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ASPECTS PHILOSOPHIQUES DU DROIT INTERNATIONAL PRIVÉ, by Henri Batiffol. Librairie Dalloz, Paris, 1956. Pp. 346.

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the problems which were made the keynotes of the celebration, and it is convenient to have such lectures assembled in one volume.¹

*Robert A. Pascal**

ASPECTS PHILOSOPHIQUES DU DROIT INTERNATIONAL PRIVÉ, by Henri Batiffol. Librairie Dalloz, Paris, 1956. Pp. 346.

At the end of the last century, a French legal writer said: "The legislation of a country is an element of its power; we have had evidence to prove this. It should not work against us."¹ An ordered and coherent legislation is, indeed, a great source of rational strength and prestige for a nation. In his thought-provoking book Dean Batiffol makes the point that legal philosophy today — as far as Private International Law is concerned — has departed from the ultra-nationalism that dominated it during the nineteenth century and emphasizes, instead, that a legal system must be a means to the service of a better legal understanding in the juridical world. No claim is made that one legal system is superior to another; it is recognized rather that a "community of nature" binds and tends to unite both men and legal systems.

In less than four hundred pages, Professor Batiffol, already the author of the leading French book on Conflict of Laws, discusses the philosophical aspects of Private International Law.² Although in his title, he gives the impression that he is to be concerned with "philosophical aspects" only, he plunges deeper into the very heart of the subject than the complete treatise of Werner Goldschmidt,³ a book which is primarily concerned with the method of Private International Law and the rules of conflicts adopted by the Latin-American countries.

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1. Mention should be made of the excellent selected bibliography of English-language items by Julius J. Marke, Law Librarian and Associate Professor of Law, New York University. It collects the items under three headings: 1. The Code — Its Background, Technique, and Expansion; 2. The Code and Contemporary Problems (which corresponds to the reviewer's second and third groups of lectures), and 3. Codification and the Common-Law World.

1. GLASSON, *LA CODIFICATION EN EUROPE AU XIX IEME SIÈCLE*, quoted by Larnaude, *Le Code Civil et la nécessité de sa révision* in 2 *LE CODE CIVIL, LIVRE DU CENTENAIRE* 931 (1904).

2. BATIFFOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT INTERNATIONAL PRIVÉ* (2d ed. 1955).

3. *SISTEMA Y FILOSOFIA DEL DERECHO INTERNACIONAL PRIVADO* (2d ed. 1952-1954).

According to Dr. Batiffol, the problems of conflicts of law arise out of factual situations which involve a foreign element so that two or several legal systems may be claimed by the parties to the case. At a rudimentary stage of the development of legal science, it would have been possible for the judge who had to decide the case to take into consideration only the regulations of the internal law unless he was told not to do so by a mandatory order of the legislative authority.⁴ But since it is impossible for a State to confine its citizens within the limits of its borders and, moreover, since every political entity has a legitimate desire to protect its citizens outside its borders, a régime predicated upon the idea of pure reciprocity tends to be established. Such was the case in the legal history of France in the nineteenth century. However, without denying the existence of internal elements, the *lex fori* still is the point of reference in the solution of a problem of conflict of laws. The easy temptation would be therefore to characterize strictly according to the rules of the internal legal system without taking into consideration the international element. This pitfall must be overcome, and the characterization *lex fori* will look for the acknowledgment of the rule of the foreign legal system. Dr. Batiffol writes that for the purpose of "articulation" it is necessary to use as a landmark the category *lex fori*. (p. 31) In this respect, an international characterization based upon a comparative analysis of alien legal concepts would face the tendency to a legal isolationism resulting from a narrow and strict interpretation of the *lex fori*.⁵ An author who is fundamentally concerned with a system centered around the idea of "a harmony of solutions"—which according to Dr. Batiffol cannot be the primary objective of the Private International Law—writes as follows: "The true difficulties consist in the adjustment of several internal legal systems working together in respect of the same set of facts."⁶ Under the present conditions of the systematization of internal law, however, is any adjustment possible? What, moreover, are the means offered for this, by legal philosophy and positive legislation? These are the problems that Dr. Batiffol discusses in his work.

