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BARTOLUS AND THE CONFLICT OF LAWS

NIKITAS E. HATZIMIHAIL*

I. INTRODUCTION

Of the many jurists who have dealt with the “dismal swamp” of the conflict of laws, perhaps only Bartolus of Sassoferrato (1314-1357), and Friedrich Karl von Savigny (1779-1861), may today boast of a truly global reputation. Charles Dumoulin, Ulric Huber or Joseph Story are, by comparison, only local celebrities. This is interesting, because, while the legacy of Savigny to the conflict of laws is easy to pinpoint and generally acknowledged, it is less clear what Bartolus has stood for. A respectable French textbook reduces him to the role of having made existing doctrines more easily accessible to a broader public¹. At the same time, a leading American casebook goes as far as to ascribe to Bartolus, among other things, the discovery of a constitutional foundation for his analysis of conflicts issues, the unilateralist approach to

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This article is the child of a longstanding discussion with Professor Charles Donahue, to whom I owe many thanks as well as the translations of Carolus de Tocco, Accursius and Aldricus. A more extensive study of Bartolus appears in Nikitas Hatzimihail, *Preclassical Conflict of Laws* (Cambridge, 2011: Cambridge University Press).

¹ Yvon Loussouarn & Pierre Bourel, *Droit international privé* (6ème éd., Dalloz, Paris 1996) 73 : “Bartole ... qui fut surtout un vulgarisateur de la doctrine des glossateurs”.

choice-of-law, and the distinction between real and personal statutes²: for conflicts doctrine, this is the equivalent of one person discovering both the wheel and the use of iron. Others have in turn suggested that Bartolus first came up with the choice-of-law rules that are still in use today.

The divergence in opinions about the legacy of Bartolus has been exacerbated in recent times. Things have not been helped by the fact that most historical research on pre-1800 conflict of laws [hereinafter: pre-classical conflict of laws] dates back to the late nineteenth and early twentieth century, and accordingly reflects the conflicts scholarship, and medieval historiography, of a different era. This has privileged certain types of historical material, certain historical narratives about the creation and evolution of the conflict of laws, and certain readings of the classic pre-classical texts³.

The other complicating factor has to do with contemporary perceptions on medieval conflict of laws. We often have to navigate between the Scylla of state sovereignty being conceived as the singular foundation of the conflict of laws, and the Charrybdis of conceiving the *ius commune*, and medieval European legal scholarship in general, as a singular, unitary legal edifice. This fixation on state sovereignty as a foundation for the conflict of laws has led many to view pre-classical conflict of laws with colored glasses: for the ones, conflict of laws in medieval Italy consists of “researching the limits of the sovereignty” of Italian city states; for the others, it cannot be called conflict of laws properly speaking, but it is a genre akin to statutory interpretation. In the meanwhile, many of the proponents of a new “European private law” for the territories of the European Union, who invoke the medieval or early modern *ius commune* for genealogical validation, would as soon forget the possible existence within that *ius commune* of a legal system, or literary genre, managing the diversity of local laws.

This article has been conceived as a study of doctrinal medieval legal history. Its object of study is Bartolus’s treatment of the conflict of laws – a text rich, yet small enough; self-sufficient, yet necessitating connections with the rest of Bartolan legal and political thought. This is a text with a notable contemporaneous context, but also with an especially fertile second life, as part of a specialized doctrinal discourse. Too often in conflicts literature this second life has prevailed over the text itself. But trying to exclude this second

² See Symeon Symeonides, Wendy Perdue, & Arthur T. von Mehren, *Conflict of Laws: American, Comparative, International* (Thomson/West, St Paul 1998) 7-9.

³ See Nikitas Hatzimihail, *Pre-Classical Conflict of Laws* (CUP, Cambridge 2011).

life from any consideration has also led to a sterile reading of the text, to losing the understanding of what Bartolus was doing.

The first part of the article introduces the text. After a short prelude on the gloss that formed the starting point for Bartolus and his contemporaries (Section II), we will study in some detail the Bartolan text (Section III).

The second part discusses the text – along two axes. The first one will present the basic discussions concerning Bartolus in the doctrinal history of the conflict of laws (Section IV). The second one will consider the relationship of the text to the international system – and politics – in which Bartolus played a part (Section V).

II. PRELUDE

Conflicts historians have paid some attention to the “first” doctrinal conflicts text – a gloss on the first words of the first provision of the Code, *cunctos populos*: in that provision, the Roman Emperor wills “that all peoples whom the due temperance of Our clemency rules live in accordance to that religion which the Divine Apostle Peter gave to the Romans”⁴. It is the *Glossa Ordinaria* of Accursius that made it into posterity and is commented upon by Bartolus:

Argument that if a Bolognese is sued at Mantua he ought not be judged according to the statutes of Mantua to which he is not subject, because it says [i.e., the *lex*] ‘which [the *imperium*] of our clemency [rules]’⁵.

Yet conflicts historians have discovered an earlier, richer gloss dating from around 1200:

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 Mantuan litigates against a Bolognese in this city [i.e., Bologna] that the statute not harm the Mantuan. But some, however, say the contrary to this, [using the] argument that the Mantuan here follows the forum by summoning the Bolog-

⁴ C.1.1.1. (edict of emperors Gratian, Valentinian and Theodosius, 380 C.E.; C.1.1. is entitled *De summa trinitate et de fide catholica et ut nemo de ea publice contendere audeat*).

⁵ Accursius ad C.1.1.1 v^o quos (Venice 1488), fol. 4va: “Argumentum quod si Bononiensis conveniatur Mutinae non debet iudicari secundum Statuta Mutinae quibus non subest, cum dicat: quos nostrae clementiae”.

nese [to the Bolognese court], and by this act (unde) he accepts all the laws of this forum⁶.

It is interesting that the Ordinary Gloss only maintained the argument against the extended application of the city law, omitting the contrary argument⁷. Viewed in the context of the thirteenth century, the Gloss took a position defending the application of the *ius commune* and delaying the assertion of local “sovereignty.” What nineteenth- and twentieth-century conflicts historians did with it, however, is to note how the Gloss recognized the applicability of foreign law – or at least law different from that of the *lex fori* – and may even have espoused a “personalist” conflicts idea⁸. What is clear, in any case, is that, as the *Ordinaria* became the starting point for the next generation of scholars – the commentators or post-glossators – *lex cunctos populos* became the main basis for the treatment of conflicts questions under the *Corpus Iuris*⁹.

⁶ Carolus de Tocco ad C.1.1.1 MS Bibl. nat. 4546 v^o 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^o quum igitur, etc.). Est autem hoc contra consuetudines civitatum que 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”.

The text was transcribed by Karl Neumeyer, *Die gemeinrechtliche Entwicklung des internationalen Privat- und Strafrechts bis Bartolus*, vol. II (Munich 1916) 75 and then E.M. Meijers, *L’histoire des principes fondamentaux du droit international privé à partir du Moyen Age*, 49 RCADI (1934) 542-686, 594. Neumeyer attributed it to Rodofredus. See the contrary argument of Meijers, *ibid*, 594 note 1.

⁷ In that sense our inquiry seems to validate Savigny’s allegations that Accursius butchered, for the purposes of his *Glossa Ordinaria*, the rich juristic tradition that preceded him. See Friedrich Karl von Savigny, *Geschichte des römischen Rechts im Mittelalter*, Ch. 51-53. In his turn Jules Valéry, *Manuel de droit international privé* (Fontemoing, Paris 1914) 23 not knowing about the pre-existing glosses (but possibly aware of the allegations of corruption by Accursius and members of his family), hints at personal motives for the gloss’s extreme personalism (“inspirée à Accurse par le désir de servir les intérêts de quelque Bolognais de ses amis engagé dans une instance portée devant les juges de la ville voisine”).

⁸ See e.g. Valéry, *supra* note 7, 23.

⁹ However, the gloss *cunctos populos* was not necessarily the only one, as is generally assumed. Bartolus, for example, also treated conflicts issues in his commentary on the *lex de quibus*, D.1.3.32, which provides that “what ought to be held to in those cases where we have no applicable written law is the practice established by customs and usage”. That commentary is translated in J.A. Clarence Smith, Bartolo on the Conflict of Laws, *American Journal of Legal History* 1970, 163-174 [preceding a translation of Bartolus ad C.1.1.1]. In the late thir-

Bartolus's principal treatment of conflicts issues indeed comes as a commentary on the gloss *si Bononiensis*, in nos. 13-51 of his commentary on *cunctos populos*¹⁰. Bartolus uses neither the term *conflictus legum*, nor any term covering the entire subject. Nor is the text a stand-alone "treatise" (*tractatus*), a genre with which Bartolus was quite familiar. However, considering the comprehensiveness and sophistication in the treatment of the topic, we may assume it to have been more than a simple part of Bartolus's discourse

teenth century, the ultramontanus Jacobus de Ravanis (Jacques de Révigny) did not use the *lex de quibus*, whereas he did consider whether a custom (*consuetudo*) binds clerics and foreigners in the *quaestiones* to his *repetitio* on the "sister" *Jl.1.2.9* (*ex non scripto*). 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. 405 *et seq.*

¹⁰ Bartolus ad C.1.1.1 (Venice 1602), fol. 4ra-7rb. This is a fairly reliable edition of the complete works of Bartolus in 11 volumes. That text has also been transcribed by Andrew Barry, *Bartolus on the Conflict of Laws* (J.D. paper, Harvard Law School, 1998) and used here as corrected by Professor Charles Donahue and myself. I have also consulted the – less reliable – Lyon 1533 edition and, with the help of Professor Donahue, the manuscript Vatican City, Bibliotheca Apostolica Vaticana, MS Vat. Lat. 2589. The manuscript was first consulted – with some interesting results – by Clarence Smith. The translation used here is, with modifications, the one by Joseph Henry Beale in *Bartolus on the Conflict of Laws* (Harvard University Press, Cambridge 1914). Beale himself claimed no special qualifications as a translator of Medieval Latin, and the translation is quite liberal. In fact, one conflicts scholar has written a small piece criticizing Beale's translation: Albert Ehrenzweig, Beale's translation of Bartolus, *American Journal of Comparative Law* 1963, 384-385. A better-qualified translator alleges "continual errors, some of them truly monumental, ... not worthy treatment of a text nearly every paragraph of which was cited time and time again for three hundred years": Clarence Smith, *supra* note 9, 157. The remark is not fundamentally unjust: Beale omits the "not" from the Accursian gloss (17), translates *mutuavit* as "borrowed" rather than "lent" (20), repeats the error of the printed edition in distinguishing between prohibitive, permissive and "prohibitory" (*prohibitoria*) in §32 (30), and makes Jacques de Révigny (Jacobus de Ravanis) hail from Ravenna (44). More confusing is Beale's translation of nos. 25-26 (... *An autem tale testamentum porrigatur ad bona alibi existentia ubi non est talis consuetudo, infra dicemus / Sed circa hoc dubitatur quid si statutum disponit circa personam ...*) as "we now come to the question whether such a will extends to goods which are elsewhere, where there is no such custom. But as to this, doubt is raised whether, if the statute disposes with regard to a person" (27), instead of "we shall see below [nos. 36-37; trans.] as to the question ... But doubt is raised". A few other serious errors are noted in the course of Section I.A below. And of course Beale tends to translate in contemporary legal concepts (e.g. *solemnitas* becomes "form," *dispositio* "substance," and Bartolus appears to have espoused the idea of vested rights). On the other hand, Beale's prose is better than Clarence Smith's, whose translation is at times too technical and at times too literary; moreover, Clarence Smith omits several paragraphs of Bartolus ad C.1.11 as being a repetition of Bartolus ad D.1.3.32. But this is not fully the case and it certainly does not help the casual reader.

on the Code: the whole of Bartolus's commentary on de summa Trinitate was probably delivered on its own in an evening lecture, as a repetitio¹¹. But no separate publication of the conflicts treatment or the entire repetitio seems to have occurred prior to the late nineteenth century¹².

This article assumes that the Bartolan text was a repetitio. For the purposes of convenience, we will refer thus to the commentary on the gloss si Bononiensis, as if it were not preceded by nos. 1-12 ad C.1.1.1, which refer to general matters of statutory interpretation, religious doctrine as law, the legal treatment of heretics and certain types of personal incapacity¹³.

III. OUTLINE

The commentary is divided into nine sections, which themselves are grouped into two parts. Each part corresponds to one of the two questions into which Bartolus divides the issue posed in the gloss:

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 sub-

¹¹ See also Vatican City, Bibliotheca Apostolica Vaticana, MS Vat. Lat. 2589, fol. 68v.

¹² The most famous reprint in modern times is the one included by Guthrie in the appendix to the second edition of his translation of Savigny's conflict of laws treatment. See Friedrich Carl von Savigny, *Private international law, and the retrospective operation of statutes: a treatise on the conflict of laws, and the limits of their operation in respect of place and time* by Friedrich Carl von Savigny; translated, with notes, by William Guthrie; with an appendix containing the treatises of Bartolus, Molinaeus, Paul Voet, and Huber, (2nd edn, rev., T&T Clark, Edinburgh 1880). This was the Latin text used by Beale in his translation. Guthrie's Latin text is a reprint from the 1589 Basel edition of Bartolus' works, which was also used by Clarence Smith for his own translation [*Commentaria in primam [-secvndam] Infortiati partem; cum adnotationibvs doctissimorum plerumque qui in eundem sunt commentati* (Basle 1588)]. But according to Clarence Smith, *supra* note 9, 160 at note (e), "[a] rough count shows about forty new misprints in Guthrie's text, all but two of single letters, excluding mistakes in the references." Another reprint, from the Turin edition of 1574 was published by Meili in *Zeitschrift für internationales Privat- und Strafrecht mit besonderer Berücksichtigung der Rechtshilfe* 1894, 258 *et seq.*, 340 *et seq.*, 446 *et seq.* According to Clarence Smith, *supra* note 9, 160 at note (e), this reprint also "contains a fair sprinkling of errors, including, mirabile dictu, some of Guthrie's, but mainly in extending abbreviations and in translating the references into yet another system."

¹³ Bartolus ad C.1.1.1, nos. 1-12 (Venice 1602, fol. -4ra).

ject (non-subjects); second, whether the effect of a statute extends beyond the territory of those who set it down (the legislator)¹⁴.

In the first part of his Commentary Bartolus examines consecutively the question with regard to contracts (nos. 13-19), delicts (nu. 20), testaments (nos. 21-26) and real property (“those things that are neither contracts nor delicts nor testaments:” nu. 27). A fifth section, usually omitted as not pertaining to the conflict of laws¹⁵, examines “whether statutes and customs of the laity bind the clergy” (nos. 28-31)¹⁶. In the second part, Bartolus examines “whether statutes or customs may extend their effect outside the territory” (nu. 32). The issue “must be examined by many lines of questions” (nu. 32): some statutes are “prohibitive not by reason of a penalty but by reason of some solemnity” (statuta prohibitoria; nos. 32-33), other are permissive (statuta permissoria; nos. 34-43), and other punitive (statuta punitoria; nos. 44-49). The Commentary’s final section examines the (extraterritorial) effect of punitive judgments (effectum sententiae punientis; nos. 50-51).

The first four sections all begin with a hypothetical case in which a foreigner takes a broadly described action with legal consequences under the laws of the local jurisdiction, triggering the question “of what place should the statutes be observed or looked?” (e.g. nu. 13). On the contrary, the last four ones do not begin with hypothetical cases, but instead refer to statutes and cases as illustrations of the doctrinal arguments already made.

It is easy to realize that Bartolus is less keen on a rigorously structured exposition than his successors: the Commentary looks like an oral presentation, and repetitions are not uncommon. But the text is also vague – and multi-layered – enough to solicit several interpretations across time.

A. “*Cujus occasione videnda sunt duo...*”

¹⁴ Bartolus ad. C.1.1.1, nu. 13:

“Nunc veniamus ad glossam quae dicit quod si Bononiensis conveniatur Mutinae, non debet iudicari secundum statuta Mutinae, quibus non subest cui occasione videnda sunt duo et primo utrum statutum porrigat †extra territorium† ad non subditos, secundo utrum effectus statuti porrigat extra territorium statuentium”.

(daggers are used to indicate text that should be omitted)

¹⁵ Both Beale and Clarence Smith omit nos. 28-31 from their translations. In his extensive summary of the repetitio Armand Lainé, *Introduction au droit international privé* (vol. I, Paris 1888) 144, does the same thing.

¹⁶ As Barry, *supra* note 10, 11, observes, “though it does not clearly belong with the first four sections, it clearly does not belong with the latter four”.

The potential for misunderstanding is evident already in the opening distinction. The text that has made its way into all printed copies of Bartolus' works (the oldest of which dates from 1471 or earlier), indeed inquires "whether a statute extends beyond its territory (*extra territorium*) to those not subject (*nisi subditos*)," but neither does it makes sense, nor does it correspond to the wording of manuscripts of the Commentary¹⁷. In any case, the additional *extra territorium* did not overshadow the fact that Bartolus made the distinction between a territorial and a personal question the starting point of his conflicts analysis¹⁸. In fact, the opposite problem has arisen. Most writers have given so much emphasis on the division of the original question as to the sway of local laws into the reach of local laws – over foreigners within the locality, on the one hand, and the reach of the same local laws over citizens beyond that locality, on the other – that it is today rather common to read Bartolus, and the Italian or Franco-Italian school along with him, as preoccupied with the unilateralist examination of the reach of the forum's statutes, on the one hand, and the rigorous division of statutes into personal and real, on the other hand. These common assumptions and their validity will be addressed in Section IV, but the reader should begin forming a personal opinion through the summary that follows.

B. "... utrum statuta porrigantur ad non subditos"

1. Contracts (nos. 13-19)

¹⁷ The manuscript in the Bibliothèque Nationale (Paris, Bibliothèque Nationale MS Lat. 4591) reads: "Nunc venio ad glossam qui dicit 'Si Bononiensis' cujus occasione videnda sint duo, primo utrum statuta porrigantur ad non subditos, secundo utrum effectus statutorum ... statuentium". See Franz Gamillscheg, *Der Einfluss Dumoulins auf die Entwicklung des Kollisionsrechts* (Walter de Gruyter, Berlin 1955) 54 at note 2. Gamillscheg extended his argument in his *Überlegungen zum Text und zur kollisionsrechtlichen Methode bei Bartolus*, in Okko Behrends *et al.* (eds), *Festschrift für Franz Wieacker zum 70. Geburtstag* (Vandenhoeck und Ruprecht, Göttingen 1978) 235. The omission is corroborated by the Bibliotheca Apostolica Vaticana manuscript first consulted by Clarence Smith, *supra* note 9, 160-161, and then verified by myself: MS Vat. Lat. 2589, fol. 70r.

