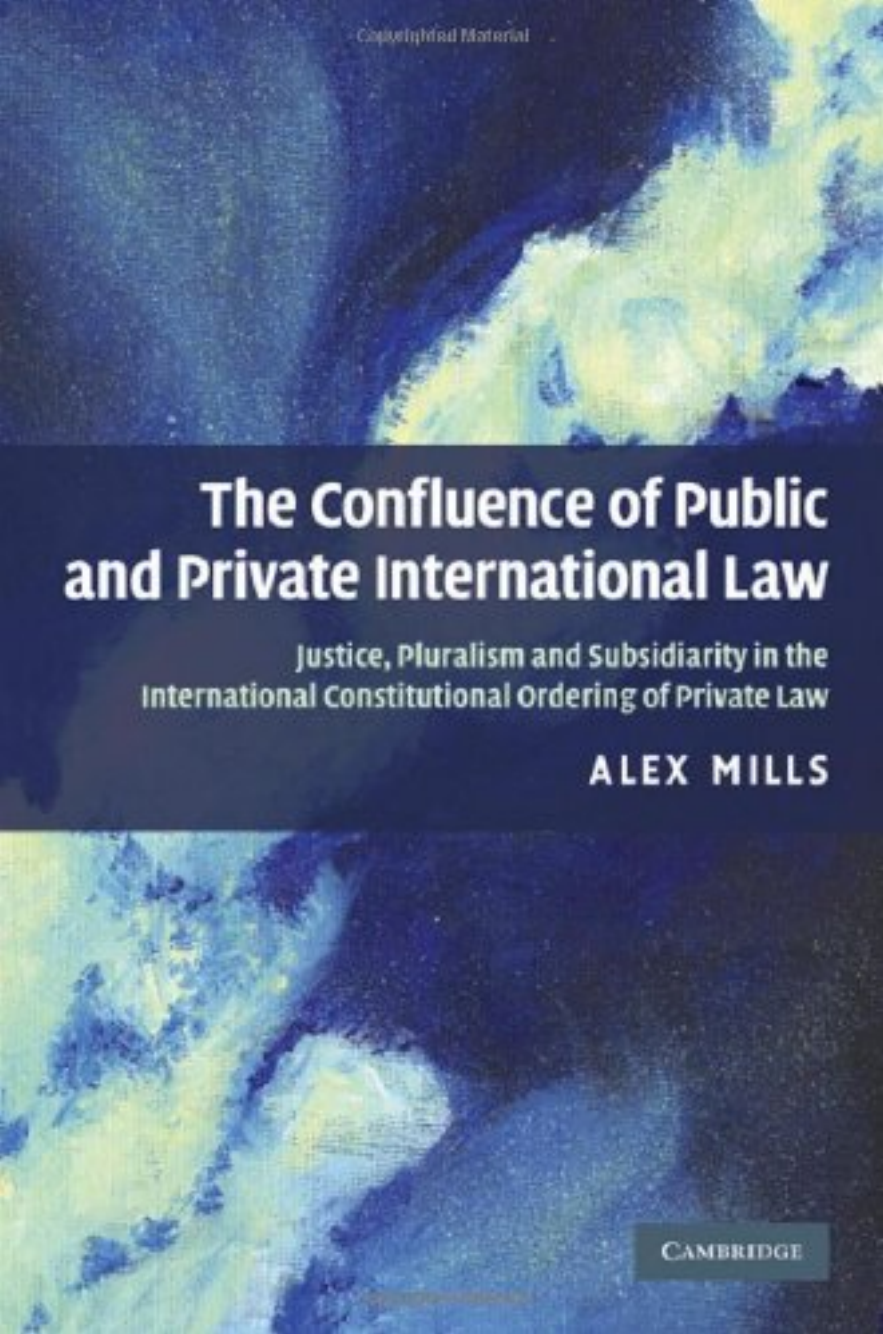

The Confluence of Public and Private International Law

Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law

ALEX MILLS

CAMBRIDGE

THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW

A sharp distinction is usually drawn between public international law, concerned with the rights and obligations of states with respect to other states and individuals, and private international law, concerned with issues of jurisdiction, applicable law and the recognition and enforcement of foreign judgments in international private law disputes before national courts. Through the adoption of an international systemic perspective, Dr Alex Mills challenges this distinction by exploring the ways in which norms of public international law shape and are given effect through private international law. Based on an analysis of the history of private international law, its role in US, EU, Australian and Canadian federal constitutional law, and its relationship with international constitutional law, he rejects its conventional characterisation as purely national law. He argues instead that private international law effects an international ordering of regulatory authority in private law, structured by international principles of justice, pluralism and subsidiarity.

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Any one watching keenly the stealthy convergence of human lots, sees a slow preparation of effects from one life on another, which tells like a calculated irony on the indifference or the frozen stare with which we look at our unintroduced neighbour.

George Eliot, *Middlemarch* (1874), Chapter XI

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Alex Mills
March 2009

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International Court of Justice / Permanent Court of International Justice

International Criminal Tribunal for the Former Yugoslavia

International arbitral awards

European Court of Justice

European Court of Human Rights

Australia

Canada

France

Germany

The Netherlands

United Kingdom

United States of America

ABBREVIATIONS

ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
ECJ	European Court of Justice
ICCPR	International Covenant on Civil and Political Rights 1966
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
PCIJ	Permanent Court of International Justice
VCLT	Vienna Convention on the Law of Treaties 1969
WTO	World Trade Organization

1

Justice, pluralism and the international perspective

1.1 Introduction

This book is about the relationship – past, present and future – between public and private international law.[1] In the study of international law, a sharp distinction is usually drawn between public international law, concerned with the rights and obligations of states with respect to other states and individuals, and private international law, concerned with issues of jurisdiction, applicable law and the recognition and enforcement of foreign judgments in international private law disputes before national courts. Private international law is viewed as national law, which is and ought to be focused on resolving individual private disputes based on domestic conceptions of justice or fairness. Some acknowledgment of the international dimension of private international law problems is given through the role played by the concept of 'comity', but its status remains ambiguously 'neither a matter of absolute obligation, on the one

[1] The term 'private international law' is used in this book in preference to the alternative name 'the conflict of laws', except in quotations or where it indicates a particular approach associated with the latter name. For the sake of consistency its usage will include rules governing disputes involving different States of a federal system, even where such disputes are not international. Except in quotations (in which original capitalisation is preserved), where the word 'State' is capitalised in this book it refers to a State or province of a federal system, like New South Wales, Quebec or Texas.

hand, nor of mere courtesy and good will, upon the other'.[2] In turn, public international law traditionally neglects the analysis of private international interactions and disputes, which are viewed as outside its 'public' and 'state-centric' domain. Thus, public and private international law are viewed as distinct disciplines, as two separate intellectual streams running in parallel.

The central project of this book is to challenge this conventional distinction on both descriptive and normative grounds, identifying and building a conceptual bridge between public and private international law to replace the precarious connection equivocally acknowledged through the concept of 'comity'. The sharp distinction between the public and the private in international legal theory does not accurately reflect the real character of these subjects – it does not correspond with a clear separation in their effects, their social products, or their practice. Public and private international law are increasingly facing the same problems and issues – reconciling the traditional role and impact of the state with the legalisation of the international system, and balancing universal individual rights against the recognition of diverse cultures, all under the shadow of globalisation. The theory that provides the foundations for the distinction between public and private international law thus reflects and replicates outdated international norms. It does not support but rather obstructs the development and implementation of contemporary ideas of international ordering in and through international law, both public and private. The distinction between public and private international law obscures the important 'public' role of private international law, both actual and potential, in ordering the regulation of private international transactions and disputes.

Reconnecting the theories of public and private international law requires work from two directions. This book recognises and extends some threads of theoretical analysis in public international law, developing ideas of international constitutionalism which facilitate a greater understanding of the importance of the global ordering effected by the regulation of private transactions through national courts applying private international law. At the same time, beginning in the remainder of this first Chapter, it proposes a reconsideration of the foundations of private international law, by exploring the way that private international law is shaped by rules and principles of public international law. The argument in this book crosses traditional disciplinary boundaries, by

[2] *Hilton* v. *Guyot* (1895) 159 US 113 at 163–4.

viewing private international law not as a series of separate national rules, but as a single international system, functioning through national courts. This reconceptualisation opens the possibility for private international law to achieve both greater internal coherence and consistency with broader international norms. It both exposes and facilitates the confluence of public and private international law. The adoption of an international perspective reveals not only a new way to understand private international law, but also a new way to critique it – not based on the application of national conceptions of private justice or fairness in individual cases, but on the justness of the public principles of global ordering it embodies.

This Chapter introduces the central arguments of the book, explaining the background and foundations of the approach it adopts, and the challenge it poses to traditional perspectives on private international law.

1.2 Justice, pluralism and private international law

As the international movement of people, property and capital proliferates and intensifies, private international law is a subject of increasing practical importance. At the same time, its theoretical foundations have long been confused, criticised and contested, and its infamous old description as 'one of the most baffling subjects of legal science'[3] remains apposite.

A common law textbook on private international law typically begins with the question: 'Why are there rules of private international law at all?', and the answer almost universally given is 'justice'.[4] In one sense this is trite – all law must be evaluated on its justness. On closer examination it is, however, not obvious what appeals to 'justice' mean in the context of private international law.

The idea of justice in private international law is usually connected with a claim that the subject is concerned with the protection of 'private

[3] Cardozo (1928) p. 67.

[4] Thus, 'Theoretically, it would be possible for English Courts … to apply English domestic law in all cases. But if they did so, grave injustice would … be inflicted not only on foreigners but also on Englishmen' – Dicey, Morris and Collins (2006) p. 5; 'Why should an English court apply foreign law? … The first explanation is that it may be necessary to apply foreign law in order to achieve justice between the parties' – Clarkson and Hill (2006) p. 6; 'why should an English court ever apply foreign laws? … The answer is that the application of English law might work a grave injustice' – Collier (2001) p. 377; 'the invariable application of the law of the forum, i.e. the local law of the place where the court is situated, would often lead to gross injustice' – Cheshire, North and Fawcett (2008) p. 4.

rights'; frequently it is contended that this is achieved by meeting 'party expectations'. This section will look first at a general private rights based notion of justice, and then at the particular idea of party expectations, arguing that these approaches cannot provide a satisfactory explanation for the adoption of private international law rules. To explore this further, it is necessary to distinguish here between the different components of private international law. Three qualitatively distinct parts of private international law are usually recognised – the determination of the applicable law, jurisdiction, and the recognition and enforcement of foreign judgments. Each is concerned with what is referred to in this book as 'regulatory authority' – the application of a legal order to an event or set of facts. The distinction between these components frequently obscures their commonality as part of a single system,[5] but it is useful for the purposes of the following analysis.

1.2.1. Justice and the application of foreign law

A case in which an applicable law issue arises will also necessarily be a dispute about some aspect of private law, such as contract, tort or family law. The rules of private law of each state contain and embody a different determination about what the 'just' outcome of a dispute should be – 'every legal system is … the expression of a particular form of life', and 'legal regulation expresses the collective identity of a nation of citizens'.[6] If English contract law embodies English notions of 'justice', how can it ever be 'just' for an English judge to apply foreign contract law? When an English judge applies foreign law, are they really suggesting that the foreign law is more 'just' than the law of England? Do English courts really think the outcome suggested by the law of England would be a 'grave injustice'?

If a judge were to decide to apply foreign law because it is more 'just' in its substantive effect, they would be substituting their own views about justice for the judgment, the collective values, embodied in the law of their state. No English judge would approach the problem in this way – although some private international law rules in the United States controversially permit exactly this, suggesting that the 'choice of law' rules which determine the applicable law should not be blind to the outcome of the cases to which they are applied, and thus the courts should be allowed

[5] See 1.5 below. [6] Habermas (1994) pp. 124–5.

to take into consideration the substantive outcomes of choice of law decisions.[7] Judges are, however, supposed to apply *law*, not decide cases based on their intuitions. If a judge decides a case based purely on their preferred outcome, then their decision does not reflect the law, but the personal preferences and even prejudices of the judge.[8] This is the 'rule of the judge', not the 'rule of law' – in the common law, 'the judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires'.[9] Even in the context of a more 'politicised' judiciary in the US legal system, this level of discretion is still difficult to reconcile with basic ideas concerning the powers and function of the courts.

This analysis suggests that the usual sense in which the word 'justice' is used is unable to help as a justification for choice of law rules. The idea that 'justice' could operate as a justification for applying foreign law seems to be question-begging – since the problem is determining which idea of 'justice' should be applied.

The usual meaning of 'justice' may tell us little about choice of law rules, but choice of law rules reveal something about our ideas of justice. The application of a foreign law on the grounds of justice presupposes an underlying acceptance that the outcome determined by a foreign law and perhaps a foreign court may, depending on the circumstances, be more 'just' than local law.[10] It acknowledges that the 'just' outcome of a claim for damages for an accident in England, governed by English substantive law, would not be the same as the 'just' outcome of a claim for damages for the same accident, if it occurred in a foreign territory and was thus governed by foreign law. This reveals an underlying commitment to what is referred to in this book as 'justice pluralism'.

The idea of justice pluralism can be understood as the reflection in law of the concept of 'value pluralism' in philosophy, which is distinguished from both absolutism and value relativism.[11] Under this conception, the

[7] See further 4.3.2 below.

[8] 'The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness' – *Loucks* v. *Standard Oil Co. of New York* (1918) 224 NY 99 at 111 (Cardozo J).

[9] *Duport Steels Ltd* v. *Sirs* [1980] 1 All ER 529 at 551, per Lord Scarman. The tension between discretion and the rule of law was most famously highlighted by Dicey (1915).

[10] 'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home' – *Loucks* v. *Standard Oil Co. of New York* (1918) 224 NY 99 at 111 (Cardozo J).

[11] Modern conceptions of 'value pluralism' are presented in e.g. Raz (2003); Berlin (1991); Berlin (1969); see similarly the 'presumption of equal worth' between cultures in Taylor (1994).

just outcome to a dispute does not merely depend on the facts of the dispute itself but on the *context* in which it occurs – there is a presumption that the variety of legal cultures represent significant and distinct sets of norms which should be independently valued. Subject to limits, represented in private international law through the concept of 'public policy' which defines the boundaries of tolerance of difference between states,[12] there is no universal 'just' resolution of a type of dispute, but an incommensurable conflict of values, embodied in different national private laws.

The underlying justification for the application of foreign law must therefore be a question of context – of determining the appropriate circumstances for the application of local or foreign standards of justice, the appropriate 'connections' between the dispute and the forum or legal system. This determination cannot be based on ordinary principles of national law, because the point is to determine which national law ought to apply. A central problem in choice of law, explored throughout this book, is thus the determination of what standards could be applied to identify when the application of a foreign law is 'just'.

1.2.2. Justice and jurisdiction

There are two fundamentally different concerns in an exercise of national judicial jurisdiction. The first is the *existence* of state power: whether the state has regulatory authority over the dispute. If the state has authority, a second concern arises: whether the state court will *exercise* this power. This distinction is not the same as the distinction between jurisdictional *rules* and *discretions* at the national level. Some rules of jurisdiction may determine, instead of or in addition to discretionary powers to stay proceedings, whether state power is exerted. Equally, the exercise of apparently discretionary rules could mask an underlying objective of compliance with international limitations on judicial authority. It may not be left to the courts to determine, as a matter of judicial restraint, whether regulatory authority is exercised; but equally, it may be left to the courts to determine whether regulatory authority even exists. In the common law tradition, the two different concerns behind rules of jurisdiction are obscured by the fact that these theoretical considerations have been amalgamated in broad discretionary tests.

[12] See 5.3.5 below.

It would be possible to imagine an international system in which it was accepted that all states had unlimited power (regulatory authority always exists), and the only restrictions were self-imposed or practical limits on the exercise of that power. A position close to this has been adopted by some adherents to positivist international legal theory.[13] Under such a system, the theoretical and practical limits on state power would correspond. It would equally be possible to imagine jurisdictional rules which were mandatory rather than facilitative, leaving states with no discretion in the exercise of their judicial power (regulatory authority only exists and must be exercised when specified by international law). A position close to this is adopted by some 'internationalist' private international law scholars.[14] Neither position, however, is an accurate account of the rules and practices of courts around the world, which, as explored throughout this book, distinguish between and accommodate both the existence and exercise of state judicial authority.

The distinction is important because rules which are concerned with the existence of state power involve fundamentally different considerations from those concerned with its exercise, although this is often difficult to detect in practice because the two objectives are frequently addressed in (and obscured by) a single rule. Rules concerned with the *exercise* of jurisdiction will frequently draw on national conceptions of the balance between the rights of plaintiffs and defendants, and the domestic evaluation of practical considerations such as the cost of the proceedings to the state – matters which are part of each national conception of 'justice'.[15] By contrast, rules concerned with the *existence* of jurisdictional authority cannot reflect national policies or values, because this would beg the question as to whether there is power to apply those policies. This component of the determination of jurisdiction cannot be based on a national conception of private rights, because no national system could provide authority for a decision that such rights exist; it must therefore be international in character.

[13] See discussion in Chapters 2 and 3. [14] See 1.6 below.

[15] In states (such as the US or France) which do not have national courts with general competence but different courts limited by territory or subject matter, it may also involve considerations of what is usually described as the problem of 'venue' – the question of which national court is the appropriate one to exercise jurisdiction.

1.2.3. Justice and foreign judgments

In the common law tradition, the enforcement of a foreign judgment is generally addressed as an issue of private justice, as a request for the recognition of private rights. Foreign judgments are approached as if they are merely 'debts',[16] which has traditionally meant that only fixed money judgments are enforceable.[17] However, the decision whether or not to enforce a foreign judgment is not merely a *recognition* of a debt which has 'vested' in the plaintiff[18] – it *determines* whether or not there is a debt to be enforced in the local jurisdiction. As in the case of choice of law rules and rules of jurisdiction discussed above, it begs the question to say that the recognition of a foreign judgment is a matter of private rights, or an ordinary question of 'justice'.

If a foreign judgment is to be recognised through a procedure which does not involve rehearing the dispute, a different conception of justice is involved. Recognising a foreign judgment involves recognising that a foreign decision is no less just because it resolves a dispute in a way which might not be identical to standards of justice for local disputes. Here, as in the context of the application of foreign law, a concept of 'justice pluralism' is operative. The 'just' result is not necessarily always the result that a local court would reach; the validity of a different determination depends on the context of the dispute, on the degree of connection between the dispute and the state in which the judgment is obtained.

1.2.4. Party expectations

References to 'justice' as a justification for private international law rules are frequently augmented by claims that the rules are necessary to meet 'party expectations'.[19] It is, for example, sometimes argued that the expectations of economic agents, including as to the court in which

[16] *Adams* v. *Cape Industries Plc* [1990] Ch 433 at 553; *Schibsby* v. *Westenholz* (1870) LR 6 QB 155; Caffrey (1985) pp. 42ff.

[17] But note the Canadian decision in *Pro Swing* v. *Elta Golf* (2006) SCC 52; see Pitel (2007); Oppong (2006a). A broader approach is taken in some States of the US – see *Third Restatement (Foreign Relations)* (1986) s. 481(1).

[18] See further 2.4.2 and 4.2.4 below.

[19] 'The main justification for the conflict of laws is that it implements the reasonable and legitimate expectations of the parties to a transaction or an occurrence' – Dicey, Morris and Collins (2006) pp. 4–5; 'Simply applying English law could lead to a highly inappropriate outcome that would defeat the reasonable expectations of the parties' – Clarkson and Hill (2006) p. 6.

their disputes will be heard and the law which will be applied, need to be met so they can make rational economic decisions – properly costing their contracts or business risks.[20]

If the parties have clear shared expectations, then usually these will be met through recognition of an agreed choice of forum or choice of law. But it is arguably more accurate to say that these are enforced because there is an agreement, not because the parties have a common expectation.[21] A private international law dispute, however, will generally only arise when the parties are asserting different expectations. In the absence of an express or implied agreement, there is no basis for choosing the expectations of one party over the other.

There is an even more fundamental problem here. Private international law, like any area of law, cannot simply claim to reflect expectations because it also shapes them and is designed to shape them. A well-advised party can only legitimately expect that the rules of private international law, whatever they are, will be applied. Any law which is properly publicised and correctly applied creates party expectations, but this does not indicate what the content of the law should be.

The key to resolving these problems is that justifications for private international law do not (and should not) speak only of 'expectations' but of 'legitimate' or 'reasonable' expectations. An inquiry into the legitimate expectations of the parties does not focus on their subjective expectations (their psychological state, background and context) but on the expectations of a reasonable person in their position – on the assumption that there are no rules of private international law. Thus, despite the approach ostensibly adopted by the courts, the analysis of party expectations is not a subjective test which serves private party interests, but a claim that objective standards may be found through consideration of a hypothetical. This is a common mode of legal and philosophical argument[22] – in law it is used every time a judge asks what a 'reasonable person' would have done, or considers the views of 'the man on the Clapham omnibus'.[23] Its essential feature is that it purports to justify objective rules

[20] This justification is particularly prominent in the regulation of private international law in the EU – see 4.6 below.

[21] The enforcement of choice of law or choice of forum agreements raises particular issues examined in 5.6 below.

[22] In philosophy its most famous modern version is the argument from the 'original position' in Rawls (1971).

[23] *Hall* v. *Brooklands Auto-Racing Club* (1933) 1 KB 205 at 224.

through the adoption of a hypothetical and abstract subjectivity. If this is to be anything more than an appeal to intuition, there must be further reasons behind the rules which are adopted. Thus, justifications for private international law which are based on 'party expectations' raise the same question as justifications based on 'justice': what standards could be applied to determine the types of connections or context which are sufficient such that the application of foreign law meets 'legitimate expectations'?

1.2.5. Conclusions

'Justice' and 'party expectations' at first glance seem to offer straightforward private rights based justifications for private international law, but on closer examination raise more questions than they answer. In the words of the Supreme Court of Canada:

> Anglo-Canadian choice of law rules as developed over the past century … appear to have been applied with insufficient reference to the underlying reality in which they operate and to general principles that should apply in responding to that reality. Often the rules are mechanistically applied. At other times, they seem to be based on the expectations of the parties, a somewhat fictional concept, or a sense of 'fairness' about the specific case, a reaction that is not subjected to analysis, but which seems to be born of a disapproval of the rule adopted by a particular jurisdiction. The truth is that a system of law built on what a particular court considers to be the expectations of the parties or what it thinks is fair, without engaging in further probing about what it means by this, does not bear the hallmarks of a rational system of law. Indeed in the present context it wholly obscures the nature of the problem.[24]

References to justice and party expectations as justifications for private international law only obfuscate its underlying realities, suggesting the need for different perspectives.

1.3 Perspectives on private international law

1.3.1. The systemic perspective

In private law, the development of legal rules by the courts typically involves consideration of both the outcome of the specific case at hand, and the 'systemic' effects of the rule, including its impact in other cases

[24] *Tolofson* v. *Jensen* [1994] 3 SCR 1022 at 1046–7.

and its ability to guide behaviour. In public law, however, the analysis typically focuses primarily or exclusively on these systemic effects. In constitutional law, for example, when determining which branch or level of government ought to be responsible for a particular issue (such as when testing the constitutionality of a federal law), a possible rule is not evaluated according to its effects on the outcome of the individual case at hand, but according to the general appropriateness of its allocation of authority – 'a judicial decision must … rest on "reasons that in their generality and their neutrality transcend any immediate result that is involved"'.[25]

The focus on justice or party expectations in private international law theory characterises the subject as a matter of private law, concerned with specific outcomes. However, as argued above, it is unclear how private international law rules can be evaluated based on whether they meet the needs of justice or party expectations in individual cases. In the context of private international law, references to 'justice' only make sense as indicating an underlying concern with the appropriateness of an allocation of regulatory authority. Determining whether English or French law applies should not involve a determination of whether English or French law gives a more just outcome to the dispute. It should involve an examination of whether English or French law is more appropriate to the resolution of this type of dispute, and to the many more situations in which the allocation of regulatory authority will shape the decisions of parties without the issue ever reaching a courtroom. This implies that a rule of private international law should not be evaluated based on the outcome produced in individual cases, but on the systemic effects produced by the generalisation of the rule.[26] This evaluation necessarily adverts to the existence of standards determining the degree of connection between a dispute and a forum or legal system. This suggests that private international law is best understood as 'public' in character, and that the appropriate perspective for its analysis is systemic – contentions explored throughout this book.

[25] *Robinson* v. *Secretary of State for Northern Ireland* [2002] UKHL 32 at [33], per Lord Hoffmann, citing Wechsler (1959) p. 19.

[26] This idea, that rules should be evaluated according to their ability to be generalised, is most closely associated with Kant's 'categorical imperative'; see 2.4.1 below; Rawls (1971).

1.3.2. National and international perspectives

Private international law theorists sometimes distinguish between an 'internal' (or national) and an 'external' (or international) perspective.[27] On the one hand, a legislator or court may look at a private international law dispute from the perspective of their domestic role, defined by national rules and sources of authority. On the other hand, they might seek to understand and address the problem as an issue involving the interests of more than one state – seeking to 'transcend' their domestic status by adopting an international perspective on the problem.[28] It may be problematic for domestic institutions, particularly national courts, to adopt such a position. This is because their role is frequently curtailed by national law which limits their functions, balancing their powers against those of other government institutions. Nevertheless, it should be noted that courts do resolve problems from a perspective which is at least ostensibly outside their national framework.[29] A purely domestic or national approach to private international law emphasises the independence of each national action and interest. By contrast, the approach which is adopted and advocated in this book recognises and encourages the view of private international law as an international system, even if it is operationalised by national courts through national law.

Private international law texts assuming an internal perspective sometimes reject the use of the terminology 'private international law'. This is said to be an implication of the generally accepted idea that private international law is not truly 'international', that it is fundamentally part of national law,[30] an idea challenged throughout this book.

[27] See e.g. discussion in Wai (2002) pp. 222ff; Wai (2001) pp. 143ff; Hatzimihail (2000); Brilmayer (1995) pp. 1ff; Cassese (1990); Dane (1987); Juenger (1985) pp. 353ff; Lepaulle (1939).

[28] See further 5.2 below.

[29] A classic statement of such a perspective was made by Chief Justice Fuller, in *Kansas* v. *Colorado* (1901) 185 US 125 at 146–7: 'Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand'. See further 3.4.1 below.

[30] Thus, private international law is a 'branch of English law' and 'that part of the law of England which deals with cases having a foreign element … [meaning] a contact with some system of law other than English law' in Dicey, Morris and Collins (2006) p. 3; 'the rules of private international law are part of the internal law of the state concerned' and are defined as 'the rules developed by states as part of their domestic law to resolve the problems which, in cases between private persons which involve a foreign element, arise over whether the court has jurisdiction and over the choice of the applicable law' in Oppenheim (1992) p. 6; 'Conflict of Laws is … part of the law of each state' in the *Second*

Even if a national perspective is adopted, private international law is international in being increasingly the product of exchanges of influence between judges and legislators in different states.[31] International institutions and treaties concerned with private international law may be viewed as a formalisation of these efforts to find coordinated solutions.[32] There is a strong national interest in the creation of a harmonised international system to reduce the conflicting legal treatment of private disputes, which suggests that a purely internal perspective is untenable.[33] Within federal systems, the development of private international law is often and increasingly approached as a constitutional problem of systemic ordering, as explored in Chapter 4.

Adopting a systemic perspective enables an analysis of private international law which reveals that it is international in a deeper sense, explored throughout this book. The history of private international law examined in Chapter 2 shows that it did not emerge separately in independent legal systems, but from a universal 'law of nations'. International institutions may be seen as providing a framework within which private international lawyers (practitioners, academics and judges) have, to some extent, a common sensibility of the international significance of their actions, and engage in a transnational dialogue, an international 'self-ordering'.[34] International treaties containing private international law rules may be viewed not as signs of reciprocal influence or *ad hoc* coordination, but as part of a fragmented international legal

Restatement (Conflicts) (1969) s. 2; 'Principles and rules of the conflict of laws are not international, they are essentially national in character' in Castel (1994) p. 3; and 'Private international law … is essentially municipal in origin and in legal effect' and 'each State is at liberty to determine the contents of its own national rules of private international law' in Verzijl (1968) p. 190; see similarly Cheshire, North and Fawcett (2008) p. 3; Clarkson and Hill (2006) p. 1; Shaw (2008) p. 2; Collier (2001) p. 3.

[31] Present European private international law has been described as 'the fruit of a dialogue between the continents' – Jayme (1990) p. 24. Recent Australian and Canadian approaches could similarly be described as the product of intercontinental dialogue: see Chapter 4.

[32] See 5.2.1 below.

[33] Thus, 'there is a body of conflicts law, qualitatively different from domestic law, that derives its power at least partially from shared interstate concerns rather than from the policies of any particular sovereign' – Cox (2001) p. 174 (fn. 5); see also Allott (2002) p. 298; Lauterpacht (1970) p. 39. An analogy may be drawn here with arguments for international law generally – that it is in each state's national interest to have a functional international system; thus 'rational choice, for American policymakers, must mean taking international law seriously' – see Franck (2006) p. 106. See further 5.3.6 below.

[34] See 3.4.1 below.

order.[35] Viewed from this perspective, private international law is international in character because it forms part of a single, broadly defined, international system of law.

1.3.3. Autonomy and mutuality

From an internal perspective, the application of a foreign law or the recognition and enforcement of a foreign judgment may be considered 'autonomous' acts. Like rules of private law, under this conception they are purely local actions reflecting the will of national lawmakers, which need only comply with domestic standards and conceptions of justice.[36] From this perspective, there would be no need to ensure that a foreign law was applied in the same way that the foreign state would apply it, and the consideration of whether to enforce a foreign judgment would not need to be concerned with the appropriateness of the assertion of jurisdiction by the judgment court, only the compatibility of its outcomes with local norms.

The international systemic perspective depends on a radically different understanding of the significance of an act of application or recognition of a foreign law or judgment, rejecting the artificiality of a framework of analysis constrained by state boundaries.[37] Rather than an application or recognition being an autonomous, independent act, it is an act of engagement, of 'mutuality'. Private international law is thus conceived as embodying a principle of 'tolerance of difference', not in a paternalistic or permissive sense, but in the sense of respect between equals.[38] This argument is not merely analogous to but also an aspect of a philosophical tradition which recognises individual identity as a social phenomenon. Proponents of a social perspective on individual identity argue that it is the product of a relationship of interaction, of 'mutual recognition'.[39] Equally, communities are the products of their interactions, which include the interactions of their values as embodied in their legal orders. It is no coincidence that the term 'mutual recognition' has also been adopted in the EU to describe the obligations of respectful

[35] See 5.2.1 below. [36] See further 4.3.2 below. [37] O'Neill (2000).

[38] See e.g. Habermas (2006) pp. 21ff; Batiffol (1985).

[39] See e.g. Sandel (1998); Taylor (1994); Habermas (1992); Neuhouser (1990); Fichte (1796). Tully (1995) argues (at p. 8) that 'a just form of constitution must begin with the full mutual recognition of the different cultures of its citizens' – an argument made in the context of national federalism, but equally applicable internationally. The argument draws on the philosophical tradition of Hegel – see 2.5.1 below.

engagement between EU Member States.[40] Recognition of foreign law and judgments is more than an *ad hoc* process of taking and internalising foreign norms – it is an acknowledgment of the value of both the foreign state and its people, an acceptance of the coexistence of states in international society. Where an internal perspective might acknowledge a crude internationalism through a concept of bilateral 'reciprocity'[41] in the context of the recognition and enforcement of foreign judgments, or through the ambiguous idea of 'comity',[42] an international perspective sees a single functional system in which private international law embodies openness to the legitimacy of foreign norms. Private international law is thus a legal situs for 'a civilized debate among convictions, in which one party can recognize the other parties as co-combatants in the search for authentic truths without sacrificing its own claims to validity'.[43]

The application of a foreign law should thus not be viewed as a purely domestic act, where foreign law is incorporated by reference as part of 'local law', or acknowledged only as a fact. It is an act which affects the 'scope' of the foreign law itself; it determines its domain of application. And courts do in practice adopt an internationalised conception of the domain of application of different laws, for example by approaching the characterisation of a private international law dispute, in order to determine which choice of law rules should apply, with a 'broad internationalist spirit', looking for 'an autonomous international view'.[44] Similarly, the enforcement of a foreign judgment may be recognised as more than a pursuit of local standards of justice, like the enforcement of a local debt, but as an acceptance of the validity of foreign values. And when courts decide to recognise foreign judgments, they frequently do so based only

[40] See 4.6.7 below; Nicolaidis and Schaffer (2005); Maier (1983) p. 585.

[41] See e.g. the UK's *Foreign Judgments (Reciprocal Enforcement) Act 1933*, Australia's *Foreign Judgments Act 1991*, and Germany's *Zivilprozessordnung* s. 328(1)(5); Rosner (2004) pp. 284ff. The requirement of 'reciprocity' is usually not considered part of the common law, but divided the US Supreme Court in *Hilton* v. *Guyot* (1895) 159 US 113, and US practice remains variable: see generally Childs (2005). A long-recognised but perhaps overstated problem with such a requirement is that it risks entrenching a mutual practice of non-recognition.

[42] See further 2.3.4 below.

[43] Habermas (1994) p. 133.

[44] *Raiffeisen Zentralbank Österreich AG* v. *Five Star General Trading LLC (The Mount I)* [2001] QB 825 at 840, 842; Forsyth (1998); Kahn-Freund (1974) pp. 227ff; Robertson (1940): see further 5.2 below. This is particularly evident in the context of choice of law in property, where an international distinction between immovable and movable property is used (rather than the common law distinction between real and personal property), and the classification of property is a matter for the *lex situs* rather than the forum: see e.g. *Air Foyle Ltd* v. *Center Capital Ltd* [2002] EWHC 2535; Staker (1987) pp. 169ff.

on a determination of the appropriateness of the judgment court's exercise of jurisdiction,[45] without closely scrutinising whether the outcome would be different if the matter had been litigated locally.[46]

Any collective enterprise involves a degree of mutual trust, of acceptance of the judgment of others. In the same way, the functioning of a collective and diverse international system requires states to accept the 'judgment' – including as it is expressed in the law and by the courts – of other legal systems. The systemic perspective, with its focus on the international functioning of the system of private international law, facilitates the recognition that the rules of private international law embody a commitment to this idea of mutuality, through their reflection of the principle of 'justice pluralism'.

1.4 Justice revisited

The analysis set out above rejects a role for the traditional private law conception of 'justice' as underpinning private international law. This section reconsiders the role of justice in private international law from an international systemic perspective, founded on the principle of 'justice pluralism'.

1.4.1. Conflicts justice

Part of the justness of any set of rules is its coherence and consistency. The need for systemic coherence in private international law is usually described as the objective of 'conflicts justice', which is contrasted with the idea of private law 'substantive justice'.[47] The existence of diverse

[45] The test is not, in the English approach, whether the jurisdiction was properly taken under the rules of the judgment state, but whether it complied with English rules of 'international jurisdiction': *Adams* v. *Cape Industries Plc* [1990] Ch 433; *Emanuel* v. *Symon* [1908] 1 KB 302. The rules of international jurisdiction recognised in England are defined much more narrowly than the jurisdiction which English courts assert themselves, a disparity which has led to much criticism and the rejection of those rules in Canada – see further 5.3.2 below.

[46] Extreme, 'intolerable' differences are, however, likely to lead to the invocation of a 'public policy' exception: see further 5.3.5 below.

[47] See Symeonides (2001) p. 61ff; Symeonides (2001a). The objective of conflicts justice is implicitly present whenever a court strives to resolve a dispute in the same way as a foreign court would resolve it, a policy which is influential across private international law, but perhaps most visible in considering how to approach the proof of foreign law, or the problem of *renvoi*.

rules of private law in national legal systems creates the potential for conflict, for the inconsistent legal treatment of an event or set of facts. This possibility poses significant problems both in regard to the regulation of conduct, where parties may, for example, have difficulty complying with inconsistent regimes, and in regard to the regulation of status, where individuals may, for example, be confronted by the fact that the validity of their marriage varies from state to state, referred to as a 'limping marriage'. For some parties, the existence of overlapping regimes may be an unfair barrier to movement, while for others it invites the possibility of gaining an unfair advantage and increasing institutional costs by bringing proceedings in a court which is most advantageous but not necessarily most appropriate, a practice known as 'forum shopping'.[48] The need for international coordination of rules of private law is thus not merely a technical legal issue, but a political, cultural and economic problem – a problem of global justice.

As expressed by the Australian High Court:

> Once Australian choice of law rules direct attention to the law of a foreign jurisdiction, basic considerations of justice require that, as far as possible, the rights and obligations of the parties should be the same whether the dispute is litigated in the courts of that foreign jurisdiction or is determined in the Australian forum. This is not a consideration which seeks uniformity for the sake of the aesthetic value of symmetry. Nor is it a precept founded in notions of international politeness or comity. As has been said, comity is 'either meaningless or misleading'; it is 'a matter for sovereigns, not for judges required to decide a case according to the rights of the parties'.[49]

The idea of conflicts justice offers an important insight into a key systemic objective of private international law. It suggests that an international systemic analysis, looking at the consistency of private international law as a whole rather than at any national policies or objectives, is essential to meet (in the words of the High Court) 'basic considerations of justice'.

1.4.2. Systemic justice

With the benefit of an international systemic perspective, the idea of justice can also be used to help understand and critique the content of

[48] See e.g. Bell (2003); Juenger (1994); Opeskin (1994).

[49] *Neilson* v. *Overseas Projects Corporation of Victoria* [2005] HCA 54 at [90] (per Gummow and Hayne JJ, footnotes omitted). 'Symmetry' in this case was, however, artificially achieved through an arguably unsatisfactory interpretation of Chinese law – see further Mills (2006).

private international law rules, the question of *when* they should provide for jurisdiction, the application of foreign law, or the recognition and enforcement of foreign judgments. From this perspective, the problem of private international law is the problem of the appropriate allocation of regulatory authority: which state should hear a dispute, whose law should be applied, and whether a foreign judgment should be enforced locally. Despite the reputation of private international law as a complex technical subject of interest only to a narrow range of experts, it is argued throughout this book that this is not a purely technical question, which might be resolved as a matter of rational coordination. It is not enough to avoid potential inconsistent legal treatment by selecting any single source of regulatory authority – it matters which source is chosen. The distribution of regulatory authority is itself a question of justice – perhaps 'meta-justice' – operating within the framework of justice pluralism.[50] The answer to a problem of private international law involves the determination of which idea of justice (which state law) would be most just to apply. Private international law, properly understood, is about determining the most 'just' distribution of regulatory authority.

Viewing private international law from a systemic perspective is not about denying that it has real effects in individual cases. But it does imply rejecting the idea that private international law should be evaluated based on those effects. If the outcome is objectionable, it will not be because of private international law but because of the procedural rules of the selected forum, or the applicable rules of substantive law. The outcome of a private international law decision is an allocation of regulatory authority, not a final judgment. A private international law rule should not be subject to criticism because of its *effects* (the chosen court and law got the decision 'wrong'), except where those effects are the result of an inappropriate or unjust allocation of regulatory authority (the regulator should not have been the one making the decision).

From a systemic perspective, the division of regulatory authority made by private international law rules constitutes a method of international ordering. The fact that, in practice, different states frequently adopt inconsistent rules of private international law does not undermine this contention; it only reveals that the system of global governance which is presently reflected in private international law is one of conflict and incoherence. The evaluation of private international law involves deep

[50] 'Meta-justice' is suggested as an allusion to 'meta-ethics', the concern of 'value pluralism' in philosophy.

political questions concerning the organisation of the international system, the definition and differentiation of human societies. Private international law rules are not about doing justice in individual cases, but the justness of this international legal ordering.

1.4.3. Private international law rules as secondary rules

The understanding of private international law explored above can be developed further by drawing on a distinction made famous by H. L. A. Hart, the distinction between primary and secondary legal norms.[51] In Hart's words, primary rules 'impose duties', where secondary rules 'confer powers'. Under primary rules, 'human beings are required to do or abstain from certain actions'; under secondary rules, 'human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations'.[52] While 'primary rules are concerned with the actions that individuals must or must not do', 'secondary rules are … concerned with the primary rules themselves'.[53]

The impact of the distinction between primary and secondary rules on private international law may be illustrated through an example. Consider a dispute over ownership of property, where the law of England would give title to one party and the law of France would give title to the other. The decision of the law of England to give title to the first party is a primary legal norm. The decision whether it is the law of England or the law of France which should determine title is a secondary legal norm. It is concerned with the scope of authority of the law, not the outcome in the specific case. The same distinction operates in the context of jurisdiction. The determination of whether an English court will hear the dispute does not dictate the outcome of the dispute according to primary legal norms; it concerns only whether the state will exercise judicial authority.

[51] See generally Hart (1994) p. 79ff. The distinction was at least partially adapted from Ross (1958) and Kelsen (1934) esp. [31]. The clarity of the distinction has been subject to some criticism – see e.g. Lucas (1997); Cotterrell (1989) pp. 83ff – but not in a way which damages its usefulness for the purposes of the analysis in this book. A similar distinction (between first-order and second-order views) is discussed in the context of private international law by Dane (2000); Dane (1987). Hart's use of these terms (and their use in this book) should be distinguished from their use by the International Law Commission in its work on state responsibility – see Crawford (2002c) pp. 14ff.

[52] Hart (1994) p. 81. [53] Hart (1994) p. 94.

When private international law rules are evaluated based on the 'justness' of their outcomes in individual cases, they are treated as primary rules. A central contention of this book is that such a classification is mistaken and that private international law rules should be at least primarily understood, from a systemic perspective, as secondary rules concerned with the allocation of regulatory authority between states. Private international law rules, from this perspective, are not concerned with private rights, but with public powers.

1.5 The components of private international law

Adopting an international systemic perspective, the division of private international law into the three components of jurisdiction, applicable law and the recognition and enforcement of foreign judgments may be seen in a fresh light. The existence of different national legal systems creates the potential for inconsistent legal treatment of disputes. This problem could be addressed through three distinct strategies of 'meta-justice', in support of the principle of justice pluralism. One strategy would be to try to ensure that disputes will only ever be heard by one court, by minimising the overlap in the jurisdiction of national courts. A second approach would be to adopt unified rules for the application of foreign law. The idea would be that wherever a dispute is litigated, the same national substantive law should be selected and applied. A third approach would be to provide that where a foreign court has heard a dispute, the judgment will be recognised locally rather than reheard. This approach would eliminate inconsistent judgments, but would have the disadvantage of accentuating the incentives for forum shopping.

Each of these strategies is embodied in a component of private international law – rules on jurisdiction, the applicable law, and the recognition and enforcement of foreign judgments. Since the perfect implementation of any of these strategies is impossible, each of them is pursued simultaneously. There are limits on the jurisdiction of national courts, although those limits are not perfectly defined and may permit overlapping jurisdiction. The existence of those limits may be obscured by the fact that they are governed by a judicial discretion (which may also involve consideration of whether to *exercise* jurisdiction under national policies), but equally can be reinforced by the possibility that in some courts an anti-suit injunction will be issued to prevent their breach. Choice of law rules try to find a single most closely connected law to a dispute, although there can be disagreement on how such a connection

should be measured. Even if there were complete agreement, difficulties in proving the content of foreign law and differences in the procedural law of the forum could still lead to inconsistent legal treatment of disputes, although the likelihood of such differences is minimised by the concurrent application of the rules which limit jurisdiction. At the same time, foreign judgments are frequently recognised and enforced, reducing the likelihood that inconsistent judgments will arise through duplicated local proceedings. But a foreign judgment will only be enforced when it is final, not merely an interim award which could be varied by the judgment court,[54] a requirement clearly motivated by the desire to avoid increasing the possibility of inconsistent judgments.

In addition to these three strategies, the problem of inconsistent legal treatment of disputes could also be addressed through the elimination of difference in the law, substantive and procedural, of national legal systems. The possibility of inconsistent national treatment is diminished according to the extent that national laws are (horizontally) harmonised, or the field is (vertically) regulated by international law. These strategies are pursued under the auspices of such international organisations as UNCITRAL or UNIDROIT.[55] Private law regulation may, to some extent, also be universalised outside the realm of national or international law through recourse to private systems of rules and arbitration, through the development of a free-floating *lex mercatoria*.[56] In many circumstances such harmonisation of substantive private law may be an appropriate and desirable method for reducing the possibility of regulatory conflicts. As explored throughout this book, however, this strategy comes at a price which will often be greater than the potential costs of regulatory conflict under imperfect rules of private international law, because it requires the abandonment of distinct national legal cultures and traditions – the loss of legal pluralism.

The three components of private international law are usually distinguished and examined separately. While this separation is understandable, it risks missing the interaction and intersection between the different rules.[57] For example, in English courts jurisdiction may depend

[54] *Buehler* v. *Chronos Richardson Ltd* [1998] 2 All ER 960; *Third Restatement (Foreign Relations)* (1986) s. 481(1); *Zivilprozessordnung* s. 328(1)(3); Rosner (2004) pp. 286–7.
[55] See www.uncitral.org; www.unidroit.org. [56] See further 3.4.1 below.
[57] As analysed in Harris (1998); Briggs (1998); Fawcett (1991).

directly on the applicable law;[58] an English court is less likely to stay proceedings where the applicable law is English law;[59] the applicable law may need to be consulted to evaluate the validity of a contract which could give rise to jurisdiction;[60] and, as noted above, the enforcement of a foreign judgment involves consideration of whether the jurisdiction of the foreign court was acceptable.[61] The separate treatment of the components of private international law also, more fundamentally, obscures their functional commonality. Each component of private international law is a distinct strategy operating as part of a single functional system aiming to reduce the inconsistent legal treatment of a dispute or legal relation by limiting, in a different way, the regulatory authority of a state – while not compromising the diversity of its substantive law.

When a dispute comes before a national court, the rules which establish whether that court has jurisdiction, and the rules which establish what law it will apply if it does, determine in conjunction the law that governs the dispute. The determination of factual questions is governed by the procedural law of the forum, including its law of evidence, which is decided by the rules of jurisdiction. Choice of law rules determine the substantive applicable law, which governs the determination of legal questions. In so doing, these rules define the scope of application of the legal orders which are and are not applied. The importance of their role in each case will depend on the nature of the issues in contention. In a case which primarily involves the determination of difficult factual questions, the rules of jurisdiction, which decide which procedure governs the determination of facts, will be crucial. In a case with difficult and controversial problems of legal policy, the determination of the applicable law may be more important. In many cases, both will play a significant part. In every case, they operate together to define the law which governs a dispute – the scope of application of the legal orders which might potentially be brought to bear. Equally, the recognition and enforcement of a foreign judgment does not merely endorse the substantive outcome in the judgment, it also importantly involves a

[58] English *Civil Procedure Rules* 6.36, PD 6B, 3.1(6)(c). Equivalent provisions apply in many other common law jurisdictions, e.g. New South Wales *Uniform Civil Procedure Rules 2005*, Schedule 6, (c)(iii).

[59] *Standard Steamship* v. *Gann* [1992] 2 Lloyd's Rep 528; *Arkwright Mutual Insurance* v. *Bryanston* [1990] 2 QB 649; *EI Du Pont de Nemours* v. *Agnew* [1987] 2 Lloyd's Rep 585; see similarly *Voth* v. *Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 566; *Oceanic Sun Line Special Shipping Company Inc.* v. *Fay* (1988) 165 CLR 197 at 266.

[60] *Tessili* v. *Dunlop* [1976] ECR 1473, Case 12/76.

[61] See 1.3.3 above and 5.3.2 below.

validation of the private international law component of the judgment, an endorsement of the jurisdiction of the judgment court.

The functional purpose and effect of private international law rules is, however, only half their story. Private international law rules do not merely address the problem of reducing the potential for inconsistent legal treatment of disputes. They are not just concerned with achieving a rational or orderly division of regulatory authority. They also involve the normative question of *how* that ordering of regulatory authority should be achieved. The selection of a *particular* rule of jurisdiction or choice of law rule is not just a recognition that (following from justice pluralism) other legal orders may be more justly applied to a dispute. It is also a determination of *which* legal order should govern; it implies that the connecting factor adopted in that choice of law rule should be the foundation of the division of the regulatory authority of states. Although in this book the components of private international law will sometimes be the subject of separate discussion and analysis, the focus will be on the function and effects of private international law as a whole, operating as a single system. But a functional analysis must not disguise the other dimension to this problem, also explored throughout this book. Private international law rules must additionally be subject to a normative questioning of the appropriateness of the underlying principles according to which they perform their global ordering of the regulatory authority of states.

1.6 The international character of private international law

This Chapter has argued that private international law should be analysed from an international perspective, which reveals that it constitutes an international system of law. This, together with the historical origins of private international law in the law of nations, noted above and explored in Chapter 2, has historically led theorists to ask whether private international law is part of international law or national law.

Despite the arguments of a small number of so-called 'internationalist' theorists, private international law rules cannot generally be viewed as having the status of rules of public international law.[62] While it is possible that some private international law rules have, or may develop, the status of customary international law or 'general principles of

[62] See discussion in Collier (2001) pp. 386ff; Steenhoff (1984); Mann (1984) p. 31; Kahn-Freund (1974) pp. 166ff; Akehurst (1973) pp. 219ff; Lipstein (1972) pp. 168ff; Mann (1964) p. 20; Hambro (1962) pp. 47ff; Mann (1954) p. 181.

international law recognised by civilised nations',[63] at present that could only be contemplated in respect of a small number of norms.[64] To claim that private and public international law were so directly connected would obviously not explain or accommodate the diversity of private international law rules and approaches. Private international law rules are incontrovertibly developed and applied by national legislatures and courts. If private international law cannot be viewed as part of international law, then the traditional response, according to the question posed, is that it must be part of national law.

This book rejects the dichotomy underlying the question of the international or national character of private international law. Drawing on an analysis of contemporary international law in Chapter 3, it argues that the relationship between public and private international law is more complex and dynamic than a binary choice between identity and distinction. Private international law rules, although formally part of national law, constitute a type of distributed network of international ordering. This order both reflects and replicates underlying international norms, which are also reflected in rules of public international law. Public international law rules define the conceptual framework and terrain within which private international law seeks to achieve its own specialised international function: the reduction of conflict between regulatory systems in private disputes. Within this framework, differences in private international law rules correspond to competing ideas concerning the division of regulatory authority in different contexts, combining international and national influences. The question is therefore not whether rules of private international law are 'really' international, or 'comply' with international requirements. Rather, this book will explore the complexity of the relationship between public and private international law, through an analysis of the ways in which private international law rules both operate within and define international norms, including constitutional ideas of pluralism and subsidiarity, which provide their foundational standards, structure and objectives.

1.7 Outline

The neglected historical relationship between public and private international law, explored in Chapter 2, is a key to understanding the

[63] *Statute of the International Court of Justice* 1945, Art. 38(1)(c).
[64] See further 5.7 below.

development of private international law theory. The idea of private international law as an expression of national state sovereignty, addressing concerns of private justice or fairness, is a reflection and replication of nineteenth-century positivist international law which obscures the historical origins of private international law in the universal 'law of nations'. This conception is itself an obstacle to the implementation of contemporary ideas of international ordering in and through private international law, and to an international legal order which acknowledges the significance of private actors and law.

The central argument of this book is that the link between public and private international law can be revitalised by rethinking their theoretical foundations, based on an analogy with the relationship between the constitutional law and the internal private international law of a federal system. Chapter 3 begins the exploration of this analogy by rejecting, on both descriptive and normative grounds, the positivist conception of public international law, with its sharply defined distinction between the international and national legal domains. In its place, it argues that modern public international law is and ought to be developing principles of public law including a form of 'federal' constitutional law. Chapter 4 conducts a comparative analysis of the relationship between private international law and federal constitutional law in the US, Australia, Canada and the EU. This reveals an increasing recognition of the interaction between constitutional law and the private international law rules dealing with internal disputes within each federal system. The ideas which are developed to understand this relationship provide the analytical framework through which the international interaction between public and private international law, past, present and prospective, is more fully explored in Chapter 5, before concluding and consolidating comments are offered in Chapter 6. The structure of the argument in this book mirrors the analysis which it makes of the progression of public and private international law themselves: commencing (in Chapter 2) with a historical unity, separating for distinct analysis and development (in Chapters 3 and 4), but returning (in Chapters 5 and 6) to an essential unity and conceptual confluence.

2

The private history of international law

2.1 Introduction

This Chapter examines and challenges the foundational narratives of international law, looking at the 'private' history of the relationship between international norms and private international law. By exploring the intersecting histories of public and private international law, it discredits the myth that these are necessarily discrete, distinct disciplines, with independent, parallel trajectories.

A typical history of private international law is 'intrinsic', a history of the development of legal doctrine within the discipline.[1] Theories or approaches are presented chronologically, in a series of 'epochs' or competing 'paradigms'. The story of their succession is told as a historical fact, without significant attention to contextual factors, suggesting the discipline is propelled forwards by internal dynamics.[2] These limitations are the consequences of choices which reflect a theory of what is important and relevant.[3] The typical history of private international law thus chooses to tell us only the story of private international law as the discipline is conceived today – a genealogical history of private international law as a discrete, autonomous, national discipline.

[1] On this concept see e.g. Allott (2002) p. 340.
[2] Note e.g. Watson (1992) and its criticism in Baker (1993).
[3] 'What you hold to be true about the world depends on what you take into account, and what you take into account depends on what you think matters' – Marks (2000) p. 121.

The focus in this Chapter is on the history of the theory of private international law, as expressed through the most influential writers and theorists in international law.[4] It is not a history of the rules or practice of private international law, but an exploration of the influence of different ideas of private international law as expressed by international legal theorists, including theorists not traditionally viewed as a part of the history of the discipline of private international law. This Chapter is thus an 'extrinsic' history of private international law, looking at the role played by broader ideas of international law and international order in its development, including in its early origins,[5] and through the ideas of positivism,[6] natural law[7] and historicism.[8] The analysis in Chapter 1 and the historical study in this Chapter reveal that the different approaches to private international law do not merely reflect, as contemporary accounts might suggest, private law objectives of justice or fairness within each state. Instead, private international law theories and rules are reflections of and responses to changes in their context, including changes in international norms and ideas of international order.

The history explored here is of course a simplification – it cannot fully describe the diversity and complexity of approaches adopted by different people at different times, and it risks overplaying the importance of distinctions commonly drawn between the different schools of legal theory it examines.[9] In its history of private international law theories and theorists, this Chapter should not be read as a claim that these ideas were universally accepted or uniformly conceived, but only that they were (to differing degrees) influential in the development of the discipline. Thus, in its history of international norms and in the division it makes between positivist, natural law and historicist approaches this Chapter should not be read as a claim that these positions are coherent or conceptually independent,[10] but only that they were adopted and advocated, and that they were and remain influential.

[4] It focuses on European scholarship, because most of the world's international law (public and private) has been adopted or adapted from the European tradition. A separate tradition of private international law, similar to the 'personal law' approach discussed in 2.2.2 below but probably predating the European tradition, was developed in China, but later declined: see Paul (1991) p. 35; Graveson (1981) p. 96ff, who also considers the origins of private international law both within and outside the European tradition, particularly in Africa. Contemporary practice in China reflects the European tradition: see Kong and Minfei (2002), who suggest (at p. 415) that 'Private international law was introduced in China in the early 1980s'; see also Zhang (2006); Jin and Guomin (1999).

[5] See 2.2 below. [6] See 2.3 below. [7] See 2.4 below.

[8] See 2.5 below. [9] See e.g. Koskenniemi (2006); Koskenniemi (2002a).

[10] In fact often they are not, and perhaps ought not to be – see Berman (2005a).

There are three reasons for the exploration of the history of private international law pursued in this Chapter. First, it reveals that the origins of private international law involve ideas that are fundamentally different from its present conception. The idea of private international law emerged as part of an international 'law of nations', as an aspect of international ordering. This indicates the possibility of conceptualising private international law from a systemic perspective, as both international and public in character. Second, the fact that radically different approaches have operated in the past highlights the contingency of the modern theoretical perspective on private international law – the idea of private international law as autonomous national law. This perspective is revealed to be the product of its particular historical and theoretical context.[11] Recognising the fact that private international law has been viewed differently in the past reopens the possibility of new conceptions of private international law to reflect new ideas and contemporary conditions.[12] Finally, this history of private international law reveals a functional relationship between private international law and international norms. Private international law, throughout history, has both reflected and replicated conceptions of global ordering. This provides an insight into the effects of contemporary private international law theory, inviting its reconceptualisation and recognition as an international regulatory system.

2.2 The origins of private international law

This section traces the early development of ideas of private international law, beginning with Roman law. There were no private international law rules in what is now known about Roman law,[13] but ideas from Roman law played a key role in its gestation, and continue to exercise an

[11] Blagojevic (1962) – 'In every study of the history of private international law … it is necessary to clarify each phenomenon in the light of the conditions and circumstances of the place and time where and how these phenomena manifested themselves' (cited and translated in d'Oliveira (2002) p. 118.

[12] As Maitland (1911) put it (Vol. 3, p. 438), 'Today we study the day before yesterday, in order that yesterday may not paralyse today, and today may not paralyse tomorrow.'

[13] Understanding the ideas and conditions under which private international law rules failed to evolve also helps us to understand their foundations – see Graveson (1981) pp. 95ff. Note, however, that Phillipson (1911) identifies 'rudiments' of private international law in ancient Greece (p. 192), and 'elements' of private international law in ancient Rome (p. 265). Note also the ancient 'conflict of laws' rules identified by Vinogradoff (1928) Vol. II, p. 248, pp. 262ff; see also Graveson (1981) p. 100.

influence on contemporary theory. An understanding of the origins of private international law is thus an essential prerequisite for the analysis of more modern approaches.[14]

2.2.1. Roman law

The dominant ideology of the Roman world was the concept of a universal empire. This idea reflects the Roman adoption of Greek natural law philosophy, most closely associated with Aristotle and the Stoic school,[15] and in part explains and in part reflects the fact of Roman hegemony. The only recognition of the role that different legal systems might play in resolving disputes was a 'vertical' division of competence – the deference to local law to resolve local disputes.[16]

It is not surprising that private international law rules did not develop within such a system. Roman universalism demanded the integration of other territory as part of the empire, not mutual respect of different peoples and their legal systems.[17] Given the Roman conception of justice as unitary, absolute and universal (and thus its rejection of 'justice pluralism'[18]), it was impossible that justice could be served through the application of a foreign legal order.[19] The Roman theory of international order was simply the universalisation of the Roman order – a homogenisation of law which renders private international law redundant.[20]

Until the late Roman empire, there was, however, at least one important way in which the Roman legal order was not universal. This was the distinction between citizens, whose relations were governed by the formal *ius civile* (the civil law), and non-citizens, who were subject to other

[14] Savigny argued that 'a right understanding and criticism of modern principles and practice is only possible after a thorough examination of the doctrines of the Roman law': Savigny (1849) p. 50; see also Harrison (1919) pp. 105ff.

[15] Neff (2006) p. 31; Shaw (2008) p. 17; Kelly (1992) pp. 14ff, pp. 47ff, noting this as a reaction against the tendency towards relativism and self-interest of the Sophist school.

