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Article

2019

Published version

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### How to cite

SCHULTZ, Thomas, MITCHENSON, Jason. The History of Comity. In: Jus gentium, 2019, vol. 4, n° 2, p. 383–418. doi: 10.2139/ssrn.3405341

This publication URL: <https://archive-ouverte.unige.ch/unige:168068>

Publication DOI: [10.2139/ssrn.3405341](https://doi.org/10.2139/ssrn.3405341)

# THE HISTORY OF COMITY

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The principle of comity has received little modern academic attention. Its history, even less so.<sup>1</sup> What academic work there is has generally sought to understand the principle by reference to its use in practice – an application of what common law scholars refer to as the *case method*. To be sure, the case method is an effective way to distill general principles of law. Yet, by itself, it is limited. Rather like looking at a painting through a straw, it prevents us from seeing the whole picture.

This article explores the history of comity through events and the ideas of those who most influenced its development. By doing so, a number of important aspects may be revealed about the principle which have been hidden from view. This may shed new light on comity and open the door to new ways of thinking about the principle.

Comity was created to resolve the vexed question of how, and under what circumstances, sovereign States ought to recognize each other's authority. Although originally developed as a means to facilitate international trade and commerce, it became a principle of justice. States act with, or ought to act, with comity because the recognition of foreign authority will, in many cases, be the most just exercise of their own. The principle embodies the idea that whereas every State is sovereign, often the most just exercise of one State's own authority will in fact be to recognize the authority of another.

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<sup>1</sup> See essentially Hessel Yntema, "The Comity Doctrine", *Michigan Law Review*, LXV (1965), p. 9.

The history explored here is a simplification and cannot fully or accurately describe the diversity and complexity of the events and ideas presented. As with any historical enquiry, the search for truth is not an easy task. Often we must negotiate between contending versions of past events and competing interpretations of historical works. For this reason, the historical enquiry presented here should not be read as a claim that these events or ideas were universally accepted or uniformly conceived, but only that they were all – to varying degrees – influential in the development of comity.

### **The Events Leading to Comity**

The birth of comity is connected to the birth of the modern State system. By all accounts, the events leading to the creation of comity are the same as those leading to the creation of sovereignty – only told from a different perspective. It is a shared history, one marked by the brutality of the Thirty Years War and the rise of the sovereign State.

#### *A Fragmented World*

Following the collapse of the Western Roman Empire in 476, Rome's centralized government was replaced by a network of smaller semi-autonomous communities. Although these communities were not "States" as we would think of them today, they did enjoy a level of autonomy previously unimaginable. Some later would develop more organized forms of government on the basis of their mutual Christian beliefs. This spiritual union, combined with the later military intervention of the Crusades, resulted in profound changes to the European political-legal landscape. It also brought two new powerful actors to the forefront of European politics – the Pope and the Emperor – both of whom aspired to the *civitas Christiana* which entailed an authority superior to all.<sup>2</sup>

When the Holy Roman Empire was established in 800, Charlemagne (742-814) acknowledged the universal authority of the Papacy. But 34 years later the new Emperor, Louis I (778-840), would challenge papal authority. The Pope defended the Papacy with the *two swords* doctrine under which God was said to have delegated his power over spiritual and temporal matters directly to

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<sup>2</sup> François Ganshof, *Histoire des relations internationales: Le moyen âge* (1953), pp. 5-79; Stéphane Beaulac, "The Westphalian Legal Orthodoxy – Myth or Reality?", *Journal of the History of International Law*, II (2000), p. 152.

the Papacy. The Emperor, on the other hand, asserted that although this was true in respect of spiritual matters, God delegated his power over temporal matters to the Emperor. Later, under the influence of Peter Damian (1007-1073), a compromise was reached, yet the relationship between the Papacy and Emperor was never amicable as each sought to expand its power.<sup>3</sup>

As these actors entered the Middle Ages, there was a constant struggle for power. Two main power relations characterized this time period. The first was horizontal, between the Papacy and the Holy Roman Emperor; whereas the second was vertical, between the Papacy/Holy Roman Emperor and the multitude of new semi-autonomous communities that had sprung up all over Europe. Even at a local level these communities fought for power and resources.<sup>4</sup>

Despite the Papacy's continual effort until the thirteenth century to impose its *plenitudo potestatis*, it was never fully recognized by some of the more powerful monarchs in Europe. France and Spain never accepted feudal vassalage, and England repudiated Papal overlordship in 1366.<sup>5</sup> Then, in 1517, Martin Luther (1483-1546) nailed his Ninety-Five Theses to the door of the Schlosskirche in Wittenberg, setting in motion the Protestant Reformation. Rejecting many traditional teachings of the Late Medieval Church, Luther dealt a lethal blow to the Pope's hope for universal authority.<sup>6</sup>

As the authority of the Papacy declined, so did the authority of the Emperor. The Great Interregnum (1254-1273) provided the perfect opportunity for the Princes of the Holy Roman Empire to assert their growing independence. By the fourteenth century, authority over temporal matters ceased to be considered within the exclusive jurisdiction of the Emperor as more power transferred to local rulers.<sup>7</sup> The Emperor's *de jure* overlordship was solidified by the work of jurists such as Bartolus (1313-1357) and Baldus (1327-1400), the authority of the Princes being seen as independent with

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<sup>3</sup> James Bryce, *The Holy Roman Empire* (4th ed.; 1873), pp. 153-166; Walter Ullmann, "Reflections on the Medieval Empire", *Transactions of the Royal Historical Society*, XIV (1964), pp. 95-103.

<sup>4</sup> Markus Fischer, "Feudal Europe 800-1300: Communal Discourse and Conflictual Practices", *International Organization*, XLVI (1992), p. 449.

<sup>5</sup> Leo Solt, *Church and State in Early Modern England 1509-1640* (1990), p. 4.

<sup>6</sup> Harro Höpfl, *Luther and Calvin on Secular Authority* (1991), p. 3; John Carlson and Erik Owens, *The Sacred and the Sovereign: Religion and International Politics* (2003), p. 14.

<sup>7</sup> James Burns (ed), *The Cambridge History of Medieval Political Thought c. 350 - c. 1450* (1988), pp. 432-433.

a certain level of self-determination – *rex in regno suo est imperator regni sui*.<sup>8</sup>

England, France, Spain and certain Italian cities – such as Genoa, Florence, Pisa and Venice – all asserted their own authority in competition with the Emperor. Largely succeeding, they effectively replaced the Emperor's universal authority over temporal matters with the concept of distinct self-governing communities. Lacking a strong economic or military base, the Emperor had no means by which to fold these communities back into the Empire. The constant struggle for power between the Papacy and successive Emperors created a power vacuum which allowed these new self-governing communities to thrive. The brooding tension between the Papacy, Holy Roman Emperor and now certain feudal monarchs, Princes, and free cities as to the appropriate scope of each party's competing, and often incompatible, claims of authority became highly explosive.<sup>9</sup>

Things only got worse for the Emperor as certain German principalities also began to break away from the Empire. Increasingly large concessions were made in favor of the more powerful German Princes and some revolted against the Empire by siding with the Protestants in emerging conflicts. These conflicts were ultimately settled by the Treaty of Augsburg in 1555, which established the principle of *cujus regio, ejus religio* allowing the Princes to determine the religion of their respective territories – the only two acceptable choices at the time being Catholicism or Lutheranism. The Treaty effectively reaffirmed the independence these Princes and directly contributed to the creation and formal recognition of distinct self-governing communities within the Empire.<sup>10</sup>

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<sup>8</sup> "Principes superiores non recognoscentes" (Princes recognise no superior) – Bartolus of Sassoferrato (1314-1357). The importance and influence of this statement is evident by the widely accepted adage "emo bonus iurista nisi bartolista" (no one is a good jurist unless he is a Bartolist). Baldus de Ubaldis (1327-1400), the only pupil of Bartolus, later reformulated the principle of his teacher as "rex in regno sui est imperator regni sui" (a king in his own kingdom is emperor of his realm). See Walter Ullmann, "The Development of the Medieval Idea of Sovereignty", *The English Historical Review*, LXIV (1949), pp. 5-7.

<sup>9</sup> Eelco van Kleffens, "Sovereignty in International Law", *Recueil des cours*, LXXXIII (1954), pp. 22-25.

<sup>10</sup> Cicely Wedgwood, *The Thirty Years War* (1944), p. 42; John Merriman, *A History of Modern Europe: From the Renaissance to the Age of Napoleon* (1996), p. 110.