One of the lights which is thrown on the subject by the writer

4. See, for instance, the nineteenth century construction of Article 11 of the French Civil Code.

5. RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* (1945).

6. WOLFF, *PRIVATE INTERNATIONAL LAW* 166, n. 157 (2d ed. 1950).

is the way he approaches the problem of "qualifications." Emphasizing the relations which bind internal provisions of law and external legal systems, Dr. Batiffol has to face a delicate problem wherever the internal categories do not give any help in characterizing a foreign legal institution, either unknown or *a priori* entirely different. The answer to this problem is not to be found in the nature of the institution which is assumed to be radically different, but it is rather to be found in the idea of function — characterization, for instance, of a polygamic marriage as a real marriage or only as a form of concubinage.

Dr. Batiffol argues that, in contrast to the strict qualification *lex fori* there is the tendency within the field of the Conflict of Laws to give wide scope to the principle of "autonomy of choice of law."⁷

Witness the extension to Private International Law of the famous Article 1134 of the French Civil Code: "Agreements legally entered into have the effect of laws on those who have formed them." Certainly the principle is excluded from such matters as family law or succession, but the field of contracts appears to be the place of election for the extension of this principle. However, the present evolution of internal legislations prove that less and less the parties to an agreement are free to put down any provisos they want. The scope of public policy becomes broader and broader. The State cannot be indifferent to these private contracts whether these contracts are internal or contain an international element. As Gény already stated it at the end of the nineteenth century, the necessary plenitude of positive law exercises a prevailing influence on the judges who so far have always been opposed to the application of a series of norms based upon a principle of natural law. Even in a border situation such as that of the Scandinavian Airlines System — this typical international corporation mentions in its charter that the legal difficulties which may arise will be decided according to the law of the jurisdiction before which the action will be brought. This proves that a complete autonomy in choice of law is spurious. With the failure of this trial, the only possibility left, according to Dean Batiffol, is the adjustment of the different legal systems through the authority of the power of the national states. As long as the world is po-

7. Yntema, *Autonomy in Choice of Law*, 1 AM. J. COMP. L. 341 (1952), reprinted in *SELECTED READINGS IN CONFLICT OF LAWS* 681 (1956).

litically divided on a nationalist basis, however, there is no possibility of establishing one set of common rules of conflicts. Nevertheless, the essence of law is rationality for Dean Batiffol and for this reason a rational adjustment of the judicial systems may be anticipated for the future. The imperative nature of law, which is — again according to the author — subsidiary to the rational essence of law, will not stand in the way of this adjustment. However, granted that the coordination of different legal systems is the final objective of Private International Law, there is no simple method of attaining this coordination.

The author considers that the best approach must be based upon the concept of the fundamental community of the nature of human beings on the one hand, and the analysis of the sociological environment on the other. Since appeal to natural law, which rests on this assumption of the identity of human nature, is limited in its scope by the complexity of the technical society in which we are living, the deductive method is therefore strictly limited, but it has the great merit of providing some idea of contemplated solutions and foreseeable decisions. Sociological analysis on the other hand, originally, presupposed that a simple analysis of the environment would discover some fundamental basis for law; however, it underestimated the voluntary element in the formation of law. The sociological method, therefore, has its own limitations. Only, according to the writer, a teleological reasoning based on both the deductive and sociological methods would overcome the limitations of either method taken individually. Some ultimate conclusions will thus be reached. The utilitarians also approached legal problems from a teleological point of view; however, Bentham and Mill confused the principles of private and general interests, whereas the everyday experience shows us that it is "*le malheur des uns qui fait le bonheur des autres.*"

Professor Batiffol associates himself with the School of Aquinas and Ihering. It is quite necessary to integrate private interests with the general interest.⁸ It is his view that a conclusion may be reached through an analysis of positive law — an analysis which, he argues, will light on the process of positive law itself. Dr. Batiffol, however, would be the first to admit that the state of positive law at the moment offers many obstacles to those who hope to coordinate several legal systems.

