

THE INTERACTION BETWEEN PUBLIC AND PRIVATE INTERNATIONAL LAW - SOME NEW TRENDS

Gautam Narasimhan*
William V. John*

On the topic of the interaction between Public and Private International law, the learned Professor Cheshire stated in the 4th Edition of his book on the 'Conflict of Laws' that

"There is of course, no affinity between Private and Public International Law."¹

However, the learned author in the next edition to his book changed his stance to state:

"It would, of course, be a fallacy to regard Public and Private International Law as totally unrelated. Some principles of law, such as the maxim *Audi alteram partem* and *ut res magis valeat quam pereat* are common to both; some rules of private international law, as for example the doctrine of "proper law" of a contract, are adopted by a court in the settlement of a dispute between sovereign states; equally some rules of Public International Law are applied by a municipal court when seized of a case containing foreign elements."²

This *volte-face* by one of the most revered authors on Private International Law only indicates the extent of confusion that a combined study of Private and Public International Law has thrown up. In fact, there has developed two distinct schools of thought in approaching the topic - the universalists and the particularists.³ Of course, before going into these finer aspects, one needs to attend to the initial query of the purpose served by the study of the interaction of Public and Private International Law. Firstly, there is a growing realisation that has crept in amongst

* V Year, B.A., LL.B. (Hons.), National Law School of India University, Bangalore.

1 G. C. Cheshire, *Private International law*, 16 (1952).

2 G. C. Cheshire, *Private International law*, (1957), cited from, Edvard Hambro, *The Relation between International law and Conflict law*, 105 Hag. R. 12 (1962).

3 The universalists advocate, as would be evident from the name, a greater unification of the rules of private international law. The particularists view private international law as particular to a State and stress its essential national character in application and development.

modern jurists of Private International Law⁴ that the progressive “unification” of some of its rules has given it the characteristics of Public International Law. Secondly, the Public Law taboo which was identified with Private International Law is today being repeatedly questioned by jurists⁵. Thirdly, there is an increasing acknowledgement that concepts of Public International Law could be of immense use in solving knotty cases of Private International Law issues and *vice versa*.

Defining Public and Private International law

The process of defining Public and Private International Law is of utmost importance here, given the need to analyse these terms threadbare. Curiously, there are several definitions ascribed. While some believe that ‘Public International Law’ has to be defined according to its sources⁶, others believe that it is to be defined according to the subjects covered by its scope.⁷ However, it would be desirable here to accept the meaning given by Mr. Wortley, that International Law is:

“The body of customary and conventional rules legally binding upon civilised states and other entities having international personality in their intercourse with each other”⁸

While defining Private International Law, too, the difficulties faced are not dissimilar. For example, Private International Law was defined by Jenkin L.J., by the subjects it covered, thus:

“...Private International Law is concerned only with the rights of individuals and not with the competing rights of sovereign States.”⁹

On the other hand, the other definition used is that Private International Law is not so much “person oriented” but “forum oriented”. Dicey, says:

“The vital questions to be considered are the choice of the system of law to be applied to cases which come before the courts for decision when they contain some foreign element, and the rules which should be maintained by the courts as to the limits of the jurisdiction to be exercised by English or foreign courts respectively.”¹⁰

4 See generally, Andreas Lowenfeld, *Public law in the International arena: conflict of laws, International law and some suggestions for their interaction*, 163 Hag. R. 321 (1979); B. A. Wortley, *The interaction of public and private international law today*, 85 Hag. R. 245 (1954); Edvard Hambro, *The Relation between International law and Conflict law*, 105 Hag. R. 6 (1962); Otto Kahn Freund, *General problems of private international law*, (1976).

5 See, Lowenfeld, *supra.*, n. 4.

6 Hambro, *supra.*, n. 4.

7 Marek St. Korowicz, *Introduction to International law*, 390 (1959).

8 Cited from, Lowenfeld, *supra.*, n. 4.

9 *Re Maldonado*, [1953] 2 All.E.R. 1579.

10 Dicey, *Conflict of laws*, (1973). This definition does find acceptance in the views of Cheshire, Greaveson and Schmitthoff.

