JUDICIAL REVIEW IN CONFLICT OF LAWS *)

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It has been a practice of long standing for legislatures to attempt to act extraterritorially. The policies behind some extraterritorial statutes are laudable; others, not. Although nations try, by this method, to obtain benefits for their own citizens, they also resist similar attempts by other States. This type of sparring goes on among the forty-eight States as well as among nations. Various techniques have been used to reach out beyond state boundaries. Some statutes expressly provide that they are to be applied to acts taking place beyond the limits of the States. More often, one finds the subject of the legislative act stated in broad terms, such as »every person who shall do« or »every liability insurance policy shall contain«, with no attendant statement that the statute is to be applied only to acts taking place at home.

Not infrequently one hears that Conflict of Laws is a multiplicity of State systems of rules, and that the rules are not essentially inter-state or international in character. Thus, Frederic Harrison said that Conflict of Laws »is that portion of every system of Municipal Law which determines the conditions on which it will found legal relations on the rules of some other system of Municipal Law«. In the same sense Dicey said that he treated »the principles of private international law recognised by English Courts« as a branch of »the law of England.« According to this theory, there are forty-eight such systems in the United States.

This supposed internal character of Conflict of Laws is based upon such ideas as that:

1. The will of the sovereign is law
2. The sovereign power of the State resides in those departments having political control of the purse and the physical force
3. The courts are the weakest branch of the State
4. The judges may not make law, but must administer the commands of the sovereign

This supposed judicial subservience, said to be especially apparent in England because of the doctrine of the Sovereignty of Parliament,
is also asserted to be true in the United States in the department called Conflict of Laws. It is pointed out that it is not an international tribunal, but a national or State court which usually determines questions of Conflict of Laws. Because of this and because State judges are said to be essentially nationalistic and provincial, it is supposed to follow that they will not apply the principles, standards, and rules of either private or public international law. While granting that American courts will on rare occasion hold a statute unconstitutional, the position is that the American judge neither understands nor trusts public or private international law; and that even if he did, he would not, indeed he is not free to, conform the application of State statute to international law and decide cases on that basis. A State statute providing for untoward extraterritorial operation is supposed to be of no interest to (certainly no responsibility of) the courts of that State, whose duty is to apply the Act in accordance with its terms, without question.

Uncomplimentary as these ideas about the judiciary are, it must be granted that there is an element of truth in some of them, especially as reflected in lower court decisions. Our question is whether or not there is enough truth in the idea solidly to postulate a particularistic character to this branch of law. An exhaustive study of this subject could fill a volume or more. The limited compass of an article restricts our inquiry to a sampling of what American (and a few British) courts have done, in the area called legislative jurisdiction or the reach of State power, in applying statutory provisions (whose terms were sufficiently broad to be susceptible of extraterritorial operation) to cases involving out-of-State facts. The cases discussed are selected from courts of different levels (State, lower federal, and the Supreme Court of the United States) and are distributed geographically throughout the United States. About one-third arose before 1880, two-thirds since. It has not been necessary to go far afield for these cases. Most of them will be found in standard casebooks. Since we are concerned with motivations, we shall not be primarily concerned with the correctness of the decisions.

**BRITISH DOGMA VS PRACTICE**

The doctrine just outlined appears baldly in England, as regards Acts of Parliament. Since much of our jurisprudence follows the Anglo-Saxon pattern, it will be helpful, in appreciating the American scene, to glance, first, at the English situation. *Ex parte Blain* (1879)