise which should reflect the existing laws. He did not aspire to create a theory, he wrote a practical guide for lawyers. Had he amplified his statements he would have admitted, without question, that some of the rules laid down, by him could not be derived from his general principles but he founded general principles on grounds of convenience.

.....

Huber’s work quickly gained popularity among the other experts in the science of international private law. Many of the representatives of French conflict theory of the XVIIIth century studied his short essay. However, the basis of his theory – the rule of *lex loci actus* and recognition of acquired rights abroad through *comitas gentium* – were not accepted in European science of the conflict of law. In the estimation of continental jurists, Huber does not occupy such a prominent position and is considered one of the lesser writers on the subject.

Friedrich Carl von Savigny supported Huber’s basic principle of territorial sovereignty. However, he denied Huber’s conclusion that the judge should recognize the rights acquired under foreign law: “This principle leads us in a circle, and we can know what rights are legitimate only if we know the original, according to what law they were acquired.”⁶⁰ The Belgian jurist, Alberic Rolin, speaking of Huber, says: “His doctrine, however, is badly reasoned and little scientific. It is summed up in several axioms, stated quite arbitrarily, from which the author draws his deductions.”⁶¹

Huber’s category “comity” underwent the most severe criticism: “Comity is a pretext for the evasion of the consequences of a strict territorial law. [Although] it may not be amiss to observe that in its obscure and little defined concept, interest, courtesy, and reciprocity, are ideas so important for the history of law... [t]he name of science cannot be given to them, nor can a practical and useful system be based upon them.”⁶² The reason for this sharp criticism from continental scholars consisted above all in the fact that throughout the XIXth century most of them were trying to create a science of private international law on a more stable basis than reciprocity, comity and the benefit of states. In the doctrine of private international law the

⁶⁰ Savigny F. Geschichte des romischen Redits im Mittelalter, Bd. VIII. Cited: Cheshire G.C. Private international law. Oxford, 1961.

⁶¹ Rollin A. Principes du droit international prive. Bruxelles, 1884.

⁶² Bustamante. Tradato de diritto international privado. B. I. Cited: Lorenzen Ernest G. Huber’s de conflictu legume.

idealistic view prevailed that the rules of conflict laws cannot have a national character, and should be a universal system, which obliges all states.⁶³

Concerning the influence of the Dutch school upon the development of the conflict of laws (and Huber in particular), Swiss scholar Meili expressed the general verdict among the continental jurists: “The Dutch school has in fact put the Conflict of Laws out of joint and has placed the whole subject on a basis where it nearly perished. [In all] events it blocked the way to its future development. Retrogression and not progress resulted from this school. Every day we still feel the reflex effect of this erroneous doctrine. The Dutch writers prepared a juridical blind alley for our subject in the form of *comitas*. This is the truth and all else is fiction.”⁶⁴

The Anglo-American view of Huber is a fundamentally different. At the end of the XVIIIth century, when the first cases of conflict of laws in English jurisprudence occurred, English lawyers and judges accepted theory of the Dutch school. Huber has been paramount to the idea that all the laws in nature are territorial and can be used in another state only insofar as it is established by international agreement. This view was extremely suited to the common law of England, which has a pronounced territorial nature.⁶⁵ This explains why, in the opinion of English lawyers, Huber’s treatise can be invoked in the courts. English writers and judges freely borrowed Huber’s concept of “comity”, because in England the dominant approach that if the agreement resolves all issues not only on *lex fori*, it is dictated not only by convenience, bordering on a necessity, but also by respect for legal science. Science embodies justice, and justice determines the interpretation and application of the law. Such approach has led to the rules of “comity”.⁶⁶

The founder of the American doctrine of private international law Joseph Story himself relied upon Huber more than upon any other foreign jurist. Indeed, Laine goes as far as to say that Story’s celebrated work on the “Conflict of Laws” is in reality nothing but a paraphrase of Huber.⁶⁷ Unlike continental lawyers the American doctrine of conflict of laws has caused the greatest sympathy with primarily the theory of *comitas*.

This is stated in the following words of Story: “The true foundation on which the administration of international law must rest is, that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return... There is then not only no impropriety in the use of the phrase “comity of nations”, but it is the most appropriate phrase to express the true foundation

⁶³ See: *Pillet A.* Principes de droit international prive. Paris-Grenoble, 1903; *Zitelmann E.* Internationales Privatrecht. Leipzig, 1912.