The term International Law was coined by Bentham¹¹. Standing without qualification, International Law would suggest 'Public International Law', whereas 'Private International law' is treated separately. The modern dichotomy was made by Bentham. Before Bentham, the traditional terms used were '*the law of nations*', *Volkerrecht*, *droit des gens*, *jus gentium*, for what is today called Public International Law and also the relatively undeveloped subject of Conflict of Laws.¹²

The emergence of Private International Law as being distinct from Public International Law can be traced to two curious factors: Firstly, the rise of nationalism amongst the continental states (France in particular) and secondly, the growth of utilitarianism and positivism in England¹³. With this growth of a kind of 'positive law', Private International Law found its genesis.

As mentioned above, the earlier *jus gentium*, or the *law of nations*, made no distinction between the two branches of law. Though this is only of historical importance, it is an indicator that the two branches were treated under a common heading at some time in the past.

The Influence of Private International Law on Public International Law – Application by the World Court.

Amongst the various authors who have commented on the working of the International Court of Justice¹⁴, there seems to be a consensus that the International Court does, in fact, have a doctrinal function. Judge Moerno Quintana beautifully explained this in his separate opinion in the *Application of the Convention of 1902 governing the Guardianship of Infants*.¹⁵

“Side by side with its function of deciding in accordance with international law such disputes as are submitted to it, as mentioned in Article 38, paragraph I of the Statute, the International Court of Justice has also - notwithstanding the limitation which Article 59 prescribes

11 Bentham, *Principles of Morals and Legislations*, (1879), cited from, Wortley, *supra.*, n. 4.

12 Wolff, *Private International law*, 11 (1950).

13 The French codifiers led the way to a conception of a legal regime based primarily on nationality and not on domicile. Nationality was synonymous with sovereignty. Sovereignty meant that the nations were to be treated according to the law of the sovereign. In England, the Utilitarians under Bentham emerged as great codifiers, promoting legislation based on national sovereignty. Bentham and his followers considered 'International Law' to deal with law governing 'the mutual transactions between sovereigns as such'. Another aspect of the Utilitarians was to analyse law in terms of sovereignty.

14 See, Shabtai Rossene, *The World Court*, (1990); Nagendra Singh, *The Working of the International Court*, (1992).

15 *Netherlands v. Sweden*, 1958 I.C.J. Rep. 55 at 102. This incidentally was a case concerned with the application of a private international law convention by the International Court.

for its decisions a 'doctrinal function' of the greatest importance. The Court can and must discharge this function in the present case with a view to the progressive development of international law on the question submitted for its consideration..."

It is with this liberal point of view, that the Court has, on most occasions (in some there were serious objections raised that the Court could never seize itself of an issue of Private International Law) approached cases that involve questions of conflict of laws. The general trends in these cases fall under the following three general sub-headings, illustrating the influence of Private International Law on the development of Public International Law.

1. By direct borrowing from case law or legislation to be found in national systems of Private International Law, to supplement the rules of Public International Law.
2. By the acceptance in international disputes of national rules settling *nationality* (in most systems of law these are to be found in books of Private International Law);
3. By the acceptance in international disputes of Private International Law rules governing jurisdiction of national courts.

The Permanent Court of International Justice has had to deal with Private International Law particularly in the two important cases concerning the *Serbian and Brazilian Loans*¹⁶. The Court went out of its way to give some definition of what it means by Private International Law and its relation to Public International Law. It stated:

"Any contract which is not a contract between states in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as private international law or the doctrine of conflict of laws. The rules thereof may be common to several states and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between states. But apart from this, it has to be considered that these rules form part of municipal law."¹⁷

¹⁶ *Serbian and Brazilian loans*, P.C.I.J. Ser.A.Nos.20/21. The judgements in both these cases were delivered on the same day by the Court.

¹⁷ *Ibid.* at p.41.

This statement of the Court raises two important queries:

- a) Firstly, if a choice of law matter is a part of municipal law, will the Court refrain from examining the choice of law and apply it as such?
- b) Secondly, can the Court recognise a uniformity of practice of conflict of laws to state it as a general principle of law?