### *The Consequence of Overlapping Authority*

It was not long before the Treaty of Augsburg lost its purpose. The Emperor and Princes interpreted it to their own convenience, and the Lutherans never considered it more than a temporary accord. The rise of Calvinism throughout Europe added a third major worldview of the Christian religion but was afforded no recognition in the Treaty.<sup>11</sup>

Tensions heightened when Emperor Rudolf II (1576-1612) decided in 1607 to re-establish Roman Catholicism in Donauwörth, and the Imperial Diet decided in 1608 that renewal of the Treaty of Augsburg was to be conditional upon the restoration of all Catholic church lands appropriated since 1552. In response, Protestants formed the Evangelical Union (1608) under the leadership of Frederick V (1596-1632) of the Palatinate. Catholics, responded in kind, forming the Catholic League (1609) under the leadership of Maximilian of Bavaria (1573-1651). Although both coalitions formed in Germanic regions, they were soon joined by foreign forces. On one hand, England and the United Netherlands sided with the Protestants. The Evangelical Union even obtained the support of Henri IV (1553-1610) of France (despite the fact that he was Catholic), who saw an opportunity to further French interests. On the other hand, the Catholic League obtained the support of the Emperor's cousin, Philip III (1578-1621), the King of Spain.<sup>12</sup>

The increasingly large number of powerful actors, each with different religious and political interests, combined with the multitude of overlapping claims of authority made the Thirty Years War inevitable.<sup>13</sup> The spark was struck in 1618 at the Defenestration of Prague, when a group of Protestants invaded the Imperial Palace and threw two Catholic members of the Bohemian Council out the window. The following series of wars are cumulatively known as the Thirty Years War – the most devastating and destructive conflict in Europe until World War I. As David Sturdy notes, the Thirty Years War “acquired a momentum which for almost three decades resisted ... political control”.<sup>14</sup> The sheer number of actors, the length of time, and the

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<sup>11</sup> “However, all such as do not belong to the two above named religions [Catholicism or Lutheranism] shall not be included in the present peace but be totally excluded from it”. Article XVII, Treaty of Augsburg, transl. in Henry Vedder, *The Peace of Augsburg* (1901), p. 5.

<sup>12</sup> David Sturdy, *Fractured Europe 1600-1721* (2002), pp. 12-18.

<sup>13</sup> Beaulac, note 2 above, p. 160.

<sup>14</sup> Sturdy, note 12 above, p. 27.

brutality of the war can all be understood as the inevitable consequence of an increasingly complex multi-layered mess of political, secular and spiritual authority.

The Defenestration of Prague was a reaction against the closing of Protestant chapels by Catholic officials in Bohemia. King Ferdinand (1578-1637) of Styria, a devout Catholic, sought to impose religious uniformity in Bohemia by forcing Roman Catholicism on its people. Given the relatively large number of Protestants in the city, Ferdinand's unpopularity soon caused the Bohemian Revolt. Taking control of the government within a month, the Protestants disposed of Ferdinand as King of Bohemia and revolved against the authority of the Emperor and Catholicism. The Emperor attempted to repress the Protestant rebels and thus the first two years of the Thirty Years War were known simply as the Bohemian War. Unfortunately for the Emperor, Frederick V (1596-1632), the leader of the Evangelical Union, quickly joined the Bohemian Rebel and was later crowned King of Bohemia.<sup>15</sup>

Following the events of the Bohemian War, Ferdinand remained a staunch supporter of the Catholic League, and when he succeeded Matthias (1557-1619) as Holy Roman Emperor in 1619 he was determined to reclaim Bohemia. With the support of the Catholic League, the King of Spain and the Polish-Lithuanian Commonwealth, Ferdinand quashed Frederick V and his Bohemian rebels and ordered the re-conversion of Bohemia to Catholicism.<sup>16</sup>

By this time, fighting had spilled well beyond Bohemia. Into the conflict poured new combatants – various German Princes, Denmark, France, Sweden, the United Netherlands, and Spain.<sup>17</sup> All of Europe was involved in what would ultimately become the Thirty Years War. As the war moved into its second and then third decade, it became increasingly untamed. Religious affiliations were soon forgotten and events became “so confused that people no longer knew why or against whom they were fighting”.<sup>18</sup>

In no time at all, the Thirty Years War had turned into a dreadful massacre of hordes of ill-paid soldiers from countries far and wide who rampaged throughout the lands, looting and killing.

<sup>15</sup> William Guthrie, *Battles of the Thirty Years War: From White Mountain to Nordlingen 1618-1635* (2001), p. 52.

<sup>16</sup> Tryntje Helfferich, *The Essential Thirty Years War: A Documentary History* (2015), pp. 4-7.

<sup>17</sup> Andreas Osiander, "Sovereignty, International Relations, and the Westphalian Myth", *International Organization*, LV (2001), pp. 251-255.

<sup>18</sup> Ernst Gombrich, *A Little History of the World* (2008), pp. 193-195.

Although statistics are hard to come by, the Thirty Years War devastated entire regions and bankrupted most of the combatants. In certain regions, population losses reached as high as 75%. Moving troops and battle fronts, combined with the displacement of civilian populations, led to further disease and famine. By the end, there was a desperate need to end the bloodshed.<sup>19</sup>

### *Rise of the Sovereign State*

In 1648, in the cities of Münster and Osnabrück, the Thirty Years War finally ended with the signing of the Treaties of Westphalia. The peace negotiations involved a total of 109 delegations representing various European powers, including the Holy Roman Emperor, Philip IV of Spain, the Kingdom of France, the Swedish Empire, the United Netherlands, the German Princes, and the free imperial cities. Spain and the Netherlands also signed a separate Treaty approximately ten months earlier to end their Eighty Years War which had run parallel to the Thirty Years War.<sup>20</sup>

It is a founding myth that the Treaties sought to establish a New World Order – one based on mutual agreement that all States would be sovereign.<sup>21</sup> In truth, the Treaties reveal no such grand political aspiration. To a large extent they were technical documents relating primarily to the redistribution of lands within Europe. Yet they did require that all the parties recognize a modified version of the Treaty of Augsburg, which permitted local rulers to determine the religion of their territories – the options now being Catholicism, Lutheranism, or Calvinism.<sup>22</sup>

Thus, it is within the Treaties that we find the seed of modern sovereignty. Yet, it is the events leading to their signing, rather than the Treaties themselves, which appear to have been the primary motivation for adopting the principle of sovereignty as the central pillar of the modern State system. The Treaties sought to

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<sup>19</sup> Peter Wilson, *The Thirty Years War: Europe's Tragedy* (2009), pp. 790-795; Quentin Outram, "The Socio-Economic Relations of Warfare and the Military Mortality Crises of the Thirty Years War", *Medical History*, XLV (2001), p. 151.

<sup>20</sup> The Treaty between Spain and the Netherlands is closely associated with, although not commonly understood to be part of, the Treaties of Westphalia. For the full text of the Treaties, in Latin and English, see Clive Parry, *The Consolidated Treaty Series* (1969), I.

<sup>21</sup> Beaulac, note 2 above. See also Leo Gross, "The Peace of Westphalia, 1648–1948", *American Journal of International Law*, XLII (1948), p. 20.

<sup>22</sup> Kalevi Holsti, *Peace and War: Armed Conflicts and International Order 1648-1989* (1991), pp. 28-29.

end the brutality of the Thirty Years War by removing the catalyst that started it all – namely, by giving each party the right to self-determination and non-interference with respect to religious matters within their territory.

In *De jure belli ac pacis* Hugo Grotius (1583-1645) wrote that the brutality of the Thirty Years War led him to reflect on the idea of sovereignty as the basis for his international community of States. For Grotius, the concept of sovereignty was built on the idea that “good fences make good neighbours”. By compartmentalising State authority and removing the possibility of overlaps, Grotius believed the principle of sovereignty would contribute to a more peaceful Europe.<sup>23</sup>

This compartmentalisation of authority never truly matched the realities of socio-economic life. Whereas the authority of States could be restrained to certain boundaries, people could not. People continued to travel to foreign lands. There they acquired property, entered into contracts, committed crimes, and suffered injury. Yet, legal relations that arose in one State were of no effect in another. Sovereignty meant that no State was required to recognize the laws or legal judgements of foreign States within their territory. As international trade increased and disputes with foreign elements became more frequent, there was a need to create a principle that could soften the sharp edge of sovereignty – a principle that would regulate the recognition of foreign authority without jeopardizing the peace. Quite simply, there was a need for comity.

### **The Concept of Comity**

The creation of comity coincided with a period of radical international change. New States emerging within their own territorial boundaries were resisting any claims of authority superior to their own. The brutality of the Thirty Years War, combined with the work of jurists such as Jean Bodin (1530-1596) and Hugo Grotius, all contributed to the growing absolutism of sovereignty and its place at the center of this Westphalian system.

One State which asserted its sovereignty with force was the United Netherlands. After the conclusion of the Thirty Years War – which ran parallel to its Eighty Years War with Spain – the United Netherlands was recognized as independent from the Spanish Crown. In the years that followed, the United Netherlands enjoyed

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<sup>23</sup> Alfred Dufour, Peter Haggemacher, and Jiri Toman, *Grotius et l'ordre juridique international* (1985).

unprecedented prosperity as it became one of the world's foremost trading nations. It quickly became apparent that its success and prosperity depended upon its ability to continue trading within this new system of sovereign States. It was thus imperative for the Dutch to develop a means by which they could recognize foreign law and judgements so that legal relations created abroad would be recognized and enforced at home.

The Dutch were not the first to wrestle with the idea of conflicting legal orders. The Statutists had developed a principle-based approach to resolve legal conflicts between free cities and provinces in Italy as early as the thirteenth century. But their approach was developed well before the principle of sovereignty crystallized in Europe, and it became apparent that this was insufficient to resolve conflicts of authority between sovereign States.