¹⁸ For a writer who has actually observed the second *extra territorium* see Celia Wasserstein Fassberg, *The Choice of Law Problem: Continuity and Change* (S.J.D. dissertation, Harvard Law School, 1980), 193-194 n. 6.

The limits of Bartolus's alleged unilateralism are best demonstrated in his section on contracts:

... And first, I ask, what about contracts? Suppose a contract celebrated by a foreigner in this city: a contest arises, and suit is brought in the place where the contract was made: of what place should the statutes be observed or looked at? Since these questions are much discussed, let us omit other distinctions, and examine the questions more fully than the doctors have done. We either speak of statute or custom with respect to the solemnity of the contract itself (*quae respicit ipsius contractus solemnitatem*), or the suit on it, or with respect to jurisdiction over the performance provided for in the contract itself¹⁹.

According to Bartolus, "the place of the contract is looked to (*inspicitur locus contractus*)" regarding the first case (solemnity; nu. 14). As to the second case, he distinguishes between, on the one hand, matters which pertain to "the manner of conducting the case" (*ad litis ordinationem*), for which "the place of trial will be looked to" (*inspicitur locus iudicii*), and, on the other hand, matters pertaining to the decision of the case itself (*ad ipsius litis decisionem*), distinguished in their turn between matters arising from the nature of the contract itself at the time it is made (*secundum ipsius contractus naturam tempore contractus*) and matters arising *ex post facto* due to negligence or delay: The place of celebration of the contract (*locus contractus*) will be "looked to" regarding the former matters, and the place of performance regarding the latter²⁰.

2. *Delicts* (nu. 20)

The question here is "[I]f a foreigner does a wrong here shall he be punished according to the statutes of this city?" The issue is easily settled if the

¹⁹ Bartolus, ad C.1.1.1 nu. 13. MS Vat. Lat. 2589, fol. 70r.

²⁰ Bartolus ad. C.1.1.1, nu. 15:

"Secundo casu aut quaeris de his quae pertinent ad litis ordinationem et inspicitur locus iudicii. [D.22.5.3 in fine] Aut de his quae pertinent ad ipsius litis decisionem et tunc aut de his quae oriuntur secundum ipsius contractus naturam tempore contractus, aut de his quae oriuntur ex post facto propter neglegentiam vel moram".

The transcriptions of Guthrie, Barry spell *oriunt* rather than *oriuntur*, but this is both grammatically inaccurate and does not conform to the original printed text: see Venice 1602, fol. 4ra (using hook symbols), Lyon 1533, fol. 5rb (spelling the entire word).

ius commune characterizes the foreigner's act as wrong; if not, for the act to be punished under the local law, either "the foreigner must have lived so long in the city that he really ought to know the statute," or the act must be "commonly prohibited by all cities"²¹. If the act is "not so generally prohibited," he is not held responsible unless he knew of the prohibition²².

It is interesting that the personal law of the foreigner does not come at all into discussion in the section. But neither is Bartolus' treatment a model of territoriality. In fact, the decisive factor seems to be the foreigner's awareness – an awareness measured against objective standards. Bartolus's treatment is in that sense reminiscent of contemporary, "unilateral" approaches to criminal jurisdiction over foreign residents, only less forum-minded, as he pits local law against a "common" law which reaches beyond the *ius commune*.

3. Testaments (nos. 21-26)

The section on testaments²³ develops around the issue of the validity and reach of a hypothetical statute or custom of Venice "that a testament shall be valid [if made] before two or three witnesses," instead of the seven prescribed by the *ius commune*. In nos. 22-23, Bartolus examines the validity of the statute. Jacobus de Arena made its validity conditional on the consent of the princeps and expressed doubts as to the statute's sound policy. In his turn, Bartolus discards the consent requirement and provides rationales for the rule.

He then argues that "as to those things which are of voluntary [i.e. non-contentious] jurisdiction, a statute binds foreigners" (nu. 24)²⁴. But "statutes cannot legitimate a person not subject to them, nor can they make any disposition about such a person" (nu. 26). Statutes extend to foreigners whenever and only when they have to do with form (solemnity), "[f]or the solemnity of an act pertains to the jurisdiction of the city in whose territory it is done; so it varies according to the difference in places; but whenever there is a differ-

²¹ The example invoked by Bartolus is that of "carry[ing] grain outside the territory without license from the government, which is commonly prohibited throughout all Italy".

²² Bartolus cites VI.1.2.2 and the gloss ("an ignorant man is not held unless his ignorance was gross and supine").

²³ Explain why testament more correct than "will" for medieval and early modern.

²⁴ Nu. 25 refers the issue of extraterritorial effects of such a testament as to the ownership of goods to nos. 36-37 below (in the section on permissive statutes).

ence of person, a statute cannot dispose, except about a person subject to it.”(nu. 26).

4. *Real Property (nu. 27)*

Only one question is asked in the fourth section: “Suppose one has a house here, and it is a question whether he can raise it higher. Briefly, when there is a question of any right growing out of a thing itself, the custom or statute of the place where the thing is should be observed”²⁵. The passage has been taken to imply the application of *lex rei sitae* on the whole as to rights over real property. The example that Bartolus uses does evoke the servitude *altius non tollendi*²⁶. But the wording of the phrase seems to make mention of “regulatory” statutes (which did exist in Italian cities at the time), where the city authority restricts the height, bulk or type of a citizen’s building.

5. *Clerical (nos. 28-31)*

The disregarded fifth section of the Commentary could be taken by many as proof of Bartolus’s “exoticism” to some contemporary conflicts lawyers: Bartolus discusses herein whether secular statutes and customs bind clergy and ought to be observed in the bishop’s court (nu. 28). Here the starting point is the scope and purpose of clerical privileges. Local secular law, whether it is directly prejudicial or only in its effects, cannot contradict privileges granted to the clergy by the pope or the emperor; insofar however as no privilege is granted, the clergy is bound by “honorable” statutes (nu. 29). The example posed is a statute of Perugia invalidating testaments that are not opened in public (*quod not valeant testamenta propter omissam insinuationem*): if this requirement is not observed (*non fuit insinatum*), the cleric’s last will is only valid to the extent that it confers property to pious causes, since the pope has specifically dispensed with formal requirements in those cases (nu. 30).

²⁵ Bartolus ad C.1.1.1, nu. 27:

“Quarto quaero quod in his quae non sunt contractus neque delicta neque ultimae voluntates. pone quidam habet domum hic et est quaestio an possit altius elevare. breve cum est quaestio de aliquo iure descendente ex re ipsa, debet servari consuetudo aut statutum loci ubi est res”.

²⁶ JI 2.3.1.

C. “... *utrum effectus statuti porrigat extra territorium statuentium*”

Bartolus distinguishes statutes into prohibitive, permissive and punitive. The difference between prohibiting and permitting a certain action is easy to understand, so Bartolus gives more emphasis to the distinction between *statuta prohibitoria* and *statuta punitoria*²⁷: “certain statutes are prohibitive not by reason of penalty, but by reason of another solemnity” (*non ratione poenae sed ratione alterius solemnitatis nu.32*)²⁸.

1. *Prohibitive Statutes (nos. 32-33)*

Prohibitive statutes are distinguished into those which seek to impose a solemnity for an act (*statutum prohibitivum ratione solemnitatis*)²⁹, those which impose a prohibition with regard to a thing (*statutum prohibitivum in re[m] et respectu rei*), and those which do so with regard to a person (*statutum prohibitivum in personam*).

[1] Solemnity requirements are denied extraterritorial effect: “in matters of solemnity we always look to the place where the thing is done” (*in solemnitatibus semper inspicitur locus ubi res agitur; nu. 32*).

[2] The treatment of prohibitions in *rem* is more cryptic: Bartolus uses the example of a statute prohibiting a joint-property owner from alienating his/her own his/her share to a third person (*extra consortes*): “[t]hen wherever a disposition of such a thing is made it is not valid, because such a provision affects the thing and prevents the title from passing” (*nu. 32*)³⁰.

²⁷ The word *prohibitiva* has made it into printed editions in lieu of *punitoria* (e.g. Venice 1602, fol. 5 va, but also Lyon 1583, fol. 6vb) and hence into the translation of Beale. The manuscript has confirmed this is an error: MS. Vat. Lat. 2589, fol. 72r.

²⁸ *Ibid.*

²⁹ The example given is of a statute requiring the testament or instrument to be made before two notaries.

³⁰ Beale translates the *extra consortes* passage as “where it prohibits the title of property to be passed between husband and wife.” He is followed by Barry *supra* note 10, 13-14. “Between” is an evidently wrong translation of *extra*, but also the word *consors* is principally used in Latin to denote those whose share, e.g. an inheritance, and only rarely a “wife.” See the *Oxford Latin Dictionary*, “*consors*.” My translation concurs with Clarence Smith, *supra* note 9, at 181, and Lainé, *supra* note 15, 1:146.

[3] Prohibitive statutes in personam are distinguished into those containing a “favorable” or “benevolent” provision (*statuta favorabilia*; nu. 32) and those containing a “burdensome” or “malignant” one (*statuta odiosa*; nu. 33). Examples of the former are: prohibiting persons under fifteen years of age to make a testament (“in order that young persons shall not be deceived in the making of testaments”); prohibiting gifts between spouses (“lest by reason of their mutual love they may despoil or deceive one another”); and interdicting a person from disposing of his property (“so that his goods shall not be wasted”). As example of a *statutum odiosum* is mentioned the prohibition on a daughter-in-power (*filia familias*) succeeding to an inheritance. *Statuta favorabilia* extend their effects everywhere, as opposed to *statuta odiosa*. Bartolus refers to canon law (a decretal of Boniface VIII) for authority “on this distinction between a prohibition which is reasonable and benevolent and [one which is] malignant”³¹.

2. *Permissive Statutes (nos. 34-43)*

Bartolus distinguishes two questions regarding permissive statutes: “first, whether a permissive act may be done outside the territory of the permitting law; and second, if it is exercised in this very way or place which the law permits, whether it takes effect outside the territory?” Bartolus examines both questions in treating each of several hypothetical cases. We can categorize these cases into examples of granting authority to someone or dispensing with solemnity requirements, of affecting personal quality (in which we can distinguish a sub-category addressing the status of property).

(a) Statutes Conferring a Privilege

The first type of permissive statutes are those which “concede and permit something which by reason belongs only to those to whom a special privilege is granted” (*aliquando nam statutum concedit et permittit id quod rationabili-*

³¹ The printed edition of Bartolus refers to VI 5.11.26 (*si sententia*), according to which no individual member of a people placed under an interdict may anywhere take part in worship and receive the sacraments of the church. Clarence Smith, *supra* note 9, 183, suggests as a more appropriate reference to VI 5.13.15 (*odia*): It is right to construe malignant provisions strictly and benevolent provisions widely.

ter non competit nisi in his in quibus specialiter privilegium est concessum)³². Such is the case of appointing a notary under the laws of a city. According to Bartolus, he cannot draw legal documents (*conficere instrumentum*) outside the territory of the city, and the same holds for similar matters that can [only] be done within the territory (nu. 34). On the contrary, “legal documents drawn by such a notary within his territory have force everywhere outside the territory ... because it is matter of solemnity rather than of substance” (nu. 36)³³.

(b) Statutes Facilitating Permissible Acts

A second type of statutes are those which “allow what is already permitted by the *ius commune*, but they remove some requirement of the *ius commune*” (*quandoque statuta sunt permissiva permittendo id quod de iure permittitur, sed per statutum tollitur obstaculum quod erat de iure communi*). They can be further distinguished, depending on whether they remove a solemnity requirement (*obstaculum solemnitatis*: nos. 36-37), or a limitation on personal capacity (nos. 38-41).

(ba) Solemnity

Regarding solemnity requirements, the *ius commune* rule requiring seven witnesses for a valid testament returns in the discussion. The validity of a statute providing that, for example, four witnesses shall be enough for the testament to be valid was already demonstrated in nos. 22-23 – but will the effects of such a testament extend to the testator’s goods outside the territory?

Bartolus discusses extensively the opinions of past jurists, among whom stand out, on the side denying extraterritorial effect to the will, Jacobus de Ravanis (Jacques de Révigny), who was willing to accept a man dying “in part testate and in part intestate” as a result of the plurality of customs, point-

³² Beale, Bartolus, 33, has translated this as “for always a statute allows and permits what it does not reasonably forbid, excepting those things in which a privilege is specially granted”. Lainé, *supra* note 15, 1:148 omits the passage. Clarence Smith, *supra* note 9, 247, translates:

“sometimes then local legislation grants and permits something which in nature could be within no one’s power, but only by franchise particularly granted, and in matters to which it extends”.

³³ Bartolus ad C.1.1.1, nu. 36 (*hoc est magis ad solemnitatem quam ad dispositionem*).

ing to other cases where a “plurality of estates” leads to the same result, and, on the other side, Gullielmus de Cuneo³⁴, who argued that “the statute operates upon the will itself” and, as long as the will was valid initially, the statute’s effect “extends from the will itself to all the goods by consequence:” hence “though the statute cannot dispose of the goods directly, it may do so by consequence”.

Bartolus, who would grant extraterritorial effect to the testament, dismisses this argument of Gullielmus: what is not permitted directly is permissible only insofar as it is a necessary consequence, and it is possible for someone to die in part testate and in part intestate “by force of the law”. On the contrary, he lets stand Gullielmus’s other arguments, namely that “as a proper action may be instituted elsewhere, where the land lies, so a disposition may be made elsewhere, where the thing (res) is,” that “an act before one judge has force before another,” and that the Code provides for a testament, made before the judge of a locality where less formality is required, to stand everywhere.

(bb) Personal Capacity

In contrast to that position, Bartolus would deny the extraterritorial effect of statutes removing limitations on personal status (*obstaculum qualitatis personae*), such as allowing an unemancipated son (*filius familias*) “or some other person forbidden by law” to make a testament, or allowing a *spurius* to be appointed heir (nu. 38)³⁵. “Since this is a grant by an authority lower than

³⁴ Bartolus also mentions on this camp Jacobus Buttrigarius and also Cinus, who initially supported the position of Jacobus de Ravanis (Jacques de Révigny) but eventually changed his mind. Lainé, *supra* note 15, 1:123-124 translates a pertinent passage of Cinus, who presents at length the position of Jacobus de Ravanis, noting that Petrus Bellaperticus agreed insofar as the laws were really contrary but not when both cities followed the *ius commune*, and then remarking that more modern writers think that the *héritier institué* is entitled to all goods, by reference to the place where the testament was made. It must be reminded that Petrus was Cinus’s teacher and Jacobus the teacher of Petrus (or the teacher of Petrus’s teacher), while the two writers omitted by Cinus and mentioned by Bartolus are contemporaries of Cinus.

³⁵ Bartolus assumes for the purposes of nos. 38 ff. the validity of such legislation, promising to discuss the issue “elsewhere.” See Bartolus ad D.1.10.12 and ad C.5.12. Children born out of wedlock were *spurious* or *natural*, depending on whether they were born of a union disapproved by law or not. *Spurious* children were those whose paternity was uncertain (“as the son of a meretricious woman”), or whose father should not have been one according to good morals (sons of priests and monks), or the children of a slave with a free woman. Anna T. Sheedy,

the Emperor, although it is concerned with a voluntary act of the granting authority, it still cannot be performed outside the jurisdiction of the granting authority” (nu. 39: *hoc concedatur ab alio inferiori a principe licet spectet ad actum voluntarium, tamen non possunt exerceri ex iurisdictione concedentis*). It is easily concluded that the spurious cannot validly be appointed heir outside the city’s territory and then enter on the inheritance (nu. 39). But what about the – “constantly recurring” – case where the said act is executed within the city, and is thus valid? Can the spurious then lay claim to possessions in another city?

Bartolus acknowledges the “great difficulty” of the issue. The argument pro refers to the extraterritoriality of legislation pertaining to solemnities (nu. 40), and to provisions in the Code and Digest suggesting that an emancipation (or a notary’s act) are effective everywhere, and that a court judgment is enforceable by the judge of another territory: accordingly, the will, which is like a judgment (*quasi sententia*), should extend to possessions situated elsewhere (nu. 41).

Bartolus adopts however the opposite view. He first remarks that “[a] provision in general terms can only be understood as referring to possessions in the territory of the providing authority” (nu. 41; *simplex dispositio non intellegitur nisi de bonis quae sunt in territorio disponentis*)³⁶. But the bulk of Bartolus’ argument lies in the distinction between specifying the solemnities required for an act, on the one hand, and the granting of capacity to a person to do this act, on the other. While difference in the formality requirements is justified by the different conditions from place to place (for example, fewer men are available as witnesses to a military will; more men are qualified as witnesses in one city than in another), there is no prejudice to another city if

Bartolus on Social Conditions in the Fourteenth Century (New York, 1942: Columbia Univ. Press), 72.

The great difference between natural and spurious children was that, while natural children were legitimated by a subsequent marriage of their parents, *spurii* could not be legitimated, except perhaps by act of the pope or the emperor. A famous decretal of pope Innocent III, *Per venerabilem* (X 4.17.13) deals with the issue in fine.

Perugia itself had passed the statute like the one Bartolus mentions. In other cases, canon law required the father to provide for the support of his spurious son, and Bartolus suggests that the father can leave in his testament a certain amount for the support of his spurious son and of his own sons after his death. See Sheedy, Bartolus, 75-76.

³⁶ Citing D.42.5.12.1, Auth. 7.1.4 (*filium vero*), Nov. 89.4 where the effect of legimation is construed strictly.

the effect of such an act is recognized everywhere, “for that act could be done elsewhere, though not in that solemnity” (*non nam per hoc alteri civitati praeiudicat, cum ille actus ubicumque poterit celebrari, licet non cum illa solemnitate*). The contrary is true in the case of legitimating a person for doing an act. Bartolus characterizes the statutes regarding emancipation (C.8.49.1) and notarial acts as pertaining to solemnity: “the statute does not emancipate the son, for that would empower him abroad, but the father emancipates the son, using the solemnity provided by the statute” (nu. 41). As far as judgments are concerned, they do have effect elsewhere insofar as the judge deals with rights already grounded and defined, rights which accompany the person everywhere,” as by reference to “an obligation already existing.” “But when the judge himself creates a new right, by judgment within the territory, this does not extend beyond the territory.”

(bc) The Primogeniture Case (English question)

This conclusion brings us to the so-called English question.

... It is the custom of England that the eldest son succeeds to all the goods. Now one having goods in England and in Italy dies. What is the law (*quaeritur quod iuris*). Jacobus de Ravanis and Gullielmus de Cuneo hold that as to goods in England judgment is given according to the custom of that place; while as to those in Italy, they are distributed under the *ius commune* and divided between the brothers. Though a certain solemnity is given for goods situated there, it does not extend everywhere. Cinus holds the same here. Others say that the place where inheritance vests should be looked to, just as if a contract were made there, since in contracts we look to the place of contracting.