[16] Nicholas (1975) pp. 57–8.

[17] Yntema (1953) p. 300; Wolff (1950) p. 20; but see Kelly (1992) p. 77 who argues that Roman law contained the foundations of international law concerning the laws of war; see also Wheaton (1836) pp. 6ff.

[18] See 1.2.1 above.

[19] Juenger (2001a) pp. 4–5; Wolff (1950) p. 20; Von Bar (1892) pp. 11ff.

[20] See Phillipson (1911) p. 301 for an alternative view. Other authors have stressed that it is important not to underestimate the extent of the development of international law in the ancient world – see e.g. Bederman (2001); Verosta (1964); Nussbaum (1952).

legal orders.[21] A new form of law, the *ius gentium* (the law of peoples), was developed to address the problem of dealing with relations involving multiple possible sources of law. It did this not by choosing between them, but by 'blending' them – an approach which also has present day advocates.[22] Over time, arguably directed by practical economic imperatives, the *ius gentium* expanded to become a more flexible and sophisticated system of law than the *ius civile*, and developed principles which later became the foundations of international law.[23]

It is not clear whether the *ius gentium* was initially conceived as a universal natural legal order. This characterisation may have been adopted as a strategy to assist its legitimacy in its application to non-citizens, or it may have been a consequence of its origin as an abstraction from a range of legal systems.[24] What is clear is that the *ius gentium* took on this connotation of universality, and the term *ius gentium* became a description not of a Roman invention but of 'the law which natural reason establishes among all mankind',[25] reflecting the triumph of Stoic philosophy in Roman law.[26] This broader sense of *ius gentium*, referring not to a system of Roman private law applying to non-citizens, but to the concept of a universal law system, was particularly influential in the early development of international law based on natural law ideas and techniques.[27]

2.2.2. The statutists

i) The conflict between foreign law and local law

Around the time of the Italian renaissance, an expansion of international trade and commerce, both between European city-states and with the

[21] Shaw (2008) pp. 16ff; Kelly (1992) pp. 61ff; Walker (1899) p. 45; Maine (1861) Ch.3; Wheaton (1845) p. 26.

[22] See Von Mehren (2001a); Von Mehren (1974); Juenger (1992); discussion in Symeonides (2001) pp. 12ff; see also 2.2.3 below.

[23] Kelly (1992) pp. 62–3; Nussbaum (1954) pp. 13ff; Vinogradoff (1928) pp. 269ff; Phillipson (1911) p. 94.

[24] Hall (2001) pp. 293ff; Nicholas (1975) p. 58; Rommen (1936) p. 29; Wheaton (1845) pp. 27ff; Wheaton (1836) p. 7.

[25] Gaius, 'Institutes', cited in Nicholas (1975) pp. 54ff. See also Neff (2006) p. 31; Juenger (2001a) p. 6.

[26] Rommen (1936) pp. 25ff; Wheaton (1845) p. 29.

[27] The ambiguity between these two senses of *ius gentium* has been important as a justificatory mechanism for legal systems deriving rules from Roman law – for example, in the selective adoption of Roman law principles by English courts. See 2.2.3 below; Juenger (2001a) pp. 20–2; Nussbaum (1954) pp. 14ff, p. 86; Maine (1861) pp. 59–60, pp. 107ff, p. 128 (note by Pollock).

Middle East, led to an increase in disputes with significant foreign elements. Italian city-state legal systems adopted Roman law as a common 'natural law', and sought to reconcile the fact of human law with the concept of divine universal law.[28] They did this by arguing, following Aquinas, that natural law was discoverable through the 'participation in the eternal law by rational creatures',[29] applying 'right reason'.[30] However, in practice the need to supplement basic Roman principles with more detailed rules and the growing diversity of city-state cultures led to the evolution of distinct legal identities from these common Roman law origins.[31] This diversity was combined with a strong degree of mutual respect between different cities and states, as a product of both a broadening world view and the concerns of commerce, and in some cases a continuing union under the Holy Roman Empire.

These practical and ideological issues translated into a legal problem, the basic problem introduced in Chapter 1. The existence of diverse legal systems created the possibility of inconsistent legal treatment of disputes. In addition to the practical problem of possible conflicts between mechanisms for the enforcement of laws, if each of these legal systems was an interpretation of natural (Roman) law, or a valid human law operating within a natural law framework, then theoretically each had to be considered as containing a valid idea of 'justice'. The idea of private international law emerged to address these problems, as a mechanism to minimise the possibility of inconsistent legal treatment of private disputes, while accepting a degree of pluralism. Private international law rules were conceived as a distinct part of the universal natural law, 'secondary'[32] norms which facilitated and supported the existence of diverse local legal systems.[33] This point is worth emphasising. Private international law was first conceived of not as part of the local law which

[28] Shaw (2008) p. 21; Hall (2001) p. 294. [29] Aquinas, 'Summa Theologica', Ia 2ae 91 2.
[30] *Ibid.* Ia 2ae 93 3, cited in Kelly (1992) p. 136; see also Ia 2ae 95 4; Bull (1979) pp. 160ff; Nussbaum (1954) p. 38; Suarez (1612) Bk. 2. The idea of 'right reason' was again inherited from the Stoic school – see Rommen (1936) p. 23.
[31] Yntema (1966) pp. 10–11; Yntema (1953) p. 299. [32] See 1.4.3 above.
[33] The first attempt at private international law rules is usually attributed to Aldricus, in Bologna in the late twelfth century, who argued that the courts, when faced with a dispute connected with more than one legal system, should apply the 'better and more useful' law: see Yntema (1966) p. 12; Wolff (1950) p. 22; see further Kelly (1992) pp. 120ff. The concept that there is a 'better' law demonstrates the natural law foundations of this approach; the comparative nature of the test suggests a competitive improvement and development of the law towards a universal ideal, not the existence of diverse laws: Yntema (1953) p. 302. For modern equivalents see 4.3.2 below.

differed from city-state to city-state, but as part of a universal (natural) international law system, encompassing the modern territory of both public and private international law, designed to address the problem of coordinating legal diversity.[34]

ii) The conflict between personal law and territorial law

The first idea of private international law was probably the statutist approach,[35] a complex tradition which can, however, be distilled into a simple argument. Two basic ideas of law coexisted at this time, reflecting two conceptions of social ordering. First, the idea of personal law, associated with an individual by virtue of their identity, their membership of a group.[36] This evolved out of the tribal or ethnic groupings that dominated the European landscape in the medieval period, in which each person effectively carried their own law with them.[37] Second, the idea of local law, associated with a particular territory or region. This reflected the increased importance of localised or regionalised power centres,

[34] Berman (2005b). Kennedy (1986) argues that the distinction between international law and municipal law was itself largely unknown to 'primitive' international law scholarship.

[35] The statutist approach is most closely associated with the natural law theorist, Bartolus: see Nicholas (1975) p. 47; Yntema (1966) pp. 13ff; Wolff (1950) pp. 23–5; Harrison (1919) pp. 108ff. The fame of Bartolus, and incidentally the continued dependence on Roman law (even private international law principles were, dubiously, 'derived' from Roman law), was expressed in the slogan 'Nemo romanista nisi bartolista' ('If you're not a follower of Bartolus, you're not a scholar of Roman law') – Kelly (1992) p. 122. Bartolus is, however, only the most prominent figure of a varied and complex tradition: see Juenger (2001a) p. 10; Lipstein (1972) pp. 110ff; de Nova (1966a) pp. 441ff; Nussbaum (1954) p. 41; Yntema (1953) p. 304; Wolff (1950) p. 29; Lorenzen (1947) pp. 182ff; Westlake (1880) p. 9; Westlake (1858) p. 130. Juenger suggests that the tradition included more recognisably 'modern' rules, including both multilateral choice of law rules and modern territorial choice of law rules.

[36] The idea of a 'personal' connection was more flexible than this might seem to imply. Juenger (2001a) p. 7 points out that this extended to condoning a fictional declaration of ethnicity as a sort of exercise of party autonomy. Von Bar (1892) p. 27 notes that even a private contract may be analysed (and was at this time and subsequently) as a form of temporary 'subjection' to the authority of a state. This form of reasoning was echoed by Grotius, and noted again by Huber – see Weinstein (1990) pp. 80–1.

[37] Lipstein (1972) pp. 107ff; Nussbaum (1954) p. 41; Wolff (1950) p. 21; Von Bar (1892) pp. 17–21; Maine (1861) p. 112; Savigny (1849) pp. 58ff. Thus Westlake commented that 'Within each of the new kingdoms, even in the same city, Roman and Lombard, Frank, Burgundian, and Goth might all be found, each living under his own personal law, very much as the Englishman, Hindoo and Mahometan now live together in India under their respective laws': Westlake (1880) p. 11; the passage appears to have been adapted from Wheaton (1845) p. 31; see also Kahn-Freund (1974) pp. 296ff; Yntema (1966) p. 10; Phillipson (1911) p. 284.

exemplified by the emergence of increasingly territorial, frequently 'walled', Italian city-states.[38] In practice, the dominant systems of social organisation reflected a balance and tension between these two competing ideas.[39]

The idea of the statutist approach was that each statute 'naturally' belongs to one of these two categories of laws. If a law is personal, it 'attaches' to the person and applies outside the territory of the statutory authority. If a law is local (or 'real', meaning territorial), it 'attaches' to the land, and applies only within the territory of the statutory authority, but to all persons within that territory. Any court dealing with a dispute should therefore determine and apply the laws applicable by reference to both the personality of the parties (if their statutory authority has made any relevant personal laws), and the place of the relevant disputed action or thing (if the statutory authority of that place has made any relevant territorial laws), thus ensuring consistent legal treatment of the dispute.

The statutist approach addressed the potential for conflict between legal systems by attempting to develop a principled and analytical way of determining the scope of the effect of different laws. It is worth emphasising again that this is a conception of private international law as part of a universal and international system of law. The division between types of laws is intended to reflect a natural division which operates in all legal systems.[40] By adopting a division between personal and territorial laws, the statutist approach followed and reflected the developing complexity of the political, social and economic order. The reason behind the widespread and lasting influence of the statutist approach is simply that it mirrored effectively the two dominant competing ideas of international order existing at the time and still operating today[41] – the division of the world into peoples, and the division of the world into territories. In

[38] See Juenger (2001a) p. 9; Kelly (1992) pp. 117ff; Nussbaum (1954) p. 41. Phillipson (1911) suggests that these two types of law can also be identified in ancient Greek (at p. 200) and Roman (at pp. 284–5, pp. 295–6) law, and thus that the statutists were merely drawing on and expanding ancient approaches.

[39] This is illustrated by the development of feudalism, which was a combination of personal and territorial rights and duties, typically the grant of land use rights in exchange for goods or personal services (for example, farming) or an oath of personal loyalty (usually for purposes of military service): see Kelly (1992) p. 97; Paul (1991) pp. 12ff; Lipstein (1972) pp. 109ff; Nussbaum (1954) pp. 22–3; Yntema (1953) pp. 302–3; Von Bar (1892) p. 22.

[40] Berman (2005b); de Nova (1966a) pp. 442ff.

[41] Juenger (2001a) p. 13; Westlake (1858) p. 124. The continued relevance of these ideas today is explored in Chapter 5.

mirroring this duality, the statutist approach also reinforced it by embedding it in legal categories.

'Natural' as this methodology may have seemed to the medieval scholar, its limitations will be apparent.[42] The division of statutes into one of two categories became quickly problematic, and a third category, 'mixed' statutes, was invented, sometimes as a third type of classification, and sometimes simply to contain those statutes which could not comfortably be classified as personal or territorial.[43] The difficulty of classifying statutes reflected not merely the uncertainties of the interpretative method, but the continued pragmatic and political problems of balancing the interests and claims of foreign and local legal systems. The reliance of this approach on the interpretation of statutes also left it vulnerable to criticism that it made unprincipled distinctions based on the form and not the substance of laws, and thus reflected an implicitly discretionary decision.[44]

iii) The rise of the territorial state

After its emergence in Italy, the statutist approach was developed further in a flourishing France whose diverse provinces and local laws operated under a unified crown, a context analogous to that of the Italian

[42] Although it continued to be influential, even until the early nineteenth century: see Livermore (1828); Juenger (2001a) p. 26; Baker (1993) pp. 466ff; Paul (1991) p. 20–1.

[43] Yntema (1966) p. 15; Nussbaum (1954) p. 42; Wolff (1950) p. 25. Note the characterisation of this as a typical phase in the decline of a legal distinction in Kennedy (1982) p. 1351.

[44] Von Bar (1892) argues (at p. 33) that the statutist method fails because there is 'no real substantial ground of classification to take up'. Bartolus himself (see above) infamously struggled to categorise the English rule of primogeniture, according to which all property was inherited by the first-born son (see Gutzwiller (1977) p. 294), and was criticised for his attention to the form of wording used in the expression of the rule: see d'Oliveira (2002) p. 114; Juenger (2001a) p. 11; Wolff (1950) p. 25; Von Bar (1892) p. 28. A later statutist, De Coquille (see Juenger (2001a) pp. 15–16), argued for a more teleological interpretive methodology, based on the presumed intention of the legislator, perhaps anticipating contemporary US policy analysis approaches: see 4.3.2 below; Currie (1963). It should be noted that Bartolus' resolution of this problem was also partly supported by the argument that the English law was 'odious' (and not 'favourable'). This may be seen as an echo of the 'better law' approach developed originally by Aldricus (see above) and more recently advocated in the US, or even a very early expression of the idea that laws might be excluded because of 'public policy': Juenger (2001a) p. 12; see 2.5.2 below. The focus on statutory policy by De Coquille is probably broadly a contributor to this trend as well. As Von Bar (1892) p. 31 points out, what is favourable for one party is clearly odious for the other, which perhaps suggests that 'odious' and 'favourable' were intended to carry an objective, natural law meaning; see also Lipstein (1972) p. 119; Yntema (1966) p. 14.

city-states.[45] One early French theorist, Du Moulin,[46] emphasised law as a personal attribute and considered the intention of the parties themselves as relevant,[47] a departure from the statutist focus on interpretation of laws. However, as the development of permanent territorial forms of social organisation started to become recognised as enduring 'states',[48] legal theory correspondingly developed the concept of territorial sovereignty.[49] D'Argentré, writing again in the fertile private international law conditions of sixteenth-century France, reflected this trend, and may be contrasted with Du Moulin.[50] Where Du Moulin argued for a presumption in favour of the classification of laws as personal, D'Argentré argued, more influentially, that laws should be presumptively territorial and only exceptionally personal and that mixed statutes should also be classified based on territorial points of connection.[51] While ideas of personal law played an important historical role in the colonial era and continue to have an influence even today,[52] in this drift towards territoriality private

[45] On the relevance of these conditions see e.g. Juenger (2001a) p. 13; Kelly (1992) p. 200, pp. 205ff; de Nova (1966a) pp. 447ff; Yntema (1953) p. 299; Wolff (1950) p. 20.

[46] Yntema (1966) p. 16; Wolff (1950) p. 26, p. 29; Von Bar (1892) p. 34; Westlake (1880) pp. 16ff.

[47] Westlaker (1858) p. 123 suggests that this argument relied on the separation of human (customary) law from Roman law, with only the former subject to the intention of the parties. Du Moulin did not only recognise actual party intentions, for example, expressed through an agreement, but appeared to admit fictional tacit agreements (what would now be called an imputed agreement). This is evidently an objective test, focusing on the factual circumstances, and not a subjective analysis of the intentions of the parties. A focus on the facts and away from the interpretation of statutes is encouraged more generally by the emphasis on party intentions, and in this innovation Du Moulin's approach laid the foundations for a modern proper law approach: see Juenger (2001a) p. 14; Yntema (1953) pp. 304–5; see further 2.4.2 below.

[48] Neff (2006) pp. 33ff. The personal element of feudal relations (see above) was reduced as they evolved into merely a system of land title: see Yntema (1953) p. 305; Westlake (1880) p. 12.

[49] Shaw (2008) p. 21; Von Bar (1892) p. 29. 'Territorial sovereignty' received its first systematic analysis by Bodin in late sixteenth-century France, who argued that 'it is the distinguishing mark of the sovereign that he cannot in any way be subject to the commands of another': Bodin (1576) Ch. 8; see Koskenniemi (2006) pp. 78ff; Kelly (1992) pp. 158ff, p. 175; Yntema (1966) p. 18; Yntema (1953) p. 305; Harrison (1919) p. 10ff. Nussbaum (1954) p. 77 points out that Bodin's theory of absolute sovereignty may be contrasted with the reality of fractured power within the French kingdom, suggesting his theory had a political agenda of centralisation in support of the monarchy.

[50] Lipstein (1972) pp. 120–1; Yntema (1966) pp. 15–16; Nussbaum (1954) p. 75; Yntema (1953) p. 306; Lorenzen (1947) pp. 137ff; Harrison (1919) pp. 111ff; Von Bar (1892) p. 35; Westlake (1880) p. 17.

[51] Juenger (2001a) p. 14; Gutzwiller (1977) p. 296; Wolff (1950) p. 26; Von Bar (1892) p. 35.

[52] Italian city-states continued to resolve some practical problems through treaties which invoked and reinforced conceptions of personal law: Neff (2006) p. 34. Agreements were entered into between Italian and Islamic states, allowing Italian traders dealing with each

international law again reflected and reinforced changes in the prevailing theory of international order, the increased importance of regional autonomy and territorial sovereignty.

2.2.3. The common law

The English common law resisted the spread of Roman law which founded the civil law systems, and with it the ideas of the statutists on private international law.[53] The common law therefore did not develop private international law rules until much later than continental Europe. Part of the explanation for this comes from the requirement in the common law for a trial by jury, which created an obstacle to dealing with foreign disputes,[54] characteristically solved through legal fictions.[55]

other in Islamic states to use Italian law and courts to resolve their disputes. This idea was reflected in the system of *capitulations* – agreements (usually not reciprocal) which enabled European powers to establish their own legal community within a foreign state: Cassese (2005) pp. 26ff; Nussbaum (1954) pp. 55ff; Simpson (2001) pp. 544ff; Lillich (1984) pp. 18ff. In the nineteenth century the system of capitulations was in some way continued through the use of judicial consuls (see Nussbaum (1954) p. 208), the applicability of laws in the Turkish empire was (still) largely based around the personal laws of the parties, and in many countries disputes involving Jewish persons (for example, the validity of a Jewish marriage) were tried according to Jewish law, at the time a purely personal, tribal law without a territorial situs: see Von Bar (1892) pp. 20–1; Westlake (1858) pp. 134–47; Savigny (1849) pp. 58–9, pp. 60–2 (Guthrie note). The continuation of this practice in the colonial subcontinent is also noted by Westlake (see 2.2.2 above). Several treaties between Western states and China in the nineteenth century provided for the application of the law of nationality to foreign traders in Chinese territory, and the United States Court for China (a branch of the US District Court) operated from 1906 to 1943 (see Lee (2004)). In the colonial context, the extent to which these recognitions of personal law are signs of the acceptance of a theory of world order (and not merely an exercise of power) is debatable, given the lack of reciprocity in the arrangements. One place where the influence of the personal law approach is still felt today is in the diverse religious laws recognised in some states: see e.g. Tier (1990); Sanders (1990).

[53] But note the statutist influences, and emphasis on private international law as a branch of international law, in Hosack (1847).

[54] An English jury traditionally consisted of men from near the location of the disputed act or thing, who would therefore be expected to serve both as adjudicators and as witnesses (of the event or the character of the disputants): see e.g. Cheshire, North and Fawcett (2008) p. 20; Baker (1993) p. 463; Glenn (1993) p. 61. The English court had no power to order foreigners to serve in juries, which initially rendered the courts powerless to deal with disputes concerning foreign property or events. But note the historical practice of 'mixed juries' to decide disputes between different communities, examined in Constable (1994).

[55] See Maine (1861) Ch. 2. For example, in a case involving property in Brussels, a plaintiff might plead (and the defendant would accept) that Brussels was in London, in order that

The English legal system also responded to international cases through the development of special courts and special law, including the *lex mercatoria* or law merchant,[56] in much the same way that the Roman *ius gentium* was developed to deal with non-citizens.[57] In fact, English judges borrowed much of the source of this law from Roman law, and used the term *ius gentium* or the law of nations to describe it.[58] Eventually, many of the rules of the *ius gentium* were absorbed through reforms to the common law, again much like the absorption of the Roman *ius gentium* by the *ius civile*. However, the laws of England remained characteristically distinct from other systems, and (with the collapse of the *lex mercatoria* into the common law) without a developed mechanism for addressing the possibility that events connected with more than one state might receive inconsistent legal treatment. English law was thus perhaps unusually receptive (particularly through the influence of Scottish civil lawyers and judges[59]) to the next wave of private international law theory, developed in the Netherlands as part of a broader positivist revolution in international law.

2.3 The positivist 'revolution' in international law

2.3.1. General features of positivism

The history of international law studied thus far reflects natural law ideas and techniques: an appeal to a 'higher' Roman or religious law to found a claim that certain principles or categories developed are universal, and the application of deduction and interpretation to those principles to develop more detailed rules. For the statutists, the renaissance inspired a revival of the Roman system of universal natural law, with the addition of rules of private international law, not conceived of as part of the laws of

a jury could be empanelled: see Juenger (2001a) p. 19; Baker (1979) p. 303. A typical example is *Mostyn* v. *Fabrigas* (1774) 98 ER 1021. This might also be viewed as a method of accommodation of party autonomy. The need for this approach declined with changes to the role of juries and the rules regarding their formation.

[56] See Shaw (2008) p. 19; Juenger (2001a) pp. 19ff; Paul (1991) p. 18; Baker (1979); Nussbaum (1954) p. 28. Sachs (2006) challenges the accuracy of the traditional view of the *lex mercatoria*.

[57] Baker (1993) pp. 463ff; Lipstein (1972) pp. 126ff. See 2.2.1 above.

[58] Gessner (1996) pp. 39–40; Nussbaum (1954) p. 74.

[59] A particular influence is usually attributed to Lord Mansfield, for example, in *Robinson* v. *Bland* (1760) 96 ER 129. See Juenger (2001a) pp. 22–3; Watson (1992); Paul (1991) pp. 17ff; Paul (1988) p. 159; Anton (1956); Charteris (1938); Davies (1937); Sack (1937); Westlake (1880) p. 8. Lorenzen (1947) p. 155 suggests a philosophical affiliation between English feudalism and the Dutch approach; see also Lipstein (1972) pp. 126ff.

any state, but as part of an international law system which transcended local law.

However, the renaissance also brought with it a revival of inductive scientific methodology, in both the natural and social sciences, which would profoundly affect this reliance on natural law. The discovery of the New World by the Old challenged the belief in the universality of European law and values, and the explosion in international trade raised new practical and theoretical problems which did not seem to be addressed by the old natural law, inviting a more pragmatic and 'scientific' approach.[60]

The application of scientific methods to the study of social sciences is usually referred to as positivism.[61] Positivism is more a methodology than a theory, which, in its application to law, prescribes the study of laws as if they were natural phenomena, to be observed and evaluated, detached from preconceived ideas and dogma.[62] According to positivist ideas, theorising should be based on the observation of behaviour, from which rules are developed through inductive reasoning – the opposite process to natural law deductions. Influenced by the empirical scepticism of Hume and Locke,[63] a positivist theory attempts merely to predict, not explain.[64] Just as a positivist approach to studying animals would involve observation of their behaviour and not contemplation of their 'nature', a positivist approach to international law means the study of the behaviour or practice of states, and the derivation of rules from that practice.[65]

2.3.2. Sovereignty and state practice

The trend towards a territorial conception of law, noted above,[66] reflected the increasingly defined and fixed boundaries between permanent states, and the growing powers of local rulers over their territories.

[60] Wardhaugh (1989) pp. 326ff; Rommen (1936) p. 61.

[61] Note that the term 'positivism' carries a technical meaning in international law – see 2.3.3 below. On its origins see Comte (1830) (who coined the term); Kelly (1992) p. 331.

[62] Neff (2006) p. 38; see also Kelly (1992) pp. 223ff. Although it carries theoretical (particularly epistemological) presumptions and implications, discussed further below.

[63] Shaw (2008) p. 25; Kelly (1992) p. 271. This was itself borrowed from the Greek Sceptics: see Rommen (1936) p. 20.

[64] Thus Holmes (1897) p. 461 defined law as 'The prophecies of what the courts will do in fact'.

[65] Neff (2006) pp. 39ff; see Lorenzen (1947) p. 1. The analogy is not trivial – the high point of positivism, the application of the natural sciences to the study of human society, followed from the identification of man as animal implicit in the theory of evolution in the late nineteenth century.

[66] See 2.2.3.

The latter was in particular a consequence of the decline of the Papacy and Holy Roman Empire, which previously acted as limitations on state power,[67] manifest in the political disintegration of Europe during and after the Thirty Years War. The concentration of power in state sovereigns was reinforced by theorists such as Machiavelli and Hobbes.[68] The concept of sovereignty was initially an expression of the personality of the head of state,[69] but developed into the idea that the sovereign's legal acts, embodied in treaties, were not personal (expressing the will of the sovereign) but attached to the territory of the state (expressing the 'will' of the state), and endured and survived to bind future heads of state.[70]

The emphasis here on law as a reflection of 'will' is notably in opposition to the natural law emphasis on law as the triumph of reason over will.[71] This lent the positivist methodology a natural affinity with the rise in liberal theory, with its emphasis on private, individual power competing through the market system.[72] The theoretical emphasis on the will of the sovereign or state also corresponded with an increase in the number of international treaties and arbitrations, and a corresponding focus on international law as the product of agreements, which accelerated in the nineteenth century.[73] The idea of international law as a product of state will was reflected in the readiness of states to 'manage' the international order, notably in the counter-revolutionary 1815 'Concert of Europe' and its subsequent conferences.[74] However, this was not a

[67] Kelly (1992) p. 200; note further the role of protestant Holland in developing the theory of sovereignty – see 2.3.3 and 2.3.4 below; Paul (1991) p. 16.

[68] Machiavelli (1513); Hobbes (1651); see Koskenniemi (2006) pp. 79ff; Kelly (1992) p. 172; Nussbaum (1954) p. 76, pp. 144ff. Hobbes' emphasis on sovereign will (and not on reason) is linked to the empirical scepticism of Locke – see Rommen (1936) pp. 82ff; see further 2.3.1 above. Note however the alternative interpretation of Hobbes, under which the sovereign is subject to substantial natural law rules, offered in Malcolm (2002) Ch. 13, and similarly Covell (2004).

[69] See e.g. Vattel (1758) p. 137: 'the Sovereign represents the entire Nation of which he is head, and unites in his person the attributes which belong to the Nation'. Note also Louis XIV's famous aphorism 'L'État c'est moi' (see Kelly (1992) p. 254).

[70] Neff (2006) p. 35; Kelly (1992) p. 145; see Nussbaum (1954) pp. 94ff on the development of this idea by Gentili, p. 112 on its further adoption by Grotius; see also Kennedy (1986) p. 94; Wheaton (1845) pp. 50ff; Wheaton (1836) pp. 16ff.

[71] Rommen (1936) pp. 59ff.

[72] See 2.6.1 below; note the discussion of the history of the idea of 'autonomy' in private international law in Yntema (1955).

[73] Neff (2006) pp. 38ff; Kelly (1992) pp. 345ff; Nussbaum (1954) pp. 196ff; Hershey (1912) pp. 55ff.

[74] Although this system was largely ineffective, this was arguably because of the diversity of state 'wills', reflecting differing degrees of national resistance to the forces of early nineteenth-century liberalisation – Neff (2006) pp. 45ff; Koskenniemi (2002); Cassese

centralised international legal order; although coordinated, it was still based on the exercise of power (of the dominance of one state will over another), not on a sense of legal right or obligation. In the eighteenth and nineteenth centuries, the behaviour of states thus appeared increasingly unrestrained in theory or practice by any sort of natural law limitations on the exercise of their 'sovereign' powers.

2.3.3. The positivist account of international law

Positivist legal theorists derived their account of international law as conclusions from observing this type of behaviour among states. It should be noted that these observations and conclusions were entirely contingent on that behaviour.[75] While the conclusions discussed here are what is known as the positivist theory of international law, in fact they are only the result (and perhaps not even the only result or the correct result[76]) of applying a positivist methodology to studying the behaviour of states in the eighteenth and nineteenth centuries. The application of a positivist methodology to international law in the present day arguably would not lead to such an emphasis on state sovereignty, because this is not how states behave.[77] Caution must therefore be exercised in the use of the term 'positivism' in association with international law, because its technical (historical) meaning, implying a theory of strong state sovereignty (which is the sense explored in this section), is only contingently connected with its general (methodological) meaning.[78]

For positivists, a new set of rules was necessary to describe the behaviour of states, because states were not part of the 'natural order' but an artificial creation of human society. The leading figure in making this distinction, and one of the founders of modern international law, was Grotius,[79] writing in the aftermath of the still troubled unification of the

(2005) pp. 28ff; Nussbaum (1954) pp. 186ff; Yntema (1953) p. 309; Hershey (1912) pp. 46ff.

[75] This is not to deny that a positivist approach may tend to construct a particular type of theory, because it inherently favours the recognition of certain types of constitutive elements (for example, treaties over custom).

[76] Hall (2001) argues (at p. 281) that the fact that 'States continued to regard international law as real law' means that 'legal positivism involved, despite its scientific aspirations, an unscientific attempt to make the facts fit a preconceived theory'.

[77] See further Chapter 3; Henkin (1979).

[78] See Kennedy (1996) p. 398.

[79] See generally Koskenniemi (2006) pp. 95ff; Shaw (2008) pp. 23–4; Yntema (1966) pp. 16ff; Ehrlich (1962); Nussbaum (1954) pp. 102ff; Yntema (1953) p. 305; Wheaton (1845) pp. 54ff.

Netherlands in 1579 and in the middle of the Thirty Years War which dominated the early seventeenth century.[80]

In his writings on domestic law, Grotius drew on both natural and positivist methodologies,[81] arguing that law can be derived from reflection on our nature (applying deduction and 'right reason'[82] – using again the phrase of Aquinas) and from observation (applying induction).[83] However, Grotius sharply distinguished international law from this reasoning. He argued that because states were sovereign, the law of nations was part of what he classified as 'voluntary law', not part of the natural law realm.[84] Although arguing that international law 'must have its origin in the free will of man',[85] this was really a reference to the will of sovereign states, which were viewed as possessing *a priori* authority, above law. He thus identified the will and practice of states as a 'source'

[80] The focus in this section is on the famous and influential 'De Iure Belli ac Pacis', or 'Of the Law of War and Peace' (1625). However, note the contrast with Grotius' early work, 'De Jure Praedae', or 'Of the Law of Prizes', written about 1604 and unpublished during his lifetime. This early work adopted a more systematic, natural law approach to the analysis of international law, in which (see e.g. Grotius (1604) p. 26) the positive law of nations was clearly secondary to natural law.

[81] See Grotius (1625); Neff (2006) p. 34; Koskenniemi (2006) p. 99; Hochstrasser (2000) p. 4, p. 9; Kelly (1992) pp. 224ff; Hershey (1912) pp. 31ff. Grotius' attempt to reconcile natural and positive law was particularly influential on Pufendorf and Spinoza: see Pufendorf (1672); Shaw (2008) p. 24; Hall (2001) p. 274; Hochstrasser (2000) pp. 40ff, p. 90; Yntema (1966) p. 30; Bull (1966a) pp. 111ff; Nussbaum (1954) pp. 146ff; Wheaton (1845) pp. 88ff. Wheaton suggests a stronger natural law affiliation in Pufendorf's writing, arguing (at p. 89) that Pufendorf 'professes to follow the method of the geometers'. On the other hand (at p. 93), he recognises a more positivist method behind Pufendorf's definition of law as necessarily 'emanating from a superior'. Note the argument by Kennedy (1986) that the distinction between natural law and positivist approaches only properly belongs to the later 'traditional' period of international law. Grotius acknowledged the influence of Gentili – see Shaw (2008) p. 24; Kelly (1992) pp. 201ff; Nussbaum (1954) pp. 94ff; Wheaton (1845) p. 57; Wheaton (1836) pp. 19ff. The separation of the *ius gentium* and natural law was perhaps also anticipated by Suarez (1612); Hershey (1912) p. 67; but see Kennedy (1986) pp. 42ff; Nussbaum (1954) p. 86 on the ambiguity of *ius gentium* in Suarez' writings.

[82] Grotius (1625) Book 1, Ch. I, Part X, 1.

[83] Grotius (1625) Prolegomena, p. 26: 'History in relation to our subject is useful in two ways: it supplies both illustrations and judgements. … And judgements are not to be slighted … [for] by no other means, in fact, is it possible to establish the law of nations.' Note the parallel between 'induction' and the idea of an 'ascending' pattern of justification in Koskenniemi (2006).

[84] Grotius (1625) Prolegomena [17], [40]; Kennedy (1986) p. 82; Nussbaum (1954) pp. 108–9; Westlake (1880) p. 18; Wheaton (1836) pp. 35ff.

[85] Grotius (1625) Prolegomena [24]; see also Yntema (1966) p. 20; Wheaton (1845) pp. 91ff.

of law, operating distinctly to natural law[86] – exposing it to the possibility of a positivist methodology. Grotius borrowed the term *ius gentium* to describe this law of nations, importing with the term its universal, natural law, legitimating implications from Roman law.[87] However, the concept of the law of nations offered by Grotius was sharply distinct from the Roman and renaissance natural law idea – not a matter of universal laws or categories, but a matter of the will and practice of states[88] (albeit a 'great society of states'[89]). The *ius gentium* became, under Grotius, not the Roman (ideal) 'law of peoples', but a new (descriptive) 'law of *the* peoples'.[90] Although it is not entirely clear whether it is accurate to label Grotius a positivist, he at least made the conceptual distinctions which facilitated a positivist approach, by emphasising the conceptualisation of international law as the product of voluntary human action, as a form of 'private law' operating between states.

The separation by Grotius of natural and voluntary law necessarily also corresponded with a separation of the internal domestic law of states (which drew on natural law) from the external international law of sovereigns (which reflected state practice and will). Because international law was derived from exercises of the *a priori* sovereign will of states, it could only consist of law applicable *between states* – it could no longer be concerned with international private disputes. This distinction made the problem of drawing the boundary between the internal affairs of states and their external relations central to defining the scope of international law. This was reflected in the treaties of the Peace of Westphalia of 1648, often identified as the birth of modern international law,[91] and by the nineteenth century an imagined boundary

[86] Neff (2006) pp. 34ff; see further Hochstrasser (2000) p. 2; Kelly (1992) p. 226; Kennedy (1986). Note (again) the importance of the role of 'will' in Grotius, the antithesis of the natural law identification of law with the triumph of reason over will – see Rommen (1936) p. 41.

[87] See 2.2.1 above; Yntema (1966) p. 19; Hershey (1912) p. 32. Wheaton (1845) pp. 32ff provides further analysis. Note the dedication of Grotius (1625) to Louis XIII of France – see Nussbaum (1954) p. 105.

[88] Grotius (1625) Book 1 Ch. I Part XIV; see further Wheaton (1836) preface and pp. 50ff. Note the argument in Kelly (1992) p. 60, p. 111 that this reflects an ambiguity in the Roman concept of natural law, developed further in his discussion of Vitoria (see 2.4.1 below) at pp. 200ff.

[89] Grotius (1625) Prolegomena, I, 17; see Bull (1966a).

[90] See Kelly (1992) p. 61.

[91] Neff (2006) p. 35; Cassese (2005) pp. 22ff; Nussbaum (1954) p. 115; Hershey (1912); Wheaton (1845) pp. 69ff.

between the internal and external, the domestic and the international, had become entrenched.[92]

The distinctions introduced by Grotius were developed further by Vattel in the eighteenth century. Vattel's writing started as a translation of the natural law theorist, Wolff,[93] but radically departed from any sense of natural or divine order in the laws of nations.[94] He characterised each nation as an individual with a particular will, not bound by the laws of any international 'society'.[95] He argued that each nation had sovereign equality, meaning an *a priori* equality in its status and entitlements in international law,[96] claiming that 'strength or weakness, in this case, counts for nothing'.[97] Under this conception, 'Nations are free, independent, and equal, and [thus] each has the right to decide in its conscience what it must do to fulfil its duties.'[98]

Under Vattel's influential 'voluntarist' characterisation of international law, the conception of international law as merely reflecting discretionary acts of state will was adopted as a foundational principle.[99]

[92] See discussion in Symposium, 'Should we continue to distinguish between public and private international law' (1985); see further 3.4 below. For a critical discussion of the (often neglected) history of international law in the late nineteenth century (real or constructed) see Koskenniemi (2002); Kennedy (1996). It is unclear whether this increased respect for the internal diversity of states is a cause or a consequence of the introduction of diverse states (for example, from Latin America, Eastern Europe and Asia) to the 'international system' in the nineteenth century – Nussbaum (1954) pp. 194ff; Hershey (1912) pp. 49ff.

[93] See 2.4.1 below.

[94] Vattel (1758); Koskenniemi (2006) pp. 112ff; Shaw (2008) pp. 26–7; Hochstrasser (2000) pp. 177ff; Ehrlich (1962) pp. 235ff; Nussbaum (1954) pp. 156ff; Hershey (1912) p. 38; Wheaton (1845) pp. 182ff.

[95] Hochstrasser (2000) p. 179; Bull (1966a); Wheaton (1845) pp. 186ff.

[96] Neff (2006) p. 39; Vattel (1758) p. 137: 'nature has established a perfect equality of rights among independent Nations. In consequence, no one of them may justly claim to be superior to the others. All the attributes which one possesses in virtue of its freedom and independence are possessed equally by the others.' See further Chapter 3.

[97] Vattel (1758) p. 8. This account borrowed from the way Hobbes had characterised life for individuals in the pre-social state of nature – 'solitary, poor, nasty, brutish and short' – where what was moral was merely the application of reason in pursuit of self-preservation: Hobbes (1651) I.13; see Kelly (1992) pp. 212ff; note Pufendorf's comments in Hochstrasser (2000) p. 57, p. 98, contrasting Grotius' account of the fundamental sociability of humans with Hobbes' voluntarist account. See also Hochstrasser (2000) p. 177. Hobbes' account borrows from ancient Greek sophists – see Kelly (1992) p. 15; but note the alternative, natural law, account of Hobbes' theory of international relations offered in Malcolm (2002) Ch. 13.

[98] Vattel (1758) p. 7.

[99] This position is also adopted in modern 'realist' international relations: see further Chapter 3.

Positivist international law was conceived as existing purely 'between' states and not 'above' them, as a reflection of the behaviour of states which emphasised their independence and sovereign (particularly territorial) power.[100] The terminology reflects this change. Instead of the 'law *of* nations', the positivist Bentham adopted the term '*inter*national' law.[101] Even customary international law was (paradoxically) reconceived as a form of 'implied consent'.[102] This reconceptualisation transformed the study of international law, which became by the nineteenth century an exercise in collating and describing (and, arguably, justifying) state practice, rather than theorising about a universal international legal system.[103]

2.3.4. Positivist international law and private international law

Although Grotius did not directly address questions of private international law,[104] his writing contributed to a profound change in the view that private international law forms part of a single law of nations. While advocates of the statutist approach argued that private international law

[100] See e.g. Vattel (1758) p. 138: 'the public ownership possessed by the Nation is full and absolute, since there is no authority on earth which can impose limitations upon it'. Note that despite Vattel's voluntary idea of international law, he does maintain, relying on a strongly territorial theory of sovereignty, a mandatory theory of the enforcement of judgments, arguing (at p. 139) that 'It is the part of the Nation … to enforce justice throughout the territory subject to it, to take cognizance of crimes committed therein, and of the differences arising between the citizens. … when once a case in which foreigners are involved has been decided in due form, the sovereign of the litigants may not review the decision.'

[101] Bentham (1780) Ch. 17; Janis (2004) pp. 1ff; Katzenbach (1956) pp. 1115ff; Nussbaum (1954) p. 136; Nys (1911); Wheaton (1845) pp. 328ff; Wheaton (1836) pp. 54ff. Bentham generally advocated an 'expository' study of law: see Bentham (1776); Kelly (1992) pp. 287ff. Note also his famous rejection of natural law: '"Natural rights" is simple nonsense; "natural and imprescriptible rights", rhetorical nonsense – nonsense upon stilts' – Bentham (1816) Art. II.

[102] Vattel (1758) p. 8. See also Wolff (1749) Prolegomena, p. 18. For a modern discussion see e.g. Koskenniemi (2006) pp. 325ff; Hall (2001) pp. 285ff; Elias (1995); Lobo De Souza (1995); Pellet (1992) pp. 36ff; see further 3.2.2 below.

[103] Neff (2006) pp. 40ff; Cassese (2005) pp. 12–13 (noting the centrality of ideas of 'effectiveness' in international law, and arguing (p. 12) that international law 'takes account of existing power relationships and endeavours to translate them into legal rules'); Shaw (2008) p. 29; Nussbaum (1954) p. 135, pp. 165ff, pp. 232ff, pp. 243ff (discussing the emphasis on statistical data and state practice in the works of positivist international law theorists); Hershey (1912) pp. 35ff. A particularly influential example was Wheaton (1836) – see discussion in Janis (2004) pp. 44ff.

[104] Yntema (1966) p. 20; Wortley (1954) p. 247; but see Westlake (1880) pp. 20–1.

rules were part of natural law (hence part of a single universal legal order which encompassed all of the law of nations), a positivist approach viewed private international law rules as simply one implication of the fundamental (voluntarist) concepts of international law.

The positivist emphasis on the boundary between the internal and external aspects of the state raised the difficult issue of whether to characterise private international law as national or international law. The reconceptualisation of the law of nations as 'inter*national*' law led to the exclusion of any law dealing with 'private' disputes. Their regulation was instead 'nationalised'[105] and 'privatised' as part of the development of the global market economy.[106] The characterisation of private international law as national law was thus part of its conceptualisation as *private* national law, not as part of the public law operating between sovereign states. This section examines the evolution of theories which addressed private international law in this way, as an implication of the positivist territorial theory of sovereignty.[107]

i) The Dutch school

As noted above, the unification of the Netherlands in 1579 influenced the development of the Grotian theory of state sovereignty and voluntary international law.[108] This unification, however, did not exclude the continued existence of individualist provinces with diverse legal and cultural history. Thus, in the Netherlands in the seventeenth century there is again the combination of difference and deference which was a

[105] See 2.3.4 above; Bentham (1780) Ch. 17, XXV; Janis (2004) p. 24. See further Kennedy (1996) pp. 409–10.

[106] See 2.6.1 below. In the nineteenth century in particular international law arguably became a tool for advocacy of national politics, in particular for the growing force of economic and political liberalism, expressed through formal or institutional claims: Kingsbury (2002); Kelly (1992) pp. 305ff. Thus, the main international law issues of the nineteenth century included (very familiar) economic concerns – the push towards global freedom of trade through tariff reductions, the 'rationalisation' of the movement of peoples, and the globalisation of the international economy (through the gold standard), all in support of the penetration of European capital into the developing world: Neff (2006) p. 42; Nussbaum (1954) pp. 203ff, pp. 210ff.

[107] It is important to note that these are not 'positivist' (in the general sense) theories of private international law, but theories of private international law which are the consequence of the 'positivist' account of international law, outlined in 2.3.3 above. There would be a 'positivist' (in the general sense) revolution in private international law, but only in the twentieth century, most prominently in the US: see 4.3.2 below.

[108] See 2.3.3 above.

fertile breeding ground for the development of private international law rules in both Italy and France.[109]

Paul Voet and his son John played a key role in the emergence of a new Dutch private international law school.[110] Each accepted the statutist approach, but under the influence of the concept of territorial sovereignty suggested that the application of foreign laws by a state was at least to some extent voluntary, introducing the idea of 'comity' to explain this.[111] For the Voets, comity was a rule of interpretation to aid in classifying statutes under the statutist approach. In modern private international law it has become a quixotic and uncertain foundation for the subject, obscuring the question of the international status of private international law.[112]

The most influential writer from this period was another Dutch theorist, Huber, writing in the late seventeenth century,[113] whose approach was a more radical departure from the statutist method. Accepting the law of nations as a distinct, voluntarist system of law, following Grotius, Huber argued that it was capable of detached logical analysis, separate from matters internal to each state. He attempted to crystallise the implications of the idea of territorial sovereignty in a system of private international law.[114]

According to Huber, three logical consequences followed from the acceptance of territorial sovereignty. First, laws of a sovereign are effective within its territory, but not beyond. Second, laws of a sovereign are effective against aliens who are, even temporarily, within its territory.[115] Third, each state 'will so act by way of comity'[116] to recognise 'rights acquired within the limits

[109] Paul (1991) p. 15; Weinstein (1990) pp. 97ff; Yntema (1966) pp. 17ff; Yntema (1953) pp. 299ff; Lorenzen (1947) p. 138; Du Bois (1933). Note discussion in Savigny (1849) p. 65.

[110] Yntema (1966) pp. 22ff; Paul (1991) p. 15; Harrison (1919) pp. 115ff.

[111] Yntema (1966) p. 23; Von Bar (1892) p. 38.

[112] On this problematic concept see further Dicey, Morris and Collins (2006) pp. 5ff; Collins (2002); Watson (1992); Paul (1991); Mann (1986) pp. 134ff; Akehurst (1973) pp. 214ff; Lorenzen (1947) pp. 158ff.

[113] See generally Juenger (2001a); Lipstein (1992) pp. 121ff; Lorenzen (1947) Ch.6; Davies (1937).

[114] Yntema (1966) pp. 25ff; Yntema (1953) p. 306; Wolff (1950) p. 27; Von Bar (1892) p. 38; Westlake (1880) p. 22.

[115] These first two points are in fact no more than a restatement of the statutist theory in respect of those laws classified as 'territorial' – Huber's approach is a more incremental change from the statutist theory than is often suggested.

[116] Note the ambiguity of Huber's 'will so act', which may be a description of, or a constraint on, state practice.

of a government', so long as the state's own power, law or citizens are not prejudiced by this recognition. Setting aside for the moment the important question of how rights are 'acquired',[117] this third rule may be considered as an expression of the division between internal and external matters as part of the positivist account of international law – matters in which the state's power, law or citizens are not prejudiced should be recognised as purely within the internal domain of a foreign state.

The use of the term 'comity' reflects a fundamental ambiguity in the writing of Huber and of Paul and John Voet, which demonstrates the difficulty in characterising private international law either as part of international or national law. As noted above and in Chapter 1, this ambiguity is central to the continued use of this concept in private international law. Huber argued that his rules were not only the logical implications of sovereignty, but were implied by the needs of international commerce,[118] reflected general international practice, and were accepted based on the 'tacit consent' of nations.[119] Following Grotius, he also referred to these rules as part of the *ius gentium*, with its Roman law implications of natural, universal law. However, at the same time his conception of private international law and his use of the term 'conflict of laws', with its implications of a struggle between independent actors, clearly reflect the foundations of his approach in state territorial sovereignty.[120] Some of Huber's writing supports the view that his rules were intended to be part of a universal international law, and hence not discretionary. However, the content of his third rule, in its deference to the problematic concept of comity, made the discretionary exercise of state will central to private international law.[121]

ii) Story

Huber's approach was advocated to and adapted for the English-speaking world in the nineteenth century by the US scholar and judge, Story.[122] It is thus not surprising that Story shares Huber's ambiguity

[117] See further 2.4.2 below.

[118] It might be argued that they were implied by Dutch commercial needs in particular.

[119] See Juenger (2001a) p. 17. Note the correspondence of this idea with the use of 'tacit consent' to found international customary law as part of a positivist 'will based' theory of international law – see 2.3.3 above and 3.2.2 below.

[120] See Juenger (2001a) p. 16; de Nova (1966a) pp. 449ff; Davies (1937) pp. 58ff.

[121] See Juenger (2001a) pp. 17–18; Wolff (1950) p. 28, p. 30, p. 34.

[122] Story (1834); Baker (1993); Watson (1992) pp. 18ff; Paul (1991) pp. 21ff; Weinstein (1990) pp. 92ff; Nadelmann (1961); Yntema (1953) p. 307; Wolff (1950) p. 33; Lorenzen

towards the question of whether private international law is part of national or international law.[123]

Story's important influence on the early development of US private international law is explored in more detail in Chapter 4.[124] For present purposes, it is notable that early US authorities accepted a strong influence for the law of nations on the development of private international law, thus adopting the view of private international law as part of a single international system. It has been argued that Story's work similarly 'reflects a faith in the essential unity of private international law as an integral branch of international law'.[125] Certainly, there are elements of internationalist natural law reasoning in Story's writing, particularly his view that the objective of private international law was to become 'a general system of international jurisprudence, which shall elevate the policy, subserve the interests, and promote the common convenience of all nations'.[126]

In other respects, however, Story's approach shows the influence of a positivist methodology, particularly in its acceptance of the idea of private international law as part of national sovereign discretion, as a consequence of the exclusion of private matters from international law.[127] His seminal *Commentaries on the Conflict of Laws* of 1834[128] did not include much by way of general principle or theory,[129] but

(1947) Ch. 7; Lorenzen (1934); Harrison (1919) pp. 119ff; Von Bar (1892) p. 45. Note the broader range of direct and indirect effects of Huber's work identified in Davies (1937).

[123] Tetley describes this as Story's acceptance of the two 'hostile' concepts of natural law and the liberal social contract: see Tetley (1999) p. 308; see similarly Wardaugh (1989); Mann (1964) pp. 28ff.

[124] See 4.3.1 below.

[125] Paul (1988) p. 161; Juenger (1985) pp. 353ff; *Harvey* v. *Richards* (1818) 1 Mason 381 at 420 (see further Nadelmann (1961) p. 241).

[126] Story (1834) s. 645; Lowenfeld (1998); Lowenfeld (1996), who argues (at p. 3) that 'Story was right to think of the conflict of laws as part of the law of nations'; Wardaugh (1989). Story was influenced by Pufendorf, and by the natural law philosopher William Paley, who was himself heavily influenced by Pufendorf – see 2.3.3 above. Story's natural law philosophy is most clearly set out in his (anonymous) article entitled 'Natural law' in Lieber (1836) – see Wardaugh (1989) pp. 308ff.

[127] See 2.3.3 above. Janis (2004) pointedly asks (at pp. 23–4), 'Could it be that one reason why no [treatise on conflict of laws] existed [before Story] was that heretofore, in Blackstone's fashion, the law of nations had been comprehended in such a way as to encompass some or all of the problems Story addressed under the rubric "conflict of laws"?'

[128] The reference to 'conflict of laws' in the title again demonstrates the influence of Huber – although Story also invented the term 'private international law' in the *Commentaries*.

[129] What was included was arguably just a restatement of Huber; see Lipstein (1972) p. 130ff; Von Bar (1892) p. 46.

instead provided an extensive and 'scientifically' structured survey and analysis of private international law cases, examining the law as it existed, and reasoning by induction from these cases to rules.[130] It is true that his survey included a wide range of international cases, and he expressed regret for the fact that 'different nations entertain different doctrines and different usages'.[131] However, emphasising territorial sovereignty as the foundation of private international law, Story also argued that 'it would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation, that other nations should be at liberty to regulate either persons or things within its territories',[132] and therefore argued that 'whatever force and obligation the laws of one country have in another, depends solely upon … [the latter's] own express or tacit consent'.[133]

This equivocation in Story's approach is yet again a consequence of the problem of how to characterise private international law in the artificial division between national and international law. The difficulty is embodied in Story's dependence on the ambiguous concept of 'comity', and what has been described as his 'bizarre syncretism' of (universal) natural law ideas and (national) liberal rights based theories.[134] This uncertainty is reflected in Story's argument that rights are created (perhaps 'vested' or 'acquired') through acts of state sovereignty,[135] and that these rights should be recognised and enforced by other states as a matter of 'comity', considered (again ambiguously) as an obligation of mutual respect

[130] See Baker (1993) pp. 482ff, pp. 490ff; de Nova (1966a) p. 470; Wolff (1950) p. 33; Von Bar (1892) p. 47. This approach was particularly influential in the US and in the UK, perhaps partly because it sits well with the pragmatic, more utilitarian conceptions of law in these states: Von Bar (1892) pp. 45–6. Ironically, Story's successful application of this method arguably reduced its future adoption, and particularly the practice of referring to foreign sources, as some later authors merely cited Story's own work instead of conducting their own international comparative analysis.

[131] Story (1834) s. 645. [132] *Ibid*. p. 20; Collier (2001) p. 378; Born (1996) pp. 547ff.

[133] Story (1834) p. 23. The role of 'tacit consent' in positivist international law is discussed in 3.2.2 below.

[134] Wardhaugh (1989) p. 308.

[135] It is not entirely clear whether Story was committed to the idea of 'acquired' or 'vested' rights, developed in Huber's third rule (see above), at least in the sense later adopted by Dicey (discussed below); see Baker (1993) pp. 503ff. Story's approach to private international law did emphasise his 'conviction that individuals rather than nations or states are the primary repositories of rights': Baker (1993) p. 472. Baker also argues (at p. 476) that 'Story cast his private international law rules as guardians of contractual entitlements and proprietary interests', and (at p. 488) that his private international law work 'is best characterized as a heuristic, constitutional essay on the correlative scope of private and public sovereignty'.

between nations, 'a sort of moral necessity to do justice, in order that justice may be done to us in return'.[136]

iii) Westlake

The influence of positivist international law theory on private international law was carried further by Westlake, whose theoretical engagement stands out in the predominantly pragmatic international legal context of nineteenth-century England.[137] His position as a positivist is made very clear, as he expressly rejected natural law as a basis for the study of law,[138] suggesting that students have been 'cheated by the empty assertion of universal agreement',[139] and (somewhat obviously) pointing out that in the work of natural law theorists 'it sometimes looks as if important distinctions had been suggested by logic, without the aid of experience at all'.[140]

Applying an interpretation of Story which emphasised the idea of private international law as national law, Westlake examined 'private international law jurisprudence … regarded as a department of English law'.[141] Although Westlake was praised for introducing continental theory into English private international law, and his first edition showed the influence of Savigny,[142] in fact he rejected the international elements of Story's approach, including the internationalism of his comparative methodology. Unlike Story, Westlake largely confined his study to the cases of his jurisdiction, in this instance English cases.[143] Westlake

[136] Story (1834) p. 35; Born (1996) p. 549. Note the argument in Baker (1993) p. 459 that 'Manipulating the concept of comity by emphasising the fiction of willing ratification … helped Story reconcile popular sovereignty with principles of international law derived from an older, natural-law tradition'; compare 2.4.1 below. Watson (1992) argues (at pp. 58ff) that comity was crucial in mediating the relationship between slave and non-slave States – see *Dred Scott* v. *Sandford* (1857) 60 US 393; Janis (2004) pp. 82ff.

[137] See Wardhaugh (1989) pp. 321ff; Crawford (2004) pp. 684ff; note also Harrison (1919).

[138] Westlake (1880) p. 2. [139] *Ibid*. p. vi. [140] *Ibid*. p. 16.

[141] *Ibid*. pp. 4ff; Westlake (1858) p. iii.

[142] de Nova (1966a) p. 471; Dicey (1914) p. 26; see 2.4.2 below.

[143] Note the change in title from Westlake (1858) ('A Treatise on Private International Law or The Conflict of Laws with principal reference to its practice in the English and other cognate systems of jurisprudence') to Westlake (1880) ('A Treatise on Private International Law with principal reference to its practice in England'). With the development of English private international law between these and subsequent editions, Westlake increasingly focused on English cases to the exclusion of foreign judgments and jurists. See also Nelson (1889); Piggott (1884) noting (at p. 4) the fundamental ambiguity of the central concept of comity. Foote (1878) also focused on English cases, but argued by contrast (at p. v) that 'Private International Law is to be collected from the judicial decisions of many nations, and from the writings of many jurists.'

justified this focus through the argument that private international law is an instance of domestic sovereignty. He also referred to the binding authority of precedents in English law, and noted the more practical problem of adapting the legal categories used by continental authors for use in the common law.[144]

The movement towards a national conception of private international law in Westlake's approach was an inevitable consequence of the positivist theory of international law; if the application of foreign law is purely a matter of discretion, and can only be studied by examining state practice and inductively forming rules, then the practice of each territorial sovereign state ought to be studied separately.[145] While a state may examine the practice of other states when forming its own rules, that foreign practice can never be determinative or even constitutive of its private international law.

Westlake criticised Huber's addition of comity to the Grotian model, arguing that 'comity might be a reason for receiving any rules on this subject, but could hardly point out which to receive'.[146] In rejecting comity as a legal rule, Westlake argued that private international law must be understood, like all law, as commanded by the local sovereign.[147] Following this command conception of law, he argued that private international law disputes should be resolved simply by determining which sovereign has the power to command the duty which is correlative to the disputed right,[148] and examining as a matter of statutory interpretation whether that power was in fact exercised. The

[144] Westlake (1858) p. iv; note also that this anticipates Kahn's arguments in 2.6.1 below. An additional argument, also discussed in 2.6.1 below, points to the increasing 'completeness' of the English legal system, removing the need for references to foreign legal jurisprudence in the development of English law.

[145] Westlake (1858) p. 128. Note however that Westlake does not appear to apply this characterisation to the international sphere in his later writings on international law, arguing that international law required a 'society of states' – Westlake (1894); see Koskenniemi (2002) pp. 48ff.

[146] Westlake (1858) p. 149.

[147] Following Austin and Bentham, again linking law and the sovereign will – see Koskenniemi (2006) pp. 125ff; Hall (2001) pp. 279ff; Kelly (1992) pp. 313ff; Wortley (1954) pp. 250ff; Harrison (1919); Westlake (1880) p. 2; Westlake (1858) pp. 130, 132. But see also Wardhaugh (1989) pp. 330ff, who views Austin's methodology as a continuation of the 'geometric' or deductive method favoured by natural law theorists.

[148] Westlake (1858) p. 131. This argument seems to beg the question, unless by power Westlake means material power and not legal authority, in which case it risks becoming purely descriptive of state practice. Note that it echoes John Voet, and also Cocceji's argument in the seventeenth century – see Gutzwiller (1977) p. 301.

rights accrued[149] under that sovereign command are 'by comity, if you please, though it is a comity almost demanded by a sentiment of justice, *treated as valid everywhere*'.[150] Although Westlake predominantly adopted a national conception of private international law, the idea of a comity 'almost demanded' and effective 'everywhere' once again reflects the difficulty of characterising private international law within the national-international dichotomy developed under the positivist approach to international law.

iv) Dicey

The culmination of this tradition, the final implication of the positivist theory of international law for private international law, is explicated in the work of Dicey, perhaps the most influential English private international lawyer.[151] Dicey clearly characterised private international law as part of the national law of each state, not part of any sort of international law or international order.[152] This is not surprising given that Dicey, like Westlake, argued that international law, in the absence of a sovereign binding authority, is not strictly law.[153] Adopting a positivist methodology, Dicey inductively derived English private international law rules from the almost exclusively English cases he examined, and presented these virtually as if they were a set of sovereign commands,[154] thus replicating and reinforcing the theoretical foundations on which his approach was based. In viewing private international law as part of national law, this perspective legitimised the application of these rules by national courts wary of exceeding their constitutional role in their engagement with international problems. Dicey avowedly rejected comity as a foundation for private international law (calling it 'a singular specimen of confusion of thought produced by laxity of language'[155]),

[149] Echoing the idea of 'vested rights' implicit in Huber's third rule and arguably in Story and Dicey (see below).