In response, Dutch jurists, working during or immediately after the Thirty Years War, broke away from the Statutist tradition. Relying, to varying degrees, on the twin concepts of sovereignty and comity, they developed a new means by which to resolve conflicts of authority and minimize inconsistent legal treatment. The origins of comity must therefore be understood as a reaction to these changing forces – the rise of the sovereign State, the need to promote international commerce, and the inability of the Statutist approach to resolve conflicts of authority within this new Westphalian political-legal framework.

For the Dutch School, comity was a means of reconcile two competing paradigms – the political need for sovereignty and the commercial need to promote international commerce. The central idea behind their work was that States *can* or *ought to* (depending on the jurist) act with comity to recognise foreign authority within their territory because international commerce contributes to the prosperity of all nations. The idea that States ought to act with comity “for reasons of justice” was not developed until later, when the principle was exported to and developed within the common law tradition.

In the United States, Justice Joseph Story (1779-1845) saw comity as an attractive principle for developing a new system of conflict rules for the American context. As was the case in the United Netherlands, Story sought to reconcile the political need for sovereignty with the commercial need to promote international commerce. In adapting it for the American context, Story focused on comity's concern with justice – an idea given little attention by Dutch scholars. To Story, States ought to act with comity to recognize foreign law, not only because it promotes international

commerce, but also because it furthers each State's paramount duty to do justice.

The idea that States ought to act with comity for reasons of justice was developed in England, where the legal context was substantially different from the United Netherlands and even that of the United States. When comity was received in England, that country was already a major trading nation and Englishmen commonly travelled to foreign shores. However, at the time, English courts were precluded from recognizing foreign law, meaning that they were required to either withhold relief in all cases with a foreign element or simply apply English law.

To remedy this situation, William Murray, First Lord Mansfield (1705-1793), adopted the principle of comity to permit English courts to recognize foreign law and judicial acts in circumstances where it would be just to do so. In the process of adapting it for the English common law tradition, Mansfield reconceptualized comity as a principle concerned primarily with interests of justice. For Mansfield, States ought to act with comity to recognize authority, not because it is commercially beneficial for States, but because it will often be more just that a dispute should be resolved subject to foreign rather than domestic law.

The remainder of this article provides an account for this claim. Beginning with the Statutists and the response of the Dutch School, we trace the development of comity from Europe, to the United States and England through the works of those most influential in its development.

### *The Statutists*

Prior to the creation of free cities in Europe, there was no need for comity. The dominant ideology of the Roman Empire was the concept of *imperium sine fine*, which demanded the integration and assimilation of other territories into the Empire. Given the Roman conception of justice as absolute and universal, Roman jurists considered it impossible that justice could be done by recognizing foreign law. The Roman idea of "international order was simply the universalisation of the Roman order – a homogenisation of law".<sup>24</sup>

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<sup>24</sup> Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (2009), p. 29.

By the time of the Italian Renaissance (c. 1330-1550), an expansion in trade between different Italian and European cities had led to an increase in the number of disputes that contained a foreign element. The heritage of these cities meant that they adopted Roman law as their natural “common law”. As they broke away from the Empire, they developed their own local laws to reflect their unique cultures and interests leading to substantive differences over time. This development created a unique problem not previously addressed by Roman jurists.<sup>25</sup>

At a practical level, the existence of different legal orders required jurists to develop a method to resolve conflicts of authority and inconsistent treatment. At a theoretical level, it required jurists to confront a more difficult problem – the idea that there may be more than one conception of justice. If each city’s legal systems was an interpretation of Roman law, then theoretically each had to be considered as reflecting a valid idea of “justice”. Private international law – and later, comity as part thereof – developed to address this problem. It was created to minimize the potential for conflict and inconsistent treatment by determining which set of laws – or more specifically, which conception of justice – ought to apply to resolve which types of disputes.<sup>26</sup>

The first idea of private international law was probably developed by the Statutists, who considered each statute – or law – to *naturally* belong to one of two categories: (1) personal; or (2) territorial. Under the Statutist approach, if a statute was personal it attached to the person and applied outside the territory of the relevant local authority – be that a Prince, Monarch, or some other ruler. If a statute was territorial, it attached to the land and applied to all persons within the territorial boundaries of the relevant local authority. Any court dealing with a dispute was therefore required to apply the “applicable law” by reference to the personality of the parties and the place of the disputed action or thing.<sup>27</sup>

The Statutists sought to address the injustice caused by conflicting legal orders by developing a principle-based approach by which to determine which set of laws should apply in any given context. The idea was that disputes could be resolved most justly by choosing that set of laws which were most “natural”. As great as this methodology might have seemed at the time, its limitations became apparent as differences in substantive law became greater and

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<sup>25</sup> Ibid., pp. 29-31.

<sup>26</sup> Ibid., p. 31.

<sup>27</sup> Ibid., p. 33.

disputes that contained a foreign element became more frequent and complex. Over time it became increasingly difficult to categorize laws as personal or territorial. The division of law into one of two categories was insufficient; a third “mixed” category was added to classify those statutes that did not “naturally” fall into either.<sup>28</sup>

However, as time passed, people became increasingly attached to the land. As a result, theories in support of the authority of local rulers began to emerge with greater force. In France, for example, Bertrand d’Argentré (1519-1590) argued for a presumption in favor of classifying laws as territorial.<sup>29</sup> To d’Argentré, laws were to be classified as personal or mixed only in exceptional cases. Jean Bodin (1530-1596) and Hugo Grotius (1583-1645) took this idea further, arguing that sovereignty necessarily implied that all laws were inherently territorial. In *Les six livres de la république*<sup>30</sup> Bodin argued that sovereign States enjoyed “absolute and perpetual power” within their territory, meaning that no State could be subject to the will of any other. And, in *De jure belli ac pacis*,<sup>31</sup> Grotius argued for a community of formally equal States built upon a similar conception of sovereignty.

Over time the progressive adoption of the Westphalian system begat the more complete conceptualized view that State authority extended no further than its territorial boundaries and that no State was subject to the authority of any other.<sup>32</sup> The brutality of the Thirty Years War, combined with the works of d’Argentré, Bodin, and Grotius, all contributed to the progressive absolutism of sovereignty and the view that States enjoyed absolute control over all things, persons, and transactions within their territory. Whereas Grotius did not write directly on the subject of private international law, his conception of sovereignty would later be considered the starting point for all thinking on public and private international law. Perhaps most importantly, his theory was promptly accepted in the United Netherlands, where Dutch jurists were wrestling with

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<sup>28</sup> Martin Wolff, *Private International Law* (2d ed.; 1950), p. 25; Yntema, note 1 above, p. 15.

<sup>29</sup> Joseph Beale, *A Treatise on the Conflict of Laws; or Private International Law* (1916), pp. 33–36; Armand Lainé, *Introduction au droit international privé* (1888), p. 422.

<sup>30</sup> Jean Bodin, *Les six livres de la république* (1576), p. 111.

<sup>31</sup> Hugo Grotius, *De jure belli ac pacis* (1631).

<sup>32</sup> Alex Mills, “The Private History of International Law”, *International and Comparative Law Quarterly*, LV (2006), pp.18-26; Donald Childress, “Comity as Conflict: Resituating International Comity as Conflict of Laws”, *UC Davis Law Review*, XLIV (2010), p. 17.

the problem of how to promote international commerce within this new system of sovereign States who incurred no duty to recognize each other's authority within their territory.

### *The Dutch School*

Dutch jurists working during and after the Thirty Years War were all indoctrinated in the civil law tradition and the teachings of their Statutist predecessors. Yet their work represents a break from the Statutist tradition in favour of a new basis for resolving conflicts of authority between sovereign States – namely, *the principle of comity*.

There are several reasons why comity originated in the United Netherlands. First, by the time the Dutch School came to consider the question of conflicting legal orders, Dutch jurists had accepted and elaborated upon the work of Bodin and Grotius. After the Thirty Years War – which coincided with its Eight Years War against Spain – the United Netherlands was recognized as independent from the Spanish Crown. The concept of sovereignty found particular favor with Dutch jurists during this time because it reinforced the United Netherlands claim to independence, self-determination, and non-interference against Spain and other foreign powers.<sup>33</sup>

Second, in the years following its independence, the United Netherlands enjoyed a period of prosperity as it became a foremost trading nation. After the Thirty Years War, few European powers were in a position to capitalize on the peace. However, the United Netherlands was, and when it signed the 1648 Treaty of Münster to end its Eight Years War with Spain, the treaty was concluded on highly favorable terms. The revolution against the Spanish ushered in a golden age, and the United Netherlands became the first modern European State. Within a generation, the United Netherlands was the most progressive major power in Europe. With the collapse of the Papacy and Holy Roman Emperor's plans for universal authority and internal disorder in France, Germany, and England, it established commercial trading hubs in Europe, Africa, Asia, and the Americas.<sup>34</sup>

But it became apparent that the prosperity of the United Netherlands depended upon its ability to continue trading within this new system of sovereign States. And, while the doctrine of

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<sup>33</sup> Yntema, note 1 above, pp. 16-17.

