

# ON THE DOCTRINAL BEGINNINGS OF THE CONFLICT OF LAWS

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## I. Introduction

This article is concerned with the doctrinal beginnings of the conflict of laws. These beginnings are commonly traced to the scholarly output of the Italian universities of the High Middle Ages.<sup>1</sup> Commonly but not universally: a growing tendency in modern literature has been to look for conflicts norms in the Antiquity, whereas there are also those who would argue that we cannot speak of “conflict of laws” prior to the elaboration of the concept of sovereignty in the Early Modern

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<sup>1</sup> See e.g. F. LAURENT, *Droit civil international*, vol. I, Bruxelles 1880; A. LAINE, *Introduction au droit international privé*, 2 vols., Paris 1888-1982 (citations below are from vol. I, but vol. II also includes valuable discussions of medieval doctrines); M. GUTZWILLER, *Le développement historique du droit international privé*, *Recueil des cours* 29 (1929), p. 287-400; E.M. MEIJERS, *L’histoire des principes fondamentaux du droit international privé à partir du Moyen Age*, *Recueil des cours* 49 (1934), p. 542-686; H. YNTEMA, *The Historic Bases of Private International Law*, *Am. J. Com. L.* 1953, p. 293-317; M. GUTZWILLER, *Geschichte des Internationalprivatrechts*, Basel/Stuttgart 1977; B. ANCEL, *Histoire du droit international privé*, Paris 2008.

era.<sup>2</sup> But the consensus has been to look to the medieval scholarship in the learned law as our remotest discursive ancestors.<sup>3</sup> In this regard, the first specimens of conflicts scholarship are to be found in the so-called school of Glossators and their literary output, especially short texts (“glosses”) appended as comments to fundamental passages of the Justinian *Corpus Iuris Civilis*.

The real question is: why does it matter? The answer is twofold. First, the historical examination of these beginnings may allow us to better understand the early canonical texts of the discipline: their meanings, their context, and their contribution to the discussions of their time as well as ours. Second, even more telling is the examination of how these beginnings have been approached in the subsequent doctrinal literature, as well as of their place in our historical consciousness. This article is therefore constructed along two axes – history and historiography – which are explored in Parts II and III below. The article’s main subject consists of the three texts most commonly mentioned as the first doctrinal contribution to the conflict of laws: Accursius, whose mid-thirteenth-century gloss became the starting point for the subsequent, more famous conflicts treatments; Carolus, who, a generation earlier, wrote a similar, largely forgotten gloss; and Aldricus, yet another generation prior, to whom an alternative text is attributed. In order to understand these texts we shall consider the legal authorities on which these glosses were anchored.

## II. History

### A. Medieval Schools and Literary Sources of a Conflicts History

The history of the conflict of laws in the Middle Ages has been primarily a history of medieval legal doctrine – more specifically, of the scholarship on the *ius civile*.<sup>4</sup> On the contrary, relatively little attention has been paid to court records – and such research has made very little inroads to the historical consciousness of private international law.<sup>5</sup>

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<sup>2</sup> Respectively see e.g. F. JUENGER, *Choice of Law and Multistate Justice*, The Hague 1993, p. 6 *et seq.* and S.E. THORNE, Sovereignty and the Conflict of Laws, in *Bartolo da Sassoferrato: Studi e Documenti per il VI Centenario*, vol. II, Perugia 1962, p. 673-689.

<sup>3</sup> These ideas and the concept of historical consciousness of private international law are explored in N. HATZIMIHAIL, *Preclassical Conflict of Laws*, Cambridge (forthcoming in 2021).

<sup>4</sup> Relatively little attention has been paid to the potential contribution of the other stream of medieval learned law, the canon law. See notably K. NEUMEYER, *Das kanonische Recht und die Lehren der Kanonisten in ihrem Einfluß auf die Entwicklung des internationalen Privatrechts (1250-1357)*, *Tijdschrift voor Rechtsgeschiedenis* 1965, p. 177-197; A. VAN HOVE, *La territorialité et la personnalité des lois en droit canonique depuis Gratien (vers 1140) jusqu’à Jean Andre (1348)*, *Tijdschrift voor Rechtsgeschiedenis* 1922, p. 277-322.

<sup>5</sup> The most notable exceptions have been E.M. MEIJERS (note 1), and ID., *Études d’histoire du droit international privé*, Paris 1967; P.-C. TIMBAL, *La contribution des*

*Ius civile* scholarship is presented, in legal history, in terms of two schools, the Glossators who flourished in the twelfth and thirteenth century (*i.e.* the High Middle Ages) and the Commentators who flourished especially in the fourteenth but also dominated the fifteenth century (*i.e.* the Late Middle Ages): these schools are connected by the late thirteenth-century postglossators who taught in the universities of Southern France (hence *ultramontani*).<sup>6</sup> The school of Glossators took its name from the *glossae* – explanatory notes made on the margins of the authoritative main text.<sup>7</sup> It culminated in the consolidation of glosses (*apparatus*) by Accursius, around 1220-1250, which became known as the Standard Gloss (*Glossa ordinaria*).<sup>8</sup>

The first histories of private international law, written in the late nineteenth century, began with the Commentators or their *ultramontani* teachers.<sup>9</sup> By the early twentieth century, however, we see more attention paid to the Glossators.<sup>10</sup> These are the doctrinal beginnings we shall discuss. Inevitably, however, our understanding of the Glossators has been coloured by our increased familiarity with their immediate successors. For example, the most famous medieval conflicts text, by the illustrious Bartolus da Sassoferrato (1314-1357), is as an extended commentary on a gloss by Accursius.<sup>11</sup> Whereas, however, Bartolus has been much discussed, minimal attention has been paid to the authority he reacts upon.

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auteurs et de la pratique coutumière au droit international privé du moyen âge, *Rev. crit. dr. int. pr.* 1955, p. 17-32; B. ANCEL (note 1), p. 52-90.

<sup>6</sup> See especially R. LESAFFER, *European Legal History*, Cambridge 2009, p. 25-29; O.F. ROBINSON/ T.D. FERGUS/ W.M. GORDON, *European Legal History*, 3rd ed., Oxford 2000, p. 42 *et seq.* and p. 59 *et seq.*; F. WIEACKER, *A History of Private Law in Europe*, trans. T. Weir, Oxford 1995, p. 28 *et seq.*, 55 *et seq.*; F. CALASSO, *Medio Evo del diritto*, vol. I, Milano 1954, p. 511 *et seq.*, p. 563 *et seq.* F.C. VON SAVIGNY, *Geschichte des Römischen Rechts im Mittelalter*, 2nd ed., Heidelberg 1834-1851 still remains a vital reference especially for biographical information.

<sup>7</sup> See *e.g.* M. BELLOMO, *The Common Legal Past of Europe*, trans. Lydia Cochrane, Washington, D.C. 1995, p. 129 *et seq.*

<sup>8</sup> The traditional view held that a first edition of the *Glossa* (minus the *Institutes*), was published by 1228. It is now believed that the *Glossa* was constantly revised over a broader timeframe, such as 1220-1250. See *e.g.* R. FIGUEIRA, *Glossa Ordinaria: Roman Law*, in CH. KLEINHERZ (ed.), *Medieval Italy: An Encyclopaedia*, vol. I (2004), 437-439.

<sup>9</sup> F. LAURENT (note 1), A. LAINE (note 1), p. 115 *et seq.*

<sup>10</sup> K. NEUMEYER, *Die gemeinrechtliche Entwicklung des internationalen Privat- und Strafrechts bis Bartolus*, vol. I, Munich 1901, and especially vol. II, Munich 1916, which is cited below, was especially influential in this regard: whereas Lainé, whose examination begins with the postglossators, worked with the systematic works of Commentators, Neumeyer brought into focus the latter part of the Early Middle Age and the High Middle Age and brought to light several texts, including the ones presented in Section C below. Neumeyer clearly and fruitfully influenced M. GUTZWILLER, *Le développement historique du droit international privé*, *Recueil des cours* 29 (1929), p. 287-400, to this day one of the principal texts of conflicts historiography. His influence is also evident in E. MEIJERS (note 1), who went further into primary research of archives and manuscript sources.

<sup>11</sup> BARTOLUS ad C. 1.1.1, nu. 13-51. I am discussing Bartolus in my forthcoming book (note 3), esp. Ch. 7-10, which significantly expands upon – and replace –

Research into medieval conflicts doctrine draws primarily from two groups of literary sources: systematic works and discussion of individualised cases.<sup>12</sup>

Sources from the first group are found inside systematic doctrinal expositions of Roman law, organised around the individual passages of the *Corpus Iuris*, especially the Code and the Digest. Most of our earliest texts come from these sources, which span the entire period from 1200 to 1600. It is these texts that have traditionally been discussed in the literature. In the case of Glossators, such texts tend to have the size of a paragraph or even be limited to a single sentence, whereas Commentators produced booklet-size treatments. In either case, the fact that these texts form part of systematic works does not mean that they themselves are exhaustive or comprehensive, or even that they do not contradict other passages, by the same author, in the same work. Medieval doctrinal writing was a multi-generational endeavour: such systematic works developed gradually and, especially at first, in the shadow of a rich oral tradition.<sup>13</sup>

Some of the Late Medieval conflicts treatments that made their way into systematic works originally came in the form of a *repetitio* – an evening lecture, delivered separately from the standardised morning lectures on the curriculum, where the professor would analyse in depth a textual fragment.<sup>14</sup> On the contrary, we have no examples of a standalone short treatise (*tractatus*) dedicated to our subject.<sup>15</sup>

The second group of sources consists of material involving concrete cases, notably *quaestiones* and *consilia*. In a *quaestio*, a genre developed and used to great effect by the Glossators, a problem was raised and discussed, often with a position and a counter-position presented. In many older *quaestiones*, the master's own answer is laconically stated with a simple yes or no.<sup>16</sup> Such *quaestiones* – which may or may not have arisen out of actual cases – were often put together in collections including texts and ideas of several authors. Many of them found their way to systematic works. The *consilium* was a legal opinion, concerning an

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N. HATZIMIHAİL, Bartolus on the Conflict of Laws, *Revue hellénique de droit international* 2007, p. 37-97.

<sup>12</sup> This account is by definition incomplete. It moreover cannot do justice to the many literary forms in which the Glossators' prolific inventiveness appears to have been expressed but do not have an immediate relation with our subject. See e.g. O.F. ROBINSON/T.D. FERGUS/W.M. GORDON (note 6) p. 52-56.

<sup>13</sup> In the words of M. BELLOMO (note 7), p. 129:

“If over the years some professors and a good many students had not noted down their glossae on parchment as a way of documenting and remembering the *lecturae*, we would today know little or nothing of that world of ideas, beliefs and values today. Thanks to them, we can manage to know something – on the condition that we keep in mind that the glossae were only an extremely feeble projection of a much fuller investment of both individual and collective reflection, and that we remember that they are a fragmentary and highly reductive expression of the oral activities that revolved around a central nucleus of the few certain, authoritative, and sacred texts.”

<sup>14</sup> R. LESAFFER (note 6), p. 252; M. BELLOMO (note 7), p. 137-139.

<sup>15</sup> O.F. ROBINSON/T.D. FERGUS/W.M. GORDON (note 6), p. 53, p. 64-65.