[150] Westlake (1858) p. 154, emphasis in original.

[151] Dicey (1914); Dicey (1896); Morse (2002) p. 273; Wardhaugh (1989) pp. 324ff; Lipstein (1972) pp. 135ff; de Nova (1966a) p. 471; Katzenbach (1956) pp. 1106ff; Wolff (1950) p. 45; Lorenzen (1947) pp. 1ff; Davies (1937) p. 59.

[152] Dicey (1896); still reflected in Dicey, Morris and Collins (2006); see 2.6.1 below. Note the protest of Farrelly (1893).

[153] Dicey (1879) Introduction iv, v. (see Von Bar (1892) p. 3); Stevenson (1952) p. 566. The link between positivist international law and modern realist scepticism towards international law is noted in 2.3.3 above.

[154] Perhaps influenced by the late nineteenth-century codification trend: see Morse (2002) pp. 278ff; see further 2.5.2 below.

[155] Dicey (1896) p. 10.

although he did adopt the idea of 'acquired' or 'vested' rights from Story and from Huber's third rule.[156] Although the theory of vested rights has since been rejected,[157] it has had a strong continuing influence, cementing the common law focus on private international law as concerned with private rights.[158]

By 'codifying' the private international law principles developed in the case law, Dicey gave them greater prominence, influence and perhaps even respectability, but also completed their transformation from public international to national private law. It is perhaps ironic that Dicey's work[159] has taken on almost the status of natural law within the English study and practice of private international law, its positivist form and methodology so embedded in the consciousness of the English private international lawyer that it is itself 'tantamount to being a source of law'.[160]

2.4 Natural law

2.4.1. Natural law and international law

Despite the dominance of the positivist approach, natural law theory has continued to play an important, if often implicit, part in the development of international law.[161] Its evolution has moved away from dependence on religious foundations, towards expression as a consequence of some sort of universal human quality, usually articulated in terms of reason or rationality or as an aspect of a universal human society.[162]

[156] See above – the adoption of 'vested rights' appears inconsistent with the rejection of natural law and international law, although note that Dicey's use of the term arguably differs from that of Story. On 'vested rights' see Born (1996) pp. 616ff; Paul (1991) p. 23; Dane (1987); Caffrey (1985) pp. 42ff; Yntema (1953) p. 308.

[157] See 2.4.2 and 4.2.4 below.

[158] See 1.2 above.

[159] Carried on in successive editions of Dicey and Morris and now Dicey, Morris and Collins (2006).

[160] Fentiman (1994) p. 459; Morse (2002) pp. 282ff.

[161] Neff (2006) p. 43; Hall (2001). For a more critical view of this 'conventional story' see Koskenniemi (2002); Kennedy (1996).

[162] Hochstrasser (2000) points out (at p. 4) that 'Natural law theories before the seventeenth century were dominated by a principle of theistic origins – that God was the source of all laws perceived as natural by human reason.' Vitoria (in the sixteenth century) and Suarez (in the seventeenth century) argued (following Plato) that political society is the natural state of human beings, which includes an international society, with its own authority and laws which establish the rights and duties of persons and states (referred to as the *ius gentium*), which (as universal) included and gave rights to non-Europeans: see Vitoria (1532); Suarez (1612); Shaw (2008) p. 22; Kelly (1992) p. 170; Kennedy (1986); Nussbaum (1954) pp. 79ff; Rommen (1936) Ch. IV.

The eighteenth-century Enlightenment may be identified as the high point of the rationalist natural law approach to international law.[163] Wolff, who was also a mathematician, took a deductive approach to the study of law, rejecting the Grotian characterisation of international law as voluntary, on the basis that 'the law of nations is originally nothing except the law of nature applied to nations'.[164] Influenced by Leibniz, who applied mathematical methods and a concept of universal reason to derive a system of ethics and a theory of the law of nations,[165] Wolff argued that 'ideal' or 'moral' laws, the laws which ought to exist, could be identified by the exercise of human reason independently of either divine revelation or practical observation. Equally, just as humans needed society for self-fulfilment, for their own fulfilment 'nature herself has combined nations into a state', and the rules of this international society of nations can be again derived by the application of reason.[166] As noted above, Vattel's reinterpretation of Wolff[167] had a positivist character, which replaced his notion of reason with the voluntarist concept of will, substituting Wolff's society of 'quasi-agreement'[168] with a concept of international law based on consent. The natural law tradition continued, however, in parallel to and despite the positivist tradition which followed Vattel. Perhaps the most influential Enlightenment rationalist was Kant, who argued that reason allows us to derive the rules which will maximise our self-fulfilment in society, including the moral rules that govern our freedom which are derived through Kant's 'categorical imperative'.[169] At the international level, this led Kant to advocate a model of a federation of states, to establish a rule of law between nations and preserve peace – an idea which has been increasingly influential since the First World War, and which is explored further in Chapter 3.[170]

[163] Neff (2006) pp. 34ff; Hall (2001); Hochstrasser (2000) pp. 150ff; Kelly (1992) pp. 260ff.

[164] Wolff (1749) p. 9; see Koskenniemi (2006) pp. 108ff; Hochstrasser (2000) pp. 165ff; Wardhaugh (1989) pp. 327ff; Nussbaum (1954) p. 150; Wheaton (1845) pp. 180ff. A different interpretation is suggested by Hershey (1912) p. 37.

[165] See generally Neff (2006) p. 36; Nijman (2004); Hochstrasser (2000) pp. 72ff; Wardhaugh (1989) pp. 327–8; Wheaton (1845) p. 176.

[166] Wolff (1749) prolegomena, p. 12. See Hochstrasser (2000) pp. 178–9; Kelly (1992) p. 299.

[167] See 2.3.3 above. [168] Wolff (1749) prolegomena, p. 12.

[169] Kant (1797); Kant (1785); Hochstrasser (2000) p. 198; Kelly (1992) pp. 261ff; Rommen (1936) pp. 100ff.

[170] Kant (1795); Kant (1784); Habermas (2006) pp. 115ff; Capps (2001); Kelly (1992) p. 300; Bull (1966) pp. 91ff; Nussbaum (1954) pp. 143–4; Wheaton (1845) pp. 750ff.

Under the continued if only partial influence of natural law, many scholars continued to view international law as governing both interstate and private relationships and disputes. This is evident in Blackstone's definition of the law of nations as 'a system of rules, *deducible by natural reason*, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, *and the individuals belonging to each*'.[171] Put another way, 'the universal law was law for individuals no less than for states'.[172] The influence of both these ideas is also present in Wheaton's 1836 first edition of *Elements of International Law*, which defines the law of nations as 'those rules of conduct *which reason deduces*, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent',[173] and which also includes analysis of rules of private international law as part of international law.[174] By the 1866 edition, the analysis of private international law in Wheaton's text was based on the view that it derived 'only from considerations of utility and the mutual convenience of States'.[175]

One way in which natural law theory survived the apparent dominance of positivism in the eighteenth and nineteenth centuries was by hiding behind the formalism of the positivist approach.[176] For example, an argument about human rights would be expressed through a (fictional[177]) claim that they were part of a social contract, the product of an exercise of will by individuals in a society.[178] Thus, the foundation of liberal democracy, its claim to reflect individual freedom, arguably

[171] Blackstone (1765) Vol. IV, Ch. 5 (emphasis added); see Janis (2004) pp. 10ff.
[172] Dickinson (1952) p. 27. [173] Wheaton (1836) p. 54.
[174] *Ibid*. p. 136ff. The personal relationship between Wheaton (official Reporter of the decisions of the Supreme Court) and Justice Story may have been influential in the development of these ideas: see Dunne (1970) p. 200; see further 2.3.4 above.
[175] Wheaton (1866) p. 112.
[176] See Koskenniemi (2002); Hall (2001) p. 273; Kennedy (1996); Wolff (1950) p. 33. Hall alternatively (at p. 276) characterises this as 'the politicization of Enlightenment naturalism into radical political ideology'.
[177] Boyle (1993); Lessnoff (1986) pp. 87ff. Kant was insistent that the social contract was only hypothetical – see part II of Kant (1793).
[178] For Rousseau, 'citizenship' reconciled the particularity of individual will (through contract) and the universality of public will (through the society's contract): see Rousseau (1762); Kelly (1992) pp. 253ff; note that the 'social contract' device dates to the ancient Greeks – Kelly (1992) p. 14.

depends on 'the redescription of natural law as natural rights',[179] a natural law 'creation myth'.[180] However, this 'redescription' necessitated one fundamental change. These myths were generally based on a conception that rights emerged as part of a national social contract, not as universal. They thus emphasised the trend towards a national conception of law also found in a positivist approach.

2.4.2. Natural law and private international law

The early part of this Chapter examined the influence of natural law theories in the initial stages of the evolution of private international law. Savigny, probably the most influential private international law theorist of the nineteenth century, also drew heavily on natural law processes of reasoning.[181] This is not to suggest that Savigny's approach was abstract and unconscious of historical development – indeed he was influenced by the detailed comparative work of Story,[182] and he is a leading, if not the founding, figure of the 'Historical School of Jurisprudence' (largely the application of Hegelian philosophy to jurisprudence[183]). However, his approach to private international law was less influenced by historical concerns than his general legal philosophy would perhaps suggest. There is an obvious reason for this; as discussed above, despite the purported justifications of the statutists, Roman law did not contain rules of private international law.[184] Savigny's private international law could not depend on the same historical foundations as his general approach to private law, and thus its character is far more analytical than is typical of his jurisprudence, and imbued with the spirit of a natural law approach.

[179] Hochstrasser (2000) p. 5; see also Shaw (2008) p. 26.

[180] Allott (2002) pp. 328–9; note the naturalistic account of economic development in Smith (1776).

[181] Savigny was writing in the context of the customs union which preceded German unification: another context of diversity within a unified system – see 2.2.2 and 2.3.4 above; Nussbaum (1954) pp. 192ff.

[182] See Nadelmann (1961) pp. 248–9.

[183] See e.g. Berman (2005a); Koskenniemi (2002) p. 44; Kelly (1992) p. 309, pp. 320ff; Böckenförde (1991); Harrison (1919) pp. 75ff. Savigny lectured at the University of Berlin in the enormous shadow of Hegel's influence, and interestingly taught historical jurisprudence to a young Karl Marx, whose writings continued to bear a Hegelian hallmark despite his later rejection of Hegel's idealism – see 2.5.1 below. Savigny also introduced the Brothers Grimm, both of whom studied law under him, to medieval literature through his personal library.

[184] See 2.2.1 above.

Savigny accepted Huber's basic principle of territorial sovereignty[185] and, similarly to Huber, sought to derive private international law rules. He departed from Huber in negating any role for comity by taking an additional axiom – the idea that there is an international community of nations,[186] a 'community of law among independent states'.[187] In part this was a factual recognition of increased world trade pursuant to the industrial revolution, although it was also clearly a more aspirational claim.[188]

Savigny rejected the statutist focus on the characterisation of the laws themselves, arguing that the statutist categories were 'incomplete and ambiguous' and 'altogether useless as a foundation'.[189] He also rejected the focus on the rights of the parties in Story and Huber (later expressed as 'vested rights' by Dicey, discussed above), characterising this argument as 'a complete circle'.[190] The popularity of the idea of vested rights seems inconsistent with the obvious logical flaw that Savigny points out – that for rights to 'vest' you must have already determined which legal system applies, and hence the idea is circular. Savigny's reasoning here is, however, deceptively persuasive – whether or not the concept of vested rights is circular depends on the underlying concept of law. From the perspective of a legal positivist, 'rights' exist only when enforced by a legal system. The idea of 'vested rights' existing prior to the determination of which legal system applies is circular, if not nonsensical. For a natural law theorist, however, rights exist at the time an act or event occurs – according to natural law, not necessarily the law of any actual legal system – and there is an obligation on a legal system to recognise them. Such rights may partially rest on a (natural or international law) claim about the supreme territorial sovereignty of each state, such as that made by Huber. The attachment of Huber, Story and even Dicey to this

[185] Savigny (1849) p. 68; Wolff (1950) pp. 35–6.

[186] Von Bar (1892) p. 55 describes Savigny's approach in a way which emphasises its natural law origins; see also Lipstein (1972) pp. 133ff; Nussbaum (1942) pp. 191ff – but note (at p. 196) Nussbaum's argument that Savigny was not visualising the sort of international community posited by Wolff.

[187] Savigny (1849) p. 71; de Nova (1966a) pp. 459ff.

[188] Perhaps positing an international system of regulation as a counter to the growth of global liberalism – see 2.6.1 below. See also discussion in Michaels (2007); Reimann (1999) pp. 599ff.

[189] Savigny (1849) pp. 140–2. Although (at p. 48) he does appear to suggest that the statutist methodology (fixing the limits of each law) would give the same results as his approach (fixing the law of each legal relation) in any event.

[190] *Ibid*. p. 147; see also Collier (2001) p. 381; Castel (1994) p. 29.

position suggests an implicitly closer affinity to natural law theory than is usually recognised, and its dismissal by Savigny reveals his own problematic combination of beliefs in state sovereignty and international community.[191] While the idea of vested rights in this traditional form remains unconvincing, it is argued in later Chapters that, in a modified form, it provides an important part of the account of the function of private international law both in federal systems and as part of the international system.[192]

Instead of focusing on rights, Savigny argued for an account of private international law in which the basic unit of analysis is the 'legal relation'. For Savigny, the role of private international law was thus to find the law to which each relation 'belongs', to 'ascertain the seat (the home) of every legal relation'.[193] The bulk of Savigny's writing is an examination of practically every known type of legal relation, to decide what rule should be used to allocate it to a legal system. He argued that there must be a single 'proper' law for each relation, on the grounds that otherwise the equality of sovereigns would be violated. The sorts of connections which would be relevant considerations show the influence of his acceptance of territorial sovereignty. He rejected the 'personal' characteristics of the parties, favouring the 'location' of an event or relationship, even one which is essentially abstract. Thus, for example, he favoured the physical location of parties (or their domicile) over their nationality (a personal characteristic) as a relevant connection in 'locating' a legal relation between them.[194]

It is central to Savigny's approach that the private international law rules he developed were higher level, universal secondary norms – part of an international community of law, derived from the fact of a community of nations.[195] This may be contrasted with the conception of private international law resulting from the positivist theory of international law described above. Under that conception, private international law is (sometimes ambiguously) excluded from the domain of international law, and conceived of as part of each state's (voluntary) domestic law. Savigny rejected Huber's formulation of his third law,

[191] See further Lipstein (1972) pp. 138ff. The commitment to the sovereign state may also be explained by the influence of Hegel – see 2.5.1 below.
[192] See 4.2.4 and 5.4 below.
[193] Savigny (1849) p. 140; Michaels (2007); Reimann (1999) pp. 594ff; Wolff (1950) p. 36.
[194] Juenger (2001a) p. 33; Yntema (1953) p. 311; see further 5.3.3 below.
[195] Paul (1991) pp. 29ff; Yntema (1953) p. 309.

and its dependence on comity, precisely because it did not imply a sufficient degree of compulsion.[196]

Savigny did recognise some exceptions to the universality of this system.[197] He acknowledged party intentions as an important connecting factor.[198] He accepted that the forum should govern the law of procedure.[199] He also recognised the existence of mandatory laws within a forum state, which the judge must apply regardless of choice of law rules. Savigny characterised these as simply one type of a more general public policy exception to the universality of private international law rules. Aside from arguing against the use of these exceptions,[200] Savigny also argued that 'it is to be expected … that these exceptional cases will gradually be diminished with the natural legal development of nations'.[201]

In the late nineteenth century, Von Bar re-advocated Savigny's approach in response to a rising positivist tide, arguing that the rules of private international law can be derived from 'the nature of the subject itself',[202] from the 'idea of an international community of law which restricts all territorial laws, and defines their competency'.[203] Like

[196] Paul (1991) pp. 29–30; Wolff (1950) p. 35; Savigny (1849) p. 51 (Guthrie note), pp. 75–6 (Guthrie note).

[197] Savigny (1849) pp. 144–7.

[198] Although arguably the dominance of liberal theory (and its natural law foundations – see 2.4.1 above) means that this would not have appeared to Savigny to undermine the character of his approach, anticipating the modern universality of party autonomy; see further 5.6 below.

[199] Westlake (1858) p. 158 interestingly explains the fact that procedure is governed by forum law by characterising procedural rules as commands issued to the judge, not the individual.

[200] Savigny (1849) pp. 76ff; see also Guthrie's note on the uncertainty of defining 'public policy' in practice (at pp. 81–4). Von Bar (1892) p. 65 accepts that 'owing to the far-reaching differences in the moral conceptions of different nations and States, there must be gaps in the international community of law', but advocates a narrow public policy exception for the reason of its potential uncertainty – only immoral legal relations to be realised in the forum territory can be disapplied under forum public policy; see further Savigny (1849) p. 84 (Guthrie note).

[201] *Ibid*. p. 80; de Nova (1966a) pp. 469ff. This is the opposite of what actually happened in the nineteenth century – see 2.5.2 below. This 'progressive' view of history again shows the influence of Hegel on Savigny: see 2.5.1 below; Savigny (1849) p. 57 – 'the positive law itself has its seat in the people as a great natural whole'; 'it is only in the state that the will of individuals is developed into a common will, it is there only that the nation has a realized existence'.

[202] Von Bar (1892) p. 77.

[203] *Ibid*. p. 56.

Savigny, he therefore argued that private international law rules are not part of the law of each state, not 'dependent merely upon the arbitrary determination of particular States', but 'limitations belonging to the law of nations'.[204] When Von Bar wrote, private international law approaches in different states had already significantly diverged from the model of a single international system that he and Savigny advocated.[205] Von Bar argued, however, that this diversity of state practice ought to be characterised largely as a series of 'errors and blunders'.[206] This perspective is reflected in the foundation of the Hague Conference on Private International Law in 1893, 'to work for the progressive unification of the rules of private international law'.[207]

Savigny's influence is too broad and significant to be described adequately here.[208] It is most apparent in the use of 'proper law' style rules to determine the applicable law in many private international law systems. However, while Savigny's methods and techniques remain popular, his underlying theory, with its commitment to the existence of an international community of law, and his conception of private international law as part of a single international system, not as part of domestic law, has been largely, and regrettably, forgotten.

[204] *Ibid*. p. 2. To apply only local law would, according to Von Bar, not merely lead to loss of trade, but 'would lead in many cases to a simple denial of the rights of the foreigner, and even of the native citizen himself, or in other words, would deprive international intercourse of all legality' – *ibid*. Note that Von Bar here appears to draw upon both the language of vested rights theory, rejected by Savigny, and a sort of natural law theory, in his claim that a direction to apply local law would lack 'legality'. Note also the apparent influence of Mancini – see 2.5.2 below.

[205] See 2.6.1 below.

[206] Von Bar (1892) p. 3. Harrison (1919) noted the presence of some common international principles and ideas in private international law, and argued (at p. 105) that it is 'constantly growing more consciously in harmony with these principles'.

[207] See further 5.2.1 below.

[208] Some direct advocates of Savigny's approach who are not discussed are Phillimore, Beach-Lawrence, Wharton, Asser and Zitelmann: see d'Oliveira (2002); Reimann (1999) pp. 597ff; Juenger (1994a); Wolff (1950) p. 37; Nussbaum (1942) pp. 196ff; Von Bar (1892) p. 61. Savigny's influence in the US may also be attributed to the well-known law reformer David Dudley Field, who argued for a greater role for territorialism in Savigny's method, accepting the idea of private international law as part of a broader international law system (see Field (1876)). An influence is perhaps also apparent in the work of his brother and partner in law Stephen Field as a justice of the Supreme Court, for example in *Pennoyer* v. *Neff* (1877) 95 US 714: see 4.3.5 below. See further Juenger (2001b); Weinstein (1990) pp. 76ff.

2.5 Historicism

2.5.1. Historicism and international law

Historicism[209] became prominent in the early nineteenth century as a distinct approach to the study of law. It bears hallmarks of both positivist and natural law influences.[210] Like a positivist approach, it places importance on the study of behaviour, of past practice. However, it interprets the history of that behaviour as acting according to 'natural' laws. But unlike a natural law approach, it does not depend on 'reason' or religious belief, but on the abstract and non-rational will of the people or nation, and thus only recognises positive law.[211] The historicist approach to international law in the nineteenth century thus involved interpreting the behaviour of states and peoples as 'progressing' towards ideal nation-states.

The origin of this approach may, like much of the natural law theory discussed above,[212] be traced from those philosophers who, following Plato, considered sociability an essential incident of the human condition, as discussed in Chapter 1. It was manifest further in the political theory which buttressed the French Revolution, in particular, the emphasis on the importance of nationality which spread throughout Europe during the Napoleonic wars.[213] These ideas may be characterised as a reinterpretation of the basic concept of 'personal law' which had such an

[209] This term has been used in a number of different senses: see Neff (2006) pp. 44ff; Allott (2002) p. 332; Hershey (1912) p. 34. The approach adopted here, which is similar to that of Neff, focuses on international law which is derived from or influenced by Hegel's account of the historical necessity of the nation-state.

[210] Neff (2006) pp. 44ff; Shaw (2008) pp. 29–30; Yntema (1953) p. 309. A central issue of the historicist approach, which emerges from this dualism, is that it is sometimes ambiguous about whether it is a descriptive or normative project, whether it claims that 'progress' is inevitable or desirable. One famous instance of this ambiguity is the problematic status of revolution in Marxism, which is both the inevitable result of material historical forces, and a 'call to arms'.

[211] Rommen (1936) Ch. V; see 2.3.2 above.

[212] Particularly Wolff and Kant: see 2.4.1 above; Hochstrasser (2000) pp. 174ff. Note, however, that Kant's conception of humanity as social was a claim about rationality not historical inevitability.

[213] See Kelly (1992) pp. 311ff; Nicholas (1975) pp. 51ff; Nussbaum (1954) p. 120. The primacy of nationality was reflected in the French Constitution and the Code Civil of 1804. Note also the emphasis on international law as the law of 'peoples' in the 'Project for a Declaration of the Law of Nations' proposed by Gregoire in 1793: see Wortley (1954) pp. 249ff; Hershey (1912) p. 44.

influence on the statutists.[214] Just as the positivist approach emphasised the rise of territorialism and conceived of law as the territorial expression of a sovereign will, this approach, it might be argued, emphasised the importance of personal connections, and conceived of law as the expression of the will of the people.

The consequences of this theory were developed by Hegel. If the state is conceived as a manifestation of the will of the people, then the ideal state is, according to Hegel, not merely a reflection of will, but the embodiment and perfection of popular will.[215] Thus, arguing against an individualistic approach to human will (which, as discussed above, characterises the positivist approach), Hegel argued that the individual could only achieve self-realisation, the fulfilment of their will, through a process of collective self-realisation, the fulfilment of a 'social will' (the spirit or *Geist*), and that history should be understood as a struggle towards that fulfilment. The individual is not 'subjected' to the state, but rather it is only in participating in a state and its social institutions, in acting according to general will, that an individual can be truly free, and not subject to historical forces.[216]

This approach has a number of implications for the study of international law. First, it identifies the (nation-)state as the key unit of analysis, reinforcing the commitment to state sovereignty under the positivist approach to international law. According to Hegel, 'each state is … a sovereign and independent entity in relation to others … [and] has a primary and absolute entitlement to be a sovereign and independent power',[217] and 'since the sovereignty of states is the principle governing their mutual relations, they exist to that extent in a state of nature in relation to one another'.[218] However, this is not the formal, 'sterile' state of the positivist approach, but a nation-state which evokes and invokes people, history, language, tradition and culture – 'whether a state does in

[214] See 2.2.2 above.

[215] See e.g. Hegel (1821) p. 275; Hochstrasser (2000) pp. 217ff; Kelly (1992) pp. 307ff; Nussbaum (1954) pp. 236ff. The debt owed by Marx to Hegel is obvious here. Marx, however, adopted a more critical perspective towards the unity of the national will, highlighting the role of competing classes – see Rommen (1936) p. 125. In this Marx also owed a debt to the Sophists of ancient Greece – see Rommen (1936) p. 9.

[216] Hegel is following a line of argument developed in, for example, Kant (1785).

[217] Hegel (1821) pp. 366–7; see also Koskenniemi (2002) p. 32; Kelly (1992) pp. 345–6.

[218] Hegel (1821) p. 368. However, in other writing Hegel suggested that, like individuals, the 'mutual recognition' of states was constitutive of their identity – see 3.2.1 below. On the link between mutual recognition and a systemic perspective in private international law see further 1.3.3 above.

fact have being in and for itself depends on its content'.[219] Further, it provides support for the idea of self-determination, that 'peoples' have a right to gain self-fulfilment through collective expression as a 'state',[220] an influence felt in the unification of the German and Italian states in the nineteenth century.

In its commitment to the idea of 'fulfilment', and departure from the positivist's formal equality, this approach can also be taken to support a hierarchy of the development[221] and moral authority of states.[222] Thus, as discussed above,[223] in the early nineteenth century, in particular in the 1815 'Concert of Europe', the 'great powers' of Europe felt it morally justified to attempt to dictate the internal affairs of other states and to control the balance of power. This sense of moral hierarchy implies the pre-existence of a definition of 'progress' provided by (natural) historical law.

2.5.2. Historicism and private international law

As noted above, under the historicist account sovereignty is viewed as being defined through personal connections with the nation-state. This may be contrasted with the theory of territorial sovereignty which dominates both positivist approaches to international law and most 'natural law' inspired approaches. This difference in perspective also had an impact on approaches to private international law.

The leading advocate of the historicist approach in private international law was Mancini, who argued, most famously in an 1851 public address entitled 'Nationality as the Basis of the Law of Nations',[224] for an international system, including private international law rules, founded

[219] Hegel (1821) p. 367. [220] See further Chapter 3.

[221] From 'undeveloped' to 'developed' nations, from the 'third world' to the 'first world'. This theory was expounded, for example, by Maine (1861); see Koskenniemi (2002) p. 75; see further 3.3.2 below.

[222] Hegel viewed war as a natural part of the resolution of the conflict of state wills – see Hegel (1821) p. 369. The widespread influence of the idea of a moral hierarchy may broadly be recognised in both Marxism and, in combination with late twentieth-century Social Darwinism, fascism, which shared a belief in the moral superiority of one form of the state, as arguably do some variants of contemporary US liberalism. For the influence of Hegel on Marx (through Savigny) see 2.4.1 above. Nussbaum (1954) p. 238 discusses the openly hierarchical approach developed by Lorimer under this influence.

[223] See 2.3.2 above.

[224] Koskenniemi (2002) p. 66; Kelly (1992) p. 346; Nussbaum (1954) pp. 240ff; Wolff (1950) p. 38; Lorenzen (1947) pp. 197ff. On Mancini generally see Jayme (1980).

on the concept of nationality.[225] It is important here to distinguish an approach based on 'nationality' from one based on 'nationalism'. Mancini's approach was far from being motivated by the interests of a single nation.[226] He shared with Savigny the assumption that a legal 'community of nations' existed, but adopted nationality as the founding concept and the key determinant in attributing legal disputes to states, based on a conception of the nation as founded on personal connections (embodying, in the Hegelian sense, the people and their history and culture) rather than territorial power.

On the basis of this approach, Mancini argued that the applicable law in a private international law dispute should (generally) be determined by the nationality of the parties. He argued that this was the culmination of a trend in the development of legal history, drawing on the tradition of jurisprudence which emphasised the personal basis of law to argue that a central role for the nationality principle was an inevitable historical development.[227] Again like Savigny, Mancini rejected the positivist approach which gave priority to individual state sovereignty. Mancini thus also rejected the idea that the application of private international law rules is an inherently discretionary part of the law of each state. He saw the recognition by a state of the national law of another person as a requirement of international law; to deny giving effect to a person's national law was, following Hegel, to deny both the nation and the person themselves.[228] This position, under which 'mutual recognition' is viewed as a constitutive principle of an international society of states, was adopted and advocated by the Institute of International Law under the early influence of Mancini, its first president.[229] Thus, like Savigny, Mancini viewed private international law rules as 'secondary norms' which are essentially part of a broader system of law – in his case, the

[225] de Nova (1966a) pp. 464ff; Nussbaum (1954) p. 242; Nussbaum (1942) pp. 192ff; Harrison (1919) p. 123; Von Bar (1892) pp. 73–4.

[226] The internationalism of his perspective is demonstrated, for example, by the development of the *exequatur* as a streamlined method for the recognition of foreign judgments in the Italian Civil Code of 1865 – see below.

[227] Wolff (1950) p. 38; Von Bar (1892) p. 64; see 2.2.2 above.

[228] Juenger (2001a) p. 39; compare Von Bar (1892).

[229] Note the Institute's resolution of 5 September 1874, [IV]: The recognition of foreign laws or rights 'could not be the consequence of simple courtesy and propriety (*comitas gentium*), but the recognition and the respect of these rights on behalf of all States must be regarded as a duty of international justice' (trans. by author); see further 1.3.3 above. On the role of the Institute see Koskenniemi (2002); see further 5.2.1 below.

law of a community of nations rather than Savigny's community of territorial states.

Mancini did not exclude the operation of local law in some circumstances. He drew a distinction, reminiscent of the statutists,[230] between personal and public laws. Personal laws were part of the expression of the individual will in the state, a reflection of their personality and autonomy, and must be given effect internationally. Public laws, however, were part of the definition of national character by a nation.[231] These were both important enough to override the application of foreign law, and also specific enough to national character to be limited to the territory of the state. This concept of a 'public law', which is similar but arguably significantly broader than Savigny's 'public policy' exception, was reflected in the broadening of the concept of *ordre public* in civil law systems in the nineteenth centuries,[232] and may also have influenced the exclusion of foreign public laws from the domain of private international law, a doctrine which, although perennially challenged, persists today.[233]

The direct influence of Mancini can be identified in the use of nationality as a connecting factor in private international law in the Italian Civil Code of 1865.[234] Prior to the development of 'federalised' private international law rules by the EU, examined in Chapter 4, it was also prominent in other European states.[235] The concept of nationality was particularly influential in defining the character of states in South America, and this is reflected in their private international law rules.[236] Perhaps even more significantly, and somewhat ironically given his commitment to a single international community of law, Mancini's influence may be felt in the decline in the universality of private international law in the nineteenth century,[237] both in a practical and theoretical way. The practical impact was that while many states adopted nationality as a principle in private international law, much of the world also remained committed to more territorial connecting factors,

[230] See 2.2.2 above.

[231] Von Bar (1892) p. 63. See also *ibid.* pp. 69ff for criticism of the historicist school's characterisation of public laws. Von Bar argues (at p. 73) that in the end it must fall back on examining the 'end and object of the law', which he identifies as Savigny's approach.

[232] Wolff (1950) p. 39. [233] See 5.3.1 below.

[234] The section of the Italian Civil Code dealing with private international law was at least influenced, if not written, by Mancini – see Jayme (1980); de Nova (1966a) pp. 465ff.

[235] See 4.6 below; Juenger (2001b) p. 64; Von Bar (1892) p. 64.

[236] Wolff (1950) pp. 38–9, p. 49. [237] See 2.6.1 below.

including tests of residence or domicile.[238] This has remained a fundamental division which has proved a lasting obstacle in attempts to harmonise private international law rules through treaties.[239] The theoretical impact was that, in his general emphasis on the function of law as an expression of national identity, of the will of the people, Mancini arguably contributed to the trend towards the diversification of national legal systems in the late nineteenth century and away from a sense of a unified international system, which will now be discussed further.

2.6 The end of the private history of international law?

2.6.1. The decline of universality

Many nineteenth-century theorists, led by Savigny and Mancini, argued for an international, universal approach to private international law, and saw the differences between national rules as 'errors' or 'anomalies' which would decline over time. In fact, the nineteenth century saw a significant increase in the diversity of national approaches to private international law – a phenomenon with a variety of explanations. In part it was a reflection of rising nationalism, as sovereign states (including the emergent Italy and Germany) emphasised their individuality and unique history and culture as part of their definition of national identity, including through projects of national legal codification.[240] As the distinction between public and private international law emerged, the codification of private international law also separated from the international projects to codify international law, and formed part of these national movements.[241] In part the growing diversity of national private international law rules also corresponded with changes in the idea of the role of law within society, increasingly focused on serving national policy objectives.[242]

[238] Juenger (2001b) p. 66; Nussbaum (1954) pp. 241–2; see 5.3.3 below. Nationality was, and remains, particularly problematic as a connecting factor in the context of federal systems: see 4.2.2 below.

[239] Casad (1982) pp. 49ff.

[240] Juenger (1994a); Paul (1991) p. 25; Wardhaugh (1989) p. 331; Kahn-Freund (1974) pp. 275ff; de Nova (1966a) pp. 471ff; Yntema (1966) p. 31; Wolff (1950) pp. 42ff; Starke (1936) p. 396; note the possible influence of this movement on Dicey – see 2.3.4 above. Nussbaum (1954) pp. 235ff emphasises a link between codification and the rise of positivism.

[241] Note however the draft public and private international law code of Field (1876); see generally Nys (1911).

[242] See generally discussion in d'Oliveira (2002) p. 113; Lorenzen (1947).

It also reflected the rapidly rising numbers of private international law decisions within each state, as a consequence of expanded international trade and population movements. As each state developed an increasing depth of jurisprudence, it simply became less necessary to appeal to foreign or Roman sources to fill real or perceived gaps in its law.

Recognising this trend, in the late nineteenth century writers such as Kahn argued that Savigny's ideal of a universal system of private international law (as part of a universal system of international law) was not merely inaccurate, but in fact impossible.[243] Kahn argued that Savigny's approach wrongly assumed that the categories of legal relations were themselves universal. Without this, he argued, it is impossible for different legal systems to apply the same rules, to make the same private international law decisions.[244] In fact, according to Kahn, the divergence of legal systems in the late nineteenth century meant that national legal systems were too disparate to accommodate any universal categories.

This argument was reinforced by the state of private international law rules in the late nineteenth century. A wide variety of different types of rules were adopted,[245] arguably without a shared concept of their purpose, but with an increasing focus on private rights. Kahn's approach, which argued that private international law rules were an aspect of the law of the forum, simply seemed to make more sense of the world of private international law at the end of the nineteenth century. Kahn did not reject Savigny's general methodology, and considered his idea of locating each legal relation in space, weighing various contacts in order to identify its seat, as a useful metaphor. However, he rejected the idea that a single natural forum might be identified in each case, arguing instead that each state could have its own idea of what the proper law was. Thus Savigny's methodology remained influential, but his idea of a

[243] Juenger (2001b) p. 66; de Nova (1966a) p. 476; Yntema (1953) p. 298, p. 307, p. 312; Lorenzen (1947) pp. 115ff. Earlier work from this perspective was also done by Wächter – see e.g. de Nova (1966a) pp. 452ff.

[244] Evidence of the problems caused by a diversity of legal categories may be seen in the 'problem', 'theory' or 'device' of characterisation, under which ambiguities in private international law 'categories' are arguably susceptible to being exploited, with judges interpreting cases as belonging to the category which gives the desired result: see Dicey, Morris and Collins (2006) pp. 37ff; Lipstein (1972) pp. 198ff; Lorenzen (1947) pp. 115ff; but note that in practice English courts approach this in an 'internationalist spirit' – see 1.3.3 above. The problem may result not merely from diversity in legal categories, but from ambiguity or flexibility in the categories themselves, within a legal system: see e.g. Collins (1967).

[245] Wolff (1950) p. 11; Nussbaum (1942) pp. 203ff.

universal system of private international law as part of an international community of law was transformed into the diverse and discrete national private international law projects which continue today.[246]

The same story may be told from a different perspective, the perspective of the theory of international law. The influence of the natural law and historicist approaches on private international law, under which it formed part of a broadly defined law of nations, has been vastly overshadowed by the implications of positivist international law theory. The dominant trend of private international law, as seen above, is of its gradual exclusion from the domain of international law.[247] The positivist 'revolution' led to an emphasis on international law as the product of an exercise of *a priori* state sovereignty. Because such rules only arose from the interactions of sovereign states, this limited international law to the law of state relations, a sort of 'private law' between states. It also implied a strict, albeit problematic, division between the internal and external affairs of states, the domestic and the international.[248] This was strategically useful for the universalisation of international law which took place in the late nineteenth century[249] – a minimal 'thin' international law, dealing only with formal interstate relations, could be consistent with the largest number of diverse states. The positivist approach rejected the existence of an international society, instead conceptualising international law as a product and reflection of the will of individual states – 'the minimal law necessary to enable state-societies to act as closed systems internally and to act as territory owners in relation to each other'.[250] Deference to a foreign state's territorial sovereignty, it was argued, implied the need for private international law rules – but because of state sovereignty, these rules were characterised, problematically and ambiguously, as an exercise of 'comity'.

From this discretionary idea of private international law, and the strict division between the internal and external adopted under the positivist conception of international law, the discipline of private international law became increasingly focused on the study of the internal behaviour of individual states, through observation of cases, a

[246] See Reimann (1999); Juenger (1994a); Paul (1988).

[247] Wortley (1954) pp. 255ff; but see the account of the persistence of these ideas in some continental writers by Nussbaum (1942) pp. 194ff; note also Paul (1988) p. 162; Steenhoff (1984); de Nova (1966a) p. 468, pp. 473ff; Meili (1905); see further references to the work of 'internationalist' private international law scholars in 1.6 above.

[248] See 2.3.3 above and 3.4 below.

[249] See Jenks (1958) pp. 62ff.

[250] Allott (1990) p. 324. See 2.3.3 above; Allott (2002) p. 331; Wolff (1950) p. 11.

methodology particularly popularised by Dicey.[251] A diverse range of national responses to the problems of private international law became equally legitimate or lawful, further disintegrating the practice of private international law into distinct national disciplines. This may be contrasted to the conception of public international law, which, despite the positivist 'revolution', maintained and universalised a unitary conception of 'public' international law rules, through a retreat to formalism and in part through the exclusion of the 'private' or domestic from its domain.[252] Public international law was thus elevated to a 'higher level' of law from private international law.[253] This is the essential origin of the false perception of public and private international law as distinct disciplines, as streams which do not intersect.

An economic analysis suggests yet another perspective on this story.[254] The general legal division between 'public' and 'private' which crystallised in the nineteenth century has long been considered problematic.[255] Critics have pointed to it as a mechanism for the exclusion of some relations from the regulation (or protection) of the law, arguing that this gives effect to a conception of private interactions as occurring in an insulated regulatory space.[256] This division may therefore be viewed as an implementation of an international liberalism which seeks to establish a protected domain for the functioning of the global market. Thus, it has been argued that 'the public/private distinction operates ideologically to obscure the operation of private power in the global political economy'.[257] At an international level, the traditional division between public international law and private international law has

[251] See 2.3.4 above.

[252] See Dodge (2008); Childs (2005); Kennedy (1996); Paul (1991) p. 25.

[253] Reflected in the claim that the 'principle of subordination of considerations or rules in the sphere of conflict of laws to considerations and rules of public international law is absolute on the inter-state plane' – Verzijl (1968) p. 191; see further Paul (1988) pp. 163ff; Chapter 5.

[254] See generally Zumbansen (2004); Cutler (2003); Cutler (1997); Charlesworth (1988); note the Marxist history of private international law in Kalensky (1971).

[255] See e.g. Childs (2005); Chinkin (1999); Charlesworth (1995); Thornton (1995); Paul (1998) pp. 153ff; Horwitz (1982); Kennedy (1982); see further 3.4.1 below.

[256] Note the famous judgment by Story (consistent with his own role in the development of private international law – see above) distinguishing public and private corporations in *Trustees of Dartmouth College* v. *Woodward* (1819) 17 US 518 at 669–73; see Horwitz (1982) p. 1425. The connection is most obvious in the priority given to party autonomy in private international law: see e.g. Yntema (1955); see further 5.6 below.

[257] Cutler (1997) p. 279.

similarly isolated private international interactions from the subject matter of international law.[258] Private international law is not merely part of national law, but part of national private law, the domain of private interests. As explored in Chapter 3, the contemporary struggle to develop mechanisms by which public international law can (re-)regulate the increasingly important range of private international interactions is, from this perspective, both a challenge to this model, and a sign of its success.

2.6.2. Self-limitation in public and private international law

This division of public and private international law was not a necessary response to the problem of reconciling international law with state sovereignty. Chapter 3 explores the ways that public international law addressed this problem in the twentieth century by qualifying the conception of sovereignty, rejecting the positivist foundations of international legal theory. But if private international law became conceptualised as national law because of a historical contingency, and the circumstances which precipitated this understanding have changed, why does it continue unchallenged?

One answer is that the theory of private international law as part of domestic law is self-perpetuating. If private international law is considered to be part of domestic law, it draws the boundaries of the subject at the borders of the state. It conceives of itself in a way which formally excludes any role for international sources or norms, an approach also attractive to domestic judges wary of stepping outside constitutional limits on their functions. The theory of private international law as part of domestic law does not merely reflect international norms (in particular, the norm of state sovereignty), it is actively engaged in constructing international society according to those norms. By defining private international law as part of domestic (private) law, it defines private international lawyers as domestic, not international; it emphasises their attachment to a sovereign territory. In practice, judges, legislators, academics and practitioners are required to look only at domestic cases and domestic interests in formulating, considering and evaluating private international law decisions and rules. The division of the world constructed by positivist private international law theory reinforces their

[258] Paul (1998) illustrates this through case studies (at pp. 164ff).

identities as national actors, replicating the fragmented, competitive, individualistic world-view embodied in the theory of 'conflict of laws'. This conception of private international law is not necessarily coherent, accurate or effective, and it does not completely constrain or reflect the reality of the practice of private international law, as explored further in Chapter 5. However, the theory of private international law as discretionary domestic law negates the possibility of reconceptualising the subject to reflect this reality and escape this incoherence; because of the way it defines its own boundaries, it operates as a self-determining, self-limiting system.

There is another side to this question. Why is the history of private international law as a part of international law a 'private' history? Why is it not better known? An answer may only be tentatively suggested. The standard history of international law is a story of public international law as an expanding, developing discipline, only recently engaging with the domain of the 'private'.[259] It portrays the history of public international law as (a historicist) evolution. By leaving out the private history of international law, its rise and its decline, the history of international law, and also the present development of international law, appear more natural, more progressive, more inevitable. The engagement of international law with the private domain appears to be a sign of maturity, not a return to the past.

2.6.3. Private international law as national law

In summary, the idea of private international law as necessarily and purely a part of national law may be understood as a product of two late nineteenth-century phenomena. First, it is a product of the fact of increased diversity in national legal systems, including in national private international law rules, crystallised in codification movements. Second, it is a product of the positivist theoretical emphasis on sovereignty, which characterised the decisions of states with respect to private international law problems as a matter of discretionary comity. This was in part precipitated by the problematic divisions created between international and domestic law, and public and private law, as part of public international law's strategy of universalisation, and the privatisation of regulation as part of the growth of a global market economy.

[259] Cassese (2005) pp. 142ff; Shaw (2008) pp. 43–9.

The effects of this conception of private international law as national law include the diversity and complexity of modern rules of private international law, the understanding of private international law as a mechanism for the enforcement of national private rights, and hence the problematic focus in modern private international law theory on 'justice' and 'fairness', examined in Chapter 1. Under this limited model, private international law does not contribute much to the ordering or systematising of international private relations. In fact it frequently adds to the complexity of international dealings and international disputes. In subjecting disputes to a wide range of rules, often operating with broad and flexible exceptions, it creates uncertainty and expense, and in so doing it may even reduce the effectiveness of both national and international systems of regulation. It bears neither the character nor the function which was envisaged for private international law by the statutists or by Huber, Savigny or Mancini.

2.7 Conclusions

Private international law was invented as a mechanism for the reconciliation of higher level natural law with the existence of diverse laws in different Italian city-states, and developed through its application to similar structural legal problems in various states, including France, the Netherlands and Germany. It was thus conceived of as a set of secondary legal norms, part of natural law and of the law of an international system, reflecting and replicating territorial and personal theories of global legal ordering – an idea of private international law which was continued in the natural law and historicist perspectives. However, this conception was gradually transformed as, reflecting the rise of positivism and the sovereign nation-state in the nineteenth century, private international law became a part of national private law, a discretionary exercise of national sovereignty. In its recognition of the old idea of private international law as international law, this Chapter is a reminder of the contingency of these modern ideas, and of the possibility of conceptual confluence between public and private international law.

Chapter 3 examines the ways in which the positivist conception of international law has been increasingly rejected in the twentieth century. Its theoretical division between the international and national domains is coming under increasing pressure from both normative and institutional developments within international law, and from the growth of private international interactions, as an aspect of the range of phenomena

loosely called globalisation. The much discussed decline in the sovereign nation-state is reflected in new ideas of international law, which demand a reconceptualisation of private international law. The neglected private international law ideas of the past, explored in this Chapter, do not merely destabilise the assumptions of modern private international law, but provide the foundations for the project of reconstruction which is proposed and begun in the remainder of this book.

3

From positivism to constitutionalism

3.1 Introduction

This Chapter explores the progress of international law and legal theory beyond the history examined in Chapter 2. Throughout that history, theories of private international law have both reflected and reinforced the development of different conceptions of the international system, different sets of international norms. The present idea of private international law as discretionary national law is based on positivist international law theory,[1] which demands a strict formal separation of international and national law. In the past, this theory has competed with other ideas which have suggested different understandings of private international law. However, for reasons which are explored in Chapter 2, the idea of private international law as discretionary national law, an expression of state sovereignty, is self-perpetuating. The dominant theories of private international law therefore continue to reflect and replicate the positivist norms of the late nineteenth century,

[1] As discussed in Chapter 2, what is known as 'positivist' international law theory is not essentially connected to the broader idea of 'positivism', but only the result (and perhaps not the only result) of the application of a positivist methodology to the study of international law, largely in the nineteenth century. Some modern positivist legal theorists have recognised the problematic nature of the dependence of positivist international legal theory on the concept of 'sovereignty', and rejected the 'positivist' account of international law because of this dependence and, arguably, incoherence: see e.g. Hart (1994) Ch. 10, who argues that international law is simply a set of rules which creates obligations, rejecting the idea that *a priori* norms such as sovereignty operate as a rule of recognition or as justification for those rules.

projecting the view of the international system as an arena of conflict between individualistic state actors.

This Chapter argues that the approach offered by international positivism is fundamentally flawed. It examines developments in international law that implicitly reject the conception popularised by international legal positivism, and point to the emergence of new international norms and a breakdown of the strict formal distinction between international and national law. The critiques of positivist international law in this Chapter thus undermine the theoretical foundations of contemporary private international law, and suggest a new foundation for rethinking the relationship between public and private international law.

This Chapter also highlights a broader critique of these developments in international law, which questions the claims of universalism in international legal theory. Such a critique points to an opposition between international law's universalising tendencies and other national and international norms and values, which suggests a more radical transformation and expansion of the scope and function of international law. It proposes international law which does not attempt to establish universal norms in tension with national law, but attempts, through 'secondary' legal norms, to mediate and structure that tension, as part of the definition of the constitutional architecture of an international order. The beginning of this reformulation may be observed in the emergence of ideas of subsidiarity and international federalism as international norms. This development suggests the foundations of a new approach to private international law based on ideas of international constitutional ordering.

3.2 Critiques of positivism

3.2.1. The myth of sovereignty

Although positivist international law theory may encompass a range of traditions and beliefs, it entails a core commitment to certain essential ideas. States are viewed as the key actors in the formation of international law, and are independent, free and equal. The positivist idea of state sovereignty implies that states possess some unrestricted freedoms as an *a priori* consequence of their statehood. This freedom is said to exist 'prior' to law; thus, positivists (and their descendents, 'realist' international relations scholars) argue that international law can only exist where it is an expression of state sovereign will. Consequentially, positivism emphasises individual state will as the source of legal principles and their authority. Also consequentially, as explored in Chapter 2, because it

views international law as the product of the interactions between states, positivism demands a strong conceptual boundary between the international and domestic domains, maintaining the idea that states are featureless 'atoms' when viewed from the perspective of international law. Although private law (and private international law) have thus been excluded from the domain of international law, positivist international law has itself been constructed on the model of a higher form of private law, formed between free and equal individual states rather than citizens.[2] These ideas are all reflections and consequences of the underlying commitment to a norm of 'state sovereignty' in international law.

This idea of *a priori* or 'absolute' sovereignty is a myth which has never been meaningful outside the pages of the theorist.[3] Its origin and limitations are perhaps each best explained as an overstretch of the analogy between the individual and the state. An assertion of sovereignty necessarily involves a claim that the power of a state (or individual) is not limited by external influences.[4] States (and individuals) are, however, always limited by their own capacities and their environment, and in particular by the capacities of other states. It is only coherent to imagine a state as possessing unrestricted power in the abstraction and isolation of philosophical hypothesis.

> The existence of a number of sovereignties side by side places limits on the freedom of each State to act as if the others did not exist. These limits define an objective structural framework within which sovereignty must necessarily exist.[5]

[2] The role of private law analogies is most famously explored in Lauterpacht (1927). This is not to suggest that Lauterpacht was purely a traditional positivist – he was pivotal in the introduction of human rights in international law: see 3.3.1 below; see also Lauterpacht (1933); Koskenniemi (2006) pp. 143ff.

[3] Thus, 'the notion of absolute sovereignty is a fallacy' – Sadat (2005) p. 335; Henkin (1995) similarly opposes 'the "shibboleth" of sovereignty'; and sovereignty 'has always been a term in search of a definition' which has 'become so powerful and so emotive as a political slogan that it has been rendered meaningless in the international law discourse' – Radon (2004) pp. 195–6; see also Jackson (2006) pp. 62ff; Krasner (1999); Bartelson (1995).

[4] It is important to distinguish between the sovereignty of a state (viewed in international legal theory as absolute) and the sovereignty of a government (which is viewed, as a matter of domestic law, as subject to limitations such as those of a posited social contract). Note, for example, the rule that constitutional limits on a government do not generally affect the effectiveness of its actions in international law: see Art. 46 of the VCLT. However, this distinction between internal and external aspects of sovereignty is increasingly problematic: it has been claimed that 'the international community has become a party to the social contract between citizens and their government' – Stacy (2003) p. 2034.

[5] *Legality of the Threat or Use of Nuclear Weapons (WHO Case)*, Advisory Opinion [1996] ICJ Reports 226 at 393 (Separate Opinion of Judge Shahabuddeen).

If states only wished to act within discrete limits such as territorial boundaries, they might do so (absolutely) without coming into conflict. But such a concept of a purely isolated, individualistic entity denies the reality of the ever increasing interdependence of states.[6] Such interdependence is not merely the product of modern globalisation, but an essential aspect of the identity of states. Just as individual people (outside of some economic theories) are not independent rational actors, but construct their identities through mutually constitutive relations, states are themselves constructed through their interactions of 'mutual recognition'.[7] When states claim overlapping domains of authority, they create the possibility of regulatory inconsistency,[8] and it becomes necessary to balance the 'positive' freedom of the acting state (to act) and the 'negative' freedom (from interference) of the other state.[9]

Positivism asserts an 'absolute' sovereignty, but fails to recognise that sovereignty, like freedom, is not defined *a priori*, but refers to a contested space. The priority of sovereignty over law which is created under a positivist perspective also ignores the capacity of law to enlarge the potential activity space for individuals and states by providing for cooperative fulfilment of complex objectives. The positivist concept of absolute sovereignty has long been no more than a myth, or 'political emotion',[10] and it is increasingly ineffective and descriptively inapposite in a globalising world.

[6] Teson (1989); Jenks (1959) p. 87.

[7] See 1.3.3 above and 3.5.4 below. One obvious illustration of this is in the role of 'recognition' in the formation of states: see e.g. Brownlie (2008) Ch. 5.

[8] This possibility of regulatory conflict is precisely the problem which gives rise to private international law: see further Chapter 1.

[9] See Koskenniemi (2006) pp. 240ff; Worth (2004) pp. 259ff; Besson (2004); Koskenniemi (1991) pp. 38ff; Jackson (1990). This reasoning draws on the distinction between negative and positive constructions of liberty developed most famously by Berlin (1969). An interpretation of sovereignty which emphasised freedom *from* interference would imply strict limits on the scope of state action, perhaps a strongly territorial conception of state power. It is sometimes suggested that this negative conception is closely associated with the US constitutional tradition – applied internationally, this suggests sovereignty as a shield against the application of international law (mirroring the idea of individual rights as limitations on government). A contrast is sometimes drawn with a more positive conception of rights in the European legal tradition – applied internationally, this suggests sovereignty as a guarantee of certain capacities of the state (mirroring the idea of individual rights as positive duties of government).

[10] Radon (2004); see also Worth (2004) pp. 260–1.

3.2.2. *Explanatory critique*

A further criticism of positivism questions its effectiveness as a descriptive or explanatory theory, its ability to account for the phenomena of international law. Positivist international law is usually considered to be at its strongest in accounting for legal arrangements which are analogous to private law relations, such as treaties, and indeed emphasises them as a source of international law.[11] But the private law analogies on which positivist international law depends are suspect. It is simply not clear when, if ever, rules developed for natural persons ought to apply to states,[12] and a treaty cannot provide a satisfactory (non-recursive) explanation of what norms ought to be applied in the interpretation and application of treaties themselves.[13] The VCLT correctly identifies a treaty as 'an international agreement … *governed* by international law'[14] – not only constitutive of international law. The principle of *pacta sunt servanda*[15] itself is widely recognised to have a special status as a norm (that it is, or is derived from, a *Grundnorm*[16]) which cannot and need not be justified as a rule of positive law.

The explanatory limitations of a positivist approach are even more apparent in those areas which provide a direct challenge to the central role it gives to state will in the formation of law.[17] The development of the idea of peremptory or *jus cogens* norms[18] and the associated idea of universal jurisdiction, for example, are difficult to reconcile with individual states retaining absolute sovereignty.[19] More broadly, customary international law continues to have an important function in the international legal order, but has never been comfortably viewed as the product of the will of states.[20] The positivist approach stretches the

[11] See further 2.3 above. [12] Teson (1989) p. 562.
[13] See e.g. Koskenniemi (1991) pp. 19ff. [14] Article 2(1)(a), emphasis added.
[15] A principle expressed, somewhat unhelpfully, in a treaty – see the VCLT Art. 26: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.
[16] The term used by Kelsen to denote the basic norm from which other norms are derived or get their normative force: see Kelsen (1934). The adaptation of Kelsen's ideas of normative structure does not require endorsing his articulation of the content of the *Grundnorm* itself.
[17] See generally Tomuschat (1993); Wortley (1954) pp. 251ff.
[18] See 3.3.1 below. [19] See further 5.3.1 below.
[20] See e.g. Koskenniemi (2006) pp. 325ff, 388ff; Koskenniemi (1991) pp. 14ff. This incompatibility has led some to argue instead for the rejection of customary international law, or to doubt its meaningfulness: see Roberts (2001); Kelly (2000); Goldsmith and Posner (2000).

private law analogy by adopting the legal fiction of viewing state practice as a sort of collective 'implied consent' to the law, like an informal, unwritten treaty. However, there are many features of customary international law which do not fit comfortably with such an account – for example, the way it is generally viewed as automatically binding on new states,[21] the problem of whether a rule should bind a state which is a 'persistent objector',[22] and the differential role given to the practice of 'specially affected states'.[23] Modern customary international law also seems to emerge more quickly, with greater focus on the role of international institutions and less reliance on individual state practice, leading to suggestions of the emergence of 'instant customary international law'.[24] This quasi-legislative conception is difficult to accommodate within the traditional positivist framework of the sovereign independence of states.

3.2.3. Normative critique

The idea of the sovereign equality of states is, as discussed above, integral to the positivist approach. Recognition as a 'sovereign' is the mechanism through which international law has traditionally excluded or included prospective 'states' as fully-fledged members of the international community.[25] The positivist commitment to the *a priori* formal equality of sovereigns offers a degree of protection for weaker states. However, it may also arguably serve to discourage deeper critical attention, and thus hinder any examination beyond formal equality to address the causes and effects of the material inequalities which exist between states.[26]

[21] Mendelson (1998) p. 259.

[22] Mendelson (1998) p. 227; Charney (1985); Stein (1985).

[23] See *North Sea Continental Shelf (Denmark* v. *Germany* and *Netherlands* v. *Germany)* [1969] ICJ Reports 3 at [73]; Mendelson (1998) p. 219.

[24] See Crawford (2002); *North Sea Continental Shelf (Denmark* v. *Germany* and *Netherlands* v. *Germany)* [1969] ICJ Reports 3 at [61ff]; Sadat (2005) p. 334; Mendelson (1998) p. 370; Cheng (1965).

[25] Kingsbury (1998) pp. 606ff.

[26] See the VCLT Arts. 51 and 52; Mills (2008a). It was suggested in negotiations that the VCLT should include 'economic or political pressure' in the definition of coercion – this was withdrawn, although such forms of pressure were 'condemned' by the conference which drafted the convention. Similarly, communist states traditionally held that international law concluded other than on the basis of sovereign equality was invalid. See Kingsbury (1998) p. 602, p. 615 (pointing out that economic coercion is not prohibited and usually has no effect on the validity of a treaty). Note the limited interpretation of coercion in *Fisheries Jurisdiction (FRG* v. *Iceland)* [1974] ICJ Reports 3.

The positivist approach to international law postulates sovereignty as existing prior to law, operating as a limitation on laws restricting state activity. It thus celebrates the positive conception of state freedom to act.[27] Because the positivist approach to international law is premised on the belief that states are free and equal, it underplays real differences in their capacities and the constraints of their environments, which might be viewed as qualifications on state 'free will'. Positivist formalism risks international law being shaped too closely by the material strengths and weaknesses of states, becoming 'an endorsement of current practice camouflaged by the supposedly self-enforcing sanction of conscience'.[28]

Another dimension to this critique also follows from the central commitment of positivist international law to state sovereignty, its emphasis on international law as a product of state will. The denial of any authority above the state leads to the denial of any international legal 'system' which operates outside the will of any state – the view of public international law as analogous to private law. Some have argued that this approach not only assumes but also promotes the non-existence of an international 'order'. According to these critics, positivism risks being a theory of international disorder, the embodiment of an international Hobbesian state of nature. In a triumph of self-fulfilment, it creates the very situation which was purported to justify Hobbes' theory of the necessity of absolute sovereignty in government, but without transferring ideas of governance to the international level.[29] Instead of the international society postulated by natural law theorists, positivism posits, and facilitates, the international anarchy underlying realist international relations.[30] According to positivism, only the will of each state may constitute a limit on the will of each other state. The real determinant of the scope of a state's legal authority, in this approach, is not a question of law, but a question of power, a question of force of will – and, in extreme cases, of force.