<sup>34</sup> Ibid; Friedrich Juenger, *Choice of Law and Multistate Justice* (2005), p. 19.

sovereignty had led to peace in Europe, it was impeding international commerce. The compartmentalisation of State authority meant that legal relations arising abroad were incapable of being recognized and enforced at home. This problem attracted the attention of jurists who began to contemplate the grounds on which recognition of foreign law and judicial acts within the United Netherlands might be justified.<sup>35</sup>

Third, the political-legal climate in the United Netherlands was favorable for reflecting on questions of private international law. The United Netherlands was a loose federation which had combined as if they were one province for its defence against Spain. However, Article I of the *Union of Utrecht*<sup>36</sup> stipulated that although the provinces were to unite for this common purpose, the traditional privileges and rights of each were not to be diminished. This decentralized regime, combined with the fierce independence of the provinces, provided a fertile breeding ground for reflecting on private international law. The Dutch needed a means to resolve both inter-national and intra-national conflicts of authority that arose between sovereign States and provinces.<sup>37</sup>

Fourth, by this time, it was evident that the Statutist approach was incapable of resolving conflicts between sovereign States. Italian and French jurists wrestling with the question since the thirteenth century wrote before the doctrine of sovereignty crystallized in Europe. Their approach did not account for Europe's changed political-legal landscape. As the opportunity for contact and business outside of one's own territory increased, so did the complexity of the questions confronted by the Statutists. Accelerated commerce and movement between States wore down the hard lines of Statutism, and as the doctrine grew more complex, it began drawing distinctions that seemed arbitrary and "unnatural".<sup>38</sup>

Comity's origins must therefore be understood as a reaction to these changing forces – the progressive adoption of the doctrine of sovereignty, the need to promote commerce between sovereign States and independent provinces, and the inability of the Statutist approach to resolve conflicts of authority between sovereign States.

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<sup>35</sup> Yntema, note 1 above, pp. 18-19.

<sup>36</sup> *Unie van Utrecht* (1579).

<sup>37</sup> Yntema, note 1 above, pp. 17-19; Beale, note 29 above, p. 38.

<sup>38</sup> Joel Paul, "The Transformation of International Comity", *Law and Contemporary Problems*, LXXI (2008), pp. 21-22; Ernest Lorenzen, "Story's Commentaries on the Conflict of Laws: One Hundred Years After", *Harvard Law Review*, XLVIII (1934), pp. 16-17.

Taking their cue from Jean Bodin and Hugo Grotius, the Dutch School thus sought to address the vexed problem of how to reconcile the commercial need to recognize foreign authority with the political need to uphold the doctrine of sovereignty.

### *Paulus and Johannes Voet*

Paulus Voet (1619-1667) was the first to suggest that States may recognize foreign law *comiter*. Accepting the political need for sovereignty, Voet considered all States to be equal and law to be inherently territorial. Yet, he had one foot within the Statutist tradition, considering there to be nine exceptions which he traced back to Roman law.<sup>39</sup> The first eight were nothing new, but his ninth was the idea that States *could*, if they so chose, recognize foreign law *comiter*.<sup>40</sup>

To Voet, the principle of sovereignty meant that no State could exercise authority over another. The logical implication then was that any recognition of foreign law had to be completely within the discretion of each State. In *De statutis eorumque concursu liber singularis*,<sup>41</sup> Voet developed his conception of comity as a discretionary principle States could use to recognize foreign law. He made clear that the primacy of sovereignty meant that there was no obligation to do so – it happens, but it need not happen.<sup>42</sup>

Voet touched on the idea that States recognize foreign law for reasons of justice – *aequitate* as he put it.<sup>43</sup> Just as his Statutist predecessors, he understood that, in any one case, there may be competing conceptions of justice and that often justice might better be done if States recognize foreign law rather than apply their own. Yet, a literal reading of his work suggests that Voet's primary concerns were governmental in nature. True, the recognition of foreign law may further interests of justice in certain cases. But States do not recognize foreign law “for reasons of justice”. They do so because it is in their mutual interest – namely, because this promotes international commerce without derogating from each State's sovereign right to self-determination and non-interference.

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<sup>39</sup> Yntema, note 1 above, pp. 22-23.

<sup>40</sup> Pauli Voet, *De statutis eorumque concursu liber singularis* (1661), transl. H. Yntema, Sect. IV, Cap. II, 17 in *ibid.*, p. 23.

<sup>41</sup> Pauli Voet, *De statutis eorumque concursu liber singularis* (1661).

<sup>42</sup> Pauli Voet, *De statutis eorumque concursu liber singularis* (1661), transl. Alan Watson, Sect. IV, Cap. III, 15 in Alan Watson, *Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws* (1992), p. 15.

<sup>43</sup> *Ibid.*, Sect. IV, Cap. II, 17.

The idea that States ought to act with comity “for reasons of justice” was not developed until later.

Paulus Voet’s idea of comity was more eloquently endorsed by his son, Johannes Voet (1647-1713). In *Commentarius ad pandectas*<sup>44</sup> Johannes Voet added little to his father’s original idea but, through his succinct writing style, he advanced his father’s conception of comity as a discretionary principle.<sup>45</sup> Considering all law to be inherently territorial, and all States to be sovereign, Johannes Voet believed any recognition of foreign authority to be within the discretion of each State. It is true, he noted, that the courts of one State may refuse to assume jurisdiction where the same action is already pending abroad, they may recognize foreign law or give effect to foreign judgements within their territory. But, when they do so, this is done only out of convenience and mutual utility. Just as his father, he made it clear that no State is obliged to recognize the proceedings, laws, or judgements of another State within their territory.<sup>46</sup>

### *Ulrik Huber*

In the interval between the key works of Paulus and Johannes Voet, another basis for resolving conflicts of authority between sovereign State was advanced by Ulrik Huber (1636-1694). Huber, a Professor at the University of Franeker and a member of the Court of Appeal in Friesland, sought to supplement the work of Grotius, who did not explore the issue. Huber’s enormous reputation extended well beyond Friesland, attracting many students from Holland, Germany, and Scotland. He is generally considered the father of comity, and his conception of the principle would later migrate to the United States and England, where it became instrumental in the development of many common law conflict of law rules.<sup>47</sup>

In *De conflictu legum*,<sup>48</sup> Huber articulated three “axioms” as the basis of his new theory of private international law. which he considered self-evident and not open to question:

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<sup>44</sup> Johannis Voet, *Commentarius ad pandectas* (1829), IV.

<sup>45</sup> Watson, note 42 above, pp. 15-16; Yntema, note 1 above, pp. 13–14; Roeland Kollewijn, *Geschiedenis van de Nederlandse wetenschap van het internationaal privaatrecht tot 1880* (1937).

<sup>46</sup> Yntema, note 1 above, p. 24; Watson, note 42 above, p. 16.

<sup>47</sup> Yntema, note 1 above, p. 25; Watson, note 42 above, pp. 1-3.

<sup>48</sup> Published as Vol II, Book I, Tit iii of Ulrik Huber, *Praelectiones juris romani et hodierni* (1735). For the original Latin, with English translation, see Ernest

1. the laws of each State have force within the boundaries of the State, and bind all subjects to it, but not beyond (Digest 2.1.20);
2. all persons within the limits of a State, whether they live there permanently or temporarily, are deemed to be subjects thereof (Digest 48.22.7.10);
3. States will act by way of comity, so that the laws of every State, having been applied within its own boundaries, should retain their effect everywhere so far as they do not cause prejudice to the powers or rights of such States or of its subjects.<sup>49</sup>

Huber's first two axioms continue the progressive trend towards absolute territorial sovereignty. Yet, in describing sovereign authority, Huber takes the idea further than the Voets, rejecting what remained of the Statutist approach by arguing that all laws are inherently territorial. Instead, his theory of private international law derived solely from the twin concepts of *sovereignty* and *comity*.<sup>50</sup>

The pertinent question is whether Huber's conception of comity differs from that advanced by the Voets, and if so, how. There are, we suggest, a number of possible interpretations of Huber's third axiom. On one hand, some scholars consider Huber's comity to be no different to that advanced by the Voets. This has led them to consider Paulus Voet, rather than Huber, to be the true father of comity.<sup>51</sup> Indeed some of Huber's writing suggests that indeed he did intend his third axiom to be discretionary in much the same way – the most notable being the lack of authority he provides for his third axiom compared to axioms one and two. In laying down his first two axioms Huber based them on Roman law – *Digest 2.1.20* and *Digest 48.22.7.10* respectively – suggesting that they form part of the *ius gentium*. After the conclusion of the 1648 Treaties of Westphalia, and the acceptance of the principle of sovereignty expounded by Bodin and Grotius, these two axioms reflected State practice and could hardly be argued with. But, in laying down his third axiom, Huber neglected any reference to Roman law (and thus the universality of the *ius gentium*). There is

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Lorenzen, "Huber's De Conflictu Legum", *Illinois Law Review*, XIII (1918), pp. 199, 375.

<sup>49</sup> Lorenzen, note 48 above, p. 227.

<sup>50</sup> Childress, note 32 above, p. 20; Lorenzen, note 48 above, p. 137; Juenger, note 34 above, p. 20; Winston Nagan and Aitza Haddad, "Sovereignty in Theory and Practice", *San Diego International Law Journal*, XIII (2012), pp. 429, 395.

<sup>51</sup> Kollweijn, note 45 above; Lainé, note 29 above.

an argument then that Huber never intended his third axiom to form part of the *ius gentium*.<sup>52</sup> Comity was simply “common sense” because it facilitated international commerce within the political-legal framework laid down by axioms one and two.