<sup>16</sup> M. BELLOMO (note 7), p. 139-143.

individual case, rendered, at the instigation of the court or a party to the case, by a jurist, who was concerned less with bringing up for discussion both sides of the argument and more with providing support for the solution he proposed.<sup>17</sup> Glossators evidently wrote *consilia* (indeed we cannot know when a *quaestio* was a purely academic one or inspired from an actual case or even consultation given by its author) but it was the subsequent school of Commentators who developed this genre.<sup>18</sup>

## B. Authoritative Texts

For over four centuries, between 1200 and 1600, authors attempting to provide a general approach to what we regard as conflict-of-laws issues have included their treatment of such questions in their comments on the first title – indeed the first passage – of Justinian’s Code.<sup>19</sup> The *locus* chosen was the Edict of Thessalonica, which in 380 AD re-affirmed Nicene Christianity as the official religion of the Empire and laid the foundation for the suppression of all Christian heresies and polytheistic religions.<sup>20</sup>

*“Emperors Gratian, Valentinian, and Theodosius Augusti to the People of Constantinople: We desire that all people (cunctos populos) who are governed by the moderation of Our Clemency shall practice that religion which was handed down by the divine Apostle Peter to the Romans, as shown by the religion introduced by him and transmitted down to this day – the religion which, it is clear, is now followed by the Pontiff Damasus and by Peter, Bishop of Alexandria, a man of apostolic sanctity; that is, according to apostolic learning and the teaching of the evangelists, we shall believe in one deity of the Father and the Son and the Holy Spirit, in equal majesty and in a pious Trinity. 1. We order all who obey this law to embrace the name of Catholic Christians, and all others, whom We*

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<sup>17</sup> O.F. ROBINSON/ T.D. FERGUS/ W.M. GORDON (note 6), p. 55, 66-67; M. BELLOMO (note 7), p. 211-215.

<sup>18</sup> Such *consilia* circulated more broadly in the age of the printed book, when it became easier, and more affordable, to assemble the entire work (*omnia opera*) especially of famous jurists. Not unlike the present, some medieval scholars did their best work in commissioned legal opinions. Baldus, for example, who wrote a landmark systematic treatment, second only to Bartolus among medieval jurists, was especially prolific as an author of *consilia*. A subsequent Bartolist, Alexander Tartagnus, became known primarily because of his *consilia* – through which Bartolan doctrines on conflicts survived, albeit caricatured, to the nineteenth century. These *consilia* were, among others, republished with commentaries by Dumoulin – himself the author of the most famous *consilium* in the history of private international law.

<sup>19</sup> C. 1.1 De summa trinitate et de fide catholica et ut nemo de ea publice contendere audeat.

<sup>20</sup> See e.g. E.D. HUNT, Imperial Law or Councils of the Church? Theodosius I and the Imposition of Doctrinal Uniformity, *Studies in Church History* 2007, p. 57-68.

deem mad and insane, to suffer the infamy of heretical doctrine; they shall be stricken, first, by divine vengeance and, second, also by the vengeance of Our wrath, which We shall take in accordance with the judgment of Heaven.”<sup>21</sup>

This passage became known with its first words, *cunctos populos*. Medieval scholars glossed to the passage comments on subjects for which they regarded it as constituting authority, including, as might be expected, the definition and consequences of heresy, insanity and infamy; legal aspects of religion (e.g. usury); and the meaning of certain words such as the pronoun *qui* (who) and the verb *volere* (will/desire).<sup>22</sup> And, finally, the “matter of statutes”,<sup>23</sup> as reframed, for example, much later than our texts, by Bartolus.

“Now let us come to the gloss which says “if a Bolognese makes a contract at Modena, he shall not be judged by the statute of Modena”. As to this, two things are to be noticed: first, whether a statute extends to those not subject (non-subjects); second, whether the effect of a statute extends beyond the territory of those who set it down (the legislator).”<sup>24</sup>

*L. cunctos populos* was not the only textual authority used as anchor. The other main contender was *l. de quibus*, a passage in the first book of the Digest, which states the following:

“What ought to be held in those cases (*de quibus causis*) where we have no applicable written law, is the practice established by customs and usage (*quod moribus et consuetudine inductum est*). And if this is in some way deficient, we should hold to what is most nearly analogical to and entailed by such a practice. If even this is obscure, then we ought to apply law as it in use in the City of Rome. 1. Age-encrusted custom is not undeservedly cherished as having almost statutory force, and this is the kind of law which is said to be

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<sup>21</sup> C. 1.1.1, as translated in B. FRIER (ed.), *The Codex of Justinian*, Cambridge 2016, p. 14:

Imppp. Gratianus Valentinianus et Theodosius AAA. ad populum urbis Constantinopolitanae. Cunctos populos, quos clementiae nostrae regit temperamentum, in tali volumus religione versari, quam divinum Petrum apostulum tradidisse Romanis religio usque ad nunc ab ipso insinuata declarat quamque pontificem Damasum sequi claret et Petrum Alexandriae episcopum virum apostolicae sanctitatis, hoc est ut secundum apostolicam disciplinam evangelicamque doctrinam patris et filii et spiritus sancti unam deitatem sub pari maiestate et sub pia trinitate credamus. 1. Hanc legem sequentes christianorum catholicorum nomen iubemus amplecti, reliquos vero dementes vesanosque iudicantes haeretici dogmatis infamiam sustinere, divina primum vindicta, post etiam motus nostri, quem ex caelesti arbitrio sumpserimus, ultione plectendos.

<sup>22</sup> See e.g. BARTOLUS ad C.1.1.1, nus. 1-12.

<sup>23</sup> BALDUS ad C. 1.1.1, nu. 49 (“Nunc venio ad materiam statutorum”).

<sup>24</sup> BARTOLUS ad C.1.1.1, nu. 13.

established by use and wont. For given that statutes themselves are binding upon us for no other reason than that they have been accepted by the judgment of the populace, certainly it is fitting that what the populace has approved without any writing shall be binding upon everyone. What does it matter whether the people declares its will by voting or by the very substance of its actions? Accordingly, it is absolutely right to accept the point that statutes may be repealed not only by vote of the legislature but also by the silent agreement of everyone expressed through desuetude.”<sup>25</sup>

The best known example of a conflicts treatment anchored on *de quibus* is, in fact, again by Bartolus.<sup>26</sup> That text has been translated by J.A. Clarence Smith, along with Bartolus’s commentary on *cunctos populos*.<sup>27</sup> Bartolus is of course known for that latter commentary, and for good reason: the text on *cunctos populos* refines certain ideas and adds crucial aspects of Bartolan doctrine, to the point that we can safely conclude that it was either written, or at least revised and revisited, subsequently.

Yet another contender was the sibling passage (*ex non scripto*) in the Institutes.<sup>28</sup> This is, for example, where Jacobus de Ravanis (Jacques de Révigny), a very influential late thirteenth-century jurist, discussed whether a custom (*consuetudo*) bound clerics and foreigners in *quaestiones* of his *repetitio* on the respective provisions of the Institutes; remarkably, Jacobus did not include this same discussion in his *repetitio* on *de quibus*.<sup>29</sup>

There are also other passages that played a small part in the earliest stages of medieval doctrine.<sup>30</sup> The most notable, which we will come across below, comes from the first title from the fifth book of the Digest, entitled “Actions: Where a Man Should Sue and be Sued”, whose first passage reads as follows:

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<sup>25</sup> D.1.3.32 (Julian, Digest, Book 84). Translation from A. WATSON, *Digest of Justinian*, vol. I, Philadelphia Penn. 1985, p. 13.

<sup>26</sup> BARTOLUS ad D.1.3.32, nus 25-31, p. 44b-45b, Basel 1562.

<sup>27</sup> J.A. CLARENCE SMITH, Bartolo on the Conflict of Laws, *Am. J. Leg. Hist.* 1970, p. 157-183, p. 247-275.

<sup>28</sup> JI.1.2.9: “Law comes into being without writing (*ex non scripto ius venit*) when a rule is approved by use (*usus*). Long-standing custom (*mores*) founded on the consent of those who follow it is just like legislation.” Translation from P. BIRKS/ G. MCLEOD, *Justinian’s Institutes*, Ithaca N.Y. 1987, p. 39.

<sup>29</sup> See L. WAELKENS, *La théorie de la coutume chez Jacques de Révigny: édition et analyse de sa répétition sur la loi De quibus*, Leiden 1984, esp. p. 405 et seq.

<sup>30</sup> See also C. 8.52 (*Quae sit longa consuetudo*), which also provides authority for the status of long-held customs (*longa consuetudo*) but also a reservation that they cannot overcome reason or law; C. 8.48.1 (a father born elsewhere is able to emancipate his son if municipal law conferred such power to the local magistrates). Both these texts were used by Azo and Accursius, as noted by E.M. MEIJERS (note 1), p. 593 n. 1.

If people submit themselves and agree to someone's jurisdiction, any judge who is in charge of a seat of judgment or has other jurisdiction has jurisdiction over those agreeing.<sup>31</sup>

This brings us to a twofold question. First, why anchor the treatment of conflicts issues to a text – any text – that addresses a very different subject in a very different environment (essentially, a unitary legal system)? Second, why *cunctos populos*? Charles Dumoulin, for example, the last important author to have written on conflicts as a commentary on *l. cunctos populos* (during his time as a professor in imperial universities, outside the Kingdom of France), was clearly responding to an established tradition.<sup>32</sup> But what about Bartolus? And what are we to make of the fact that, even though in his discussion of *l. cunctos populos* he appears to respond to Accursius' gloss, he essentially replicated his treatment in discussing *l. de quibus*? Did he respond to a need, or a convention, in addressing the subject in both places? Is there any significance in his apparently conscious choice to devote more effort to the former rather than the latter treatment?

The very first question is easily addressed. Even by the end of the Middle Ages, the subject was important enough to be included in systematic doctrinal works but not developed enough to merit a separate treatment. Bartolus for example, who was quite familiar with the genre of *tractatus*, did not publish one on statutes. We know however that both his treatment of *l. cunctos populos* and the one on *l. de quibus* were presented as *repetitiones*.<sup>33</sup> In both cases – especially *l. cunctos populos* – our subject takes up most of the *repetitio* but coexists with other subjects. Whether such treatments developed out of their association with the *locus*, or autonomously from and anchored to it, the fact of the association remains.

We will have to get to the Eighteenth Century to find standalone books on conflict-of-laws issues, and this only in France, where legal literature had a different character. Early Modern authors, such as Ulric Huber and Johannes Voet, included their own conflicts treatments as autonomous chapters of their commentary on the Digest.<sup>34</sup> The abandonment of *l. cunctos populos* by Early Modern authors writing in the learned law tradition has to do with the decline in the importance of the Code, in favour of the Digest (and the Institutes). This also related to the changing attitudes as to why Roman law was to be regarded as authoritative: instead of the fiction of Roman imperial continuity (*Romidee*), any authority Roman law enjoyed derived from the idea that it embodied Reason and from the decision of the sovereign to make it applicable (Reception theory).

This brings us to the second, more challenging, question. One explanation for the primacy of *cunctos populos* has to do with its place in the overall system of

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<sup>31</sup> D 5.1.1 (Ulpian, Edict, bk. 2). Translation from WATSON (note 25), p. 164.

<sup>32</sup> C. MOLINAEUS ad C.1.1.1, *Opera omnia*, Paris 1680, p. 556a.

<sup>33</sup> This is evidenced by the manuscripts listed by F. CALASSO, Bartolo da Sassoferrato, *Annali di storia del diritto* 1965, p. 472-520.

<sup>34</sup> U. HUBER, *Praelectiones ad Pandectas*, vol. I, Franeker 1689; J. VOET, *Commentarius ad Pandectas*, vol. I, The Hague 1698. Their conflicts treatments appear as appendices to Bk. 1 Title 3 (Huber) and Bk. 1 Title 4 (Voet).

the *Corpus Iuris Civilis*, being located at the very beginning of the Code. A late thirteenth-century French jurist, Petrus Bellaperticus (Pierre de Belleperche), is quoted as saying that *cunctos populos* may not have raised the same questions if it was found at the end of the book, “but it is the first, and this place vests it with a solemn character”.<sup>35</sup> The *lex de quibus* was likewise located relatively early in another book, taught in different years of study (often by different teachers).<sup>36</sup>

This explanation does not fully account for the victory of *l. cunctos populos* over *l. de quibus*, however. Nor does it explain why we have to get to the mid to late thirteenth century to start seeing either *locus* being used seriously.