The normative criticism which is made of positivist international law, then, is that the private law analogy it constructs serves too easily to act as a justification for the exercise of power by individual states. By

[27] Hart (1994) argues (at p. 223) that sovereignty is negative in conception – a sovereign may only exist in the absence of external controls over it. However, this is not the 'positivist' meaning of sovereignty, but rather the word 'sovereign' used to mean the attributes which a state possesses under international law. This idea is explored further in 3.3.3 below.

[28] Hochstrasser (2000) p. 181. [29] Radon (2004) p. 197; Pound (1939).

[30] On the influence of this idea on private international law, see Brilmayer (1995) pp. 41ff.

emphasising the role of will in the production of law, it risks validating power as law. In its unquestioning subservience to state will, positivism was unable to recognise the pathology of will, the madness of the fascist state.[31] Its critics argue that the period of the dominance of positivism, from the late nineteenth century to the mid-twentieth, left the international system open to a 'ready subservience to power',[32] and ultimately and tragically to the expression of power through armed force.[33]

3.3 Beyond positivism

International law has undergone a remarkable, perhaps revolutionary, transformation since the Second World War. Although much of this development has been in the form of a dramatic expansion in treaty law, there have been other, arguably more fundamental, changes in the development of international law which are more difficult for the positivist approach to accommodate or explain. As explored in Chapter 2, in the nineteenth century, under the influence of positivism, international law was conceived as consisting only of the formal relations between sovereign states. This idea justified and promoted the successful universalisation of international law outside its European origins. Following this success, however, international law has again expanded its substantive scope of application, and the positivist conception of international law no longer accounts for much of its content. This invites a further type of critique, drawing attention to modern versions of other traditional theories which more readily account for the changes which have occurred and which challenge the foundations of a positivist approach.

3.3.1. New natural law

Many of the developments in international law which took place immediately after the Second World War can be interpreted as an attempt to remedy the failures of positivist international law – that it constituted an anarchic, purely private conception of the international order, which left

[31] Allott (2002) pp. 121ff. Rommen argues that totalitarianism is the inevitable consequence of the adoption of positivism: see Rommen (1936) p. 152.

[32] Neff (2006) p. 41.

[33] Thus, Grossman and Bradlow (1993) argue (at p. 2) that 'The Second World War provided members of the international community with a powerful and tragic lesson in the dangers inherent in an international legal order based upon a notion of absolute sovereignty'; see e.g. Jessup (1948).

the international system, and individuals, too vulnerable to the exercise of the sovereign will of powerful states. Positivist international law had nothing to say about the treatment by a state of its own people – it was silent even in the face of the Holocaust. Part of the reaction against the impotence of positivism was a greater assertion of universalism, for example, through the emergence of fundamental international norms, particularly human rights.[34]

The status of human rights norms is often contested. Within a positivist framework, they may be viewed as the product of treaties or customary international law. Treaties may, however, also be viewed as merely declaratory[35] (not constitutive) of international human rights. Increasingly there is even the assertion of a right or perhaps a responsibility of intervention in states to ensure the protection of human rights.[36] The evolution of human rights norms since the Second World War suggests the emergence of fundamentally distinct elements of international law which are incompatible with the deference to state sovereignty under a positivist perspective.[37] Individual rights had traditionally been characterised through the framework of diplomatic protection as being rights created by and for states *in respect of* individuals. Increasingly, individuals have instead been viewed as possessing a range of rights, not limited to human rights, directly under international law.[38] The

[34] Some argue that individual economic rights are also fundamental elements of international law – see e.g. McGinnis (1997); but see also Abbott (1997). On the impact of international economic law on private international law, see further 5.5 below.

[35] Thus, the Universal *Declaration* of Human Rights.

[36] The possible impact of this idea of the primacy of human rights norms is explored in Stacy (2003); Larson (2001). See further *The Responsibility to Protect* (2001), which carefully avoids the language of a legal duty; note the narrow interpretation of this doctrine adopted by states in the *World Summit Outcome Document* (2005) [138–9]. The emphasis on states possessing legal duties under international law is an old idea: see Symposium, 'The International Law of the Future' (1944); Hudson (1944); Hudson (1944a).

[37] But note a distinct Chinese approach which traditionally 'located the meaning of human beings from their social being in an intricate web of social relationships rather than from their atomized autonomy', placing the sovereignty of the state prior to the rights of the individual, at least partly on the basis that state sovereignty is a necessary requirement for a state to provide effective human rights protection: Zhaojie (2001) p. 324. On the other hand, while sovereignty remains an inviolable cornerstone of the Chinese approach, the conception of sovereignty itself is not the absolute conception of Western tradition, but a relative concept that 'is meaningful only in terms of mutuality, that is, the sovereignty of one state is restricted by that of all others' – Zhaojie (2001) p. 322; see also Feinerman (1989).

[38] See *Avena and Other Mexican Nationals (Mexico* v. *United States of America)* [2004] ICJ Reports 12; *LaGrand (Germany* v. *United States of America)* [2001] ICJ Reports 466;

complementary development of international criminal law has equally established international obligations binding directly on individuals.[39] Together, these developments have constituted a revolutionary recognition of individuals as international legal agents, new subjects of international law, which rejects the prioritisation of the state under positivism.

Some special norms in international law, including some human rights norms, are described as being *jus cogens*.[40] The term *jus cogens* derives from the Roman law expression describing public norms which prevail over private contracts,[41] underlining the fact that these norms are analogous to the public policy which can intervene in contemporary private relations as part of domestic legal systems.[42] This analogy with the intervention of public norms in private law is also reflected in the recognition of peremptory norms in the VCLT.[43] There is much debate over the set of norms which should be considered to possess this special character, but the existence and effect of this category of 'higher' norms is now well established.[44] Given that it is an essential feature of the character of these norms that they prevail over external acts of state will, for example, inconsistent treaties, it is not easy to accommodate these developments within the positivist approach. Instead, these norms have a public character, as the contentious common values or public policy of a rediscovered international community of states.

The essence of a natural law theory is its appeal to a norm or principle which it is claimed is above state will, because it is somehow universal.

Occidental Exploration & Production Company v. *Republic of Ecuador* [2005] EWCA Civ 1116 at [17ff]; McCorquodale (2006). The existence of rights for individuals under international law has long been contested: see *Jurisdiction of the Courts of Danzig* (1928) PCIJ Ser B, No. 15; Parlett (2008).

[39] Most prominently under the *Rome Statute of the International Criminal Court* (1998).

[40] On the development of this idea see e.g. *ILC Fragmentation Report* (2006) [361ff]; Shelton (2006); Tomuschat and Thouvenin (2006); Orakhelashvili (2006); Brownlie (2008) pp. 510ff; Shaw (2008) pp. 123ff; Helfer (2003) p. 214; Simma and Alston (1992); Danilenko (1991); Mann (1990) pp. 84ff; Weil (1983).

[41] The origin of the expression *jus cogens* appears to be the Roman law maxim attributed to Papinian – 'jus cogens [or jus publicum] privatorum pactis mutari non potest'; see Kalensky (1974) pp. 48ff; but see *ILC Fragmentation Report* (2006) [361].

[42] The analogy is with the 'internal' public policy of a state which invalidates contracts governed by the law of that state, not the private international law conception of public policy which excludes the application of foreign law: see further 5.3.5 below.

[43] The VCLT provides that a treaty is void if it conflicts with a 'peremptory norm of general international law' at the time it is made (Art. 53), or if such a norm subsequently arises (Art. 64), rules which are analogous to the common law rules dealing with the initial and supervening illegality of contracts.

[44] See e.g. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Rwanda)* (2006) ICJ (3 February 2006) at [64].

Although, as explored in Chapter 2, the claims of universality which have been at the heart of natural law theory have historically tended to be derived from religion, more recently they typically involve assertions concerning universal features of human nature or society. In either case, the essential point is that these norms have a universal quality because they derive their force from an external source of authority (and of limits on authority) which exists outside the sovereign will of individual states. The widespread recognition of human rights norms constitutes precisely such a limitation on state sovereignty, in their recognition of a superior 'sovereignty of the individual'.[45] Further limitations on state sovereignty are clearly acknowledged in the form of norms of *jus cogens*. This suggests a return to natural law modes of reasoning, incompatible with the approach of international positivism.

3.3.2. New historicism

The historicist approach to international law views it not as the product of *a priori* principles or as the product of the spontaneous exercise of will by states, but as the embodiment of history and culture, as the development of law is considered to correspond to the development of society according to historical principles.[46] This approach has been (perhaps unknowingly) revived in relation to international law in recent years, through a new historicism of both institutions and theory.

A number of important international institutions were established following the First World War, particularly through the League of Nations and the creation of the PCIJ. These were at least partially modelled on institutions of liberal states – an approach sometimes described as Wilsonian liberalism. They did not, however, purport to restrict state sovereignty, only to facilitate its constructive and non-violent expression. Arguably, the absence of restrictions on state sovereignty explains why the dispute settlement procedures of the League of Nations, while supposedly mandatory and supported by economic sanctions, were in practice relatively dormant.[47]

[45] Annan (1999); see further 5.4 and 5.6 below. This idea has a long history; Lauterpacht (1950) argued (at p. 70) that 'International law, which has excelled in punctilious insistence on the respect owed by one sovereign State to another, henceforth acknowledges the sovereignty of man'; see also Teson (1989); Remec (1960); Lauterpacht (1948); Lauterpacht (1947).

[46] See 2.5 above. [47] Habermas (2006) pp. 154ff; Neff (2006) pp. 46ff.

After the Second World War, however, more radical changes were introduced. In addition to the establishment of constraints on state sovereignty through the recognition of *jus cogens* norms discussed above, the institutional development of the United Nations has also provided a direct challenge to the traditional conception of state sovereignty.[48] One measure of the impact of these institutions is the way in which they have been recognised as independent legal actors, with the capacity for an independent 'will' and agenda, in international legal ordering.[49] A broader significance lies in the way they attempt to realise the idea that international law should move beyond its positivist 'private' character to develop a system of public law, following the model of national systems of governance – with (very roughly) a parliament (the General Assembly), an executive (the Security Council) and a judiciary (the ICJ).[50] The historicist claim is that these institutional developments represent 'progress' in the establishment of an international legal system, echoing the progress of national systems towards more 'civilised' forms of social and legal order.

These analogies are, of course, imperfect. The General Assembly has some of the form but little of the power of a parliament. The ICJ is troubled by elements of 'representation' which sit uneasily with its judicial function,[51] and limited to a more arbitral function by its dependence on state consent for its jurisdiction. Most significantly, the role and function of the Security Council is fundamentally problematic, because of an ambiguity in the origin of its lawmaking authority, which demonstrates the influence of a different idea of historicism in international law. The election of members of the Security Council embodies an idea of representative government. However, the powers of the Permanent Members, particularly the veto power,[52] are indicative of a different

[48] See Kingsbury (1998) pp. 603ff.

[49] Perhaps the earliest such recognition was in *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Reports 174; see further Alvarez (2005).

[50] Allott (2002) has (at p. 59) criticised this 'naïve constitutional extrapolation'; see also Macdonald (1999). The development of global administrative law, discussed further in 3.4.2 and 5.4.1 below, may be viewed as part of the same phenomenon.

[51] Note the requirement for 'representativeness' of the judges of the ICJ (Art. 9 of the *Statute of the International Court of Justice 1945* provides that 'in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured') and the role of *ad hoc* judges as representatives of the parties (Art. 31); see Mosler (1985).

[52] The institutional inequality in the Security Council is, as Kingsbury points out, just one example of the relatively common inequality between states established in intergovernmental organisations: see Kingsbury (1998) p. 611.

source of authority, and the Security Council exercises quasi-legislative and perhaps quasi-judicial authority.[53] A compelling historical comparison may be made with the system of great power management established following the Napoleonic wars.[54] Like the Concert of Europe, the members of the Security Council assert legal authority not merely because of a claim of *de facto* superiority, but on the basis of a belief in moral or historical superiority. Their greater legal powers are taken to be representative or indicative of their greater (historical) 'development' as states, in much the same way that the members of the Concert of Europe claimed to represent 'civilisation'.[55]

The idea of a hierarchy in the legal development of states has recently been influential in the increasing recognition of the importance of democracy as an international norm, and in the way that representativeness in governance allows individuals within the state to 'self-determine' through the political system.[56] Many have argued that this idea (which may be expressed as an individual right, or as a duty of the state toward 'responsible' or 'legitimate' governance[57]) should be given the status of an international norm, expanding the realm of human rights into more controversial political territory. This suggests a new idea of sovereignty, as an external projection of the consistency of the state with these international norms – also justifying intervention in those states that fail to meet minimum standards, for example, through violations of human rights norms. Some scholars view this as an incursion into the 'hard won prize' of the state sovereignty of the developing world,[58] a resurrection of the exclusionary strategies which justified differential

[53] See e.g. Marschik (2005); Happold (2003); Szasz (2002); Koskenniemi (1995); Harper (1994); Schachter (1964).

[54] See 2.3.2 above.

[55] An idea which is echoed in the reference to 'civilised nations' in Art. 38 of the *Statute of the International Court of Justice 1945*.

[56] The extensive literature includes e.g. Wheatley (2006); Symposium, 'Globalization and Governance: The Prospects for Democracy' (2003); Wouters (2003); Fox and Roth (2000); Marks (2000); Murphy (1999); Simpson (1996); McCorquodale (1994); Crawford (1993); Franck (1992); *Reference re Secession of Quebec* [1998] 2 SCR 217; 37 ILM 1340 (Supreme Court of Canada); note also the ICCPR, Art. 1(1).

[57] Buchanan (2004); Stacy (2003) p. 2030.

[58] Zhaojie (2001) argues (at p. 322) that 'state sovereignty is a hard won prize in [the] long struggle to shake off the yoke of colonial domination and oppression. "We are just in a position to exercise sovereignty, and you are trying to eradicate it, now," a typical Third World critic goes.'; see also Clapham (1999).

treatment in the age of colonialism, or an attempt 'to replace absolute sovereigns with absolute sovereigns in the form of institutions'.[59]

Where previously this section discussed the idea that institutional developments in the international system mirrored the 'progress' of nations towards liberal democracy, the formal equality of states mirroring the equality of citizens, the distinct but also historicist idea being examined here is that the varying degrees of progress exhibited by states justify an *inequality* in their legal status, their authority, in the international sphere. It is implicitly supported by a hierarchical view of particular domestic ideas and institutions which not necessarily, but frequently, sees liberal democracy as the final point of all social development – the 'end of history'.[60]

The tension in the different functions of the Security Council may be viewed as a tension between two theories of international liberalism. In one, the Security Council should become increasingly egalitarian and representative, to increase its resemblance to the government of a liberal democracy. In the other, the Security Council should give greater powers to those states whose internal (liberal democratic) institutional arrangements place them higher in the hierarchy of the development of states. Recent proposals for reform of the Security Council arguably attempt to transition the institution away from this role, emphasising the more representative aspects of its power and functions.[61] Proponents of these changes frequently claim that this move would be a progressive historical development, towards a more 'mature' or 'advanced' international system – an argument which is another example of an institutional historicism.

3.3.3. Sovereignty reconsidered

The critiques analysed above demonstrate that the positivist approach to international law, upon which contemporary theories of private international law are founded, cannot be accepted as providing a successful descriptive or normative framework for the contemporary international legal system. The positivist conception of international law as purely the product of relations between *a priori* state sovereigns is unable to account for the widespread recognition of fundamental individual rights, which are themselves viewed as prior to the state. The formalist positivist

[59] Rajagopal (2000); see generally Symposium, 'International Law and the Developing World: A Millennial Analysis' (2000).

[60] Fukuyama (1992); see further Marks (2000a).

[61] See e.g. *A More Secure World* (2004).

assumption of sovereign equality of states fails to recognise the incursion of international law within the state, reflected in the development of institutional and normative hierarchies.

Much of the weakness of the positivist approach is hidden through reliance on the ambiguous concept of sovereignty. It is too much to say that the concept of sovereignty is itself meaningless, even that it is 'a mockery, not a fulfilment, of the deepest aspirations of humanity'.[62] The term sovereignty retains a symbolic significance, representative of international law's respect for the diverse values of national communities.[63] However, the positivist conception of sovereignty as an *a priori* value, above international law, fails as an explanatory theory and has objectionable normative consequences – it has fairly been described as 'the quicksand on which the foundations of traditional international law are built'.[64]

If the concept of 'sovereignty' is to be retained it must be radically redefined, drawing on different perspectives and intellectual traditions. It may still be useful to speak of 'sovereignty', not as an attribute existing prior to law, but as a set of attributes of the legal construct that is the state, existing as a consequence of law – 'the general legal competence of states'.[65] As already discussed, the idea of sovereignty is best viewed not as representing a fixed value, but a contested space, a space in which the sovereignty of the individual must also be given meaning. There is an increasingly popular view that the term 'sovereignty' should be reinvented to mean those attributes which are given to a state under international law – descriptive of the scope of state freedom.[66] Sovereignty, in this conception, does not define, but is defined by, the *legal* powers of a state within an international community or society of states. It reflects the vertical division of regulatory authority between the international and national levels – a topic which will now be examined in more detail.

3.4 Challenges to the international/national legal divide

As explored in Chapter 2, positivist international legal theory necessitated the restriction of international law to the external relations of

[62] Jenks (1969) p. 134. [63] Roth (2004); Radon (2004). [64] Jessup (1948) pp. 2, 40.

[65] Brownlie (2008) p. 299; see further e.g. Koskenniemi (2006) pp. 224ff, 246ff; MacCormick (1999) Ch. 8; Koskenniemi (1991) p. 39.

[66] Thus, 'we can only know which states are sovereign, and what the extent of their sovereignty is, when we know what the rules are' – Hart (1994) p. 223; see Jackson (2006) pp. 72ff; Cohan (2006); Roth (2004); Kingsbury (1998) pp. 617ff; Tomuschat (1993).

sovereign states. It thus required the exclusion of much of the traditional 'law of nations' from this newly conceived international law. This extended to a new self-limiting theory of private international law, that is, the dominant conception of private international law as necessarily belonging to the domain of internal or domestic law, of private concerns. Questioning this conception of private international law therefore also requires questioning this compartmentalisation, the formal division between international and national law.

3.4.1. Explanatory critique

The debate about the relationship between international and national law is traditionally viewed through one of two opposing perspectives. 'Monists' have argued, idealistically, that international and national law are necessarily part of a single system of law. This ignores the reality that states, at least to some extent, choose how to mediate the interface between the international and national, the specific effect that international law is given in the domestic sphere. 'Dualists', on the other hand, have argued, abstractly, that international and national law operate in separate domains that do not overlap. This ignores the reality that the boundary between the international and the national is increasingly porous, and rules of national and international law are mutually influential in complex ways.[67]

This sterile dichotomy offers contrasting conceptions, each of which lacks convincing foundations, of the logical or *necessary* relationship between international and national law. The *actual* relationship between international and national law can also be considered in practice, as a real phenomenon. International law is not only a group of formal rules or structures, but a set of practices conducted by a wide variety of participants.[68] The reality is that international law is increasingly pervasive in areas traditionally considered part of the realm of state regulation, even areas considered matters for private regulation. The relationship between the international and national is more complex than one of dominance or hierarchy. The theory and practice of international law are necessarily carried out across the fictitious borders and hierarchies

[67] See e.g. Slaughter and Burke-White (2006); Mills and Joyce (2006); Reed (2003); Schachter (1998).

[68] See e.g. Berman (2007); Koh (1996a); Jennings (1985) p. 188; McDougal and Lasswell (1959).

of legal formalism, including the boundary between the international and national.

i) Legal instruments and arguments

An international legal instrument frequently, perhaps inevitably, embodies a degree of ambiguity, sometimes intentionally and sometimes unintentionally.[69] This is particularly problematic in the absence of an international institution to provide binding interpretations. The ambiguity and absence of institutionalisation may be simply the product of failed negotiations. In some contexts, however, where the rules require domestic implementation, ambiguity can actually be a mechanism which enables national courts to protect national interest and diversity.[70] It may represent a judgment by the parties to the treaty that national courts are most appropriately placed to interpret or implement it, suggesting deference to domestic norms and institutions. The fact that international instruments may thus, like all legal instruments, be the locus of diverging meanings does not merely inform us that public international law may be 'less international' than its form sometimes indicates. It also reminds us of the general point that the act of interpreting and applying law involves an engagement with a particular legal culture and tradition – reflected in the idea that there are different 'traditions' of international law.[71] International lawyers, who are almost always also national lawyers trained in a particular national system, inevitably adapt the ideas and structures of their national background to the problems they face at the international level, both in developing and interpreting the law,[72] whether based on comparative

[69] Allott (2002) suggests (at p. 305) that 'A treaty is a disagreement reduced to writing'; McDougal and Lasswell (1959) speak (at pp. 4–5) of the 'false myth that universal words imply universal deeds'; Helfer (2003) argues (at p. 196) that 'governments often leave agreements imprecise or incomplete, to be clarified and augmented by later state practice'; see also Pinto (1996). Note the argument by Kennedy (2005) at p. 376 that indeterminacy is not only a quality inherent in a rule, but is a product of the rule and the 'legal work' of the interpreter.

[70] Differences in interpretation may also perform an important 'signalling' function: Whitehead (2006). See further 3.5.3 below.

[71] *ILC Fragmentation Report* (2006) [195ff]; Symposium, 'International Law's American Roots' (2006); Orakhelashvili (2006a); Janis (2004); Cohen (2003); Crawford (2002b); Schreuer (1995).

[72] See generally Lauterpacht (1927). Thus, 'we common lawyers are likely to transpose our domestic legal routine and perceptions to the international stage' – Janis (1989) p. 549, part of a panel discussion in Symposium, 'The Challenge of Universality' (1989), commenting on Jenks (1959). Other papers focus on identifying the impact of different national law traditions, including also civil, Soviet and Chinese law, on the universality of norms of international law. See also Kennedy (2000) p. 108; Mosler (1985).

study or analogy.[73] The language of international law is objective, but this has long been critically dissected as a set of 'rhetorical strategies' obscuring underlying policy choices.[74] While international law may be universal in aspiration, it is a universality which is not easily, and perhaps not ever, attainable or even identifiable.

National laws are archetypically viewed as purely representations of the norms of a particular legal order, and the role of national courts has been traditionally neglected in studies of international law. Yet this may be as misleading as the aspiration of universality in international norms. Even in states which do not give direct effect to international law domestically, national legislation or case law may be drafted or interpreted drawing on international norms,[75] or applying a comparative method which draws heavily on foreign and international sources. From a functional perspective, national law is frequently 'international' in the sense that it is engaged in the regulation of international problems.[76] Networks of national actors (governmental or non-governmental) may interact directly with each other and with international tribunals to establish an international order.[77] Judges of

[73] Jenks (1959) p. 91 – 'The rule of law among nations and the rule of law within nations are mutually dependent on each other; and the progress of both on a world basis is dependent on a universality of outlook and appeal which draws nourishment from a wide range of cultures and legal traditions'; calling (at p. 92) for 'a marriage of international and comparative law'; see further Jenks (1958). For an alternative view, that international norms should be built on 'techniques of reciprocity' rather than commonality of values, see Cohen (1959); note the role of reciprocity in private international law discussed in 1.3.3 above.

[74] Koskenniemi (2006); Kennedy (1987); Allott (1971). It is thus argued that, far from being a mechanism which establishes universal claims, international law theory is a style of thinking and acting which operates in conjunction and in competition with other styles, with 'a stockpile of arguments for the hyperbolic defence of modest reforms': Kennedy (2000) p. 110.

[75] A common rule is that domestic law is presumed, where possible, to be consistent with international law: see e.g. *JH Rayner (Mincing Lane) Ltd* v. *Department of Trade and Industry* [1990] 2 AC 418; *The Charming Betsy* (1804) 6 US 64; Brownlie (2008) pp. 45ff; Bradley (1998); Oppenheim (1992) pp. 61ff; Steinhardt (1990); Mann (1986) pp. 87ff.

[76] Franck (1962) argues (at p. 139) that 'International law is, of course, what international courts do', but also part of what national courts do; see further Cassese (1990); Chayes, Ehrlich and Lowenfeld (1968); but note the criticisms of functionalist perspectives in Allott (1971); Higgins (1968). Functionalism may also be the form for arguments inspired more by natural law perspectives. For example, it has been argued that the explanation for the normative content of the law comes not from its substance, but from its legitimacy, and that there are objectively definable criteria for measuring the legitimacy of the social practice, the process, of law. See further Franck (1995); Franck (1990).

[77] See generally Bederman (2007); Slaughter and Zaring (2006); Slaughter (2004); Martinez (2003).

national courts may, for example, through direct judicial dialogue and cooperation or through indirect coordination using comparative legal methods, develop new forms of international law, which are complementary to or possibly even in competition with other international law or institutions.[78] The decisions of national courts may not merely be domestic acts of governmental institutions, but state practice for the purposes of the development of rules of international customary law, and may constitute relevant state acts for the question of state compliance with international legal obligations. This idea is evident, for example, in the development of public international law rules of state immunity – international rules which limit the jurisdiction of national courts, developed largely by national courts themselves.[79]

When engaging with international problems, national courts must reconcile the reality of global integration and the impact of foreign states and their law with the claims of local sources of authority – a phenomenon which Scelle described as their *dédoublement fonctionnel*.[80] In doing so they develop international and national rules which define, both externally and reflexively, the scope of national regulatory authority – rules of public and private international law. This analysis is explored further in Chapter 5.

ii) The public/private distinction

The development in the nineteenth century of the national and international distinction between public and private law was examined in Chapter 2. At the national level, this served to limit the function of law in fields such as family law or the law of contract to the definition and protection of a private 'unregulated' space. At the international level, this distinction defined the limits of the proper concerns of 'public' international law, viewed as operating purely between states. As explored in Chapter 2, private international law, conceived as a part of national private law, was automatically excluded from its traditional unity with public international law as part of a broader law of nations.

The separation of public and private law has always been theoretically problematic, and has become increasingly difficult to maintain.[81] At the

[78] Krotoszynski (2006); Mills and Stephens (2005); Waters (2005); Badinter and Breyer (2004); Cassese (1990); Franck (1962).

[79] See further 5.3.1 below.

[80] Scelle (1935); see further Koskenniemi (2006) p. 333; Cassese (1990).

[81] See 2.6.1 above; Berman (2005); Childs (2005); McLachlan (2004) p. 599; Zumbansen (2004); Cutler (2003); Wai (2002); Cutler (1997); Schachter (1998) pp. 11ff; Steinhardt (1991); Horwitz (1982). Thus e.g. 'Immigration and international economic activity go hand in hand. The public/private and international/national dichotomies cannot fully

domestic level, critics have long pointed out that where a state attempts to facilitate a space for private relations (whether in family law or commercial matters), that in itself constitutes a form of regulation which may be even more powerful than direct intervention.[82] At the international level, the construction of an ostensibly unregulated space of national sovereign exclusivity equally constitutes a covert system of regulation, constituting a positivist affirmation of the primacy of state will.

The formal exclusion of private matters from the concern of international law also breaks down at a more practical level. It is obvious that private rights may be affected by the resolution of questions of international law. The determination of a national boundary or a question of statehood may, for example, decide the nationality of individuals, their property rights or access to resources, and the validity of contracts entered into between private parties or with states.[83] More recently, there has been an expansion of the domain of international law, reversing its contraction in the nineteenth century, into what was previously considered the sphere of national or private law. The development of direct rights for individuals under international law has already been discussed;[84] in parallel to this recognition of new subjects of international law, there is an expansion in new 'objects' of international legal regulation. International economic law curtails state activity in areas which are designated as belonging to the market, restricting the traditional role of states in attempting to preserve national interests through

describe the way in which these functions and activities bleed into each other' – Stacy (2003) p. 2046.

[82] See e.g. Chimni (2004); Sunstein (1997); Cutler (1997) p. 277; Paul (1988) pp. 153ff.

[83] Wortley (1954) p. 285. See e.g. *La Ninfa (Whitelaw* v. *United States)* (1896) 75 F 313 (concerning the maritime boundary of the US, and following an international arbitral decision); *Willis* v. *First Real Estate and Investment Co.* (1934) 68 F 2d 671 (concerning the boundary between the US and Mexico); *Stafford Allen & Sons, Ltd* v. *Pacific Steam Navigation Company* [1956] 2 All ER 716 (determining that the Panama Canal Zone was part of the US for the purpose of application of US legislation); but note the separate analysis of private rights espoused in *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276*, Advisory Opinion [1971] ICJ Reports 16 at [125]; see also *Hesperides Hotels* v. *Aegean Turkish Holidays Ltd* [1978] 1 QB 205 at 217ff. In *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.* (1971) 331 F Supp 92 the Court refused to determine the maritime boundary of the US for the purposes of resolving a dispute between two oil companies claiming exploration rights, holding that this should be resolved by an international court; see similarly *Buttes Gas & Oil* v. *Hammer (No. 3)* [1982] AC 888. See further Schreuer (1981) pp. 257ff; note also the *Draft Articles on Nationality of Natural Persons in Relation to the Succession of States* prepared by the International Law Commission: see http://untreaty.un.org/ilc/summaries/3_4.htm.

[84] See 3.3.1 above and 5.4.1 below.

market distorting mechanisms (such as tariffs, subsidies, trade quotas and non-trade barriers). States are also increasingly engaged in commercial activities in a variety of forms, both directly and through ownership of or investment in private entities, and the boundary between the public and private sectors is blurred by the variety of mechanisms and degrees of privatisation in modern economies.[85] At the same time, there is an increase in the importance and scope of activities of non-state actors, both with each other and with states, who are themselves growing in number and variety.[86] The development of new forms of transnational business law, served by international commercial arbitration and mirroring the medieval *lex mercatoria*, is only one among many successful international systems of self-regulation, of private ordering.[87] The importance and complexity of the interface between the private and public realms and the national and the international is also reflected in the growth of systems of arbitration and substantive legal principles to deal with investment disputes between states and private parties.[88]

In the face of these developments, the ability of states to protect and regulate an internal domain unilaterally, as envisaged under the positivist model of international law, has declined. The breakdown of the formal distinctions behind positivist international legal theory challenges the exclusion of international norms from the private realm, and the exclusion of private norms from the international. This has been reflected in the expansion of international law into realms traditionally identified as 'private', bringing the acknowledged regulatory domains of public and private international law (back) into increasing intersection.

iii) Fragmentation

It has been widely observed that international law has developed a variety of sub-systems, sometimes viewed as the evolution of additional, specialised rules, and sometimes as a claim for local exceptions from general

[85] For an early analysis see Mann (1957).

[86] See e.g. Alvarez (2006); Charnovitz (2006); Lindblom (2006); Mills and Joyce (2006); Dickinson (2005); Grossman and Bradlow (1993). Mann (1959) had already recognised the potential challenges to the boundary between international and national law posed by these developments.

[87] See e.g. Bederman (2007); Koh (2006); Levit (2005); Bradley (2005); Joerges (2004a); Wiener (1999); Teubner (1997); Dezalay and Garth (1996); Gessner (1996) pp. 24ff; Spanogle (1991).

[88] Most significantly through NAFTA and the International Centre for the Settlement of Investment Disputes (ICSID) (www.worldbank.org/icsid/); see McLachlan (2007); Shany (2006); Franck (2005); Douglas (2003); see further 5.4.1 below.

rules of international law.[89] This phenomenon of the development of different norms and institutional structures within international law is usually referred to as 'fragmentation', the topic of a lengthy report by a Study Group of the International Law Commission.[90] While the significance and effects of this phenomenon are widely contested, it is clear that it represents at least a practical challenge to the further universalist and 'centralised' development of international law, creating problems of consistency and coordination.[91]

The traditional response to such problems in international law is naturally to push for greater universalism; to view fragmentation as a 'crisis' in international law, as some sort of 'flaw' which should be overcome through more law.[92] This fails to appreciate that there may be different views about whether universality is always attainable or desirable.[93] The work of the ILC Study Group on fragmentation started from the premise that 'fragmentation could be seen as a sign of the vitality of international law', and that there are 'advantages in increased diversity of voices and a polycentric system in international law'.[94] The topic of analysis was changed from the originally suggested focus on the 'risks' of fragmentation, with a strongly negative implication, to a more balanced focus on the 'difficulties arising from the diversification and expansion of international law'. The report produced by the ILC Study Group concentrated primarily on techniques to manage fragmentation, a 'toolbox' of rules to resolve conflicting norms, such as the use of rules of

[89] In *Prosecutor* v. *Tadic* (1996) 35 ILM 32 the ICTY suggested (at [11]) that 'In international law, every tribunal is a self-contained system (unless otherwise provided).'

[90] *ILC Fragmentation Report* (2006), examining only substantive, not institutional fragmentation; see also generally Benvenisti and Downs (2007); Koskenniemi (2006a); Craven (2003); Pauwelyn (2003); Koskenniemi and Leino (2002); Symposium, 'The Proliferation of International Tribunals: Piecing Together the Puzzle' (1999). The term 'fragmentation' may be criticised for implying a mythical past unity of international law – other terms such as 'diversification' or 'specialisation' may be preferable.

[91] Fragmentation is also sometimes viewed as an obstacle or opposing force to constitutionalisation (e.g. Peters (2005)) but this is not true with respect to all types of international constitutionalism – see 3.5 below; Simma (2004).

[92] See e.g. Shelton (2006); but note the various positions in Symposium, 'Diversity or Cacophony: New Sources of Norms in International Law' (2004).

[93] See 3.5 below.

[94] Report of the ILC on the work of its 54th session (2002) Ch. 9 at [498]. The chair of the study group has written separately on fragmentation as 'an unavoidable reflection of a "postmodern" social condition and a, perhaps at least to some extent, beneficial prologue to a pluralistic community in which the degrees of homogeneity and fragmentation reflect shifts of political preference' – Koskenniemi (2006a) p. 77.

priority concerning special and general laws or prior and subsequent laws, the recognition of a hierarchy of norms within international law, or the application of an interpretive principle of systemic integration.

The argument in this book is concerned with the coordination of the relationships between international and national legal systems, and in particular of the regulatory authority of states – the domain of rules of private international law. It thus addresses a broader fragmentation of law which is the inevitable consequence of the acceptance of diverse national legal orders. It does not examine the interesting question of whether rules of conflict regulation analogous to private international law rules would be an appropriate mechanism to respond to institutional or normative fragmentation within international law – regulatory conflicts between international norms or tribunals.[95] While the topic addressed by the ILC Study Group is thus distinct from the issue addressed in this book, its work is an important development in the movement of international law beyond the articulation of ever more primary rules, to a recognition of the importance of secondary rules of legal coordination – a topic to be addressed further below.[96] It implicitly recognises that while international law remains predominantly concerned with articulating the content of universal principles, it is unable to engage constructively in the debate concerning the scope of universalisation itself. This is an argument that applies not only to fragmentation within international law, but also to the more general fragmentation of legal regulation across both international and national dimensions explored in this book.

3.4.2. Normative critique

As discussed in Chapter 2, the strict division between the international and national domains may be analysed as part of a strategic move for the universalisation of the model of the international system represented by positivist international law in the nineteenth century. By minimising the substantive content of international law, through insulating the majority of issues as matters of domestic sovereign concern, international law

[95] In addition to the *ILC Fragmentation Report* (2006), see Canor (2008); Fischer-Lescano and Teubner (2004); Pauwelyn (2003); Fox (2001); Perez (1998); Lipstein (1972) pp. 173ff; Jenks (1958) pp. 53ff; Jenks (1953). Shany (2006) considers the distinct question of regulatory overlap between international and national tribunals, particularly in the context of investment disputes.

[96] See 3.5 below.

became compatible with a wide degree of internal state diversity. International law in this universalising mode was thus able to move beyond its European origins. A minimal and largely descriptive international law was no obstacle to the expansion of the system of state sovereignty through the processes of colonisation and decolonisation.

The expansion of international law explored in this Chapter may be viewed as a critical response to the international order which was thus universalised. The anarchic, 'privatised' conception of positivist international law proved too accommodating to the darker intentions of the state will it championed.[97] International law has addressed these concerns through the adoption of substantive 'public' norms, including human rights, economic freedoms and the institutional framework of the United Nations.[98]

However, this expansion of international law, under the auspices of the universalism which it attracted in the late nineteenth century, is itself problematic. There is an ever-present danger that what are claimed as *universal* international norms actually reflect their particular origins. In the application of these norms, Western states are left relatively unaffected, their 'sovereignty' intact. Other states may be pressured by this universalising imperative to make radical changes to their legal system, and thus to the structure of their economy and the values of their society, to bring them into line with international standards. The claimed universality of these norms is used to justify exclusionary enforcement strategies, declaring uncooperative states as rogue or outlaw states.[99] The project of recognising and articulating ostensibly universal norms risks becoming a neo-colonial mechanism through which the assertion of normative objectivity by powerful states subjugates 'developing' states, or forces them to conform to particular values.[100] The false recognition of certain value claims as universal also diverts real concern from the identification of both difference and commonality, and undermines the

[97] See 3.2.3 above. [98] See 3.3 above. [99] See generally Simpson (2004).

[100] See Antoniolli (2005); Anghie (2005); Roth (2004); Weeramantry (2004). One Chinese perspective on international law argues that 'Western powers never intended to apply international law to their relations with China in the same way that they did among themselves, even if their demands were often couched in terms of the Western system of international law. They introduced this Western legal learning to China, but they did so largely as part of their efforts to destroy the traditional Chinese world order and place China under the domination of the Euro-centric system of international relations, making the Chinese follow the rules that a semi-colonial state was supposed to follow' – Zhaojie (2001) p. 317.

effectiveness of genuinely universal norms.[101] The universalisation promised by the expansion of international law, while a necessary response to the anarchic tendencies of positivism, must therefore itself be subject to critical analysis. Determining the validity of claims of universalism is critical to the coherence and normativity of international law, to distinguishing authentic common developments from the imperial imposition of selective values under slogans of 'freedom' or 'democracy'.

The benefits of universalism are obvious – universal legal rules create, or at least encourage, a harmony and consistency of rights and obligations. A global approach may lead to efficiency benefits, and it may be essential for dealing with global problems.[102] These values, however, are not absolute. Something is lost in the achievement of universalism, of centralisation of legal norms. The exclusion of national law by international law is achieved at the cost of cultural specificity, and the ability of a state and its people to self-define, to engage in a broadly conceived process of 'self-determination'. It means a loss of pluralism and legal diversity, and thus the creation of a separation between law and national culture. More broadly, centralisation may be contrasted with specialisation; as rules gain increased generality they may become more crude tools which lead to less just outcomes. This may also lead to a decline in opportunities, sometimes valued in national systems, for experimentation by lawmakers, or for potential benefits to emerge from 'competition' between different ideas or regulatory sub-systems.[103] Diversity, through creating contestation, may create a dynamic process which does not necessarily lead to the triumph of a single 'right' idea, but to a system which continues to develop correspondingly with changes in social values or beliefs.

Another problem with universalisation is that international law is always more distant than national law from the human subjects of its regulation, introducing problems of legitimacy and accountability. One response to this issue is to address legitimacy problems through reform of international lawmaking, and through evaluation of how the processes of international law formation affect the legitimacy of the norms they seek to universalise. Thus, there are strong movements towards the

[101] McDougal and Lasswell (1959) p. 3. See generally Talbott (2005).

[102] See Jackson (2006) pp. 73–4; Charney (1993).

[103] Note that the apparent benefits of regulatory competition must be weighed against the efficiency costs caused by the effect of encouraging forum shopping – see e.g. Helfer (1999). On the perceived beneficial effects of regulatory competition, see further 4.3.7 and 4.6.7 below; Murphy (2004).

introduction of more 'democratic' international systems and procedures, with greater transparency and opportunities for participation,[104] and global administrative law to provide legal standards for reviewing the decision-making processes of international organisations.[105] These strategies, however important, can only ever be a partial response. National legal systems will always be closer to the effects of at least some types of regulation, and variations in local context may demand variations in law. Increasingly, international law must recognise the existence of challenges to its traditionally absolutist mode of regulation and reasoning. This recognition is arguably already occurring through the emergence of norms of international constitutional law.

3.5 International constitutional law and subsidiarity

Positivist international law has traditionally constructed a conceptual barrier between the realms of the international and the national (between the universal and the particular), viewing them as operating in distinct contexts. It has been argued above that this barrier has broken down, in both explanatory and normative terms. International and national law are recognised as increasingly overlapping in practice, and there is growing awareness of norms which challenge the assumption that universal international law is always desirable. Although international law has moved beyond its positivist 'private' conception through the assertion of further universal norms, there is an opposing and increasing internal engagement with the problem of the limits of that universality, a recognition that there are normative boundaries to international law. Rather than existing in discrete realms, international and national law are in dynamic tension; the 'pull' of international law, represented in the 'ideal' of universal regulation, may be contrasted with the 'pull' of individual states, represented in the 'ideals' of pluralism, diversity and national self-determination. This tension is reflected in the emergence of legal norms which are concerned not with the substantive rights and obligations of states, but with the distribution of regulatory authority between the international and the national – questions of 'meta-justice'.[106] This development, which provides a conceptual framework for international law that rejects both the positivist (apologist) dependence on *a priori* state sovereignty and the (utopian) commitment to

[104] See e.g. Kuper (2004); Archibugi, Held and Köhler (1998); Archibugi and Held (1995).
[105] See further 5.4.1 below. [106] See 1.4.2 above.

limitless universalisation,[107] can best be described as part of a process of international constitutionalisation.

3.5.1. Constitutionalism and international 'secondary norms'

References to constitutionalism in international legal theory have become fashionable, but are frequently opaque.[108] Assertions of constitutionalism are perhaps most often made in respect of a treaty arrangement which founds a particular 'regime' of international law, for example, WTO law or Law of the Sea.[109] They are sometimes also made with respect to certain international norms, typically rights (such as human rights) which recognise the sovereignty of individuals, or those with a *jus cogens* or *erga omnes* character. From a constitutional perspective, these norms are viewed as analogous to an international 'bill of rights'.[110]

The distinct idea of constitutionalism explored here is the development of 'secondary' norms in general international law.[111] As introduced in Chapter 1, secondary norms are rules which are not concerned directly with determining outcomes in cases, but which attempt to define the allocation between different authorities of the *legal power* to make rules. Hart famously argued that the international legal system was a primitive legal order, because it consisted only of primary legal rules, lacking more sophisticated secondary norms.[112] International lawyers have always had cause to object to this characterisation; the rules regarding the creation of treaties or customary international law, for example, are obvious

[107] See Koskenniemi (2006).

[108] Peters (2005) argues (at p. 63) that 'many phenomena which are discussed under the heading of constitutionalization may simply be called thicker legalization and institutionalization'.See Fischer-Lescano (2005), discussing Slaughter and Burke-White (2003).

[109] See e.g. Helfer (2003); Macdonald (1999) pp. 219ff. In relation to the WTO system, see e.g. Joerges and Petersmann (2006); Jackson (2006); Dunoff (2006); Trachtman (2006); Petersmann (2006); Cass (2005); Gerhart (2003); Petersmann (2001); Petersmann (2000); McGinnis and Movsesian (2000); Petersmann (1991). Sometimes the EU is also described in this way, although it has been so successful in transforming a treaty arrangement into a type of constitutional order that emphasis is usually placed on the quasi-federal, rather than international, character of its arrangements: see discussion in Weiler and Wind (2003); Verhoeven (2002); Weiler (1999). The EU is treated as a 'federal' system, broadly defined, in Chapter 4.

[110] Gardbaum (2009); de Wet (2006); de Wet (2006a); Petersmann (2006); Tomuschat and Thouvenin (2006); Schilling (2005); Craven (2003) p. 14; Dupuy (1997) p. 3. This assertion of priority is discussed critically in Weil (1983).

[111] See 1.4.3 above.

[112] Hart (1994) pp. 213ff.

(although problematic) secondary norms.[113] However, Hart's argument did draw attention to the relatively under-developed status of secondary norms within international law, and the disproportionate focus in international law, discussed above, on private law analogies. In various ways, explored in this Chapter, modern public international law has undergone an evolution away from the anarchic private law analogies of positivism towards a more public law perspective, based on a rediscovery of the conception of international society.[114] A further stage of this transformation is the *problematisation* of international public authority, through the development of international secondary norms. This is part of the process of the constitutionalisation of international law – the evolution of a system for the regulation and control of international power.

Constitutionalism in this context refers to the development of a legal framework, a constitutional *structure* or *architecture*, within which substantive norms can be recognised as having a certain value or effect based on the scope of the authority from which they are derived.[115] These norms may be viewed as 'general principles of international law',[116] operating as part of a broader 'constitutional network' encompassing various levels and types of regulation.[117]

The Charter of the United Nations is sometimes claimed to have, or aspire to, this type of constitutional character.[118] To the extent that it contains 'constitutional' principles, it predominantly serves the function of distributing authority between *institutions* at the international level.[119] The importance of this function should not be underestimated, however imperfectly it is achieved. It is intimately connected with issues

[113] See further Marschik (1998); Barnhoorn and Wellens (1995). These focus on secondary rules in sub-systems rather than general international law, and thus on the problem of fragmentation (see 3.4.1 above). Barnhoorn and Wellens (1995) also examine the distinct concept of secondary rules used by the International Law Commission in its work on state responsibility: see further Crawford (2002c) pp. 14ff.

[114] See further 3.5.5 below.

[115] See generally Allott (2002) pp. 342ff; Allott (1990). Another expression for this idea is that they are part of a 'rule of recognition' of international law, something which Hart argued was missing in the 'primitive' international legal system: Hart (1994) p. 234ff.

[116] *Statute of the International Court of Justice 1945*, Art. 38(1)(c).

[117] Peters (2005); Cottier and Hertig (2003).

[118] See e.g. Habermas (2006) pp. 158ff; Macdonald and Johnston (2005); Crawford (2002a); Macdonald (2000); Macdonald (1999); Fassbender (1998); Fox (1997); Petersmann (1997); Dupuy (1997).

[119] In addition, Art. 103 is concerned with the priority of one part of international law (the Charter) over another (other treaties).

of international legitimacy.[120] However, the type of constitutional law which is envisaged here is concerned with another aspect of the distribution of authority, which is largely ignored by the Charter: the determination of the distribution of regulatory authority between states and between the international and the national.

The type of structural law explored below is 'constitutional' in a further sense. In dealing with the allocation of power between the international and states, this type of law does not attempt to fix the limits of international and national law, but to define a framework within which a balance can be struck. Rather than attempt to provide an answer, it attempts to provide a language in which the problems concerning the scope of international law can be discussed, to construct a framework for a 'legal conversation' about the future ordering of society.[121] International constitutional law seeks to mediate the tension between the 'pulls' of international law and individual states. As such, it is constitutional in a special sense – just as a constitution is the form in which a society expresses its ideas about itself, as part of the dynamic process of its self-definition, secondary norms of international law are the form within which an international society might develop its sense of self, its 'constitution', through understanding and defining its own limits.

3.5.2. Universalism and the supremacy of international law

The most obvious rule which governs the relationship between international and national legal systems is the rule that national law can offer no excuse for non-compliance with an international legal obligation.[122] From an international perspective, all international law prevails over rules of national law.[123] It is a violation of international law for a state to act contrary to rules of international law or in breach of internationally established rights, regardless of the content of domestic law, and regardless of whether the state acts through conduct of the executive, legislative or judicial branches of government.[124]

[120] See 3.3.2 above; Kumm (2004).

[121] See generally Allott (2005); Allott (2002); Tully (1995); Onuf (1994).

[122] See Art. 32 of the *ILC Articles on State Responsibility* (2001); Art. 27 of the VCLT; Brownlie (2008) pp. 34ff; Oppenheim (1992) pp. 82ff; see further 5.4.2 below.

[123] Of course the relationship may be different when viewed from the internal perspective within a state; the adoption of an international perspective is discussed in 1.3 above.

[124] Article 4(1) of the *ILC Articles on State Responsibility* (2001) provides that 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions,

This might be described as a 'rule of non-recognition', a secondary norm which indicates that national rules have no legal effect within the international domain. This secondary norm embodies the idea of universalism in international law, the idea that no departure from its prescriptions is permissible.[125] It justifies and provides for a 'constitutional' hierarchy of the international over the national domain, giving the rights recognised as part of international law an overriding character and effect.

3.5.3. Subsidiarity

The rule that international law prevails over national law does not end the question of the relationship between the international and national domains. This is because there remains an issue concerning whether and in what circumstances an international law rule should exist at all. Although traditionally international law has been concerned purely with articulating universal rules, the idea that there ought to be limits on the development of international law is increasingly recognised in international law itself in a variety of forms.

A broad recognition of the principle that a domain of national regulation should be protected is found in the exclusion of matters 'essentially within the domestic jurisdiction of any State' from the authority of the United Nations under the UN Charter.[126] Although this principle has only had limited practical effect,[127] and (as previously explored)

whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.' A number of cases before the ICJ have involved the responsibility of states for acts of civil or criminal domestic courts, including *Certain Property (Liechtenstein* v. *Germany)*, Preliminary Objections [2005] ICJ Reports 6; *Avena and Other Mexican Nationals (Mexico* v. *United States of America)* [2004] ICJ Reports 12; *LaGrand (Germany* v. *United States of America)* [2001] ICJ Reports 466; *Barcelona Traction, Light and Power Co. Ltd (Belgium* v. *Spain)* [1970] ICJ Reports 3; *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands* v. *Sweden)* [1958] ICJ Reports 55; *Jurisdiction of the Courts of Danzig* (1928) PCIJ Ser B, No. 15.

[125] This idea, that all international rights are non-derogable with respect to internal acts of states, should be carefully distinguished from the idea of internationally non-derogable norms, or rules of *jus cogens*, which override inconsistent *external* acts of states, other *international* rules: see 3.3.1 above. Shany (2006) examines whether, instead of a 'hierarchy', more complex rules should regulate overlapping jurisdiction between national and international courts.

[126] Article 2(7).

[127] The PCIJ's Advisory Opinion concerning the *Tunis and Morocco Nationality Decrees* (1923) PCIJ Ser B, No. 4 described (at p. 24) the domestic jurisdiction of a state as an 'essentially relative question' which 'depends upon the development of international relations'; see further Koskenniemi (2006) pp. 246ff; Brownlie (2008) pp. 292ff.

international law has expanded into a range of areas traditionally considered as domestic, it remains an acknowledgement of the need for limits on international regulation. In various specialised areas of international law there are emerging principles which embody deference to national decisions or institutions concerning the implementation or interpretation of international rules. The idea of complementarity, adopted in the *Rome Statute of the International Criminal Court* (1998), recognises that priority should be given to national judicial institutions, even in the enforcement of international criminal law.[128] The idea of the margin of appreciation in international human rights law acknowledges that respect must be given to the legitimate variation in national interpretation and implementation of some rights.[129] The idea of the standard of review in international economic law, adopted particularly as part of WTO jurisprudence, suggests that international courts and tribunals should give deference to the views adopted by national regulators.[130] In various contexts, the local remedies rule also requires that priority be given to national institutions as the *fora* for dispute resolution before a claim can be espoused at the international level.[131] The value of diversity both in and of national legal orders has also increasingly been expressly recognised as part of international human rights law.[132] The modern doctrine of self-determination appears qualified, at least in respect of its operation outside the context of decolonisation, on the basis that, unless a people lack effective means of political participation and minority protection within the state, it must be pursued through domestic constitutional mechanisms.[133] The international law rules on statehood are thus deferential to domestic political and legal institutions.

[128] *Rome Statute of the International Criminal Court* (1998) Art. 17; Kleffner and Kor (2006); El Zeidy (2002).

[129] See e.g. Shany (2005); Donoho (2001); Hutchinson (1999); *Lithgow* v. *United Kingdom* (1986) 8 EHRR 329; *James* v. *United Kingdom* (1986) 8 EHRR 123.

[130] See e.g. Becroft (2006); Ehlermann and Lockhart (2004); Oesch (2004).

[131] See e.g. Art. 44(b) of the *ILC Articles on State Responsibility* (2001); D'Ascoli and Scherr (2006); Amerasinghe (2003); Brownlie (2008) pp. 492ff.

[132] Thus, Stacy (2003) argues (at p. 2049) that 'The trajectory of contemporary human rights is to place a moral worth upon a *proliferation* of unique human identities' (emphasis in original); see also Carozza (2003) pp. 75ff. See the ICCPR, Art. 27; the 1966 UNESCO *Declaration of Principles of Cultural Cooperation*; the 2001 UNESCO *Universal Declaration on Cultural Diversity*; and the 2005 UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*.

[133] Bayefsky (2000); *Reference re Secession of Quebec* [1998] 2 SCR 217; 37 ILM 1340; Koskenniemi (1994); McCorquodale (1994).

These diverse principles have in common that they adopt, as part of international law, norms which acknowledge the pull of regulation away from the international towards the state. They impose limits on the scope of application of international law, deferring regulatory authority to national institutions. This idea may be better expressed and developed as a recognition of a general principle of 'subsidiarity' as part of international law.[134]

Subsidiarity is most famous as part of European law, where it is defined as the principle that European institutions ought to take action 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community'.[135] The history of the idea of subsidiarity suggests that it is potentially applicable beyond the European context.[136] Its rise to prominence as part of Catholic thought reflects a reaction against the lack of restraints on totalitarian states in the first half of the twentieth century – a critique of the positivist sovereign state. While it has gained prominence in the EU, subsidiarity may equally be applied at the international level, where it embodies the recognition that there is an inherent value in having diverse, localised and specialised national laws,[137] in the decentralisation of authority – a critique of the unrestrained universalising tendencies of international law. It has a dual character, simultaneously acknowledging the value of pluralism, acting in support of local mechanisms of accountability and legitimacy, as well as acting as a justification, where necessary, for universal regulation.

[134] The idea of subsidiarity is considered in the context of general international law in Broude and Shany (2008); Jackson (2006) p. 74; Kumm (2004); Slaughter (2004) pp. 255ff (note also (at pp. 247ff) the recognition of pluralism in the principle of 'legitimate difference'); and in the context of international human rights in Carozza (2003).

[135] *EC Treaty* (2002) Art. 5; see also *Subsidiarity Protocol* (1997). See further 4.6.7 below.

[136] In Catholic theology, it refers to the doctrine, developed in the nineteenth and early twentieth centuries (from the teachings of Aquinas – see Aroney (2007)), which argues for the importance of a range of levels of human society and governance (individual, family, church, state) in an attempt to strike a middle path between liberal individualism and totalitarianism. 'Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do.' – Pope Pius XI (1931) at [79]; see further Carozza (2003) pp. 40ff; Endo (1994); Cass (1992).

[137] A similar argument might be made in favour of international law sub-systems.

While its application may not always be very clear, the concept of 'subsidiarity' is not 'a socio-philosophical doctrine … [but] a principle of constitutional law'.[138] Its purpose is to 'legalise' the debate between the value of universalism and the values which are centrifugal.[139] It is a 'secondary' legal rule, which does not attempt to establish substantive outcomes, but deals with the question of the distribution of lawmaking authority. Instead of the outmoded conception of international law as limited by *a priori* state sovereignty, it 'demarcates a conceptual territory in which unity and plurality interact, pull at one another, and seek reconciliation'.[140] A wider recognition of the principle of subsidiarity within international law would enable international lawyers to engage in greater internal debate about the scope and limits of the universalist claims of 'substantive' international legal norms.

3.5.4. The allocation of regulatory authority

The idea of subsidiarity is traditionally applied vertically; thus, it would address a choice between regulating at the international or national level for a legal issue contained within a single state. It may also be applied in a more complex situation where the legal issue is one which affects more than one state. This creates two dimensions of choice: the vertical dimension, regarding whether the issue is international or national, and (if the national level is selected) a horizontal dimension, determining which state should have regulatory authority over the issue. Of course, these two dimensions are not separable; the demand for a vertical centralisation of regulatory authority will be affected by how problematic the outcome of allocating the decision to the national level would be. If the legal area is one in which there is likely to be conflict between national laws, this increases the attractiveness of an international solution. Subsidiarity suggests that both these allocations of regulatory authority, vertical and horizontal, should be made according to the idea that regulation should be effected by the system closest to those who will be affected by it.

[138] Von Borries and Hauschild (1995) p. 369.

[139] See further discussion in Broude and Shany (2008); Sander (2006); Nicolaidis and Howse (2001); Bermann (1997); Bermann (1994); Bermann (1994a); Schilling (1994); Endo (1994).

[140] Carozza (2003) p. 52; see further Casanovas y La Rosa (2001).

Here a further type of secondary norm may be identified. This is the idea of a norm which attempts to address the problem of *coordinating* or ordering the *horizontal* diversity which may arise when a legal issue is allocated to a subsidiary level. In public international law this function is served primarily by rules of 'jurisdiction'. These rules, discussed in detail in Chapter 5, deal with the sources and limits of national legal authority, viewed from the perspective of international law. They reflect principles which are derived from fundamental norms of international ordering, such as ideas of territoriality and personality. Their function, however, is much broader – they constitute a form of 'mutual recognition' between states,[141] by defining the collectively acknowledged terms of their pluralist coexistence. They move beyond the positivist international law view of states as indistinguishable and identical, to a view of states as unique and valued sites of difference. The following Chapters explore the idea that private international law, viewed from an international systemic perspective, is also fundamentally connected with the operation of these secondary norms.

3.5.5. International federalism and global governance

The analysis set out above has highlighted the development of three contrasting international secondary norms. The first, the hierarchical rule that national law offers no defence in international law, represents the force of universalism and centralisation of regulation. The second, broadly encapsulated in the idea of subsidiarity, represents the force of decentralisation of regulation, of diversity and pluralism. These two norms are opposing forces in the vertical tension between universality and particularity in regulation, between the international and the national. The third, which relates to the horizontal ordering of diverse national regulatory systems, is indirectly implicated in considerations of subsidiarity, and demonstrates the interaction between the vertical and horizontal dimensions of the division of regulatory authority.

This framework of norms dealing with the vertical and horizontal division of regulatory authority suggests a new idea of constitutionalism for the international system. The modern origin of the concept of subsidiarity in European law provides a clue for further development of the idea of international constitutional law being explored here. The most obvious model for the international development of such a system is the legal structure which attempts to meet this requirement at the national

[141] See further 4.6.7 below.

level – the idea of a federal system. The idea of this new type of international legal architecture might therefore be called 'international federalism'.

The idea of international federalism is both venerable and topical, and the term 'international federalism' has been used in a number of inconsistent ways.[142] Its use here is intended to signify the recognition, as part of the international legal order, of rules which effect the distribution of regulatory authority. A national federal system fragments the positivist conception of 'internal' state sovereignty through a complex internal distribution of governance. In a similar way, international federalism rejects both the anarchic tendencies of positivist state sovereignty and the universalism which has been asserted in opposition by international law, by recognising the validity of competing levels of regulation. This includes the need to ensure individual liberty, reflected in the development of human rights norms that seek to establish a 'protected zone' of freedom for each person. As noted above, this 'libertarian' dimension of the principle of subsidiarity is in fact the conception under which it came to prominence in the early twentieth century, as an antithesis to the totalitarian state. The idea of international federalism is a corresponding attempt to recognise the need to provide an international pluralism of societies, to allow each society a degree of liberty to pursue its own development. It is coextensive with the idea of ensuring individual freedom, because it involves the recognition of diversity in socialised expressions of liberty – through social and cultural identity.[143] It could be viewed as representing a further broadening and evolution of the concept of self-determination.[144] It is an idea which recognises the value of

[142] The term was famously used by Kant (1795) (see 2.4.1 above); modern examples include Symposium, 'The New Federalism: Plural Governance in a Decentered World' (2007); Baratta (2003); Schreuer (1995); institutional support is embodied in the World Federalist Movement (www.wfm.org). This idea is curiously underplayed in the US, given that 'U.S. lawyers, with their commitment to and understanding of federalism, have extraordinary gifts to share in the crafting of a world order that permits the solution of global problems without unnecessary or undue interference in local affairs' – Sadat (2005) p. 340; note also Friedrich (1964).