The first question reflects the hesitation of the International Court when dealing with municipal laws in general and conflict of laws in particular. In *Certain Norwegian Loans between France and Norway*¹⁸ the facts were similar to the *Serbian loans case* and involved the repayment of loans taken in the international market. One of the objections of Norway was that the dispute was not of an international character, being one to be determined by the Norwegian rules of conflict of laws. In his separate opinion, Judge Badawi agreed with the view that the jurisdiction rested with the Norwegian Courts. However, the learned judge stressed in the same vein:

“Though the questions at issue are to be settled according to the law of the debtor, *in casu*, Norwegian law, the same has to be “according to the generally recognised rules of private international law”¹⁹

Judge Lauterpacht, in the same case states more categorically,

“...It does not mean that national law (read conflict of laws) is a matter which is wholly outside the orbit of international law. National legislation - including currency legislation - may be contrary, in its intention or effects, to the international obligations of the State. The comity of national legislation with international law is a matter of International Law.”²⁰

The International Court of Justice had earlier in the *Nottebohm case*²¹ held that a State was not bound to recognise the granting of naturalisation to a person by another State if the naturalisation was carried on in suspicious circumstances. The decision was in an area that was considered to be one determined by National Courts. Naturally, this decision drew criticism from judges who came out with their dissenting opinions.²²

18 *Certain Norwegian Loans between France and Norway*, 1957 I.C.J. Rep. 9.

19 1957 I.C.J. Rep. 30.

20 1957 I.C.J. Rep. 37.

21 *Nottebohm case*, 1955 I.C.J. Rep. 1.

22 Judge Klaestad and Judge Read delivered closely reasoned dissents wherein the common ground was that the Court by determining the issue of nationality was stepping outside the province of public international law into an area reserved exclusively by States within the areas of their municipal private international laws.

Coming to the second of the questions, i.e., can the International Court term a conflict of law principle to be a general principle of law recognised by civilised countries? In this regard, we have seen the opinion of Judge Badawi in the case of *Certain Norwegian Loans between France and Norway*.²³ However, the most important decision is the *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden)*.²⁴ The main issue at stake was the application of a convention, which gave the case a typical international law character even though the Convention concerned conflict of laws. This was a case concerning an apparent conflict between the rules of the convention concerning the guardianship of infants and the Swedish decrees by which a Dutch child had been brought under the special Swedish regime of protective upbringing. The Court did not find it necessary to deal with the crucial problem of a possible conflict between treaty obligations in the field of conflict of laws and *ordre public* of the individual countries since it deemed that the convention was not aimed at such cases as the present one.

However, Judges Spiropoulos, Badawi and Lauterpacht, though agreeing with the final judgement of the Court, reached their conclusions separately. The words of Lauterpacht are critical to the issue at hand:²⁵

“...in the sphere of private international law, the exception of *ordre public*, of public policy, as a reason for the exclusion of foreign law in a particular case is generally - or rather universally - recognised...the recognition of the part of *ordre public* must be regarded as a general principle of law in the field of private international law. If that is so, then it may not improperly be considered to be a general principle of law in the sense of Article 38 of the Statute of the Court. That circumstance also provides an answer to the question as to the nature and content of the conception of public policy by reference to which must be judged the propriety of the Swedish policy in the matter. Clearly, it is not the Swedish notion of *ordre public* which can provide the exclusive standard in this connection. The answer is that, the notion of *ordre public* – of public policy - being a general legal conception, its content must be determined in the same way as that of any other general principle of law in the sense of Article 38 of the Statute, namely, by reference to the practice and the experience of the municipal law of civilised nations in that field. It is by reference to some such considerations that I have, in an earlier part of this Opinion,

23 1957 I.C.J. Rep. 9.

24 1958 I.C.J. Rep. 55.

25 *Ibid.* at p.92.

attempted to answer the question whether the Swedish law on protective upbringing can properly be regarded as falling within the domain of *ordre public*.”

To conclude, the words of Lauterpacht may not find approval of the so-called particularists. Even on an impartial note, it must be submitted that it is but impossible to have an international conception of public policy. Public policy by terminology and origin is forum specific. Hence, it could be felt that Lauterpacht’s judgement went too far.