On the other hand, some of Huber’s work suggests that he may have conceived of comity as obligatory in nature. For the Voets, sovereignty is supreme, the necessary implication being that no State is obliged to act with comity – it happens because it is commercially desirable, but need not happen. Huber, however, appeared to conceiving of comity not as an exception to sovereignty, but rather as a necessarily corollary of it. To Huber, comity flows naturally from sovereignty so that each makes the other work. This suggests that he may have considered States to have an obligation to act with comity – a proposition supported by his use of the word *will*, rather than *can* or *should*, in axiom three. Indeed, nowhere in his work does Huber indicate a situation in which a State has a choice not to act with comity, and he certainly does not cite the Voets.<sup>53</sup>

If this interpretation is correct, what is the source of a State’s obligation to act with comity? Does not sovereignty imply complete control over all matters within one’s territory, including whether a State will act with comity? There are, we suggest, two possible sources for Huber’s obligation to act with comity. First, it is possible that Huber considered all three of his axioms to form part of the *ius gentium*. Several authors support this conclusion, including modern Dutch jurists.<sup>54</sup> The fact that Huber’s third axiom provides no authority in Roman law does not necessarily mean that it does not derive from Roman law or necessarily form part of the *ius gentium*. As Huber explains:

It often happens that transactions entered into in one place have force and effect in a different country or are judicially decided upon in another place. It is well known, furthermore, that after the breaking up of the provinces of the Roman Empire and the division of the Christian world into almost innumerable nations, being not subject one to the other, nor sharing the same mode of government, the laws of the different nations disagree in many respects. It is not surprising that there is nothing in the Roman law

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<sup>52</sup> Watson, note 42 above, p. 4.

<sup>53</sup> *Ibid.*, p. 15.

<sup>54</sup> See Watson, note 42 above; Kollewijn, note 45 above, p. 133; Theodoros de Boer, “Living Apart Together: The Relationship Between Public and Private International Law”, *Netherlands International Law Review*, LVII (2010), p. 183.

on the subject inasmuch as the Roman dominion, covering as it did all parts of the globe and ruling the same with a uniform law, could not give rise to a conflict of different laws. The fundamental rules according to which this question should be decided must be found, however, in the Roman law itself. Although the matter belongs rather to the law of nations than to the civil law, it is manifest that what the different nations observe among themselves belongs to the law of nations. For the purpose of solving the subtlety of this most intricate question, we shall lay down three axioms which being conceded as they should be everywhere will smooth our way for the solution of the remaining questions.

It follows, therefore, that the solution of the problem must be derived not exclusively from the civil law, but from convenience and the tacit consent of nations. Although the laws of one nation can have no force directly within another, yet nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law. And that is the reason for the third maxim concerning which hitherto no doubt appears to have been entertained.<sup>55</sup>

Huber is not out of line with other civil law jurists in taking this approach. In exactly the same way, Bartolus, who sought to build a system of private international law between free Italian cities, based his position on Roman law despite its lack of authority. Indeed, if the law was to grow and meet new challenges not faced by the Romans, then it was necessary for jurists to use such an approach. Of course, as Huber knew, he was not going to find any authority in Roman law for comity because the Romans did not recognize foreign legal systems or different conceptions of justice.<sup>56</sup>

If this interpretation is correct, there is a skillful sleight-of-hand in all this. Huber starts by admitting that his third axiom did not exist in Roman law. But he claims that because his third axiom is self-evident and has never been doubted, it forms part of the *ius gentium* – it is accepted everywhere. Huber does not make it easy though, for he provides no evidence that his third axiom is accepted everywhere. But he argues that he does not need to because his third axiom is

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<sup>55</sup> Lorenzen, note 48 above, pp. 226-227.

<sup>56</sup> Yntema, note 1 above, p. 26; Watson, note 42 above, p. 6; Alan Watson, *The Making of the Civil Law* (1981), pp. 5, 52-53.

exactly that – an “axiom” – a rule that requires no proof because it is self-evident and not open to question.<sup>57</sup>

Huber’s first and second axioms are to the effect that the laws of a State are not directly binding beyond its territory. His third axiom would thus be to the effect that, subject to the exception that foreign law would cause prejudice to a State or its citizens, every State is bound to recognize foreign law by way of comity. Under this interpretation, foreign law is therefore recognized, but indirectly, so there is no conflict between axioms one and two, on one hand, and axiom three, on the other. By recognizing the authority of another State by consent rather than compulsion, States facilitate international commerce whilst preserving their sovereignty.<sup>58</sup>

There is another possible source for Huber’s obligation to act with comity which we suggest has the most support on a reading of his *De conflictu legum* and associated works. By including the word *will*, yet failing to provide authority for his third axiom as part of the *ius gentium*, Huber may have conceived of his third axiom as giving rise to an *imperfect obligation*. This interpretation is supported – to a certain extent – by the work of Justice Story (discussed below), who considered the nature of the obligation to act with comity in in his *Commentaries on the Conflict of Laws*.<sup>59</sup>

The distinction between perfect and imperfect obligations was well known, not only to philosophers of the time, but also to the jurists of the Dutch School.<sup>60</sup> Grotius, whose work greatly influenced Huber, wrote of the distinction in *De jure belli ac pacis*, as did other legal theorists before and during Huber’s time. Indeed, imperfect obligations began their life as imperfect rights in the work of Grotius.<sup>61</sup> Although he wrote after Huber’s death, Vattel succinctly summarized the distinction between perfect and imperfect

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<sup>57</sup> In *Praelectiones juris romani et hodierni*, Huber explain what he means by an “axiom”, a term he borrowed from the study of mathematics. Axioms, he declared, are nothing more than self-evident truths. They require no proof and their correctness cannot be faulted. See also Watson, note 42 above, pp. 4-7.

<sup>58</sup> *Ibid.*, pp. 7-9; Childress, note 32 above, p. 22.

<sup>59</sup> Joseph Story, *Commentaries on the Conflict of Laws* (1834).

<sup>60</sup> Watson, note 42 above, p. 21.

<sup>61</sup> This terminology makes more sense of the label: a perfect right includes the authorization to use force and coercion to ensure it is respected. To have an imperfect right, on the other hand, is to be genuinely owed something, but not to have license to use force to get it. So an imperfect right is, in a sense, incomplete – it does not come with everything that we might want in a right. For more on imperfect obligations, see Andrew Schroeder, “Imperfect Duties, Group Obligations, and Beneficence”, *Journal of Moral Philosophy*, XI (2014), p. 557.

obligations in *Le Droit des gens*.<sup>62</sup> Drawing a parallel between the relations of free men and sovereign States, Vattel wrote of the distinction between perfect and imperfect obligations as follows:

To understand this properly we must note that obligations and the corresponding rights ... are distinguished into internal and external. Obligations are internal in so far as they bind the conscience and are deduced from the rules of our duty; they are external when considered relatively to other men as producing some right on their part. Internal obligations are always the same in nature, though they may vary in degree; external obligations, however, are divided into perfect and imperfect, and the rights they give rise to are likewise perfect and imperfect. Perfect rights are those which carry with them the right of compelling the fulfilment of the corresponding obligation; imperfect rights cannot so compel. Perfect obligations are those which give rise to the right of enforcing them; imperfect obligations give but the right to request.

It will now be easily understood why a right is always imperfect when the corresponding obligation depends upon the judgment of him who owes it; for if he could be constrained in such a case he would cease to have the right of deciding what are his obligations according to the law of conscience.<sup>63</sup>

Thus, an obligation, and its corresponding right, are external whenever each is vested in a different subject – that is, where Party A has an obligation to perform some act and Party B has the correlative right that Party A perform that obligation. Yet, external obligations may be perfect or imperfect depending on who has the authority or capacity to judge the existence and nature of the obligation.

If the person who is obliged also has the authority or capacity to judge the existence and nature of the obligation they are to perform – if he has “the right of deciding what are his obligations according to the law of conscience” – then he is only imperfectly obliged, and his counterpart has only an imperfect right to request

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<sup>62</sup> Emer de Vattel, *Le Droit Des Gens, Ou Principes de La Loi Naturelle, Appliqués à La Conduite et Aux Affaires Des Nations et Des Souverains* (1758). Vattel’s work is more commonly known by its shorter English title “The Law of Nations”. See Emer de Vattel, *The Law of Nations, or the Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, transl. C. Fenwick (1916), p. 137.

<sup>63</sup> Vattel, note 62 above, p. 137.

that he fulfil that obligation. As long as a person retains the authority to judge himself, the obligation remains imperfect. If, however, the person who claims a right can also judge the existence and nature of the obligation, or if a third person has authority or capacity to do the same, then we have a case of a perfect obligation and a perfect corresponding right.

External obligations and rights arise because we are required to interact with others in order to pursue our own greater advantage. As Vattel explains, since man originally entered the state of nature as free and independent, he remains the judge of his obligations towards others. For the same reason, he has no authority to judge what others owe to him in a manner perfectly binding them. A perfect obligation, and corresponding right, may then only be created if, by free will, a person alienates his authority or capacity to judge his own duties and obligations and transfers it as an additional right to the party which originally had the imperfect right of demanding the fulfilment of the obligation or to a third person. This transfer of the right of judgment is the essence of contract. Properly speaking, there are no perfect rights and obligations in the state of nature.<sup>64</sup>

In the same way, sovereign States exist in a state of nature. Yet, in order to pursue their own greater advantage, they must interact. As Huber was acutely aware, the prosperity of the United Netherlands depended on its ability to promote international trade and commerce. These interactions of course, create obligations, and corresponding rights, which may be either perfect or imperfect in nature. As perfect obligations may only be created by contract, States can be said to have a perfect obligation to recognize international law – which we are told is based on their tacit consent. Thus, if one were to accept that Huber considered comity to form part of the *ius gentium*, then comity could be said to give rise to a perfect obligation – that is, an obligation capable of being enforced not just in the forum of conscience.