[143] Note the argument in Carozza (2003) pp. 46ff that, although this is not always recognised, international human rights law already reflects a 'socially situated person'. This is not to deny that individual and collective self-determination may conflict – see generally Gutmann (1994).

[144] See Knop (2002); Franck (1996); Tully (1995); Koskenniemi (1994); McCorquodale (1994). Simpson (1996) calls (at p. 260) for 'a renewal of the links between autonomy, democracy, human rights, and the right to self-determination. Central to cultivating this renewal is the adoption of a more liberal and expansive interpretation of the right incorporating autonomy, constitutional recognition, devolution, and cultural self-expression'.

collective self-determination by individuals or by groups of peoples, including through the legal form of the state – respecting the particularity of that self-expression. Self-determination is thus reconceptualised not only as a right against an oppressive government within a state, but also as a right against the universalising tendencies of international law. Under this conception, states are not the featureless atoms governed by positivist international law, but sites of valued diversity.

The recognition of diverse societies validates both them and the individuals belonging to them – 'the integrity of the individual legal person cannot be guaranteed without protecting the intersubjectively shared experiences and life contexts in which the person has been socialized and has formed his or her identity'.[145] This is not to claim that the state should have priority in being the locus of self-definition; the decline of effectiveness of the 'sovereign' state as an organisational concept has already been identified, and in fact provides a justification for developing complementary ideas of ordering.[146] It is also important to acknowledge that the recognition of the diversity of legal orders through states may be problematic. As explored above, international law is increasingly concerned with the internal regulation of states, and law under authoritarian regimes which cannot be understood as genuinely the embodiment of community values may therefore be less entitled to the presumption of mutual respect underlying pluralism. While the state remains an intensely powerful locus of collective identity formation, underwritten by international law, there is also increasing recognition that identity is and ought to be formed at a wide range of levels, including individual, family, local community, the state, regional organisations, all the way to the international community.[147] This is also not to ignore the fact that identity claims at one level may conflict with other international norms, or with other levels of identity, or that there are limits on the tolerance of difference under a pluralist (as opposed to a relativist) approach, most obviously where 'universal' human rights standards

[145] Habermas (1994) p. 129. See the discussion of Mancini in 2.5.2 above. Thus (as discussed in 1.3.3 above), just as individual identity is established through an exchange of recognition with other persons, the identity of a culture or society and its individuals is established through a process of mutual recognition with other cultures or societies: see e.g. Burke (2005); Williams (1997); Smith (1989).

[146] Peters (2006); O'Neill (2000).

[147] Tierney (2004); O'Neill (2000); MacCormick (1999); Franck (1996); Taylor (1994); Habermas (1994); Cassese (1990); Finnis (1980) pp. 144ff.

clash with local cultural norms.[148] It is simply to argue that international law has, as analysed above, begun to adopt internal norms which, following a federal model, implicitly acknowledge the validity of a plurality of different legal orders and sources of authority.[149] International law does not possess a simple hierarchy. It recognises and seeks to mediate competing sources of normativity, including claims of universality, claims of national sovereignty, and claims of individual rights and freedoms. It does and should not aspire to be a 'state of states', but the polycentric legalisation of the international relations of individuals, peoples and states.

The idea of federalism also critically reflects the dynamic character of the development of international constitutional law. The constitution of any federal system provides a language in which debates may occur about the allocation of power between federal and state institutions. The effect of the legal structure is not to 'fix' the relationship between the federal and state levels of a federal system. It is to ensure that the dynamic determination of that relationship, the process of contestation between states and between the state and the federal, is carried out as a matter of legal debate.[150] The idea of international federalism is the idea that international law can provide a structure for the debate between the interests and identities of different international actors, encompassing both universalist and particularist forces.

It is equally important to be clear about what is *not* meant by international federalism. The idea of international federalism being considered here does not require the existence of federal institutions, of what is sometimes aspirationally and sometimes derisively called 'world government'. International federalism would certainly be compatible with such an idea, but it does not require it.[151] It would, for example, be perfectly

[148] See e.g. Simpson (1996) pp. 261ff; Berting (1990). The role of public policy in defining the limits of tolerance in private international law is discussed in 5.3.5 below.

[149] Thus, it is 'more important to stress the imperative need to develop international law to comprehend within itself the rich diversity of cultures, civilizations and legal traditions, than to concentrate on what might be called the "common law of mankind approach" which sees importance in those general notions which, so long as they are stated in sufficiently general terms, are undoubtedly but hardly surprisingly to be found in all systems' – Jennings (1985) p. 195; see also Berman (2007); Berman (2007a); Bederman (2007); Roth (2004); Burke-White (2004); Kingsbury (1998a); Tully (1995).

[150] See generally Schapiro (2007); Nicolaidis and Howse (2001).

[151] This limits the usefulness of analogies from the development of the EU and the WTO, which have both been dependent on the development of centralised institutions, particularly judicial organs, in developing what is sometimes suggested to be their 'constitutional' status: see Helfer (2003) pp. 200ff. Helfer also notes, however (at

possible to envisage an international constitutional federal system developed by states without the formation of a world 'superstate' and without international legal institutions. International federalism could (perhaps imperfectly) still exist provided individuals and national institutions acted in the furtherance of the international order, understanding themselves as participating in that order. International federalism requires the existence of an international legal order – it requires global *governance*. However, it is independent of ideas about what institutional mechanisms are necessary or desirable to achieve that order. It does not require global *government*.[152]

To understand this further, an analogy can be made with different approaches to designing computer networks. Traditional ideas of government might be compared with traditional computer network arrangements, in which a centralised server coordinates or 'governs' the entire network. The idea of distributed governance might, by contrast, be compared with the modern innovation of peer-to-peer networks, in which the function of coordination is distributed across the units which make up the network.[153] The possibility of an international legal order constituted only by national institutions, without a centralised authority, is another example of this powerful idea of 'peer governance'.

It has been argued that 'if a world federalism went wrong, there would be no asylum, no safe harbour, no refuge. Hence, a world consisting of separate nation-states maximises the probabilities of global protection of liberty interests'.[154] But this is to confuse federalism and centralisation – federalism, defined here to incorporate a principle of subsidiarity, is precisely intended to provide a mechanism to guarantee a continued role for separate nation-states in defining and protecting liberties. The architecture of international federalism ought to be universal, but it is a structure which is designed to defend diversity, and in this form, 'Universality does not mean uniformity'.[155]

p. 223), that the main international relations approaches 'share the belief that compliance is possible even in a decentralized legal system'. McGinnis (1997) uses 'international federalism' to refer to the economic institutions operating in support of a globalised free market; see also Abbott (1997).

[152] See generally Habermas (2006) pp. 115ff; Peters (2006); Nicolaidis and Schaffer (2005); Joerges (2004a); Slaughter (2004); Teubner (1997); Rosenau and Czempiel (1992). For discussion of some antecedents of this approach, see Cassese (1990).

[153] These networks have become infamous for their association with copyright infringement, but their potential application is much broader. See e.g. *MGM Studios* v. *Grokster* (2005) 545 US 913.

[154] Teson (1989) p. 564. [155] Jennings (1985) p. 187.

The possibility of global law without global institutions is only problematic if the positivist perspective on law and the state is accepted.[156] It will be recalled from Chapter 2 that traditional positivism viewed law as the command of a sovereign, an expression of power, leading to scepticism concerning the legal status of international law operating between sovereigns. Other perspectives on law, however, take the view that it is the product of a collective will – that, at least in a democracy, the people are themselves 'sovereign'. From this perspective, law is not the vertical product of an institutional 'sovereign state', but the horizontal product of a collective 'state of mind', the inter-subjective beliefs and social practices of a community. Law is, at least ideally, the way each society articulates and actualises its shared aspirations and values. Equally, international law need not be the product of a centralised institutional order, or the product of bilateral relations between autonomous sovereign states, but the collective beliefs and ambitions of a 'world society' or an international community of law, a global legal culture.[157] Thus, international federalism has no necessary connection with the idea of world government, often seen as a 'threat' to the independence of national government and values. In fact, it is the opposite – a mechanism designed to provide for just and dynamic *limits* on centralising norms and institutions.

3.6 Conclusions

Chapter 2 demonstrated that ideas of private international law throughout history have been dependent on broader international norms, linking the development of public and private international law. It was also noted that the present dominant approach to private international law is based on positivist international legal theory which was developed in the late nineteenth century, and that this has established self-limiting boundaries for private international law which have petrified it in this form.

This Chapter has identified a broad range of challenges to positivist international law theory, both explanatory and normative. It has been

[156] See e.g. Berman (2006).

[157] Allott (2002); Abi-Saab (1998); Simma and Paulus (1998); Simma (1994); Simma and Alston (1992) pp. 88ff; Steinhardt (1991); Allott (1990); Mosler (1980). Kennedy (2000) warns (at p. 106) that 'For more than a century, international lawyers have imagined each new moment as *the* overcoming of sovereignty, formalism, autonomy, politics, and the coming into being of law, pragmatism and international community.'

argued that international law has developed beyond its positivist 'private' conception, through an expansion of international public law, leaving private international law frozen in the image of an outdated set of international norms. This Chapter has also examined a new challenge facing international legal theory, which problematises (descriptively and normatively) both the division between international and national law and the presumptive universalism of international law. In response, it has been argued that international law is increasingly recognising a general principle of subsidiarity, which embodies the benefits of decentralisation, diversity and pluralism. The dynamic tension between the universal claims of international law and the particular claims of national law is reflected in the development as part of international law of secondary norms, which constitute a new conceptual, constitutional, framework for international law.

Three types of international secondary norms have been identified – the priority of international law over national law, the idea of international subsidiarity, and the horizontal allocation of regulatory authority between states (expressed through public international law rules on jurisdiction). These operate in two dimensions: the vertical allocation of authority between different levels of regulation, and the horizontal allocation of authority where there is the potential for a conflict between subsidiary national regulatory systems. The best model for understanding the development of structural law which accommodates these mechanisms for preserving internal diversity is the idea of international federalism. This idea need not involve federal institutions, but may be constructed through an idea of an international community legal order.

This book does not examine any further the *general* implications of this idea of federalism for the development of an international constitutional order. Its focus in subsequent Chapters is on exploring the particular implications of these ideas for the evolution of private international law beyond its dependence on an outdated positivism. The theory of private international law cannot satisfactorily rest on the positivist idea that the international system is made up of conflicting individualistic sovereign states, whose relations are modelled on private law. The reality is that the international system is forming a constitutional global order, governed by emerging principles of public law. The theory of private international law cannot depend on the positivist idea that there is a sharp distinction between international and national law. The reality is that this idea does not stand up to explanatory or normative challenges. The idea of international federalism suggests that an analogy with other

federal systems can provide the foundation for a new consideration of these issues. Chapter 4 begins to consider the implications of international 'federal' constitutional law for international private international law by pursuing this analogy, examining the impact of federalism, and in particular of federal constitutional law, on private international law within federal systems.

4

Private international law and constitutional law in federal systems

4.1 Introduction

This Chapter investigates the relationship between private international law and constitutional law in federal systems that contain diverse rules of private law.[1] This analysis is conducted in order to explore an analogy and a research agenda suggested by the identification in Chapter 3 of the idea of 'international federalism'. Because this Chapter is exploring an analogy, its purpose is not to identify or comment on the *current* rules or practice of private international law in federal systems, but rather to examine the ideas and theories relating to private international law which have been developed in these states as a result of their federal structure, the ways in which the ideas of private international law have been affected by or are part of the constitutional ordering of these federal systems. Whether or not these ideas and theories are now (or ever were) operative, they may still be usefully applied by way of analogy in the context of the emerging idea of international federalism. As explored in Chapter 3, this idea involves secondary norms which deal with the distribution of regulatory authority between states and between the international and national realms. By looking at the effect on private

[1] In this book, the term 'federal' is used loosely to indicate a variety of non-unified legal systems with diverse degrees of centralisation. The debate about what constitutes a 'federal' system is largely semantic; but see generally Nicolaidis and Howse (2001).

international law of equivalent norms within federal systems, this Chapter identifies a conceptual framework which provides the foundations for a new perspective on international private international law.

The first part of this Chapter considers the idea of 'federal' private international law, identifies and discusses the basic differences between 'internal' and 'international' private international law, and suggests reasons why the recognition of the impact of federal systems on the development of private international law has been slow. It then addresses the special role of private international law in federal systems, introducing the themes that are explored throughout this Chapter. The remaining parts develop these ideas through an examination of the relationship between private international law and federal constitutional law in particular federal systems. This analysis could be developed through examination of private international law (historical, actual or proposed) within any federal or quasi-federal system in which the rules of private law are or have been part of the regulatory authority of the States. This could include, for example, the Soviet Union,[2] Central America,[3] South America,[4] South-East Asia,[5] Africa[6] or other federal states including Switzerland.[7] The focus in this Chapter, however, is on four federal

[2] In the Soviet Union, different private international law rules applied between member states of the communist block: Boguslavskii (1988); Garnefsky (1968) p. 31. The absence of genuinely 'private' law in communist legal theory emphasised the close relationship between public and private international law, a product of the fact that relations between communist states were largely between government-controlled bodies and therefore 'public' in character: thus, Garnefsky (1968) (at p. 6), cites Lunts, a Russian scholar, for the proposition that 'The legal acts of a state in the field of Private International Law are to be regarded as an expression of its foreign policy.'

[3] Casad (1982) proposes a Central American recognition and enforcement of judgments regime as part of a move towards greater regional integration, outlines the complex history of previous attempts to establish regional federalism, and discusses more generally 'the significance of judgment recognition to the integration of multiple-state entities' (pp. 21ff).

[4] The Mercosur group (which is proposed to merge with the Andean Community of Nations and the Latin American Integration Organization to form a South American Free Trade Area and ultimately a South American Community of Nations), developed the *Buenos Aires Protocol on International Jurisdiction in Disputes Relating to Contracts* (1994) and the *Los Leñas Protocol on the Recognition and Enforcement of Judgments of other Mercosur States* (1992). These measures have been justified on the grounds that they are necessary for the development of the common market, an idea explored in the context of the EU in 4.6 below; see further Walter and Walther (2001) pp. 185ff.

[5] See Caffrey (1985). [6] See Oppong (2006).

[7] The Swiss federation adopted federalised ideas of private international law for internal disputes, before the adoption of a uniform civil code: see e.g. Kahn-Freund (1974) p. 210; Schoch (1942).

systems in which analysis of the relationship between the constitution and private international law is particularly significant and well developed – the US, Australia, Canada and the EU.

4.2 'Federal' private international law

4.2.1. The possibility of federal private international law

Chapter 2 examined the emergence of the dominant modern approach to private international law as an implication of the 'positivist' theory of international law. The positivist emphasis on state sovereignty led to the view of private international law rules as an exercise of discretion by each individual state, sometimes characterised, problematically, as a matter of 'comity'. The dominance of this perspective, particularly towards the end of the nineteenth century, ended the study of private international law as a part of a universal law of nations, replacing it with a variety of national disciplines.

This change (in theory and practice) created the possibility that private international law, as a national discipline, could reflect the characteristics of each state, its local context, conditions and values.[8] In particular, it created the possibility that private international law could be affected by the *federal* character of a non-unified state. This Chapter deals precisely with the consequences of this possibility – the private international law ideas which have been developed within federal systems to take account of their federal context. The emergence of distinct federal approaches is thus a result of the collapse of the international conception of private international law examined in Chapter 2. These federal approaches ironically provide the theoretical foundations for a revitalisation of the traditions of internationalism in private international law, which are explored further in Chapter 5.

4.2.2. Internal and international private international law

The inherent complexity of federal systems creates special problems for private international law, both internally and externally.[9] The focus in

[8] Thus, it was observed in Chapter 2 that the historicist movement, while itself viewing private international law as part of international law, actually contributed to the decline of universality in private international law by emphasising the more general link between national culture and law.

[9] See generally Kahn-Freund (1974) pp. 293ff. For example, the use of nationality as a connecting factor, noted in 2.5.2 above, is of little assistance in determining which sub-national law area should govern a dispute, a fact recognised in Mancini's apparent

this Chapter is on 'internal'[10] disputes within federal systems rather than 'international'[11] disputes. This is because it investigates an analogy between the function of private international law in a federal system and its (obviously 'internal') function as part of the international legal order. It will also be necessary to give some consideration to international disputes, because in practice the rules for internal and international disputes have often been mutually influential if not conflated. As demonstrated throughout this Chapter, federal constitutional concerns frequently provide clear arguments for the distinct treatment of internal and international private international law.[12] This is, however, another context in which the dichotomy between the domestic and the international, between international and internal law, breaks down.[13]

One reason for this breakdown is the interaction of internal and international systems – the existence of so-called 'hybrid' disputes involving a foreign state and more than one State of a federal system.[14]

fall-back on domicile in this context: see Nadelmann (1969). The concept of domicile itself has necessarily evolved in federal systems. The traditional unity of domicile is inapplicable where an individual may be domiciled in the federal system for some purposes (governed by national law) and in a State for others (governed by State law): Graveson (1974) pp. 235ff; Castel (1969) p. 80, p. 85; Cowen (1957) pp. 30ff; Graveson (1954); *Lloyd* v. *Lloyd* (1962) ALR 279; *Armstead* v. *Armstead* (1954) VLR 733.

[10] The term 'internal' will be used to designate a private international law problem within a federal system which relates only to different component States.

[11] An 'international' dispute is a dispute which has an external dimension, a connection with a state outside the federal system. On the distinction see e.g. Laycock (1992) pp. 259ff.

[12] There is also an argument that international private international law disputes are connected with questions of international relations: see 4.2.4 below. Lowenfeld (1998) argues (at p. 141) for a 'vision of the United States as a nation, free, beyond doubt, to experiment in all kinds of ways within the federal union, but facing the outside world with one foreign policy, one legal system, and one place in the international legal order'. Although the recognition of international and inter-State judgments have not always been clearly distinguished in the US, distinct approaches to international judgments are suggested in the proposed *Foreign Judgments Recognition and Enforcement Act* prepared by the American Law Institute (www.ali.org) and the model *State Uniform Foreign-Country Money Judgments Recognition Act* prepared by the National Conference of Commissioners on Uniform State Laws (www.nccusl.org).

[13] Maier (1982) p. 289; Maier (1971) p. 164; see further 3.4 above.

[14] For example, an English court hearing a dispute involving a contract connected with the US may be faced with the problem of determining which US State law applies to the dispute. Such a dispute is essentially both international and internal in character. The English court will have its own private international law rules to apply, but these will be developed for an international context. The English court will face a dilemma: whether to apply its own international rules to determine the appropriate State law, or to adopt the rules used by one or more of the States of the US to deal with internal disputes (which may reflect its internal constitutional order or policies). See discussion in Haak (2001)

Another reason for the interaction between internal and international private international law is historical. When federal systems are formed from a group of coalescing states, the regulation of their relationship may initially involve the adaptation of rules previously developed for the international context to what have now become 'internal' disputes.[15] As new rules are developed reflecting the federal context, however, a reverse process has also tended to occur. Rules developed for internal disputes, which may constitute the majority of private international law cases, may be automatically (and problematically[16]) extended to international disputes.[17]

However difficult it may be to draw a boundary between internal and international disputes and their regulation under private international law, this does not undermine the role of the distinction for present purposes – that is, the investigation of the internal private international law of federal systems in this Chapter, in order to pursue in Chapter 5 an analogous study of international private international law viewed as part of the 'internal' ordering of the international 'federal' system of law proposed in Chapter 3.

4.2.3. The slow development of federal private international law

As explored in Chapter 2, much of the significant development in private international law theory emerged out of federal or quasi-federal systems – at different stages in history, those of Italy, France, the Netherlands and Germany. In a federal system, the combination of internal diversity and unifying mutual respect, difference and deference, creates what has been called a 'conflict-of-laws paradise' and a 'laboratory' for private international law experimentation.[18] The continued existence of federal states (such as the US, Australia and Canada) and the growth of federal regional organisations (such as the EU) mean that federal systems

p. 215; Fletcher (1982). Graveson (1974) pp. 245ff discusses similar problems with respect to the enforcement of judgments.

[15] See further 4.3.1 below.

[16] Parrish (2006); Lipstein (1972) pp. 161ff; Trautman and von Mehren (1968); Ehrenzweig (1967) pp. 19ff; Ehrenzweig (1957) p. 717, p. 725; Du Bois (1933).

[17] Some European private international law instruments, such as the *Rome Convention* (1980), apply directly to international cases; others, such as the *Brussels Regulation* (2001) have been viewed as having strong incidental effects on international disputes: see 4.6 below; *Owusu* v. *Jackson* [2005] ECR I-1383, Case C-281/02; Nuyts and Watté (2005).

[18] Von Mehren (1969) p. 685.

have retained their importance for private international law throughout the twentieth and into the twenty-first century.

However, in the federal systems examined in this Chapter the adaptation of international rules for the particular context of internal disputes within the new federal environment has not always been rapid. Historically, the different States of federal systems have been treated simply as if they were separate countries for the purposes of private international law.[19] Two main ideas, opposing in perspective but with congruent effect, have contributed to this phenomenon.

i) Universalism

As discussed in Chapter 2, until the late nineteenth century, private international law was largely conceived as part of a single international system of law, a 'universalism' which negated the possibility of it reflecting 'local' concerns. Private international law rules adopted by federal systems before this period therefore largely incorporated rules and approaches developed for international disputes without adapting them to the federal context. The positivist development of the view of private international law as part of national law did not immediately address this. Ideas based on the positivist conception of absolute state sovereignty were not easily applied in the context of the fragmented sovereignty within federal orders.

The idea of private international law as national law was also affected by a different type of universalism of law in Commonwealth countries such as Australia and Canada. Private international law was dominated by common law rules developed primarily in the courts of England, which were intended to be applied throughout the common law world.[20] The potential role of Australian and Canadian constitutional provisions was thus overshadowed for a long time by the unifying influence of the Privy Council on the common law. This idea of an international unity of the common law prevented the customisation of rules of private international law to reflect the local context of common law states with a federal structure.[21]

[19] *Chaff and Hay Acquisition Committee* v. *JA Hemphill and Sons Pty Ltd* (1947) 74 CLR 375 at 396; *Laurie* v. *Carroll* (1958) 98 CLR 310 at 331; *Pederson* v. *Young* (1964) 110 CLR 162 at 170; *Lung* v. *Lee* (1928) 63 OLR 194; see also Castel (1969).

[20] McClean (1996); Graveson (1974) p. 210; *Breavington* v. *Godleman* (1988) 169 CLR 41 at [4] (Brennan J).

[21] Noted in *Morguard Investments Ltd* v. *De Savoye* [1990] 3 SCR 1077 at 1091; see Castel (1969); Cowen (1957) pp. 17ff; see also *Pfeiffer* v. *Rogerson* (2000) 203 CLR 503.

Another reason for the slow development of federal rules of private international law may be attributed to a lack of differentiation in substantive laws. The unity of law within the common law world suggested not only standardised private international law rules, but also standardised substantive law rules – which would render private international law largely redundant in disputes between common law states. In the US, the lack of early development of federal private international law rules might be partially ascribed to the idea that there was a developing federal common law.[22] In a similar way, the initial focus in the EU on the substantive harmonisation of law between the Member States deflected attention from the role that unified European private international law might play in coordinating differences in that substantive law.[23] The development of private international law within federal systems may thus have been neglected or rejected on the basis that it was unnecessary because of substantive harmonisation of law, or that it was an unsatisfactory compromise from the goal of substantive harmonisation.[24]

ii) Unilateralism

Chapter 2 analysed the emergence in the late nineteenth century of the view that private international law is part of national law, a matter of domestic and not international concern. This perspective emphasised the adoption of private international law rules as a matter of discretion for each state, as part of its expression of 'sovereignty'.

This characterisation of private international law rules as discretionary had an impact on the characterisation of private international law rules in States of federal systems. The problematic view of international private international law as a matter of discretion for each state was even more problematically transplanted to the view that private international law within a federal system also ought to be a matter of discretion for each State. In the EU, national resistance to Europeanised private international law rules is part of continued assertions of Member State 'sovereignty'. As in the US, this corresponds with more general political concerns regarding the rights of States in the balance of power within the federal system. The effect of this perspective has been to slow the development of conceptions of private international law which might place limits on the discretion of States by virtue of their federal context.

The development of private international law within a federal system may thus be neglected or rejected on the basis that it represents an undue

[22] See 4.3.1 below. [23] See 4.6 below. [24] See 1.5 above.

centralisation of power – the opposite of the idea of 'universalism' considered above, but with identical effect.

4.2.4. The special role of private international law in federal systems

Each federal system contains a unique and complex balance between multiple sources of authority, its own 'federalist' philosophy. The analysis of each federal system must reflect this specific context. However, the two dimensions of the architecture of this distribution of power may be analysed in general terms.

The *vertical* division of regulatory authority in a federal system determines which powers are centralised and which are distributed to the States. Although one purpose of a federal system is to centralise powers in pursuit of common goals, any federal system is premised on the idea that unification of law is not always necessary or possible. Localised systems of regulation may also be more desirable because of concerns about accountability, legitimacy, and cultural diversity – ideas which may be encapsulated in the concept of 'subsidiarity'.[25] The division of powers between the federal and State governments is a source of legal and political contestation in every federal system. These conflicts are traditionally part of the domain of constitutional law, although in some federal systems they may be characterised as private international law problems and addressed through private international law methodology,[26] or arise in the context of private international disputes.[27]

[25] See 3.5.3 above.

[26] Fletcher (1982) Ch. 2 characterises EU and Member State legal conflicts as private international law problems. Note also that in the US, the Full Faith and Credit clause affects the federal division of powers in addition to its effect on internal conflicts discussed in 4.3 below. Brilmayer and Lee (1985) pp. 833ff criticise the different interpretation of the Full Faith and Credit clause in the context of federal division of powers problems. See also Weinberg (1992).

[27] Decisions of State courts in private international disputes may, for example, come into conflict with a federal monopoly power on dealing with foreign relations: see generally *Zschernig* v. *Miller* (1968) 389 US 429; Born (1996) pp. 5ff. This may include the determination of questions with international law implications, such as the characterisation of an event as an 'Act of State': in the US context, *Banco National de Cuba* v. *Sabbatino* (1964) 376 US 398 decided that the Act of State doctrine was part of federal common law, to reflect the constitutional separation of powers; see Born (1996) pp. 489ff; Maier (1971) p. 159, who suggests (at p. 167) that a private international law inspired interest analysis approach (see 4.3.2 below) ought to be applied in this context.

The existence of distributed powers creates a further *horizontal* dimension for the division of regulatory authority, which presents a structural problem. The different regulatory regimes of the States may conflict with each other, leading to the possibility of inconsistent legal treatment. A federal system therefore imposes a division of regulatory authority between the laws of the different States. The two dimensions, the vertical and the horizontal, are inextricably linked; the horizontal division facilitates the vertical, by ordering the exercise of distributed powers.

These two dimensions of the distribution of regulatory authority in a federation create the possibility for the special role of private international law. In the last fifteen years in particular, new ideas concerning the relationship between private international law and federal constitutional law have been developed, particularly in Australia, Canada, and the EU, with old antecedents in the constitutional jurisprudence of the US. These approaches have developed new ideas of private international law by viewing it through its relationship with the two dimensions of the architecture of a federal system – the horizontal and vertical divisions of regulatory authority.[28]

i) Private international law as structure

The dominant approaches to private international law theory, discussed in Chapter 1, focus on ideas of private 'fairness' or 'justice'. They attempt to develop national rules (expressing national policies) to achieve these goals based on characteristics of the individual dispute, parties or laws, viewed as a particular event.

Within federal systems, a different idea has been developed – or more accurately, has been preserved or revived from the historical origins of private international law explored in Chapter 2. This is the idea that

Such an approach seems to have influenced the decision in *American Insurance Association* v. *Garamendi* (2003) 539 US 396; see Symeonides (2004a) p. 12, p. 15. Federal or State entities may also argue that they are entitled to sovereign immunity in each other's courts. US States have been more successful in arguing for sovereign immunity in federal courts than in other State courts – see Westover (2005) pp. 732ff; Brilmayer and Lee (1985) pp. 845ff; *Nevada* v. *Hall* (1979) 440 US 410. The dissenting judgments in *Nevada* v. *Hall* (1979) found that a guarantee of State sovereign immunity was implied by the federal nature of the constitution.

[28] It is not suggested that these two ideas are always entirely distinguishable; for example, Yntema (1953) argues that the first purpose of private international law is to provide the order necessary to preserve basic human values; see also Batiffol (1967) p. 162. For a discussion of the relationship between rights-based and structural approaches to constitutional interpretation see Westover (2005).

private international law is a part of the division of regulatory authority between the component States of a federal system, that it may function as part of this horizontal constitutional ordering or 'structuring' of a federal system. Private international law rules are not viewed as ordinary legal norms, which should be governed by national ideas of fairness or justice, but as 'secondary'[29] legal norms, which reflect or govern the distribution of regulatory authority.

ii) Private international law as rights protection

The second idea of private international law is the idea that it functions as part of the system of protection of constitutional rights.[30] It is important to distinguish this idea from the traditional theory of vested rights.[31] Private international law does not function to protect rights which have 'vested' in the plaintiff or defendant at the time of an event under the laws of one or more of the States of a federal system, as scholars have long recognised. To claim that rights 'vest' in this way would be circular – it would assume that a particular legal system applies to the dispute, which is begging the private international law question.

However, as explained in Chapter 2, this criticism of circularity is invalid if rights may 'vest' in some way from 'outside' the laws which private international law rules are choosing between (here, the laws of the States) – such as through natural law.[32] A similar argument may be made with respect to constitutional law in a federal system. If a private international law dispute concerns more than one of the States in a federal system, then, regardless of which State's law is selected, the same federal constitutional rights must apply. Thus, these constitutional rights exist 'prior' to the determination of the applicable rules of private law, which is made according to private international law. Federal constitutional law is a higher level of law, which may 'vest' rights in parties to inter-State disputes. Thus, the idea of vested rights has survived in a narrow, modified form – in the idea that private international law may function as part of the mechanism of rights protection in a federal system.[33]

[29] See further 1.4.3 above.
[30] 'Constitutional rights' is used in a broad sense, to include not only rights expressly set out in the constitution, but rights derived from constitutional powers, those created by federal legislation.
[31] See 2.3.4 above.
[32] See similarly the argument in Dane (1987) based on the separation of law and norms.
[33] A different reinterpretation of 'vested rights' is set out in Michaels (2006).

This approach may be viewed in another way. Just as the idea of private international law as structure constitutes an analysis of the implications of the *horizontal* division of regulatory authority (derived from the relationship between States), the idea of private international law as rights protection considers the implications of the *vertical* division of regulatory authority (derived from the relationship between federal rights vested in individuals, and the State). Rights established under federal constitutional law prevail over State law systems. Constitutional rights are qualifications of the 'sovereignty' of the States, which temper the positivist idea of private international law as an exercise of 'sovereign' discretion.

4.3 The United States

In the context of private international law the US has been fairly described as the 'fifty laboratories'.[34] The number and diversity of State legal systems have provided a fertile environment for the development of varied private international law rules. This variety includes not only numerous State jurisdictions, but competing federal and State jurisdictions, particularly in cases heard in federal courts involving citizens from more than one State, exercising what is known as federal diversity jurisdiction.[35] This complexity is further enhanced by the rich history of interpretation of the US constitution.

A number of different constitutional provisions have impacted on the evolution of US private international law. Some of these provisions affect private international law rules only in particular contexts. The Privileges and Immunities[36] clauses preclude a form of discrimination between residents of different States.[37] The Equal Protection[38] clause similarly establishes a limited prohibition on State discrimination against

[34] Brilmayer and Lee (1985) p. 852. [35] See 28 USC 1332.

[36] Article IV, Section 2: 'The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states'; Amendment XIV, Section 1: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.'

[37] Laycock (1992) pp. 261ff suggests that this clause should be given greater attention as a prohibition against private international law rules that discriminate against inter-State litigants. See also Hay (2000) pp. 371ff; Herzog (1992) pp. 287ff; Gergen (1988); Hay and Rotunda (1982) pp. 160ff.

[38] Amendment XIV, Section 1: 'nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws.'

non-residents or non-citizens.[39] The Commerce Clause[40] provides an increasingly important source of limits on the regulation of multi-State business activities, in a way which could potentially impact on private international law.[41] The most significant constitutional provisions, and the focus of this section, are the Full Faith and Credit[42] and Due Process[43] clauses.

One fundamental difference between these two constitutional provisions should be noted at the outset. The Due Process clause protects 'any person' from being deprived of their 'life, liberty or property'. It applies equally to citizens and foreigners,[44] and to internal and international private international law disputes. By contrast, the Full Faith and Credit clause requires each State to give 'full faith and credit' only to the laws of 'every other state' (of the US). Thus, it can have no application in the international context.[45]

Despite this difference, the approaches which have been taken to the interpretation of the two provisions have been mutually influential – at times confused. The interpretation of each provision has also been affected by contextual developments in both constitutional and private international law theory, and they will therefore be examined through a broader analysis of the history of private international law in the US.

[39] Hay (2000) p. 370; Herzog (1992) pp. 285ff; Gergen (1988); Hay and Rotunda (1982) pp. 166ff.

[40] Article I, Section 8, cl. 3: 'The Congress shall have Power … To regulate Commerce with foreign Nations, and among the several States.'

[41] See Smith (2004); Hay (2000) pp. 373ff; Brilmayer (1995) pp. 144ff; Herzog (1992) pp. 289ff; Horowitz (1971); *Edgar* v. *MITE Corp*. (1982) 457 US 624.

[42] Article IV, Section 1: 'Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.'

[43] There are two components to 'due process': Amendment V: 'No person shall be … deprived of life, liberty, or property, without due process of law' (affecting federal authorities, ratified in 1791); and Amendment XIV, Section 1: 'nor shall any state deprive any person of life, liberty, or property, without due process of law' (affecting the States, ratified in 1868). In practice they work in conjunction, and this Chapter will refer to the Due Process clause in the singular for the sake of simplicity.

[44] Although, some have spuriously claimed, not to 'unlawful combatants': but see *Boumediene* v. *Bush* (2008) 553 US __.

[45] Scoles (2000) p. 146. This is true in theory, though in practice the same rules are often extended to international cases, as a matter of convenience or confusion rather than compulsion. It has been argued that this is the case for the recognition of judgments in those States which have adopted the *Uniform Recognition of Foreign Country-Money Judgments Act*: see e.g. Hay (2000a) p. 238.

4.3.1. Private international law – international or constitutional?

i) Story – private international law as federal common law

Until the middle of the nineteenth century, the prevailing theories of private international law, explored in Chapter 2, conceived of its rules as part of a unified system of international law. The earliest ideas of private international law in the US adopted this stance.[46] A close connection between international law and US private international law had been argued in *James* v. *Allen* (1786)[47] and accepted in *Millar* v. *Hall* (1788)[48] even before the US constitution was adopted. Huber's ideas of private international law[49] (which it will be recalled viewed private international law primarily but somewhat ambiguously as part of a single international system of law, to be derived from the principle of territorial sovereignty) were extremely influential, with the full text of Huber's 'De Conflictu Legum' of 1684 included as an annex to the case of *Emory* v. *Grenough* (1797),[50] and given almost the status of precedent. As late as 1895, the Supreme Court held that 'International law, in its widest and most comprehensive sense … [includes] not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law or the conflict of laws'.[51]

The idea of private international law as part of international law precluded any role for the US constitution in shaping its rules, including for inter-State disputes.[52] This brought private international law into potential conflict with developing ideas of US constitutional law, reflecting the political reality of the evolution of 'a more perfect union'. Story, whose influence on the general history of private international law was

[46] Laycock (1992) pp. 295ff; Nadelmann (1961); Nadelmann (1957) pp. 52ff; see discussion in *Sun Oil Co*. v. *Wortman* (1988) 486 US 717. On the early relationship between international law and US domestic law see more generally Janis (2004), particularly Ch. 3; Smith (2004). The text by Rorer (1879) excluded (at p. 1) international transactions from analysis on the grounds that they were subject to 'the doctrine of international law' (see Ehrenzweig (1957) p. 717), but (at pp. 5ff) did not exclude the application of the law of nations as part of US law to inter-State problems.

[47] 1 US 188; see Nadelmann (1957) p. 50.

[48] 1 US 229. See also *Camp* v. *Lockwood* (1788) 1 Dall 393 (Pa); Nadelmann (1957) p. 50, pp. 77ff.

[49] See 2.3.4 above.

[50] 3 Dall 369; see Nadelmann (1972) p. 5.

[51] *Hilton* v. *Guyot* (1895) 159 US 113 at 163; Lowenfeld (1998) p. 128; Childs (1995) pp. 252ff.

[52] Cheatham (1953) p. 586; Du Bois (1933).

already discussed in Chapter 2, was at the forefront of the development of both constitutional and private international law, both as a scholar and as a Supreme Court justice.

The two fields received an uneasy reconciliation in Story's 'Commentaries on the Conflict of Laws' in 1834. Story argued that 'comity' demanded a sort of 'Full Faith and Credit' with respect to international private international law disputes, and that this was embedded in the common law – his use of the ambiguous term 'comity' masking the uncertain status of these rules.[53] He had previously argued that the constitutional Full Faith and Credit principle was intended to incorporate and reflect the requirements of the common law, and thus international law, but to give them 'a more conclusive efficiency'.[54] Thus, he considered the international and the constitutional as manifestations of the same principles, and did not distinguish inter-State and international disputes. Each of these ideas is notably very different from the modern view of private international law as a subject of private law concerned with questions of justice in individual cases. In fact, the closing words of Story's 1834 Commentaries describe private international law as an 'interesting branch of public law', aspiring towards becoming 'a general system of international jurisprudence, which shall elevate the policy, subserve the interests, and promote the common convenience of all nations'.[55]

Story's position is more readily comprehensible in the context of his belief that the evolution of US law ought to involve the development of a unified body of federal common law by the Supreme Court, under the influence of international law – in the broad sense of the law of nations explored in Chapter 2, including law dealing with international private relations. This body of law would be developed to deal specifically with cases heard by federal courts under diversity jurisdiction, and would also influence the development of State common law. This idea was reflected in the judgment delivered by Story for the Supreme Court in *Swift* v. *Tyson* (1842),[56] a decision which remained the law for almost a

[53] See 2.3.4 above; Lowenfeld (1998); Lowenfeld (1996); Nadelmann (1957) pp. 69ff.

[54] Story (1833) s. 1303. Story delivered the opinion of the Court in *Mills* v. *Duryee* (1813) 11 US 484, which held that the Full Faith and Credit clause (automatically) extended the common law rules in requiring recognition of other State judgments (distinguishing them from international judgments). See further Nadelmann (1957) pp. 66ff, and generally Laycock (1992) pp. 291ff; Jackson (1945) pp. 7ff.

[55] Story (1834) s. 645, see also s. 9.

[56] 41 US 1; Von Mehren (1969) pp. 683ff; Baxter (1963) pp. 25ff; Cook (1942) pp. 516ff.

century.[57] Story's views towards private international law were thus an aspect of his more general advocacy of the development of a federal common law, under the influence of the US constitution (and in particular the Full Faith and Credit clause) as well as international law.[58]

ii) Full Faith and Credit

As private international law changed in conception throughout the nineteenth century from international to national law,[59] and as US constitutional jurisprudence expanded, the influence of the Full Faith and Credit clause increased. The Full Faith and Credit clause at the very least gave Congress some power to legislate in the field, and that power had been quickly exercised in respect of the evidentiary question of the proof in State (and Federal) courts of the laws of other States.[60] However, there were two questions this implementation left unresolved. First, it did not address the breadth of the power of the Full Faith and Credit clause outside of the narrow question of proof of inter-State law – for example, whether it would empower Congress to legislate federal private international law rules, if it were so minded.[61] Second, and perhaps more importantly, it did not address the possibility that the Full Faith and Credit clause might have a more substantive *automatic* (self-executing) effect on private international law.[62]

[57] See 4.3.2 below. The view that federal common law should remain influenced by international law is manifest, for example, in the statement that 'the law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield … to be in a great measure, not the law of a single country only, but of the commercial world': *Swift* v. *Tyson* (1842) 41 US 1 at 19 (omitted text is a reference to *Luke* v. *Lyde* (1759) 97 ER 614). Similarly (at p. 19), 'the true interpretation and effect [of instruments of a commercial nature] are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence'.

[58] See Weinstein (2004) p. 173; Laycock (1992) pp. 281ff; Watson (1992) pp. 39ff; Ehrenzweig (1957) p. 718.

[59] See Chapter 2.

[60] 1 Stat 122 (1790), later updated to include non-judicial records: 2 Stat 298 (1804); for the modern equivalent see 28 USC 1738–9; see further Laycock (1992) pp. 293ff; Jackson (1945) pp. 5–6. This statute ensures that the law of each State of the US is treated in each other State as law (not fact): contrary to the usual treatment of foreign law in the common law tradition, on which see Fentiman (1998).

[61] Nadelmann (1957) p. 81; Cook (1942) p. 523.

[62] The fact that Congress felt the need for implementing legislation does not entirely discredit the argument that the Full Faith and Credit Clause may also have an automatic or self-executing effect, a question which is perhaps still unresolved: see e.g. Nadelmann (1957) p. 80. It is arguably of only academic interest since a 1948 amendment to the implementing statute extended it to 'Acts', thus apparently 'executing' the clause in any event: see 4.3.3 below.

In practice, the Full Faith and Credit clause was increasingly interpreted broadly in the nineteenth and early twentieth centuries, giving it a substantive (not merely evidentiary) effect. In cases such as *Converse* v. *Hamilton* (1912),[63] *New York Life Insurance Co.* v. *Head* (1914),[64] *New York Life Insurance Co.* v. *Dodge* (1918),[65] *Modern Woodmen of America* v. *Mixer* (1925)[66] and *Bradford Electric* v. *Clapper* (1932)[67] it was arguably, as Story had advocated, used as a source of federal private international law rules.

At the height of this trend, the Supreme Court held in *Alaska Packers Association* v. *Industrial Accidents Commission of California* (1935)[68] that the Full Faith and Credit clause, as a matter of logic, could not be applied without implying the application of a federal system of private

[63] 224 US 243. This case held that only the State of incorporation has a legitimate policy interest in the regulation of the internal affairs of the corporation, effectively establishing a federal choice of law rule.

[64] 234 US 149, holding (at p. 161) that there are 'constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends'. The idea of territorial restrictions on State sovereigns was played down in *Bradford Electric* v. *Clapper* (1932) 286 US 145 at 156 ('the power of Vermont to effect legal consequences by legislation is not limited strictly to occurrences within its boundaries') and *Alaska Packers Association* v. *Industrial Accidents Commission of California* (1935) 294 US 532 at 541 ('the power of a state to effect legal consequences is not limited to occurrences within the state if it has control over the status which gives rise to those consequences' – note the analogy here with the division between territorial and personal ('status') law by the statutists: see 2.2.2 above). Such territorial restrictions have, however, been more recently revived in Australia (see 4.4.3 below) and Canada (see 4.5.1 below).

[65] 246 US 357. See Herzog (1992) pp. 261ff; Lasok and Stone (1987) p. 139; Weintraub (1959).

[66] 267 US 544. Applying similar reasoning to that in *Converse* v. *Hamilton* (1912), the Court held that the State of incorporation of a beneficial society has an exclusive interest in its regulation, and that other States must give full faith and credit to its regulatory decisions.

[67] 286 US 145, holding (at pp. 154ff) that the Full Faith and Credit clause did not merely provide a negative limitation on State choice of law rules (invalidating extreme choices), but in fact was a rule of positive law, superseding State rules: see Scoles (2000) p. 156; Herzog (1992) pp. 276ff; Bermann (1986) pp. 172–3; Hay and Rotunda (1982) pp. 127ff, pp. 140ff; Weintraub (1959) pp. 468ff. The Court declared (at p. 158) that the recognition of an obligation created through the application of the law of another State, under the influence of the Full Faith and Credit clause, was 'not to be deemed an extra-territorial application of the law of the State creating the obligation', although it did note (at p. 160) a number of exceptions to this rule, and (at p. 162) adopted a sort of interest analysis approach to their application: see 4.3.2 below.

[68] 294 US 532 at 547; see also *Pacific Employers Insurance Co.* v. *Industrial Accident Commission* (1939) 306 US 493 at 502; Scoles (2000) p. 157; Hay (2000) pp. 337ff; Herzog (1992) pp. 278ff; Weintraub (1959) pp. 469ff; Cheatham (1953) pp. 588–9.

international law rules.[69] It would be impossible to require a State to give 'full faith and credit' to the laws of another State, without having a federal determination of when the laws of each State actually applied. Without federal standards, each State would either (absurdly) always have to apply the laws of other States in preference to its own, or would itself determine the scope of its obligation to give full faith and credit, because it would determine when in fact a foreign law applied by setting its own choice of law rules. The Full Faith and Credit clause would be reduced to an obligation on each State merely to apply its own choice of law rules. Rejecting this view, the Court held that 'the full faith and credit clause imposes on the courts of one state the duty so to enforce the laws of another'.[70]

The Supreme Court thus held the view at this time that it should not be left to the States to determine the scope of their own obligations. Rather, this fundamental feature of federalism, the division of the regulatory authority of the States, ought to be the product of the impact of the Full Faith and Credit clause on private international law – a clear illustration of the idea of private international law as structural law.[71]

iii) Due Process

The Fourteenth Amendment to the US constitution, which introduced the Due Process clause affecting the States, was ratified in 1868. It was initially unclear what effect, if any, this clause might have on the development of private international law rules which had been formed under the auspices of the Full Faith and Credit clause. The potential influence of the Due Process clause was noted in *New York Life Insurance Co.* v. *Dodge* (1918).[72] A substantive role was also suggested in cases such as *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.* (1934)[73] (which held, in language familiar from Chapter 2, that a State must not 'ignore a right which has lawfully vested elsewhere'[74]) and *Alaska Packers Association* v. *Industrial Accidents Commission of California* (1935).[75] The

[69] Hay and Rotunda (1982) p. 142; Nadelmann (1957) p. 73 – although it did so in a way which suggested an interest analysis type approach rather than a mechanical choice of law rule: see 4.3.2 below. See similarly the modern argument by Laycock (1992) pp. 289ff.

[70] 294 US 532 at 543. [71] See 4.2.4 above.

[72] 246 US 357 at 374ff (see above). However, the clause was probably relied on only because it was unclear at the time whether the obligations of the Full Faith and Credit clause extended to the unwritten common law, or whether they were limited to statutes.

[73] 292 US 143. [74] *Ibid.* at 150. [75] 294 US 532 at 539ff.

most influential approach was set out in *Home Insurance* v. *Dick* (1930),[76] which interpreted the Due Process clause as providing a restriction on the choice of law rules which could be applied by State courts. A Texan court was not permitted to apply the law or public policy of the forum because it did not have a sufficient connection with the dispute.[77] The application of Texan law would effectively involve an unjust non-recognition of contractual rights which ought to be governed by Mexican law. The Due Process clause was therefore interpreted as providing a negative limitation on choice of law by State courts – a minimum standard, setting outer limits within which private international law rules had to operate.

These developments perceived private international law rules not as a mechanism to structure the division of state regulatory authority, but as part of the protection of 'life, liberty or property' under the Due Process clause. The Due Process clause creates a type of private constitutional right. Private international law rules must be shaped to conform with and to ensure the protection of this type of right, by limiting the circumstances in which State courts can take jurisdiction over, or apply State law to, private disputes. Initially, as noted above, this idea was related to and confused with the idea of 'vested rights' as the founding principle for private international law. However, since the rights which are being recognised here are not vested through the application of State law, this is clearly an expression of the distinct idea of private international law as a form of constitutional 'rights protection'.[78]

iv) Private international law – a branch of constitutional law?

By the mid 1930s, it was widely and generally accepted that these two constitutional provisions exercised an extremely broad influence on State choice of law rules – even if the exact character and extent of this influence were not entirely clear. In 1926, it was suggested that the

[76] 281 US 397; Hay (2000) pp. 326ff; Scoles (2000) p. 147; Herzog (1992) pp. 263ff; Hay and Rotunda (1982) pp. 128ff; Weintraub (1959) pp. 454ff. Note that this case involved rights under Mexican law, an example of the application of the Due Process clause to international cases.

[77] The Court held (at p. 410) that the State's public policy 'may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them'. See also 4.3.4 below; note the similarity of this limitation on public policy with the European idea of 'attenuated' public policy discussed in 4.6.5 and 5.3.5 below; see further Mills (2008). Hay (2000) argues (at p. 330) that the connections with Texas were understated by the Court.

[78] See 4.2.4 above.

'Supreme Court has quite definitely committed itself to a program of making itself, to some extent, a tribunal for bringing about uniformity in the field of conflicts',[79] on the basis that 'the full faith and credit clause … impose[s] on a state court the duty, in framing its local rule, to follow the statute of another state where, *in the opinion of the Supreme Court*, the demands of justice require that such a course be adopted'.[80] Private international law was understood to be concerned with 'the powers of independent and "sovereign" states and the limitations which result from their uniting in the Federal Compact',[81] acting 'to coordinate the administration of justice among the several independent legal systems which exist in our Federation'.[82] In 1931 it was open to question whether private international law had become a branch of constitutional law.[83]

4.3.2. The two revolutions in United States private international law

i) Beale and the First Restatement

The leading figure of the development of private international law in the US in the early twentieth century was Beale,[84] who drafted the *First Restatement (Conflicts)* (1934). Beale shared Dicey's problematic combination of beliefs, examined in Chapter 2, in the idea of private international law as national law, together with the idea of 'vested rights'.[85]

While the *First Restatement* viewed private international law as part of the law of each state (not as international law),[86] it did not examine the practice of each of the States of the US independently. This is in part because of the strong constitutional influence on private international

[79] Dodd (1926) p. 560. [80] *Ibid*. p. 544 (emphasis added).
[81] Jackson (1945) p. 11; see further *Milwaukee* v. *ME White* (1935) 296 US 268 at 276–7.
[82] Jackson (1945) p. 2; see also p. 26. [83] Ross (1931).
[84] Beale (1935); Tetley (1999) p. 308; Brilmayer (1995) pp. 20ff; Wardhaugh (1989) pp. 325ff; Yntema (1953) p. 308.
[85] This is reflected in Beale's inconsistency in dealing with the relationship between international law and private international law: see Mann (1964) p. 11. The vested rights approach had gained judicial acceptance in cases such as *Slater* v. *Mexican National Railroad Company* (1904) 194 US 120, in which Justice Holmes stated (at p. 126) that 'the only source of … obligation is the law of the place of the act'; see Juenger (1984) p. 3; Dane (1987). It is too critical to say, in respect of his belief in vested rights, that 'Beale's imperviousness to the obvious flaws of his theory is baffling': Juenger (1984) p. 3. As pointed out in 2.4.2 above, the vested rights approach is only circular when viewed from a positivist perspective.
[86] *First Restatement (Conflicts)* (1934) s. 5.

law at this time, and in part because Beale was also directly influenced by Story's ideas of a US (federal) 'general system of common law'.[87] As a result, while his approach was broadly 'positivist' and attempted to reflect the practice of courts in the US, his was not really a 'Restatement' of the law. It included a strong normative element, in its attempt to create a uniform system of private international law. The *First Restatement* thus failed to reflect the diversity of actual practice in different States. For example, Beale's theory of vested rights meant that he was committed to the application of foreign law as a mechanical result of territorial choice of law rules, regardless of the intentions or wishes of the parties. This failed to reflect the practice of the courts, which was to give effect to party autonomy, through choice of law and jurisdiction agreements.[88] The lack of realism in Beale's approach left his project vulnerable to attack from two 'revolutionary' perspectives which would lead to the widespread rejection of his conception of private international law.

ii) The Supreme Court's revolution – private international law as State law

The history of private international law in Chapter 2 ended with the characterisation of private international law (as an implication of the positivist theory of international law) as purely part of domestic law, an exercise of sovereign discretion by a state. For a federal system, such a characterisation raises a further question: is private international law an exercise of federal or State discretion?

As noted above, Story and later Beale advocated the development of federal private international law rules as part of a federal system of common law – an idea applied by the Supreme Court (in a judgment delivered by Story) in *Swift* v. *Tyson* (1842).[89] Although the Supreme Court is not a general court of appeal from State courts, it was able to develop a wide body of federal common law because of its role as appeal court from all federal courts exercising federal diversity jurisdiction – jurisdiction over disputes involving parties from more than one State.[90]

The original conception of federal common law drew on international law, which was at the time broadly conceived to include law dealing with

[87] See 4.3.1 above; *First Restatement (Conflicts)* (1934) s. 4, Comment.
[88] See e.g. Yntema (1955) pp. 54ff; on party autonomy see further 5.6 below.
[89] 41 US 1.
[90] On the relationship between this power of the Supreme Court and approaches to choice of law see Laycock (1992) pp. 278ff; Baxter (1963).

international private relations, including private international law.[91] With the separation of public and private international law in the nineteenth century, discussed in Chapter 2, this conception was increasingly out of step with the growing diversity of private law in US States. In the early twentieth century, the idea of a federal common law was subject to strong criticism by some legal scholars and judges.[92] These criticisms gained the support of a majority of the Supreme Court in the landmark case of *Erie Railroad* v. *Tomkins* (1938).[93] The Court declared that 'there is no federal general common law',[94] deciding that federal courts exercising diversity jurisdiction must instead apply the law of the State in which they are physically sitting.[95]

The effect of this decision on the existence of federal private international law rules was not immediately clear. *Erie Railroad* v. *Tomkins* (1938) did not involve private international law questions, and it was uncertain whether it was intended to apply to cases where the applicable law was itself in dispute.[96] While federal private international law rules had been viewed as part of the federal common law, they also, as discussed above, had a separate constitutional justification – the Full Faith and Credit clause.

This idea of the Full Faith and Credit clause was questioned in *Pacific Employers Insurance Company* v. *Industrial Accident Commission* (1939),[97] which argued that 'the very nature of the federal union of states, to which are

[91] See 4.3.1 above.

[92] The dissenting judgment of Justices Holmes, Brandeis and Stone in *Black & White Taxi Cab* (1928) 276 US 518 was particularly influential. On the link with the rise of positivism see Weinstein (2004) p. 173. Story's judgment in *Swift* v. *Tyson* (1834) 41 US 1 depended on his view (at p. 18) that 'In the ordinary course of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws', a view clearly incompatible with the positivist focus on law as a study of judicial practice.

[93] 304 US 64. See Clark (2007); Kahn-Freund (1974) p. 212; Von Mehren (1969) p. 683; Baxter (1963) p. 32; Jackson (1945) p. 12.

[94] At p. 78. But see Leflar (1986) pp. 198ff – federal common law continues to apply in areas under federal statutory control (as a supplement, where the intention is for federal law to 'cover the field', i.e. to exclude State law) and in other areas which are 'necessarily' under federal control because they require a uniform solution. The principle established in *Erie Railroad* v. *Tomkins* (1938) 304 US 64 is thus only certain in diversity jurisdiction cases: see e.g. *Boyle* v. *United Tech Corp.* (1988) 487 US 500.

[95] For an example see *Day & Zimmerman* v. *Challoner* (1975) 423 US 3. Federal procedural law applies, although there is a tendency to interpret this narrowly – for example, statutes of limitations are substantive and therefore governed by State law: see *Walker* v. *Armco Steel* (1980) 446 US 740.

[96] Cook (1942) pp. 494ff.

[97] 306 US 493; Scoles (2000) p. 157; Hay (2000) pp. 337ff; Bermann (1986) pp. 173; Weintraub (1959) p. 454; Cheatham (1953) pp. 588–9.

reserved some of the attributes of sovereignty, precludes resort to the Full Faith and Credit clause as a means for compelling a state to substitute the statutes of other states for its own statutes'.[98] The uncertainty was finally and controversially resolved in *Klaxon* v. *Stentor Electric* (1941),[99] which extended the *Erie* doctrine to private international law. In *Klaxon*, the Court held that a federal court sitting in diversity not only had to apply the substantive law of the State in which it was sitting, it also had to apply the choice of law rules of that State.[100] Ironically, federal private international law was rejected because it was characterised as part of federal common law, just at the point in time when the rejection of federal common law accentuated the diversity of State laws and thus the need for federal private international law to perform a coordinating function.

This position was justified by the Court on the grounds that it was necessary to have consistency between the decisions of State courts and federal courts sitting in that State. However, this consistency would have equally been achieved by holding that the constitution mandates a federal system of choice of law rules binding on both federal and State courts.[101] This would also have avoided the lack of consistency between State courts and between different federal courts which is the inevitable result of the Supreme Court's approach.[102]

The decision in *Klaxon* v. *Stentor Electric* (1941) rejected the previously dominant idea that private international law serves a structural 'constitutional' function, as part of federal law, and replaced it with the idea that it is part of the 'private' law of each State.[103] A number of commentators have heavily criticised the decision on various grounds,[104]

[98] 306 US 493 at 501.

[99] 313 US 487. For an example of the application of this doctrine see *Waggoner* v. *Snow, Becker, Kroll, Klaris & Krauss* (1993) 991 F 2d 1501.

[100] This obviously does not exclude the application of federal law by the federal court. However, in disputes internal to the US (which are the focus of this Chapter) the existence of federal law will mean that there is no private international law dispute. In the case of international private international law disputes, it is possible that a conflict might arise between the federal law of the US and the law of another state, or the law of one or more States of the US and the law of another state.

[101] Laycock (1992) pp. 282ff; see also Horowitz (1967); Schoch (1942) pp. 773ff.

[102] The Supreme Court's approach also assumes that federal courts are able to ascertain and apply State choice of law rules consistently with State courts, which has not proved easy in practice. See Jackson (1945) p. 1; Cook (1942) pp. 497ff, pp. 525ff.

[103] Jackson (1945) p. 13.