To achieve this, we must consider the medieval context and look to both authoritative texts as argumentative tools – at least, foundations for the legal reasoning developed by the Glossators. As a rule, Glossators were heavily invested in the revival of the Roman imperial idea and in the elevated position of imperial Roman law. They were more reluctant to acknowledge deviations from the scope of local law than their successors, the *ultramontani* French jurists of the late thirteenth-century and the Commentators of the fourteenth (and fifteenth) century, who insisted on the legal power of Roman law but could no longer harbor illusions of an actual political restoration of imperial power.

Medieval jurists were faced with the revived imperial Roman law (the “common law”, *ius commune*), on the one hand, and local norms derogating from that common law, on the other. Such local law consisted of customs and statutes. Many customs *de facto* preceded the effective revival of Roman law, but *de jure* Roman law had preceded them and any legal authority they would possess was supposed to emanate from Roman law. Older customary law had given way to written codifications, first by private initiative and eventually given official sanction or form. For example, the customs of Bologna were reportedly first written down *in curia Bulgari*, i.e. at the initiative of Bulgarus (d. 1166), one of the leading twelfth-century Glossators, perhaps as he exercised some adjudicative function.<sup>37</sup>

In fact, when Emperor Henry V in 1116 granted to the *concives* of Bologna the privilege of imperial protection and of pursuing their own customs (*consuetudines*) in matters of commerce, that privilege did not comprise public rights.<sup>38</sup> Indeed, at the Diet of Roncaglia (1158) the famous Four Doctors – including Bulgarus – declared that the Emperor maintained power in matters such as taxation and appointment of magistrates.<sup>39</sup> But a century later, in 1265, when the time came

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<sup>35</sup> A. LAINÉ (note 1) p. 106 (“*la revête d’un caractère solennel*”).

<sup>36</sup> Following the restorative work by Irnerius, the *Corpus Iuris Civilis* was divided into five *codices* (books), three for the Digest – *Digestum vetus* (D. 1 – 24.2), *Infortiatum* (D. 24.3 – 38.17), *Digestum novum* (39.1-50. 17) – one for the first nine books of the Code and another one (*Authenticum*) for the last three books of the Code, the Institutes and the Novels.

<sup>37</sup> M. BELLOMO (note 7), p. 84.

<sup>38</sup> G. TAMBA, *Civic Institutions* (12th-early 15th centuries), in S. BLANSHEI (ed.), *Companion to Medieval and Renaissance Bologna*, Leyden 2017, p. 211.

<sup>39</sup> K. PENNINGTON, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition*, Berkeley (Cal.) 1993, p. 8 *et seq.*

to update the statutes of Bologna, 265 volumes had to be examined.<sup>40</sup> It is telling that, whereas Glossators called *statuta* “written custom,” by the mid-fourteenth century Baldus calls custom a “tacit statute” (*tacitum statutum*).<sup>41</sup>

In this environment, *de quibus* would at first look like a more appropriate locus to discuss the legal status of customs. But it could be either too restrictive (“no applicable written law”) or too permissive (allowing city judges to define too broadly what is not expressly covered by Roman law). In the long run, it possessed the advantage of allowing different types of norms to be treated differently – eventually encouraging the Bartolan typology of distinguishing between “burdensome” and “favorable”, “permissive” and “prohibitive” norms. But it provided no general rule, no answer to the question of whether such a custom would extend its effect over all those found within the city’s territory – notably foreigners, but also clerics who possessed a distinct legal and jurisdictional regime.

*L. cunctos populos* could provide some better guidance in that regard, which also happened to fit the imperialist attitude of the leading Glossators. The opening phrases of the imperial Edict provided a powerful argument by analogy. More precisely, an argument *a maiore ad minus* with allusions to an argument *a contrario*: if, in a matter as vital as religion, imperial Roman law would restrict its application to those under the Emperor’s power, it goes without saying that neither would Roman law apply beyond the territory of the Empire, nor could the local laws and customs of cities apply beyond the narrow confines left to them by Roman law, for example over a citizen of another city.

Over time, that argument was weakened as the cities’ flexing of their legal muscles had given rise to coherent systems of local norms, and the legal fiction of the Empire had subsided. But this was a gradual process. By that time, not only was *cunctos populos* established as an anchor in the legal tradition, but it also helped underline that this was an issue of jurisdiction, not of legal sources.

### C. Doctrinal Texts

The primary sources we shall consider all come from the period between mid-twelfth and mid-thirteenth century – the Age of the Glossators.<sup>42</sup> Leaving aside the anonymous French text, all three texts which vie in the historical consciousness of private international law for the title of the first doctrinal text of our field come from Italy indeed the law professors of Bologna. They also correspond – chronologically – and we will see in their substance as well – to the three different stages of the schools of Glossators. Aldricus lived at the time of the first peak of High Medieval legal scholarship but before the consolidation of masters’ colleges

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<sup>40</sup> Ph. JONES, *The Italian City-State: From Commune to Signoria*, Oxford 1997, p. 373.

<sup>41</sup> J. CANNING, *The Political Thought of Baldus de Ubaldis*, Cambridge 1987, p. 102 n. 31.

<sup>42</sup> For all four texts, I have been using the transcription of E.M. MEIJERS (note 5), (with the exception of Accursius). All four translations are by Professor Charles Donahue, originally for N. HATZIMIHAİL (note 3).

led to the medieval university, and the doctrinal literature, we are familiar with, by the time of Carolus. In the time of Carolus, doctrinal discussion was especially prolific and vibrant, culminating in efforts of systematization and consolidation by the time of Accursius. This was also a transformative time both for political theory and the formation of the Italian polities, which became the focus also of the subsequent, better known, generations of medieval jurists.<sup>43</sup>

### 1. *Aldricus: “potior et utilior”*

Relatively little is known about Master (*Magister*) Aldricus: his work has survived in the texts of others, but there is clear evidence that he was alive between 1154 and 1177 and probably taught in Bologna.<sup>44</sup> He was thus a contemporary of the famous Four Doctors – Martinus, Bulgarus, Jacobus and Hugo – whom we saw above taking a pro-imperial legal stance but also better known as the main pupils of Irnerius, the man who recomposed and established an authoritative version of the entire *Corpus Iuris Civilis* and thus laid the foundations for the textual authority on which all subsequent medieval scholarship relied.<sup>45</sup> We saw above that Bulgarus is associated with the writing down of Bolognese customary law: he is also regarded as having advocated “a more rigorous method for analysis of the formal logic of Justinian law”, in contrast to Martinus who explored the equitable possibilities of the *ius commune*.<sup>46</sup> This would mean that Aldricus lived in an environment where not just the hierarchy but the *content* of the sources of law themselves was still a work in progress.

All this should illuminate the passage for which he has found a place in our historical consciousness.

“It is asked: if men of different provinces which have different customs litigate before one and the same judge (*iudex*), which of them [the customs] ought the judge who undertakes to judge the case follow? I reply that [custom] which seems stronger and more useful (*potior et utilior*). For he ought to judge according to what has seemed better to him. According to Aldricus.”<sup>47</sup>

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<sup>43</sup> In the words of PH. JONES (note 40), p. 371, by the mid-twelfth century “[the Italian communes’] development in various spheres was so advanced as to influence the practice of empire and then papacy. In the next hundred years, critical in the history of all medieval governments, down to c. 1250, the communes perfected a political system which, though constantly evolving, experienced little substantial change before the fifteenth century.”

<sup>44</sup> H. LANGE, *Römisches Recht im Mittelalter*, vol. I, Munich 1997, p. 202-204; F.C. SAVIGNY (note 6), vol. 4, p. 231-236, noting that what we have from Aldricus consists of subsequent authors referring to his oral lectures.

<sup>45</sup> F. WIEACKER (note 6), p. 28 and 40; F.C. SAVIGNY (note 6), vol. 4, p. 9 *et seq.*

<sup>46</sup> M. BELLOMO (note 7), p. 167.

<sup>47</sup> Codex Chisiani Collectio §46 (*An consuetudo legem vincat vel abrogare possit*), in fine:

We must first consider the text itself. This passage is found in a collection of “Disputes among the masters” (*dissensiones dominorum*).<sup>48</sup> These collections presented conflicting interpretations of legal questions by various glossators, between those insisting on strict law and those advocating a more equitable approach.<sup>49</sup> In this case, our passage comes at the end of a discussion on whether a custom could prevail over or abrogate a law (*An consuetudo legem vincat vel abrogare possit*). The passage takes the form of a *quaestio*, but we cannot know if it referred to an actual case. We cannot in fact even know how the passage relates to the broader argument originally provided by Aldricus. We can draw inferences in considering the entire text, but caution must be exercised.

With this in mind, we shall consider the argument – and norm – advanced. It must be noted that our text does not specify if the forum (the “one and same judge”) is found in the province of one of the parties, or in a third province. In this regard, the text is markedly different than all the subsequent ones we will examine, where not only the forum, but also its connection to both litigants is clearly defined.

There is more than one way to read the text. The first one is to think in terms of a “domestic” case. In the Early Middle Ages, the *iudex* tended to simply mean the one who judges, not necessarily a trained jurist.<sup>50</sup> A *iudex* in the Kingdom of Lombardy presided over a judicial territory including several smaller court districts (*schulteis*).<sup>51</sup> The solution that Aldricus gives compels the judge to exercise his judgment, by choosing between the competing customs as alleged by the parties and thus deciding the case himself, instead of relying upon compurgation or judicial duel – the ancient method of judicial proof under Lombard law, which had been waning for centuries. This would be in the spirit of the procedural reform movement, which had started in ecclesiastical courts. It would also lead to the ascertainment and writing down of customary law, in the spirit of Bulgarus and in the light of eleventh-century efforts, such as the *Lombarda*, to organise systematically Early Medieval Lombard legislation.<sup>52</sup>

But it is also possible, and indeed desirable, to examine the text from a conflict-of-laws perspective. It must be apparent that I do not share the enthusiasm

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Sed quaeritur, si homines diversarum provinciarum, quae diversas habent consuetudines, sub uno eodemque iudice litigant, utrum earum iudex qui iudicandum suscepit sequi debeat? Respondeo eam, quae potior et utilior videtur; debet enim iudicare secundum quod melius ei visum fuerit. Secundum Aldricum.

I am using the original printed edition by G. HÄNEL (ed.), *Dissensiones dominorum*, Leipzig 1834, p. 153. The text was originally found in a manuscript (*Codex Chisianus*). It was brought to our attention by K. NEUMEYER (note 10), p. 67 and made more widely known by M. GUTZWILLER (note 1), p. 301.

<sup>48</sup> *Codex Chisianus collectio*, §46, in G. HÄNEL (note 47), p. 151-153.

<sup>49</sup> O.F. ROBINSON/ T.D. FERGUS/ W.M. GORDON (note 6), p. 55.

<sup>50</sup> M. BELLOMO (note 7), p. 45.

<sup>51</sup> K. FISHER DREW, *The Lombard Laws*, Philadelphia (Penn.) 1973, p. 25.

<sup>52</sup> O.F. ROBINSON/ T.D. FERGUS/ W.M. GORDON (note 6), p. 23.

of some modern authors, who regard Aldricus as offering us an early example of a multilateral or a better-law approach.

An important reason for such misreading is that the passage is read as synchronous to the subsequent medieval texts, all the while appearing very different from them. Glossators, such as Carolus and Accursius, and commentators, such as Bartolus, primarily addressed questions of conflicts between the *ius commune* and the local custom or statute. Once the power of a city to issue a statute governing the conduct of its own “subjects” in its own territory had been established, the next question concerned the power of the city to govern the same conduct by “non-subjects” in its own territory, and then by its subjects outside its territory. This is the reason why medieval jurists have tended to be regarded as unilateralists in conflicts literature.