However, we suggest that Huber likely considered comity to give rise to an imperfect obligation. In this sense, every State would be considered to have an obligation to act with comity which derives from the mutual benefit of international commerce and from the inconvenience that would result from a contrary doctrine. Yet, sovereignty implies that the obligation to act with comity will always be imperfect. Every State has the right to judge for itself the nature and extent of its obligation to act with comity

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<sup>64</sup> Peter Remec, *The Position of the Individual in International Law According to Grotius and Vattel* (1960), pp. 136-140.

towards the authority of other States according to the laws of its own conscience.

Under this interpretation, Huber's conception of comity differs to that advanced by the Voets. For the Voets, there is certainly no obligation to act with comity. Comity is simply a means by which a State *can*, if it so chooses, recognize the authority of another. If, however, Huber conceived of comity as giving rise to an imperfect obligation, then States have an obligation to act with comity. The obligation is imperfect – that is, incapable of being enforced by others – but it is an obligation nonetheless. At most, the correlative right of such an imperfect obligation entitles one State to ask another to recognize their laws and judicial acts, but it does not given them a right to demand in a manner consistent with a perfect right.

This means that although States have a duty to act with comity, exactly how they discharge that duty is within their discretion. Perfect obligations, such as the obligation to keep a promise, do not provide us with such discretion. The obligation to repay a loan, for example, obliges the borrower to repay the precise amount agreed upon, to a specific person, often at a specific time. Conversely, imperfect obligations like beneficence, charity, gratitude, mercy, or comity for that matter, all carry with them a certain discretion. Most think that whereas the obligation to be charitable requires us to give something to the needy, it does not require that we give a set amount, and it does not require that we donate to any particular person or organization. Similarly, whereas we may be obliged to be merciful, that obligation does not specify the form our mercy must take, nor exactly when or to whom we must exhibit it. In the same vein, if Huber considered comity to give rise to an imperfect obligation, he meant for States to be obliged to act with comity. As with all imperfect obligations, he must have considered it within the discretion of each State to determine, in accordance with its own conscience, how it would exhibit comity towards the authority of other States.

Short of waking Huber from the dead, we may never know how he conceived of his third axiom. We suggest he likely conceived of it as giving rise to an imperfect obligation. Thus, although he envisaged his first two axioms to give rise to perfect obligations forming part of the *ius gentium*, he conceived of his third as an imperfect obligation whose fulfilment was to lay within the discretion of individual States. Such an interpretation is in keeping with the positivist progression towards the growing absolutism of sovereignty at the time and the pressing need to form a basis by which to recognize foreign law.

As we will see below, it was Huber's conception of comity, rather than the Voets, that would later find favor in other jurisdictions. In the common law, Huber was relied upon more than any other jurist to developed conflict of law rules and doctrines. As Lorenzen noted:

Of the vast number of treatises on the Conflict of Laws Huber's "De Conflictu Legum Diversarum Imperiis" is the shortest. It covers only five quarto pages; and yet it has had a greater influence upon the development of the Conflict of Laws in England and the United States than any other work. No other foreign work has been so frequently cited.<sup>65</sup>

Comity's place at the center of United States and English private international law is hardly surprising. Huber conceived of comity, not as a stand alone principle, but rather as a theoretical basis upon which to build concrete rules and doctrines of law. At the time of its inception in the common law, the United States and England required – to varying degrees – a principle by which they could build an array of conflict rules and doctrines. Campbell McLachlan wrote that comity was an attractive principle for this purpose:

Huber, Voet and the jurists that followed them in the modern Conflict of Laws used the concept of comity as a springboard from which they proceeded to develop a highly organized and sophisticated set of choice of law rules. In this sense, "comity" did not remain a vague desideratum – an invitation to replace law with its antithesis in mere courtesy and discretion. On the contrary, it supplied the basis for the elaboration of a detailed set of positive rules, grounded in practical reality.<sup>66</sup>

Indeed, those of the Dutch School developed advanced conflict rules based on the twin concepts of sovereignty and comity. In *De conflictu legum*, Huber notes that his three axioms were intended to "smooth" the way for the resolution of all conflict of law problems.<sup>67</sup> Using them as a base, he went on to develop concrete rules and doctrines that would later guide not only the courts of Friesland, but courts around the world. Although comity is vague in the abstract, Huber demonstrated that it could be used to develop

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<sup>65</sup> Lorenzen, note 48 above, p. 199.

<sup>66</sup> Campbell McLachlan, *Lis Pendens in International Litigation* (2009), p. 223.

<sup>67</sup> Lorenzen, note 48 above, p. 226.

positive rules and doctrines of law aimed at regulating how States ought to act with respect of each other's authority.

### *Comity in the Common Law*

Comity was most famously introduced to the common law world by the American jurist Justice Joseph Story in the early nineteenth century. Much like Huber, Story sought to rely on the twin concepts of sovereignty and comity to develop a new system of private international law capable of reconciling the political need for sovereignty and the commercial need for international and interstate commerce in the United States. Yet, in adapting the principle for the American context, Story increasingly focused on the connection between comity and justice. To Story, the obligation to act with comity derived not only from the commercial need to promote international commerce among sovereign States, but also from each State's paramount duty to do justice to those subject to their own authority.

This idea that States ought to act with comity "for reasons of justice" was continued, most notably, under Lord Mansfield and John Westlake in England. When comity was received in England, the country was already a major trading nation. Yet, at the time, English courts were unable to recognize foreign law or grant relief in cases with a foreign element. To remedy the obvious injustice that would result from always applying English law, or from withholding relief all together, Mansfield adopted comity to permit English courts to recognize foreign law in circumstances where it would be just to do so.

However, unlike Story, Mansfield and Westlake repositioned the source of the obligation to act with comity solely within each State's paramount duty to do justice to those subject to their own authority. In effect, they detached comity from any concern it had with the promotion of international commerce or as a principle founded on the mutual benefit of States. To Mansfield and Westlake, private citizens would continue to engage in international commerce regardless of whether English courts recognised foreign law. The question was therefore one of achieving justice within the Westphalian political-legal framework of sovereign States. For them, States ought to act with comity not because it is in their mutual commercial interest, but rather because, in certain cases, it will be more just to recognize foreign law or judgements than apply one's own domestic law or withhold relief entirely.

### *Justice Joseph Story*

Huber's conception of comity was adapted for the common law world most famously by Justice Joseph Story (1779-1845). Story, a Professor at Harvard University and an Associate Justice of the Supreme Court of the United States, sought to rely on the twin concepts of sovereignty and comity to develop a new system of private international law for the United States.<sup>68</sup> In his *Commentaries on the Conflict of Laws*,<sup>69</sup> Story endorsed Huber, writing:

Some attempts have been made, without any success, to undervalue the authority of Huberus... But it will require very little aid of authority to countenance his merits ... It is not, however, a slight recommendation of his works, that hitherto he has possessed an undisputed recommendation preference on this subject over other continental jurists, as well as in England as in America.<sup>70</sup>

Just as Huber, Story saw comity as a means of reconciling sovereignty with the need for international and interstate commerce. And, just as comity had done in the United Netherlands, Story believed it would contribute to the greater prosperity of a newly federated United States.<sup>71</sup> Adopting Huber's three axioms, Story set about building a system of private international law capable of resolving both international and internal conflicts of authority.<sup>72</sup> Elaborating on each axiom in greater detail, Story wrote:

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<sup>68</sup> Early United States decisions demonstrate that comity was received long before Story turned his attention to the subject. Yet, it was Story's academic and judicial stature that lent unprecedented credibility to the idea of comity as a means to recognize foreign authority in the United States. See Kurt Nadelmann, "Joseph Story's Contribution to American Conflicts Law: A Comment", *American Journal of Legal History*, V (1961), pp. 230-231.

<sup>69</sup> Story, note 59 above.

<sup>70</sup> *Ibid.*, p. 32.

<sup>71</sup> Story was acutely aware that the United States was in an analogous position to the United Netherlands in this regard. "To no part of the world is [comity] of more interest and importance than to the United States, since the union of a national government with already that of twenty-six distinct states, and in some respects independent states, necessarily creates very complicated private relations and rights between the citizens of those states ...". *Ibid.*, p. 9.

<sup>72</sup> Elliott Cheatham, "American Theories of Conflict of Laws: Their Role and Utility", *Harvard Law Review*, LVIII (1945), p. 376; Childress, note 32 above, p. 24; Beale, note 29 above, p. 24.