Application of Public International Law principles in Conflict Of Law cases by municipal fora

In the following few pages an effort has been made to understand a few Public International Law principles which have, over the years, found acceptance in the text books of conflict of laws, being recognised as principles of Private International Law and finding application in municipal fora. Here, by way of example, four concepts are considered which have become accepted principles of the common law rules of conflict of laws. They are²⁶ :

1. The immunities of sovereigns and States;
2. The immunities of diplomatic agents and related matters;
3. The recognition of new States, of new governments and of state jurisdictions;
4. The effects of condemnations in Prize and of acts of war.

The immunities of Sovereigns and States

Students of Public International Law would recognise the maxim, *parem in parem non habet imperium*, i.e., one sovereign cannot sit in judgement over the acts of another. The Common law courts have a rich history of cases involving sovereign immunity.²⁷ In the well known case of *Duke of Drunswick v. King of Hanover*,²⁸ the Master of Rolls disallowed a claim to make the King of Hanover account for money received under a settlement, saying that it is “a general rule in accordance with the law of nations that a sovereign prince, resident in the dominion of another, is exempt from jurisdiction of the courts there.” In this historic case, there is a clear mention of the Public International Law roots of the doctrine.²⁹ In

²⁶ See, Wortley, *supra.*, n. 4.

²⁷ In fact the maxim *par in parem non habet imperium*, which is the best description of sovereign immunity in public international law is said to have found some mention in English feudal law. See, Wortley, *ibid.*

²⁸ *Duke of Drunswick v. King of Hanover*, (1848) 2 H.L.C.1.

²⁹ Further in the course of this judgement, the Court quoted Grotius, Zouche, Vattel and Bynkershoek, von Martens and Wheaton who were all authoritative exponents of customary international law.

fact, it should be added here that the British conception of sovereign immunity goes beyond the doctrine as accepted elsewhere. One good example would be the case of *Sayce v. Ameer Ruler Sadiq Muhammad*³⁰, where the Court of Appeal granted immunity to a ruler who was no longer a sovereign, having merged his kingdom with Pakistan. This, it seems, goes beyond even the Public International Law understanding of sovereign immunity.

“The recent attempts to extend immunity³¹ in respect of all forms of state trading and similar activity, may well be regarded by international lawyers as nothing more than over-sympathetic concessions by national courts operating under their own private international rules and not as concessions necessarily deriving from the *jus gentium*.”³²

This statement, only reaffirms that the principle of sovereign immunity in private international law is a manifestation of a public international law principle.

The immunities of Diplomatic Agents and related matters

Perhaps one of the most generally accepted and widely known rules of the *jus gentium* is that which lays down that ambassadors shall be inviolable. The customary law of nations governing immunity of diplomatic agents certainly has been fully received by common law. A good example of this would be the ancient English case of *Magdalene Steam Navigation Co. v. Martin*³³, where it was held by the Court of Queens Bench that the envoy of the Republic of Guatemala and New Grenada could not be sued for 600 Pound Sterling in respect of contributions alleged to be due from him in respect of shares in the plaintiff Company. What is noteworthy is that the learned judge accepted the rule of International Law in preference to the suggestions of leading English jurists to settle the matter. In England, a committee under Somervell L.J. reviewed the whole issue of Diplomatic Immunity.³⁴ It reiterated that the principle of sovereign immunity, as applied in the English Private International Law cases, had its genesis in the traditional principles of International Law. It is noteworthy that the report recognises that the principle of retaliation in Public International Law might justify the passage of legislation “empowering His Majesty’s Government” by appropriate procedure to

30 *Sayce v. Ameer Ruler Sadiq Muhammad*, [1952] 1 All.E.R. 326.

31 Continental courts have for instance disregarded the immunity where the sovereign is sued for his personal acts. See, the detailed exposition in B. A. Wortley, *The interaction of public and private international law today*, 85 Hag. R. 263 (1954).

32 *Khan v. Pakistan Federation*, [1951] 2 K.B.1003 at 1005.