[104] Scoles (2000) p. 176; Laycock (1992); Baxter (1963) pp. 32ff; Ehrenzweig (1957) p. 720; Nadelmann (1957) p. 74; Cheatham (1953) p. 587; Cheatham (1950); Cook (1942) pp. 517ff; Jackson (1945).

and it has arguably been qualified in respect of certain fundamental elements of private international law.[105] The rejection of a federal private international law has also not entirely eliminated a role for the constitution in shaping State private international law rules, considered further below. Nevertheless, the growth in State diversity of private international law which followed from this decision had the effect of entirely undermining the federal conception of private international law reflected in the *First Restatement (Conflicts)* (1934).

iii) The theorists' revolution – private international law as judicial discretion

While the Supreme Court was rejecting Beale's theory of the federal character of private international law, the mechanical style of rules which characterised his approach was being challenged by the increasingly acute development of positivist legal analysis, which became known as American legal realism.[106] Chapter 2 explored how positivism in international law emphasised the study of state practice rather than international law rules, leading to a national conception of private international law. American legal realism applied this methodology to national law, suggesting a focus on the processes and substantive outcomes of law, not on its forms (its expression in statutory rules, or law reports). Lawyers should study the actual behaviour of judges, not the rules they claim or are claimed to follow.[107] Taking the decentralising tendencies of the positivist approach to their logical conclusion, advocates of legal realism argued that the application of private international law rules was not merely a discretionary act by a sovereign state, but a discretionary act by a judge.

The most prominent figure in the early application of this approach to private international law was Cook,[108] who rejected both any role for

[105] The rules governing choice of forum agreements (*The Bremen* v. *Zapata Off-shore Co.* (1972) 407 US 1) and *forum non conveniens* (*Gulf Oil Corp.* v. *Gilbert* (1947) 330 US 501; *Piper Aircraft Co.* v. *Reyno* (1981) 454 US 235) are arguably now part of federal common law: see e.g. Greenberg (1986). It is also relevant for the purposes of the broader argument in this book that it has been held that *Erie Railroad* v. *Tomkins* (1938) 304 US 64 does not prevent the direct application of customary international law by federal courts – see *Sosa* v. *Alvarez-Machain* (2004) 542 US 692; and further Koh (1998); Bradley and Goldsmith (1997); Jessup (1939).

[106] See generally Brilmayer (1995) pp. 33ff; Kelly (1992) pp. 365ff; Wardhaugh (1989); Summers (1982) esp. pp. 144ff.

[107] See Wardhaugh (1989) pp. 333ff; Davies (1937) p. 60.

[108] Cook (1924); Cook (1942); Cheshire, North and Fawcett (2008) pp. 26–7; Tetley (1999) pp. 309ff; Juenger (1992) pp. 39–40; Wardhaugh (1989) pp. 342ff; Dane (1987); Lipstein (1972) p. 141; Yntema (1953) p. 314; Yntema (1935).

comity[109] and Beale's characterisation of the application of foreign law as being a matter of 'vested' rights. Cook argued that a court always applies local law even if sometimes local law directs it to look at foreign law. In one sense this is an obvious result of the assumptions of legal realism. If law is simply a description of the behaviour of judges, all law is, in a sense, 'local'.[110]

The influence of legal realism on private international law was developed and applied further by Cavers in a series of articles beginning in the 1930s.[111] Cavers argued not only that there were no real international or federal private international law rules, but that there were no real private international law rules at all. Judges in State courts, although they purported to be following established rules, were in fact exercising a discretion. According to Cavers, private international law rules were so difficult, ill-defined and contained so many exceptions ('escape devices'), that in reality courts were choosing their preferred result and using the law to justify their choice.

Cavers' position was that it was better for the courts to be open in exercising this discretion.[112] He therefore proposed that instead of private international law rules, courts should expressly analyse the competing policies and concrete results which would follow from their decisions, and choose what they considered the most 'just' outcome. Over time, he believed that courts would develop 'principles of preference' which would shape the exercise of this discretion, enabling different social values to be consistently weighed.[113] This idea was developed further

[109] Described sardonically by Goodrich (1930) p. 173 as best restricted to determining 'the number of guns to be fired in salute to a foreign admiral and the place which a sister-in-law of a visiting ambassador is to occupy at an official dinner'.

[110] Yntema (1953) p. 316. The judgments of Justice Learned Hand were influential here. For example, in *Guinness* v. *Miller* (1923) 291 F 769 he held (at p. 770) that 'no court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign'. This reasoning does not affect the idea of vested 'federal' rights in 4.2.4 above.

[111] Cavers (1933), Cavers (1965); Tetley (1999) pp. 310ff; Laycock (1992) pp. 283ff; Wardhaugh (1989) pp. 348ff; Juenger (1984); Lipstein (1972) pp. 157ff.

[112] The adoption of private international law approaches which accept such discretion may only be possible within the broader movement of US legal theory and practice, which recognises judges as politicised decision-makers: see Tetley (1999); Fawcett (1982). The adoption of such an analytical approach is also, in some ways, self-fulfilling: a theory which endorses the exercise of judicial discretion is likely to lead to an increase in the exercise of that discretion.

[113] See also Von Mehren and Trautman (1965) pp. 341ff.

by Leflar,[114] who argued that the courts should exercise a discretion structured by five 'choice influencing considerations', including, controversially but influentially, an open consideration of which potential applicable law was the 'better law'.[115] Some courts have openly adopted an approach in which they evaluate the different laws available to them, and choose the 'better law'.[116]

In *Alaska Packers Association* v. *Industrial Accidents Commission of California* (1935), the Supreme Court suggested that choice of law disputes should be resolved 'not by giving automatic effect to the Full Faith and Credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight'.[117] As suggested in a 1946 article,[118] scholars such as Currie[119] and Baxter[120] used this reasoning as the foundation for new approaches to choice of law based on the idea of an analysis of competing interests, which have been widely adopted.[121]

[114] Leflar (1966); Posnak (2000); Singer (2000); Tetley (1999) p. 315; Brilmayer (1995) pp. 70ff.

[115] This approach has drawn comparisons with the early statutist Aldricus – see 2.2.2 above.

[116] Laycock (1992) p. 312 argues that these approaches are unconstitutional.

[117] 294 US 532 at 547; see also p. 549; *Bradford Electric* v. *Clapper* (1932) 286 US 145 at 160ff.

[118] Freund (1946).

[119] Currie (1963); see Tetley (1999) pp. 311ff; Brilmayer (1995) pp. 47ff; Wardhaugh (1989) pp. 351ff; Juenger (1984) pp. 9ff; Lipstein (1972) pp. 154ff; Ehrenzweig (1967) pp. 62ff; Leflar (1963) pp. 723ff. Currie argued that state interests should be principally revealed through an examination of the statutes of the respective states (leading to suggestions that he 'merely reinvented the statutist approach': Juenger (2001) p. 108); but also (perhaps inconsistently) suggested that interests must be 'reasonable' or 'legitimate': Brilmayer (1995) pp. 52ff. Currie emphasised the interest of the forum in applying its own law, which arguably gave his approach a tendency towards parochialism, criticised by Juenger (1985a) as 'a complicated pretext for applying the lex fori' (p. 218); see also Juenger (2001) p. 105; Laycock (1992) pp. 274ff, pp. 310ff), but advocated by e.g. Whitten (2002); Ehrenzweig (1965); Ehrenzweig (1960); see also Tetley (1999) pp. 309ff.

[120] Baxter recognised that in any private international law dispute, the private interests are necessarily 'in balance', and thus it is necessary to turn to state interests to resolve the dispute in a principled way: Baxter (1963); Tetley (1999) pp. 314ff; Brilmayer (1995) pp. 69ff. He suggested a negative interest analysis idea of 'comparative impairment': see e.g. *Waggoner* v. *Snow, Becker, Kroll, Klaris & Krauss* (1993) 991 F 2d 1501.

[121] See generally Brilmayer (1995) pp. 138ff; Juenger (1984); see further 5.3.6 below.

The idea of an analysis of interests also reflects the influence of the Due Process clause, as developed in *Home Insurance* v. *Dick* (1930).[122] The dominance of the Due Process clause over the Full Faith and Credit clause was typical of a trend in US constitutional theory – the focus on the interpretation of the US constitution as a source of rights, in which 'too little attention has been paid to constitutional structure'.[123] The doctrinal effect of this focus was that the US constitution was interpreted as providing only a negative and narrow limitation on State private international law. The application of a State's choice of law rules would only be rejected if the relationship between the chosen law and the dispute was so insignificant it would cause a manifest injustice to a defendant. In a series of cases, the Supreme Court moved away from the idea of a balancing of interests to a rule that any State court can apply either its own law or the law of any other State of its choice, provided that law is 'sufficiently' interested in the dispute.[124] This focus on injustice to the defendant and the analysis of interests in individual cases reflected and contributed to an increased focus on the study of private international law as a collection of individual disputes, a matter of private law, not as a broad 'structural' discipline, or a matter of constitutional law.

4.3.3. The impact of the constitution on State choice of law rules

i) The decline of Full Faith and Credit

The interest analysis approach has proved to be problematic in application.[125] This is not merely because the test is inherently imprecise, since the courts have failed 'to define standards by which "superior state interests" in the subject matter of conflicting statutes are to be weighed'.[126] It is also because it is politically contentious for the Supreme Court to weigh and

[122] 281 US 397; see 4.3.1 above. Some argue that the Supreme Court intermingled the effects of the Full Faith and Credit and Due Process clauses, failing to recognise the distinctions between them: Weinstein (2004); Scoles (2000); Bermann (1986) pp. 173–4; Leflar (1986) pp. 165ff; Hay and Rotunda (1982) p. 127.

[123] Wilkinson (2004) p. 1706. The emergence of a new, opposing trend is suggested in Westover (2005).

[124] *Watson* v. *Employer's Liability Corp.* (1954) 348 US 66; *Carroll* v. *Lanza* (1955) 349 US 408; *Clay* v. *Sun Insurance* (1964) 377 US 179; see Scoles (2000) pp. 149ff; Hay (2000) pp. 340ff; Bermann (1986) p. 173; Hay and Rotunda (1982) p. 132, pp. 143ff; Weintraub (1959) pp. 453ff.

[125] See generally Juenger (1984).

[126] Jackson (1945) p. 16, who adds 'I think it difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of

reject a State's subjective claim of having an interest in a dispute.[127] Perhaps because the test that it had established for itself was so difficult for it to apply, the Supreme Court effectively withdrew almost entirely from the field of choice of law.[128] It was even proposed at one point to amend the constitution to prevent the US federal government from entering into treaties which might affect State private international law rules.[129]

In 1948 the statute which 'implemented' the Full Faith and Credit clause with respect to its evidentiary function[130] (the proof of State laws in other State courts) was, somewhat enigmatically, amended to require the recognition in each State court not only of the records and judicial proceedings of other States, but also of their 'Acts'.[131] The effect of this amendment was and remains unclear. It has been argued that the recognition of 'Acts' ought to include the recognition of private rights arising from them, and thus that Congress has effectively legislated in the field of private international law, in a manner which requires Supreme Court interpretation and implementation.[132] The revision notes to the amending statute, however, suggested that it was made merely so that the provision follows the language of the constitution, without evident consideration of its potential implications.[133] Despite the statutory amendment, during this period the Full Faith and Credit clause, with isolated

guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution'; see also p. 28. It was, however, only in 1935 that Cheshire had written, with respect to English conflict of laws, 'it is perhaps the one considerable department in which the formation of a coherent body of law is in course of process, it is, at the moment, fluid not static, elusive not obvious, it repels any tendency to dogmatism, and, above all, the possible permutations of the questions that it raises are so numerous that the diligent investigator can seldom rest content with the solution that he proposes': Cheshire (1935) Preface.

127 The link between the academic approach of positivists and the political support for state 'sovereign' rights is analysed in 2.3 above. For example, in *Baldwin* v. *Missouri* (1930) 281 US 586, Justice Holmes (at p. 595) criticised 'the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States'. Juenger (1984) notes (at p. 38) the link between Currie's interest analysis and a 'Hobbesian state of nature' (citing a book review by von Mehren). But note the different ideas of interest analysis discussed in 5.3.6 below.

128 Laycock (1992) p. 257; Nadelmann (1957) pp. 80–1.

129 Ehrenzweig (1957) p. 719. Even this proposal is arguably an implicit recognition of the role that private international law may play in the distribution of regulatory authority through the structure of a federal system.

130 Act of 25 June 1948, ch 646, 62 Stat 947, codified at 28 USC 1738–9; see 4.3.1 above.

131 Cheatham (1950) p. 114; Hay (2000) p. 370. 132 Cheatham (1953) p. 585, p. 600.

133 Nadelmann (1957) pp. 71ff, pp. 81ff.

exceptions, continued to be interpreted as requiring only a balancing of interests.[134]

ii) Significant contacts

The 'interest balancing' approach was definitively rejected by the Supreme Court in *Allstate Insurance* v. *Hague* (1981),[135] which held that the constitution (in respect of both Full Faith and Credit and Due Process) requires not a balancing of interests but simply the existence of a 'significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction'[136] and the State whose law is to be applied, so that the application of its law would not be 'unfair'.[137] The

[134] This was consistent with US jurisprudence on the extraterritorial application of public law: Maier (1983). One exception was the case of *Order of United Commercial Travellers* v. *Wolfe* (1947) 331 US 586, in which the Supreme Court reiterated its previous finding that the Full Faith and Credit clause required each State to apply the law of the State of incorporation when addressing issues related to membership of a fraternal benefits society: see Hay (2000) p. 335; Leflar (1963) pp. 715ff; Cheatham (1953) pp. 595ff. While such an approach seems like a federal choice of law rule, it might be reconciled with the general approach of the Court by the argument that a fraternal society is so closely and uniquely connected with one State's law that any other State would automatically be insufficiently interested in its regulation. The Court also suggested (intriguingly) that the scope of liability for the society should be limited because of its internal 'representative form of government' regulated by the law of the State of its incorporation.

[135] 449 US 302; Symeonides (2004a) p. 25; Tilbury (2002); Hay (2000) p. 351; Laycock (1992) pp. 257ff; Herzog (1992) pp. 266ff; Lasok and Stone (1987) p. 140; Juenger (1984) pp. 24ff; Hay and Rotunda (1982) pp. 134ff, pp. 147ff.

[136] 449 US 302 at 313.

[137] The focus on 'fairness' as part of the interpretation of the Full Faith and Credit clause reveals the continued confusion of the ideas of Due Process and Full Faith and Credit. The Supreme Court openly held (at p. 308) that it was equating the impact of the Full Faith and Credit and Due Process clauses. A separate judgment by Justice Stevens argued (at pp. 320ff), more persuasively, that these clauses rested on different policy foundations and addressed different concerns. In *Philips Petroleum Co.* v. *Shutts* (1985) 472 US 797 the Supreme Court applied the 'significant contact' test but held that there was insufficient contact between the dispute and the forum State for the State court to apply its own law. Justice Stevens gave a separate judgment again, and further clarified his alternative interpretation of the Due Process clause, arguing (at pp. 837ff) that the Due Process clause was concerned with the effect of choice of law on the rights of the parties, a clear recognition of the idea of private international law as a form of rights protection. Due Process would not be breached merely by the application of a law insufficiently connected with the dispute, but only if the outcome resulting from the application of that law was different from the outcome which would have resulted from the application of a law which was sufficiently connected to the dispute, a requirement which he held was not proven in this case. See Tilbury (2002); Hay (2000) p. 364; Laycock (1992) p. 258; Lasok and Stone (1987) p. 141; Brilmayer and Lee (1985) pp. 849ff; Hay and Rotunda (1982) pp. 134ff.

constitution was therefore held to provide only a negative rule or standard, preventing the application of the law of a State unconnected with the dispute, but imposing no restriction on the selection of the law of any State with 'significant contacts'.[138]

This narrow interpretation of the effect of the constitution was continued in *Sun Oil Co.* v. *Wortman* (1988).[139] The Court noted and accepted the fact that its constitutional minimalism meant that 'frequently … a court can lawfully apply either the law of one State or the contrary law of another', but strongly rejected the suggestion that it 'embark upon the enterprise of constitutionalizing choice-of-law rules, with no compass to guide us beyond our own perceptions of what seems desirable'.[140] It has been argued that the effect of the Supreme Court's approach is that 'the Full Faith and Credit Clause means almost nothing, and state courts can often evade the little that it does mean'.[141]

iii) The Second Restatement

The effect of the US constitution on private international law rules has, following *Klaxon* v. *Stentor Electric* (1941) and the 'Supreme Court's revolution', gradually diminished. State private international law approaches, under the influence of the 'theorists' revolution', have tended to emphasise wide judicial discretion, and were thus also increasingly unconstrained by any unifying federal influence. This has led to widespread diversity and arguably confusion in US State private international law approaches,[142] a sense of crisis in private international law which, for some scholars at least, persists today.[143]

The *Second Restatement (Conflicts)* (1969) attempted to bring coherence to this doctrinal uncertainty.[144] Under the *Second Restatement*, the

[138] In *Allstate Insurance* v. *Hague* (1981) there was held to be sufficient contact between the applicable law and the dispute despite the existence of only very minimal contacts, and indeed it has been argued that the Supreme Court misapplied its own test: see Brilmayer and Lee (1985) p. 849; Hay and Rotunda (1982) pp. 138ff – note the dissenting judgments. Hay and Rotunda (1982) also (at pp. 147ff) criticise the decision for ignoring the role of the constitution in limiting the territorial authority of State legislatures.

[139] 486 US 717; Hay (2000) p. 436. [140] 486 US 717 at 727–8.

[141] Laycock (1992) p. 258.

[142] Symeonides (2004a); Leflar (1986) pp. 281ff; Prosser (1953) p. 971.

[143] See generally Symposium, 'Preparing for the Next Century – A New Restatement of Conflicts' (2000); Symposium, 'New Direction in Choice of Law: Alternatives to Interest Analysis' (1991).

[144] Perhaps, more fairly, it attempted to initiate a process which it was hoped would ultimately lead to coherence. See Tetley (1999) pp. 317ff; Brilmayer (1995) pp. 73ff; Wardhaugh (1989) pp. 355ff; Reese (1972); Reese (1963). (Reese was the Reporter for

courts should follow an express or implied choice of law by the parties,[145] unless there is no substantial relationship with the parties or the dispute and there is no other reasonable basis for the choice, and subject to the rule that the parties cannot contract contrary to a 'fundamental policy of a State which has a materially greater interest than the chosen state in the determination of the particular issue'.[146] If no choice of law is made by the parties, flexible choice of law rules apply: for example, selecting the law of the State with the 'most significant relationship' to a contract.[147] The *Second Restatement* lists a series of relevant principles to be considered in determining which State has the most significant relationship, which include 'the needs of the interstate and international systems', 'the relevant policies of the forum', 'the relevant policies of other interested states', 'the protection of justified expectations' and 'certainty, predictability and uniformity of results'.[148] Additional 'contacts' are specified for particular subject areas, such as, in the case of contracts, the 'place of contracting', 'place of performance', and location of the parties.[149]

Although the *Second Restatement* has proven widely influential, it remains a point of debate whether it has reduced or contributed to the uncertainty of private international law doctrine.[150] The attractiveness of the *Second Restatement* may ultimately come not from the 'clarity' it purported to bring, but from the fact that it is a conglomeration of a variety of traditional and modern elements, and thus compatible with a broad range of theoretical approaches. Critics have argued that the rules or 'contacts' it incorporates, which include traditional objective factual connections as well as the policy interests of affected states, are so broad

the *Second Restatement*). Although originally intended to apply only to internal US problems, in its final form the *Second Restatement* applies to both international and domestic problems, although it acknowledges that they may require different treatment: *Second Restatement (Conflicts)* (1969) s. 10; Ehrenzweig (1957) p. 717.

145 *Second Restatement (Conflicts)* (1969) s. 187 – see Born (1996) p. 658. Contrast the *First Restatement (Conflicts)* (1934) approach: see 4.3.2 above.

146 *Second Restatement (Conflicts)* (1969) s. 187(2)(b).

147 *Ibid*. s. 188, s. 6 – see Born (1996) p. 675.

148 *Second Restatement (Conflicts)* (1969) s. 6.

149 *Ibid*. s. 188(2).

150 Laycock (1992) argues (at p. 253) that in 'Trying to be all things to all people, it produced mush'; see also Ehrenzweig (1967) pp. 66ff. But see Leflar (1986) who argues that all the different modern approaches, including the *Second Restatement (Conflicts)* (1969), lead to the same results, and are therefore part of a new 'law of choice of law'. Others have observed that in practice, courts in the US combine and intermingle different approaches with the *Second Restatement*, 'in hybrid or kaleidoscopic fashion' (Nafziger (2001) p. 402), creating a sort of 'mish mash' (Reppy (1983)) or 'mixture of discordant approaches' (Juenger (1985a) p. 220); Tetley (1999) pp. 322ff.

and vague that the *Second Restatement* is in practice not a defined legal test, but a variety of justificatory criteria for an exercise of judicial discretion.[151]

Whether or not these criticisms are well founded, it remains notable that the *Second Restatement* invites the courts to engage in reasoning which incorporates elements of both the 'structure' and 'rights protection' approaches to private international law. The appeal to the courts to take account of 'the needs of the interstate and international systems' reflects the idea of private international law as part of the structure of these systems.[152] On the other hand, the measuring of contacts reflects the concerns of the Due Process clause with fairness to defendants, supporting the view that private international law operates as part of the system of constitutional rights protection, limiting the regulatory authority of States. Thus, although the federal constitutional conception of private international law has largely been rejected at a theoretical level, and US private international law is viewed as State law, constitutional concerns continue to exercise an influence over State choice of law rules.

4.3.4. The impact of the constitution on exceptions to State choice of law rules

Some early cases suggested that the Full Faith and Credit clause would impose extensive limitations on the rule which allows a court to refuse the application of the law of another State if it conflicts with the public policy of the forum.[153] As noted above, the Due Process clause was also

[151] See e.g. Symeonides (2001); Wardhaugh (1989) pp. 353ff.

[152] This principle is discussed further in 5.2.2 below.

[153] See e.g. *Loucks* v. *Standard Oil Co. of New York* (1918) 224 NY 99, which argued (following a 'vested rights' approach – see 4.3.2 above) for a restrictive interpretation of the public policy exception, suggesting (at p. 113) that 'the fundamental public policy is perceived to be that rights lawfully vested shall be everywhere maintained'. See further Paulsen and Sovern (1956); Nussbaum (1940); Nutting (1935); Du Bois (1933); Dodd (1926) p. 547. In *Broderick* v. *Rosner* (1935) 294 US 629 it was held that, because of the Full Faith and Credit clause, a State may only exclude the application of the law of another State under the public policy exception if it has a legitimate policy interest in the dispute; see Hay and Rotunda (1982) p. 146. The Court also held (at p. 643) that 'the constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate rules of comity'. See also US section p. 24, in Rubino-Sammartano and Morse (1991); Hay (2000a) p. 247. In a few cases, as endorsed by the *Second Restatement (Conflicts)* (1969) s. 187(2)(b), courts of the US have applied the 'fundamental policy' of a State other than the forum or the State whose law has been selected by the parties: see Bermann (1986) p. 169; Nussbaum (1940). Note the connection between this doctrine and the idea of foreign mandatory rules in the EU – see 4.6.5 below.

interpreted, in *Home Insurance* v. *Dick* (1930),[154] as providing limits on the application of the public policy of the forum, even in international cases – an approach connected with the European idea that public policy should be attenuated based on the degree of connection between the forum and the dispute.[155]

In more recent cases this is difficult to identify, since the widespread adoption in the US of very flexible private international law rules, which permit and in some cases encourage the judge to consider the content of the potentially applicable laws as part of the selection process, has largely obviated the necessity for the public policy exception to be applied. Concerns about the limits of public policy have been subsumed within this broader form of policy analysis. In *Hughes* v. *Fetter* (1951),[156] the Supreme Court held that a State cannot simply apply its own public policy to exclude the law of another State; it is up to the court to balance the policy interests and determine whose prevail. This approach merged the public policy exception with the interest balancing approach of *Alaska Packers Association* v. *Industrial Accidents Commission of California* (1935).[157] The Supreme Court has, however, generally given the Full Faith and Credit clause a narrower effect on the use of public policy exceptions in choice of law.[158]

Other exceptions to choice of law rules also show some signs of constitutional influence. The traditional rule that the penal or revenue laws of other states will not be enforced has been repeatedly challenged in the context of internal federal disputes, on the grounds that it is incompatible with the requirement to give Full Faith and Credit to the laws of

[154] 281 US 397.

[155] See further 4.6.5 and 5.3.5 below; Mills (2008) pp. 210ff. A general need to constrain the public policy exception has been recognised on the basis that 'Since every law is an expression of the public policy of the state, some higher threshold is needed to prevent the forum's law from being applied in every case. A strict construction of the public policy exception [is] necessary to prevent the whole field of conflicts of law from collapsing in on itself': *Tucker* v. *RA Hanson Co*. (1992) 956 F 2d 215 at 218.

[156] 341 US 609; Hay (2000) p. 319; Bermann (1986) p. 180; Hay and Rotunda (1982) p. 146; Cheatham (1953) pp. 587ff.

[157] See 4.3.1 and 4.3.2 above.

[158] *Bradford Electric* v. *Clapper* (1932) 286 US 145; *Carroll* v. *Lanza* (1955) 349 US 408; *Nevada* v. *Hall* (1979) 440 US 410; *Baker* v. *General Motors Corp*. (1998) 522 US 222; *Franchise Tax Board of California* v. *Hyatt* (2003) 538 US 488. See further Symeonides (2004a) pp. 24ff; Bermann (1986) p. 173; Hay and Rotunda (1982) p. 142; Nussbaum (1940) p. 1053.

other States.[159] The determination of which laws are substantive and which are procedural, for the purpose of determining whether the law of the forum or the applicable substantive law applies, may also be affected by constitutional requirements.[160] These impacts, while exceptional, show a latent continuing recognition of the constitutional dimension of analysis of private international law.

4.3.5. The impact of the constitution on jurisdiction

The approach to civil jurisdiction in the United States, although based on the common law, is complicated by the variety of distinct doctrines and terminology which have developed. It is also complicated by the fact that jurisdiction is governed by different State and federal statutes, and has been shaped by a focus on disputes between States which are particularly affected by US constitutional limitations. The existence of federal courts with jurisdiction limited based on the types of legal issues in dispute adds an additional jurisdictional complexity, recognised in the separate doctrine of 'subject matter' jurisdiction. The further existence of international considerations in the exercise of jurisdiction is implicitly recognised in the *Third Restatement (Foreign Relations)* (1986), discussed further in Chapter 5,[161] which includes rules governing the exercise of jurisdiction involving considerations of both public and private international law.

Early cases suggested that the foundations of US jurisdictional rules lay in international law. Jurisdiction could be established based on mere physical presence, giving effect to the territoriality which dominated international law.[162] The constitution was interpreted only as giving effect to, not modifying, the international law rules.[163] The landmark

[159] See e.g. *Huntington* v. *Attrill* (1892) 146 US 658 (although this case concerned quasi-penal laws governing the liability of directors for debts of a company; note also the related Privy Council decision of the same name in [1893] AC 150); *Milwaukee* v. *ME White* (1935) 296 US 268; *State ex rel. Oklahoma Tax Commission* v. *Rodgers* (1946) 193 SW 2d 919; *Oklahoma ex rel. Oklahoma Tax Commission* v. *Neely* (1955) 282 SW 2d 150; Bermann (1986) p. 180; Kahn-Freund (1974) p. 305; Castel (1969) p. 94; Cheatham (1953) p. 589; Beale (1919).

[160] *John Hancock* v. *Yates* (1936) 299 US 178 at 182; *Wells* v. *Simonds Abrasive* (1953) 345 US 514; *Sun Oil Co.* v. *Wortman* (1987) 486 US 723; Weintraub (1959) pp. 462ff, pp. 486–7; Cheatham (1953) p. 593.

[161] See 5.2.2 and 5.3 below.

[162] Burbank (1999) pp. 115ff; see further Chapter 2 and 5.3.2 below.

[163] Korn (1999) pp. 948ff, pp. 966ff; Juenger (1984a) p. 1196.

case of *Pennoyer* v. *Neff* (1879)[164] clarified the US approach, largely consistently with developments in the common law in other states. The judgment, which purported to be based on both international law and the constitution,[165] recognised two basic permissible grounds for jurisdiction over a defendant: submission and physical presence.[166] Physical presence was interpreted broadly to include domicile or residence.[167] Aside from the recognition of party autonomy implicit in allowing submission to a forum, discussed further in Chapter 5,[168] this approach emphasised the territorial limits on the regulatory authority of the States, and recognised the role of private international law rules in reflecting and defining this order. It held that there was 'a principle of general, if not universal, law' that 'the authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established'.[169]

These jurisdictional rules were radically redeveloped in *International Shoe Co.* v. *Washington* (1945).[170] The Supreme Court held that for a State to take jurisdiction over a dispute it must have certain 'minimum contacts',[171] such that the act of taking jurisdiction is not unfair or unjust. This approach clearly emphasised the role of the Due Process

[164] 95 US 714; see Weinstein (2004) p. 174; Korn (1999) pp. 971ff; Born (1996) pp. 23ff; Brilmayer (1995) pp. 268ff. The judgment was give by Justice Field – see 2.4.2 above.

[165] Whether this approach was a successful reconciliation or a confused 'mismatch' (Juenger (1995) p. 1029) remains open to dispute. The rules on international law were derived from Story (see 4.3.1 above; Juenger (1984a) p. 1196), whose rules were in turn derived from Huber (see 2.3.4 above), and there is an argument that Huber's rules were intended to apply only to choice of law problems, not jurisdictional issues: see Korn (1999) pp. 977ff.

[166] Casad (1999) p. 94. These are still typically used for the purposes of the recognition and enforcement of a foreign judgment, as the criteria for evaluating the jurisdiction of the foreign court: see further 5.3.2 below. It was thought for a long time that quasi *in rem* actions were not subject to these restrictions, until *Hanson* v. *Denckla* (1958) 357 US 235 at 246ff and *Shaffer* v. *Heitner* (1977) 433 US 186 decided that the 'minimum contacts' rule also applies to these actions; see Juenger (1984a) pp. 1200ff; Lasok and Stone (1987) p. 137.

[167] *Milliken* v. *Meyer* (1940) 311 US 457. The development of the concept of domicile has itself been affected by the US federal context: see e.g. Du Bois (1933) pp. 369ff.

[168] See 5.6 below.

[169] *Pennoyer* v. *Neff* (1879) 95 US 714 at 720.

[170] 326 US 310; Casad (1999) pp. 95ff; Born (1996) pp. 24ff; Goldstein (1995); Juenger (1984a) pp. 1198ff.

[171] It is important to distinguish the 'minimum contacts' test established with respect to jurisdiction from the 'significant contacts' test established with respect to US choice of law disputes (see 4.3.3 above). The requirement for 'minimum' contacts is lower than that for 'significant' contacts, and in the case of jurisdiction, the minimum contacts are between the forum and the *defendant*, not the transaction, because of the basis of the doctrine in fairness to the defendant. This is a distinction that is, however, not always

clause[172] (and the idea of private international law as a system of rights protection) over the influence of international law ideas of territorialism (and the idea of private international law as part of the structure of the federal system). The effect of the decision was to authorise the development of 'long-arm' statutes by different States, asserting jurisdiction over absent defendants on the basis of various connections or 'contacts'.

Two types of 'long-arm' jurisdiction are usually distinguished, based on the types of connections involved. Specific jurisdiction exists where a cause of action arises directly out of the defendant's contact with the jurisdiction. General jurisdiction exists where there is no such direct connection, but the defendant has systematic and continuous activity in the territory. This may be viewed as another form of constructive presence within the territory, like an expanded definition of when a party is 'resident' in the State.

The various grounds for asserting jurisdiction set out under long-arm statutes are subject to the constitutional 'minimum contacts' test, which is more difficult to meet in the case of general jurisdiction. Some States assert jurisdiction widely within these limits – in California, for example, jurisdiction is automatically asserted up to the constitutional limits, because the long-arm statute expressly permits jurisdiction to be exercised 'on any basis not inconsistent with the Constitution of this state or of the United States'.[173] The determination of how much contact is required by the constitution has sometimes been interpreted to require a sort of 'interest balancing' by the court.[174] Such an approach suggests a unification and perhaps a confusion of the rules for jurisdiction and choice of law. Other cases have emphasised the idea that jurisdictional

apparently appreciated by the courts. See Hay and Rotunda (1982) p. 130, pp. 149ff; Tilbury (2002) p. 162. Compare also the test in *Helicopteros Nacionales de Colombia* v. *Hall* (1984) 466 US 408, which refers (at p. 414) to 'sufficient contacts between the State and the defendant'.

[172] The Court held (at p. 316) that 'due process requires only that … [the defendant] have certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice"'.

[173] Californian Code of Civil Procedure, s. 410.10. This is subject to a possible stay of proceedings under s. 410.30.

[174] Casad (1999) pp. 97ff; see e.g. *McGee* v. *International Life Insurance Co.* (1957) 355 US 220; *Asahi Metal Industry Co.* v. *Superior Court of California* (1987) 480 US 102; *Burger King Corp.* v. *Rudzewicz* (1985) 471 US 462; Juenger (1995) pp. 1031ff; Lasok and Stone (1987) p. 136; Juenger (1984a) pp. 1198ff. *Asahi* seems to suggest (at pp. 113ff) that different interests may apply in international cases, which seems inconsistent with the underlying theoretical basis of the minimum contacts requirement in the Due Process provision: Juenger (1995) p. 1035.

rules reflect 'territorial limitations on the power of the … States'[175] (adopting the 'structural' idea of private international law), and should not therefore involve considerations of State policies or defendant interests. More complex tests have evolved based on whether there is 'purposeful availment'[176] or a 'stream of commerce',[177] and it has been suggested that there is a general requirement of 'reasonableness' in any exercise of jurisdiction.[178] The case law suggests that in reality the courts of the US are badly divided on this issue, and critics have suggested there is 'doctrinal incoherence'.[179]

Although its interpretation has remained narrow, the Due Process clause has played a dominant role in the development of constitutional limitations on State jurisdictional rules, at the expense of the Full Faith and Credit clause. The attempts to make the Due Process clause play a structural role confuse the idea of private international law as 'structure', associated with the Full Faith and Credit clause, with the idea of private international law as a system of rights protection. Some critics have thus argued that jurisdictional limits ought to be based on the structural limitations of State authority, not ideas of 'fairness' or individual rights.[180] Further reliance on the Full Faith and Credit clause would also permit a greater distinction to be drawn between domestic and international jurisdictional problems, allowing the rules to reflect the federal or international context more closely.[181]

In addition to limits expressly provided in jurisdictional rules, State or federal courts may also exercise a discretionary stay of proceedings under the doctrine of *forum non conveniens*. As discussed in Chapter 1, the

[175] *Hanson* v. *Denckla* (1958) 357 US 235 at 251; Juenger (1995) pp. 1031ff; Goldstein (1995).

[176] *Hanson* v. *Denckla* (1958) 357 US 235 held (at p. 253) that the contact between the defendant and the jurisdiction giving rise to the suit must be the result of 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum States, thus invoking the benefits and protections of its laws'; Casad (1999) p. 98.

[177] *World-Wide Volkswagen* v. *Woodson* (1980) 444 US 286; Casad (1999) p. 99; Goldstein (1995).

[178] See 5.3.2 below.

[179] Juenger (1995) p. 1035. See e.g. *Burnham* v. *Superior Court of California* (1989) 495 US 604; *Omni Capital International* v. *Rudolf Wolff & Co.* (1987) 484 US 97; Casad (1999) p. 103; Juenger (1995). In *World-Wide Volkswagen* v. *Woodson* (1980) 444 US 286 the Supreme Court (at p. 292) suggested that the Due Process clause is one of 'the limits imposed on [the States] by their status as coequal sovereigns in a federal system', arguably confusing the ideas of Due Process and Full Faith and Credit: Juenger (1984a) p. 1201.

[180] Weinstein (2004) pp. 299ff; Goldstein (1995).

[181] Juenger (1995) pp. 1030ff.

availability of a discretion to decline the exercise of jurisdiction allows consideration of a range of factors which go to two separate questions. First, there is the international (or inter-State) question of the existence of jurisdiction. Second, there is the domestic question of whether jurisdiction should be exercised, also taking into consideration domestic policy considerations such as the interests and convenience of the parties. The extent to which private international law rules form part of a constitutional system for limiting jurisdiction is often camouflaged by the combination of these two questions as part of a single discretionary test.[182]

4.3.6. The impact of the constitution on the recognition and enforcement of judgments

The clearest influence of the constitution on US private international law is the requirement, based on the Full Faith and Credit clause and implemented in statute, for each State to recognise the judgments of each other State.[183] Perhaps because the rules are so uncontroversial, little theoretical attention has been given to characterising the purpose or legal justification of this requirement. No 'public policy' exception applies to this rule,[184] which suggests that there are no limits on the 'tolerance of difference' operating between US States. This is, however, somewhat difficult to reconcile with the continued possibility of public policy being invoked to preclude the application of the law of another State.[185] The reason for the disparity in the treatment of the laws and judgments of other States is unclear; it has been described as a 'fault' of US federalism.[186]

[182] See 5.2.2 below.

[183] See 4.3.1 above; Brilmayer (1995) pp. 298ff; Reynolds (1994); Lasok and Stone (1987) p. 142. While this prevents a rehearing of the dispute, it does not prohibit the award of supplementary damages if these were not available in the initial State: *Thomas* v. *Washington Gas Light Co.* (1980) 448 US 261; Brilmayer and Lee (1985) pp. 842ff.

[184] See e.g. *Fauntleroy* v. *Lum* (1908) 210 US 230; *Milliken* v. *Meyer* (1940) 311 US 457 at 462: 'the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based'; *Baker* v. *General Motors Corp.* (1998) 522 US 222; Reynolds (1994) pp. 436ff; Du Bois (1933); Beach (1918). Although the requirements for international recognition of judgments are not directly affected by the US constitution, State courts and legislatures have been influenced or indirectly affected by these rules: see *Aetna Life Insurance Co.* v. *Tremblay* (1912) 223 US 185; Hay (2000a); Lasok and Stone (1987) p. 142.

[185] See 4.3.4 above.

[186] Laycock (1992) pp. 289ff; Von Mehren (1969) pp. 687–8.

The obligation to recognise and enforce a judgment of another State only applies where the judgment was obtained on the basis of jurisdiction which complied with the constitutional requirement for 'minimum contacts',[187] reflecting Due Process standards. The structural effect of Full Faith and Credit, requiring recognition and enforcement, is thus balanced against the rights protection effect of Due Process, which allows for an exception where the defendant's constitutional rights have been violated.

4.3.7. Explaining the weak impact of the constitution on US private international law – subsidiarity and regulatory competition

The analysis in this section has identified a number of ways in which the federal context has influenced the development of US private international law, and led to a recognition of its connection with constitutional structure (primarily through the Full Faith and Credit clause) and rights protection (primarily through the Due Process clause). Private international law rules in the US may be said to possess a 'hybrid' character; they are neither purely federal nor State law, but a combination of both.

Some critics continue to push for an expansive role for the constitution in providing the foundations of a federalised private international law.[188] However, the influence exercised by the US constitution on private international law has clearly declined since the high point in the early twentieth century, when federal private international law rules were being developed by the Supreme Court as part of federal common law. Under the current approach, the impact of the federal constitution and federal law on private international law is only to police the 'outer limits' of the diverse private international law rules of the States.[189]

In *Pacific Employers Insurance Company* v. *Industrial Accident Commission* (1939),[190] the Supreme Court accepted the possibility that under its approach more than one State might have a sufficient interest in a dispute to apply its own law. Similarly, despite the constitutional restrictions considered above, extensive and overlapping 'long-arm' jurisdiction rules have

[187] *Ackermann* v. *Levine* (1986) 788 F 2d 830 (dealing with a West German judgment, also holding that service of process must satisfy the law under which it is effected); *Estin* v. *Estin* (1948) 334 US 541.

[188] See e.g. Whitten (2001); Goldstein (1995); Laycock (1992); Gottesman (1991); Weintraub (1959).

[189] Juenger (1984a) p. 1206. [190] 306 US 493.

permitted multiple fora in which a claim can be brought. This approach, perhaps intentionally,[191] has increased the likelihood of recovery for plaintiffs, by permitting multiple fora (chosen by the plaintiff) and applicable laws (chosen by the court). It has thus arguably abandoned the old idea of decisional harmony as a goal of private international law – the idea that the purpose of choice of law rules is to identify a single applicable law, regardless of where proceedings are brought.[192] Even a comparative interest analysis approach, which recognises that private international law affects the distribution of state regulatory authority, misses the possibility that there are systemic, *federal* interests at stake.[193]

This provides a challenge to the idea of the relationship between private international law and constitutional law. The challenge is to explain why a more unified approach has not been adopted in the US – why, in the words of one US commentator, 'we alone … have made no effort better to integrate our judicial systems'.[194] The unification of private international law in the US would clearly bring more order and predictability to disputes involving more than one State, increasing the level of decisional harmony.

Some critics view this as a failure of the US legal system,[195] perhaps the result of confusion in US jurisprudence of the idea of private international law as structure and the idea of private international law as protecting rights.[196] The finger may be pointed particularly at the reasoning of the Supreme Court in *Klaxon* v. *Stentor Electric* (1941).[197] If the rejection of federal common law in *Erie Railroad* v. *Tomkins* (1938) was correct,[198] it is still not clear why, as the Supreme Court maintained, it necessitated the rejection of federal private international law. The assumption appears to have been that the only two options available to the Court were an entirely centralised system, or an entirely disaggregated one – the law moved from one extreme, in *Swift* v. *Tyson* (1842), to

[191] Juenger (1984) p. 6. [192] See 1.4 above; Laycock (1992) p. 296; Weinberg (1991).
[193] See further 5.3.6 below.
[194] Jackson (1945) p. 20, contrasting the situation in the US with Australia and Canada.
[195] Laycock (1992) argues (at p. 331) that 'The Failure of Congress and the Court to deal with choice-of-law problems is a major abdication of responsibility'; see Spamann (2001); Goldstein (1995).
[196] Juenger (1995) p. 1029. The long tradition and recent revival of structural interpretation in the US, similar to the methodology which prefaced the constitutional private international law revolutions in Australia (see 4.4 below) and Canada (see 4.5 below), may point towards the emergence of an approach more similar to the new private international law revolutions in those states: see Westover (2005).
[197] See 4.3.2 above. [198] The decision remains controversial – see e.g. Clark (2007).

the other, in *Erie Railroad* v. *Tomkins* (1938) and *Klaxon* v. *Stentor Electric* (1941).[199] This missed the possibility that, by unifying private international law but retaining diverse State substantive laws, a balance might be drawn between uniformity and diversity, centralism and State independence. It may be argued, following this approach, that the courts of the US failed to recognise the potential for private international law rules to operate as part of the constitutional structure or system of rights protection – although the continued recognition of some effect for constitutional principles on private international law suggests that such ideas remain latent.

Another explanation is that, as discussed previously, the development of the conception of private international law as part of the domain of national discretion, explored in Chapter 2, may have had the incidental effect of causing private international law to be viewed within the US federal system as part of the domain of the discretion of each State.[200] The minimal constitutional influence on modern State private international law could be the consequence of such a view. Just as the rejection of private international law as part of an international system was associated with the rise in state sovereignty as part of the positivist approach to international law, the rejection of private international law as part of the US federal system may be connected with an equivalent prioritising of State sovereignty in the US. Advocates of a stronger role for the constitution in shaping US private international law point out that federal standardisation of rules would promote decisional harmony and 'conflicts justice'. However, this would leave less room for judges in individual cases to provide for their preferred outcome, and for each State to pursue its own policies and conceptions of 'justice'. The focus in the US on private international law as a part of the domain of State regulation may reflect a concern with diversity and flexibility in the pursuit of 'justice' which, in the context of private international law, is misguided.[201]

The emphasis on State regulatory authority suggests that an idea of subsidiarity, as discussed in Chapter 3,[202] may be operating here. Although there is no constitutional principle of subsidiarity in the US, a literature has developed which both advocates the use of this idea in governing the flexibility which exists within US federalism, and claims that it operates functionally in the existing structural federal-State

[199] See 4.3.2 above. [200] See 4.2.3 above. [201] See Chapter 1. [202] See 3.5 above.

balance of power.[203] State diversity in private international law rules may be viewed as the result of an implicit application of the principle of subsidiarity – not furthered through the application of private international law, but applied to private international law itself.[204] The hybrid federal-State character of US private international law rules may thus, in itself, constitute a form of balancing of powers which is typical of federalism.

Particularly in the US, appeals to subsidiarity are sometimes strengthened by reference to the idea of 'regulatory competition'. This is the idea that if a field is governed by the State and not the federal level, the different States of the US might act as competing parties in a market of legal regulation, leading to overall improvements in the quality of laws. According to this perspective, the conflict between State legal systems has a competitive benefit.[205] Justice Brandeis, who later delivered the opinion of the Court in *Erie Railroad* v. *Tomkins* (1938),[206] wrote a dissenting judgment in 1932 (in a case dealing with the interpretation of the Due Process clause) which included the statement that 'it is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country'.[207] This approach views the 'forum shopping' between States which is a consequence of *Erie Railroad* v. *Tomkins* (1938) not as a matter of injustice or economic inefficiency, but as a natural and beneficial aspect of an internally diverse and competitive system.[208]

Evaluating this claim requires further examination of what is meant by 'forum shopping'. By ensuring that federal courts apply the State law of the location in which they are sitting, the decision in *Erie Railroad* v. *Tomkins* (1938) permitted one kind of 'forum shopping'; people and companies can choose which set of laws they wish to live under by relocating their residence or activities from State to State. Thus, the States are in regulatory competition with respect to their substantive laws. The extension of this idea

[203] See generally Sander (2006); Bermann (1997); Neuman (1996); Vause (1995); Bermann (1994).

[204] See further 5.7 below.

[205] Brilmayer and Lee (1985) p. 852; see discussion and analysis in Muir Watt (2004); Muir Watt (2003); Allen and Ribstein (2000) at pp. 1227ff; Bermann (1997); Bermann (1994).

[206] See 4.3.2 above.

[207] *New State Ice Co*. v. *Liebmann* (1932) 285 US 262 at 311.

[208] Juenger (1994); see also Opeskin (1994). Note that in the US, the strongest rejection of forum shopping has been applied to the idea that litigants might choose between State and federal courts, not the idea that they might choose between State courts – see 4.3.2 above.

to private international law in *Klaxon* v. *Stentor Electric* (1941), leading to the establishment of diverse State private international law rules, may appear to be an incremental step. However, because private international law rules are qualitatively distinct 'secondary' rules,[209] when different private international law rules exist in different States a different form of 'forum shopping' becomes possible. A person or company can change the laws applicable to their activities not by changing where they live or do business, but simply by choosing where they litigate. This possibility is reinforced by the adoption in some States of private international law rules which favour the law of the forum, or openly permit the courts to apply the 'better' law, providing a second level of regulatory competition which is carried out by the courts rather than by plaintiffs.[210]

The effect of this is to increase the amount of legal uncertainty in the system for defendants, and the possibility of recovery for plaintiffs. The fact that this approach is weighted in favour of plaintiffs – that it broadens the possibility of recovery by permitting multiple fora and applicable laws – is more than an incidental effect. It indicates that a hidden substantive norm is operating within the private international law system, favouring plaintiff recovery. The relative absence of federal private international law is arguably a by-product of a system designed to favour plaintiffs over substantive harmony.

A more critical consequence of the idea that regulatory competition should operate between private international law rules is that it risks *undermining* the possibility of regulatory competition operating between State substantive laws, since the scope of application of each State's laws becomes more difficult to anticipate. Viewing the States as 'fifty laboratories' of private international law may diminish their effectiveness as 'fifty laboratories' of substantive law. However, the continuing existence of a degree of constitutional control over private international law (policing the 'limits' of State private international law) does ameliorate the disorder which this introduces into the system.

There is a long-standing tradition of argument in the US for the development of federal private international law, which would arguably promote subsidiarity by ordering the diverse substantive laws of the different States. The fact that private international law rules in the US contain elements of both federal and State law reflects a tension which is the product of the application of the ideas of subsidiarity and regulatory competition to private international law itself.

[209] See 1.4.3 above. [210] See 4.3.2 above.

4.4 Australia

The Australian federal system, established in 1901 as a combination of a US-style written constitution with an English common law tradition, might be thought to be fertile ground for the development of ideas concerning the relationship between constitutional law and private international law. This would seem to be enhanced by the fact that Australia (like the US) has separate State systems of private law, but (unlike the US) has a unitary federal legal system, with the High Court as a general court of appeal from State courts.[211]

While there are signs that this promise may finally be realised, Australian courts have been slow to recognise the possibility that traditional private international law rules might by affected by the Australian federal context.[212] Although the purpose of this section is not to evaluate the current state of the law in Australia, it remains difficult to dispute the old argument that Australian courts and lawyers should give greater consideration to the effects of the Australian constitution on private international law.[213] Part of the reason for this slow development has been the approach taken to questions of the applicable law in courts exercising federal diversity jurisdiction.

4.4.1. Applicable law in diversity jurisdiction

In Australia, as in the US, diversity jurisdiction, that is, jurisdiction over disputes involving parties from more than one State, is given by the constitution to federal courts.[214] In practice, however, federal courts in Australia, unlike those in the US, almost only ever deal with matters

[211] See *Breavington* v. *Godleman* (1988) 169 CLR 41 at [21] (per Deane J).

[212] See 4.2.3 above; Tilbury (2002); O'Brien (1976); Castel (1969); Cowen (1957) p. 10. Some incidental effects have been identified. For example, in *Walton* v. *Walton* [1948] Vict LR 487 it was held that, because of the federal context, a change of domicile is easier within Australia than internationally. Much like in the US, the federal government in Australia has exclusive authority to deal with questions of foreign relations. It has been argued that this has the potential to affect some private international law disputes: Cowen (1957) p. 9, pp. 30ff. A potential role has also been suggested for the dormant s. 76(iv) of the Australian constitution, which states that 'The Parliament may make laws conferring original jurisdiction on the High Court in any matter … (iv) Relating to the same subject-matter claimed under the laws of different States' – see Castel (1969) p. 44.

[213] Castel (1969) p. 105; Cowen (1957) pp. 29ff.

[214] Section 75(4); see Pryles and Hanks (1974) pp. 104ff; Castel (1969) pp. 14ff; Cowen (1957) pp. 42ff.

pertaining to federal law. The authority to decide diversity cases has been delegated to State courts, and various mechanisms are used to ensure that applicants bring their cases in State and not federal courts. The provision of the constitution dealing with diversity jurisdiction has also been interpreted narrowly.[215]

When an Australian court does exercise federal diversity jurisdiction, the law to be applied is determined by sections 79 and 80 of the Commonwealth *Judiciary Act 1903*.[216] The federal court (or State court exercising federal jurisdiction) must apply the law of the State in which the court is sitting, as modified by any federal statutes. This includes the choice of law rules of that State, which may require the application of a foreign law or the law of another State to the determination of the substantive rights of the parties. This rule is the same as that applicable in the US, after the decisions in *Erie Railroad* v. *Tomkins* (1938) and *Klaxon* v. *Stentor Electric* (1941)[217] ruled out the possibility of the court exercising federal choice of law rules as part of a federal common law.

The Australian approach to diversity jurisdiction suggests that, like the US, Australia does not have a concept of 'federal' common law which might include the development of federal private international law rules. This is, however, a matter of ongoing uncertainty. Some early jurisprudence of the High Court of Australia asserted the existence of federal common law.[218] In subsequent cases, however, the High Court rejected the argument that a court exercising federal diversity jurisdiction had to apply federal common law.[219] This does not sit comfortably with the fact that in Australia (unlike the US) the High Court acts as an ultimate and general court of appeal from State courts, including on issues of the interpretation of State law. Regardless of the theoretical position, there is thus as a matter of fact an institutionally driven unity of common law in Australia which is not present in the US.[220] The result of this is that,

[215] For example, it was held in *Australian Temperance & General Mutual Life Assurance Society Ltd* v. *Howe* (1922) 31 CLR 290 that it did not extend to disputes involving parties who were not natural persons (such as corporations). See Pryles and Hanks (1974) pp. 145ff; Castel (1969) p. 24. Given the narrowness of the approach to diversity jurisdiction in Australia, it is not surprising that it has been argued that the clause has no purpose and is in fact inappropriate in the Australian context: Cowen (1957) pp. 15ff.

[216] Pryles and Hanks (1974) p. 159; Cowen (1957) pp. 45ff.

[217] See 4.3.2 above; Kahn-Freund (1974) p. 214.

[218] *King* v. *Kidman* (1915) 20 CLR 425 at 435ff; Cowen (1957) p. 47.

[219] *Musgrave* v. *Commonwealth* (1937) 57 CLR 514; Castel (1969) p. 48.

[220] Cowen (1957) p. 48.

compared to the US, there has been less diversity in the substantive law or private international law of the Australian States, and thus less of a demonstrable need for federalised private international law when dealing with internal disputes. It is only recently that the High Court has begun to recognise federal constitutional implications for private international law in Australia.

4.4.2. Early interpretation of the Full Faith and Credit clause

The Full Faith and Credit clause of the Australian constitution was borrowed almost verbatim from the US constitution.[221] However, it appears that this was done without a great deal of consideration as to its intended significance for Australian private international law, importing not just the US text but also the US doctrinal disputes explored earlier in this Chapter. Examination of the Australian constitutional conventions only highlights the scarcity of consideration of this issue.[222] The uncertainty, as in the US, extends to the issue of whether the Full Faith and Credit clause is self-executing or requires implementation by parliament (or some combination of both).[223] Despite these issues, private international law dealing with internal disputes in Australia has been affected by its federal context from the beginning of federation.

i) Jurisdiction and the recognition and enforcement of judgments

The question of whether the federal constitutional system has an effect on the rules of private international law relating to jurisdiction and the enforcement of judgments in Australia has been rendered partially redundant by Commonwealth legislation which gives effect to principles of full faith and credit.

In Australia, as elsewhere under the common law, the limits on jurisdiction are expressed in the form of rules governing service of process. While each State has its own rules on jurisdiction, these are substantially similar. Jurisdiction exists only in cases where the defendant is present and served

[221] Section 118 of the Australian Constitution reads: 'Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.' The text of the US Full Faith and Credit clause is footnoted in 4.3 above.

[222] Pryles and Hanks (1974) p. 60; Cowen (1957) p. 20. [223] See 4.3.1 above.

within the jurisdiction, submits to the jurisdiction, or where the rules permit the service of process outside the territory.[224]

Special arrangements exist, however, for disputes internal to Australia but involving more than one State. From the beginning of Australian federation, the Commonwealth *Service and Execution of Process Act 1901* established national rules under which proceedings commenced in any State of Australia could be served in any other State, provided a territorial nexus existed with the forum state.[225] These were substantially broadened with the Commonwealth *Service and Execution of Process Act 1992*, which eliminated the territorial nexus requirement. The jurisdiction of each State court is also 'cross-vested' in the courts of every other State, meaning that each State can exercise jurisdiction over any dispute which would be subject to the jurisdiction of any other State.[226] The effect of these rules is that, for the purposes of inter-State disputes, each State accepts every other State's jurisdictional rules, and thus jurisdiction over any person present in Australia taken under the laws of any State cannot be viewed as 'exorbitant'. Partly as a consequence of this effective harmonisation of jurisdictional rules, and partly as a result of the rule (discussed below) that public policy (or any other defences to recognition and enforcement) cannot be applied between States,[227] the recognition and enforcement of judgments between Australian States is practically automatic.[228]

This is not to suggest, however, that the legislation has provided complete clarity in this field. It remains uncertain whether the Full Faith and Credit clause prevents an Australian State court from reviewing the jurisdiction of another Australian State court when being asked to enforce a judgment from that court.[229] There has also been some suggestion that, in addition to the uniformity secured by legislation, the content of the jurisdictional rules ought to be affected by the requirement to give full faith and credit.[230] Notwithstanding these issues, and notwithstanding

[224] See e.g. New South Wales *Uniform Civil Procedure Rules 2005*, Parts 10–11; see further 5.3 below.

[225] See e.g. Cowen (1957) p. 39.

[226] See e.g. *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW). Proceedings commenced in one State can also be transferred to the courts of another State.

[227] *Service and Execution of Process Act 1992* (Cth) s. 109. [228] *Ibid.* s. 105.

[229] *Ibid.* s. 105(5) requires that the judgment must be capable of being enforced in the court of rendition, which does not entirely close off the possibility of challenging the exercise of jurisdiction giving rise to the judgment. The situation was similar under the previous legislation; see Castel (1969) p. 55; Cowen (1957) pp. 79ff.

[230] Pryles and Hanks (1974) Ch. 3.

that the solution has been legislative and not judicial, the federal rules on jurisdiction and the enforcement of judgments in Australia exemplify the idea that the rules of private international law are an integral part of the structural ordering of a federal system.

ii) Choice of law

An early consideration of the possible impact of the Full Faith and Credit clause by an Australian State court suggested that it mandated that 'the law to be applied shall be the same wherever in Australia the cause is tried'.[231] Uniform choice of law rules which did not favour the law of the forum would be required to ensure such a result. Australian State courts have, on occasion, considered the possibility that the Full Faith and Credit clause might justify, indeed necessitate, the development of constitutional choice of law rules.[232] Despite considering the issue in a couple of cases, until recently the High Court had neglected determining the effect of the Full Faith and Credit clause on private international law, largely because, as explored above, State choice of law rules were subject to a *de facto* unification under the common law.[233]

As in the US, there was scope for debate as to whether the Full Faith and Credit clause was intended to have a substantive function (affecting choice of law rules) or merely an evidentiary one (affecting the method of proof of inter-State laws).[234] The *State and Territorial Laws and Records Recognition Act 1901*, passed in the first session of the Australian parliament, dealt with evidentiary issues in the proof of the laws of other States – the law of another State is characterised as a matter of law, of which judicial notice is taken, not as a matter of fact.[235] An interpretation of the Full Faith and Credit clause as 'self-executing' and having substantive effects has been adopted in some decisions concerning the availability of exceptions to choice of law rules. For example, the idea that one of the Australian States may not exclude the application of

[231] *Re E and B Chemicals and Wool Treatment* [1939] SASR 441 at 443–5; *Re E and B Chemicals and Wool Treatment* (No. 2) [1940] SASR 267 at 280; Graveson (1974) p. 209; Kelly (1974) p. 100; Cowen (1957) p. 21; Cowen (1952).

[232] *Re Cth Agricultural Service Engineers Ltd* [1928] SASR 342 at 346; *Harris* v. *Harris* [1947] Vict LR 44; *Hodge* v. *Club Motor Insurance Agency* (1974) 7 SASR 86.

[233] *Jones* v. *Jones* (1928) 40 CLR 315; *Anderson* v. *Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20; see Nygh (1991); Kelly (1974) pp. 100ff; Pryles and Hanks (1974) p. 84; Castel (1969) p. 60; Cowen (1957) pp. 19ff; Cowen (1952); Sykes (1952).

[234] See 4.3.1 above.