Aldricus himself addresses a horizontal conflict – one between different customs of different territories. He thus avoids any consideration of the role of the *ius commune* – he could have offered the same answer before a provincial imperial court in the Late Antiquity. He even uses the political vocabulary of Late Antiquity, in speaking of “provinces” rather than referring to cities. He also avoids any consideration of political power (and jurisdiction). In fact, his actual solution confirms this: rather than employing formal criteria, such as the custom prevailing in his own province, the judge should use his own judgment to select that custom which seems to him stronger and more useful: the meaning of either word is unclear, but they make apparent where Aldricus lies in the debate between “strict law” and an equitable approach.

There is moreover an intermediate approach, which requires us to not to think in purely abstract terms – as has predominantly been the case in our historical literature – but to consider instead what kind of problems each text is concerned with. Our Glossators’ texts offer us little help by themselves, so we must infer from what we know from general legal and social history. It is there where we discern an expansion of the material scope of local norms, as we move from the transactional *consuetudines* of the early twelfth century to elaborate systems of *statuta* regulating especially patrimonial aspects of family and succession, by the fourteenth.<sup>53</sup> This is discernible in Bartolus: eight of the nine sections of his conflicts treatment evidently address the question in terms of defining the personal, territorial and material scope of derogation of such city statutes from the *ius commune*, Roman law.<sup>54</sup> But his very first section looks different – both as to how the question is posed and as to the wording of Bartolus’ solutions, which indeed look like multilateral choice-of-law rules. Even the distinctions Bartolus employs have affinities to our own: “matters arising out of the nature of the contract itself at the time it was made” are governed by the law of place where

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<sup>53</sup> For an overview of potential issues see e.g. TH. KUEHN, Property of Spouses in Law in Renaissance Florence, in M.G. DI RENZO VILLATA (ed.), *Family Law and Society in Europe from the Middle Ages to the Contemporary Era*, Cham 2016, p. 109-133; J. KIRSHNER, Materials for a Gilded Cage: Nondotal Assets in Florence, 1300-1500” in idem, *Marriage, Dowry, and Citizenship In Late Medieval and Renaissance Europe*, Toronto 2015, p. 74-93.

<sup>54</sup> BARTOLUS ad C.1.1.1, nus. 20-51.

the contract was concluded, whereas “matters arising ex post facto due to neglect or delay” are governed by the place of performance.<sup>55</sup> This by itself takes further the distinction elaborated by Jacobus Balduinus (1175-1235), who had reputedly first drawn a distinction between matters concerning the manner of conducting the case (*ad ordinatoria litis*) and matters concerning the decision itself (*ad litis decisionem*), in which it was not necessary for the law of the judge to apply.<sup>56</sup> On the other hand, almost two centuries after Aldricus and over a century following Jacobus, Bartolus devotes some effort to distinguish conceptually between the place of the trial and the place of contractual performance.

This should lead us to the conclusion that Aldricus had in mind a contractual case – a point to which we shall return as we discuss our subsequent texts. But it could not change our verdict on Aldricus as an aspiring founder of private international law. His approach undoubtedly captured the tensions, inherent in the judicial work of the time, between creative work and formalized decision making. It is also remarkable how many ideas are included in these 37 words. But, in the end, Aldricus did not provide any standards useful to the thousands of lawyers and judges who were faced with an increasing number of such cases. His solution moreover does not take into account political power or the hierarchies of jurisdiction. This may explain why we have little evidence of influence of Aldricus’s approach – with the single exception of Hugolinus (d. 1233), whose collection of *quaestiones* was characteristically entitled *Insolubilia*.<sup>57</sup>

## 2. A French Interlude

We do not know the author of the next text, but we can safely assume he was not Italian. E.M. Meijers, who brought it to light, came to the conclusion that it was probably authored by someone who taught in Paris, before the Pope abolished law teaching in Paris in 1219.<sup>58</sup>

Let us suppose that it is the custom in the city of Paris that if someone contracts marriage with some woman, the marriage having been dissolved by the death of the woman, the man ought to have half the goods given on account of the marriage (*donatio propter nuptias*) and it is the custom of the city of Chartres, that if the marriage is

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<sup>55</sup> *Ibidem*, nus. 13-19.

<sup>56</sup> E.M. MEIJERS (note 1), p. 595 and K. NEUMEYER (note 10), p. 86-87. This is reported by Jacobus’s students, Odofredus and Jacobus de Ravanis in their glosses to D. 5.1.1.

<sup>57</sup> E.M. MEIJERS (note 1), p. 593 n. 1, following Neumeyer and citing HUGOLINUS ad C.8.52-53.1 v<sup>o</sup> *controversiarum*.

<sup>58</sup> E.M. MEIJERS (note 1), p. 585, notes that even though the manuscript contains some more recent glosses from Bologna, he believes that it came to France around 1200. See also A. FLINIAUX, Le manuscrit 141 de la Bibliothèque municipale d’Avranches et le problème de l’introduction en France au Moyen-âge de texte des compilations de Justinien, in *Atti del Congresso internazionale di diritto romano (Bologna e Roma, 17-28 Aprile 1934)*, vol. I, Pavia 1934, p. 313-327.

dissolved by the death of the woman, the man has nothing. Let us suppose that someone contracts marriage in the city of Paris and afterwards goes to the city of Chartres and stays there properly (*recte*) for a year and more and in that city the woman dies. The man seeks a half of the *donatio propter nuptias*. It is asked whether he can claim [to get it], because the heirs [of the woman] want to have the case decided by the customs of the city of Chartres and not by the custom of Paris. But someone said in reply that he can properly claim.<sup>59</sup>

Even though Meijers placed the text in his treatment of early customary and court practice, prior to his discussion of the “Italian theory”, where he included Aldricus, this is a text in the learned-law tradition, whose roots were not very deep in the North of France. It is also more or less contemporaneous to the gloss by Carolus de Tocco.

In a way, this text is the most modern of the four: it states a clear, horizontal conflict between two laws – the customary law of Chartres and Paris. Even the substance of the case itself is more concrete than our Italian passages – which, at best, simply allude to a contractual dispute being litigated.

This is a classic case that was to be raised again and again over the next centuries, including in some of the most canonical texts of preclassical and even classical conflict of laws, even as the subject moved from contracts to family law, and our doctrine from interpretative method to *conflits de systèmes*.<sup>60</sup> The wife dies childless, which means that her blood relatives are her heirs. With the marriage dissolved, the wife’s proprietary interests must be restituted to her heirs, which raises the question of whether the husband should be allowed to keep part of the gift bestowed upon him by his wife, by way of contribution to the household needs. Such gifts raised questions because of the Roman law restrictions of gifts between spouses.

A conflict is thus triggered between the laws of the place where the marriage was celebrated (and the dowry contract executed), and the place where the couple subsequently made their home (the husband’s domicile). What makes this case even more interesting is that here each party seeks application of the custom (and jurisdiction of the courts) of the place of the other party’s domicile.

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<sup>59</sup> MS 141, Bibliothèque municipale d’Avranches, fol. 248v.

Hic ponitur quedam questio. Ponamus ut est de consuetudine in civitate Parisiensi quod si aliquis contrahat matrimonium cum aliqu[a] muliere, matrimonio soluto per mortem mulieris, vir debet habere medietatem rerum donatarum propter nuptias, et est de consuetudine in civitate Carnotensi, quod si matrimonium dissolvatur per mortem mulieris, quod vir nihil habebat. Ponamus quidam contrahit matrimonium in civitate Parisiensi et postea advenit ad civitatem Carnotensem et ibi moratur recte per annum et amplius et in illa civitate mulier decedit; ille vir petit medietatem donationem propter nuptias. Queritur utrum potest, quia heredes volunt quod illa causa determinatur ex consuetudinibus Carnotensibus et non ex consuetudine Parisiensi. Sed quidam respondens dicebat quod bene potuit petere.

<sup>60</sup> See *e.g.* BARTOLUS ad C.1.1.1, nu. 19.

On the other hand, the author of the gloss takes no position here, except to refer to a *responsum* by a jurist who advocated the application of the custom of Paris.

It is unfortunate we cannot know the arguments of the *responsum*, especially because, for many centuries, subsequent scholarship took the opposite position. For Bartolus, for example, these cases constitute an exception to his general rule about the place of contracting determining matters arising from the contract itself.<sup>61</sup> Bartolus gives no explanation for his position, which must have been the dominant one in practice, except for referring to the Digest.<sup>62</sup> But that reasoning was apparently enough, until Dumoulin grounded the same rule on the presumed intention of the parties.<sup>63</sup>

It would be tempting to read into our text, especially the *responsum* in the final sentence, a preference for *lex fori* or for the place of contracting – or, alternatively, for the expansive application of the custom of Paris (which moreover was closer to the Germanic ideas of northern French customary law about community of property). It is equally, if not more, likely that there were substantive considerations involved: it is stated that the couple lived “properly” (*recte*) and therefore the contract of marriage was fulfilled, inducing the husband into expenses for which the donation constituted consideration. So would it not be unjust for him not to keep anything? On the other hand, especially given that the couple lived together for a little more than a year, would it not be too generous for the husband to keep half of the *donatio propter nuptias*? And what should we make of the fact that the wife’s family only expected to receive half of the donation in case of early dissolution of the marriage?

The truth is we do not know the arguments on which the case was decided or even which solution prevailed. And this may well have been the author’s purpose: our text looks more like a *quaestio*, with the facts balanced so as to best invite arguments on both sides, and readers left imagining what these arguments were.

Viewed from this perspective, this text represents a moment of transition: the problem of a “conflict” between customary norms applicable to the same question in different territories has been identified. It is clear that the judge must choose between one law or the other. It is also clear that hard choices are involved. But it is yet unclear what legal arguments should be employed to that effect. We cannot even be sure as to whether the response would have been the same if the substantive provision was the reverse.

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<sup>61</sup> BARTOLUS ad C.1.1.1, nu. 19.

<sup>62</sup> D. 5.1.65:

“A wife should lay claim to her dowry in the place where her husband had his home, not where the dowry agreement was drawn up; for it is not the sort of contract in which the place where the dowry agreement was made has also to be considered rather than the man to whose home the wife herself was due to go under the conditions of the marriage.”

<sup>63</sup> C. MOLINAEUS, Consilium 53, *Opera Omnia*, vol. 2 (Paris 1681), p. 953-956b.

### 3. Carolus: “Si Mutinensis”

Carolus de Tocco lived in the late twelfth and early thirteenth century.<sup>64</sup> This was a time of prolific literary production, including the first serious efforts at comprehensive treatments of the *Corpus Iuris* material: Carolus’ more famous contemporaries, Hugolinus and especially Azo, are known for their *apparatus*, especially on the Code. The late twelfth century also saw the first instances of professors leaving Bologna for other towns attempting to set up universities. Carolus himself taught in Bologna but also spent some time in Piacenza and exercised judicial functions in Salerno. His most celebrated – and widely circulated – work was his systematic commentary (*apparatus*) on the *Lombarda*.<sup>65</sup> In contrast, little has survived of his glosses and *summae* on the *Corpus Iuris*, but that includes the following gloss on *cunctos populos*:

Here note that he does not want to bind others than those who are subject to his *imperium*, and there is an argument [in this direction] below [C.3.1.14]. This is, however, contrary to the customs of the cities which also want to bind others with their statutes. And there is an argument that if a Modenese litigates against a Bolognese in this city [*i.e.*, Bologna] that the statute not harm the Modenese. But some, however, say the contrary to this, [using the] argument that the Modenese here follows the forum by summoning the Bolognese [to the Bolognese court], and by this act (*unde*) he accepts all the laws of this forum.<sup>66, 67</sup>

This text is markedly different from the previous ones. Unlike Aldricus, Carolus defines the issue in terms of a conflict between the law in place in two different city-states and seems to acknowledge the existence of political and jurisdictional entities. There are elements of a *quaestio* in the way in which Carolus presents both sides of the argument without taking himself a clear position but we also see, for the first time, actual arguments and references to legal authorities.

The starting point is the argument by analogy from *l. cunctos populos*, as was suggested above: a polity can only bind those subject to its *imperium*. This is

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<sup>64</sup> See F.C. SAVIGNY (note 6), vol. 5, p. 174-183.