What follows is one of the most frequently alluded-to – and probably the most misunderstood – Bartolus passages³⁷:

It seems to me that the words of the statute or of the custom are diligently to be examined. For either the provision is made about a *res*, as by these words: the possessions (goods) of decedents shall pass to the first-born (*bona decedentium veniant in primogenitum*), and in that case I should adjudge all the possessions according to the custom and statute of the place where the things are situated, for the law affects the things themselves, whether they are

³⁷ See below Sect. IV A.

possessed by a citizen or a foreigner (D.50.4.6, C.8.10.3); or the words of the statute or of the custom make provision about a person, as by these words: the first-born shall be heir (*primogenitus succedat*), and then either such decedent was not from England (*erat de Anglia*), though he had possessions there, in which case such a statute does not affect him and his sons, because a provision about persons does not affect foreigners, as was said above in the second [meaning third, in nu. 26; trans.] question; or such decedent was English and then the first-born succeeds to the goods which are in England, and to the other ones he succeeds at *ius commune*, according to what the said doctors say; because this may either be said to be a statute depriving the younger sons, in which case it is odious and does not extend to goods situated abroad, as was proven above in the sixth question [nu. 33; trans.], or you can say that the statute is permissive, in removing an obstacle so that the younger sons may not interfere with the first-born, and that is the same with what was said above [nu. 40 or 41; trans.]. [On this point, that one should examine if the provision is in *rem* or *personam*, see D.18.1.81.]

3. Punitive statutes (nos. 44-49)

While Bartolus speaks of “many issues” raised in the examination of punitive statutes, we can essentially distinguish between those punitive statutes which expressly forbid acts outside the city’s territory (nos. 44-46), and those which are stated in general terms (nos. 47-49). The discussion in Section Eight does not concern criminal acts committed within the city’s territory, a subject treated in Section Two.

(a) Statutes with Explicit Extraterritorial Effect

[1] Regarding the former category, Bartolus first examines the case where both the offender (*delinquens*) and the victim (*ille in quem delinquitur*) are foreigners: “then the rule is that the statute, though it expressly forbids the act, does not extend to those persons who are outside the territory etc., because the statutes are law peculiar to the city (*ius proprium civitatis*, phrase taken from D.1.1.9).” The opposite is true in the case of confederated cities and allied cities, or if the state in whose territory the offense was committed had consented to the making of the statute (nu. 44).

[2] Bartolus is also skeptical regarding a statute punishing a delict perpetrated by a foreigner against a citizen outside the city's territory. He dismisses the argument that this case is similar to the rule of trying in the ecclesiastical court a layman injuring a cleric: for Bartolus, the true reason for church jurisdiction is that the layman "commits sacrilege, which is an ecclesiastical crime, and therefore pertains to the church" (nu. 45). He is even more dismissive of the argument that the person of the injured citizen constitutes a place subject to the city and the act thus falls within the city's territory: the place of the offense has to refer to something immovable, like territory, not to a movable or self-moving thing. Bartolus acknowledges one exception (denied by Cinus), in the case of thieves from a shipwreck, who may be punished by the injured person's judge, as well as the exceptions granted above (e.g. federated cities). An interesting third exception lies in the case of inaction by the judge of the place where the citizen was injured (whether because he does not want to act or because he cannot)³⁸.

[3] On the contrary, Bartolus accepts the extraterritoriality of statutes punishing delinquent conduct by a citizen abroad (nu. 45 or nu. 46³⁹: "by reason

³⁸ The passage is subjected to the opposite reading. Indeed, the Latin text used by Guthrie and hence Beale, but also Barry's transcription read as follows:

Item fallit si iudex loci ubi civis meus offendit, offensam non vindicat (ut quia non vult, vel quia non potest) tunc poterit fieri statutum contra offendentem civem extra territorium. (emphasis added)

Beale, Bartolus, 51 translates this

Another exception, where my fellow citizen offends and the judge of the place does not punish the offense ... then a statute against the offending citizen may be made outside the territory.

If the translation is not very convincing, a bigger problem is to view the text in context. The jurisdiction of the city with regard to the offenses of its citizens abroad is dealt immediately below. Indeed, a re-inspection of the original 1602 book showed a small hook next to the verb *offendit*: the symbol, in the early age of printing, for the passive-voice ending *-ur*. [Lyon, 1533, fol. 8ra actually omits the hook, but this edition is generally less reliable than Venice 1602] The existence of the hook was corroborated by the inspection of the manuscript MS Vat.Lat. 2589, fol. 74r.

Once it has been established that the forum's citizen *offenditur* rather than *offendit*, the active participle *offendentem* is read not as an adjective to *civem*, but as a verbal participle, with *civem* its object.

³⁹ Beale's text has this part under an extended nu. 45. This is corroborated in Venice 1602, fol. 6va, which Barry, "Bartolus" has followed: nu. 46 begins with *Sed iuxta praedicta potest*. The same holds with the Lyon, 1533 edition (fol. 8ra).

of his origin he may be punished for a crime committed anywhere; therefore, since such an offense is within the jurisdiction, a statute about it may be made”). He would also allow the chief authority (podestà) of a city whose army occupies the territory of another to punish, for example, the murder of one foreign soldier by another, even though this seems to contradict what he has argued above: “Territory is so called from ‘terrify’ (terrendo). But while the army of this city is there, terrifying and coercing that place, properly an offense there committed may be punished by the podestà although committed in that territory.”

(b) Statutes Expressed in General Terms

The second category of issues concerns the extraterritoriality of statutes expressed in general terms (non cavetur expresse sed simpliciter). For example, “[I]t is provided by the statute of the city of Perugia that the podestà may enquire of any homicide whatever, or proceed by accusation or by inquisition. It is provided in another statute that a certain penalty shall be imposed for homicide.” Should the podestà, in the case of a homicide committed outside the territory of Perugia by one of its citizens, follow these statutes or the *ius commune*? A criminal proceeding under the *ius commune* would normally require accusation, i.e. the bringing of a complaint by someone; the proceeding could only be commenced at the initiative of the public authority in cases of public vengeance, and so that offenses could be punished and not covered up. Past jurists engaged in a long debate, with Odofredus arguing against the extraterritoriality of the local legislation, and Cinus for it⁴⁰. Bartolus reproduces the bulk of their arguments (nu. 47), which offer an interesting perspective on medieval political thought⁴¹.

Guthrie’s text jumps from nu. 45 to nu. 47 in paragraph numbering. On the contrary, Clarence Smith marks the beginning of nu. 46 at aliquando civis delinquit extra territorium (“Bartolo,” 260). Our manuscript, which is the same that Clarence Smith used, does have a change of paragraph sign at that point. This would also make sense in the light of the offenditur correction proposed by Clarence Smith and myself.

⁴⁰ Bartolus tells us that the case was first discussed by Odofredus, who answered in favor of the *ius commune* on both counts. His views were preserved by Albertus Gandinos. Bartolus’ teacher Cinus came to the opposite conclusion. Bartolus remarks that Cinus, who used Sienna in the hypothetical, failed to credit Odofredus (iura Odofredi licet de eis nulla fiat mentio).

⁴¹ Thus, Odofredus with Albertus argued that any public harm can only exist in the place where the offense was committed, and not in the offender’s place of origin (*ius commune* did

But Bartolus tries to avoid philosophical speculation and proposes instead “that the words of the statute should be more diligently examined” (nu. 48). He first repeats that if the statute refers to “what a citizen does, even outside the territory,” it can be used for his prosecution and punishment, whereas the opposite holds true if the statute limits itself to what happens inside the territory. As to the case where the statute expresses itself in general terms, Bartolus differentiates between statutes addressing the manner of proceeding and those addressing the sentence. On the one hand, “statutes with respect to process or the institution of litigation extend to every suit which is brought in that city”⁴². On the other hand, as far as the manner of punishment is concerned, the accused will be punished under either the *ius commune* or the laws of the place where the offense was committed. In both cases, Bartolus refers for validation to the similar limits of extraterritoriality he has posed with regard to contracts and delicts.

4. *Effects of Judgments* (nos. 50-51)

The last section concerns the effects of a punitive judgment (*effectum sententiae punientis*). Bartolus differentiates between judgments regarding persons and judgments regarding possessions (*bona*).

(a) Judgments in personam (as to Persons)

The first category is further divided between judgments banishing the person from a certain place (*interdictio certi loci*), those interdicting the person from a certain occupation (*interdictio certae artis*)⁴³, and those diminishing

allow for inquisition *ad vindictam publicam*), and that the rulers of cities are called in the *Authentica* fathers of their subjects, and accordingly not of foreigners who have a different father. Cinus counter-argued that jurisdiction already exists; that a *civitas* has an interest in having good citizens, and men are made good by punishing (their) offenses; that this is demanded by “public policy and morality” (*ratio publicae disciplinae*, translation of Clarence Smith based on a manuscript). Other arguments involve analogies between contracts and delicts, as well as between statutes and judgments: one may bind one’s subjects by a judgment, and hence it follows they can be bound by a law (nu. 47).

⁴² Bartolus ad C.1.1.1., nu. 48.

⁴³ D.3.1.9, to which reference is made, speaks of *pro alio postulare*, i.e. of the right to make an application to the magistrate on another’s behalf (the term includes both setting out the claim and opposing the claim of another: D.3.1.1.2)

the person's status (*diminutio status*). The effects of the two types of interdictions are limited to the territory of the interdict (though banishment may extend to some other places "by consequence and disposition of the law"). On the contrary, diminution of status "has its effect everywhere." The classic example of such diminution is a person rendered infamous. But Bartolus is more concerned with "penal slavery" (*servi poenae*): thus, a woman sentenced to death by burning but then rescued by her family, remains slave of her punishment, incapable of making a testament or a contract or doing other such things. Just like the case of excommunication, "those penalties ... are inflicted upon the person and follow the person as leprosy does the leper"⁴⁴.

(b) Judgments in rem (as to Possessions)

The second category of judgments principally addresses the forfeiting of a person's possessions by a city: does such forfeiture also extend to goods located elsewhere? Here Bartolus departs from the *ius commune*-based arguments of past jurists (nu. 50)⁴⁵, and his ultimate conclusion is that it does not matter if the judge has jurisdiction under the *ius commune* or the municipal law; all that matters is if he enforces a right created under common law, or if he creates one *de novo* (nu. 51). In the meanwhile, he argues that a city cannot forfeit goods to itself on account of a *ius commune* delict, nor does it possess *merum imperium* and jurisdiction over the most serious crimes. An exception exists for the cities which have been granted such privilege by the

Beale, Bartolus, 62 translates this as interdiction "of a certain kind," which makes no sense (Beale's translation of the eighth section is generally problematic, but then Lainé, Introduction, 1:163, is right when he remarks that "la matière est traité d'une manière vague et obscure"). Clarence Smith, "Bartolo," speaks of "occupation" in the introductory outline (163), and translates as "calling" (268). Barry, "Bartolus," 24 translates *artes* as "skills" (Barry also seems to read too much – and too little – into the rule by implying that Bartolus "seems to refer in particular to skills practiced in connection with the courts. As such, it is consistent with Bartolus' rule that procedural issues are determined by the law of the forum.").

⁴⁴ Bartolus ad C.1.1.1 nu. 50.

⁴⁵ Gullielmus de Cuneo argued that the possessions of the condemned, being *bona vacantia*, escheat to each city to the extent that they are in its territory. Nicolas Matarellus distinguished between the cases where the forfeiting judge both exercised his jurisdiction and issued the judgment under the *ius commune*, and those cases where he proceeds, in one or both respects, under "municipal law." In the former case, the judgment reaches all possessions, but each judge will forfeit the goods in his own territory (Nicolas views the judges as operating under a single *fiscus*). In the latter case, the forfeiture can have effect only in the territory of the judge.

emperor, or can claim an ancient custom (“which has the force of a constituted privilege”) to that purpose. These cities (which possess a fiscal chamber, *camera fiscalis*), exercise the rights of the princeps over the property on their own behalf, by virtue of the – tacit or implicit – imperial grant (nu. 50).

Bartolus then distinguishes between those cases where the iurisdictiones are separate, but the “fiscal purse” (*bursa fiscalis*) is in effect common, and those where there also exist separate *bursae fiscales*. In the former case, the forfeiture will take place everywhere, carried out by the official of the place where the possessions are located, provided that the forfeiture is done under the *ius commune*, or under local laws in force in all the places in question; but such forfeiture reaches no possessions outside the place where the pertinent local law applies. In the latter case, possessions in other territories will be forfeited only if the forfeiture is under the *ius commune*, but in that case each fiscal authority (*procurator fisci*) will take on its own behalf the possessions situated on its territory.

IV. CONFLICTS HISTORIOGRAPHY: BETWEEN ANACHRONISM AND CONTINUITY

We could discern two streams among the historians of the conflict of laws who trace a discursive continuity between Bartolus and contemporary conflict of laws. The former stream sees in Bartolus a representative of – more or less well-shaped – theoretical positions on the conflict of laws, such as the division of statutes into personal and real (basic theory of statutes; A), or the advocacy of the unilateral conflicts method (B). The latter stream sees in Bartolus an early exponent of specific conflicts doctrines or mechanisms, such as rules on conflicts (C), the form/substance distinction (D), or decisional harmony (E).

A. Personal and real statutes

The following excerpt summarizes what most of the conflicts teachers and students who have given a thought to the matter think about Bartolus’s conflicts doctrine:

Bartolus’s method of resolving conflicts was based on a simplistic classification of local laws into two categories: real or personal. Real statutes were those that operated only within the territory of the enacting state but not

beyond. In contrast, personal statutes operated beyond the territory of the enacting state and bound all persons that owed allegiance to it. Bartolus thought that this classification could resolve all potential conflicts because all statutes, both domestic and foreign, belonged to either the one or the other category, leaving neither gaps nor doubts.

Obviously, this was naively optimistic, but worse than that was the fact that Bartolus' criteria for classifying a statute into real or personal were completely mechanical in that they were based solely on the statute's wording. For example, he argued that if the statute's words referred to a person, such as saying that "the first-born son shall succeed to the property," then the statute was personal. If the words referred to a thing, such as by saying that "the property shall pass to the first-born son," then the statute was real. It is therefore not surprising that Bartolus was ridiculed by subsequent authors. This criticism was justified to the extent it referred to Bartolus's mechanical classification of statutes. However, such criticism should not obscure Bartolus's impact, positive or negative, on the future direction of private international law⁴⁶.

We have inherited this caricature from ancestors who themselves inherited it from pre-classical scholars fighting their own battles, often against Bartolists⁴⁷. It seems that by the sixteenth century the mentioned rule had been regarded as the criterion par excellence for distinguishing between real and personal statutes, leading to disagreement by Dumoulin or d'Argentré (who appears to have viciously attacked Bartolus, calling the rule "futile," "childish," and a "sophistry"). This coincides with a general decline in Bartolus's influence: having been the central reference until then, he is, from that point on, quoted less and read very little. The "Bartolan rule" is all that remains in doctrinal writings on conflicts. Yet it apparently continues to be applied in practice, inspiring eighteenth-century French jurists Froland and Boullenois, major references of nineteenth-century jurists like Joseph Story, to lengthy

⁴⁶ Symeonides et al., CoL, 8.

⁴⁷ Even the sympathetic Frantz Despagne, *Précis de droit international privé*, 3rd ed (Paris, 1899), 185 seems to regard this rule as the basic criterion for distinguishing between personal and real statutes and notes that it was accepted by most of his disciples, Baldus excepted, until Dumoulin. See also Martin Wolff, *Private International Law*, 2nd ed. (Oxford, 1950), 25 (calling the rule a "very crude literal interpretation" but taking issue with d'Argentré for "condemning a scholar greater than himself merely for not having broken away from the narrow methods of his epoch"), A. Anton, *Private International Law* (Edinburgh, 1967), 20 ("the verbalism of this approach hardly commends it ... and it is hard to believe that such a canon of interpretation was generally applied").

refutations of Bartolus⁴⁸. By the early nineteenth century, Story himself was mentioning Bartolus and his rule (without citing him) as providing “a memorable example of these niceties” i.e. of “subtilities” that “have so perplexed the subject that it is difficult to venture even an explanation”⁴⁹. It will take François Laurent, and especially Armand Lainé, in the late nineteenth century, for someone just to suggest that this was an individual rule with perhaps some rationale behind it⁵⁰.

Be that as it may be, the quotation is obviously a considerable exaggeration. Bartolus did not think that “all potential conflicts” could be resolved by employing the real v. personal distinction. We have already seen that the first five sections of his treatment resolve the conflicts posed on the basis of the subject-matter, and none employs the real v. personal distinction. It is possible, however, that the quotation points to a deeper reality. It may be that the fundamental division of the *repetitio* (nu. 13) has underlying it a distinction between real and personal. And it is certainly true that Bartolus’s resolution of the “English case” employs a distinction between in rem and personam and looks, at first blush, mechanical. It is to these topics that we must now turn.

Bartolus makes no mention of “real” or “personal” statutes, or even a distinction between in rem and in personam legal acts, until the sixth section. Hence we will first consider the entire *repetitio* in looking for a territorialist or personalist approach – or a combination thereof – and then examine how the concept of real and personal statutes is used in that section.

1. Territorialism, Personalism and the Bartolan Doctrine

For some, the opening distinction at nu.13 provides evidence about the paramount importance of the real-personal distinction in the doctrine of Barto-

⁴⁸ See Louis Froland, *Memoires concernans la nature et la qualité des statuts*, vol I (Paris, 1729), 29; Louis Boullenois, *Traité de la personnalité et de la réalité des loix, coutumes, ou statuts*, vol. I (Paris, 1766), 16 ff.

⁴⁹ Story, *Commentaries*, § 14. See also *ibid*, 16 n. 1 (citing Boullenois and Livermore in stating the Bartolan rule) and n. 2 (the same two, plus Froland, Martin and Bouhier as to the “civilians” that have “justly exploded” the distinction).

⁵⁰ See François Laurent, *Droit civil international*, t. I (Bruxelles, 1880), 298-301; Lainé, *supra* note 15, 1:154-161, and for an elaborate expression of his frustration at the caricature, 1:131-133.

lus⁵¹. If that opening statement is to be taken at face value, the first part of the Commentary deals with the territorial reach of statutes (“whether a statute extends to those not subject”) and the second part with the personal or extraterritorial reach (“whether the effect of the statute extends beyond the territory of those who set it down”).

We should probably be cautious. The passage does not use the terms we are looking for. The “territorialist” first leg of Bartolus’s distinction uses the “personalist” notion of “not subject”⁵², whereas the “personalist” second leg speaks in terms of the effects of a statute with no reference to persons, and its development in the second part includes “territorial” topics such as the non-effect of formalities abroad.