33 *Magdalene Steam Navigation Co. v. Martin*, (1859) 28 L.J.Q.B. 310

34 Report submitted on 13th July 1951; (Cmd:8460/1952), cited from, Wortley, *supra.*, n. 4.

reduce the immunities at present accorded to the embassy or missions of any foreign country so that it could correspond to the immunities granted by them.”³⁵

Recognition of New States of New Governments and of State Territory

Without going into this aspect in great detail, it can be said that municipal courts try to accept the repercussions of the operations of public international law on litigation coming before them by following the lead given to them by the executive, so that the executive and the judiciary may speak in one voice. To take an example, in matters of State territorial jurisdiction, it is clear from the decisions of the ICJ on the extent of territorial waters³⁶ that this decision on the Public International Law of state jurisdiction will have many repercussions on Private International Law. Similarly, if a State is extinguished by absorption in accordance with public international law then its law may cease to exist and when a claim is agitated in the local fora on the basis of this law, then it is but certain that the private international law would refuse to recognise this law anymore.³⁷

Without going into the complex issues of recognition of states and allied areas, in short, it may be concluded that issues of Private International Law concerning the ‘recognition’ of a legal system go back to the Public International Law rules of recognition of the State.

The Effects of Condemnations in Prize and of Acts of War

This issue should be concluded by mentioning one particularly intrusive aspect of international law of war and its repercussions on matters of Private International Law, i.e. the effect of the law of Prize arising out of Private International courts.

A decision in Prize condemning a vessel or cargo is *an act of Public International Law*, which directly affects the *private* interests of owners and insurers, mortgagees and pledgees and their claims under Private International Law. *Prima facie*, the decision of a Prize Court is *res judicata* and will, in general, be so regarded by all international and national courts faced with problems concerning the goods condemned.³⁸ On a review of the legal systems of both the common and the civil law countries, one must conclude that a decision in Prize has always been a ground for a municipal court’s refusal to consider the claims of third parties based on equities, liens, pledges, mortgages, etc. In general then, condemnation in a Public international Court of a Prize affects the private rights of third parties. Private International lawyers cannot ignore this fact, since the courts of Private International

35 *Ibid.*

36 *See, Anglo-Norwegian Fisheries Case*, 1951 I.C.J. Rep. 116.

37 *See, Stransky v. Stransky*, [1954] 2 All.E.R. 536.

38 Wortley, *supra.*, n. 4.

Law treat the prize decision as *res judicata* and generally consider themselves bound to accept titles lawfully acquired in accordance with Public International Law.

To conclude, the body of rules generally called private international law by the lawyers of each country contains many rules that have been taken from Public International Law.

The Problem of 'Jurisdiction'- Is the Jurisdiction in Conflict of Law Cases Determined by the Rules of Public International Law?

One of the major problems occurring in the studies of public and private international law confronts the judge who is invited to give effect to a decision made by the legislative, judicial or administrative organs of another State. Often, the judge may have to decline to do so if in making the decision the foreign authority transgressed the limitations set by the rules of Public International Law. Over the years, this problem has been thoroughly explored by two authors: in 1964 by Dr. Mann³⁹ and in 1969 by Professor van Hecke,⁴⁰ Dr. Mann approaching it from the point of view of Public International Law, and Professor van Hecke from that of Private International Law. The question may arise from a legislative act (including a rule of judge-made law), from a judicial decision, or from an administrative act. It has been argued that a State may violate International Law by applying its legislative power so as to trespass upon the legislative sphere of another State, that it may exceed the frontiers drawn by International Law to the exercise of civil, and especially criminal judicial jurisdiction, and that it may be an administrative act, e.g., of expropriation.⁴¹

The issue of jurisdiction has basically occurred in two circumstances:

1. The enforcement of competition law
2. The concept of juridically improper fora

Enforcement of competition law

The first of these instances arose out of the now academically popular concept of the anti-trust litigation arising out of the controversial Sherman Act in the U.S. Courts. Before getting into the details of the topic, it would be relevant to trace the history of how legislative jurisdiction has become a contentious area of both Private and Public International Law.

39 F. A. Mann, *The doctrine of Jurisdiction in International law*, 111 Hag. R. 1 (1964).

40 van Hecke, *Principles et Methodes de Solution des Conflicts de Lois*, 126 Hag. R. 126 (1969).

41 Otto Kahn Freund, *General problems of private international law*, 30 (1976).

The American Courts established the *territoriality principle* in the famous cases of the *American Banana Company v. United Fruit Company*⁴² where the Justice Holmes said:

“But the general and almost universal rule is that the character of an act as lawful must be determined wholly by the law of the country where the act is done.”