<sup>65</sup> See *e.g.* F. CALASSO (note 6), p. 552.

<sup>66</sup> CAROLUS ad C.1.1.1 MS Bibl. nat. 4546 v<sup>o</sup> *clementiae* fol. 2a.

Hic nota quod alios noluit ligare nisi subditos imperio suo et est argumentum, infra, de iudiciis l. rem. primo responso (C.3.1.14 v<sup>o</sup> *quum igitur*, etc.). Est autem hoc contra consuetudines civitatum quae etiam alios constringere volunt cum suis statutis. Et est argumentum si litigat Mutinensis contra Bononiensem in hac civitate, quod statutum non noceat Mutinensi. Sed quidam contra hoc autem dicunt, argumento illo quod Mutinensis hic forum sequitur conveniendo Bononiensem, unde omnes leges illius fori recipiat.

<sup>67</sup> The text was transcribed by K. NEUMEYER (note 10), 2:75 (who attributed the manuscript to Rodofredus) and then E.M. MEIJERS (note 1), p. 594. Neumeyer followed Savigny in attributing the manuscript to Rodofredus. See the contrary argument of E.M. MEIJERS (note 1), p. 594 n. 1.

an argument that was to have a long life thereafter. However, unlike the Commentators of a century later, Carolus does not elaborate on this point or draw distinctions. Neither is there any reference to a political word such as “citizens” (*cives*), “subjects” (*subditi*) or “foreigners” (*forenses*). He does refer in support to another passage of the Code (*rem non novat*): this is a *constitutio* of Justinian, which extolls legal certainty and orders the judges to apply his law.<sup>68</sup>

At this point come the opposing arguments, in favour of the application of Bolognese law. Carolus makes a pragmatic remark: this line of argument runs contrary to the customs of the cities who want to bind “others” with their statutes. This is an acknowledgment of the existing practice of cities to apply “their” law in cases brought before them.<sup>69</sup> Glossators found imperial Roman support for this practice by relying, on the one hand, on the acknowledged force of a custom and, on the other hand, on the Digest passage regarding submission to a judge’s jurisdiction.<sup>70</sup> It is to that *locus* that Carolus seems to allude to, in the argument he provides.

It is tempting to think of Carolus as providing a choice-of-law rule. Even stronger would be the temptation to regard the argument of *submission* to jurisdiction as also constituting submission to the pertinent customs and statutes of the city, which is found in our text, as the first recorded instance of a tacit agreement, or consent, being invoked in order to determine the applicable law: by suing in the courts of Bologna, the Modenese has accepted all the laws of the Bolognese court. One cannot deny the affinities in argumentative patterns with subsequent doctrine, but we must also consider the context. The notion of consent is connected to the doctrine on custom.

An argument based on submission would make sense especially with regard to commercial transactions, where the judge should choose between competing trade usages, but also in other contractual disputes. For example, it would allow us to resolve the Paris/Chartres case from the previous section: the husband sues in Paris, being subjected to the – favourable – Parisian custom. But the same case would also entail a different response if the *donatio* had already been delivered and his wife’s heirs sued him in Chartres. Another example concerns a problem case of particular interest for Italian commerce (and a long history ahead): prescription. Bartolus offered a case of a Florentine, who borrowed money *in curia Romae* with the promise to repay the money in Perugia, where however such actions are barred after ten years: everyone seems to agree that the law of Perugia should apply and the action is barred, with earlier jurists arguing that this is so because Perugia is the place of trial (*locus iudicii*), until Bartolus who argues that Perugia is the place of performance.<sup>71</sup> Bartolus did go in that regard further than any other jurist until then, but the attempt to draw distinctions between matters concerning the manner of conducting the case (*ad litis ordinationem*) and matters concerning the decision itself (*ad litis decisionem*), in which it was not necessary for the law of

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<sup>68</sup> C. 3.1.14

<sup>69</sup> See E.M. MEIJERS (note 1), p. 594, citing Azo and Accursius (in other glosses).

<sup>70</sup> D 5.1.1.

<sup>71</sup> BARTOLUS ad C.1.1.1, nu. 19.

the judge to apply, was reputedly first made by a contemporary of Carolus, Jacobus Balduinus (1175-1235) in his comment on *si se subiciant*.<sup>72</sup>

Carolus de Tocco was a representative of his age – an age of learned-law exploration of *ius commune* and its relation with the emerging *iura propria* and of efforts to consolidate three generations' worth of scholarly work. His short text puts together not just opposing answers to the conflict-of-laws question but also opposing approaches: legal hierarchies and political power, jurisdiction and substantive law are contrasted to submission and consent, procedural law, and custom. Carolus acquired a place in our historical consciousness because of the invocation of *l. lex cunctos populos*, but his true legacy appears to be in illustrating the different directions that could be taken.

#### 4. *Accursius: "Si Bononiensis"*

We thus come to Accursius (1185-1263), professor at Bologna and author of the Standard Gloss (*Glossa ordinaria*, *Magna Glossa*, or simply "the Gloss"). Accursius consolidated a lot of pre-existing material and was especially influenced by his master Azo, but also by the latter's rival, Hugolinus. Over time, the work of Accursius overshadowed much of that earlier material.<sup>73</sup> The *Glossa ordinaria* maintained its authoritative status up to the seventeenth century, but Accursius has also invited a lot of hostility and accusations of unoriginality.

There are several glosses of interest to our subject in the Gloss, but they fall outside the scope of this study. Accursius has secured his place in our historical consciousness with the following gloss to *l. cunctos populos*:

Argument that if a Bolognese (*si Bononiensis*) is sued in Modena he ought not be judged according to the statutes of Modena to which he is not subject, because it says [*i.e.*, the lex] 'which [the *imperium*] of our clemency [rules]'.<sup>74</sup>

There are three separate questions here. The first one concerns the relation between *si Bononiensis* and Carolus's *si Mutinensis*. The second is about the significance of *si Bononiensis* in its own context. The third one is about the relation of *si Bononiensis* to subsequent doctrine.

Viewed in isolation, the gloss of Accursius sounds like a response to Carolus. We could even be tempted to perceive the gloss *si Bononiensis*, which only presents one side of the argument, as lacking in comparison with *si Mutinensis*, which presented a fuller discussion, a clear indication that there were

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<sup>72</sup> E.M. MEIJERS (note 1), p. 595 and K. NEUMEYER (note 10), p. 86-87. This is reported by Jacobus's students, Odofredus and Jacobus de Ravanis in their glosses to D. 5.1.1.

<sup>73</sup> J.W. WESSELS, *History of the Roman-Dutch Law*, Grahamstown 1908, 116-117, quoting F.C. SAVIGNY (note 6), 5:262 *et seq.*

<sup>74</sup> ACCURSIUS ad C.1.1.1 v<sup>o</sup> *quos*, Lugdunum 1527, fol. 13:

Argumentum quod si Bononiensis conveniatur Mutinae non debet iudicari secundum Statuta Mutinae quibus non subest, cum dicat: quos nostrae clementiae.

arguments on both sides. Likewise, Accursius is here setting unequivocal limits on the city's ability to regulate its own territory, even though we know that Italian cities have in the meantime pushed further with their projects of asserting political and legal power. On the other hand, if we follow Meijers's thesis, that the most important development for the birth of conflict-of-laws doctrine was the notion that a forum may not necessarily apply its "own" law, it must be granted that Accursius states this position unequivocally, unlike Carolus.

Carolus had left open the possibility that the claim of a Modenese being sued in Bologna will be adjudicated in accordance with Bolognese statutes. Accursius reverses the facts of the case. This does not appear accidental: given his conclusion, this reversal makes it more palatable to an audience that should include at least as many, if not more, Bolognese as Modenese. The effect of Accursius' position is thus to spare the Bolognese his subjection to Modenese statutes and customs. Nothing is said about the reverse case – and this would remind a modern jurist of unilateralism – but the principle that Accursius states should be regarded as applicable in the reverse case as well.

Meijers presents *si Bononiensis* as a mild variation of *si Mutinensis*.<sup>75</sup> Meijers considers the positions Accursius takes in other glosses (including *de quibus*), in which he appears more favourable to the idea of the court applying its own laws to a case and surmises that Accursius originally followed the position of his master Azo, to that effect, with *si Bononiensis* being a relatively late addition (around 1245).<sup>76</sup>

I am not in position to dispute this conclusion and indeed there is no reason to – but this does not mean that Accursius changed his mind. Accursius was certainly very much influenced by Azo, but he also incorporated into his own *apparatus* other material and ideas; he himself lived a long and full life, getting involved in the practice and politics of his time and establishing a dynasty of jurists. We know that the Gloss was written over a long period of time and a work of such scope and ambition was not meant to be without any internal contradictions.<sup>77</sup> But it would befit the scholastic spirit to consider whether there is concordance between these diverse glosses. My tentative conclusion would be that such concordance should be found in Accursius: even if he was content with the customary *locus iudicii* to provide the solution in such cases, this would not prejudice his answer to the general question. In his other glosses, Accursius is dealing with concrete legal problems, such the ones discussed in the preceding sections, which tend to involve "conflicts" between customary norms or usages. For example, the

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<sup>75</sup> E.M. MEIJERS (note 6), p. 595 ("cette glosse a été répétée avec quelque variante par Accurse").

<sup>76</sup> *Ibidem*, p. 595 ("Accurse avait soutenu d'abord, dans son appareil primitive, l'opinion de son maître Azon, qu'on doit suivre toujours la *lex fori*") and p. 593 n. 1, where Meijers refers to Azo ad D 5.1.1 and Accursius ad C. 8.52.1, v<sup>o</sup> *controversiarium*, ad C. 8.48. v<sup>o</sup> *duumviris*, D. 1.3.32 v<sup>o</sup> *de quibus*.

<sup>77</sup> The traditional view held that a first edition of the Glossa (minus the Institutes), was published by 1228. It is now believed that the Gloss was constantly revised over a broader timeframe, such as 1220-1250. See e.g. R. FIGUEIRA, *Glossa Ordinaria: Roman Law*, in CH. KLEINHERZ ed., *Medieval Italy: An Encyclopedia*, vol. I (2004), 437-439.

cases Accursius uses in his gloss on *de quibus causis* concern *statuta* altering norms of feudal law.<sup>78</sup> All indications are of a “domestic” case.<sup>79</sup>

On the contrary, *si Bononienis* does not only provide a general rule but also deals with a different kind of problem: a conflict between city statute and the *ius commune*, which is vertical as well as horizontal. Accursius seems concerned, in his gloss, with instances where city legislation is encroaching upon the *ius commune*, especially in matters pertaining to status, succession and patrimonial aspects of the family. The proliferation of such legislation by the time of Bartolus, a century later, makes this trend especially visible in his work, whose bulk is devoted to such questions: to give an example, alongside the simple, “horizontal” conflict of laws as to dowry we must add questions scattered in that *repetitio* about the effect of statutes prohibiting a husband from instituting his wife as heir, or prohibiting one spouse from leaving a legacy to another.<sup>80</sup> And to them we should add, as the medieval practitioner probably would, statutes altering the legal norms as to who could be heir (notably daughters or illegitimate children), which would thus have a transformative effect to the same question.

Accursius responded to these emergent questions by stating the classic position expected of a glossator, who stood for imperial power: the city statutes represent a local derogation from the *ius commune* and may therefore only bind their city’s own citizens. The argument by analogy from the limitation of imperial power is made in an addition to the gloss and then again repeated in the *paratitla*.

Contrary to a modern lawyer’s reflective understanding, the Bolognese facing the Modena court could not be subject to Bolognese law: it would appear highly unlikely for a thirteenth-century Modena court to apply a particular Bolognese statute. The alternative to the law of Modena is the common Roman law.