⁶⁴ *Meili F.* Geschichte und System des internationalen Privatrecht im Grundriss. Zurich, 1902.

⁶⁵ *Lorenzen Ernest G.* Huber’s de conflictu legume.

⁶⁶ *John Westlake.* Lehrbuch des internationalen Privatrechts. Holtzendorff, 1884.

⁶⁷ *Laine A.* Introduction au droit international privé.

and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter, and is inadmissible when it is contrary to its known policy or prejudicial to its interests. In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their government, unless they are repugnant to its policy or prejudicial to its interests. It is not comity of the courts, but the comity of the nation, which is administered and ascertained in the same way, and guided by the same reasoning by which all other principles of the municipal law are ascertained and guided.”⁶⁸

Harrison supports Story’s evaluation: “Huber’s treatise “de conflictu legume” is only a short essay, forming part of his introduction to the civil law, and is contained within five quarto pages... They are characterized by clearness, practical judgment and an entire absence of pedantry. The rules laid down within those five pages are satisfactory and exact. The matter is not exhausted, it is true, and the maxims are very general. But, at the same time, they establish the bases of Private International Law.”⁶⁹ The dominant influence of the teachings of Huber in the Anglo-American doctrine and practice PIL is noted in many studies.⁷⁰

Such a difference in the appreciation of Huber must be due to a difference in the fundamental conception concerning the nature and legal basis of the subject of Private International Law in Anglo-American and Continental doctrine of conflict. In continental Europe, the concepts of “comity” and “justice” have always been viewed as the opposite.⁷¹ Continental legal writers (the supporters of a universalist conception of PIL) traditionally believed that the science of conflicts of law must aim toward the establishment of a perfect legal system, in principle, not related to the national legislation. Anglo-American lawyers and judges (positivists and pragmatics) have always understood “law” as rules, which are enshrined in the existing legislation, and are recognized and enforced by the courts. In their view it is impossible to achieve a result by discussing ideal doctrinal principles and not basing it on real jurisprudence.

The debates have not ended, there is no *communis opinio doctorum*. However, despite the persistence of the fundamental differences in the science of continental and Anglo-American PIL in the XXth century, Huber’s works have been appreciated. Modern authors certainly recognize the undoubted merits of this truly great scientist in the development of PIL doctrine.

The merit of the whole Dutch school PIL in general, and Huber in particular, is that their work laid the foundation for understanding the conflict of laws, not only as interlocal but as well

⁶⁸ *Story Joseph*. Commentaries on the Conflict of laws, foreign and domestic. Boston, 1834 // URL: <http://books.google.com/>

⁶⁹ *Harrison F*. On Jurisprudence and the Conflict of Laws. 1919.

⁷⁰ See: *Мережко А.А.* Наука международного частного права: история и современность. Киев, 2006; *Raape L*. Deutsches Internationales Priratrecht. Berlin, 1938; *Cheshire G.C*. Private international law. Oxford, 1961; *Symeon C*. *Symeonides*. American Federalism and Private International Law // *Revue Hellénique de Droit International*. 2010. Vol. 62.

⁷¹ *Lorenzen Ernest G*. Huber’s de conflictu legume; *John Westlake*. Lehrbuch des internationalen Privatrechts. Holtzendorff, 1884.

as international conflicts: “The spirit of pride in their hard-won independence overwhelms all these writers. The issue is no longer a conflict of statutes of individual regions, it is a conflict of the laws of different countries.”⁷²

The ideas of state sovereignty and international comity, which make up the foundation of the Dutch doctrine of the conflict of laws, established the existence of a “national private international law”, and the idea that each state has own PIL. The principle that the rules on conflict law refers to the domestic law of the country is first clearly and unambiguously been formulated in Huber’s writing. Ironically, Huber enshrined the nature of the national norms of PIL in the third rule – in his axiom of international comity.⁷³

XVIIIth century Dutch scholars invested the term *comitas* with specific content. Since the application of foreign law is only by virtue of comity, to the extent each state is free to set their own laws, and to the extent it would accept the actions of foreign laws. The states in this regard are not bound by any “higher” standards. There are not principles of conflict laws that could claim universal validity. For Huber *comitas* did not create any international legal coherence for states in establishing specific conflict rules.⁷⁴

The writings of Huber first established the idea that the rules on dealing with conflicts of different national laws are not based on the nature of these laws (real or personal statute), but solely on the good will of the local sovereign, authorizing the use of foreign law in their territory. As such rules are the authoritative assent of national legislator, they have domestic nature. In this respect, the Dutch school was the beginning of the formation of the national (civilistic) concept of PIL.

