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The concept of “comity” in Ulrich Huber’s conflict doctrine¹

1. 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, the most influential author of the Dutch school of the conflict of law, and one of the most famous Dutch legists deserves special study.

2. 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.

3. 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.

4. 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

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maxims (see below), which he considered sufficiently comprehensive to evolve a system for the reconciliation of conflicting laws.

5. In a short preamble to “De Conflictu Legum” Huber states the facts that give rise to a conflict of laws: “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.”

6. 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 pads”, 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* is not an ideal, universal law of all peoples, it is the actual law of a specific people, the public international law.

7. Huber, like Grotius, was a strong supporter of positivism and natural law. 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 so-

lution of the problem must be derived not exclusively from the civil law, but from convenience and the tacit consent of nations.”

8. 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. 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.

9. 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:

- The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.
- All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.
- 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.

10. The first two principles 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. 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.

11. 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. For Huber this idea is expressed in the axiom: “The laws of each state have force within the limits of that government [...] but not beyond”. Foreign law is a statute, just “released” for the territory, but at the same time preserving its power.

12. 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.

13. 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. 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. 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."

14. 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". 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. The genuine history of international comity doctrine begins with Huber.

15. 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”.

16. 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”. 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”. 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”.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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". 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. 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.

22. 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."

23. 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”. Politeness is justified only to the extent that it is beneficial.

24. *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.

25. 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”.

26. 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 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.”

27. 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*”, 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.

28. 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 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.

29. 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.

30. 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*”. 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”.

31. 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 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.



32. 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.

33. 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 State, 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 our subject until the complete sovereignty of the individual states is lost and a common superior has been established."

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