The same would be expected of another case not mentioned in the gloss: whether a Bologna statute might regulate the conduct of Bolognese outside the territory of their town. Accursius settles the matter easily and by implication. By the time of Bartolus, however, such an answer would not suffice. It is in responding to that question that Bartolus employs his typology of statutes, which became associated with medieval conflicts doctrine. Bartolus draws at a primary level, a distinction between prohibitive and permissive statutes. Within each category, further distinctions are drawn: between statutes regarding a thing or person, and between “favourable” (*favorabilia*) and “burdensome” (*odiosa*) statutes.<sup>81</sup> This is obviously not the place to discuss Bartolus but, on the whole, he seems to have attempted to minimize disruption of the common legal regime and fourteenth-century social life. Bartolus and his contemporaries, however, faced a very different political and legal landscape and approached the role of learned law and the relationship between Roman law and Italian society through another lens.

The very act of inclusion of the gloss in his work would be enough for Accursius to merit a place in our historical consciousness. Azo, his master of

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<sup>78</sup> ACCURSIUS ad D 1.3.32 v<sup>o</sup> *de quibus causis*, Lugdunum 1627, col. 41.

<sup>79</sup> ACCURSIUS ad D 5.1.1 v<sup>o</sup> *Si se*, Lugdunum 1627, col. 633, is a *casus* involving two Modenese agreeing to litigate in Bologna.

<sup>80</sup> BARTOLUS ad C.1.1.1, nu. 26, 32.

<sup>81</sup> *Ibidem*, nus. 32-33.

Accursius, does not discuss at all the subject in his own gloss on *l. cunctos populos*.<sup>82</sup> But even Odofredus, his contemporary (possibly a student and to some extent one of the High Medieval voices not completely shadowed by Accursius) limits himself to noting that such city statutes do not extend over “scholars” (this includes university students) and clerics – a first step, in the same direction as Accursius, but hardly a general principle.<sup>83</sup>

But we should not limit ourselves to this. Accursian doctrine captures the political and social, as well as legal and jurisdictional, transformation of Italian polities. It is easy to dismiss the gloss as a relic of the *Romidee*, obsolete in its own time. But it must be acknowledged that it gave the impetus for the rich doctrinal discourse of the next century, and beyond. In the long run, it identified the political dimension of what we regard as private law. In its own time, it signifies an awareness that a new way of thinking would be required to manage the legal regulation of emerging social problems.

### III. Historiography

The historical examination of the preceding section constitutes a re-interpretation of primary sources, which were brought to light by the grand men of conflicts historiography. Undoubtedly, such examination relates to a different question: how these doctrinal beginnings of the conflict of laws have been approached in the existing literature and how they have registered in the historical consciousness of private international law.

The answer is that two distinct themes are being explored, each corresponding to the two subjects considered in the previous section. Some authors have paid attention to the textual authority most commonly used as anchor of medieval conflicts treatments, *i.e.* the *lex cunctos populos*: this discussion revolves around the significance and possible relation (or lack thereof) between that text and our subject.

A more common preoccupation has been to designate the first jurist, or jurists, who wrote on conflicts doctrine: identification of the founder is related to what is presented as the foundational moment.

#### A. Foundations

*Cunctos populos* may have worked as an anchor for four centuries, but over time its use as a founding stone of conflicts doctrine has evoked hard reactions. Already in the sixteenth century, Guy de Coquille was disparaging medieval writers:

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<sup>82</sup> AZO ad C 1.1, (Summa, Venetia 1631), col. 7-9.

<sup>83</sup> ODOFREDUS ad C. 1.1.1, nu. 2, *Lectura super Codice*, Lyon 1552, fol. 5rb. “*Statuta civitatum non ligant scolares aut clericos*”.

someone randomly chose the text, and the rest aped him.<sup>84</sup> Such derision relates to broader jurisprudential ideas and the evolution in legal style: as the humanist *mos gallicus* replacing the scholastic *mos italicus*, legal humanists accused their medieval forefathers, especially the glossators, for their failure to understand the Roman world, and its language. Accursius himself was a prominent target of such attacks.<sup>85</sup>

Humanist viciousness inaugurated a longstanding tradition of deriding the relationship between the *lex cunctos populos* and conflicts issues. In the late nineteenth century, François Laurent would question the link between *cunctos populos* and statutes, wondering “what relationship could possibly exist between an incomprehensible dogma and a legal doctrine.”<sup>86</sup> A century later, Friedrich Juenger calls the glossators’ reasoning “preposterous.”<sup>87</sup> A more sympathetic take was offered by Ernst Rabel, who spoke of conflict of laws being “artificially incorporated” into Roman law.<sup>88</sup> Even Armand Lainé, who defended the choice made by medieval jurists and explained their reasoning, conceded that they were “blinded by their faith” that the *Corpus Iuris* contained everything.<sup>89</sup>

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<sup>84</sup> G. COQUILLE, *Questions et réponses sur les articles des coutumes*, Paris 1644, p. 345 (Quest. CXXXI (also quoted in A. LAINÉ (note 1), p. 104)

Et comme ce domicile semble avoir été mal ellev et choisi, parce que le texte n’y est aucunement à propos, aussi la question y est traitée trop prolixement pour y être bien traitée. Mais le dessein du premier docteur qui a commencé a été suivi comme par singerie et indiscrete imitation par les autres suivants : tous lesquelles à la file ayans divisé chacun de trois volumes des Digestes, et le Code en deux parties, ont travaillé de tout leur pouvoir d’enrichir les premières lectures de cette partie, en y ramassant pêle mêle toutes les belles questions qu’ils sçavoient; et au milieu et à la fin de chacune desdites parties ont passé comme en courant disant peu, ou du tou n’y ont rien dict. Et selon mon advis ils eussent mieux fait de dire mediocrement à l’entrée, et suivre par tout avec la même mediocrité et style, pour enseigner par tout.

<sup>85</sup> J. VALÉRY, *Manuel de droit international privé*, Paris 1914, p. 26 mentions the following quotation by François Rabelais’ *Pantagruel* 2.5 (quoting from T. URQUHART, *The Works of Francis Rabelais*, vol. I, London 1849, p. 309):

“the books of the civil law were like unto a wonderfully precious, royal, and triumphant robe of cloth of gold edged with dirt; for in the world are no goodlier books to be seen, more ornate, nor more eloquent than the Texts of the Pandects; but the bordering of them, that is to say, the Gloss of Accursius, is so scurvy, vile, base, and unsavoury (*tant salle, tant infame, et punaise*), that it is nothing but filthiness and villainy (*ordure et villenie*).”

<sup>86</sup> LAURENT (note 1), p. 297 and 298:

Les glossateurs fondent leur doctrine sur des textes mal interprétés, donc sur une base imaginaire. Ceci n’est pas un reproche. Les légistes du moyen âge étaient étrangers à toutes études, littéraires, historiques et philosophiques; il faut s’étonner, non de leurs erreurs, mais de la subtilité de leur intelligence, digne de la race italienne.

<sup>87</sup> F.K. JUENGER (note 2), p. 11: “The reasoning is, of course, preposterous.”

<sup>88</sup> E. RABEL, *Comparative Conflict of Laws*, vol. I, Ann Arbor (Mich.) 1945, p. 6-7.

<sup>89</sup> A. LAINÉ (note 1), p. 106-109. Cf. *ibidem*, p. 109:

It must be noted that those authors who actually took pains to examine primary sources – or even serious secondary literature – are the ones most sympathetic of medieval jurists. Nonetheless, there is more to these modern reactions than simply failure to understand the medieval mind. I would suggest that what makes of the attachment of a gloss, such as *si Bononiensis*, to Justinian’s Code, a seminal moment for the discipline of private international law is the discovery of a *doctrinal foundation*. This is a moment signifying the linkage of the discipline with Roman law and thus with learned law and doctrinal sophistication. Going further, there are two issues involved. First, the role of doctrine – in contrast to that of the legislator and especially the judges. Second, the author’s understanding (and “narrative”) of how conflict-of-laws doctrine evolves.

Whereas it is relatively common to look for a foundational moment, or even moments, few authors seem to take into account, in their narratives, the anchoring of early conflicts doctrine to a “legislative” or at least authoritative provision – moreover, one with a very different subject and approach. Among those who do, their attitudes seem to reflect their opinions on the role of legislation. Let us take, for example, the two leading early classical scholars who wrote histories of private international law in the French language, in the late nineteenth century, François Laurent and Armand Lainé. Their own different attitudes can also be associated to the evolving politics and aspirations of classical conflict of laws.

Laurent promoted an optimistic progress narrative, a veritable *Universalgeschichte*, in which each stage of history (and doctrinal pre-history) is leading us to the present moment of creation of the discipline of private international law (and eventually, an international codification of private international law principles). Perceiving his mission, near the end of his life, as helping lay the groundwork for a new beginning, he does not look for validation of his views in Medieval or Early Modern doctrine. He looks to the “glossators” for an elaboration of the distinction between real and personal statutes, for which he found little basis on *cunctos populos*.

In contrast, Lainé, who wrote only a few years later, represents another generation. His understanding of history was certainly not Hegelian. Lainé, who read more medieval texts, and closer than probably anyone before or since, also expressed considerable sympathy with the Italian school, which he identified with the pursuit of justice rather than a mechanical distinction between real and personal statutes. An instrumental figure of the School of international law for decades, at the time when its original manifestos were evolving into a web of doctrinal works, journals and academic deliberations, Lainé was also more of a pragmatist – less keen on a grand break with the past, more eager to keep what building materials and moral victories tradition could give him. He was also better able to understand the importance for a nascent subject of being anchored at the beginning of the Code, *i.e.* in a more visible place, than in the middle of the Digest or of a

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Ils s’imaginèrent à tort que le *Corpus juris* contenait tout, ne pouvait faire défaut à qui le scrutait bien. Aveuglés par leur foi, ils crurent sincèrement avoir trouvé ce qu’ils cherchaient avec tant de confiance; ils donnèrent pour des règles concernant les conflits de lois des décisions qui sont en rapport très indirect, très éloigné avec cet ordre d’idées, quand elles n’y sont pas entièrement étrangères.

French provincial Custom. He thus notes that until the – recent – emergence of specialist treatises, the subject had been “always attached accessorially, in a more or less arbitrary fashion, to other subjects.”<sup>90</sup> It is the word *always* that has the biggest importance: Coquille, d’Argentré and Paul Voet have more in common with Bartolus and his predecessors than the claim. The decisive break happens when the subject has obtained its own foundations so as to construct standalone doctrinal edifices.

If we now turn to twentieth-century reactions, it should come as no surprise that the most derisory reference comes from Friedrich Juenger, in the same work in which he attacked “scholars’ predominance” as the cause of “our discipline’s obscurity and vexing nomenclature,” and lamented the “speculative minds ... drawn into our discipline precisely because it offers a ‘mental game with infinite complications’”.<sup>91</sup> Accusing medieval jurists of “preposterous reasoning,” immediately following several pages of examples of an alternative approach to choice-of-law principles, makes sense given Juenger’s professed hostility to scholarly insistence on the choice-of-law method.

Mature classical scholars took a different approach. Max Gutzwiller, writing in the interwar period, and projecting his own progress narrative – of scholarly development eventually giving rise to national and finally international legislative codification – in which the role of courts and practice is, in the long run, subordinate to that of legal doctrine. In his story, Roman law allowed jurists to move away from the “instinctive” preference of courts for the *lex fori*.<sup>92</sup> By placing the conflicts of laws within the “common law of Roman origin”, it eventually became easier for courts to apply the statisticians’ system of conflicts norms.<sup>93</sup> Gutzwiller notes the emotional and doctrinal importance of the anchor: the nascent doctrine found a home, a permanent seat and secured its place within the great system of medieval Roman law.<sup>94</sup>

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<sup>90</sup> A. LAINÉ (note 1), p. 108: “Au surplus, est-ce que la matière des conflits de lois, jusqu’au jour où par son importance elle est devenue l’objet de traités spéciaux, n’a pas toujours été accessoirement rattachée de façon plus ou moins arbitraire à d’autres sujets?”

<sup>91</sup> F.K. JUENGER (note 2), p. 162-163.