This classic rule of territoriality was slightly diluted later by the American Courts in the case of *United States v. Sisal Sales Corpn.*,⁴³ where the Courts agreed to exercise jurisdiction under a claim for unfair competition occurring in Mexico. The decision of the Court rested on the logic that since both parties were American and the contract was entered into in America, the Courts could entertain the claim. This, however, sowed the seeds of what later came to be known as the “effects doctrine” in the *Alcoa case*.⁴⁴ The dictum of this case was that if any activity between parties entered into even outside the United States caused ‘direct and foreseeable’ effects within the United States, then the Courts could establish jurisdiction over such an activity. This case is termed historic in the discussion of the topic of extraterritoriality as it is seen as the genesis for the development of the modern rules of jurisdiction, especially the ‘balancing of interests’ theory. In fact, according to Lowenfeld, the decision of Judge Hand in the *Alcoa* case considered the limits of legislative jurisdiction by reference to conflict of laws.⁴⁵ In the *Incandescent Lamp case*⁴⁶ the U.S. Courts’ attempt to exercise jurisdiction over actions of the Dutch based Phillips Company was severely objected to by the Dutch Government which represented in Court that that the U.S. Government should abide by the rules of International Law and not petition for decrees of penal or quasi-penal nature, having extraterritorial effect.⁴⁷

A true conflict did arise in the case of *United States v. Imperial Chemicals Industries Ltd.*,⁴⁸ wherein the Courts showed no restraint in cracking the agreement between the American Company DuPont and I.C.I by holding the latter liable for violations of the Sherman Act. It was of little doubt that the British Courts would find this decision hard to digest and they said so in the case of *British Nylon*

42 *American Banana Company v. United Fruit Company*, 212 US 347 (1909).

43 *United States v. Sisal Sales Corpn.*, 274 US 268 (1927).

44 *United States v. Aluminium Company of America*, 148 Fed.2d 416 (2d Cir.1945).

45 Lowenfeld, *supra.*, n. 4.

46 *United States v. General Electric Company*, 82 F.Supp.753 (DNJ 1949).

47 This submission on behalf of the Dutch Government, substantially changed the case, with the U.S. Courts going soft on Phillips by stating that it would not be guilty of contempt of Court if it were to act on the directions of another Sovereign.

48 *United States v. Imperial Chemicals Industries Ltd.*, 100 F.Supp. 852.

*Spinners Ltd. v. Imperial Chemical Industries Ltd.*⁴⁹, where they considered the American order to be an intrusion.

This conflict scenario has caused both Private and Public International lawyers and jurists to react in different ways. Dicey and Morris cite the *B.N.S. v. I.C.I. case*⁵⁰ situation in illustration of the rule that “The Court has no jurisdiction to entertain an action for the enforcement...of a penal, revenue, or other public law of a foreign State; and again in support of the rule that “the validity or invalidity of a contract must be determined in accordance with English law, independent of the law of any foreign country whatever, if and in so far as the application of foreign law...”⁵¹ Professor Kahn Freund seeing this conflict from the view point of Public International law says that

“...it’s far deeper significance lies in the question whether the judgement of the Federal District Court does not constitute a violation of public international law and whether for that reason alone it should not be regarded as incapable of leaving any effect outside the United States.”⁵²

It should be mentioned that the rules of jurisdiction have today taken on what is known as the “evaluation process”. This was evident in the case of *Timberlane Lumber Company v. Bank of America*⁵³, wherein the Court devised a three-pronged test to assume jurisdiction.

“A tripartite analysis seems to be indicated...the antitrust laws in the first instance that there be some effect - actual or intended - on American foreign commerce before the federal courts may legitimately exercise subject-matter jurisdiction under these statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognisable injury to the plaintiffs... Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States - including the magnitude of the effect on American foreign commerce - are sufficiently strong, vis-à-vis those of other nations to justify an assertion of extraterritorial authority.”⁵⁴

49 *British Nylon Spinners Ltd. v. Imperial Chemicals Industries Ltd.*, (1953) 1 Ch.10 (CA).