Perhaps the opening statement is there more for educational purposes, and less as the grand principle underlying Bartolus’ system. Bartolus is keen on showing he is charting new paths⁵³, and in his opening paragraph the Master seems to be more concerned with the simple-mindedness of the Accursian gloss and its emphasis on the “personalist” dimension. To the declaration of the gloss that the Bolognese will not be “subject” to the statutes of Modena, Bartolus counters that the issue of the reach of statutes actually consists of two questions, first as to the effects of the statute on foreigners in the legislator’s territory, and second as to its effects on both citizens and foreigners beyond the territory.

The skeptical argument goes further: while the opening distinction does point to a contrast between personalism and territorialism, Bartolus presents them not as opposing perspectives, but as different parts of a coherent whole: in fact, he evokes a unitary image of a “statute” and inquires into its reach, vertically and horizontally. We could contrast that, for example, with the Dutch jurist Paul Voet, writing three centuries later⁵⁴. We would notice in Voet: a conscious effort to characterize statutes; a clear preference for the uti-

⁵¹ See e.g. F. Surville and F. Arthuys, *Cours élémentaire de droit international privé*, 2nd ed. (Paris, 1895), 21-22.

⁵² Compare for example with the territorialist second axiom of Ulrich Huber, *Praelectiones iuris Romanis et hodiernis*; vol. 2 (Franeker, 1689), 2.3.2: “Those are held to be subject to a sovereign authority who are found within its boundaries, whether they be there permanently or temporarily.”

⁵³ See also, a little further down, Bartolus ad C.1.1.1, nu. 13: “Since these questions are much discussed, let us omit other distinctions, and examine the questions more fully than the doctors have done.”

⁵⁴ See Paulus Voet, *De Statutis Eorumque Concorso*, Sect. IV Cap. II §§1-4.

lization of the distinction between real and personal statutes, but also references to different ways of characterizing statutes, which implies that the real-personal distinction has had some past competition which is not yet forgotten; and a preference for the “real” statutes, expressed directly and indirectly through the definition of “mixed” statutes.

Bartolus, on the contrary, is disinclined to commit a priori to either territorialism or personalism. He does make substantive choices as he goes along in his text, but again his emphasis seems to be on solving the specific questions while using the tools/framework provided to him by the *Corpus Iuris* and the rest of the *ius commune*. To decide the scope of statutes, he uses some of the concepts eventually derided by Voet.

There is one final, potent observation to bolster our skepticism: Bartolus is only partly preoccupied with a horizontal conflict between cities’ laws, since that conflict is also played out in terms of a conflict or deviation of local law from the *ius commune*, which also works as a superstructure for the whole system. A striking example is his discussion of whether a foreigner should be punished under the local law for a local delict: if the act is wrong under the *ius commune* as well, he ought to be punished; if not, the assertion of territoriality gives way to a restrictive notion of foreigner’s criminal awareness measured by objective standards, while the personal law of the foreigner is not even mentioned (nu. 20).

Yet let us not misunderstand: the structure of the Commentary certainly takes account of a hybrid distinction between real and personal statutes. On the one hand, the conceptual clarification of nu.13 serves as a reminder of the dual nature of sovereignty (as understood by Bartolus and probably ourselves). On the other hand, the subject matter treated in the second part deals with issues pertaining to the person and rather disconnected to the territory, while the statutes in the first part are more capable of territorial localization. Instead of the grammatical characterization of statutes into real and personal, as is frequently thought, the Commentary appears to be a distant forerunner of the distinction between the legal categories of *statut réel* and *statut personnel* as used by early classical French doctrine.

2. Bartolus’ “Theory of Statutes”

Bartolus’s solution of the “English case” (nu. 42) has been seen as offering a mechanical method for determining whether the statute is real or personal.

After examining the case, we will consider the extent to which he carries it over to other parts of the repetitio.

(a) Understanding Bartolus on the English case

According to Bartolus, the “real” statute states: “let the goods of the decedents go the first born” (*bona decedentium veniant in primogenitum*); the “personal” one states: “let the first-born succeed” (*primogenitus succedat*).

[1] The common reading emphasizes the order of the words, or at best the subject of the sentence: if the “goods” are the first word / the subject, the statute is real, if the person is the first word / the subject, it is personal⁵⁵. This would be a “mechanical” standard – at least *prima facie*.

The characterization of the statute as mechanical implies two things: First, that the determination of territorial reach is based on something – syntactic structure – which could be fortuitous (the legislators were not thinking of this when they phrased their sentences). Second, that the difference between the two rules is not substantive enough to justify different treatment: in lieu of the legislator’s whim, an external rule – or external criteria – should apply.

As to the first criticism, we should know more about the wording of the statutes before we passed such a judgment: maybe the drafting techniques in the specific time and place were such that the placement of the words signified something to most members of the interpretive community. In any case, the first criticism is trumped once a substantive difference may be shown between the two rules – and it is to this and we will now turn.

[2] The key to the passage lies in the sentences as a whole. Whereas the word *primogenitus* remains, the “real” statute speaks of the fate of the goods of the deceased (*bona decedentium*). Instead, the “personal” statute talks about “being heir” (*succedat*). The difference is not simply conceptual. The *in rem* statute appears concerned only with the disposal of property. But being the “heir” also means being the universal successor, inheriting not only the property but also the active and the passive of the obligations. Indeed, in Roman law the heir would also inherit the *sacra familiaria*.

⁵⁵ The common reading actually tends not to even mention syntax. For example, Despagne, *Précis*, 185 speaks of “first word” in the sentence. To his credit, Despagne does suggest that criticism is exaggerated, and that “the substance of [Bartolus’s] thinking is that we must appreciate the real or personal character of law according to its dominant idea, and that this idea may be revealed by the terms in which it was conceived” (185).

Bartolus speaks in terms of the wording of the statute or custom. He was operating in a world in which local law was, for the most part, contained in written statutes or codified customs. But English law in his day, and on the very topic that he covers, was not to be found in such a source. It is possible that Bartolus was aware of this. If so, we must either assume that he could think of no way of dealing with unwritten customary law, or – and this seems more likely – that he is speaking not only of the wording of the statute, but also of the substantive import of the legal rule.

Once we take this latter approach, Bartolus's criterion has application to the actual case. English law in the fourteenth century did not practice universal succession. Primogeniture was a rule about land; in fact, only certain kinds of land. We may locate hints of this where Bartolus describes the rule as that "a certain solemnity is given for goods situated there".

(b) Interpreting Bartolus on the "English case"

There are two, complementary, ways to further explore the Bartolan solution: first, approaching it as an instrumental solution given to the specific case; second, approaching it as articulating a "positivist" statutory doctrine.

[1] The effect that the Bartolan solution has in this case is illustrated once we consider all possible cases which may arise (Table I). The Italian/*ius commune* rule will apply in five of the eight possible cases (statute in rem or in personam; decedent English or not; property in Italy or England), and in four of the six principal variations. Furthermore, the Italian rule will apply to property in Italy under any circumstances.

The only additional case that Bartolus could have conceivably chipped away from the primogeniture rule concerns the English property of a foreign decedent provided the English statute is in rem – and he could have only done this by asserting a bilateral personalist rule ("the rights of heirs will be determined under the law of the place of origin") while simultaneously claiming the primogeniture rule violated Italian public policy with regard to property in Italy. Such a technique however does not exist in the world of Bartolus, who occasionally uses "bilateral" rules without conceptualizing them as such (not, in any case, when he forms the question as opposing *ius commune* to local law), who does not demonstrate the tendency to do legal characterization as required by the substantive difference by the statutes, and who does not possess the concept of the "public policy" exception as such.

The result that Bartolus reaches does, however, remind us of the effects of a modern-day invocation of the public-policy exception to the application of foreign law. The English “personal” statute does not have extraterritorial effect, whether it is prohibitive or permissive. The idea about the odious prohibitive statute not having extraterritorial effect is clear enough and aptly announced in nu. 33, to which Bartolus refers. But what about the case when the statute is permissive? In his discussion of permissive statutes, Bartolus has found some to have extraterritorial effect: the acts of a validly constituted notary within his own jurisdiction, a testament valid where made with fewer witnesses than the *ius commune* requires, an act of emancipation made under a form valid where made. On the other hand, a notary cannot validly act outside the jurisdiction in which he was constituted, and the legitimation of the spurious is ineffective outside the jurisdiction where he is legitimated. The case at hand fits with the second group of cases: the local law has done something not permitted by the *ius commune*.

On the contrary, the Italian rule could find its way to Italians in England, since it is the *ius commune* rule and the English rule is only concerned with English subditi. This confirms our understanding that Bartolus presents the rule as an exception from the *ius commune*: he does not treat on an equal basis the two opposing rules (primogeniture and division), but makes the English one a subsidiary rule.

While on the surface this may appear different from conflicts doctrine, it operates in a similar way. Aside from the – conscious or unconscious – bias of many conflicts lawyers vis-à-vis the policies of their homeland, it is reminiscent of the way in which governmental interest-analysis sought to reduce conflicts by narrowly defining what kind of cases the foreign state wanted to regulate. The way in which Bartolus instantly kills the question of extraterritoriality in the many cases when the statute may be in rem, also reminds us of the “false conflicts” doctrine and the legitimation of forum law’s application.

We could thus interpret the Bartolan rule as a way to mitigate the effect of the primogeniture rule, especially with regard to Italy. It is clear that Bartolus does not like the rule, and in fact this seems to have been the opinion of the majority: three writers are mentioned as proposing a *lex rei sitae* solution, and we can find more, whereas the other solution – “the place where inheritance vests” – appears to have been put on the table for argument’s sake⁵⁶. But

⁵⁶ Bartolus’s contemporaneous jurist Albericus de Rosate (d. 1354), in a passage translated by Lainé, Introduction, 1:127-128, presents as the two opposing solutions with support the *lex*

Bartolus's solution manages to limit the effect of the primogeniture rule more than the territorialist solution of the ultramontani and their disciples. Finally, we could view Bartolus as providing another line of defense against those who advocated extraterritoriality by analogy to *locus regit actum*, by turning the legislator against them.

[2] Bartolus's solution was perhaps too modern for its time, and was not much followed by his immediate successors. But the notion of legislative positivism Bartolus articulated did survive, even though it was eventually reduced to the literalist mutation subsequent conflicts lawyers came to know and abhor. It seems that the Bartolan primogeniture rule played right in the middle of a neglected tension among pre-classical conflicts lawyers. The tension pitted, on the one hand, a "scholarly" sensibility which tried to come up with abstract criteria to divide types of statutes on the basis of the subject matter they treated, and, on the other hand, a "positivist" sensibility which paid closer attention to the wording of the statutes and the intention of the lawmaker. The first tendency is represented by most famous pre-classical writers, including Huber. We may see the second tendency reflect in Jan Voet, but it must have been most prominent among precisely those people who decided – or wrote upon – conflicts cases without developed ideas.

Bartolus uses a textual positivist argument most clearly in two instances. First, in nu. 41, during his discussion of whether a statute making a spurious heir has extraterritorial effects: this and the subsequent discussion of the primogeniture rule, are the two legs of the Bartolan discussion of the extraterritorial effects of permissive statutes pertaining to a person's capacity (with a view principally to inheritance). Bartolus goes at great lengths to deny such extraterritoriality (e.g. when he claims that emancipation pertains to "form" and legitimation to "substance"), but first he tries to limit the number of "conflicts" by noting that "[a] provision in general terms can only be understood as referring to possessions in the territory of the providing authority".

Second, in nu. 48 he urges that the words of the punitive statute be more "diligently examined". Bartolus essentially lets the citizen be punished under

rei situs solution, on the one hand, and the *lex originis* (which he supports himself), on the other hand. He mentions as a third, "singular" opinion the idea to apply the law of the place where the defunct died on the basis that intestate succession constitutes a tacit testament concluded there.

Bartolus does not mention Albericus, which is less notable than the fact that he makes no reference of the "personal-law" approach which seems to have had more adherents than the place of death.

a statute that refers to his conduct “even outside the territory” and points to the possibility of the statute limiting itself to conduct inside the territory. In the likely case when the statute is in general terms, Bartolus in effect denies the statute extraterritorial effect (he allows it for procedural issues, but that was essential and does not include sentencing).

B. The limits of Bartolus’s unilateralism

Bartolus and the Italian school are widely credited with the introduction of the so-called “unilateral conflictual method,” or perhaps better “approach” to the conflict of laws. Parallels are also drawn between the “unilateralism” of pre-classical doctrine and the unilateral approaches or instincts of modern conflicts approaches. According to a modern casebook:

Bartolus introduced the “unilateral” conflictual method, as distinguished from the “bilateral” conflictual method which was developed later in history.

The bilateral method postulates a system of a priori choice-of-law rules that designate the cases that fall within the scope of domestic and foreign law, respectively. In contrast, Bartolus’ unilateral method approaches the matter from the other end. It focuses on the conflicting domestic and foreign laws themselves and tries to determine whether the case at hand falls within the intended scope of the one or the other law⁵⁷.

Let us approach separately the opening distinction, the first part and the second part of the repetitio.

The standard casual reading of Bartolus’ text points to the division of the original question as a unilateralist examination of the reach of the forum’s statutes. The opening distinction probably suggests that Bartolus is not imbued by an overarching, self-conscious bilateral methodology, but this does not automatically mean that it is unilateralism which breathes life into the Bartolan doctrinal system. The distinction carries several and complex messages to the reader, on the one hand, but imposes no grand principle or axioms, on the other.

The first four sections all begin with a hypothetical case in which a foreigner takes an action with legal consequences under the laws of the local jurisdiction, triggering the question “of what place should the statutes be ob-

⁵⁷ Symeonides et al., *Conflict of Laws*, 8.

served or looked?”⁵⁸. Note that, although the question is asked primarily from the perspective of the local jurisdiction⁵⁹, the answer sought aims at designating the applicable law in all cases⁶⁰. The rules of the first section (on contracts) are aprioristic and multilateral. The only exception is the section on delicts, which is reminiscent of modern international criminal law: at the same time, this is exactly the area where Bartolus comes up with a “multilateral” rule in the second part⁶¹.

The second part, which addresses extraterritoriality properly speaking, is more “unilateralist” than the first. At the same time, things become less clear once we view the second part as interacting with the first – that is, the perspective and some of the issues discussed in the second part complement those discussed in the first one, while some points discussed therein are repeated. We would in any case talk of a principled unilateralism: it is possible for all cities to apply the choice-of-law rules that Bartolus indicates, leading to legal harmony; it could even be suggested that Bartolus writes with a view to all cities applying its rules.

[2] Bartolus also seems to weigh the foreign law and its claims to applicability: the scope of the English rule will be determined by the intention of the rule itself. This is reminiscent of modern unilateralism in the sense of Quadri and Gothot, where the foreign law is allowed to determine the applicability of its own law as a way to reduce the number of real conflicts⁶². The difference is that the Bartolan conflicts are triangular, of sorts: the *ius commune* is the law of the one of the two cities, but also a common vocabulary and the source of the residual substantive rules.

⁵⁸ See e.g. Bartolus ad C.1.1.1, nu. 13:

And first, I ask, what about contracts? Suppose a contract celebrated by a foreigner in this city: a contest arises, and suit is brought in the place where the contract was made: of what place should the statutes be observed or looked at?

⁵⁹ See e.g. *ibid*, nu. 21 (“Second, I ask what about delicts. If a foreigner does a wrong here, shall he be punished according to the statutes of this city?”).

⁶⁰ Cf. Barry, “Bartolus,” 2: “... and asks whether the laws of that jurisdiction govern the case.”

⁶¹ See Bartolus ad C.1.1.1, nu. 48 (if local statute expresses itself in general terms, either the *ius commune* or the law of the place where the offense took place (*lex loci delicti commissi* in terms) will be applied).

⁶² See Pierre Gothot, “Le renouveau de la tendance unilatéraliste en droit international privé,” *Revue critique* 60 (1971): 1-36, 209-243, 415-450, 3.

In fact, the “unilateralism” of Bartolus is one that seeks to limit the unilateral expansion of the forum’s law. Just like the proponents of interest-analysis, Bartolus seeks to locate “false conflicts,” but unlike them he does not thus seek to expand the jurisdiction of the forum: the result is the return of the residual law, the *ius commune*. The idea of a “residual” legal system being located above partly explains why Bartolus has no concept of a false conflict (though the principal reasons may be epistemological, notably the lack of a sense of legal systems properly speaking).

But we still have to deal with the first part’s aprioristic consideration of the possibility of foreign law to govern an action that occurred within the forum’s territory. The approach in itself is not surprising: it is justifiable to distinguish between the two questions as a matter of conceptualization, but to address the former one has also to consider the latter. This is especially so when the author, like Bartolus in this instance, is so mindful, on the one hand, of the *ius commune*, and so preoccupied, on the other, with assigning one and only solution to each case. But nonetheless a unilateralist’s job could be quite well done by discussing the limitations that the *ius commune* imposes to the reach of Perugia’s statutes.

Even though Bartolus is, for the most part, still quite far from the paradigm of bilateral *a priori* choice-of-law rules, he does not seem to offer a good example of a unilateralist. He seems on the contrary both rather committed to “universal” jurisprudence and quite reliant on a methodological eclecticism so as to carry out his commitment. But moreover, the use of *ius commune* as “interface” makes it difficult to determine what is aprioristic and multilateral and what is unilateral.

C. Private law and rules on conflicts

How relevant is Bartolus to today’s conflicts doctrine? And in which way is he relevant? Answers vary – and they probably tell us as much about modern conflict of laws as about Bartolus and his time.

Thus, Joseph Beale’s translation of Bartolus is certainly influenced by his discovering modern choice-of-law rules in the medieval text. Beale puts in the mouth of a nineteenth-century Continental writer the remark that “the substance of truth was found in [Bartolus’s] writings and that advocates and judges could do no better than to follow his opinions,” while he himself re-

grets how “in the course of five hundred years the simple principles which Bartolus laid down became strangely warped and distorted”⁶³.

Beale’s French counterpart, Jean-Paulin Niboyet, would instead think of Bartolus as the archetype of “analytical” and “eclectic” conflicts writers. Unlike the synthetic writers who are imbued by a “spirit of synthesis or of system” and wary of losing direction through too much detail, the analytical writer analyzes situations by focusing on “clinical cases” whose number they expand or reduce but never before a certain minimum⁶⁴. Unlike the dogmatic writers, who proceed from one fundamental theme “which they affirm and around which everything revolves,” eclectic writers do not begin from a priori principles but “abandon themselves” to whatever their analysis might lead them to⁶⁵. Yet another take on Bartolus emphasizes his – and the Italian school’s – preoccupation with “justice”⁶⁶. Finally, other writers discover in Bartolus most of the contemporary choice-of-law rules⁶⁷.