[235] Now in ss. 143 and 185 of the *Evidence Act 1995* (Cth); see further Castel (1969) p. 55; Cowen (1957) p. 19.

another State's law on the grounds of 'public policy' has received support in a line of cases,[236] suggesting that there are no limits on the policy of 'tolerance of difference' implicitly adopted between Australian States. Similarly, as in the US, it has been questioned whether the exclusion of revenue laws from the domain of private international law is consistent with the general obligation to give full faith and credit to the laws of another State.[237]

4.4.3. The Australian revolution – choice of law in tort

The long-standing uncertainty over whether the Full Faith and Credit clause has a direct substantive effect on Australian private international law has recently been resolved by the High Court. Given the lack of diversity in Australian State choice of law rules, which are largely governed by the common law, the motivation for this change came not from a desire to effect a centralisation or standardisation of regulation in this field, but from a desire to reform the common law choice of law rule in tort.

Australian courts have traditionally followed the common law approach to choice of law in tort, which meant the application of the 'double actionability' test established by the English courts in *Phillips* v. *Eyre* (1870),[238] even in the case of disputes between Australian States. This provided that a claim in tort could only be pursued if the conduct was actionable under both the *lex fori* and the *lex loci delicti*. The test was developed further by the English courts in *Boys* v. *Chaplin* (1971),[239] which introduced a flexible exception under the influence of the interest

[236] *Jones* v. *Jones* (1928) 40 CLR 315 at 320; *Merwin Pastoral* v. *Moolpa Pastoral* (1933) 48 CLR 565; *Breavington* v. *Godleman* (1988) 169 CLR 41 (see especially Deane J at [27], arguing that the national law system establishes a 'superior policy'); *Pfeiffer* v. *Rogerson* (2000) 203 CLR 503; see also Tilbury (2002) p. 537; Kahn-Freund (1974) p. 295; Castel (1969) p. 61; Cowen (1957) pp. 20–1. Burston (2004) argues that a government interest analysis approach plays a part in the exceptions to choice of law rules.

[237] Whitelaw (1994); Castel (1969) p. 62, p. 95; *Permanent Trustee Co. (Canberra)* v. *Finlayson* (1967) 9 FLR 424 (point not decided on appeal to the High Court, reported at (1968) 122 CLR 328). *Pfeiffer* v. *Rogerson* (2000) 203 CLR 503 arguably suggests that this may extend to all public laws; see analysis of the possible exclusion of 'foreign public law' in Burston (2004); Tilbury (2002) pp. 537–8.

[238] (1870) LR 6 QB 1; see discussion in *Breavington* v. *Godleman* (1988) 169 CLR 41; *Pfeiffer* v. *Rogerson* (2000) 203 CLR 503; *Koop* v. *Bebb* (1951) 84 CLR 629; Princi (2002); Lindell (2002); James (2001).

[239] [1971] AC 356; see also *Red Sea Insurance Co. Ltd* v. *Bouygues SA* [1995] 1 AC 190.

analysis approach developed in the US,[240] although the lack of clarity of the test and the favour it gives to the law of the forum were and continue to be much criticised.[241]

The idea that the Australian constitution or federal system might provide a basis on which to reject this rule was explored by the High Court in *Breavington* v. *Godleman* (1988),[242] although without a clear majority. Justices Wilson and Gaudron argued that the constitution created territorial limits on the sovereignty of each of the States,[243] and that this limited the choice of law rules each State could adopt. Justice Mason rejected a specific role for the constitution in developing private international law, but held with Justices Wilson and Gaudron that the federal context had an effect on choice of law rules, concluding that it required the application of a *lex loci delicti* rule in inter-State torts. Part of the justification for this approach was a return to the idea that the same law should be applied wherever in Australia proceedings might be brought,[244] reducing both the unpredictability of the legal system and the attractiveness of forum shopping. The existing uniformity of choice of law rule under the common law did not achieve this, because the application of the double actionability rule also required consideration of the law of the forum. Justice Deane argued that the territorial limitation of each State sovereign and the fundamentally unitary system of law established by the constitution meant that the common law rules of private international law were thus inapplicable. Instead, he argued, a new federal standard 'sufficient relevant nexus' test ought to be applied.[245] While four out of the seven judges rejected the existing common law approach, they

[240] See 4.3.2 above; *Régie National des Usines Renault SA* v. *Zhang* (2002) 210 CLR 491 at [63ff].

[241] See e.g. *Breavington* v. *Godleman* (1988) 169 CLR 41 (per Wilson and Gaudron JJ) at [26]. The rule has been (outside of the context of defamation) reformed in the UK – see the *Private International Law (Miscellaneous Provisions) Act 1995*, recently replaced by the *Rome II Regulation* (2007), discussed in 4.6.3 below.

[242] 169 CLR 41; Lindell (2002) p. 366; Tilbury (2002) p. 519, pp. 528ff; McClean (1996); Whitelaw (1994); Nygh (1991). See also *Union Steamship Co. of Australia Pty Ltd* v. *King* (1988) 166 CLR 1, in which some judges suggested that the constitutional division of powers was not merely vertical, but horizontal – that it includes not merely a delimitation of federal and State powers, but a territorial limitation of each State sovereign. Support for this idea was found in the fact that each State government has power, under its State constitution, to make laws for the 'peace, welfare and good government *of the state*' (emphasis added).

[243] At [42]; see also Deane J at [15], [25] (inter alia).

[244] Wilson and Gaudron JJ at [28]; see further 1.4 above.

[245] Deane J at [27]; Tilbury (2002) p. 519.

did so in three separate judgments for different reasons, and the Australian choice of law rules for tort remained unclear for a 'decade of confusion, illustrated by a baffling array of conflicting state appellate decisions'.[246]

The idea of a constitutional limit on inter-State choice of law rules was rejected in *McKain* v. *R W Miller & Co. (SA) Pty Ltd* (1992)[247] and *Stevens* v. *Head* (1993),[248] which held that the choice of law rules formulated by Justice Brennan in *Breavington* v. *Godleman* (1988), a restatement of the old common law test, continued to apply (unless modified by State legislation).[249] However, a change in approach was foreshadowed by two developments in Australian constitutional law. First, since the early 1990s, the Australian High Court has increasingly recognised the possibility that the Australian constitution may, despite being silent on an issue, prescribe rights or norms by implication.[250] Second, the High Court adopted a new attitude to the development of the common law itself in *Lange* v. *Australian Broadcasting Corporation* (1997),[251] which held that the common law must be adapted to the text and structure of the constitution.

Influenced by this approach[252] and by the decision of the Canadian Supreme Court in *Tolofson* v. *Jensen* (1994),[253] the High Court finally accepted a constitutional effect on choice of law rules in *Pfeiffer* v. *Rogerson*

[246] Lindell (2002) p. 367. [247] 174 CLR 1; Lindell (2002) p. 366; Opeskin (1992).

[248] 176 CLR 433. Note that Justice Deane (at p. 462) criticised the majority's approach on the basis that it went 'a long way towards converting the Australian legal system into a national market in which forum shoppers are encouraged to select between competing laws'. Some in the US would not have recognised this as criticism – see 4.3.7 above.

[249] McClean (1996) p. 78.

[250] For example, in *Nationwide News* v. *Wills* (1992) 177 CLR 1 and *Australian Capital Television* v. *Commonwealth* (1992) 177 CLR 106, the High Court established that, although the Australian constitution includes no express right of free speech, the character of Australia's democratic political system implies a constitutional guarantee of freedom of political communication. Similarly, the fact that the constitution incorporates the doctrine of separation of powers has been held to have an implicit impact on the boundaries of permissible reasoning by Australian courts, requiring that it be 'legal' in character, not administrative or political – meaning a requirement of 'Due Process': Wheeler (2004). It is unclear whether this conception of 'Due Process' rights could have any impact on private international law.

[251] 189 CLR 520; see Taylor (2002) on the relationship of this case with *Pfeiffer* v. *Rogerson* (2000) 203 CLR 503.

[252] See e.g. *Pfeiffer* v. *Rogerson* (2000) 203 CLR 503 at [66ff].

[253] See 4.5.1 below; Duckworth (2002) pp. 580–1; *Pfeiffer* v. *Rogerson* (2000) 203 CLR 503 at [87], [111ff] (per Kirby J).

(2000).[254] The Court held that the constitutional idea of a unitary federal system with territorially limited State sovereigns implied a *lex loci delicti* rule for choice of law in Australian inter-State tort disputes, with no equivalent to the flexible exception under the traditional common law approach. Only a mechanical territorial choice of law rule, it was held, would satisfy the constitutional requirement for a clear territorial division of the sovereign competencies of the States.

Although at least part of the motivation for this change in approach was clearly a desire to reform the anachronistic double actionability choice of law rule in tort, the reasoning adopted appears to reflect a broader willingness by the High Court to develop federal choice of law rules. It also signifies the recognition by the Court of the role of private international law in the structuring of the federal system itself. The adoption of a mechanical rule suggests a change in focus away from viewing each private international law dispute individually – the idea of private international law as a set of primary legal rules concerned with justice in individual cases discussed in Chapter 1 – towards a conception of private international law as a set of secondary legal rules, concerned with systemic or structural issues.

In *Regie National des Usines Renault SA* v. *Zhang* (2002)[255] the *lex loci delicti* rule was extended to international torts. Given that the constitutional arguments from *Pfeiffer* v. *Rogerson* (2000), including those concerning the Full Faith and Credit clause, were inapplicable to international torts, this required new justification. The extension of the new approach beyond the inter-State context was largely based on a general preference for the predictability and territoriality of the *lex loci delicti* rule, and the pragmatic basis that it is better to have a consistent single approach for both internal and international choice of law disputes.[256] As noted above, in inter-State cases the court rejected the possibility of a flexible exception operating to modify the possible injustice caused in individual cases by such a mechanical rule. Unlike the approach recently adopted in Canada,[257] the Australian

[254] 203 CLR 503; see generally Stellios (2005); Princi (2002); Tilbury (2002) pp. 533ff; James (2001).

[255] 210 CLR 491; Duckworth (2002); Princi (2002); Lindell (2002).

[256] Kirby J at [125ff]. But contrast, however, the approach taken by the High Court in respect of torts occurring on the high seas in *Blunden* v. *Commonwealth* (2004) 203 ALR 189; see Mutton (2004).

[257] See 4.5.2 below; see also the exception provided in s. 12 of the *Private International Law (Miscellaneous Provisions) Act 1995* (UK) and Art. 4(3) of the *Rome II Regulation* (2007); note criticism in Princi (2002); Duckworth (2002), who also argues that this approach underestimates the difficulty of 'locating' a tort.

High Court extended this inflexibility to the international sphere, rejecting the idea that in the international context the court should reserve the right to apply the *lex fori* or another more closely connected law.[258]

These cases clearly recognise the role of the constitution in private international law – and, implicitly, the constitutional function of private international law. However, the exact character of their reasoning remains problematic. It is not clear, for example, whether the new *lex loci delicti* rule in internal cases is a development of constitutional law, an implied constitutional norm, or merely an evolution of the common law – the point is significant, but was left open by the court.[259]

As noted above with respect to the US Full Faith and Credit clause,[260] in the absence of federal rules or standards of private international law, a State may determine the content of its obligation to give 'full faith and credit' through its own choice of law rules. Full faith and credit would thus be reduced merely to an obligation on a State to apply its own rules.[261] In Australia, the fact that there is a unified system of common law means that uniform private international law rules are only exceptionally not present. However, giving the unified common law rules of private international law a constitutional status would have an effect if a State enacted legislation which purported to introduce a rule which differed from the High Court's approach: it would invalidate the legislation. The logically necessary effect of the Full Faith and Credit clause may therefore not be merely a change to private international law rules, but also a change in their status from (private) common law to (public) constitutional law.[262]

Whether the new approach is a matter of constitutional law or the evolution of the common law, it remains an exemplification of the idea

[258] One of the consequences of this rigid approach is that the courts may tend to employ 'escape devices' where its results are unattractive. The High Court, for example, adopted (somewhat unsatisfactorily) the doctrine of *renvoi* in *Neilson* v. *Overseas Projects Corporation of Victoria* [2005] HCA 54; see further Gray (2007); Mills (2006); Yezerski (2004).

[259] *Pfeiffer* v. *Rogerson* (2000) 203 CLR 503 at [70]; (per Kirby J) at [137]; Tilbury (2002) p. 535; James (2001) p. 146; Lindell (2002) p. 368. Contrast the developments in Canada: see 4.5 below.

[260] See 4.3.1 above.

[261] A point also noted in *Breavington* v. *Godleman* (1988) 169 CLR 41 (per Wilson and Gaudron JJ) at [39]; *Pfeiffer* v. *Rogerson* (2000) 203 CLR 503 at [65].

[262] Support for a constitutional justification for rejection of the traditional common law is found in the statement that 'the terms of s. 118 indicate that, as between themselves, the States are not foreign powers as are nation states for the purposes of international law': *Pfeiffer* v. *Rogerson* (2000) 203 CLR 503 at [65].

that choice of law rules ought to be shaped by their constitutional context, and that they are part of the shaping of that context. A territorial division of State sovereignty in the constitution must correspond with a territorial division of regulatory authority through territorial choice of law rules. The Australian revolution in choice of law in tort demonstrates the idea that a federal structure can mandate not merely a limit on State private international law rules, but a system of private international law itself. In recognising the systemic constitutional function of private international law rules, it also acknowledges their character as secondary legal norms.

4.5 Canada

Despite the presence of significant diversity in private law in Canada, most notably because of the civil law province of Quebec, the Canadian courts have also been slow to recognise the potential interaction between the constitution and private international law rules – the role that private international law might play in ordering that diversity.[263] This is perhaps partly because the Canadian constitution has no equivalent to the US and Australian Full Faith and Credit clauses. In practice, however, many of the rules which in those states have been justified on the basis of their Full Faith and Credit clauses have still been adopted in Canada, although overall the Canadian courts have adopted more flexible solutions.[264]

The evidentiary role of a Full Faith and Credit clause, for example, has been served by federal and provincial statutes, which ensure that judicial notice is taken of the laws of the provinces, while other foreign law remains a question of fact.[265] Just like in the US and Australia, the concept of domicile has been adjusted to reflect its federal context; it is easier to change domicile between provinces than internationally.[266] The idea that the public policy exception to the application of foreign law ought to be interpreted more narrowly in internal disputes (and thus that there should be greater tolerance of difference) has similarly been adopted in Canada, without the express constitutional justification of a

[263] Swan (1985); Hertz (1977).
[264] It has been suggested that, even without express constitutional mandate, internal and international choice of law disputes have historically been more distinguished in Canada than Australia: Castel (1969); Graveson (1974) p. 218.
[265] Castel (1994) pp. 147ff; Castel (1969) p. 57, p. 99.
[266] Castel (1994) p. 85; Castel (1969) p. 89.

requirement to give full faith and credit.[267] The application between provinces of the traditional prohibition on the enforcement of a foreign public, penal or revenue law has also been questioned.[268] Canadian courts have thus generally recognised a need to adapt private international law to reflect the federal context, a recognition which has recently flourished into more radical changes.

4.5.1. The Canadian revolution – jurisdiction and the recognition and enforcement of judgments

The Canadian 'revolution' in private international law began with *Morguard Investments Ltd* v. *De Savoye* (1990),[269] a case concerned with the enforcement of an Alberta civil judgment in the courts of British Columbia. Under the common law approach, which was 'firmly anchored in the principle of territoriality',[270] foreign (including other provincial) civil judgments would only be enforced in strictly limited circumstances, such as when the defendant had been present in the judgment jurisdiction at the time the proceedings were commenced, or had submitted to the jurisdiction.[271]

The Supreme Court, however, rejected this approach, emphasising that it would be inappropriate to continue to apply laws developed for international disputes in the context of disputes internal to Canadian federalism. Instead, it held that 'the rules of … private international law … must be shaped to conform to the federal structure of the constitution',[272] and that the common law must be updated to reflect the idea that 'the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner'.[273] It declared that the principles of 'order' and 'fairness' are the very foundation of private international law.

[267] Castel (1994) p. 164, p. 271.

[268] *Weir* v. *Lohr and Allstate Insurance Co. of Canada* (1967) 65 DLR 2d 717. The prohibition has also been weakened in the international context following *United States of America* v. *Ivey* (1996) 30 OR 3d 370 – see further 5.3.1 below.

[269] 3 SCR 1077; Monestier (2005); Blom (2002); Wai (2001); Tetley (1999a) p. 185; McClean (1996) p. 70; Castel (1994) p. 9. For further background, note the decision of the courts of British Columbia in *Morguard* at (1988) 27 BCLR (2d) 155; Law Reform Commission of British Columbia Working Paper, 'The Enforcement of Judgments Between Canadian Provinces' (1989).

[270] *Morguard Investments Ltd* v. *De Savoye* [1990] 3 SCR 1077 at 1095.

[271] *Ibid*. at 1092; see further 5.3.2 below. [272] At 1101. [273] At 1096.

The requirement for 'order' was held to mandate that the judgment of another province must be enforced if there was a 'real and substantial connection' between the judgment province and the dispute.[274] The Court acknowledged that the introduction of this rule was in effect the adoption of a 'full faith and credit' requirement for Canada, despite the absence of an express full faith and credit constitutional mandate.[275] At the same time, the Court recognised that the 'real and substantial connection' test should apply equally to the assertion of jurisdiction by provincial courts themselves. This established constitutional limits on the jurisdiction of each province, which traditionally have followed the common law approach to jurisdiction.[276] It is not clear whether this has any implications for existing provincial rules on jurisdiction; the requirement for a real and substantial connection should ordinarily be satisfied simply by virtue of the fact that a *forum non conveniens* discretion to decline jurisdiction is available. In any case, this approach clearly recognises the role of private international law in placing limits on the regulatory authority of the provinces, the idea that private international law is part of the ordering or structuring of the federal system.

The requirement for 'fairness' was held to be reflected in the existence of exceptions to this rule, discussed below, which must be balanced against the structural function of the rule itself. For example, a judgment of another province need not be enforced where the judgment court has not taken or exercised its jurisdiction according to a 'fair process'.[277] This reflects the idea that private international law is also part of the Canadian system of rights protection – a federal conception of 'fairness' limits the regulatory authority of the provinces in private international law. The requirement for fairness is equally reflected in the acknowledgement that it would be unfair for the courts of Canada to refuse to enforce a judgment of another court which was (fairly) issued on the basis of a jurisdiction claimed by the Canadian courts themselves.[278]

As noted above, there is ongoing uncertainty in Australia as to whether the changes to tort choice of law rules reflect an evolution of the common law, which might be overridden by State statutory reform, or a constitutional effect of the Full Faith and Credit clause. The Court in *Morguard*

[274] Note the development of this idea by the British Columbia Court of Appeal in *Braintech Inc.* v. *Kostiuk* [1999] 63 BCLR 3d 156 at [56]; Tetley (2004a) pp. 553–4.
[275] *Morguard Investments Ltd* v. *De Savoye* [1990] 3 SCR 1077 at 1100.
[276] See further 5.3.2 and 5.3.3 below.
[277] *Morguard Investments Ltd* v. *De Savoye* [1990] 3 SCR 1077 at 1103. [278] At 1089ff.

Investments Ltd v. *De Savoye* (1990) expressly reserved its position on whether the full faith and credit rule it was introducing was a constitutional principle or the development of the common law in line with the constitution. Equally, the Court considered but declined to decide whether section 7 of the Canadian *Charter of Rights and Freedoms*[279] (comparable to the US 'Due Process' clause[280]) might have any impact on private international law rules.

The Court did note some arguments for the proposition that its new approach was constitutional in character, supported by a theory of the territoriality of provincial power.[281] Previous cases had suggested that the federal system placed territorial limits on provincial sovereign authority.[282] The idea that this structure might be relevant to private international law rules echoed the arguments expressed by some judges of the Australian High Court in *Breavington* v. *Godleman* (1988).[283]

The constitutional status of the 'full faith and credit' principle in Canadian law was confirmed in *Hunt* v. *T&N* (1993),[284] which established that the principles of order and fairness were constitutional imperatives. Adopting and extending the language of *Morguard Investments Ltd* v. *De Savoye* (1990), the Court held that 'the "integrating character of our constitutional arrangements as they apply to interprovincial mobility" calls for the courts in each province to give "full faith and credit" to the judgments of the courts of sister provinces. This … is inherent in the structure of the Canadian federation, and, as such, is beyond the power of provincial legislatures to override.'[285]

In *Hunt* v. *T&N* (1993), a Quebec law[286] which was designed to interfere with the conduct of foreign litigation involving local defendants (by limiting the export of evidence from the province) was, at least in respect of its application in other provinces, held to be inconsistent with these

[279] 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'

[280] See 4.3 above. Note that there is one very important difference between the provisions: the Canadian protection does not extend directly to 'property' rights.

[281] *Morguard Investments Ltd* v. *De Savoye* [1990] 3 SCR 1077 at 1109; see Castel (1994) pp. 6ff.

[282] See e.g. *Gray* v. *Kerslake* [1958] SCR 3; *Dupont* v. *Taronga Holdings Ltd* (1986) 49 DLR (4th) 335 (Quebec Supreme Court).

[283] See 4.4.3 above.

[284] [1993] 4 SCR 289; Blom (2002) pp. 91ff; Wai (2001).

[285] At p. 324 (quoting from *Morguard Investments Ltd* v. *De Savoye* [1990] 3 SCR 1077 at 1100).

[286] *Business Concerns Records Act*, RSQ, c D-12.

principles and therefore unconstitutional.[287] An order made by the courts of Quebec on the basis of the unconstitutional law could not be enforced in the courts of another province. The Court recognised that the issue lay at 'the confluence of private international law and constitutional law',[288] and, adopting a systemic perspective, argued that 'coordination in the face of diversity is a common function of both public and private international law … [and] also one of the major objectives of the division of powers among federal and provincial governments in a federation'.[289] Later decisions have continued to emphasise the fundamental necessity for territorial limits on the regulatory authority of the provinces in Canadian federalism.[290]

In *Beals* v. *Saldanha* (2003),[291] the constitutional requirements for 'order and fairness', reflected in the 'real and substantial connection' test for the enforcement of judgments, were extended to international disputes.[292] Although the decisions of *Morguard Investments Ltd* v. *De Savoye* (1990) and *Hunt* v. *T&N* (1993) were justified based on their context within Canadian federalism, the Court held in *Beals* that the old common law approach was equally outmoded in the international context, because 'international comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law'.[293] Canadian provincial courts are therefore required, subject to statutory amendment,[294] to enforce a foreign judgment from a foreign court which has acted consistently with Canadian rules of jurisdiction.

The Court confirmed in *Beals* v. *Saldanha* (2003) that common law defences to the enforcement of a judgment continue to operate as exceptions to the new rule. Thus, a judgment may not be enforced if it involved a denial of natural justice or fraud, or its enforcement would be contrary to public policy.[295] The Court left open the question of whether these were

[287] See *Hunt* v. *T&N* [1993] 4 SCR 289 at 304; Tetley (1999a) p. 186; see similarly the judgment of Bastarache J in *Castillo* v. *Castillo* [2005] SCC 83.
[288] *Hunt* v. *T&N* [1993] 4 SCR 289 at 296. [289] At 296.
[290] *Unifund Assurance Co.* v. *Insurance Corp. of British Columbia* [2003] 2 SCR 63; *British Columbia* v. *Imperial Tobacco Canada Ltd* [2005] 2 SCR 473.
[291] [2003] 3 SCR 416; Monestier (2005); Briggs (2004).
[292] Note also *United States of America* v. *Ivey* (1996) 30 OR 3d 370; Tetley (1999a) p. 188.
[293] [2003] 3 SCR 416 at [28].
[294] This is possible because in the international context these requirements are not based on constitutional imperative, but only on comity, held to be less than an obligation: see *Beals* v. *Saldanha* [2003] 3 SCR 416 at [28], [167]; see further 2.3.4 above.
[295] See further *United States of America* v. *Shield Development Co.* (2005) 74 OR 3d 583.

the only possible defences, and accepted that it was appropriate that their interpretation should differ depending on whether the judgment was from the courts of another province or another state. Some case law suggests that public policy must be interpreted more narrowly in its application between provinces.[296] The Court rejected an argument that the foreign judgment should be subject to close scrutiny on the basis that its enforcement (which might lead to bankruptcy) could offend section 7 of the Canadian *Charter of Rights and Freedoms*. It did not, however, entirely dismiss the possibility that such an argument, which would view private international law as part of the system of constitutional rights protection,[297] might succeed in future cases.

The new approach to Canadian private international law has also had implications for the exercise of discretionary relief concerning foreign proceedings. Part of the foundation for *Morguard Investments Ltd* v. *De Savoye* (1990) was the principle that a court should not reject a form of jurisdiction which it claims for itself.[298] A similar symmetry was established in *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)* (1993)[299] in respect of anti-suit injunctions. An anti-suit injunction may be justified if 'a serious injustice will be occasioned as a result of the failure of a foreign court to decline jurisdiction'.[300] However, where a foreign court has taken jurisdiction on a basis which is equivalent to Canadian jurisdictional rules, including *forum non conveniens* principles, an anti-suit injunction is inappropriate.[301] In *Amchem*, the courts of Texas took jurisdiction without exercising a *forum non conveniens* discretion. However, the fact that the Texan court was limited by US rules of Due Process, which required that there be 'minimum contacts' between the forum and the dispute or defendants, was held to be sufficiently similar to proscribe the granting of an anti-suit injunction.[302]

In summary, the rules affecting jurisdiction and the enforcement of judgments, both internally and internationally, have been dramatically reformulated by the Supreme Court of Canada. The internal reforms have been justified on the basis that they are required by the constitutional structure of Canadian federalism, an implied full faith and credit

[296] *Mutual Trust Co.* v. *St-Cyr* [1996] RDJ 623. [297] See 4.2.4 above.
[298] *Morguard Investments Ltd* v. *De Savoye* [1990] 3 SCR 1077 at 1089ff.
[299] [1993] 1 SCR 897; Blom (2002) p. 101; Wai (2001).
[300] *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897 at 914.
[301] At 934; see Tetley (1999a) p. 162. [302] At 937; see 4.3.3 and 4.3.5 above.

requirement. The international reforms have been justified on the basis that 'comity' demands reform of the common law to adapt it to the conditions of modern international society. The reasoning of the Canadian Supreme Court in these cases has provided an explicit recognition of the structural role of private international law, in both a federal and international context – its character as public law, closely related to both constitutional law and public international law. The existence of natural justice or due process style exceptions to these rules indicates a concurrent awareness of the role of private international law as part of a system of rights protection. These two ideas, combined in the finding of the Canadian Supreme Court that 'order' and 'fairness' are the twin foundations of private international law, together constitute a recognition that private international law rules operate as secondary legal norms, concerned with the distribution of regulatory authority rather than the outcome of individual cases.

4.5.2. The Canadian revolution – choice of law in tort

Canadian courts have traditionally applied common law choice of law rules, unless modified by provincial choice of law statutes.[303] In disputes involving torts, as in Australia, this required the application of a much criticised 'double-actionability' test, under which the conduct had to be actionable in both the *lex fori* and the *lex loci delicti*.[304] An opportunity to reject this rule was, however, heralded by the decision in *Morguard Investments Ltd* v. *De Savoye* (1990), with its new emphasis on order and fairness as the underlying principles of private international law, particularly in the context of Canadian federalism.

The implications of the new approach for choice of law were developed by the Supreme Court in *Tolofson* v. *Jensen* (1994).[305] Although the case concerned an inter-provincial tort, the Court addressed the choice of law rules to be applied in both internal and international disputes. The Court expressed the public law foundations of its reasoning in the plainest terms, holding that 'in dealing with legal issues having an impact in more than one legal jurisdiction, we are not really engaged in [a] kind of interest balancing. We are engaged in a structural problem.'[306]

[303] *Tolofson* v. *Jensen* [1994] 3 SCR 1022 at 1042ff; Castel (1994) p. 6; Castel (1969) p. 52.
[304] See discussion in 4.4.3 above.
[305] [1994] 3 SCR 1022; Blom (2002) pp. 109ff; Wai (2001); Tetley (1999a) p. 156; Herbert (1998); McClean (1996) pp. 80ff.
[306] *Tolofson* v. *Jensen* [1994] 3 SCR 1022 at 1047.

In respect of inter-provincial torts, the Court drew on the idea, discussed above, that the sovereign power of the Canadian provinces is subject to territorial limitation. Thus, as reasoned in *Morguard Investments Ltd* v. *De Savoye* (1990) and *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)* (1993), the constitutional system in Canada establishes minimum standards for provincial private international law rules – in this case, arguably implying that a province can generally only apply a law which has a 'real and substantial connection' to the case. In this context, drawing on the reasoning of some members of the Australian High Court in *Breavington* v. *Godleman* (1988),[307] the Court held that the character of the constitutional system mandated the application of a *lex loci delicti* rule for inter-provincial torts. As in Australia, this adoption of a mechanical rule suggests a recognition of the systemic character of private international law, its function as a set of secondary rules, rather than the traditional focus on its role in resolving individual disputes. The Court refrained from deciding whether this was a development of the common law or a constitutional principle,[308] although the reasoning in *Hunt* v. *T&N* (1993)[309] suggests that a constitutional characterisation is likely.

In respect of international torts, the Court reasoned in terms which similarly emphasised its recognition of the idea of private international law as structure. It held that 'it is to the underlying reality of the international legal order … that we must turn if we are to structure a rational and workable system of private international law',[310] and that 'on the international plane, the relevant underlying reality is the territorial limits of law under the international legal order'.[311] Thus, the *lex loci delicti* rule was held to be equally applicable in international tort disputes.

The apparent strictness of this rule was noted by the Court, which held that although 'the underlying principles of private international law are order and fairness, order comes first',[312] and emphasised the need for certainty in the application of the law.[313] The potential for the strictness of this rule to cause unfairness is also diminished by possible exceptions. For example, the Court did consider that it is possible that 'a rigid rule on

[307] *Ibid.* at 1063. The Court suggested (at p. 1052) that Australia had established a *lex loci delicti* rule, which was not the case at the time, given its rejection in *McKain* v. *Miller* (1992) and *Stevens* v. *Head* (1993) – see 4.4.3 above.
[308] At 1065. [309] See 4.5.1 above; but see Art. 3126 of the *Quebec Civil Code*.
[310] *Tolofson* v. *Jensen* [1994] 3 SCR 1022 at 1047–8. [311] At 1047; see further 5.3.2 below.
[312] *Tolofson* v. *Jensen* [1994] 3 SCR 1022 at 1058; compare Jackson (1945) p. 25.
[313] At 1061.

the international level could give rise to injustice'[314] and thus that there remained 'a discretion in the court to apply our own law to deal with such circumstances'.[315] This discretion arguably reflects the fact that the *lex loci delicti* rule remains subject to a more general principle that a real and substantial connection must exist between the law thus selected and the dispute. The rule is also subject to the selection of another law by agreement of the parties. For international cases, the rule is most likely to be subject to an exception where both parties are from a common home state but the tort occurs in a foreign state.[316]

Despite these exceptions, the change in approach, from a common law rule under which the *lex fori* principally determined liability in inter-provincial and international torts, to a constitutional rule under which liability is determined largely according to the *lex loci delicti*, is dramatic. This is not merely because of the adoption of a different rule, but because this reform reflects an underlying revolution in thought about private international law. It is a clear recognition and adoption of the principle that, even without a Full Faith and Credit clause, private international law is not 'private' law, concerned directly with determining the 'just' outcome of a dispute, but an implicit part of the structural definition of both the Canadian federal constitutional system and the international legal order.

4.6 The European Union

The rise of diverse national systems of private international law in the late nineteenth century, discussed in Chapter 2, continued in Europe until the emergence of the EU.[317] The exact scope and character of the challenge presented by the EU remains, however, far from settled – perhaps because the nature of the EU itself remains a source of contention.[318]

[314] At 1054.

[315] At 1054. The exception was applied in *Wong* v. *Wei* (1999) 65 BCLR 3d 222; *Hanlan* v. *Sernesky* (1998) 38 OR 3d 479. Contrast the approach of the Australian High Court – see 4.4.3 above.

[316] *Tolofson* v. *Jensen* [1994] 3 SCR 1022 at 1057; Tetley (2004) p. 458; *Hanlan* v. *Sernesky* (1998) 38 OR 3d 479.

[317] For ease of reference the institutions of European governance, present and past, will be referred to as the EU.

[318] Its ambiguous character was captured in the title of the proposed *Treaty Establishing a Constitution for Europe* (2004) – possessing characteristics of both a treaty (international law between states) and a constitution (domestic law). For the purposes of the analysis in this Chapter the failure (thus far) of the attempt by the EU to label its legal framework a 'constitution' is unimportant – the existing legal architecture already performs a 'constitutional' function.

Little consideration was given to the impact of European integration on private international law prior to the establishment of the EU, and European institutions were at least initially slow to pay attention to the potential role of private international law.[319] Only a handful of early writers considered the potential impact of private international law on European integration, and of European integration on private international law.[320] There was thus only limited recognition of the fact that the issue of what role private international law ought to play in the EU is analogous to the problem of the role of private international law in federal systems such as the US, Australia and Canada – a 'typically "federal" problem'.[321]

The most negative view of the relationship between private international law and the European legal order is that they are incompatible, or even 'enemies'.[322] This view may be adopted by those who have a strong belief in the need for, and the possibility of, the harmonisation of areas of substantive law (rather than private international law) in the EU.[323] If substantive private law is unified, advocates of this approach would argue, the need for harmonised private international law would be minimal.[324] Indeed, the continued existence of private international law rules might be viewed as an obstacle to substantive harmonisation,

[319] See further 4.2.3 above; Remien (2001) p. 80 describes this as 'astonishing'; Fletcher (1982) complained (at p. 46) that 'insufficient attention' had been paid to the significance of private international law in the European legal order.

[320] See Lasok and Stone (1987) Ch. 2; references in Joerges (2004) p. 14; Remien (2001).

[321] Drobnig (1967) p. 229. The use of the term 'federal' carries particular political significance in the EU, where it is often associated with movements towards centralisation. Its application to the EU in this book should not be controversial since (as will be shown) in the field of private international law the EU is already significantly more centralised than, for example, the US, and 'federal' analogies are frequently used in discussing EU private international law: see e.g. Aroney (2005); Breyer (1999).

[322] Fauvarque-Cosson (2001).

[323] See generally Study Group on a European Civil Code (www.sgecc.net); Basedow (2004). In the field of contract law, such a project has been supported by, for example, the Commission on European Contract Law (see http://frontpage.cbs.dk/law/commission_on_european_contract_law_index.html); see also Communication of 11 July 2001 from the European Commission to the Council and the European Parliament on European Contract Law (Com (2001) 398 Final); but see Smits (2005); Lagrand (1997).

[324] The argument here is confined to choice of law rules. But note that harmonised substantive law would not ensure consistent regulation of 'hybrid' disputes, where one or more Member States might apply a substantive law from outside the EU. As Fletcher (1982) p. 13 points out, a unified system of private international law would also still be necessary to provide common rules of jurisdiction and to ensure the enforcement of judgments, which perhaps explains the early focus of EU regulation of private international law on these topics.

because it 'legitimises and strengthens the diversity of substantive laws'.[325] It is a 'shallow' integration, which thereby embeds the diversity of national substantive laws, preventing a 'deeper' integration from occurring.

Such arguments have, however, largely been rejected, along with their implicit assumption that the debate over 'European' values will inevitably result in universal agreement. The growth in EU private international law is testament to the widespread recognition that it has an important role in a pluralist European legal order. While the following analysis will show that there are a variety of ideas concerning the exact nature of that role, sometimes even within a single European private international law instrument, these ideas all reject the view that private international law is essentially part of national law, serving national policy interests – identified in Chapter 2 as the dominant idea of international private international law since the late nineteenth century. Each of these ideas examines the possibility of private international law as European law, as an aspect of the European legal order, 'a new paradigm' transformed from its 'inherited methodological nationalism'.[326] Each rejects the idea that private international law should be viewed as substantive national private law, acknowledging instead, by recognising its systemic character and effects, the public function of private international law rules as secondary legal norms.

4.6.1. The need for European private international law

For many supporters of the EU, substantive harmonisation of law remains the primary objective or strategy for the development of European law. It is, however, recognised that private international law may be compatible with the European legal order in one of two ways.

First, it may be considered as an interim measure, to provide an intermediate level of ordering, with the view that this will ultimately lead to a more substantive unification of law. This point can be pithily expressed in the argument that 'the ultimate purpose of conflict of laws is self-extermination'.[327] Second, private international law may be viewed as useful as a complementary or alternative methodology to substantive integration.[328] Thus, the *Giuliano-Lagarde Report* (1980) on the *Rome*

[325] Reimann (1999) p. 574, discussing Juenger (1982). [326] Joerges (2004) p. 7.
[327] View of Kahn-Freund, according to Fletcher (1982) p. 3; see also van Erp (2002).
[328] See generally Hay (1986).

Convention (1980) noted the view that 'Compared with the unification of substantive law, unification of the rules of conflict of laws is more practicable'.[329] Similarly, the *Insolvency Regulation* (2000) introduces private international law rules after acknowledging 'the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community'.[330]

This view of private international law as compatible with the EU is based on the idea that substantive harmonisation is always desirable, but may not always be necessary. The acceptance of European private international law is expressed through the recognition that 'a unified market can perfectly co-exist with a plurality of legal systems', on the condition that 'it is an urgent Community interest to have at least converging conflict rules govern the operation of diverging substantive rules'.[331]

An alternative view of the potential role for private international law in the European order is the idea that private international law may not be merely compatible with the European order, but in fact necessary for the functioning of the common market. If it is accepted that substantive harmonisation of law across Europe is not always possible, then unification or harmonisation of private international law may be viewed as a necessity.[332]

The idea of private international law as a necessary part of the European legal order can encompass a range of approaches, reflecting the variety of possible meanings of 'necessary' in this context. One variation is in the (quantitative) degree of 'necessity' which is required. Expressed gently, the unification of private international law may be considered necessary 'to eliminate the inconveniences arising from the diversity of the rules of conflict'.[333] A slightly stronger position is expressed in the preamble to the *Brussels Regulation* (2001), which states that 'Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market'. Others have expressed more strongly the view that diversity in private international law is entirely incompatible with the internal market.[334]

The (qualitative) idea of the type of 'necessity' which is required to authorise European private international law may also vary. One idea is

[329] At p. 4, citing Vogelaar, T., Director-General for the Internal Market and Approximation of Legislation at the Commission.
[330] Preamble [11]. [331] Duintjer Tebbens (1990) p. 62.
[332] See discussion in Westenberg (1990); Drobnig (1967) p. 213.
[333] *Giuliano-Lagarde Report* (1980) p. 4. [334] Remien (2001) p. 64; Spamann (2001).

that European private international law is necessary in practice not because substantive harmonisation is impossible, but because it is extremely difficult to achieve. While substantive harmonisation might be ideal, if its achievement is not a realistic prospect European law requires the Member States to unify or harmonise their private international law rules.[335] Thus, the Commission argues with respect to succession and wills that 'As full harmonisation of the rules of substantive law in the Member States is inconceivable, action will have to focus on the conflict rules.'[336] On this basis it is argued that unification of private international law is 'logically and functionally complementary to the unification of municipal law'.[337]

Another idea is that the unification of European private international law is 'legally' necessary. The institutions of the EU are simply not given the power to unify substantive private law on all matters.[338] However, they are authorised to provide for unification of private international law, as discussed further below. In this sense European private international law may be described as 'necessary', because it is the only 'authorised' tool for the coordination of legal systems. In areas in which the European institutions lack competence to provide for substantive harmonisation, they are legally limited to establishing a European order which is based on private international law.

Under this perspective, private international law is not an interim position, but an essential part of the process of defining the European legal order. If there necessarily are to be areas of law in which diverse state laws will operate, then private international law will be required to delimitate the scope of the regulatory authority of the states. Signs of this idea of uniform private international law as a necessary aspect of the European system are present in the preamble to the *Brussels Regulation* (2001), which states that 'Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are *essential*.'[339] The *Brussels Regulation* (2001) is also described in that preamble as adopting 'measures relating to judicial cooperation in civil matters which are *necessary* for the sound operation of the internal market'.[340] However phrased, it is clear that there is widespread recognition that

[335] Fletcher (1982) p. 5. [336] *Succession and Wills Green Paper* (2005) p. 3.
[337] Fletcher (1982) p. 15. [338] Basedow (2000) p. 702.
[339] Preamble [2] (emphasis added). [340] Preamble [1] (emphasis added).

private international law has a key role to play in the EU – that 'the satisfactory solution to the age-old problem of reconciliation and harmonisation of laws, including the laws of private international law, is indeed integral to the very conception and purpose of the Common Market which lies at the centre of the Community legal order'.[341]

4.6.2. Private international law and the internal market

The reference to the 'Common Market' here is important, as the analysis of the compatibility of private international law with the European legal order tends to focus on an economic conception of the European order, the idea of the internal market. For example, the *Giuliano-Lagarde Report* (1980) stated that 'the Commission [has] arrived at the conclusion that at least in some special fields of private international law the harmonization of rules of conflict would be likely to facilitate the workings of the common market'.[342] Similarly, it argued that 'it would be advisable for the rules of conflict to be unified in fields of particular economic importance so that the same law is applied irrespective of the State in which the decision is given'[343] and that unified private international law is necessary because of 'urgent necessity for greater legal certainty in some sectors of major economic importance'.[344] More recent Regulations in choice of law have been justified on the stronger basis that 'The proper functioning of the internal market creates a need … for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.'[345]

The impact of the common market and the economic freedoms it implies is also felt in the development of particular rules of European private international law. An economic analysis underpins the view that European private international law still ought to apply to cases which are wholly connected to a single Member State, otherwise local business could gain a competitive advantage through the application of more favourable rules.[346] Another impact of the European free market is in

[341] Fletcher (1982) p. 8. [342] *Giuliano-Lagarde Report* (1980) p. 4.
[343] At p. 5. [344] At p. 5.
[345] *Rome I Regulation* (2008) Preamble [6]; see similarly the *Rome II Regulation* (2007) Preamble [6]; *Insolvency Regulation* (2000) Preamble [2].
[346] d'Oliveira (1990). The economic arguments are complex, and perhaps contradictory – see further 5.5 below. On the one hand, an excessive use of the *lex fori* in a case involving a foreign litigant might be a restriction on traders from other Member States and thus an illegal restraint of trade: see 4.6.7 below. On the other hand, the prohibition against

its natural affinity with party autonomy – the idea that the parties ought to be free to choose in which forum and according to which law their legal disputes will be resolved.[347] The *Rome Convention* (1980), *Rome I Regulation* (2008), *Rome II Regulation* (2007), and *Brussels Regulation* (2001) all give a central role to party autonomy, even though (perhaps reflecting a range of views on the balance between individual freedom and social regulation) this role had not previously been universally or uniformly accepted in the private international law systems of the Member States.[348] The idea of the internal market thus does not only dictate the need for uniform European private international law rules, but also shapes the development of those rules.

The idea that European private international law rules ought to be shaped by an economic conception of the European order, the internal market, creates a further issue. If the unification of private international law is connected to the requirements of the internal market, should there be a difference between internal and international private international law rules?[349]

The approach generally adopted by EU lawmakers, somewhat controversially, is that the internal market mandates not only unification of European private international law for disputes within the EU, but also with respect to external private international law disputes. This argument relies on the view that differing rules dealing with international (or hybrid) cases may still have an indirect and undesirable effect of distorting the internal market.[350] Thus, it has been argued that the unification of international private international law rules, especially those relating to the enforcement of judgments, is also necessary for the proper functioning of the internal market.[351] The *Rome Convention* (1980), *Rome I*

discrimination on the basis of nationality (*EC Treaty* (2002) Art. 12) might mandate greater use of the *lex fori* – see Remien (2001) pp. 82ff.

[347] Muir Watt (2004); Remien (2001) p. 83. On the other hand, it has been suggested that there may be a conflict between party autonomy and harmonisation of substantive law. Interpreting the impact of harmonisation measures broadly may limit the ability of parties to choose the law applicable to their transactions: see Verhagen (2002). There is also an international dimension to this development – see 5.6 below.

[348] Reimann (1999) pp. 575ff.

[349] See 4.2.2 above. This issue particularly arose in the decision in *Owusu* v. *Jackson* [2005] ECR I-1383, Case C-281/02.

[350] Duintjer Tebbens (1990) pp. 65ff; Fletcher (1982) p. 8, pp. 52ff.

[351] Basedow (2000) p. 705. Once the power to regulate private international law has been exercised with respect to internal disputes, there is an argument that, according to the jurisprudence of the ECJ, the EU gains *exclusive* external competence: see *Open Skies Case (Commission of the European Communities* v. *Federal Republic of Germany)* [2002] ECR I-9855, Case C-476/98 at [71ff]; *European Agreement on Road Transport Case*

Regulation (2008) and *Rome II Regulation* (2007) each expressly establish universally applicable choice of law rules, regardless of whether the dispute is internal or external to the EU.[352]

The needs of the internal market are also reflected in the emphasis in EU private international law instruments on certainty and predictability.[353] The rules of jurisdiction in the *Brussels Regulation* (2001), for example, exclude, at least in some cases, the traditional role of the common law discretion to stay proceedings on the grounds of *forum non conveniens*.[354] While this feature of the *Brussels Regulation* (2001) is somewhat controversial and many questions remain unresolved, it at least partially reflects a policy decision that, except as expressly provided for under the Regulation,[355] the domicile of the defendant is a sufficiently strong connection to both justify and require the assertion of jurisdiction, regardless of the circumstances. For the sake of simplicity and predictability, demanded by the internal market, there is no room for other considerations (such as questions of appropriateness or fairness to defendants) in determining whether jurisdiction exists or whether it should be exercised. Whether or not this policy is advisable, its lack of attentiveness to doing justice in individual cases clearly demonstrates that the *Brussels Regulation* (2001) effects a 'constitutional' ordering of the jurisdictional authority of the different Member States, and adopts a public perspective on private international law.

4.6.3. The expanding role of private international law

The view of private international law as a key part of the strategy for the development of the law of the internal market has been implicitly adopted in recent amendments to the treaties of the European Community. Prior to the *Treaty of Amsterdam*, the development of European private international law was a matter left to the Member States to resolve through separate

(Commission of the European Communities v. *Council of the European Communities)* [1971] ECR 263, Case 22/70. It has been confirmed that this operates in the context of private international law – see *Lugano Convention* (7 February 2006), ECJ Opinion 1/03; Lavranos (2006); Baumé (2006).

[352] See e.g. *Rome I Regulation* (2008) Art. 2.

[353] See e.g. *Rome I Regulation* (2008) Preambles [6], [16]; *Rome II Regulation* (2007) Preambles [6], [14]; Jayme (1990) pp. 18ff; but see Reimann (1999).

[354] *Owusu* v. *Jackson* [2005] ECR I-1383, Case C-281/02; *Konkola Copper Mines* v. *Coromin* [2005] EWHC 898.

[355] Note e.g. Arts. 22, 23, 27, 28.

international treaty negotiations.[356] This mechanism was behind such instruments as the *Brussels Convention* (1968) and *Rome Convention* (1980). Other European regulation of private international law was not based on an express authority to deal with private international law harmonisation, but on an indirect argument that it was necessary to meet the requirements of the internal market.[357] If the harmonisation of European private international law is a matter of necessity, then 'all aspects of the conflicts process … may be said to be within the compass of the long-term programme of legal unification to be carried out in fulfilment of the objectives of the European Communities'.[358]

The *Treaty of Amsterdam* gave the institutions of the EU a new competence[359] to adopt 'measures in the field of judicial cooperation in civil matters',[360] 'improving and simplifying … the recognition and enforcement of decisions in civil and commercial cases',[361] 'in so far as necessary for the proper functioning of the internal market'.[362] The Treaty also gave the institutions of the EU the power to adopt measures 'promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction'[363] in all 'civil matters

[356] Still reflected in *EC Treaty* (2002) Art. 293 (previously Art. 220); Basedow (2000) p. 687; Duintjer Tebbens (1990) pp. 50ff.

[357] Including *EC Treaty* (2002) Arts. 47, 55, 71, 95.

[358] Fletcher (1982) pp. 13, 49ff; see also Basedow (2000) pp. 696ff. A more controversial issue is whether it empowers the courts of Member States to amend domestic law to bring it in line with the requirements of the EC – see *The Siskina* [1979] AC 210, contrast the judgments of Lord Denning MR in the Court of Appeal (which would have reformed the law on Mareva injunctions to reflect the European context of the case) with the House of Lords (which denied the judiciary the power to make such reforms).

[359] See generally Boele-Woelki and van Ooik (2002); Remien (2001) pp. 60ff; Basedow (2000).

[360] *EC Treaty* (2002) Art. 61(c). [361] *EC Treaty* (2002) Art. 65(a).

[362] *EC Treaty* (2002) Art. 65. Art. III-269 of the proposed *Treaty Establishing a Constitution for Europe* (2004) would have further expanded this to permit regulation 'particularly when necessary for the proper functioning of the internal market', wording retained in the *Treaty of Lisbon* (2007).

[363] *EC Treaty* (2002) Art. 65(b). This may appear weaker than the position expressly adopted in previous European instruments and in the *Brussels Regulation* (2001), that the unification of private international law is necessary, not merely a matter where 'compatibility' ought to be 'promoted'. Alternatively, it has been argued that this clause should be interpreted as authorising unification, but requiring 'compatibility' as a sort of minimum standard: see Basedow (2000) p. 705. Note that the 'compatibility' which is being discussed here is the compatibility of the private international laws of each of the Member States with each other, not the compatibility of a unified private international law with the European legal order which was discussed in 4.6.1 above.

having cross-border implications'.[364] As well as providing direct authority for regulative action, the very existence of these provisions indirectly supports the idea that the unification of private international law is necessary for the proper functioning of the internal market, and therefore comes under existing powers of the institutions of the EU.[365]

This suggests that private international law should develop an increasingly prominent role in the European legal system, and there are signs of an expanding programme of European instruments on private international law.[366] The *Brussels Regulation* (2001), which updated and strengthened the *Brussels Convention* (1968), is perhaps the most prominent of these. Rules dealing with the recognition and enforcement of judgments on matrimonial matters and matters of parental responsibility, initially developed in 2000, were replaced and expanded with the *Brussels II* bis *Regulation* (2003), which came into effect in March 2005. The *Rome II Regulation* (2007), which took effect in January 2009,[367] introduced harmonised choice of law rules for disputes involving non-contractual obligations. The *Rome I Regulation* (2008), due to take effect from December 2009, is the culmination of a project to update the *Rome Convention* (1980) in the form of a Regulation. The Commission has published Green Papers on applicable law and jurisdiction in matters of divorce,[368] matrimonial property,[369] and succession and wills,[370] and there are plans to introduced Regulations in the near future.[371] Private international law techniques are also being applied in other European instruments, for example in the regulation of insurance contracts.[372] The *Insolvency Regulation* (2000) also includes a system of private international law rules to regulate potential conflict between the different regulatory systems of the Member States.[373] It has also been proposed that EU regulations should affect the question of the status and proof of foreign law, requiring it to be treated as law, not fact.[374]

[364] Art. 65. [365] Basedow (2000) pp. 699, 707.
[366] See e.g. Crawford and Carruthers (2005); Boele-Woelki and van Ooik (2002); North (2001).
[367] *Rome II Regulation* (2007) Art. 32.
[368] *Rome III Green Paper* (2005) (note however that this proposal has been much criticised and appears to have stalled).
[369] *Matrimonial Property Green Paper* (2006).
[370] *Succession and Wills Green Paper* (2005).
[371] *Hague Programme* (2004); *Hague Programme Action Plan* (2005).
[372] Basedow (2000) pp. 688–9, p. 696; Duintjer Tebbens (1990) pp. 51ff; Fletcher (1982) Ch. 4.
[373] See generally Morse (2001). [374] Remien (2001) p. 78. Compare 4.3.1 and 4.4.2 above.

The purpose of these Regulations is clearly the unification of private international law, not the harmonisation of the substantive laws of the Member States, on which it may be more difficult to reach agreement.[375] This wave of European regulation thus reflects the importance of private international law as a specialised technique of regulatory coordination, and its usefulness for furthering the objective of striking a harmonious balance between order and diversity within the European legal order.

4.6.4. Subsidiarity and the idea of private international law as structure

The development of private international law in the EU has been largely based on the belief that harmonisation in European substantive law is always preferable, but that harmonisation of private international law is a fallback position where this is not feasible. The role played by private international law under this idea is ancillary or supportive; it operates as an 'imperfect' ordering only where substantial harmonisation has not been achieved.

It can be argued, however, that even in situations in which substantive harmonisation is possible there may be reasons not to pursue it. This idea may be encapsulated in the concept of 'subsidiarity', as discussed in Chapter 3.[376] In the EU subsidiarity is defined as the principle that European institutions ought to take action 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community'.[377] This idea recognises that 'the dogma of harmonisation'[378] of substantive law would in some circumstances affect the range of benefits associated with diverse

[375] 'Such instruments should cover matters of private international law and should not be based on harmonised concepts of "family", "marriage", or other. Rules of uniform substantive law should only be introduced as an accompanying measure, whenever necessary to effect mutual recognition of decisions or to improve judicial cooperation in civil matters' – *Hague Programme* (2004).

[376] See 3.5 above.

[377] *EC Treaty* (2002) Art. 5; see also *Subsidiarity Protocol* (1997); Carozza (2003) pp. 49ff; Von Borries and Hauschild (1999); MacCormick (1999) Ch. 9; Edwards (1996); Schilling (1994); Cass (1992).

[378] Carozza (2003) p. 50.

local systems of regulation, including accountability, legitimacy, cultural diversity and regulatory competition.[379]

The adoption and development of the principle of subsidiarity is part of a fundamental transformation in the vision of the European order – a second phase of its 'new legal order'.[380] It emphasises the quasi-federal character of the European system rather than the idea of a 'super-state' which is implicit in approaches that advocate more widespread and centralised harmonisation. It implies that the European system ought to pursue a balance between centralised and more local systems of regulation in pursuit of a value of 'justice pluralism' – that the EU ought to be a structure for preserving diversity as well as the coalescing of common values.

Private international law potentially has a very significant role in striking this balance. Decentralisation risks disorder – diverse national systems of regulation may conflict with each other, creating inefficiencies and disharmony. However, greater European centralisation risks marginalising the protection of regional policies and interests and the benefits provided by local regulation. Private international law offers a potential mechanism to mediate this tension. As seen in the analysis of the history of the ideas of private international law in Chapter 2, it was developed to provide a tool for balancing order with diversity, for enabling the orderly coexistence of a range of localised systems of regulation. The existence of private international law thus facilitates the possibility of diverse, locally enforced systems of regulation, rather than a centrally dictated uniformity. It provides a mechanism to reinforce the functioning of the subsidiarity principle without compromising other requirements of the European legal order.[381] As the European Commission has acknowledged, 'The technique of harmonising conflict-of-laws rules fully respects the subsidiarity and proportionality principles

[379] See generally discussion in Muir Watt (2005); Joerges (2004) p. 16; Bermann (1994); Bermann (1993). The idea of 'interjurisdictional competition as an alternative to central regulation' is discussed in Muir Watt (2004) p. 431; note the comparison with the idea of regulatory competition in a 'competitive federalism' in the US discussed in 4.3.7 above.

[380] *Van Gend en Loos* v. *Netherlands Inland Revenue Administration* [1963] ECR 1, Case 26/62 at 12. Subsidiarity challenges the 'one-directional' movement towards centralism associated with the principle of direct effect developed in that case, the first 'new legal order': see e.g. Bermann (1994) pp. 348ff; d'Oliveira (1990); Lasok and Stone (1987) p. 17; Fletcher (1982) pp. 29ff.

[381] Remien (2001) p. 64.

since it enhances certainty in the law without demanding harmonisation of the substantive rules of domestic law.'[382]

This idea of European private international law as a tool for enabling the implementation of subsidiarity by ordering diverse local regulatory systems should be familiar. It is a particular expression of the idea, explored throughout this Chapter and developed in recent years particularly in Australia and Canada, of private international law as a set of secondary rules which function as an aspect of the structure of a federal system. According to this view, private international law is part of the horizontal division of regulatory authority between the constituent parts of a federal system, facilitating a system of distributed ordering.[383] Instead of a centralised harmonisation of substantive laws, this approach provides rules which demarcate State legal systems and the scope of their regulatory authority.

The function performed by European private international law under this conception provides a jurisprudential expression of the idea that the European order must balance the benefits of the common market with a commitment to protecting local cultural diversity and interests. Harmonisation, according to this view, is not something which ought to be imposed, but should only arise (if at all) as the product of a 'natural' evolution towards a common position.

Under this perspective, private international law may be identified as a key method among a 'new generation' of European instruments which have stopped aiming at substantive harmonisation in favour of the coordination of diversity and pluralism.[384] European private international law is again recognised as a system of secondary rules attempting to achieve a sort of international (European) order,[385] much like the way it was conceived prior to its reconceptualisation as national law in the late nineteenth century.[386]

4.6.5. Private international law as a system of rights protection

The *Giuliano-Lagarde Report* (1980) argued that if the rules concerning choice of law in contract were unified by European regulation, 'the level

[382] Commission of the European Communities, Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II) 22.7.2003 COM(2003) 427 final, 2003/0168 (COD) at p. 7.

[383] See 4.2.4 above.

[384] Joerges (2008); Muir Watt (2004) p. 430; Muir Watt (2001) p. 546; Duintjer Tebbens (1990) p. 67.

[385] See Plender and Wilderspin (2001). [386] See Chapter 2.

of legal certainty would be raised, confidence in the stability of legal relationships fortified, agreements on jurisdiction according to the applicable law facilitated, and the protection of *rights acquired* over the whole field of private law augmented'.[387]

The idea of private international law functioning to protect 'acquired rights' is problematic. It seems to be a re-invocation of the 'vested rights' doctrine of the late nineteenth and early twentieth centuries, discussed in Chapter 2. That doctrine is vulnerable to the obvious criticism of circularity previously discussed – that rights cannot be 'acquired' prior to the decision of which legal system is to be applied to the dispute.[388] Rules of private international law determine when private law rights are acquired and enforced; they cannot be said simply to 'protect' them.

There is, however, a different sense in which it can be argued that European private international law functions as a system of rights protection. This different sense is the idea of private international law as part of the system for the protection of constitutional rights, explored throughout this Chapter.[389] In this context, it concerns rights which are not derived from private law, but from European law. Understanding this role of private international law requires exploration of another idea of Europe.

The economic conception of the European order discussed thus far, the internal market, is only one of at least 'two Europes'.[390] The economic idea of Europe began with the treaty establishing the European Coal and Steel Community in 1951, which was broadened by the treaty establishing the European Economic Community in 1957. Another idea of Europe comes from the rights established under the ECHR from 1950. This idea of Europe is not based on the pursuit of common benefit through economic reforms designed to create a more efficient market. It is based on the belief that the Member States possess common values, basic and fundamental norms which transcend the differences in European legal systems, whose protection may be strengthened through common action. These norms can be found not only in foundational or constitutional documents like the ECHR, but also, increasingly, in ordinary EU instruments which create European-wide rights and freedoms.[391]

[387] At p. 4, citing Vogelaar, T., Director-General for the Internal Market and Approximation of Legislation at the European Commission (emphasis added).
[388] Without dependence on a theory of natural rights – see 2.4.2 above.
[389] See 4.2.4 above. [390] Muir Watt (2001).
[391] See e.g. Von Bogdandy (2000). The ECHR has, of course, a wider membership than the EU, and thus also offers a distinct geographical/jurisdictional conception of Europe.