Simultaneously, “all scholars unanimously presume that the theoretical basis” of international concept of PIL “follows from the postulate of the Dutch school about *comitas gentium*”.⁷⁵ Huber founded the idea of the origin of conflict rules “of a tacit agreement of the peoples” in the concept *comitas*. Some authors take the position that “the international framework of Huber’s doctrine stems from his first rule, which is derived from the division of legislative powers between the states and points to the jurisdiction of each state to legislate in relation to its subjects and its territory”.⁷⁶

As a result, it can be concluded that the Dutch theory of conflict of law laid the foundation for not only the national, but the international concept of PIL. There is no contradiction – the great von Savigny adds the opinion of the national character of the conflict law, but also he started from the supranational character of the idea of the international legal community, which

⁷² Raape L. Deutsches Internationales Privatrecht. Berlin, 1938.

⁷³ Lipstein K. Principles of the Conflict of Laws. National and international. Martinus Nijhoff Publishers, 1981.

⁷⁴ Луиц Л.А. Курс международного частного права. В 3 т. (по изданию 1973—1976 гг.). М., 2002.

⁷⁵ Международное частное право: современные проблемы / Отв. ред. М.М. Богуславский. М., 1994.

⁷⁶ Lipstein K. Principles of the Conflict of Laws. National and international. Martinus Nijhoff Publishers, 1981.

was based on a higher common principle for determining the applicable law. In this respect, it is quite correct to consider Huber one of the direct predecessors of Savigny.⁷⁷

Huber did not position the legal significance of foreign law as a result of any non-legal obligation but as a result of its own free will. *Comitas* in Huber's understanding is the unfettered discretion of sovereign states, it concerns their own good, benefits and convenience. No one can compel the government to recognize in its territory foreign law: the state imposes such an obligation on itself by itself, at its own discretion.

Mills says that, "Huber's third rule characterizes the application of foreign law by a State as an act of State will, based on the consent of the State, adopted as a matter of convenience or courtesy... Over time, this is a clear transitional point for private international law... [The] contents of his third rule, in its deference to the concept of comity, made the discretionary exercise of State will central to private international law."⁷⁸ This is true – the state allows the operation of foreign law in its territory only with its imperious assent, which is enshrined in the national conflict rules. Sovereignty and the will of the state are expressed in international agreements, participation in which is always an expression of the consent of the state to assume certain liabilities. The duty of the state is to recognize and execute the decisions of foreign courts, to apply uniform conflict rules and norms of international law – these are all manifestations of state sovereignty.

In this regard, I would like to emphasize the idea, expressed by Lorenzen almost 100 years ago: "As long as each country feels at heart that its own law is the best in the world, and that justice can be secured only in accordance with its rules, there is little hope of any real progress."⁷⁹ The state should not see the application of foreign law diminishing its sovereignty, Today it remains a priority for international private law to protect the subjective rights acquired under the influence of foreign laws. As the solidarity of nations becomes more evident and the justice of enforcing foreign laws under given circumstances becomes more apparent, the different systems will gradually tend towards greater uniformity.

A universal uniform system of conflict rules, which will be valid in all states, is unlikely in the foreseeable future, but it is possible to establish uniform rules to resolve conflicts of laws at the national level (this is clearly seen when comparing the current national codification of PIL). The basis of a national codification of PIL should be achievable through the theoretical research of legal science. The foundation of our science is the theory of the Statute, where the Dutch school is not in last place. In any case, the Dutch were the first to describe almost entirely the modern concept of the doctrine of PIL. "Huber's axioms must, in the nature of things, govern

⁷⁷ See: Рубанов А.А. Теоретические основы международного взаимодействия национальных правовых систем. М., 1984.

⁷⁸ Alex Mills. The private history of international law.

⁷⁹ Lorenzen Ernest G. Huber's de conflictu legume.

our subject until the complete sovereignty of the individual states is lost and a common superior has been established.”⁸⁰

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⁸⁰ *Lorenzen Ernest G. Huber's de conflictu legume.*