<sup>92</sup> M. GUTZWILLER (note 1), p. 298 (“Il est saisissant de constater que la « solution » instinctive de la jurisprudence fut celle en faveur de la *lex fori*. C’est là le principe primitif.”)

<sup>93</sup> *Ibidem*, p. 293-294:

Les juges appliquent les règles de ce système statutaire non pas en vertu d’une autorisation supérieure, non parce qu’ils y sont obligés, mais simplement parce qu’ils obéissent à une autorité scientifique, parce qu’ils rangent le Droit international privé dans cet ensemble, dans ce système doctrinaire qu’on appelle le Droit commun d’origine romaine, qui le Droit privé par excellence, la raison écrite commune point de départ de ce Droit civilisé.

<sup>94</sup> *Ibidem*, p. 303.

Grâce à cette source présumée, la doctrine naissante du Droit international privé trouve à travers les siècles son point de départ, son siège permanent: « seine Heimat », selon l’expression heureuse de M. Neumeyer. C’est à ce propos que les gloses et les commentaires exposent leurs opinions relatives aux conflits de lois; c’est en vertu de cette place que le Droit international

In the mid-twentieth century, Ernst Rabel, leading member of the comparative school, also presents a narrative emphasizing the power of scholarship to bring together diverse national practices.

In its generally accepted sense, the law of conflicts or private international law dates from the medieval school of the postglossators ... Like the Roman law in which it was artificially incorporated, this branch of law was regarded as universally binding. The territorial realm of the doctrines of the postglossators exceeded even the boundaries within which the canon and Roman laws were received as “written reason,” representing the law of all Christendom. [...] The law of conflicts thus became one field, in which the common and civil laws had a common doctrinal basis and which could be thought of as a truly international law.<sup>95</sup>

In Rabel’s account, conflict of laws was “artificially incorporated” into Roman law and thus became “universally binding,” leading over time to “a truly international law.” One comes to think of early conflicts doctrine as a living thing trying to survive and conquer the world.<sup>96</sup> The connection to Roman law eventually leads to a connection with the cosmopolitan learned-law world of the *ius commune*, and its legacy. At the same time, these conflicts doctrines reach territories well beyond the reach of the medieval learned law – a sign of the impact of scholarship in this area, as well as of its ability to bridge the great divide between Common law and Civil Law.

## B. In Search of the Foundational Moment

Conflicts literature has tended to move the foundational moment earlier in time. François Laurent had started with Bartolus (and the distinction between real and personal statutes).<sup>97</sup> Armand Lainé effectively started with the immediate predecessors of Bartolus, postglossators and early Commentators, his own focus being on the development of doctrines in the pursuit of multistate justice.<sup>98</sup> By the beginnings of the twentieth century, the gloss emerges as the foundational moment and we see references to Accursius and, especially after the diffusion of Neumeyer’s work, Carolus. These references constitute the standard narrative as to the foundational moment: there is no difference depending on who is named as the founder. The founder has become simply a name. Aldricus himself, even though he was also brought to the forefront by Neumeyer, has acquired a distinct place in conflicts historiography: in some narratives, he is presented as an alternative foundational moment that must be examined.

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privé acquit une position systématique assurée au milieu du grand système du Droit romain médiéval.

<sup>95</sup> E. RABEL (note 88), p. 6-7.

<sup>96</sup> See especially *ibidem*, p. 7-9.

<sup>97</sup> F. LAURENT (note 1), p. 297.

<sup>98</sup> A. LAINÉ (note 1), p. 115 *et seq.*

It is remarkable, in this regard, that the French text discussed above does not feature in these discussions and more generally has not really registered in our historical consciousness. The text does not lack originality; it is moreover a text of learned law, which represents a venerable tradition of medieval scholarship, highlighted by the contribution of the *ultramontani* in late thirteenth-century Southern France, where university education in law flourished. Obviously, its claim to fame was not helped either by our inability to attribute it to a scholar or by its perceived sympathy towards *lex fori*. But the principal reason is that it has been connected, since Meijers brought to the fore, with customary and judicial practice. Meijers himself placed the text earlier than the other three, consonant to his narrative of a move from courts' territorial insistence on *lex fori* to the scholars' elaboration of doctrinal alternatives.<sup>99</sup> This also connected to his impressive archival work concerning legal practice in France and the Low Countries prior to the development of the learned law. The – select few – French authors who discussed the text also placed it within their examination of early French case law.<sup>100</sup>

### **1. The Gloss as Foundational Moment**

Ever since E.M. Meijers, following Neumeyer, brought him to the forefront, Carolus has been the one most often credited with being the first.<sup>101</sup> But in our historical consciousness, Carolus has simply become the author who said first what Accursius diffused more successfully later.<sup>102</sup> It is remarkable that few if any appear to have noticed the doctrinal differences between Carolus and Accursius – let alone to have understood what it might suggest for the state of legal practice in thirteenth-century Italy.<sup>103</sup>

The gloss presents two issues in historical consciousness. First, understanding its meaning in historical terms – as a moment in its own time, even if approached through our own conceptual framework. Second, the significance of the gloss for the subsequent development of private international law.

Relatively few authors have contemplated the meaning of the gloss, apart from its representation of a beginning. Viewed outside its context, the wording of the gloss appears unilateralist – and this would fit the common perception of

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<sup>99</sup> E.M. MEIJERS (note 1), p. 585.

<sup>100</sup> B. ANCEL (note 1), p. 81; J-P. NIBOYET, *Traité du droit international privé*, vol. III, Paris 1944, p. 62-63.

<sup>101</sup> See e.g. Y. LOUSSOUARN / P. BOURREL / P. de VAREILLES-SOMMIÈRES, *Droit international privé*, 8th ed., Paris, 2004, p. 87; T. BALLARINO, *Diritto internazionale privato*, 3rd ed., Padova 1999, p. 16. More surprisingly, H. YNTEMA (note 1), p. 302 suggests, two decades after Meijers, that “Accursius himself is believed to have made [this “seemingly casual addition”] to the Glossa Cunctos Populos.”

<sup>102</sup> See e.g. H. GAUDEMET-TALLON, *Le pluralisme en droit international privé: richesses et faiblesses*, *Recueil des cours* 312 (2005), p. 9-488, p. 177.

<sup>103</sup> E.M. MEIJERS (note 1), p. 595 (“cette glosse a été répétée avec quelque variante par Accurse”); P. LALIVE, *Tendances et méthodes en droit international privé*, *Recueil des cours* 155 (1977), p. 56. Cf. B. ANCEL (note 1), p. 93-94.

medieval – and more generally preclassical – doctrine as unilateralist. Moreover, the reflective understanding of a modern lawyer examining the text of Accursius by itself would be to assume that Accursius argues that the Bolognese facing the Modena court is subject to Bolognese law. If we see this as a purely horizontal conflict, the next step would be to regard Accursius as an advocate of extreme personalism. For example, Jules Valéry presents Accursius in “formal opposition” to the territoriality principle and even acknowledges that he went too far.<sup>104</sup> Valéry (who, remarkably, had earlier on noted that these were conflicts between city statutes and Roman law), is so perplexed or embarrassed as to suggest there may have been some personal motive behind this “absolute” position.<sup>105</sup>

What seems to have occupied more the literature is the importance of the gloss as a step in the subsequent evolution of the discipline. Three perspectives are observable in this regard.

The first one emphasizes the discovery of a positive-law *foundation* for the conflict of laws, as examined above. Others place emphasis on the conflict-of-laws problem having been identified: Hessel Yntema, for example, underlines the “rapid acceptance of the fruitful idea that a court should discriminate according to the nature of the case in the application of law to a foreigner”.<sup>106</sup>

Another view shifts the viewpoint to the approach adopted: let us consider Meijers who tells the history of early conflicts doctrine in terms of a move from a mostly “territorial” court practice to the development of a more general legal doctrine. In this story, the first two approaches considered was the application of *lex fori*, on the one hand, and allowing the judge to select what he deemed the best solution, on the other.<sup>107</sup> Meijers evidently relegates the latter to part of a footnote, regarding *lex fori* a much bigger challenge, having been adopted even by eminent glossators, including Accursius in his earlier work.<sup>108</sup> The gloss of Carolus on *cunctos populos*, reprised by Accursius, laid the foundation for a break from earlier jurists’ (and courts’) absolute reliance on *lex fori*, but Meijers places the decisive break with the distinction made by Jacobus Balduinus between procedure (*ordinatoria litis*), to which the *lex fori* was applicable, and substance (*decisoria litis*), which was subjected to a *lex causae*, notably the *lex loci contractus*.<sup>109</sup> It is that distinction that constitutes, to Meijers, the true foundational moment of conflicts scholarship.<sup>110</sup> This view has found some support in the literature.<sup>111</sup>

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<sup>104</sup> J. VALÉRY (note 85), p. 23: (“[la proposition ainsi formulée ... était assurément trop absolue”).

<sup>105</sup> *Ibidem* (“il est permis de croire qu’elle fut inspirée à Accurse par le désir de servir les intérêts de quelque Bolonais de ses amis engagés dans une instance portée devant les juges de la ville voisine”).

<sup>106</sup> H. YNTEMA (note 1), p. 302.

<sup>107</sup> E.M. MEIJERS (note 1), p. 593.

<sup>108</sup> *Ibidem*, p. 593 n. 2.

<sup>109</sup> *Ibidem*, p. 594-597, also noting that Jacobus’s distinction became accepted faster among the ultramontanani in Southern France than in Italy.

<sup>110</sup> *Ibidem*, p. 596 (“[a]vec cette distinction ... la science moderne du droit international privé était née”). A. LAINÉ (note 1), p. 253 also accepts that the Italian school was founded upon this *distinction capitale* with which he credits Petrus Bellaperticus.

Contrasting Yntema and Meijers shows a difference in emphasis. Yntema, a U.S. scholar writing in an environment shaped by legal realism, and the early stages of the “conflicts revolution” takes a perspective more external to doctrinal development: Yntema does not privilege here an approach – for him, it is enough that the conflict-of-laws problem has been identified and the domestic distinguished from the international. In contrast, Meijers was a leading light of mature classical conflict of laws – an emblematic figure of the reconstructive movement of European conflicts scholarship in the interwar and early postwar period, which sought to build a new synthesis overcoming both the naïve personalism of early classical internationalists and the doctrinaire territorialism of particularists. By emphasizing the substance/procedure distinction, Meijers illustrates the importance of the doctrinal art, telling a story of doctrinal development: doctrine also overcomes judicial prejudices. In normative terms, Meijers takes a middle position, dismissive of the excesses of both *lex fori* proponents and proponents of substantive considerations. At the same time, he denies to the personalists the legacy of the gloss, while tell the story of doctrinal development as a move away from *lex fori*.

## 2. *Aldricus as an Alternative Foundational Moment?*

Aldricus appears relatively late in conflicts historiography, that is after the discovery of his passage by Karl Neumayer.<sup>112</sup> He became better known thanks to Max Gutzwiller, who in his 1929 Hague Course placed Aldricus “at the forefront of those distinguished by an independent and novel conception of the problem of application of laws.”<sup>113</sup>

Gutzwiller himself took a moderate position: Aldricus was notable because he was the first to identify the conflict-of-laws problem: Gutzwiller’s remark, about the importance of framing the question in great scholarly problems,<sup>114</sup> aptly captures his own moment, of doctrinal reconstruction of the classical paradigm. That position has been shared by many.<sup>115</sup>

But not all. In his own Hague course, five years later, E.M. Meijers limited Aldricus to one line in a footnote, characterizing him as a proponent of the “free

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<sup>111</sup> Meijers is followed by K. LIPSTEIN, *The General Principles of Private International Law*, *Recueil des cours* 135 (1972), p. 111; CH. FORSYTH, *Private International Law*, Cape Town 2012, p. 36-37 who grants Jacobus right of first place. See also M. WOLFF, *Private International Law*, 2nd ed., Oxford 1950, p. 24; P. LALIVE (note 104), p. 57 and p. 375 n. 85 (speaking of “distinction radicale”).