These various approaches touch upon – but for the most part deny – the role of systematicity and structure, on the one hand, and of substantive legal categories, on the other hand, in the formation of conflicts systems.

1. Systematicity and structure

Bartolus owes much of his lasting reputation to the transparency of his writing, which contrasts favorably with other medieval jurists. On controversial legal points, Bartolus would often succinctly summarize the position of others as well as elaborate his own position. He strived for comprehensiveness, sketching the “big picture” even when he mostly cared about a certain

⁶³ Beale, Bartolus, 10.

⁶⁴ Jean-Paulin Niboyet, *Traité de droit international privé français*, vol. III (Paris: Sirey, 1944), 70 and 53.

⁶⁵ *Ibid.*, 73 and 54.

⁶⁶ See esp. Lainé, Introduction, 1:50.

⁶⁷ See e.g. Jean-Gabriel Castel, *Droit international privé québécois* (Toronto, 1980), 7-8 [mentioning *lex fori* for procedural matters, *lex loci contractus* and place of performance, *locus regit actum*, *lex loci delicti commissi*, *lex rei sitae*].

detail in it⁶⁸. He also used to perfection the art of typology, distinguishing issues and enumerating points.

These virtues can also be remarked in this *repetitio*. The fact remains, however, that Bartolus's study on the conflict of laws ranks among the most opaque bits of his work. Even the legal categories Bartolus uses are well below his own standards. This is the result partly of the oral style of the *repetitio* and partly of its rather "experimental" character⁶⁹.

For an example of how Bartolus makes important steps, without taking them to their conclusion, we need look no further than the opening's division of the original question as to the sway of local laws, into the reach of local laws to "non- subjects" within the locality, on the one hand, and the reach beyond that locality, on the other. The *repetitio* is correspondingly divided in two parts, and many have indeed perceived this as the enunciation of the division of statutes into real or personal into the foundation of Bartolan conflicts doctrine. On the other hand, Bartolus can be sharply contrasted with the subsequent jurists who have really espoused the division of statutes as the cornerstone of their work: these writers tend to structure their presentations on the basis of substantive legal categories, which they admittedly try to shape in a way that best conforms to their territorialist or personalist preferences. These same writers would also provide some introduction in which they elaborate a definition of "personal," "real" and "mixed" statutes and express their preference or presumption. Bartolus on the contrary steps directly into the breach. He never gives a definition, or a simple criterion as to what would characterize a statute as "real" or "personal".

⁶⁸ For example, Bartolus discussed the *populi extranei*, even though he was not interested in them but simply intent on better defining the *populus Romanus*. This is not the case with Baldus, despite the fact his work is more extended than and builds upon Bartolus.

⁶⁹ Things are not made easier, of course, by the fact that we tend to read the *repetitio* as a stand-alone text, whereas it is premised upon medieval doctrines about law-making authority and the scope of legal rules. Nor has the practice of our text's principal commentators/translators, to omit those "peculiar" passages which could help tie the Bartolan conflicts doctrine properly speaking to the rest of his doctrine, helped. See especially the omission of nos. 22-23 (authority to make statute) by Beale, Bartolus, 25 (Lainé, Introduction, 1:139-140, seems on the contrary to have understood the relevance); the omission of the fifth section by Beale, Bartolus, 29, Clarence Smith, "Bartolo," 173, 180 and Lainé, Introduction, 1:144; and the playing down of the forfeiture discussion by Lainé, Introduction, 1:163.

In fact, each of the *repetitio*'s two parts is subdivided in a very different manner: the first part according to substantive legal categories, and the second part according to "classes" of statutes.

(a) Second part as law of persons?

It is observable that sections six to eight are distinguished from each other and subdivided internally on the basis of the characteristics – and intended reach – of statutes, and not on the basis of legal subject-matter: we will thus find together among permissive statutes solemnity requirements and issues of emancipation and legitimation, while, on the other hand, a statute prohibiting the *filia familias* from inheriting (nu. 33) is prohibitive and a statute allowing an illegitimate son to inherit (nu. 38) is permissive – and it is unclear if the primogeniture rule is prohibitive or permissive (nu. 42). Besides, aren't these sections considering the extraterritorial effects of all types of statutes that can make such claims?

At the same time, Sections six to eight are mostly focused on matters that we could, with some stretching, place under a "law of persons" category. To begin with, the statutes that may attempt to regulate (effectively: to limit) the activity of the forum's citizen abroad will for the most part have to do with the citizen's personal capacity: hence statutes about removing legitimation, emancipation, the capacity of a minor to make a testament (nu. 32), the capacity or non-capacity of a *filia familias* to inherit (nu. 33), or even the ability of spouses to make presents to one another (nu. 32) or, eventually, contracts with third parties. The discussion of punitive statutes revolves around the fate of the alleged offender.

But even issues which would not fall under the law of persons under the thinking of subsequent periods are presented here in a way that emphasizes personal capacity: thus, the issue of the validity of a notary's acts, which is a classic example of "form of acts" ever since that notion was born, is phrased by Bartolus as a question of the extraterritoriality of the appointment of a notary under the laws of the city (nos. 34-36).

(b) First part as a selective treatment?

Hence, the more interesting issues about categorization arise from the first part: leaving aside for a moment the "special" fifth section (but even there the

example used is about the formalities regarding testamentary succession), all four categories discussed in the first part fall under the “law of things” category in the tripartite division of legal subject-matter according to Justinian’s Institutes: “all law pertains either to persons, or to things, or to actions”⁷⁰. But we are talking about sub-categories within the Justinian law of things: the law of contracts is only a part of the law of obligations⁷¹, the law on testaments is only a part of the law of succession⁷², and of the law of single things the only thing that remains is a servitude – or is it a public-law statute? The third grand category, the law of actions, is, in the Bartolan *repetitio*, absorbed into the individual subcategories (namely contracts). Finally, the distinction between private and public law, which is consecrated in the opening of Justinian’s Institutes⁷³, is also missing from the *repetitio*.

(c) The *Repetitio* as an eclectic combination

The structure of the *repetitio* suggests that Bartolus thought that the substantive category made a difference in deciding whether foreigner would be subject to a city’s statutes when the foreigner was in the city’s courts, and hence in its territory. When it came to determining the extraterritorial reach of the statutes, however, Bartolus seems to have thought that the type of statute was more important. At the end of each major part, he treats of an issue that is frequently left out, but which, perhaps, tells us much about his mind – the “substantive” category of the status of clerics (who were not regarded as “subjects”) and the extraterritoriality of punitive judgments. In the end, the Bartolan conflict of laws system seems to be less of a system and more of an assembly of systematic thoughts.

The experimental character of the Bartolan system also shows in a comparison with his two immediate successors, Baldus de Ubaldis and Bartholomeus a Saliceto. Baldus divides his main treatment of the subject into three sections: one on persons (nos. 57-87), where Baldus includes a discussion of permissive and prohibitive statutes and which ends with his treatment of suc-

⁷⁰ *JI* 1.2.12.

⁷¹ See *JI* 3.13.2 (obligations distinguished between contractual, quasi-contractual, delictual and quasi-delictual; the elaboration of the law of obligations is structured accordingly).

⁷² See *JI* 2.9.6 (distinction made between testate and intestate succession, and each mode treated separately).

⁷³ *JI* 1.1.4.

cession, one on contracts and judgments (*de jure formae et solemnitate* nos. 88-95) and one on the reach of punitive statutes (nos. 96-103)⁷⁴. Another *repetitio* of Baldus, which remained in manuscript form until recently⁷⁵, is divided into four parts treating statutes which command, prohibit, permit, and punish respectively; each part contains four sections examining the statutes' reach on citizens and foreigners, in and out of the city's territory. Bartholomeus's own distinction is into contracts, delicts and testaments⁷⁶. The comparison of the four texts indicates the hybridity of many notions in Bartolus. That the Bartolan *repetitio* contains in a nutshell much of the content of three different, and subsequent, texts also shows how Bartolus became a point of genealogical and literary reference.

2. Legal categories

The story of how the way in which the legal subject-matter is categorized into legal categories has not been told in conflicts historiography. This is presumably a result of the epistemological separation of private-law and conflicts theory.

Once we breach this separation, however, we may observe that a state of confusion regarding the division of the legal subject matter into categories, or a private-law regime with incomplete categories, would lead to a conflicts system with no singular general principle – i.e. to what Niboyet would have regarded as an analytical-eclectic model. Conversely, a system in which the legal subject matter is orderly divided would better allow a clear division into a small number of legal rules or categories of the conflicts subject matter⁷⁷.

As to individual rules on conflicts, a historical study would show how the so-called Savignian revolution bringing forth the choice-of-law rule coincides with the formation of the grand categories of civil law, such as family

⁷⁴ Baldus ad C.1.1.1 (Lyon, 1585), nu. 57 ff. (for a summary see Lainé, Introduction, 1:166 ff.)

⁷⁵ Baldus de Ubaldis, "Tractatus de vi et potestate statutorum ratione personarum, territorii et rerum," transcribed and published by E.M. Meijers: *Tractatus duo de vi et potestate statutorum* (Haarlem, 1939), 1 ff.

⁷⁶ Bartholomeus de Saliceto ad C.1.1.1., nu. 4 (for a summary see Lainé, Introduction, 1:178 ff.). Bartholomeus (d. 1412) began teaching in Bologna in 1363, but is characterized by Lainé as a direct successor. (following Savigny, *Geschichte*, 4:268, 282).

⁷⁷ See Hatzimihail, *Pre-Classical Conflict of Laws*,

law or the law of obligations, on the one hand, and the rise of the concept of legal relationship, on the other hand. On the contrary, pre-classical conflict of laws seems to have centered around three major types of private-law institutions. First, legal acts, especially contracts and testaments (acts *inter vivos* and *mortis causa*). Second, legal norms regulating the status and capacity of a person: for example, emancipation, legitimation, the capacity of a married woman, the capacity to inherit. Third, legal norms regulating the acquisition of property rights, especially with regard to real (landed) property. The various pre-classical conflicts writers and schools often emphasized different issues – for example, real property as opposed to contracts, testaments – and tended to place certain types of issues with one or the other category. For example, questions of status and capacity could be thought in terms of the person's status or in terms of the requirements to have a valid act, and the prescription of a contracts-based claim could be linked to the procedure or to the contract itself.

We should therefore first consider how Bartolus shapes his legal categories, and then the effects of his categorization on rules on conflicts.

(a) Drawing legal categories

As far as the substantive legal categories are concerned, one soon notices the expanded conception of contract and the limited role of property as a concept. The concepts of torts and family law are nonexistent, whereas the discussion of succession concentrates on the validity of testaments.

[1] To begin with, not only is the term contract used, but also Bartolus's analysis of the conflict of contract laws is the most modern of his entire commentary: both the distinctions made by Bartolus (first that of form - procedure - substance, then that of direct and indirect effects), as well as the solutions offered (*lex loci contractus*) find resonance in Savigny and even twentieth-century scholars. Even the proponents of party autonomy may stake – exaggerated – claims on Bartolus's doctrine⁷⁸.

It is interesting to note the concrete cases Bartolus discusses in his treatment of contracts. Throughout most of the first section, the basic image is a very abstract one: a foreigner concludes a contract in Perugia, a dispute aris-

⁷⁸ See e.g. Bartolus ad C.1.1.1, nu. 43 (“contracts extend as far as the will of the contracting party goes; which is presumed to have been according to the custom of the place where the thing is done”).

es, and suit is brought therein. The two concrete cases with a richer factual setting involve the statute of limitations and a dowry, both topics that are not treated under the “contract” heading by Huber’s time.

[2] The concept of torts is on the contrary inexistent. Bartolus does address the legal category of delicts, but his notion of delict identifies with penal offenses and not with extra-contractual liability vis-à-vis another private party. The absence of a third (private) party is noticeable both in the third and the eighth section. In fact, but for the invocation of the *ius commune*, the second section of the Commentary is quite reminiscent of modern criminal-law discussion as to when a foreigner is criminally liable, and the eighth section suggests doctrines of nationality and (subsidiary) protective personality jurisdiction⁷⁹.

[3] Succession is not treated as a comprehensive category. The third section deals only with testaments. The statutes discussed in the second part which pertain to succession concern either the formalities required for a valid testament or the capacity of certain types of persons to inherit or to make a testament⁸⁰. The only passage which appears to deal with intestate succession is nu. 42 (the English case). Bartolus makes no explicit mention of succession being *ab intestam*, but the solution given refers to statutory rules as to the division of property and nothing seems to imply the existence of a testament, allocating the property in a different manner. Furthermore, under English law land could not be transferred by testaments. On the contrary, in his primogeniture case (involving a French feudal lord) Baldus differentiates between the cases where a testament exists and those when it does not⁸¹.

[4] In its turn, we will search in vain for *ius rerum*, i.e. property law, in the section headings: we simply locate its treatment under “none of the above”. Interestingly, the hypothetical of raising a house higher, which Bartolus is using, may well involve administrative rather than private (“property”) law in much of the world today, and might also have been handled as *ius publicum*

⁷⁹ See Restatement (Third) on Foreign Relations Law,

⁸⁰ Capacity to inherit: daughter-in-power (nu. 33), spurious (nos. 38 ff.). Capacity to make a testament: minor (§ 32), unemancipated son or generally anyone forbidden by the law (nos. 38 ff.)

⁸¹ See Baldus ad C.1.1.1, nos. 84-86 (Lyon, 1585, fol. 8vb-9ra), also excerpted in translation by Lainé, Introduction, 1:175-176.

under the *Corpus Iuris*⁸². Furthermore, we can only assume that when Bartolus speaks of *bona*, as in his discussion of the English case, he means movables as well as immovables: we should be led to think so, but then the English rule of primogeniture was only concerned with succession to land (primogeniture rules in France also concerned only feudal property)⁸³. In any case, the *lex rei sitae* rule is here and there is no evidence that Bartolus tried to encroach on its traditional domain. But not much reminds us of the importance territorialist authors would grant to it.

[5] It is only natural, in this context, that questions of marital property fall under the “contract” category. This is even more so since Italy, for the most part, adhered to the regime of separation of marital property, while dowry (and dotal contracts made before notaries) was widespread⁸⁴.

There is no mention of the issues regarding the formation of marriage. The reason is twofold. First, marriage is treated as a sacrament, and thus falls under the ecclesiastical jurisdiction of the Church. This phenomenon is at its most intense in the High and Late Middle Ages, when the Church is the sole legislator on the formation and validity of marriages. Second, despite divergent local practices, marriage law is considered as unitary, just as it was supposed to be.

Furthermore, we see that the social relationships which in the nineteenth-century will come together to constitute family law, in the *trecento* either fall under the canon law or are not conceptualized as relationships with their distinct body of legal rules: we will hence find scattered references to husband and wife (principally with regard to the prohibition of gifts among them), or to the emancipation and legitimation of children in the second part. This lack

⁸² There is a *servitute altius non tollendi* in Roman law. Its relationship to the public law on the same topic is problematical. See W. W. Buckland, *A Text-Book of Roman Law*, 3d ed. (Cambridge, 1963), 264 and references. For the Roman public-law sources on the general topic, see O.F. Robinson, *Ancient Rome: City Planning and Administration* (London: Routledge, 1992).

⁸³ For the English law, see Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2d ed. reissue (Cambridge, 1968), 2:268–78, 292–4, 309. For the French law, see Paul Ourliac and Jean-Louis Gazzaniga, *Histoire du droit privé français de l’an mil au Code civil* (Paris: A. Michel, 1985) 324–328. For a comparison of English and French law in this respect, see Charles Donahue Jr., “What Causes Fundamental Legal Ideas,” *Michigan Law Review* 78 (1979): 59–88.

⁸⁴ See Thomas Kuehn, *Law, Family and Women: Toward a Legal Anthropology of Renaissance Italy* (Chicago: University of Chicago Press, 1991); Manlio Bellomo, “*Ricerche sui rapporti patrimoniali tra coniugi*,” *Ius nostrum, Studi e testi* 7 (Milano: Giuffrè, 1961).

of conceptualization of social relationships as relationships makes it easier to deal with conflicts issues as a matter of extraterritoriality of statutes. We need to think in the abstract and reified terms of a “legal relationship” in order to provide an abstract choice-of-law rule for it; conversely, once we think in terms of a legal relationship we cannot examine ad hoc the reach of the individual legal rules trying to regulate it.

[6] Which brings us to the law of persons. The second part of the *repetitio* deals with the matters of personal status and personal capacity, both general and specific (e.g. capacity to make testaments). But, unlike the subsequent authors such as Huber, it is not organized in such terms. Nor are there any general choice-of-law principles – again, unlike subsequent authors. Instead we have the discussion of various issues of capacity throughout the section. They are organized according to the distinction between prohibitive, permissive and punitive statutes (but there are also capacity issues in the section on punitive judgments, as in the case of penal slavery). Within these categories, there are sub-distinctions such as the one between favorable and burdensome limitations on capacity⁸⁵. Such distinctions make it more difficult to come up with the clear rules of subsequent pre-classical authors, such as Huber and Story – or the early classical conflicts lawyers. Interestingly, Bartolus comes nearer modern conflict of laws in the way in which substantive-law preferences influence his low-abstraction rules.

[7] The Bartolan system also distinguishes between statutes, on the one hand, and legal acts – private and public – on the other hand. The distinction is not absolute, and the effects of legal acts are compared to effects of statutes, and vice versa, with no reference to it. But the distinction is there, like in the distinction between emancipation and legitimation of spurious.

As to legal acts themselves, it seems at times that the distinction between acts of public authority, such as a foreign court, and acts of individuals is not fully made.

(b) Legal categories and choice-of-law rules

Given that Bartolus’s conflicts treatment is only partly structured on the basis of categories of the legal subject matter, correlating how he delineates

⁸⁵ See Bartolus ad C.1.1.1, nu. 33: essentially, prohibiting someone from disposing one’s property is a favorable prohibition, while prohibiting someone from acquiring property or inheriting an odious/burdensome one.

these substantive-law categories with his solutions on conflicts is more difficult than with subsequent writers.

To begin with, the playing down of property law in the *repetitio* also leads the *lex rei sitae* rule, while we know it is there, away from the spotlight. On the contrary, discussing contracts first, and defining them extensively, is linked to a contracts-friendly choice-of-law regime which finds much resonance to this day. The discussion of succession occurs through the discussion of testaments, and often becomes a question of personal capacity: intestate succession seems like a peripheral, almost detached topic.

The prominent role given to statutes regulating the status, capacity and legal entitlements of persons, on the one hand, and to legal acts, on the other hand, makes the discussion revolve around extraterritorial effects. It also makes the Bartolan system appear more liberal and considerate of individual autonomy, especially if one does not observe the heavy shadow of the *ius commune*.