It is an essential attribute of every sovereign that it has no admitted superior, and that it gives the supreme law within its own dominions on all subjects appertaining to its sovereignty. What it yields, it is its own choice to yield; and it cannot be commanded by another to yield it as a matter of right. And, accordingly, it is laid down by all publicists and jurists, as an incontestable rule of public law, that one may with impunity disregard the law pronounced by a magistrate beyond his own territory ...<sup>73</sup>

But of the nature, and extent, and utility of this recognition of foreign laws, respecting the state and conditions of persons, every nation must judge for itself, and certainly is not bound to recognise them, when they would be prejudicial to its own interest. The very terms, in which the doctrine [of comity] is commonly enunciated, carry along with them this necessary qualification and limitation of it... It is, therefore, in the strictest sense, a matter of the comity of nations, and not of any absolute paramount obligation, superseding all discretion on the subject.

It has been thought by some jurists that the term, 'comity', is not sufficiently expressive of the obligation of nations to give effect to foreign laws, when they are not prejudicial to their own rights and interests ... And it has been suggested, that the doctrine rests on a deeper foundation; that it is not so much a matter of comity, or courtesy, as of paramount moral duty. Now, assuming, that such a moral duty does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity, and charity. Every nation must be the final judge for itself, not only of the nature and the extent of the duty, but of the occasions, on which its exercise may be justly demanded.

The true foundation, on which the administration of international law must rest, is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of moral necessity to do justice ... There is then not only no impropriety in the use of the phrase 'comity of nations,' but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another.<sup>74</sup>

Just as Huber, Story's theory reflects the importance of sovereignty, acknowledging that each State has the right to self-

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<sup>73</sup> Story, note 59 above, p. 8.

<sup>74</sup> *Ibid.*, pp. 34-37.

determination and non-interference. To be sure, no State can command another “as a matter of right” to recognize their authority – be that their laws or the judgements of their courts. Yet, Story considered States to have an obligation to act with comity – an *imperfect obligation* that derives, not only from the mutual benefit and utility of international commerce, but also from “a sort of moral necessity to do justice”.<sup>75</sup>

As with all imperfect obligations, Story argued that each State has the discretion to determine the nature and extent of its obligation to act with comity – to determine exactly how and when it will exhibit comity. Citing Vattel’s discussion on the nature of imperfect obligations, Story wrote:

... it belongs exclusively to each nation to form its own judgement of what its conscience prescribes to it; of what it can, or cannot do; of what is proper, or improper for it to do. And of course it rests solely with it to examine and determine whether it can perform any office for another nation, without neglecting the duty which is owes to itself.<sup>76</sup>

Elaborating on the nature of the obligation to act with comity, Story continually stressed comity’s concern with justice. To Story, part of a State’s “conscience” must necessarily be preoccupied with its duty to do justice to those subject to its own authority. In this sense, Story considered the principle of comity to “to stand upon just principles”<sup>77</sup> and to derive, not only from the mutual benefit and utility of international commerce, but also from each States’ paramount duty to do justice to those subject to their own authority.

As an imperfect obligation, no State can demand “as a matter of right” the recognition of its laws or the judgements of its courts within the territory of another. But, “every nation must judge for itself what is its true duty in the administration of justice in its domestic tribunals”.<sup>78</sup> In certain circumstances, it will be more just to recognize foreign law than simply apply domestic law to every case with a foreign element. In such cases, States, and their courts, have a duty to recognize foreign law. In Story’s mind, a failure to do so will necessarily amount to a failure to do justice – the primary duty of every State through its courts. By focusing on justice, Story repositioned the source of the obligation to act with

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<sup>75</sup> Ibid., p. 36.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid., p. 37.

<sup>78</sup> Ibid., p. 34.

comity – moving it away from the mutual commercial benefit of States to include judicial concerns.

Drawing on the twin concepts of sovereignty and comity, Story developed a complex system of conflict rules for the American context. Much like Huber's *De conflictu legum*, Story set out his understanding of comity at the beginning of his *Commentaries* before drawing upon the principle time and again to develop concrete and sophisticated rules and doctrines of law. By harnessing comity's flexibility in the abstract, Story developed fine-grained positive rules and doctrines of law aimed at regulating specific types of cases.<sup>79</sup>

United States judicial decisions immediately after the publication of Story's *Commentaries* demonstrate that comity was well received by the courts. Only five years after publication, the Supreme Court of the United States adopted Story's conception of comity in *Bank of Augusta v Earle*<sup>80</sup> and, together with lower courts, has applied the principle ever since. The courts paid less attention to the idea that the source of their obligation to act with comity was to be found in the mutual commercial benefit of States. Rather, they drew on comity to recognize foreign authority "for reasons of justice".

### *Lord Mansfield*

Across the Atlantic, England's unified legal system was not a fertile ground for thinking on questions of private international law. Unlike the United Netherlands or the United States, the English common law was the product of a powerful centralized court system that extended throughout the realm. By this time, England was a major trading nation and Englishmen commonly travelled to foreign shores. There they acquired property, entered into contracts, committed crimes, and suffered injury. But the common law, which had developed to meet the needs of a feudal society, was not attuned to legal problems posed by international relations. In English courts, jurors had to be drawn from the locality of the disputed action or thing. And, as the courts were powerless to empanel foreign jurors, they were forced to dismiss

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<sup>79</sup> "Before entering upon any examination of the various heads, which a treaties upon the Conflict of Laws will naturally embrace, it seems necessary to advert to a few general maxims or axioms, which constitute the basis, upon which all reasoning on the subject must necessarily rest ...". *Ibid.*, p. 19.

<sup>80</sup> *Bank of Augusta v Earle.*, 38 U.S. 519 (1839) (US SC).

cases that required the determination of facts that had materialised beyond the realm. Plaintiffs were left to seek redress abroad.<sup>81</sup>

To address this situation English lawyers would often resort to a typical common law ruse. A plaintiff who had been maimed in Hamburg, for example, would plead that that the city was situated in England, and the courts accepted such allegations so that the parties had access to some level of justice.<sup>82</sup> Because the matter was held to have “occurred” in England, there was no need to recognize foreign authority because the applicable law would always be English law.

This fiction was soon revealed for what it was, and the courts were aware that the application of English law to every dispute would lead to injustice. There was thus a judicial need to recognize foreign laws and judgements in England. Yet, the courts had yet to develop any means by which to do so. Because English courts had not dealt with the issue previously, the origins of what would later become English conflict of laws had to be found outside of England.<sup>83</sup> In *Potinger v Wightman*<sup>84</sup> Sir Samuel Romilly declared that, with respect to such matters, he was compelled to draw upon the work of civil jurists:

Of authority on this subject, in the *English law*, none exist ... but it has been much discussed by foreign jurists, to whose opinions in the absence of domestic authorities our courts are accustomed to resort on questions which (like the present) must be decided rather by general principles of law, than by the peculiar doctrines of any local code.<sup>85</sup>

It was the Dutch School to which they turned.<sup>86</sup> A noticeable feature of English conflict of law decisions during the eighteenth and early part of the nineteenth century is the frequency with which Huber is cited.<sup>87</sup> Chancellor James Kent noted that when the

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<sup>81</sup> Gene Shreve and Hannah Buxbaum, *A Conflict of Laws Anthology* (2d ed.; 2010), pp. 16-17.

<sup>82</sup> See, for example, *Ward's Case* (1625) 82 Eng Rep 245 (KB) 246 (Justice Doderidge).

<sup>83</sup> D. J. Llewelyn Davies, "The Influence of Huber's De Conflictu Legum on English Private International Law", *British Year Book of International Law*, XVIII (1937), pp. 50-52.

<sup>84</sup> *Potinger v Wightman* (1817) 3 Mer 67 (Rolls Ct.).

<sup>85</sup> *Ibid.*, p. 72.

<sup>86</sup> Davies, note 83 above, p. 52.

<sup>87</sup> See, for example, *Robinson v Bland* (1760) 2 Burr 1077 (KB); *Holman v Johnson* (1775) 1 Cowp 341 (KB); *Hog v Lashley* (1792) 6 Br PC 550 (KB);

question of recognizing foreign authority “was first introduced in Westminster Hall, the only work which attracted attention was a tract by Huber entitled *De conflictu legume*”.<sup>88</sup>

The introduction of Huber’s conception of comity into English law was likely facilitated by the close relations that existed between Scotland and the United Netherlands at the time and Scotland’s later union with England. Many Scottish intellectuals – denied opportunities at English universities as dissenters during the seventeenth and eighteenth centuries – studied law at Leiden, Utrecht, and Franeker, where the Voets and Huber lectured. The frequent practice adopted by Scottish jurists during this time was to complete their legal studies at these universities before returning home. In all likelihood they would have been directly acquainted with the ideas of the Dutch School.<sup>89</sup>

This proposition is supported by evidence that comity originally received greater attention in Scotland than it did in England.<sup>90</sup> And, when the 1707 Treaty of the Union was concluded between England and Scotland, the ideas of the Dutch School were likely imported by Scottish jurists into English law. Huber’s three axioms were an attractive theory for English jurists who were wrestling with the question of how to recognize foreign authority in England.