<sup>112</sup> K. NEUMEYER (note 10), p. 66 (“...den Ruhm, die wissenschaftliche Lehre vom internationalen Privatrecht begründet zu haben”).

<sup>113</sup> M. GUTZWILLER (note 1), p. 301.

<sup>114</sup> *Ibidem*, p. 301-302: “Comme dans tous les grands problèmes scientifiques, ce n’est pas la solution qui nous étonne le plus, mais bien la question.”

<sup>115</sup> A. MIAJA DE LA MUELA, *Derecho internacional privado*, vol. I, 8th ed., Madrid 1979, p. 102; G. MARIDAKIS, Introduction au droit international privé, *Recueil des cours* 105 (1962), p. 375-515, p. 486, 487.

choice of the judge,<sup>116</sup> and proceeding swiftly to the beginning of the thirteenth century when “the science received a durable basis” in the principle *statutum non ligat nisi subditos*.<sup>117</sup> This has been the most common position in the literature: Aldricus is presented as a jurist making a primitive effort to solve the conflict of laws problem without conceiving of it as a distinct problem.<sup>118</sup> But other authors make no mention of Aldricus in their narratives.<sup>119</sup> Even Gutzwiller himself was much more nuanced in the History he wrote, half a century later.<sup>120</sup>

On the opposite end, there are those who cast Aldricus in a more favorable light. In a modern treatise, for example, he is presented not just as the “probable founder of conflicts law”, but also an early proponent of a “multilateral approach” which is contrasted to the unilateral approach purportedly adopted by his statist successors.<sup>121</sup> A stronger tendency has been to present him as a “partisan of the ‘better law.’”<sup>122</sup> This is a popular idea in Anglophone – and especially U.S. – literature, especially following Hessel Yntema’s glowing presentation of Aldricus and his “equitable conception”.<sup>123</sup> In English works, Aldricus is presented “an ancient proponent of some very modern theories”,<sup>124</sup> and in his turn David Cavers is described a “new Aldricus”.<sup>125</sup>

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<sup>116</sup> E.M. MEIJERS (note 1), p. 593 n. 2.

<sup>117</sup> *Ibidem*, p. 594.

<sup>118</sup> See e.g. B. AUDIT, *Droit international privé*, 4th ed., Paris 2006, p. 60; J. KROPHOLLER, *Internationales Privatrecht*, 6th ed., Tübingen 2006, p. 12. A. ANTON, *Private International Law*, Edinburgh 1967, p. 19 takes a middle position between Continental Europeans and Americans. M. WOLFF (note 112), p. 22 seems more appreciative but he makes his conclusion that Aldricus “was referring to the quality of the law itself” seem like a fallback (Wolff apparently, and mistakenly, thinks that Gutzwiller circa 1929 thought Aldricus a sponsor of the “most real connexion with the subject of litigation” approach).

<sup>119</sup> No mention in T. BALLARINO (note 102); Y. LOUSSOUARN/ P. BOURREL/ P. DE VAREILLES-SOMMIERES (note 102), p. 86-87.

<sup>120</sup> M. GUTZWILLER, *Geschichte* (note 1), p. 14-15.

<sup>121</sup> R. MORTENSEN/ R. GARNETT/ M. KEYES, *Private International Law in Australia*, 4th ed. (LexisNexis Australia, 2018), p. 8.

<sup>122</sup> LALIVE, (note 103), p. 56-57; See especially F.K. JUENGER (note 2), p. 12; also S. SYMEONIDES / W. PERDUE / A. T. VON MEHREN, *Conflict of Laws: American, Comparative, International*, St Paul Minn. 1998, p. 7 n. 2; A. SACK, *Conflicts of Laws in the History of the English Law*, in *Law – A Century of Progress*, vol. 3, New York 1937, p. 342; L. MCDUGAL, “Private” International Law: *Ius Gentium* versus Choice of Law Rules or Approaches, *Am. J. Comp. L.* 1990, p. 531.

<sup>123</sup> See H. YNTEMA (note 1), p. 301 (“a younger and esteemed contemporary of the four celebrated ‘doctores’ of Bologna”), p. 302 (“had the genius to propose”, “equitable conception”), p. 311 (“equitable conception”), p. 317 (Yntema’s Postscript noting we have come full circle from the “equitable conception”).

<sup>124</sup> C. FORSYTH (note 111), p. 36 n. 46, noting that “[t]he opinions of this ancient proponent of some very modern theories did not amount to much.”

<sup>125</sup> K. LIPSTEIN (note 111), p. 157. Cf. C. FORSYTH (note 111), p. 64-65: even though he only mentions Aldricus by name in a footnote in his discussion of medieval conflict of laws, he uses his name in the title of that subsection, discussing the doctrine of David Cavers.

This diversity of opinion is telling as to current concerns. Those sympathetic to “better law” approaches, or at least to an increased role for judicial discretion, or substantive considerations, in the choice-of-law process view Aldricus indeed as an early ancestor: this is why this attitude is more common in the U.S., where such approaches form, in the very least, a legitimate part of modern conflicts discussion. But there are also those who, by emphasizing the medieval precedent of a very modern doctrine, suggest that this approach has been tried – and lost – before. We see a similar pattern in the parallels drawn between modern unilateralists and the unilateralist statistes.

In Continental doctrine, the dividing line is drawn differently: those sympathetic to Aldricus view him as having made a – crucial – first step towards the elaboration of conflicts doctrine. But from another point of view, which again relates to modern sensibilities, Aldricus is seen as not having conceptualized the conflict of laws as such: if Aldricus had had his way, either there would have been no conflict of laws or, at the very least, learned law would have received stronger competition from the judge.

#### **IV. Conclusion**

The study of doctrinal beginnings undertaken in this paper has involved three dimensions. The first one was to be mindful of the methodological challenges involved, in the choice of material and in striking a balance between too much of an intrinsic or extrinsic historical perspective. The second one was to examine critically our secondary literature, in order to understand the historical consciousness, and literature, of present-day private international law, as it has formed over time. The third one was the historical examination properly speaking, evaluating texts and context with a view to the doctrinal discussion of private international law.

The method employed in this article was to rely on a textual analysis of specific primary texts, attempting to place them in context but also to understand them in terms of an evolution in legal thought. These texts acquire meaning through our ongoing discourse, our awareness of certain problems, the employment of certain argumentative and conceptual tools. But too often in the literature they have been seen as setting a general theory, whereas these are living texts that must be perceived in terms of their intended audience and, especially, of the problems they were intended to address.

Our study has presented several examples of history as genealogy. Aldricus is a characteristic case in point: neglected by some, elevated by others to a precursor of modern approaches, the treatment of Aldricus’ short, second-hand passage in the literature is telling of each author’s sensibilities. But we have also seen that the same holds true of the gloss *si Bononiensis* itself, or even of the gloss’ anchor to *l. cunctos populos*, which we have used to discern different attitudes concerning the role of legal doctrine vis-à-vis the courts, or even the legislator, and even different normative agendas in private international law. We have therefore seen different narratives, emphasizing respectively the positive-law foundation or the elaboration of a distinct conflicts doctrine. We have also seen narratives elevating,

or denigrating, legal scholarship; narratives emphasizing the departure from the judicial inclination towards *lex fori*, and others promoting a partnership between theory and practice. Some narratives personify the founding figure – a homage to the role that individual scholars have played in the development of our subject. Yet others anonymize this foundational moment – alluding to the necessity of these ideas taking course or even promoting alternatives to the doctrinal conflict of laws. In these narratives, historical context fades in the background, as the main driving force is to draw parallels to modern ideas, arguments in present-day battles or to convey a cyclical or evolutionary understanding of doctrine. But the reader is nonetheless motivated to make connections with the past, to seek out affinities.

The historical dimension of this study was concerned with understanding the context (and implications thereof) in which “conflict of laws” can be said to have emerged as a subject of doctrinal study, rather than with identifying a “founder”. From a purely historical point of view, we shall never be certain of the precise doctrinal beginnings of the conflict of laws. So much of the glossators’ writing has been lost and, for much that survives, it is impossible to attribute with confidence the paternity of an idea: medieval doctrine was a collaborative exercise. One could thus acclaim Carolus as the first to produce what can be truly regarded as a doctrinal text on the conflict of laws, identifying a conflict between approaches as well as laws and employing language not unfamiliar to the doctrinal discourse that was started. But it was Accursius who really launched the doctrinal discourse, by adopting the gloss of Carolus into his own, widely circulated, systematic work. Whereas Accursius was very conscious of the scholarly – and commercial – value of his *Glossa ordinaria*, and was also mindful of the immediate legal consequences of his gloss on *si Bononienis*, it is improbable that he could imagine his single-sentence comment as constituting a foundational text for a distinct legal discourse. And this matters, because these doctrinal beginnings have acquired their value *ex post*, that is through the eventual construction of a distinct subject of the conflict of laws and, eventually, of a discipline of private international law.

Three principal conclusions can be derived from this timid examination. The first one involves the political dimension: the assertion of adjudicative and normative jurisdiction by the emerging Italian polities. The High Middle Ages was a time when the imperial power was asserted, supported by strong legal arguments, and our texts played right into that: from the point of view of medieval legal history, if we could discern a pattern from Aldricus to Accursius via Carolus, it is precisely the increased confidence in limiting the power of the city to apply its law. Aldricus would enable the judge to choose the “stronger” among competing customs in a case: there is no mention of a superior law that must be applied, which would suggest that he was concerned with a contractual case rather than the more policy-heavy instances of legislative intervention on succession and personal status, which we see preoccupying Bartolus, a few generations later. Carolus hints at the limits imposed by the *ius commune* on a city’s power but he acknowledges a potent argument (of tacit submission) for the city applying its law: the idea of jurisdiction is here finally making its appearance. Accursius is more confident in denying the city the application of its law, in derogation of the *ius commune*, to non-subjects. This a powerful assertion of the application of the *ius commune*, the

Roman law, which would however be increasingly challenged, leading to a development of an entire doctrine by the next century. Even though their language (and political theology) is markedly different from ours, medieval jurists writing on conflicts issues are in this regard not unlike classical and modern private international lawyers, tasked with managing the parochial assertions of jurisdiction and using to that effect a combination of pragmatic arguments and legal fictions of hierarchy. Even the complicated relationship between the universal aspirations of medieval scholarship and the hard, local realities of court practice should find resonance with us.

The second issue concerns the employment of a doctrinal foundation. Historical consciousness aside, it seems more likely that *l. cunctos populos* became an anchor for subsequent treatments once thinking about such conflicts could make use of such an anchor. The choice of *locus* had its own significance for our story, but it is the doctrinal edifices to which it gave rise that matter most. We must neither underestimate the power, and use, of doctrinal foundations, nor mistake them for the actual doctrine they are supposed to support, but not supplant.

This brings us to a third observation, regarding the relationship between doctrine and the legal subject matter. The polities of the High Middle Ages attempted to address the needs of commerce and social life by navigating between tradition and innovation and the same holds true of the learned law. This is reflected in the conceptual evolution that, if carefully examined, is discernible in our principal texts (but also the other medieval texts discussed in the background). In the medieval theory of sources, with which especially the Italian school of conflicts doctrine is intimately connected, custom equalled statute. But, in terms of law and society, it appears that the polities' move from custom to statute entailed a different approach to thinking about the scope of law and the relation between *ius commune* and *iura propria*.

Ernst Rabel suggested that “this branch of law ... seems predestined always to lag behind the currents of general jurisprudence”.<sup>126</sup> This need not be so, however: we cannot understand the conflict of laws without understanding the “general jurisprudence” on which it has been constructed, and with which it has to constantly interact but we must also be mindful of our potential contribution, and even the capacity of our specialised discourse to help in the understanding of the legal phenomenon.

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<sup>126</sup> E. RABEL (note 88), p. 9.

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