D. Bartolus on form and substance

The conflicts lawyers who have translated or presented the *repetitio* have discovered in Bartolus a clear distinction between the “form” and the “substance” of acts, much like contemporary doctrine⁸⁶. In contemporary conflicts doctrine, the distinction between “issues of form” and “issues of substance” is made with regard to all types of legal acts, and separate choice-of-law rules govern each. Yet seldom do conflicts textbooks attempt to define form and substance, which seems to imply that “form” and “substance” exist in nature and are not simple academic constructs.

1. Anachronisms

Bartolus himself uses the term *forma* only sparingly, and in a different sense than we present him as doing⁸⁷. Where conflicts lawyers translate him

⁸⁶ Thus Lainé, Introduction, 1:135, 142, 149, 151, and especially Beale, Bartolus, 18, 34, 40, 42-43.

⁸⁷ The word *forma* appears in four places in the *repetitio* (nos. 26, 47, 49, 50) coupled with the word *statuti* or *statutorum*. In one of these places (nu. 26), it corresponds to what elsewhere Bartolus calls *solemnitas* (it is the “form” that one uses to legitimate), but even here the meaning seems to be broader. In all the other cases, and to a certain extent in this one, the meaning

as speaking of “form,” Bartolus writes *solemnitas*⁸⁸. Furthermore, he seems to be contrasting *solemnitas* with *dispositio* (e.g. nu. 36), the meaning of which has more to do with the “effects” of the act or statute than with its “substance.”

Solemnitas has accordingly been translated in this article as “solemnity.” But the Bartolan *solemnitas* is not the same with what we would today call solemnity: *solemnitas* appears as a singular abstract noun encompassing all the individual solemnities or formalities. In that sense it is closer to our “form,” and indeed it is not an accident that the translation of *solemnitas* as “form” has made sense to conflict lawyers.

A sharp contrast between “form” and “substance,” however, would have been quite incomprehensible to someone familiar with the vocabulary of medieval philosophy (as Bartolus, almost certainly was)⁸⁹. In medieval philosophy, at least the philosophy that employed Aristotelian terminology, “substance” was contrasted not with “form” but with “accidents” or “attributes.” That this distinction is one that Bartolus has in mind can be seen in the one place in the *repetitio* where he uses the word *substantia* (nu. 47), where he contrasts it with *qualitas* (one of the “accidents”). “Form” in medieval philosophical language is most often found paired not with “substance” but with “matter.” “Form” is added to prime matter to make something that exists (a “substance”). There are hints of this usage in the way that Bartolus uses the word “form” in the *repetitio*⁹⁰. “Solemnity” was not a technical term in me-

is broader: it is the statute that gives form to the otherwise inchoate matter (admittedly not a term that he uses) that is its subject. In one final case, the use of *forma* is quite dramatic: the English rule gives “form” to the goods that are in England (*certa forma est data bonis ibi posit*), i.e., changes their nature from being inheritable by all the children (nu. 42).

The word *substantia* is only used in nu. 47, where Bartolus is reporting the opinion of Cinus that a citizen may be punished for a crime committed outside the territory under a statute, so long as the statute is punishing something that was already a crime under the *ius commune*. The statute cannot extraterritorially create a *novam obligationis substantiam*, though it may change the *qualitatem* of that *substantia*.

⁸⁸ See Bartolus ad C.1.1.1, nos. 13, 22, 26, 32, 36, 37, 40, 41.

⁸⁹ See James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991).

⁹⁰ For a relatively straightforward introduction to these topics, see Richard H. Popkin (ed.), *The Columbia History of Western Philosophy* (New York, 1999), index, s.v. accidents, attributes, form and matter, hylomorphism, matter, substance. For a more complicated discussion, see Norman Kretzmann et al. (ed.), *The Cambridge History of Later Medieval Philosophy* (Cambridge, 1982), under the same catchwords.

dieval philosophy, and while Bartolus's use of the term sometimes suggests that he is thinking of an "accident," it is probably significant that he does not use the latter term.

Another anachronism involves the distinction between substance and procedure – a distinction that part of conflicts historiography has considered as the starting point of the conflict of laws, as it allowed foreign law to be applied in matters of substance⁹¹. A century later, Bartolus still seems to fit procedure within the "substance" category as opposed to solemnity/"form"⁹². He also characterizes, in opposition to the Gloss (and subsequent authors such as Huber), a statute of limitations as substantive and not procedural⁹³.

2. *Affinities*

Yet for all the anachronism involved, Bartolus still seems to be engaged in an exercise similar to that engaged by subsequent conflicts lawyers: that of using a distinction between "form" and "substance" to promote the circulation of legal acts, or to impose burdens on their authors.

(a) "Form" as a means to promote the validity of acts

Embodied in the rule *locus regit actum*, the concept of form has been traditionally used in conflict of laws to secure the validity of acts as well as to uphold certain standards of public policy and certainty. In his discussion of contracts (nos. 13-14), as we have just seen above, Bartolus utilizes form/solemnity in a manner like ours.

A more complex characterization, which leads to "modern" results but also suggests the conceptual differences across time, is found in the discussion of permissive statutes: Bartolus distinguishes between statutes that concede/

⁹¹ See e.g. Meijers, "Principes fondamentaux," 596 ("Avec cette distinction ...la science moderne du droit international privé était née").

⁹² See Bartolus ad C.1.1.1, nos. 13-15.

⁹³ Ibid, nu. 19.

[T]here is a statute here that the right of suing for a debt is proscribed in ten years. Now a Florentine lent one hundred in the Roman court under contract to return it to the city of Perugia. Certainly if he did nothing for ten years the statute here will apply because the negligence was a violation of our statute; but this seems contra to the gloss, where it seems to be said that not the place of the contract but of the judgment governs. Certainly that gloss is wrong.

permit/make possible the exercise of a special privilege, and statutes that allow with more liberality what is already permitted by the *ius commune*: that second category is then divided into statutes removing a solemnity requirement (which are treated in a manner similar to the first category) and statutes removing a limitation on personal capacity. The first category, which involves the validity and extraterritoriality of notarial acts, would be today treated as dealing with form/solemnities, and indeed the solution adopted therein is pretty much our own: the notary cannot draw deeds outside the territory of his appointing authority, but deeds drawn within his territory “have force everywhere ... because it is a matter of solemnity rather than of substance” (nu. 36).

The rule *locus regit actum* operates in two levels, as Bartolus discusses the extraterritoriality of statutes regulating form/solemnity. In the sixth section, Bartolus denies the extraterritoriality of solemnity requirements imposed by prohibitive statutes: “In matters of solemnity we always look to the place where the thing is done” (nu. 32). In the seventh section, the talk is of permissive statutes, and hence of more lenient requirements for the validity of the will (and the capacity to inherit). The question has now shifted to the effects of an act done validly under such a statute. Bartolus acknowledges, in principle, extraterritorial effect to a testament made before fewer witness than required by the *ius commune*, but as many as the local statute requires. In discussing why, he tends to play the form/solemnity card (while dismissing the argument of Gullielmus de Cuneo that the effects of the statute extend “by consequence” to the goods of the estate located *extra territorium*).

(b) “Form v. substance” as a way to limit the reach of local law

The second aspect of the Bartolan doctrine on *solemnitas* is the use of the concept in order to distinguish cases where a statute’s or an act’s effects extend to foreigners or foreign places from cases where they do not.

In the third section (on testaments), Bartolus’s flagship example is a case of form, where the local law is more liberal (fewer witnesses required). His seemingly general conclusion is that statutes extend to foreigners within the territory whenever and only when they have to do with form, “[f]or the solemnity of an act pertains to the jurisdiction of the city in whose territory it is done; so it varies according to the difference in places; but whenever there is

a difference of person, a statute cannot dispose, except about a person subject to it.”(nu. 26).

If this seems to conform to modern ideas about statut personnel, another example shows the instrumentalist way in which the distinction could be employed.

In discussing the extraterritorial effect of statutes removing *ius commune* limitations on personal status (personal qualities), Bartolus stumbles across the case of a statute allowing a *spurius* to be appointed as heir. Bartolus is faced, like others before him, with sections in the Code and the Digest suggesting that an emancipation is effective everywhere. Are not the legitimation statutes the same with those making an act such as will or emancipation possible? Contrary to many, Bartolus draws a line. Allowing the *spurius* to be heir grants a capacity to do this act, as opposed to specifying the solemnities required for the act. On the contrary, “the statute [on emancipation] does not emancipate the son, ... the father emancipates the son, using the form provided by the statute” (nu.41). The defining characteristic of *solemnitas* is that the “act could be done elsewhere not in that form:” there is hence no prejudice to the foreign city where the effects of that act will be recognized. The notary is here Bartolus’s model with regard to the role of form: “for he takes no part in the disposition itself, but in solemnizing an act done by *er*”⁹⁴. As to court judgments, to the universal effects of which proponents of the extraterritoriality of acts pointed at, Bartolus distinguishes: in the judgment “the judge disposes of a right already vested and created, a right which follows the person everywhere; therefore execution is allowed by another judge. But when a judge acts *de novo* by creating a right within the territory, then it has no force outside the territory, as has been proved above”⁹⁵.

Interesting in its own right, this Bartolan analysis may be seen as containing in hybrid form both the public - private distinction and the vested-rights doctrine. But it is not necessarily convincing, especially when one considers the thin line between legitimation and emancipation. This would not suggest

⁹⁴ Ibid, nu. 41 (idem in notario, non nam adhibet ipse ad disponendum, sed ad solemnizandum circa actum ab alio dispositum).

⁹⁵ Ibid:

Non obstat quod supra dictum est de sententia quia ibi iudex disponit super iure iam fundato et formato quod ius respiciebat persona ubicumque. Ut puta condemnat aliquem occasione [praecedentis] bolonis], qui ligat reum obligatum in omni loco, ideo mandatur executioni per alium iudicem. Sed quando ipse iudex de novo inducit ius faciendo intra territorium tunc non porrigit extra territorium, ut supra probatum est.

that Bartolus fell victim to hair-splitting conceptualism. Some may allege personal politics: one of the privileges Emperor Charles IV conferred on Bartolus (and his descendants who were doctors of law) was the power to legitimate children. But maybe the fact that this was a privilege of some symbolic importance indicates the spirit of the times. The real issue is that we are talking not about illegitimate children in general, but about spurious children, fruits of abominable unions that could never be sanctioned by marriage.

E. Harmony of solutions

The harmony of solutions or decisional harmony, which ensures that a single legal relation is not treated differently in different jurisdictions (i.e. the same marriage is valid in some countries but not others) has been to this day a constant preoccupation in conflicts thinking⁹⁶.

Gulielmus de Cuneo's expressions of horror about a man dying in part testate and in part intestate, when the will has been made in accordance with the laxer requirements of a local statute (nos. 36-37: statute requiring only four witness, instead of the seven of the *ius commune*), would find resonance with many contemporary lawyers. On the other hand, while a modern will is essentially a postmortem conveyance and it is hence perfectly natural for the property mentioned in the will to pass according to the will while the property not mentioned in the will passes according to the rules of intestacy, the principal function of a Roman testament is to make an heir: a universal successor who steps into the shoes of the deceased, gets all property (excepting the legacies), assumes all debts and gets all credits. The same held true with regard to the intestate heir(s). Under these circumstances a case of partial testacy and partial intestacy raised problems⁹⁷. But Gulielmus also seems disturbed by the same thing that has disturbed subsequent conflicts lawyers: the validity of the testament is dependent on the fortuity of where the property lies, leading to two different results in the same case.

⁹⁶ See e.g. Laurent Barnich, *Les actes juridiques en droit international privé: essai de méthode* (Brussels: Bruylant, 2001), esp. 56-61; Giuseppe Barile, "La fonction historique du droit international privé," *Recueil des cours* 116 (1965): 305-376. See also Henri Batiffol, *Aspects philosophiques du droit international privé* (Paris: Dalloz, 1956), 195 ff.

⁹⁷ See Ph. Meylan, "Nemo pro parte testatus pro parte intestatus decedere potest," in *Zum Schweizerischen Erbrecht: Festschrift zum 70. Geburtstag von Peter Tuor* (Zürich, 1946), 179-200.

At the same time, it is noticeable that medieval jurists such as Jacobus de Ravanis (and Cinus, for a while) were willing to allow such a result: we could interpret their stance as either an ancestor of the late-nineteenth century, “particularist” acceptance that the same legal case will be treated differently in different fora, or view it as an effort to reduce the scope of application of the “particular” rule derogating from the *ius commune*.

In either case, Bartolus seems the closest among his group to contemporary mentality: on the one hand, he grants extraterritorial effect to the will, and generally his system tries to make sure that acts are validly executed and then have effect everywhere; on the other hand, he wishes to make clear that it is possible “by force of law” for one to die testate in part and intestate in part: we can see him as less conceptualistic (it is possible, and perhaps advisable, for a testament to have partial effect) and more of a legislative positivist – a characteristic also reflected in his solution to the “English case”.

The attitude of Bartolus with regard to the effects of legal acts is also characteristic in that sense. He supports the universal effects of acts validly made in their territory, insofar as they do not cause prejudice to the foreign city. But he seems to be drawing the line of “prejudice” broadly enough⁹⁸. The distinction made with regard to judgments giving rights to preexisting obligations and rights created *de novo* by the judge also works in a similar manner⁹⁹. On the other hand, the “divergence” effect of such reservations are mitigated by the existence of a common “general” law.

In fact the instances where Bartolus sees “prejudice” occur wherever the statute achieves a substantive effect that could not be achieved by the law of the other city or the *ius commune*. Testaments can be made everywhere. How one makes them is up to the jurisdiction where one makes them. But *spurii* can be legitimated only by the emperor or the pope. If a city purports to legitimate a *spurius*, that is prejudicial. Interestingly, Bartolus does not see it as prejudicial to the intestate heir, but to the city which doesn’t recognize the rule.

V. THE CONFLICTS REPETITIO AND “INTERNATIONAL GOVERNANCE”

⁹⁸ See nu. 41.

⁹⁹ See nu. 41 in fine.

I have used the term international governance in previous writings, to express the function of conflict of laws and private international law in allocating competencies and influence between the international legal entities, and in dealing with their existential problems. I am using the term international in a liberal sense, to describe this state of pluralism – horizontal as well as vertical – among normative communities or political entities. The term also draws connections to the political-science and international-relations theories of international or world systems composed of interacting units at various levels¹⁰⁰. We will observe in Bartolan thought a very complex “international” system consisting of cities with varying degrees of independence (but also varying degrees of internal coherence), regional alliances or entities, geographical systems, kingdoms and empires.

I am taking this broad approach because of what I perceive as the failed uni-dimensionalism of the positions taken in the historiographical discussions (Sub-section A). I am accordingly approaching Bartolan thought from two different viewpoints: the view from above and the view at the city level. Sub-section B presents the “world system” according to Bartolus, examining first how it is structured among entities and then the types of inter-state / universal law that breathe life into it. Sub-section C then examines the Italian city, the center of Bartolus’s preoccupations.

A. Historiography: images of Bartolan “international governance”

Perhaps a triangle is the best way to summarize how the “international governance” dimension of Bartolan conflict of laws has been touched upon.

On the one corner we will find much of mainstream conflicts literature – and even some historians, who emphasize the connection between the basic theory of statutes (i.e. the distinction between real and personal statutes) and sovereignty: these writers claim to have located both in Bartolus¹⁰¹. Others in

¹⁰⁰ See Barry Buzan and Richard Little, *International Systems in World History* (Oxford: Oxford Univ. Press, 2000).

¹⁰¹ See e.g. Despagnet, *Précis*, 184 (the theory of personal statutes presupposes territorial sovereignty and imposes to it limits; it combines individuality and territoriality) and 185 (statutists establish between the statutes the distinction already accepted between Roman law and the statutes in general); J.A. Pontier, *Conflictenrecht: grondslagen, methoden, beginselen en belangen* (Nijmegen: Ars Aequi, 1997), 57. Many writers, less explicit, simply seem to take this idea of a horizontal conflict between polities as a premise: see e.g. Jayme, “Identité culturelle,” 40. See also E.M. Meijers, “Introduction à la publication d’oeuvres inédites de Balde et

the conflicts mainstream portray Bartolus, and conflict of laws in general, as a distinctly “private law,” even a technical, enterprise¹⁰².

The third corner is occupied by medieval historians – and some modern globalists revolting against the yoke of “sovereignty.” Contrary to the first two approaches, these tend to question whether we should place Bartolus and his contemporaries into the conflict of laws tradition. Interestingly, this third perspective attributes a stronger role to the importance of state sovereignty than the first perspective: whereas mainstream conflict of laws reads its history as a move away from “conflict of sovereignties” and toward the “conflict of interests,” the skeptics are at least as convinced that state sovereignty is the fundamental ground of conflict of laws, as they are that that the pre-Westphalian, or at least the pre-Reformation writers lack this grounding. Again, the skeptics’ thesis has two aspects: first, that the medieval “world system” is such that it cannot give rise to conflict of laws as we mean it; second, that Bartolus himself has different preoccupations (and sensibilities) from those of conflicts lawyers properly speaking¹⁰³. Many skeptics also claim that the adherence of Bartolus and his contemporaries to the *ius commune* was such as to make Bartolan doctrine fundamentally different from modern conflict of laws¹⁰⁴.

de Van der Keesel,” *Revue critique* 35 (1946), 203-219 : “Ce qu’on nomme aujourd’hui la science du droit international privé se réduit pour Balde à la recherche des limites de la souveraineté des villes.”

The main effort to refute this idea from the point of view of the history of political ideas is A. Checchini, “Presupposti giuridici dell’evoluzione storica dalla ‘Bartoliana’ teoria degli statuti al moderno diritto internazionale privato,” in *Bartolo da Sassoferrato: Studi e Documenti per il VI Centenario* vol. II (Perugia, 1962), 61-105. Checchini presents in detail the arguments affirming the existence of “sovereignty” or “ordre juridique,” especially by Catellani and Calasso.

¹⁰² See e.g. André Bonnichon, “La notion de conflit des souverainetés dans la science des conflits des lois,” *Revue critique* 38(1949): 615-635, 39(1950): 11-32.

¹⁰³ See S.E. Thorne, “Sovereignty and the Conflict of Laws,” in *Bartolo da Sassoferrato: Studi e Documenti per il VI Centenario*, vol. II (Università degli Studi di Perugia, 1962), 673-689.

Thorne himself does not manage – and probably did not seriously intend – to shake off the connection between Bartolus and conflict of laws properly speaking. However, by showing the similarities between rules, on the one hand, and the drastically different theory / worldview on the other hand, he provides material for all erroneous conceptions noted above.

¹⁰⁴ Barry, “Bartolus,” 27-28.