8. 2. VON IHERING, *DER ZWECK IM RECHT* 161, No. 2 (1877-1883).

Much consolation, however, may be found in the material element which is used to localize contracts, since even in the absence of any explicit intention of the parties, this material localization of the contract on the international scene may be the solution in the determination of the applicable legal system. This localization not only protects the parties (private utility) but gives also protection to the third parties (general interest in view of the security of the transactions) who are interested to know where the performance of the contract will occur. In a sense, this elementary but fundamental determination of the law which has to be applied to the contracts takes care in the best possible way of the common interests focussed around the agreement.

Professor Batiffol analyzes carefully all the data available to juridical science. His observations of legal facts throw new lights on the field of Private International Law. He points out at the outset that internal law as well as the field of Conflict of Laws has a tendency to organize itself in terms of legal systems. In his usage, the term system is to be understood as meaning a coordinated and ordered set of legal principles. Such systems, he contends, aim at certain general objectives. He argues, furthermore, that a thoroughgoing analysis of these systems would illuminate the general principles on which they rest.

The book is by no means easy reading, and it has to be studied with almost microscopic attention if the depth of the author's thoughts and his spirit of honest inquiry are to be appreciated. Acknowledging the essential duality of law, Dean Batiffol admits that he would prefer to conduct his inquiry on deductive lines exclusively. Such an approach, he feels, would be more in accordance with the nature of man and things. He is, however, aware of the limitations of this method, as has been pointed out above, and he finally resorts to a teleological approach.

He puts his erudition in the fields of private and comparative law to great advantage in the use that he makes of the main contribution of English, German, Italian, and Spanish legal writers. This book will undoubtedly be translated into English for the benefit of legal science. It is a great contribution to our knowledge of Private International Law and its prospects. The work will certainly mediate between different legal systems and bring them into closer rapport. Dr. Batiffol, indeed, shows that Private International Law may serve as a bridge between these different legal systems.

To conclude, we may perhaps, turn the words of John Donne to our purpose and to that of Dean Batiffol and say: "No legal system is an island complete in itself; every legal system is a piece of the juridical world, a part of the main land."

*Raymond Jeanclos**

THE LAWYER'S TREASURY, edited by Eugene C. Gerhart. The Bobbs-Merrill Company, Inc., Indianapolis, 1956. Pp. 520.

Someone has said that the principal benefit to be derived from reviewing a book is that the reviewer becomes an expert on the book without having to read it; another, more economically motivated, has said that the principal advantage of reviewing a book is that the reviewer can keep without charge the copy furnished for review and does not have to buy one.

I have derived neither benefit: I had purchased and almost completed reading *The Lawyer's Treasury* when I was requested to review it.

The Lawyer's Treasury is an anthology of the best to appear in the forty-year history of the American Bar Association's official publication, *American Bar Association Journal*. In this sense, the work offers nothing new and nothing which could not be obtained from the files of many public libraries. The book's value lies in this: that the best writings of general interest to the legal profession during the last forty years were screened by the leaders of the profession today and, from the one hundred and twenty-five articles nominated for inclusion, forty-six were selected and published. This is professed by the publishers and confirmed by the tendered product.

As with all anthologies, the reader will regret that this or that article was not included (or excluded) and will undoubtedly feel now and then that the sequence of the articles should have been somewhat different. The forty-six articles occupy only 469 pages, the shortest occupying only two pages and the longest nineteen.

The book contains much that is provocative, much that is inspiring and informative, and is as a whole refreshing and interesting.

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