It is perhaps no coincidence that credit for the introduction and early development of comity in England is generally afforded to a Scotsman – William Murray, better known as Lord Mansfield (1707-1793). Through a series of judgements, Mansfield, a Scottish jurist and later Lord Chief Justice of the King’s Bench, rejected the Statutist approach for the foundation of English conflict of laws, instead favoring Huber’s twin concepts of sovereignty and comity.<sup>91</sup> In *Holman v Johnson*<sup>92</sup> Mansfield held:

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*Pottinger v Wightman* (1817) 3 Mer 67 (Rolls Ct.); *British Linen Co v Drummond* (1830) 10 B & C 903 (KB); *De La Vega v Vianna* (1830) 1 B & Ad 284 (KB); *Huber v Steiner* (1835) 2 Bing NC 202 (KB); *Don v Lippmann* (1837) 5 Cl & F 1 (HL); *Leroux v Brown* (1852) 12 CB 801 (Ct. CP).

<sup>88</sup> James Kent, *A Practical Treatise on Commercial and Maritime Law* (1837), p. 371.

<sup>89</sup> John Westlake, *A Treatise on Private International Law with Principal Reference to Its Practice in England* (6th ed.; 1922), pp. 7-8; Davies, note 83 above, p. 53.

<sup>90</sup> Andrew Gibb, *International Private Law in Scotland in the XVIth and XVIIth Centuries* (1928). See also, *Balfour v Balfour* (1793) 6 Br PC 500 (KB), where the leading Scottish decisions on comity are cited.

<sup>91</sup> Cecil Fifoot, *Lord Mansfield* (1936), p. 35; Davies, note 83 above, p. 52; Kent, note 88 above, p. 371.

<sup>92</sup> *Holman v Johnson* (1775) 1 Cowp 341 (KB).

I am very glad the old books have been looked into. The doctrine Huber lays down, is founded in good sense, and upon general principles of justice. I entirely agree with him.<sup>93</sup>

Just as Story, Mansfield appears to have considered States to have an *imperfect obligation* to act with comity. And, like Story, he considered that obligation to derive from each State's paramount duty to do justice. Yet, Mansfield took comity's concern with justice further than Story. Whereas Story considered the obligation to act with comity to derive from the mutual benefit of international commerce to States and from each State's duty to do justice, Mansfield considered the obligation to derive solely from the latter.

Mansfield would developed this conception of comity through a number of important cases – the most notable of which was *Somerset's case*.<sup>94</sup> In that case Mansfield was called upon to decide the fate of a slave who had been born in the United States. At that time, slavery was legal in the United States but not in England. Somerset, who had sailed to London with his master, argued that in England he was no longer a slave, and his legal counsel argued that, under Huber's third axiom, an English court need not "recognize" foreign law within its territory if it would be prejudicial to England or the duty it owes to those subject to its authority. Applying Huber's third axiom, Mansfield held that although non-recognition would likely cause "inconvenience", United States slavery laws were "so odious" that comity would not extend to their recognition in England.<sup>95</sup>

Just as Story, Mansfield made it clear that whereas every State ought to act with comity, the obligation to do so can only ever be imperfect. This implied that it is within the discretion of each State to determine the nature and extent of its duty to act with comity towards the authority of others. Referring to Huber's third axiom, Mansfield held that slavery was but one example of a situation where foreign law would not be recognized because it was prejudicial to England and those subject to its own authority – in essence, it would require English courts to subvert their own duty to do justice. This included the duty to do justice to Somerset who, as a temporary alien in England, was subject to the authority of the English courts.

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<sup>93</sup> Ibid., pp. 344-345 (Lord Mansfield).

<sup>94</sup> *Somerset v Stewart* (1772) 98 ER 499 (KB).

<sup>95</sup> Ibid., p. 510 (Lord Mansfield).

In recognizing that the decision may result in “inconvenience”, Mansfield effectively detached the obligation to act with comity from State interests. To Mansfield, States do not act with comity for reasons of mutual commercial benefit. Rather, they act with comity purely for “reasons of justice”. In circumstances where it would be more “just” that foreign law be recognized, so that a dispute is subject to foreign law rather than English law, courts ought to act with comity to recognize such law. In circumstances where it would be more “just” to apply English law, comity does not require courts recognize foreign law but rather than they apply English law to resolve the dispute. Because the source of the obligation to act with comity is found in the court’s duty to do justice, the effect on international commerce or on the mutual benefit or convenience of States becomes a subsidiary concern.

The idea that courts ought to act with comity for reasons of justice was adopted by English courts and scholars. For the courts, comity provided them with a new means to recognize foreign law in circumstances where the application of English law would ordinarily lead to injustice. Writing in 1767, Lord Kames, who dedicated his *Principles of Equity* to Mansfield, wrote of the reasons for comity as follows:

... though a statute has no coercive authority as such extra territorium, it becomes necessary, upon many occasions, to lay weight upon foreign statutes, in order to fulfil the rules of justice.<sup>96</sup>

### *John Westlake*

The idea that States ought to act with comity for reasons of justice was advanced further by John Westlake (1828-1893), a barrister and professor at the University of Cambridge. In his *Treatise on Private International Law*,<sup>97</sup> Westlake traced the origins of English conflict of laws, noting that once English courts abandoned their earlier practice of resorting only to English law to decide cases with a foreign element, they filled the void with the *principle of comity*. In his words, there was a “reception in England of continental maxims on the topic of private international law”<sup>98</sup> – the most influential of which was Huber’s comity.<sup>99</sup>

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<sup>96</sup> Henry Home, *Principles of Equity* (2d ed.; 1767), p. 346.

<sup>97</sup> Westlake, note 89 above.

<sup>98</sup> *Ibid.*, p. 10.

<sup>99</sup> *Ibid.*, pp. 7-8.

Although Westlake is generally praised for introducing continental theory into English law, he rejected the international elements of Story's approach – in particular his comparative methodology and reliance on foreign authority. Unlike Story, Westlake largely confined his study to English judicial decisions because he considered private international law to be a “department of English law”.<sup>100</sup> To Westlake, conflict rules are an instance of domestic sovereignty and thus any duty to recognize foreign law must be found internally within English law itself. On the obligation to act with comity, Westlake wrote:

Now since private international law is administered by national courts, it follows that each court must apply any solution of these questions which its own national law may be found to prescribe. And the national law is very likely to contain an answer to the question under what conditions an action is maintainable in its own courts, while it may probably be silent with regard to the law according to which any particular action is to be decided, or to the validity to be allowed to foreign judgements. What then is to be inferred from the silence of the national law on these topics? The inference that the national law itself must always be applied, and that no validity is to be allowed to foreign judgments, would have led to practical results so shocking to all notions of justice that it has never been drawn it has been regularly assumed that the national law tacitly adopts some maxims according to which foreign laws and foreign judgments are sometimes admitted to be of force.<sup>101</sup>

Westlake made clear that the obligation to act with comity arises because the application of domestic law would, in many cases, lead to results that are “shocking to all notions of justice”. Considering the obligation further, he noted that since the time of Mansfield, the English conception of comity had always been different from that advanced by the Voets and Huber.

While English writers and judges freely borrowed the term ‘comity’ from John Voet and Huber, it may be doubted whether they meant it strictly in a sense independent of justice. Although on the continent comity and justice are usually regarded as forming an antithesis, it is probable that in this country the prevailing view has been that while a concession is made in not determining every question by the *lex fori*, that concession is

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<sup>100</sup> *Ibid.*, p. 1.

<sup>101</sup> *Ibid.*, p. 7.

dictated not only by a convenience amounting to necessity, but also by deference to a science of law embodying justice, which the law of the land was deemed to have adopted as governing its own interpretation and application, and from which it was conceived that the rules of comity were drawn.<sup>102</sup>

Just as Mansfield, Westlake thus tied the idea of comity to justice – in his view the rules of comity were drawn from the “science of law embodying justice”. He noted later in his *Treatise* that “if the notion of comity was ever radically different from that of justice, it has now been completely merged in the latter”.<sup>103</sup> Just as Mansfield then, Westlake considered that courts have an obligation to act with comity – the source of that obligation being their primary duty to resolve matters according to the rules of justice. Yet, as private international law – and comity as part thereof – form a purely domestic branch of law, the nature and extent of the obligation to act with comity is a question for each State. As an *imperfect obligation*, it is up to each State to determine how and under what circumstances it will be just to recognize the authority of another.

### *Conclusions*

Comity was created to reconcile two competing paradigms that emerged after the Thirty Years War – the rise of the sovereign State and the need to promote international commerce. For a newly independent United Netherlands, comity was seen as fundamental to its continued prosperity as one of the world’s foremost trading nations. By drawing on the concept of comity, Dutch jurists sought to resolve the vexed question of how, and under what circumstances, formally equal sovereign States ought to recognise each other’s authority within their territory.

Since its creation, comity has undergone significant change. What started as a discretionary exception to the doctrine of sovereignty deriving from the mutual benefit and convenience of States later became an (imperfect) obligation deriving from each State’s paramount duty to do justice to those subject to their own authority. Indeed, the history of comity demonstrate that courts act with, or ought to act with comity to recognize each other’s authority solely “for reasons of justice”. The principle embodies

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<sup>102</sup> *Ibid.*, p. 20.

<sup>103</sup> *Ibid.*, p. 415.

the idea that although every State is sovereign, often the most just exercise of one State's authority will in fact be to recognize the authority of another.

If we are to attain a right understanding of modern principles, it is vital that we understand the reasons for which they were created and how they have developed over time. This article has sought to understand the principle of comity through a historical lens by analyzing the events and ideas of those most influential to its development. It is hoped that this article will shed new light on comity and open the door to new ways of thinking about the principle in practice.