I would for my part suggest locating ourselves inside the triangle. The third perspective manages to avoid the anachronistic excesses of the doctrinal mainstream – even though it is not completely devoid of wishful thinking itself. At the same time, apart from the question of historical accuracy, it raises three issues in contemporary doctrinal discussion.

First, a rigid definition of conflict of laws can identify it with one stream or thought: hence, in his essay Thorne describes contemporary conflict of laws with reference to Huber, Story and Beale and an emphasis on the Anglo-American tradition of vested rights¹⁰⁵.

Second, a reading of Bartolus as “working wholly within a private law scheme” may lead to a general understanding of private international law as essentially a “private law” affair and hence to playing down the “international governance” aspect¹⁰⁶.

Third, by painting a picture of “a complete change in theory” but little change in rules, without accounting for this process, the “technocratic,” autonomous perception of the conflict of laws is also strengthened.

It is now time to consider whether Bartolus’s ideas about the autonomy of the governmental entities with which he is dealing are close enough to our ideas of sovereignty that we can draw a line from his ideas to those of later periods, or whether his world and his political thought are so different from ours as to make it impossible to trace a continuity between the ideas of the *repetitio* and subsequent thinking on what seem to be the same issues.

B. The Bartolan “world system”

While Bartolus hints at a comprehensive world system, and especially a world empire, his principal concern was with “those parts of Italy which he knew and whose problems were actually before him – Lombardy, Tuscany, the March and central Italy generally”¹⁰⁷. This means that Bartolus treated only casually the kingdoms (*regna*) of France, England or even Naples and

¹⁰⁵ See Thorne, “Sovereignty,” 685 ff.

¹⁰⁶ Thorne, “Sovereignty,” 684:

Working wholly within a private law scheme, it was on principles of what is right and just that Bartolus established his rules, which have lasted from his day to our own despite the advent of territorial sovereignty and a complete change in outlook.

¹⁰⁷ Cecil N. Sidney Woolf, *Bartolus of Sassoferrato: his position in the history of medieval political thought* (Cambridge: Cambridge University Press, 1913), 108.

Sicily, even though regna and civitates posed many of the same problems regarding their political status and governance and Bartolus himself is assumed to have drawn from arguments about the independence of regna¹⁰⁸.

1. The Emperor as Lord of the World

[1] The Bartolan “world system” focused on a world empire – the Roman empire, constituted by the *populus Romanus*, under the secular scepter of the emperor and the religious scepter of the pope. The *populus Romanus* consists of all who obey the Roman Church (*populus Christianus*), and hence recognize the Emperor as *dominus omnium*: this includes not only those who obey the *imperium Romanum* fully or partially (e.g. the Tuscan and Lombard cities), but also those who claim an exemption based on imperial privilege (e.g. Venice). Included, too, are those upon which the Church exercises the *imperium* (the territories of the Donation and clerics), and even the kings (e.g. of France, England) who deny any subjection to the *rex romanorum*: they have to acknowledge the emperor as *dominus omnium* in order to claim their independence *de iure*¹⁰⁹.

[2] The gloss on D. 49.15.24 divided humankind into five *genera gentium*. Bartolus, however, suggested that *principaliter* there are two: *populus Romanus* and *populi extranei*¹¹⁰. He thus grouped together all those – Greeks, Tartars, Saracens, and Jews – who did not recognize the Roman Emperor as *dominus universalis*, but instead believed their own ruler to be lord of the world. Bartolus proves here more tolerant than those medieval and early-modern writers who declared the whole world as subordinate to Western Christianity. But in reality he is interested less in those extraneous peoples and more in defining and discussing the *populus Romanus*. His two principal

¹⁰⁸ On Bartolus and regna see Woolf, Bartolus, 107-112 (noting that Bartolus, who is credited with the notion of *civitas sibi princeps* did not use the phrase *rex in regno suo est Imperator regni sui*, because “the problems, which made the solution necessary, rarely presented themselves to him except in connection with the *Civitas*.” 109). See also Francesco Ercole; “L’origine francese della formola Bartoliana «*civitas superiore, non recognoscens est sibi princeps*»,” in *Da Bartolo all’Althusio: Saggi sulla storia del pensiero pubblicistico del rinascimento Italiano* (Firenze, 1932): 157-217.

¹⁰⁹ Bartolus ad D.49.15.24 (Latin text also quoted by Neville Figgis, “Bartolus and European Political Ideas,” *Transactions of the Royal Historical Society*, 2d ser., 19 (1905): 147-168, 156 n. 1; Woolf, Bartolus, 25-27).

¹¹⁰ Bartolus ad D.49.15.24.

references to *populi extranei* pertain to the conduct of public war by the Emperor against them. By suggesting that all *populi extranei* believe their ruler to be lord of the world, Bartolus also strengthens the claim of the imperial party that universal dominium is the natural order of things¹¹¹. A stronger basis for this claim is his presentation of world history as a succession of world Empires: Babylonian, Mede-Persian, Greek and Roman. With the advent of Christ, the Roman Empire became His. He transmitted it to His vicar who transmitted it to the now-emperor¹¹². This argument manages to defend both certain papal claims and the universal Roman dominium against those who argued that they could not in their turn be accused of usurping from the Romans the territories the Romans had themselves usurped by force¹¹³.

[3] In short, Bartolus is more concerned with defending the nominal authority of the emperor and the unity of Western Christianity under him and the pope, than with portraying a truly comprehensive “world system” – or with prescribing extensively the real powers of the trecento emperor. His emperor was *dominus universalis* without hindering the existence of *domini particulariter*¹¹⁴. Furthermore, Bartolus in his commentaries repeatedly drew a distinction between the imperial power *de iure* and the partial or complete disobedience of many peoples (*gentes*) *de facto*¹¹⁵.

There are three ways to interpret Bartolus’s “big picture”. The first is that this is how Bartolus really views his world, that all of it makes perfect sense to him. Towards the end of Bartolus’s life, after all, papal authority was restored to Italy, and even the Emperor came back – to dispense imperial concessions in exchange for money and the nominal recognition by cities. The second is that Bartolus is simply invoking the Emperor and the *populus Ro-*

¹¹¹ Jan Baszkiewicz, “Quelques remarques sur la conception de dominium mundi dans l’oeuvre de Bartolus,” in *Bartolo da Sassoferrato : Studi e Documenti per il VI Centenario*, vol II (Giuffrè, 1962): 9-25, 9.

¹¹² Bartolus, *Tractatus super constitutione Ad reprimendum*, (Venice, 1602), vol. 10, fol. 94va – 104va.

¹¹³ See Woolf, Bartolus, 346 ff.

¹¹⁴ See Bartolus ad D.6.1.1 (as quoted in Magnus Ryan, “Bartolus of Sassoferrato and Free Cities,” *Transactions of the Royal Historical Society*, 6th ser., 10 (2000): 65-89, 71):

I say that the Emperor is Lord of the entire world in a true sense. Nor does it conflict with this that others are lords in a particular sense, for the world is a sort of *universitas*. Hence someone can possess the said *universitas* without owning the particular rights within it.

¹¹⁵ For a list see Francesco Ercole, “Impero universale e Stati particolari: la “*civitas sibi princeps*” e lo Stato moderno,” in *Da Bartolo all’Althusio*: 49-156, 72 n. 1.

manus in order to make the *ius commune* work, and to justify its existence. The third perspective, in the middle, accepts both that Bartolus tries to make sense of the world around him and that he wants to provide a solid foundation for the practice of the body of law to which he has dedicated his life. But it would also suggest that Bartolus viewed himself as an active participant, trying to reconcile contradictory trends and ideas into a comprehensive explanation (though far from the systematicity and rationalism of Leibnitz and the natural lawyers) and a workable apparatus for the administration of justice.

This third interpretation seems the likeliest. The image of the “grand architect” of a doctrinal system, who breathes new life, content and/or structure into old institutions, seeking to provide a “complete edifice of theory ... harmonized with the legal institutions of the day” is a recurring one in the history of legal thought¹¹⁶. The grand architect often has apologetic intentions, but he also seems to reflect the spirit of a new age, and often ends up being remembered in that light. Understanding this allows us to appreciate, on the one hand, the brilliance – and the faith – required in putting together contradictory ideas as the building blocks of a coherent system, and to guard, on the other hand, against a simplistic {unambivalent} reading of the Bartolan doctrines and arguments.

2. *Of Ius Gentium and the law common to all peoples*

Bartolus envisages a hierarchy of laws in which divine law, natural law, and the *ius gentium* are all, in some sense, higher than the law of the emperor. The *ius commune* is on the contrary the law of the *populus Romanus*. So we could view these higher laws as, on the one hand, binding the emperor and other state authorities, and, on other, providing a context for the interaction between *populus Romanus* and *populi extranei*¹¹⁷.

As to the binding authority of the higher *iura* on the emperor, Bartolus seems to regard natural law as setting limits to what could be done to change

¹¹⁶ See e.g. Duncan Kennedy, “The Structure of Blackstone’s Commentaries,” *Buffalo Law Review* 28 (1979): 205-382, 265.

¹¹⁷ Baskiewitz, “La conception de dominium mundi,” 15 (suggesting Bartolus confuses *ius gentium* with natural law).

procedural systems¹¹⁸, and argues that the Emperor cannot thus take away individual property (dominium) without cause because it derives de iure gentium¹¹⁹.

As to the relations with populi extranei, we have Bartolus's tract on reprisals¹²⁰. Bartolus tried to limit the instances of reprisals, on the one hand, and to subject reprisals to due process, on the other. He thus equates reprisals with war (concedere repraesalias est indicere bellum). A just war requires that neither party has a superior – as well as a just cause. Bartolus classifies reprisals (with war) under the manus regia seu potestas regia instead of the officium iudicis: hence they are de iure gentium and not de iure communi. But then Bartolus turns to the ius commune to “establish the orderly working of reprisals between the Italian cities”¹²¹.

Other examples suggest that the Bartolan ius gentium was not so much a law that governed the relationship among gentes or populi, but, rather, a kind of substratum on which other law was built. In his first quaestio disputata Bartolus is disputing the validity of the city statute that makes a bannitus (roughly, an outlaw) subject to being killed by anyone: if it is city law that led to his condition, the bannitus maintains his rights under the ius commune (iura civitatis Romanae), but if the punishment is under the ius commune, the bannitus maintains his rights under the ius gentium (iura gentium)¹²².

The ambiguity of Bartolus in conceiving the ius gentium is of course linked to the notorious ambiguity of the term in his Roman sources¹²³. But the fact remains that in the Bartolan world ius gentium is, if not simply a substratum on which law is built, certainly nowhere near the body of law and practices regulating relations between states that we see in later days.

¹¹⁸ Bartolus, Tractatus super constitutione Ad reprimendum, v^o figura (Venice, 1602), vol. 10, fol. 99rb, after making the ius civile — ius naturale distinction.

¹¹⁹ Bartolus ad C.1.19.2 nu. 3 (Quaedam de iure civili, ut actiones, quaedam de iure gentium, ut dominium ...).

¹²⁰ Bartolus, Tractatus represalium (Venice, 1602), vol. 10, fol. 119vb – 124 va. The argument in this paragraph draws from Woolf, Bartolus, 195 ff., esp. 203 ff.

¹²¹ Woolf, Bartolus, 207.

¹²² See Woolf, Bartolus, 200 and the original texts in n. 1

¹²³ On the Roman ius gentium see Max Kaser, Ius gentium, and additionally the works of Gabrio Lombardi, Ricerche in tema di “ius gentium” (Milano, 1946: Giuffrè); Sul concetto di “ius gentium”.

3. *Ius Commune*

Bartolus lives and breathes *ius commune*, which in his case includes references to canon law alongside the ones from Roman law¹²⁴. To him the *ius commune* is the law of the *populus Romanus*. Some have in fact argued that it is the *ius commune* Bartolus is thinking about when he tries to keep Western Christianity together as *populus Romanus*, or when he speaks of the emperor¹²⁵.

But what is the role of *ius commune* according to Bartolus? Is it the “sovereign” *ordre juridique* in the way nineteenth and twentieth-century scholars came to conceive of national law? An equivalent to the modern international law? A learned law aiming at providing common legal principles and reducing legal diversity? A formidable apparatus used to achieve the sought-after results?

[1] Probably each of these suggestions contains a part of the answer: Bartolus conceives of law – *ius commune* and local law – as a whole. And his *ius commune* is presented as emanating from a political authority. Bartolan doctrine is in principle built upon the *ius commune* and the legal culture associated with its interpretation. At the same time Bartolus’s doctrinal system is full with references to local rules and occasionally builds on them¹²⁶. Bartolus also knows the limits of the real power of the emperor – and as to the papacy, we may remember that he lives during the exile of the popes in Avignon and that effective papal power in Middle Italy is restored only at the end of his life. But this is also the time when cities acknowledged the emperor’s nominal jurisdiction paying him a tribute in exchange for him legitimating their exercise of powers – an exercise often repeated by the emperors and popes who named as their “vicars” the city tyrants they could not depose.

[2] We could argue that Bartolus seems to have been more concerned with providing a doctrinal system that can work in early- and mid- fourteenth cen-

¹²⁴ See Gabriel Le Bras, “Bartole et le droit canon,” in *Bartolo da Sassoferrato : Studi e Documenti per il VI Centenario*, vol II (Giuffrè, 1962): 297-308. The more serious consideration of canon law is supposed to have been a defining characteristic of commentators vis-à-vis glossators.

¹²⁵ Woolf, *Bartolus*, 198, 207.

¹²⁶ See e.g. Woolf, *Bartolus*, 147 (“a random glance at any page of Bartolus would show the large part played by both statute and custom, not merely as illustrations, but in the actual elaboration of a law which, while Roman in basis, was to be practically effectual for the Italy of his day”).

ture Italy, than with fighting off the growing legislative power of Italian cities. Of course, Bartolus seeks to limit the jurisdiction of Italian cities in certain cases – he stands in a moment of transition, from the imperialist glossators to the more localist Romanists who succeeded them. But was he more concerned with preserving imperial power or with serving better his conception of justice? The substantive solutions favored by Bartolus may indicate so¹²⁷. Furthermore, the jurist's instinct is to secure a harmony of solutions (similar cases treated similarly), and to minimize legal diversity – even though most jurists would accept divergence as a necessary side effect in the cases when it would allow their strong substantive preferences to survive.

We will find various examples in our *repetitio*, especially in the way in which Bartolus makes arguments for denying or acknowledging extraterritorial effect to local statutes, where the *ius commune* is used less as a positive system of rules restricting the application of local law, and more as an invaluable apparatus in the pursuance of justice. This is especially so with regard to certain references to the Digest and the Code, which represent extreme cases of “arguing by analogy”.

Beyond that, we have examples where the emphasis shifts to the statute's literal meaning: the way Bartolus deals with the “English case” (nu. 42), after all, is a way to breathe soul and motives into statutes, instead of superimposing an external rule. We can also look to his solution regarding the extraterritoriality of punitive statutes (nos. 48-49).

A more striking example is the discussion about the forum's rules on delicts binding a foreigner (nu. 21): Bartolus draws a series of instances when the foreigner will be punished even though the *ius commune* did not class his act as wrong. The said instances have not much to do with strict concepts of territoriality or personality, either: they represent an effort to minimize the possibility of punishing the foreigner even though he did not, and could not reasonably, know that his action was punishable.

[3] Are we then only a step away from Baldus, who views Roman law as “supplement[ing] the provisions of local customs and statutes and provid[ing] a generally acceptable standard of law for their interpretation”¹²⁸?

¹²⁷ See for example the two cases where Bartolus denies extraterritorial effect to known Perugian statutes derogating from the common law: making it less easy for spurious children to inherit everything instead of those who would otherwise be heirs), (statute requiring more witnesses than the common law).

¹²⁸ Joseph Canning, *The Political Thought of Baldus de Ubaldis* (Cambridge, 1987), 149.

It must be remembered that the role of *ius commune* in Bartolus – and Baldus – is not only instrumental: it serves as the interface needed to produce – and operate – Bartolan doctrine and the local statutes. The concepts that Bartolus uses are taken from the *ius commune* in the broader sense (often, the canon-law additions from the previous century, as in the references to the Sext regarding the punishment of foreigners under the *lex fori*, as well as the distinction of prohibitive statutes into *statuta favorabilia* and *statuta odiosa*)¹²⁹. An interface is necessary, and the better it works the better everything goes. But it can be replaced by another interface, even a very different one, as long as certain features are in place. The *ius commune* may have been a very effective interface.

[4] To summarize from a conflict of laws perspective, the Bartolan doctrine on the conflict of laws is certainly not a purely horizontal one; but the center of attention is nonetheless the city statute and its reach. This is so even though in most of the cases examined in the *repetitio* the opposing laws are the *ius commune* and the local statute: the opposition between *ius commune* and local statute is made explicit only in a few cases, and the fact that so many people have still thought of the Bartolan world as one of horizontal conflicts suggests there was something in it¹³⁰.

In fact, most conflicts in the world of Bartolus indeed involved one city whose law derogated from the *ius commune*, and one which followed the *ius commune* in the case at hand. We could hence speak of a triangulation, in which Bartolus invokes the *ius commune* as an arbiter between the jurisdictional claims of two states. This triangulation however is not absolute: to a certain extent Bartolus is indeed seeking to delimit the scope of statutes derogating from the *ius commune*. But this is not the end of the story. It may have been the end of the story as far as the original gloss on *cunctos populos* is concerned, where the emphasis is given in shielding the Bolognese from the statutes of Modena. With Bartolus, however, while we may be still away from “traditional” conflict of laws, the critical steps have been made.

B. The power of the cities to make laws

¹²⁹ See above Sect. III B 2 and II C 1.

¹³⁰ See Bertrand Ancel, *Les conflits de qualifications à l'épreuve de la donation entre époux* (Paris: L.G.D.J., 1977), 34 speaking of a décalage entre la position théorique de la question et sa solution ...habituel aux statutaires italiens in explaining the change in the meaning of the doctrine *nisi subditos*.

Our *repetitio* is concerned with the power of cities to bind with their laws those “not subject” within their territory, on the one hand, and those “subject” but outside their territory on the other. Bartolus assumes the power of cities to bind their subjects in their own territory. He also effectively disclaims any exercise of power over non-subjects beyond the city’s territory: Bartolus actually denies the extraterritorial application of a statute when both parties are foreigners, and he only allows “passive nationality” jurisdiction (i.e. where the offender is foreigner but the victim a citizen) in *extremis*¹³¹. In this, as well as the exception made for associated cities, Bartolus seems to be using classical or modern notions about sovereignty.

At the same time, there exist hints both as to what is hanging above cities like the sword of Damocles, and as to the potential challenges to internal sovereignty. Bartolus calls statutes *ius proprium civitatis*, and in one passage he examines the validity of the city law itself¹³². The discussion about forfeitures at the end of the *repetitio* also alludes to Bartolan political thought¹³³.