50 *Ibid.*

51 Dicey and Morris, *The Conflict of laws*, 84 (1973).

52 Kahn Freund, *English Contracts and American Anti-trust law - The Nylon Patent case*, 18 Mod. L. Rev. 65 (1955).

53 *Timberlane Lumber Company v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

54 The third requirement seems to have been ratified by the Foreign law guide in the U.S. as well as the Restatement of Foreign Relations law of the United States

Many authors, including Lowenfeld⁵⁵, believe that the concept of jurisdiction in the settings of the American anti-trust laws have adopted the age old rules being applied in the conflict of law cases wherein there is a 'balancing of interests' or a 'closeness of connection' evaluation.

Juridically Improper Fora

One also needs to consider those cases when the Courts of a State assume jurisdiction in ordinary civil cases⁵⁶ over defendants outside the territory of the State who have not submitted to its jurisdiction. For example, Article 14 of the French Civil Code has been interpreted by the French courts to say

“Anyone, whatever his nationality, domicile or residence, can be sued in France for any cause of action, provided the plaintiff is a French citizen, no matter where he is domiciled, whilst on the other hand, [under] Art.15, a French citizen can always be sued in France.”⁵⁷

On the other hand, Paragraph 23 of the German Civil Procedure Code provides that the German courts have jurisdiction over any defendant who has any assets in Germany, no matter where the defendant is or who he is or whether he has submitted to the jurisdiction, and no matter whether the action has anything to do with these assets. Taking the case further, the difficulty is illustrated by the situation in Great Britain wherein according to English law, the court has jurisdiction if the writ, the document by which the proceedings are initiated, has been served on the defendant.⁵⁸

According to Kahn Freund, these examples (atleast the French and the German) are conventionally regarded as “improper” assumption of jurisdiction. However, Kahn Freund does not clearly answer how one is to determine the proper fora. In this regard, the only solution is to understand the restraints to be placed on the exercise of jurisdiction by courts through the channels of Public International Law, something that is being attempted through international conventions.⁵⁹

Conclusion - The ‘Public Law’ Taboo in Conflict of Law Cases- A Short Note

The term ‘public law’ has played a prominent role in the study of private international law from the very inception of the subject. It was Lord Mansfield, in

55 Lowenfeld, *supra.*, n. 4.

56 That is, not in status cases, such as divorce, probate, etc.

57 Cited from, *supra.*, n. 41 at p.35.

58 *Supra.*, n. 51 at p.128.

59 The 1966 The Hague Convention on the Recognition and Enforcement of Foreign judgements in civil and commercial matters; Another such is the Convention signed on 27th September 1968 in accordance with Article 220 of the Treaty of Rome by the original Six Members of the E.E.C.

*Holman v. Johnson*⁶⁰, who held that a State would not enforce the revenue laws of another State. This was possibly the genesis of what can be seen as the public law taboo in the conflict of laws.

Jurists who have studied the relationship between Public and Private International Law agree that the immediate allergy of conflict of laws to the so-called 'public laws' is the greatest hurdle in viewing public and private international law together. Consider for instance, the opinion of Dicey in *B.N.S. v. I.C.I.*⁶¹, wherein the elaborate judgement of the U.S. Courts dealing with the British patents being held by I.C.I. was to be summarily dismissed because the Sherman Act constituted 'public law' and could not be enforced, thus robbing a golden opportunity for a European Court to determine and discuss its response and stand to the evolution of jurisdiction in the U.S.

One of the most radical of thinkers in this regard, Flowenfeld, even goes to the extent of saying that "All law is of course public, so that in a sense private law including private international law is a contradiction in terms."⁶² This viewpoint, though radical, has some merit, if placed in perspective today. To elaborate, the teachings of Public International Law, based on sovereignty and territoriality fit quite neatly with the teachings and expectations that Private International Law was not concerned with the public acts of other States. However, one must ask the question as to where modern law making fits into this system? Laws passed by sovereigns today range from anti-trust, drug regulation, rules on securities, carriage of goods by sea, etc. Further, with more and more activities being carried on across national boundaries, it becomes unrealistic for one legal system not to recognise some laws of the other. From the viewpoint of a modern conflict of laws author like Flowenfeld, the study of public law cannot afford to be taboo anymore. Hence, a proper understanding of Public International Law in Private International Law necessarily means that the hitherto existing prohibition against public law has to be shed.

60 98 Ens.Rep. 1120.

61 (1953) 1 Ch.10 (CA).

62 Lowenfeld, *supra.*, n. 4.