

After dinner speech GEDIP 18 Sept, 2010

I will first address the accompanying persons who have chosen a lawyer, and moreover a conflicts lawyer, a private international law man, as the partner of your life. I think that you will agree with me that the atmosphere of these meetings is extremely pleasant. Among the members and the accompanying persons strong friendships have been established over the years. Yet I still wonder how it is to be married to a conflicts lawyer, I will come back to that.

Among the conflicts lawyers of the past there have been many schools of thought. There are the doctrinaires, who cherish principle and there are the pragmatists who claim that the life of law, and also of the conflicts, is not logic and principles but experience. Both are right and both are wrong, and this paradox has been one of the eternal problems of our science

Among the doctrinarians I have read there was the American Joseph Beale who lived and worked in the first half of the 20th Century. Like several of his American predecessors Beale adhered to the principle of territoriality . A contract had to be governed by the law of the territory where it was concluded. Its performance by the law of the territory in which it was to be performed. The place of contracting and place of performance were the decisive connecting elements. His views were those of a man of principle. Beale was easy to read and wrote a good style. His views were clear.

I never met Beale but on Wednesday I saw for the first time a picture of him which Symeon had with him in a lecture he gave here. The picture showed a handsome man who looked more like a gentle family doctor than like a rigid academic with strong views.

In Paris, I heard lectures by Niboyet in 1951. Into the lecture room came a big and bombastic professor enveloped in a big black gown and accompanied by some kind of a porter or custodian in uniform. The porter carried Niboyet's books and put them on the desk. He bowed to the professor and went away. Niboyet then read aloud from his text book and I was not amused. His two principles were territoriality of the laws and particularism. The French national interest should dictate the French conflict rules. He also opposed party autonomy. After the lectures the students applauded violently thereby showing, I think, that they found the scenery ridiculous.

Like many continental writers of that time Niboyet paid very little attention to the case law. In his books he expanded his own abstract ideas. At that time in France there was on some points strong disagreement between the professors and the courts about the conflict rules. As several other continental professors the French professors believed that they were much wiser than the judges. However when their students became judges they did what the courts did, and not what they had learned in the law school.

The English professor Cheshire was a different type. He taught in Oxford in the middle of the 20th century. It was his book which seduced me to study private international law. One day in the summer of 1944, when I lived in Sweden as a refugee, I saw in a law library Cheshire's book on *Private International Law*. I took it from the shelf and looked into it. It was about how English courts dealt with cases having a foreign element. It described these cases. One was about a Moslem who came from the Near East to London with his three wives. How did the courts react to such a ménage in a country where husbands had to contend themselves with one wife? Another case was about two Englishmen who had made a contract for the smuggling of spirits into the United States during the time of prohibition. Was this

contract enforceable? Both the cases and the way in which the author analysed them interested me.

As other English writers Cheshire reported what the courts had done. That was his law. He was much less doctrinaire than Niboyet. English lawyers never believed that they were the gurus of the law. They classify themselves as secondary authority. I never met Cheshire, but if he had been as charming a person as he was a writer he must have been very nice.

Niboyet's successor in the Paris chair was Henri Batiffol. His best book was *Les conflits de lois en matière de contrats* from 1938. It was a true and thorough comparative analysis of the conflict of laws of contracts in France, England Germany, Italy, Switzerland and the USA. French is a beautiful language and Batiffol was a fine stylist. His emphasis was on the case law of these countries and that was the first French monograph I have seen that devoted itself to foreign cases. This book was and is worthy as serving as a model for any writer of comparative and conflicts of law.

Every self-respecting French scholar must be guided by some lofty theories and Batiffol also had them. They were not all of them sustainable, but that did not made his book less valuable.

I only met Batiffol on a few occasions. His wife was fond of him. Life has taught me that men who after a long marriage are still loved by their wives must be good and honorable persons. Batiffol's wife told me that she could not judge how good a lawyer her Henri was. She assumed, however, that he was a great lawyer. But she could tell me that Batiffol was a great diplomat who was good at pouring oil on the troubled waters in the Paris Law Faculty where there sometimes were tensions. Batiffol was also kind, gentle and tolerant.

I could also tell you about the many excellent German scholars, about Ernst Rabel, one of the most brilliant and influential comparatists and conflicts lawyer that ever existed, on Arthur Nussbaum who was a great conflicts lawyer and Hans Heinrich Neuhaus who was my and many other young lawyer's Socrates in the Max Planck Institute in Hamburg and who taught us the concepts of private international law. Whenever he saw an article I had written in German or English he sent me a letter with his criticism, and that was sometimes harsh. The Max Planck Institute was and is the Mecca of comparative and conflicts law in the world. I love that place.

The last conflicts lawyer I will mention is the Harvard professor David F Cavers who was one of those who started the American revolution of the Conflicts of law. I never met him but we have corresponded with each other.

Cavers was an indoctrinarian pragmatist. In an article in the Harvard Law Review from 1933 he questioned whether the rules to which the American courts paid lip service were in fact the rules which they followed. In a careful analysis of American cases he showed that the courts of the United States had not allowed the connecting elements alone to determine the law applicable. Very often they considered the results which the application of the various laws would produce. A certain connecting factor was relied on because it gave the courts the opportunity to apply the law of the state or the country to which it pointed, but this was not in fact an automatic application of a choice-of-law rule. It was a choice of what the court thought was "the better law". I was impressed by Caver's honesty. However, his attempts at replacing the existing rules with better rules was in my view not very successful.

In the last decades the American conflicts of law has been under the influence of Cavers, and other modernists. It has become so flexible that legal certainty has been lost.

The rules of the traditional theory of private international law, the American modernist *Brainerd Currie* said, "have not worked and cannot be made to work....But the root of the trouble goes deeper. In attempting to use rules we encounter difficulties that stem, not from the fact that the particular rules are bad...but rather from the fact that we have such rules at all. We would be better off without choice of law rules".¹

That is a crazy statement. We cannot do without conflict rules.

However, the fact that it is impossible to establish good conflicts rules in some areas such as contracts and torts made me turn to the unification of the substantive law rules, but that was not unproblematic either.

But both the unification of substantive law and the attempts at harmonizing the conflicts of law are fascinating subjects. We should not give them up because they are difficult.

However, the highly cerebral character of the conflict of laws has made it many skeptics. It has been accused of sophistication and sophistry. The average lawyers do not like the Conflicts of law. Some say that it is obscure and that the scholars rave in the dark. The critics have called its academic debates, I quote in French: un combat des nègres le soir dans un tunnel. So I wonder whether among the accompanying ladies present hereto night there are some who feel that they live with an egghead.

¹ *Currie, Selected Essays on the Conflict of Laws* 1963, 180,183.

I definitely do not think so. I must point out that in spite of its faults conflicts is the most intellectual of all legal sciences. It has beauty in it . An English writer has said that there is sweep and range in it which is almost lyric in its completeness .-It is the fugal music of the law.

So my dear ladies I am sure that you are married to a person who lives in a lyric harmony with his work and who is as tolerant and behaves as gracefully as this noble science requires.