To better understand Bartolus, we may contrast him with the glossators, who had subscribed to a theory of legal sources distinguishing between (general) written law and customs applicable when no written law existed (D. 1.3.32). Statutes were originally treated as “written customs” (*consuetudo scripta*): alongside the other local customs they constituted *ius municipale*, subordinate to the general law and hence subject to the consent of the superior. Additionally, it was accepted that *collegia approbata* – a term covering not only territorial entities but also other corporations, such as guilds – could regulate their own affairs and members¹³⁴. But this subordinate jurisdiction could not justify the expanded aims of city legislation. The doctrine of Bartolus and the commentators thus worked both towards a more sophisticated

¹³¹ Namely the cases of theft from shipwreck and when the judge of the *locus delicti* does not act to punish the offense: Bartolus ad C.1.1.1, nu. 45.

¹³² Ibid, nu. 22-23. See also reference to his discussion elsewhere of the validity of the statute in nu. 38.

¹³³ Ibid, nu. 50-51.

¹³⁴ Bartolus ad D.1.1.9 (quoted by Woolf, Bartolus, 146 n. 6):

Quaero utrum collegia possint facere statuta: videtur dicendum, quod collegia licita et approbata in his in quibus habent iurisdictionem, et quo ad ea quae ad ipsos collegiatos pertinent, possunt facere statuta.

theory of legal sources and towards the consolidation of internal and external sovereignty.

1. The legislative jurisdiction of cities

To the extent that Bartolus worked with something we could today call “sovereignty,” it was a disaggregated and hierarchical model of sovereignty. The center of Bartolan “sovereignty” is jurisdiction – which is allocated in a hierarchical manner, and we will see that the issue of validity of local statutes vis-à-vis the *ius commune* (as opposed to divine law and natural law) became an issue of jurisdiction.

Bartolus defined *iurisdictio* as “the power granted by public law requiring the rendering of judgment according to law and of laying down equity, as by public person”¹³⁵ and divided it into two species, *imperium*, which pertains to the *officium nobile* of the judge and is further divided into *merum* and *mixtum*, and *iurisdictio simplex*, which belongs to the *officium mercenarium* of the judge. The distinction between *imperium* and *iurisdictio simplex* seems to correspond to the ancient Roman distinction between the part of the magistrate’s power in which he had discretion and the part in which he was bound by the law. In their turn, *merum imperium* is exercised for the public utility while *mixtum imperium* is exercised for private utility (as is *iurisdictio simplex*). Each of the three species is divided into six grades: the lowest grades define powers widely available to magistrates, whereas the highest ones, such as the power to make laws (*potestas condendi legem*) which is characterized as *maximum merum imperium*, are reserved to the Prince and Senate¹³⁶.

¹³⁵ Bartolus ad D.2.1.3: *Potestas de iure publico introducta cum necessitate ius dicendi et aequitatis statuendae, tamquam a persona publica.* (Woolf, Bartolus, 407, places *statuendae* after *tamquam a persona publica*).

The definition is the one of the Gloss, to which Bartolus has added *tamquam a persona publica*, in order, he says, to distinguish *iurisdictio* from the jurisdiction given to fathers and tutors.

¹³⁶ Bartolus ad D.2.1.3. For a table condensing Bartolus’s scheme see Woolf, Bartolus, 407.

This hierarchical taxonomy, which integrates functions from the Roman constitution and contemporaneous practice, avoids a stark contrast between the *imperium* of the Prince and that of lesser magistrates, unlike the staunch imperialist glossators, but also Baldus who, thinking also of independent cities, spoke of *merum imperium absolutum* (see Myron Piper Gilmore, *Argument from Roman Law in Political Thought* (Harvard Univ. Press, 1941), 42-43). This

Bartolus held that a statute will be valid if it does not run contrary to the law (*lex non resistit statuto*), and provided it conforms to *bonos mores* and public utility¹³⁷. As to customs, they are valid if they go beyond the law (*praeter legem*), but not if they are *contra legem*, unless the custom is subsequent to the *ius civile* rule and has been induced *ex certa scientia*¹³⁸. Now the question arises regarding the jurisdiction to make such statutes. Some (Bartolus mentions Gullielmus de Cuneo) would allow cities the right to make statutes regarding private utility (in his *quaem privatam utilatem respiciunt*), but not public utility¹³⁹. Bartolus himself differentiates depending on the degree of jurisdiction each city possesses. Cities with no jurisdiction (principally *vil-lae* and *castra*) can make statutes that “concern the administration of property that the people own collectively” (*pertinens ad administrationem rerum ipsius populi*) on their own, but they can legislate on the hearing and deciding of cases (*statutum pertinens ad causarum decisionem*) only by authority of their superior. Cities with limited jurisdiction are similarly limited (in his *in quibus habent administrationem, seu iurisdictionem ... in aliis non sive superioris auctoritate*)¹⁴⁰. On the contrary, a *populus liber* with full jurisdiction, like the *populus Romanus*, can make laws and statutes as it pleases, but those peoples which do not have jurisdiction *de iure communi* and the provinces, which possess *merum imperium* but are also subject to a superior, need confirmation by the superior for their statutes to be valid.

Bartolus’s example of entities needing such confirmation of their statutes is characteristic: the cities of the March (of Ancona) and the Duchy (of Spoleto), which were subject to the pope but remained off effective papal control until near the end of Bartolus’ life. According to Bartolus, in the papal territories the Church has substituted for the emperor in his temporal powers. Additionally, many cities are granted a *de iure* claim to self-governance by imperial concession or by proving the ancient exercise of their power¹⁴¹. But Bartolus goes further: in the course of his commentaries, we will see him repeatedly suggesting that legislative powers thus reserved to the Emperor can

has partly to do with the moment of transition that Bartolus represents, and with his desire to keep the Italian cities under some sort of symbolic leash.

¹³⁷ Bartolus ad D.1.1.9 (*lex omnes populi*), excerpted in Woolf, Bartolus, 150 n. 3.

¹³⁸ Bartolus ad C.8.53.2, excerpted in Woolf, Bartolus, 151 n. 1.

¹³⁹ Bartolus ad C.10.63.5 (referring to his commentary at D.1.1.9).

¹⁴⁰ Bartolus ad D.1.1.9.

¹⁴¹ Bartolus ad C.2.3.28.

be validly exercised by the king, prince or people not recognizing the Emperor as superior, often using the famous phrase *quia ipsamet civitas sibi princeps est*¹⁴².

The notion of *civitas sibi princeps*, as well as the elaboration of the *de iure* – *de facto* distinction are regarded as the main contributions of Bartolus to political theory¹⁴³. We could ourselves conclude that Bartolus ends up by upholding the core of the cities' external and internal sovereignty, while still trying to keep them under a nominal leash. In trying to conciliate the various ideas, and especially the various interests, we could speak of governance.

Additionally, we often find Bartolus further extending the limits of law-making through the interpretation of the *ius commune*: in nos. 22-23 of our *repetitio*, Bartolus debates the position of Jacobus de Arena that a rule reducing the number of witnesses required for a testament cannot be valid without imperial consent: Bartolus argues that for a written will to be valid publication is required, and the solemnities of publication can be reduced by statute or custom; that the *patria* can dispose with regard to its subjects just like a father can with regard to his sons (i.e. with two witnesses); and that it is convenient to keep fewer citizens away from their business. Interestingly, the case in question could have been more easily disposed, since Bartolus recognizes Venice's claim not to be subjected to imperial power. Accordingly, what Bartolus says here should be read as having application to any city that adopts this rule on testaments.

Perhaps an examination of Bartolus's most important student, Baldus, will illustrate the direction towards which these ideas are heading. Baldus represents the consolidation of the cities' legislative power, and a stronger emphasis on popular consent as basis of legislative power¹⁴⁴: he reaches the point of calling custom a *tacitum statutum*¹⁴⁵, i.e. a reversal of the glossators' *consuetudo scripta*. Whereas Bartolus tried to recognize the legislative power

¹⁴² Examples include the restitution of fame to someone declared infamous (D.3.1.1), granting to a minor the administration of his property (D.4.4.3), etc. See the list in Woolf, Bartolus, 155-160.

¹⁴³ Cf. Ryan, "Bartolus and Free Cities."

¹⁴⁴ Canning, Baldus, 102:

Bartolus' achievement had been to establish the legislative autonomy of *populi* by arguing essentially from the independence involved in the formation of custom to independence in statute-making. Baldus writes when the full legislative power of the people has already been established.

¹⁴⁵ Baldus ad Auth. Et qui iurat, ad C.7.72.9 (quoted by Canning, Baldus, 102 n. 31).

of cities while maintaining some form of the traditional hierarchy of jurisdictions, Baldus, having presented a similar gradation of cities possessing no jurisdiction, limited jurisdiction and full jurisdiction¹⁴⁶, acknowledges the power *de iure gentium* of a people to make statutes without the consent of its superior provided the statutes are “good ones bearing in mind the requirements of the place in question and the preservation of its public good”¹⁴⁷.

2. The “internal sovereignty” of cities

Bartolus worked towards the consolidation of the “internal sovereignty” of cities, which was strengthened in the *trecento*¹⁴⁸. Guilds were allowed their own judges and officials, and they could make special statutes differing from the general law of the city, “concerning the affairs of that guild or profession, but not about other things, for example inheritances”¹⁴⁹. But guilds, their members and their officials remained subject to the jurisdiction of the *podestà*¹⁵⁰.

On the contrary, most jurists were inclined to allow ecclesiastical jurisdiction to stand independent from that of the city. Like foreigners, local clergy were regarded as *non subditi* to the laws of the city. In fact, the solution that Bartolus adopted in allowing a city statute to bind clerics under certain conditions (always before ecclesiastic courts)¹⁵¹, goes further than, for example, Cinus, who had given the opposite answer, arguing that clergy and laity are

¹⁴⁶ Baldus ad II.1.2.1 (translated excerpt in Canning, Baldus, 98-99).

¹⁴⁷ Baldus ad D.1.1.9. See Canning, Baldus, 104 ff. The excerpt, translated in Canning, Baldus, 106 is as follows:

And if [a people] rules itself well a superior cannot stand in its way, because prohibitory laws were not made for those living good lives but for those who stray; for if they naturally do what the law demands, they are a law unto themselves. And the healthy need no medicine from without. [...] If therefore statutes are good ones bearing in mind the requirements of the place in question and the preservation of its public good, they do not need anyone else's direction, because they have been confirmed by their own natural justice.

¹⁴⁸ Ryan, “Bartolus and Free Cities,” 79, suggests that “the *civitas sibi princeps* is aimed first and foremost at those who denied the right of their fellows to govern them within the city itself.”

¹⁴⁹ Baldus ad D.1.1.9 (quoted in Canning, Baldus, 152-153).

¹⁵⁰ Baldus ad C.3.13.57 (quoted in Canning, Baldus, 152).

¹⁵¹ Bartolus ad C.1.1.1, nu 21.

two populi¹⁵², or even Baldus, who considered clerics “part of the people insofar as this is to their advantage, but not insofar as it is to the church’s detriment”¹⁵³. But the way the issue is phrased by Bartolus and Baldus, we have one people and the issue is of the extent of a group’s privileges.

VI. CONCLUSION

At the end of the day, could Bartolus be considered a conflicts writer? What is his relationship to today’s conflicts lawyers – and historians? And what is he teaching us about the relationship between the *ius commune*, sovereignty and medieval conflict of laws?

A. Bartolus, sovereignty and the conflict of laws

We have seen how the political ideas of Bartolus reflect on his conflicts work. We see the sword of the Roman law hanging above local statutes: while it never falls on them, it limits what they can get away with. From the opposite perspective, we see the first steps towards a model of an *ordre juridique* which is sovereign but not universal like the Roman Empire. In the end, we must remember the transitional place of Bartolus in political thought. He is trying to preserve the core vision of the glossators while acknowledging the reality that he sees around him. If we focus solely on the powers that he effectively concedes to the cities, we will see a direct line between his ideas and the ideas of those who expressly articulated the concept of sovereignty. If we focus on what he has to say about the emperor, about the *ius gentium* and, particularly, about the role that he assigns to the *ius commune*, we are clearly in a world quite different from the world of Huber and ourselves. We could perhaps deduce a certain degree of ambivalence as to the political nature (and objectives) of the argumentation – an attitude encountered again and again through the history of the conflict of laws.

It could hence be argued that Bartolus acknowledges a concept of “territorial sovereignty” through the universal respect of acts made validly within the territory, and that he is defending that concept by not recognizing the extraterritorial effects of certain other statutes, especially the ones altering

¹⁵² Cinus at C.8.52.2, nu. 27 (excerpted in Canning, Baldus, 138).

¹⁵³ Baldus ad X 1.2.7 n. 7 and in general see Canning, Baldus, 131 ff.

personal capacity. But Bartolus often talks less in terms of territorial sovereignty properly speaking, and more in terms of territorial competences allocated from above and occasionally wrested therefrom. The way in which Bartolus draws the distinction between form and substance has to do less with sovereignty and more with the pursuance of justice. The roots of sovereignty over persons are also here, and the term *subditus* (subject) and *cives* (citizen) are frequent, but we are nowhere near the Romantic notions of nineteenth-century personalism¹⁵⁴.

In fact Bartolus frequently makes the privatiste argument for legal diversity, namely that the local rule derogating from the *ius commune* addresses better local needs, and should be let to stand. At the same time, there is a political touch to this argument, as it is used to suggest that the statute should stand even if the Emperor did not know anything about it (“for many reasons best known to the citizens living there”)¹⁵⁵.

Another dimension that plays into all this is the occasional recourse of Bartolus to the words of the statute so as to determine its scope. Again, this can be seen as an effort to enhance the sovereignty of the legislator, but also as a way to reduce the number of conflicts by characterizing some potential cases as “false conflicts”.

B. Bartolus as a conflicts writer

To begin with, the Bartolan *repetitio* has become part of the conflicts discourse of subsequent generations. Bartolus himself never mentioned the term conflict of laws. Had someone presented to him the whole idea of a distinct field of conflict of laws with its own methodology, it is at best unclear if it would have made sense to him. And one may be skeptical about his having invented the basic choice-of-law rules and techniques. Yet we cannot fail but observe the intellectual affinity of certain of his techniques, rules and sometimes even his argumentative patterns, with conflict of laws as we know it.

¹⁵⁴ We could even contrast the romantic nineteenth-century allusions to the biological links between the individual temperament and national laws to the Bartolan metaphor of the punishment following the person everywhere like leprosy.

¹⁵⁵ Bartolus ad D.1.3.32, nu. 28 (expanded version of nu. 22 of our *repetitio*), excerpted translated in Clarence Smith, “Bartolo,” 169. Bartolus argues against the suggestion that the said custom is “impudent and bad.”

The Bartolan *repetitio* looks more ambitious in scope as well as more “raw” and “oral” compared with subsequent writers, such as his student Baldus, or Ulrich Huber with his neatly stated three axioms and three choice-of-law rules. Unlike the classic statistists, Bartolus makes no clear distinction between real/territorial and personal/extraterritorial statutes – unlike the classic “statutists.” In fact, the proper interpretation of the “English case” rule, discussed above, suggests that Bartolus was too preoccupied with individual statutes for him to make a “theory of statutes” in the style of d’Argentré or the Voets. Nor does he espouse any of the “aprioristic” theories which have shone on the field after him: territorialism, personalism, the celebration of party autonomy. Notions of territoriality and extraterritoriality are central to this work, yet large chunks of it evade them. *Locus regit actum* is also important, but is very far from being a “paradigm,” and the idea of vested or acquired rights exists, at best, in hybrid form. In either case, such doctrines seem to have been developed by Bartolus as a way of justifying certain solutions to practical doctrinal problems (e.g. how emancipation can have universal effects, but not the legitimation of a *spurius*).

In the end, Bartolus is still a “theoretical” writer, in the sense used by A.V. Dicey: he believes that there is a “common law” defining the reach of statutes and he tries to clarify it¹⁵⁶. But he is a different sort of “theoretical” writer than the nineteenth-century jurists who created a discipline of “private international law:” his system is a pluralist one, and it still relies on the statutes themselves, rather than meta-norms. This last aspect of his work allowed his system to be used by the positivists as well.

The discussion about unilateralism in Bartolus is also indicative of his relevance to, and distance from, today’s discourse. Allowing for a certain degree of anachronism, Bartolus is “unilateralist” when the conflict can be phrased in terms of derogation from the “common law,” and “bilateralist” when the conflict can be phrased in terms of selecting one of two rules, both derogating from the *ius commune*. In both cases, the reach of the local rules is judged from above, the “external” system of the *ius commune*: in the former case, the *ius commune* intervenes directly, opposing or permitting the extension of the local rule – it is both a rival to the local rule and a meta-system, an imperfect meta-system; in the latter case, the *ius commune* acts the part proper to a meta-system.

¹⁵⁶ See A.V. Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (London: Stevens, 1896), 15 ff.

All this makes Bartolus more exotic, but also closer to contemporary conflicts lawyers than we normally imagine. On the one hand, his conflicts “system” uses premises that we cannot truly comprehend (such as the *ius commune*), as well as principles and approaches that even our eclectic mature-modern disciplinary consciousness tends to regard as contradictory: these and other considerations may make us doubt if Bartolus is really talking about the same things that we do, and which we want him talk about. On the other hand, we do share a certain affinity with Bartolus, and we cannot fail to observe that he engaged in patterns and processes of construction and justification which many others have since repeated.

C. Contemporary relevance?

Inquiring into a medieval writer’s relevance for today is a slippery enterprise for any legal historian.

From the perspective of a doctrinal conflicts lawyer, the study of Bartolus certainly challenges some of the assumptions about the immutability of certain doctrines and notions of the field. The richness of the work, as well as the long list of its misreadings, serves as a double reminder of the rewards of studying classic texts first-hand, from time to time. It could be a plea for methodological eclecticism and the espousal of an analytical method. It could be an affirmation of the complex relationship of conflict of laws with “sovereignty” and the political context. But it also suggests to what extent our “technical” and rather “a-political” doctrines depend on the legal ideology, and the governance projects, of ourselves and our discursive ancestors.

From the perspective of legal historians, and historians of the conflict of laws in particular, the study shows the benefits of studying doctrinal legal history. Doctrinal legal history must be grounded in its historical context, lest it becomes a genealogical enterprise. Yet the historical context should not take over the picture. It is important to understand what motivates the doctrinal writer. Sometimes it is even important to keep in perspective the evolution of the legal field in question.

Conflicts historiography serves as a fine example of how anachronism can creep into the best historians. Sometimes, the only way to pair it is by mobile advance rather than static defense. And to remember that our work as historians will be of more temporary value than the work of the people we study.