This idea of the European legal order has two impacts on private international law: first, on the formulation of private international law rules themselves, and second, on the application of those rules, through the 'Europeanisation' of public policy.

i) Rights protection in the formulation of private international law rules

The rules of EU private international law include a number of special provisions concerning parties who are presumed to be in a weak position. For example, the *Brussels Regulation* (2001) provides that a 'consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled',[392] but that 'Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.'[393] Similarly, the *Rome Convention* (1980) provides for a presumption, in the absence of party choice, that a consumer contract will be governed by the law of the consumer's habitual residence.[394] Even if another law is chosen by the parties, the consumer will usually still retain the protection of the mandatory laws of their place of habitual residence.[395]

The system of European private international law therefore differs in order to provide special protection for consumers. One way of understanding this variation is that the usual rules of private international law are modified in order to protect consumer rights. This does not refer to the rights of consumers under any national law – this would be another example of the circularity of a 'vested rights' type argument.[396] Instead, as a matter of European law, parties who are in a weak position to negotiate, including consumers and those with individual employment contracts, may be viewed as having special rights of access to legal remedies, and rights of defence from proceedings in foreign courts.[397] This idea of establishing and protecting 'European' or 'federal' rights is also clearly reflected in those parts of the *Brussels Regulation* (2001) which directly establish common European standards of procedural fairness, for example, the requirement that defendants have sufficient

[392] Art. 16(1). [393] Art. 16(2). [394] Art. 5(3). [395] Art. 5(2). [396] See 4.2.4 above.
[397] Perhaps these are subsidiary elements of a more general principle, that the rights of the defence should be protected, or that disputes should be decided by an appropriate court: see Pontier and Burg (2004).

notice of proceedings to prepare a defence.[398] Any defendant may be viewed as 'procedurally weaker', given that they have no say over the timing or location of proceedings. Thus the protection of the rights of procedural fairness of defendants may be a more general justification for the weight given to selecting the forum of the defendant's domicile in the *Brussels Regulation* (2001).

The European system of private international law rules functions as a system of rights protection through special regimes which establish and protect European rights, limiting the regulatory authority of the Member States. This is evidently another manifestation of the more general idea explored in this Chapter, of private international law functioning as a system of 'federal' rights protection.

ii) Rights protection in the application of private international law rules – the 'Europeanisation' of public policy

The 'rights-based' idea of the European legal order has a second impact on private international law through the concept of 'public policy'. In private international law, this term refers to the ubiquitous exceptions which enable a court to refuse to recognise or enforce a judgment or apply a foreign law on the basis that the judgment or law conflicts with a more fundamental policy – defining the limits of the policies of 'tolerance of difference' implicitly adopted in those rules.[399] There are two main forms of public policy,[400] first where a 'public policy' exception is built into a rule,[401] and second through the recognition of 'mandatory rules', or *lois de police*, which a court may apply to override an inconsistent

[398] Art. 26; Art. 34(2). See e.g. *Denilauler* v. *Couchet Frères* [1980] ECR 1553, Case 125/79 at [11]; *Klomps* v. *Michel* [1981] ECR 1593, Case 166/80 at [7]; *Pendy Plastic Products BV* v. *Pluspunkt Handelsgesellschaft mbH* [1982] ECR 2723, Case 228/81 at [13]; *Hengst Import BV* v. *Campese* [1995] ECR I-2113, Case C-474/93 at [16].

[399] Thus, this refers only to what would be called *ordre public international* in France, public policy which is applied in international cases, and not the broader category of *ordre public interne*, which includes policies which affect purely internal private arrangements (such as domestic contracts). This includes but is not limited to the concept of *ordre public veritablement international* which is used to refer to public policy derived from international law rather than from domestic policies: see further 5.3.5 and 5.4.4 below; Mills (2008) p. 213.

[400] See generally Mosconi (1989). The two forms are distinct – but often the same argument can be expressed in both ways. A forum law may be considered as a mandatory rule directly trumping foreign law, or as authority for the existence of a local public policy which renders the foreign law inapplicable.

[401] See e.g. *Brussels Regulation* (2001) Art. 34(1); *Rome Convention* (1980) Art. 16; *Rome I Regulation* (2008) Art. 21, *Rome II Regulation* (2007) Art. 26.

choice of law.[402] Mandatory rules are generally 'positive' in effect, providing a specific law which must be applied.[403] A public policy exception is generally 'negative' in effect, providing for the non-application of a specific foreign law.[404] It is usually less controversial for the court to use mandatory rules to override a choice of law. This is because they are statutory (thus the court cannot be accused of exceeding its lawmaking powers), and because the application of mandatory rules does not formally involve any consideration of the propriety of foreign law, only an examination of the intent of the local legislator.

Public policy has traditionally been viewed as a mechanism to protect national policies and interests; public policy is the policy of a state.[405] It has therefore formed part of the balance between centralisation and the protection of local policy interests, in which private international law plays a crucial role. There must, however, be limits on the application of local public policy if it is not to disrupt this balance and thus undermine the principle of justice pluralism underlying choice of law and judgment recognition rules. Thus, public policy is subject to limitations, or 'attenuated', based on the proximity of the dispute with the forum, and the degree of relativity of the norms involved.[406] By invoking national policies and interests, public policy also runs counter to the uniformity, predictability and mutual trust which is suggested by the requirements of the EU.[407] It is therefore no surprise that a largely restrictive interpretation of public policy has been adopted by the ECJ,[408] suggesting that

[402] See e.g. *Rome Convention* (1980) Arts. 3(3), 5(2), 6(1), 7; *Rome I Regulation* (2008) Arts. 3(3), 3(4), 6(2), 9; *Rome II Regulation* (2007) Art. 16.

[403] It is also possible to have 'negative' mandatory rules, which require the courts *not* to apply them – these are known as 'self limiting' or 'spatially conditioned' rules. See further Hay (1982); Lipstein (1977); de Nova (1966). The statutist approach discussed in 2.2.2 above and some versions of US interest analysis (see 4.3.2 above and 5.3.6 below) assume (problematically) that all statutes contain such limits; a presumption criticised in e.g. Braunig (2005).

[404] This may leave uncertainty as to whether forum law or some other law should be adopted as a substitute: see further Mills (2008) p. 212.

[405] See *Krombach* v. *Bamberski* [2000] ECR I-1935, Case C-7/98, Opinion of the Advocate General, note 10.

[406] See further Mills (2008) pp. 210ff.

[407] Drobnig (1967) p. 205; see further Pontier and Burg (2004); *Solo Kleinmotoren GmbH* v. *Emilio Boch* [1994] ECR I-2237, Case C-414/92 at [20].

[408] See e.g. *Krombach* v. *Bamberski* [2000] ECR I-1935, Case C-7/98 at [21]; Opinion of the Advocate General at [16]; *Renault* v. *Maxicar* [2000] ECR I-2973, Case C-38/98 at [26]; *Hoffmann* v. *Krieg* [1988] ECR 645, Case 145/86 at [21]; Meidanis (2005) p. 103; van Hoek (2001).

there ought to be a reluctance on the part of national courts to invoke their national interest through the mechanism of public policy. Such 'reluctance' may even be legally mandated through the requirements of proportionality and non-discrimination.[409] The need for restraint is also reflected in the (perhaps largely cosmetic) change from the *Brussels Convention* (1968) rule that a judgment need not be enforced if it is 'contrary to the public policy in the State in which recognition is sought'[410] to the *Brussels Regulation* (2001) rule that it must be '*manifestly* contrary to public policy'.[411]

The idea of public policy as a protector of national interest is, however, not the only possible approach. The conception of private international law operating as a system of rights protection has provided the impetus for a reconceptualisation of this traditional idea. This transformation has occurred through two forms of 'Europeanisation' of public policy.[412]

European and foreign mandatory laws One evident way in which private international law regulation may be subject to rights defined under EU law is through the development of European 'mandatory rules'. The idea here is that some EU law, like national law, should override the ordinary application of choice of law rules. While practice is limited, there is evidence for the emergence of this category of rules.[413] Its effect is to ensure that private international law does not undermine rights established at the European level; instead it ensures that those rights are protected in national courts.

A further attempt to transform the use of public policy from being simply a tool for protecting national interest has been made through facilitating the application of the public policy, in the form of the mandatory laws, of other states. Article 7(1) of the *Rome Convention* (1980) gives the courts of a Member State the option of applying the mandatory rules of a foreign state which is not the state of the applicable

[409] Duintjer Tebbens (1990) pp. 68ff. [410] Art. 27. [411] Art. 34 (emphasis added).
[412] See generally Meidanis (2005); Muir Watt (2001).
[413] See e.g. *Ingmar GB Ltd* v. *Eaton Leonard Technologies Inc.* [2000] ECR I-9305, Case C-381/98 (particularly the Opinion of the Advocate General); *Rome I Regulation* (2008) Art. 3(4); Meidanis (2005) p. 107; Fallon and Meeusen (2002) pp. 49ff. Basedow (2000) notes (at p. 689) that 'the Community has repeatedly felt the necessity to guarantee the minimum standards of [the *Consumer Contracts Directive* (1993)] by a specific conflict rule which deprives the choice of a law of a non-member country of its effect if the contract has a "close connection" with the territory of the Member States'.

law, but which otherwise has a close connection with the dispute.[414] This article was ostensibly developed on the basis of an analysis of the case law of the Member States.[415] The rule is not, however, part of the common law,[416] although English courts may recognise the effects of some foreign legislation indirectly through public policy.[417] A number of Member States, including the UK, have opted out of this rule.[418]

The effect of a consistent application of foreign mandatory rules would be that these rules would operate identically in whichever state proceedings were commenced in the EU. Some mandatory rules would be provided by the *lex fori*, and therefore depend on the forum selected by

[414] Art. 7(1). 'When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.' See generally Dickinson (2007); Chong (2006). Compare s. 187(2)(b) of the *Second Restatement (Conflicts)* (1969) in the US – see 4.3.4 above.

[415] The *Giuliano-Lagarde Report* (1980) claimed (at p. 26) that 'Article 7 merely embodies principles which already exist in the laws of the Member States of the Community'. See in particular the *Alnati* decision of the Supreme Court of the Netherlands (Hoge Raad), 13 May 1966, NJ 1967, 3, discussed in the *Giuliano-Lagarde Report* (1980) p. 26; see also Bonomi (1999); Schultz (1983); Vischer (1974) pp. 18–30. Note also Art. 3079 of the *Quebec Civil Code*; *Gillespie Management Corp.* v. *Terrace Properties* (1989) 39 BCLR 2d 337.

[416] The *Giuliano-Lagarde Report* (1980) admitted (at p. 27) that 'it must be frankly recognized that no clear indication in favour of the principle in question seems discernible in the English cases' (see also cases noted in the Report).

[417] See e.g. *Regazzoni* v. *KC Sethia (1944) Ltd* [1958] AC 301, in which the English courts refused to enforce a contract which would have resulted in a violation of the laws of India, partly on the grounds that India was a 'friendly' country. In *Foster* v. *Driscoll* [1929] 1 KB 470 it was held (at p. 521) that the recognition of a contract smuggling prohibited whisky into the US would be 'contrary to our obligations of international comity'. See also *Mirza Salman Ispahani* v. *Bank Melli Iran* [1997] EWCA Civ 3047; *Ralli Bros* v. *Compania Naviera Sota y Aznar* [1920] 2 KB 287; Dicey, Morris and Collins (2006) pp. 1630ff; Chong (2006); Enonchong (1996); Mann (1986) p. 156; Dolinger (1982) p. 187; Mann (1937). A similar approach can be identified in Germany, where it has been considered contrary to 'good morals' to enforce a contract which would be prohibited under foreign law. The *Second Restatement (Conflicts)* (1969) expressly authorises the application of foreign policy in s. 6(2)(b) and s. 187 – see further 4.3.3 above.

[418] Also including e.g. Ireland and Germany: see Cheshire, North and Fawcett (2008) p. 738. In respect of the UK see the *Contracts (Applicable Law) Act 1990* s. 2(2). In the UK the provision was excluded ostensibly on the practical basis that it would cause confusion, uncertainty, expense and delay (North (1990) p. 42), but perhaps this also constituted a rejection of the conception of EU public policy it implies.

the plaintiff. But, regardless of where proceedings were commenced, other mandatory rules would be applied by virtue of their objective connection with the dispute. The application of those objectively identified mandatory rules would not function as a subjective protection of the interests of the forum. In fact, if forum law were selected by choice of law rules, it might even be denied application based on the overriding foreign mandatory law. Instead, the public policy exception in this form operates as a form of flexibility added to the applicable law, to protect the interests of connected states whose law is otherwise not to be applied. In effect, it would provide for a 'mixing' of the two legal systems, to provide a new governing law which should apply regardless of where proceedings are commenced.[419] This would be a further partial 'Europeanisation' of the concept of mandatory rules.[420]

In practice, it is unlikely that this rule would ever obtain the uniformity necessary to enable it to function in this manner. Even if states respected the characterisation by other states of their own laws as mandatory, it would function more as a (structural) mechanism to enforce the powers of states to legislate mandatory rules (by giving them universal effect), rather than as a mechanism for protecting the rights of the parties. Perhaps this is part of the reason for the much narrower version of this rule adopted in the *Rome I Regulation* (2008), limited to laws of the place of performance which render the performance of the contract unlawful.[421] Nevertheless, in attempting to give universal effect to rights established under certain mandatory rules, this type of private international law rule does aspire to act as a system of protection for those rights.

European public policy In the context of the 'public policy' exception to the rules regarding the enforcement of judgments, some ECJ case law

[419] Note the analogy with the approach favoured by von Mehren and Juenger, which is a modern adoption of the original Roman *jus gentium*, and not really a private international law approach – see 2.2 above.

[420] A key precedent referred to by the *Giuliano-Lagarde Report* (1980) (at p. 26) is Art. 13 of the Benelux Treaty of 1969 on uniform rules of private international law. This treaty, which never entered into force, is evidently not part of the law of any Member State but was a proposed law for a 'federalised' multi-State system. This suggests that a better justification for this clause is not its acceptance in the law of any Member State but its role and context as part of European law.

[421] Art. 9(3) provides that 'Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful', which appears consistent with the existing approach of the English courts noted above.

has suggested the possibility of a more radical transformation of the concept of public policy, through the idea of European public policy.[422] Much of the analysis has been consistent with traditional approaches. The Court has emphasised that the public policy of each Member State must be subject to a restrictive interpretation.[423] Because of the need for mutual trust between Member States, the Court has emphasised that the public policy exception cannot be used by a national court to review the general compliance of the judgment court with community law.[424] Thus, it is not enough to constitute a breach of public policy if, for example, the rules of jurisdiction in the *Brussels Convention* (1968) are wrongly applied by another Member State.[425] The concept of public policy can only be invoked if there is a fundamental or manifest breach of an essential rule of law.[426]

However, although the ECJ has rejected arguments for the direct formation of an autonomous Community meaning for public policy,[427] it might be suggested that it has indirectly developed an equivalent idea. It has adopted the view that the limits of public policy are a question of interpretation of the *Brussels Convention* (1968), and are therefore a matter which must be determined by the ECJ.[428] More radically, it has

[422] *Brussels Regulation* (2001) Art. 34: 'A judgment shall not be recognised: (1) if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought'; see also Arts. 45(1), 57. See further Mills (2008) p. 214; Kinsch (2004). The idea has also emerged in the application of the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958): see *Eco Swiss China Time Ltd* v. *Benetton International NV* [1999] ECR I-3055, Case C-126/97, which held that Art. 85 of the *EC Treaty* (2002), as part of 'public Community policy' (Opinion of the Advocate General at [38]) must be applied as part of Dutch 'public policy' in the application of the *New York Convention*.

[423] *Krombach* v. *Bamberski* [2000] ECR I-1935, Case C-7/98 at [21–2]; see generally Fawcett (2007); Lowenfeld (2004); Kinsch (2004) p. 227; Muir Watt (2001) pp. 549ff; van Hoek (2001). Applied in e.g. *Maronier* v. *Larmer* [2003] QB 620 at [28]–[30]; *Marie Brizard et Roger International SA* v. *William Grant & Sons Ltd (No. 2)* [2002] SLT 1365 at [29]; *Eurofood IFSC* [2006] ECR I-3813, Case C-341/04; see also *Citibank NA* v. *Rafidian Bank & Anor* [2003] EWHC 1950.

[424] *Maronier* v. *Larmer* [2003] QB 620; *Renault* v. *Maxicar* [2000] ECR I-2973, Case C-38/98 at [33].

[425] *Krombach* v. *Bamberski* [2000] ECR I-1935, Case C-7/98 at [32–3].

[426] *Ibid*. at [37]; *Renault* v. *Maxicar* [2000] ECR I-2973, Case C-38/98 at [30].

[427] See *Renault* v. *Maxicar* [2000] ECR I-2973, Case C-38/98, Opinion of the Advocate General at [46].

[428] *Krombach* v. *Bamberski* [2000] ECR I-1935, Case C-7/98 at [22]; *Renault* v. *Maxicar* [2000] ECR I-2973, Case C-38/98 at [27]. The first stage of the argument in *Krombach* was (at [24]) to link the *Brussels Convention* (1968) with the EU; *Mund & Fester* v. *Hatrex Internationaal Transport* [1994] ECR I-467, Case C-398/92 at [12]. This step is no longer required because the *Brussels Regulation* (2001) is itself a European instrument.

recognised that community law, and in particular the ECHR, is one of the most important sources of fundamental principles of law for the national legal systems of Member States.[429] This is in accordance with the jurisprudence of the European Court of Human Rights, which has described the ECHR as 'a constitutional instrument of European public order (ordre public)'.[430] The ECJ has held that the objective of the *Brussels Convention* (1968), achieving certainty in the enforcement of judgments, does not prevail over fundamental principles of the European order, such as those set out in the ECHR.[431]

European law is thus not merely the source of limits for the doctrine of public policy, as a matter of interpretation of the *Brussels Convention* (1968), but a source of the substance of the doctrine of public policy. The ECJ has begun to adopt the approach suggested by the *Giuliano-Lagarde Report* (1980) with respect to the *Rome Convention* (1980), that 'Article 16 [of the *Rome Convention*] provides that it is the public policy of the forum which must be offended by the application of the specified law', but that 'It goes without saying that this expression includes Community public policy, which has become an integral part of the public policy ("ordre public") of the Member States of the European Community.'[432] While the ECJ has held that it can only determine the content of 'public policy' where it is derived from community law,[433] it has also stressed that the *Brussels Convention* (1968) is subject to the fundamental principles of European law such as those in the ECHR.

In *Krombach* v. *Bamberski* (2000), the ECJ pointed particularly to ideas of 'procedural fairness' or 'due process', as embodied in Article 6 (1) of the ECHR, as matters which are an essential part of the public policy of the community and thus of the Member States.[434] However, it is

[429] *Krombach* v. *Bamberski* [2000] ECR I-1935, Case C-7/98 at [24]–[26], [39], [44]; *Eco Swiss China Time Ltd* v. *Benetton International NV* [1999] ECR I-3055, Case C-126/97; *Kremzow* v. *Republik Österreich* [1997] ECR I-2629, Case C-299/95 at [14]; see Muir Watt (2001). But note, however, the more restrictive approach taken in *Renault* v. *Maxicar* [2000] ECR I-2973, Case C-38/98, which refused to develop a community 'public policy' to enforce the principles of free movement of goods and freedom of competition.

[430] *Loizidou* v. *Turkey* (1995) 20 EHRR 99 at [75]; Kinsch (2004) pp. 203ff.

[431] *Debaecker* v. *Bouwman* [1985] ECR 1779, Case 49/84 at [10]; *Krombach* v. *Bamberski* [2000] ECR I-1935, Case C-7/98, Opinion of the Advocate General at [27]–[28].

[432] At p. 38.

[433] *Krombach* v. *Bamberski* [2000] ECR I-1935, Case C-7/98 at [23]; Opinion of the Advocate General at [24].

[434] See further Fawcett (2007); Muir Watt (2001) pp. 548ff.

clear that this idea could equally be extended to other fundamental rights; for example, the courts of one European Member State might refuse to enforce a judgment from another Member State for damages for defamation, if the law applied was inconsistent with the right to freedom of expression in the ECHR.[435] Although the ECJ has recognised a principle of deference to national procedural law,[436] it has disallowed rules of national civil procedure which discriminate on the basis of nationality, as contrary to a fundamental requirement of European law.[437] If this approach were followed more broadly,[438] private international law would thus function as part of the mechanism for the protection of a range of European rights, which would further qualify the regulatory authority of the Member States.

The idea of European 'public policy' transforms not only the content but also the character of the 'public policy' exception. To the extent that public policy is European in its origin and conception, it is no longer a source of national variation in the application of the rules of private international law, through a residual expression of national policy and values. It operates merely as a form of flexibility in the application of uniform rules throughout Europe, without undermining the universality of the rule system; and thus, unlike national public policy, does not need to be 'attenuated'.[439] Wherever proceedings were brought, the same rules would apply, and the same public policy would operate to provide a 'safety valve', to prevent the application of private international law rules from breaching more fundamental rights.[440]

[435] Article 10. If the judgment was from a non-Member State then, as noted above, the applicability of European public policy should depend on the degree of connection between the dispute and the EU – see further 5.3.5 and 5.4.4 below.

[436] See e.g. *Rewe-Zentralfinanz eG et Rewe-Zentral AG* v. *Landwirtschaftskammer für das Saarland* [1976] ECR 1989, Case 33/76; *Comet BV* v. *Produktschap voor Siergewassen* [1976] ECR 2043, Case 45/76.

[437] See e.g. *Boukhalfa* v. *Germany* [1996] ECR I-2253, Case C-214/94; Walter and Walther (2001) pp. 157ff. Some have sought to extend this influence to be the basis for the development of a European Code of Civil Procedure (see e.g. Walter and Walther (2001) pp. 184ff).

[438] Many other rules might be sources of European public policy, for example, the *Privacy Directive* (2002), which 'harmonises the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the electronic communication sector' (Art. 1(1)).

[439] See further Mills (2008) p. 214; Kinsch (2004) p. 214; Remien (2001) p. 76.

[440] Muir Watt (2001) argues (at p. 549) that this transformation in public policy changes it from an inward-looking, defensive mechanism to a more 'positive' device.

The focus of the ECJ on 'due process' rights invites an obvious and compelling analogy. The fundamental right of procedural fairness under the ECHR, and the function of private international law as part of the system for its protection, may be compared with the constitutional right of Due Process under the US constitution, and the idea that private international law ought to function as part of the system for its protection.[441] Like the US Due Process clause, the idea of European public policy, incorporating ECHR due process rights, establishes limits on the enforcement of foreign judgments.[442] The arguments which have been made in Canada concerning the impact of federal standards of 'fair process' on Canadian private international law are also equivalent.[443] In each case, the fact that private international law rules must operate subject to rights established under constitutional law means that those rules operate as part of the system of protection for those rights. They are an aspect of the vertical division of regulatory authority in the European 'federal' system.[444]

4.6.6. Reconciling structure and rights protection

The last two sections have discussed two conceptions of European private international law, reflecting two different conceptions of Europe itself. The idea of European private international law as structure, as an aspect of the horizontal division of regulatory authority in European 'federalism', is based on an idea of Europe which seeks to reconcile subsidiarity and the common market. The idea of European private international law as a system of rights protection, as an aspect of the vertical division of regulatory authority in European 'federalism', is based on an idea of Europe as a system to ensure the recognition and protection of commonly recognised fundamental rights.

While these two ideas of private international law and these two ideas of Europe are fundamentally different, they are not contradictory. The merger of these two ideas of Europe was expressed in the *Treaty of Amsterdam* through the amendment of Article 6 to reflect the founding of the EU on a set of fundamental rights and principles, and also through

[441] See Nuyts (2005); see further 4.3.3 above.
[442] See 4.2.4 above. Arguably, different rules should apply with respect to international cases, since even European public policy needs to be 'attenuated' in these circumstances – see further 5.4.4 below; Remien (2001) pp. 75ff; Muir Watt (2001) pp. 552ff.
[443] See 4.5.1 above. [444] See 4.2.4 above.

the conception of the EU as an 'area of freedom, security and justice',[445] an idea which combines and links the common market and fundamental rights.[446] It is also clear in the practice of the courts, through the ever closer interaction between the jurisprudence of the ECJ and the European Court of Human Rights.[447] The EU functions as a legal, economic and social structural order, subject to the modification necessary to ensure the protection of fundamental rights. European private international law may similarly function as part of the European structural order, subject to exceptions which ensure that its operation does not breach fundamental rights. The obligation to apply the law or recognise and enforce the judgments of other Member States must be balanced against the obligation to give effect to other principles of European law, through the adoption of special rules or through the use of European public policy.

In *Krombach* v. *Bamberski* (2000), the ECJ linked the *Brussels Convention* (1968) with the ECHR, as a consequence of the general principle adopted by the Court that 'fundamental rights form an integral part of the general principles of law whose observance the Court ensures'.[448] The development and adoption of European private international law rules are clearly motivated by an economic conception of the EU, the needs of the internal market, balanced against the subsidiarity principle, the idea of Europe as a federal system. At the same time, the application of unified rules of private international law is subject to the fundamental rights of the EU, in the form of the rules which are adopted (most obviously in the protection offered to weaker parties), and through the development of a European conception of public policy. European private international law is therefore not merely an illustration of the

[445] *EC Treaty* (2002) Art. 61, notably cited in the preambles to the *Brussels Regulation* (2001) and *Insolvency Regulation* (2000). See further *Hague Programme Action Plan* (2005).

[446] This idea was also evident in the proposed *Treaty Establishing a Constitution for Europe* (2004), which would have combined the existing range of European treaties into a single framework document.

[447] See e.g. *Bosphorus* v. *Ireland* (2006) 42 EHRR 1; Canor (2008); Hoffmeister (2006); Von Bogdandy (2000); see also the ECJ Opinion on *Accession of the Community to the European Convention on Human Rights* [1996] ECR I-1759, ECJ Opinion 2/94; *Internationale Handelsgesellschaft* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, Case 11/70.

[448] *Krombach* v. *Bamberski* [2000] ECR I-1935, Case C-7/98 at [25]; see also *Kremzow* v. *Republik Österreich* [1997] EUECJ C-299/95 at [14].

existence of a number of different conceptions of the European order, but an example of how they remain in tension with one another.

4.6.7. Mutual recognition and the 'country of origin' principle

The fact that private international law offers a type of strategy for achieving a European legal order means that uncertainty can arise in its relationship with other methods or principles which have a similar objective. One of the most difficult issues at present in European private international law is the relationship between private international law and the principle of 'mutual recognition', a philosophical idea underlying private international law itself,[449] but also adopted in the EU as a legal principle. The principle of mutual recognition was developed by the ECJ in the well known *Cassis de Dijon*[450] case as a consequence of the principles of freedom of movement. Free movement is an intersection point between the two concepts of the European order discussed above, the Europe of the common market and the Europe of fundamental rights; it may be viewed either as an economic issue or as an aspect of individual liberty.

In setting out the implications of mutual recognition, the ECJ has developed the further idea of the 'country of origin' principle, although at present it remains applicable only in limited sectors.[451] This principle holds that, unless there are special circumstances,[452] a Member State must not apply its own law to regulate an activity or a party which has its origin in another Member State if that activity or party is subject to an

[449] See 1.3.3 above. [450] [1979] ECR 649, Case C-120/78.

[451] It primarily applies in the field of corporate regulation – see *Centros Ltd* v. *Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459, Case C-212/97; *Überseering* v. *Nordic Construction Company Baumanagement* [2002] ECR I-9919, Case C-208/00; *Kamer van Koophandel en Fabrieken voor Amsterdam* v. *Inspire Art* [2003] ECR I-10155, Case C-167/01; Michaels (2007); Michaels (2006); Roth (2003); Ballarino (2002); Basedow (2000). The principle is also adopted in the *E-Commerce Directive* (2000); see De Baere (2004); Hellner (2004); Moerel (2001). Although this rule was originally proposed to form part of the *Services Directive* (2006), it was removed in the course of negotiations over the text, and the directive now expressly states (in Art. 3(2)) that it does not concern rules of private international law.

[452] Such as those indicated by the Court in *Cassis de Dijon* [1979] ECR 649, Case C-120/78, which may be summarised as a requirement of proportionality: see Fallon and Meeusen (2002) p. 44.

equivalent law in the Member State of origin.[453] For example, the ECJ has held that the internal regulation of a company must be governed by the laws of the state of origin of the company, the state of its incorporation, and not the laws of any other Member State in which it conducts business.[454] This is true even if the company has most or all of its business activities in another state, and even if it has never conducted business in its state of origin or any other state.

Mutual recognition thus, like private international law, deals with situations in which a Member State is required to give effect to the regulation of another Member State. As explored in Chapter 1, the idea of mutuality, of openness to the validity of foreign norms, is also an essential element of a systemic perspective in private international law, and the concept of mutual recognition suggests a deeper philosophical acknowledgement of a community order. While discussion of the principle in the EU tends to focus on its impact in questions of 'public' rather than 'private' regulation,[455] it is often expressed in terms which encompass areas of law covered by private international law – raising the obvious problem of their potential interaction.

i) Mutual recognition and subsidiarity

One way of viewing the principle of mutual recognition, or the country of origin rule, is as a reflection of ideas of federalism and subsidiarity. The goal of free movement of corporations could be achieved through a standardised corporate law of the EU. However, for the various reasons encapsulated in the idea of subsidiarity and previously explored, this may not be possible, necessary or desirable. The country of origin rule may be viewed as a methodology which aims to provide a system of order among the diverse systems of legal regulation between the states of the EU.

Under this perspective, there is an obvious functional parallel between the country of origin rule and private international law.[456] The country of origin rule also operates consistently with the traditional private

[453] The requirement of equivalence is also an expression of the principle of proportionality; proportionality is breached because the importing state cannot justifiably apply a regulation when the importer has already been subject to an equivalent regulation. See Fallon and Meeusen (2002) pp. 41–2.

[454] See the *Centros*, *Überseering* and *Inspire Art* cases cited above.

[455] A distinction which is of course problematic – see 2.6 and 3.4.1 above.

[456] See Muir Watt (2005); De Baere (2004); Fallon and Meeusen (2002) pp. 52ff; Spamann (2001); Basedow (1994).

international law goal of decisional harmony.[457] For example, wherever a company operates, the courts of each state must apply the same law, the law of the place of incorporation, to govern internal regulatory matters.[458] The obligation to give 'recognition' to the regulation of another Member State may be viewed as performing a similar role to the obligation under the constitutions of the US[459] and Australia,[460] and implied by the federal system of Canada,[461] to give 'full faith and credit' to the laws of other States. The requirement to give such recognition is in effect an acceptance by each state of the 'validity' or 'justice' of the regulation of each other state – exactly like the application of a foreign law through private international law rules. Each operates as a secondary rule, dealing with the distribution of legal authority, and has the effect of supporting the goal of subsidiarity by facilitating more localised forms of regulation.

ii) Mutual recognition and regulatory competition

Justifications offered for the country of origin rule frequently involve the idea of regulatory competition. This is, however, a different idea from that discussed earlier with respect to the US.[462] The form of regulatory competition facilitated by the diverse rules of private international law in

[457] Although it is unusual because it chooses the law based on factors which are unrelated to the character of the dispute at hand; it does not require any sort of present substantive connection between the law and the dispute.

[458] One central controversy regarding the country of origin principle is whether it applies in all circumstances, or only in circumstances in which the law of the country of origin is less restrictive than the law of the forum state: see Fallon and Meeusen (2002) pp. 51ff. It is not clear, for example, whether a company incorporated in a state with 'heavier' regulation should continue to be bound by that regulation if it conducts business in another state; this may be viewed as a competitive disadvantage compared with locally incorporated companies. However, if the 'lighter' system of regulation is always applied, the so-called 'country of origin' principle risks becoming a sort of '*lex minimus*' rule – a 'race to the regulatory bottom' (the so-called 'Delaware syndrome'), to the minimum standards set by European instruments. This approach would have an erosive effect on the competence of the Member States. In addition, in certain circumstances a company may *prefer* to retain a more restrictive regulatory system, to encourage the interest of lower-risk investors in the company. An unqualified 'country of origin' rule would prevent a company from adopting a more restrictive regulatory system by changing the location of its business, but would still allow for the possibility of regulatory competition in company formation.

[459] See 4.2.4 above. [460] See 4.4 above. [461] See 4.5 above.

[462] See 4.3.7 above; Armour (2005); Gelter (2005); but see Deakin (2006). This idea of regulatory competition is also present to some extent in other private international law; for example, the application of the law of domicile of the characteristic performer of a contract (as in Art. 4(2) of the *Rome Convention* (1980)) creates competition between regulatory systems in respect of the location of a business. However, the market effects

the US permits a forum to favour its own laws or to select the 'better law', abandoning the goal of decisional harmony. This form of regulatory competition operates after a dispute has arisen, through plaintiff choice of forum or judicial choice of law. The form of regulatory competition which is a product of the country of origin rule operates before a dispute arises. Under this perspective, a market operates between, for example, a company and its potential investors. The decision to invest will partly be based on the laws applicable to the internal regulation of the company. Thus, those states (and companies) with 'better' regulatory laws will be better at attracting investors, which should lead to an increase in the overall quality of regulation.

In fact, there are two markets functioning in this conception of regulatory competition. The primary market will be the choice by the shareholders of a putative company of the place of its incorporation. The secondary market will be the choice by each investor of which company to invest in, which will partly be based on the law applicable to the internal regulation of that company. The secondary market will (as long as sufficient information is provided to enable investor decisions – for example, information about the place of incorporation of the company) operate to ensure that regulatory competition works effectively in the primary market, so that it does not suffer from the 'race to the bottom' effect, but provides a range of regulatory systems to meet the range of demands and risk profiles of investors.[463]

iii) Mutual recognition as European public policy

Despite or perhaps because of the functional similarities considered above, the exact relationship between the principle of mutual recognition or country of origin rule and private international law is a matter of great difficulty and controversy.[464] Opinions range from those who argue that the country of origin principle contains a hidden choice of law rule, to

of this regulatory competition are weak, because there are many other reasons why a company will conduct business in a particular place, and it is expensive to change location. The market effects are much stronger in the field of company regulation, because the rules are not based around the place of conducting business, but the place of formation of the company, which may be freely selected if there are no subsequent barriers to entry.

[463] These principles should not exclude the possibility of a company being able to change its regulatory law, if it so chooses – although this would raise issues affecting the value of shares and the rights of shareholders.

[464] Muir Watt (2004) p. 455; De Baere (2004); Fallon and Meeusen (2002); Basedow (2000). Preamble 23 to the *E-Commerce Directive* (2000) notably states that 'This Directive

those who argue that it has at most an indirect and limited effect on the applicable law. Perhaps the most useful approach is to view private international law and the country of origin principle as separate stages in the determination of the applicable law. After choice of law rules have selected the applicable law, the country of origin principle operates in a separate 'second stage' to affect the application or modify the content of the applicable law.[465] Part of the reason why it is preferable to view this as a second stage, after the applicable law has been determined, is the possible interaction of the principles. For example, the comparison between the law of the country of origin and forum law must in fact be between the laws selected by the choice of law rules of both the forum and the country of origin. There is no clear basis for preferring the law of the country of origin if the choice of law rules of the country of origin would apply the law of the importing (forum) state.

Under this approach, the country of origin principle may prevent a state from applying the law which would normally be selected by its choice of law rules. This suggests that there might be an important analogy between the country of origin principle and the idea of a Europeanised public policy discussed above.[466] In some circumstances it may operate just like a traditional public policy exception, to exclude the application of foreign law, but because of its economic effects rather than its content. In other circumstances, it may even exclude the operation of forum law if it is the applicable law.[467] Thus, just like the idea of European public policy, the country of origin principle effectively ensures that choice of law rules operate consistently with, and are therefore part of the system for the protection of, fundamental requirements of European law.

neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts', but then goes on to say that 'provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive'. A similar issue was considered in the context of free movement of persons and personal name registration laws in the case of *Grunkin and Paul*, C-353/06 (14 October 2008).

[465] Similarly, the test for equivalence or proportionality (discussed above) must be applied between the law selected by the forum choice of law rules and the law selected by the choice of law rules of the country of origin – even if those laws are not laws of Member States of the EU. It would thus be extremely difficult to express the country of origin principle as a choice of law rule in its own right. See e.g. Fallon and Meeusen (2002) pp. 63–4.

[466] *Ibid*. pp. 61ff. [467] Like an application of a foreign mandatory rule: see 4.6.5 above.

As noted above, the decision of the ECJ in *Krombach* v. *Bamberski* (2000) was based on the development of European ideas of procedural fairness through the ECHR, and the effect of this decision is that private international law operates as part of the system of (procedural) rights protection within the EU. The country of origin principle is based on the development of a different European 'right', the right to free movement. Where the otherwise applicable law (or choice of law rule) infringes the right of free movement, it must be disregarded by the forum; it must be rejected as incompatible with this fundamental European public policy. This can therefore be understood as another example of the functioning of private international law as part of the system of rights protection in the EU, as an aspect of the vertical division of regulatory authority.

4.7 Conclusions

Every federal system is a set of compromises of regulatory authority. The character of those compromises and the methods which are used to implement them is a complex product of each system's unique historical and cultural traditions and context. The law which is used to realise and govern those compromises, which includes private international law, similarly reflects a range of factors, including the broader historical and cultural context of their development. Private international law, however, does more than merely *reflect* the character of the federal system in which it operates. It also partly *determines* the character of the federal system; it is part of the 'constitution' of the federal order. Private international law rules within a federal system should be understood not as substantive private law rules which provide for outcomes of individual cases, but as secondary legal rules which determine the distribution of regulatory authority within the federal system.

The 'constitutionalisation' of private international law within a federal system has been viewed by some as a centralising move (away from diverse State private international law) and by others as a decentralising move (away from the goal of harmonisation of substantive law). It can be both because it represents a compromise or balance in the ordering of the federal system. There is a need for specificity in the analysis of the role of private international law in federal systems, and caution should be exercised in making generalisations. Nevertheless, two common ideas of the function of private international law in federal systems emerge clearly in the analysis conducted in this Chapter.

4.7.1. Private international law as structure

Where regulatory authority is allocated to the States of a federal system, rather than the federal authority, this raises the possibility of an internal 'horizontal' regulatory conflict between the States. As argued in Chapter 1, rules of private international law are best viewed not as a mechanism for resolving an individual dispute between particular parties, based on considerations of 'justice' or 'fairness', but as a structural legal ordering which operates to address these potential conflicts as part of the federal system. Private international law aims to minimise the inconsistent legal treatment of disputes by limiting the overlap in jurisdiction of State courts, ensuring that a single law is applied to each dispute, and reducing the need for a dispute to be re-litigated in order for it to be enforced in another State. By imposing a horizontal system to regulate the range of State laws which is the inevitable result of a decentralised allocation of power, it provides for a reconciliation of the principles of order and diversity which is at the heart of a theory of federalism.

This idea is clearly identifiable, sometimes implicitly and sometimes overtly, in the analysis of federal systems conducted in this Chapter. It has recently been recognised in Australia in the direct substantive effect given to the Full Faith and Credit clause in private international law disputes in tort. In Canada, in the absence of an express full faith and credit clause, the courts have nevertheless found this idea to be implied by the character of the Canadian federal constitutional division of powers, and found that it in turn implies federal Canadian rules of private international law. In the EU, motivated by the needs of the internal market, and under the influence of the constitutional principle of subsidiarity, private international law is increasingly recognised as a key part of the framework of the European allocation of regulatory authority, facilitating the ordered existence of diverse State legal systems.

The view of private international law as structural federal law was also evident in the broad interpretation of the effect of the Full Faith and Credit clause of the US constitution up to the 1930s. It is important to note, however, the distinct role for constitutional norms in modern private international law in the US. Private international law rules are not viewed as purely State law or purely federal law, but as a combination of State rules operating within federal limits. The dichotomy of federal/State regulation has been rejected, and private international law rules are increasingly recognised as possessing a hybrid character, affected by the application of ideas of subsidiarity to private international law itself.

The analysis of private international law as part of the horizontal division of regulatory authority in a federal system is most clearly articulated in the jurisprudence of the Canadian Supreme Court:

> Legal systems and rules are a reflection and expression of the fundamental values of a society, so to respect diversity of societies it is important to respect differences in legal systems. But if this is to work in our era where numerous transactions and interactions spill over the borders defining legal communities in our decentralized world legal order, there must also be a workable method of coordinating this diversity. Otherwise, the anarchic system's worst attributes emerge, and individual litigants will pay the inevitable price of unfairness. Developing such coordination in the face of diversity is a common function of both public and private international law. It is also one of the major objectives of the division of powers among federal and provincial governments in a federation. … [It] raises issues that lie at the confluence of private international law and constitutional law.[468]

This account explains the constitutional role of private international law in the context of Canadian federalism, and also invites consideration of whether the same ideas ought to be considered in the international context. This is explored further in Chapter 5.

4.7.2. Private international law as rights protection

The idea that private international law could be justified and function on the basis that it protected rights 'acquired' by or 'vested' in the parties through their actions has long been rejected as circular.[469] However, when dealing with constitutional rights in the context of internal federal private international law, the critique of circularity is inapplicable, and the idea of private international law as a system of rights protection may be rightfully revived.

The constitution of a federal system does not only serve to allocate regulatory authority among the States or federal institutions of the system. It also defines fundamental values which form part of the fabric of the federal system, and it gives the federal authority the power to legislate further values. Constitutional rights prevail regardless of the different policies or interests of the affected States. Unlike the horizontal division of regulatory authority, these are not concerned with the relations

[468] *Hunt* v. *T&N* [1993] 4 SCR 289 at 295–6. [469] See 2.4.2 and 4.2.4 above.

between States, but with the relations between the State and individuals, by imposing federal limits on the authority of State regulators.

The establishment of constitutional rights as part of a federal system is thus part of the vertical division of regulatory authority. A State is not merely required to recognise constitutional rights. These rights are qualifications of the regulatory authority of the State – it lacks the power to refuse their recognition. This idea recognises that private international law must be subject to the limits of State regulatory authority in the federal constitution.

Like the idea of private international law as structure, this idea is clearly identifiable in the analysis of federal systems conducted in this Chapter. It is present in the interpretation of the Due Process clause of the US constitution, which has been applied to provide limits on the private international law rules of the States. The courts of Canada have recognised the potential for federal standards of 'fair process' and the Canadian *Charter of Rights and Freedoms* to have an impact on the private international law rules of the Canadian provinces. In the EU, certain common rights are defined through the design of private international law rules themselves, and the ECJ has also taken an approach to the interpretation of the concept of 'public policy' which enables it to function as a system of protection of European values, including those embodied in the ECHR.

The effect that this idea should have on the development of private international law rules depends on the character of the constitutional right under consideration, and on the specific context of each federal system. However, the most obvious application of this idea is the impact of rights of due process or procedural fairness on the operation of rules of private international law.

Chapter 1 rejected the idea that 'fairness' or 'justice' could operate as a justification for private international law, or as a guiding principle in the development of private international law rules. Such an approach miscategorises private international law rules as primary or substantive rules of law, presupposing that a common idea of fairness or justice may be identified and used to resolve the dispute, and begging the private international law question. However, to the extent that a federal system establishes a federal right of due process or procedural fairness, this would institute exactly the sort of common idea of fairness that would be necessary for this approach to operate. Within a federal system, the existence of a standard right of due process or procedural fairness means that, in this context, private international law may function as part of the

system of protection for this right. This approach invites consideration of the possibility that private international law rules may function on an international level as part of the system of international rights protection. This idea will also be explored further in Chapter 5.

4.7.3. Federalism and private international law

The idea of private international law as part of the structure of the international system dominated thinking in private international law theory until the nineteenth century. It was rejected as part of the rise of state sovereignty connected with the development of the positivist approach to international law. Subsequently, the idea of private international law as a system of protection for vested rights dominated thinking in the late nineteenth and early twentieth centuries, before it was rejected by the application of a positivist approach to private international law.

These ideas have not, however, been entirely cast aside. They have evolved into the idea of private international law as part of the constitution of a federal system. In the early nineteenth century, Savigny argued that private international law rules should be derived from the existence of a community of nations. In exactly the same way, the courts of federal systems around the world have recognised that internal private international law rules should be derived as an implication of their federal community; they are an essential part of the architecture of federalism, embodying both the structure of the federal system, and the existence of constitutional rights.

Taken together, the ideas explored and developed through the analysis in this Chapter give a new insight into the role of private international law. The argument that private international law is part of State law, that the recognition of law beyond the State would compromise the independence of the State sovereign, is misconceived. It fails to recognise the secondary character of private international law norms – their effect on regulatory authority. The recognition of federal rules of private international law may be a small compromise of a State's regulatory authority, in limiting its ability to differentiate its approach in the field of private international law. However, this compromise is not a *threat* to the sovereignty of individual States. It is, in fact, a method by which the sovereignty of individual States can be maximised, through ordering the coexistence of diverse State legal systems.

By providing a *horizontal* ordering of the operation of diverse legal systems, private international law makes universalisation beyond the

State less necessary, preserving localised regulation, with benefits in accountability, legitimacy, diversity and regulatory competition. In essence, it supports the principle of subsidiarity. At the same time, private international law facilitates the *vertical* ordering of the federal system, through its role as part of the system of constitutional rights protection. In managing the tension between these two dimensions, private international law is therefore increasingly recognised as connected with the balance or architecture of a federal system. Through its role in the distribution of regulatory authority, it provides a mechanism to give effect to constitutional principles of the federal order.

5

The confluence of public and private international law

5.1 Introduction

The history of public and private international law explored in Chapter 2 is a story of divergence. The traditionally broad conception of the 'law of nations' was fragmented into public international law, law between states, and private international law, which became understood as part of national law dealing with international private disputes, rooted in a positivist conception of state sovereignty. As examined in Chapter 1, the theoretical focus of contemporary private international law is mistakenly placed on ideas of private justice and fairness. This is the product of positivist international law theory, a set of outdated norms subject to the explanatory and normative critique explored in Chapter 3, which are no longer consistent with international law. The theory of private international law struggles to justify and explain private international law rules because it is blind to the reality that private international law 'stems from the law of nations',[1] that it is 'both within and outside the individual legal system'.[2] Although it is formally national law, 'sociologically, economically and in terms of international relations, private international law is the common language of private international legal association'.[3]

[1] Jennings (1957) p. 173. [2] Graveson (1974) p. 198. [3] *Ibid.*

The divergence between public and private international law has, however, always been greater in theory than in practice, particularly as public international law has (re-)expanded to encompass private relations. Despite the dominance of the positivist perspective, private international law rules continue to reflect and replicate underlying ideas of international order, in the context of private law – they constitute a hidden (private) international law. The decisions of national courts in private international law are a particular example of the phenomenon (examined in Chapter 3)[4] of an international order constructed by a distributed global judicial network – an example of 'peer governance'. As long as this ordering is unrecognised and unanalysed, its justness goes unexamined. For this examination to occur, the flow of the divergent streams of public and private international law theory must be channelled back towards confluence.

The idea of a systemic perspective, introduced and discussed in Chapter 1, is a keystone for this analysis. Chapter 2 showed the central role which an international systemic perspective has played in the history of the relationship between ideas of public and private international law, from the origins of both disciplines in the 'law of nations'. Although this perspective was largely abandoned internationally under the influence of a positivist methodology, it has continued in the internal context of federal systems, as explained in Chapter 4. This Chapter approaches private international law at the international level through the same lens, examining the evidence and the argument for the continued application of an international systemic perspective in private international law.

Chapter 4 examined the ways in which private international law determines the allocation of regulatory authority within federal systems, reflecting and replicating the division of authority in the federal constitution. This analysis identified two dimensions in which private international law interacts with federal constitutional law, as part of the constitutional architecture of a federal system. The first is the dimension of constitutional structure, in which private international law orders the horizontal division of regulatory authority between constituent States, acting in support of the principle of subsidiarity. The second is the dimension of rights protection, in which private international law functions subject to federal or constitutional norms, acting as part of their enforcement and protection, reinforcing the vertical hierarchy within the federal system between central and subsidiary powers.

[4] See 3.5.5 above.

The development in Chapter 3 of a theory of federalism as part of the international legal order suggests that these ideas may also be applied, by analogy, at the international level. This Chapter applies this framework to examine how the constitutional architecture of international norms shapes rules of private international law. While it is a continuation of the approaches of the classical private international law scholars examined in Chapter 2, such as Savigny and Mancini, it finds its foundations not in the natural law or historicist ideas of the international society of states or nations which motivated them, but in the very modern idea of the constitutionalisation of the international legal order.

As noted above, this argument depends on drawing an analogy between the systemic function of private international law in federal systems and in the international system. It is essential to exercise caution in any argument based on analogy, and this applies particularly to an extrapolation from a federal constitutional experience to the international level. Federal systems will always contain less diversity than the international system considered as a whole. The content of internationally accepted norms is more problematic than norms accepted as federal or constitutional law within many federal systems. Nevertheless, attempts to order the international system have much to learn from the parallel experiences of the ordering of federal systems.[5]

Just like federal constitutions, international law contains norms that define the architecture of the international system – the secondary norms, concerned with the division of regulatory authority, analysed in Chapter 3. These are implicated, in both horizontal and vertical dimensions, in the development of rules of private international law. This Chapter first looks at examples of the express recognition of a systemic perspective in private international law. It then considers each of these dimensions (focusing on ideas of structure and rights protection respectively) in turn, looking first at the relevant norms of public international law, and then at their impact (present and potential) on private international law.

5.2 Evidence of a systemic perspective in private international law

The dominant perspective on private international law denies its international character and views it as a part of national private law, concerned with doing justice in individual cases. This paradigm masks the

[5] See Helfer (2003) p. 198; Laycock (1992) p. 260; Ehrenzweig (1957); Cheatham (1950).

role of norms of international law underlying private international law, and the function and effect of private international law as an international regulatory system. Much of the analysis in this Chapter attempts to unmask this reality, to expose the hidden public international law foundations of private international law. First, however, this section considers those places where these foundations are evident, where an international systemic perspective on private international law is expressly acknowledged.

5.2.1. International law and institutions

Little evidence of an international perspective on private international law is observable in *international* courts, although very few cases have considered the issue,[6] and, as discussed in Chapter 3, international judicial decisions are not a prerequisite for internationalised law.[7] The absence of international disputes concerning private international law can be viewed, perhaps counter-intuitively, as evidence of the strong internalisation of norms of public international law by states in this field. Evidence for the influence of these norms is not found in confrontational enforcement proceedings, because they shape the design and interpretation of national law so effectively.

Perhaps the most obvious sign of the continued influence of an international perspective on private international law is in the work of

[6] But see e.g. *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands* v. *Sweden)* [1958] ICJ Reports 55. Note the observation of the PCIJ in the *Serbian and Brazilian Loans* cases, *France* v. *Yugoslavia; France* v. *Brazil* (1929) PCIJ Ser A, Nos. 20–1, Judgments 14–15 at 41, that 'The rules [of private international law] may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States. But apart from this, it has to be considered that these rules form part of municipal law.' Despite this observation, the Court applied rules of private international law without identifying them as belonging to any system of municipal law. Instead, it relied (at p. 41) on 'the actual nature of these obligations', 'the circumstances attendant upon their creation' and 'the expressed or presumed intention of the Parties'. It is difficult to see how the selection of the private international law rules of one national system could have been justified. See further Jenks (1964) pp. 431ff, 594ff; Hambro (1962) pp. 17ff; Wortley (1954) pp. 301ff.

[7] See Vest (2004) p. 811; Von Mehren (2001) p. 200. Graveson (1974) proposes (at p. 227) that the ICJ should constitute a Chamber 'to hear and determine the problem of jurisdiction and applicable law'. On the analogous issue of the role of the ECJ in the development of European private international law see Court of Justice of the European Communities (1992); Duintjer Tebbens (1990) pp. 56ff; Fletcher (1982) pp. 51ff; Drobnig (1967) p. 224.

international institutions concerned with its harmonisation. A number of well-known international legal organisations are at least formally interested in private international law, including the International Law Association,[8] Institute of International Law[9] and International Law Commission,[10] although in practice their focus has been almost exclusively on public international law. The General Assembly of the United Nations showed an interest in the subject at one time, but diverged towards a focus on the competing strategy of substantive harmonisation of private law.[11] The work of the Hague Conference on Private International Law, which has been meeting regularly since 1893 and became a permanent intergovernmental organisation in 1955, is thus particularly prominent and important in this field.[12] Its purpose, as defined in Article 1 of its Statute, is 'to work for the progressive unification of the rules of private international law'. Numerous treaties on a wide range of subject matters have been established under its auspices, both codifying existing international agreement on private international law and pushing for progressive development in the law, although their success in attracting widespread ratification has been variable.

In seeking to establish formal agreements between states, the work of the Hague Conference is compatible with the framework of the traditional dichotomy between (international) public international law and (national) private international law. It should not be thought, however,

[8] See www.ila-hq.org. Art. 3.1 of its Constitution states its objectives to be 'the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law'.

[9] See www.idi-iil.org. The early approach of the Institute to private international law under the influence of Mancini, one of its founder members in 1873 and its first president, was noted in 2.5.2 above.

[10] See http://untreaty.un.org/ilc/index.html. Art. 1(2) of the *Statute of the International Law Commission* states that 'The Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law.'

[11] See 1.5 above. In the 1960s the General Assembly considered a role for the United Nations to contribute to 'progressive development in the field of private international law with a particular view to promoting world trade' and expressly debated the adoption of an international perspective on private international law. These debates led to the founding of UNCITRAL (www.uncitral.org), whose work has however subsequently focused on harmonising substantive law. See General Assembly 19th Session UN Doc. A/5728, 9 September 1964; Sixth Committee Meetings 894–5, 9–10 December 1965; Sixth Committee Meetings 946–953, 2–9 December 1966; General Assembly 21st Session 1497th meeting, 17 December 1966.

[12] See www.hcch.net; Kessedjian (2001) pp. 231ff; North (2001); Von Mehren (2001); van Loon (1990).

that the piecemeal process of 'internationalising' private international law through its incorporation into treaties is an implicit rejection of the extant character of private international law as an international regulatory system. This process of crystallising inter-state agreement in the form of a treaty to ensure continued harmony is an important complement to the internationalism of private international law operating through national courts. Replacing the principles on international jurisdiction, examined below, with more detailed treaty rules for particular subject matter does not undermine, but in fact confirms, the 'public' international function of private international law in ordering regulatory authority between states, explored throughout this Chapter. This work should be viewed as an international formalisation of private international law rules with an existing international character, rather than a process of transformation of those rules from purely domestic to international law. The Hague Conference on Private International Law is thus necessarily an implicit institutional advocate of the international systemic perspective on private international law which is examined throughout this book. Whether or not produced through an international organisation, the existence of numerous bilateral and multilateral treaties governing questions of private international law provides an important recognition of the need to approach the subject at an international level, and does much to promote an international perspective on private international law.

Despite these achievements, the paradigm under which private international law is viewed as part of the internal law of each state still dominates the subject, and most private international law regulation thus takes place at the national level in domestic courts. Indeed, in at least some contexts the benefits of crystallising a rule in an international treaty may be outweighed by the costs of removing the dynamism and flexibility of distributed regulation through national courts. The remainder of this Chapter therefore looks at the extensive role of a systemic perspective in national rules of private international law. While this role is predominantly implicit and insufficiently acknowledged, there is growing consciousness of the role of national courts and other law makers as component parts of an international network constituting the international system of private international law rules.[13] If the influence of public international law on private international law is not always

[13] See generally Berman (2005c) pp. 1864ff; Wai (2002) pp. 222ff.

recognised, it is certainly true that 'It may leave the stage, but goes no farther than the wings.'[14]

5.2.2. The United States

The approach to private international law in the United States is complicated by the range of levels of regulation involved, due to its federal structure. First, there is the international question (the focus of this Chapter) of whether the United States itself has regulatory authority over the dispute – whether an international dispute is sufficiently connected with the US to establish the capacity to exercise jurisdiction or apply US law. Second, there is the inter-State question (the federal systemic problem examined in Chapter 4) of whether a particular State has regulatory authority over the dispute, which is based on constitutional limitations on the competence of the different States. Third, there is the domestic (usually State) question of whether that authority should be exercised in a particular case, which may involve purely local (private law) policy considerations, such as the interests and convenience of the parties, but may also involve questions of the competence of specific courts.[15] Because private international law predominantly operates at the State level, it is a State court which answers all three of these questions when it decides whether to exercise jurisdiction, and if so what law to apply.

This additional complexity does not undermine the analysis conducted below, but these overlapping questions make it difficult to isolate rules which are specifically dealing with the first question and focus of this Chapter, the international basis of US regulatory authority. Nevertheless, some rules can be identified which are evidence not only of a focus on the international question but also of the adoption of an international systemic perspective.

As examined in Chapter 4, early authorities in the US adopted an international systemic perspective on private international law. This was because of an early belief in the unity of public and private international law, also connected with the development of federal common law. The Supreme Court held, in *Hilton* v. *Guyot* (1895), that 'International law, in its widest and most comprehensive sense – including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law or the conflict of laws … – is part of our law, and

[14] Fitzmaurice (1957) p. 221; see also Graveson (1974) p. 198. [15] See 1.2.2 above.

must be ascertained and administered by the courts of justice'.[16] By contrast, thirty years later it was held, in *Johnston* v. *Compagnie Générale Transatlantique* (1926), that 'the question is one of private rather than public international law, of private right rather than public relations'[17] – symptomatic of the now dominant view of private international law as private national law and, in the US, as part of the law of each State.

As examined in Chapter 4, the *Second Restatement (Conflicts)* (1969), a strong influence on the practice of many State courts, lists factors that a court should take into account when considering which legal system is most closely connected with a dispute for the purposes of determining the applicable law. The first factor listed is 'the needs of the interstate and international systems',[18] a factor also highlighted in previous work by the Reporter of the Restatement.[19] The Comments to the *Second Restatement* explain that 'Probably the most important function of choice-of-law rules is to make the interstate and international systems work well.'[20] The Restatement also acknowledges Leflar's work on 'choice influencing considerations' in private international law, which argued that one of the central functions of the subject was 'the maintenance of interstate and international order'.[21] These strong statements

[16] 159 US 113 at 163. Note also the draft unified code of public and private international law of Field (1876).

[17] 242 NY 381 at 386–7. [18] *Second Restatement (Conflicts)* (1969) s. 6(1)(2)(a).

[19] Reese and Cheatham (1952) at pp. 962ff. Although this factor is given prominence (it is listed first and described (at p. 962) as the 'basic consideration in the decision of every choice of law case'), the authors also noted that 'Of necessity, this overriding policy is so vaguely worded as to be difficult of application. Frequently, it is well-nigh impossible to determine whether the needs of the interstate or international system would best be served by the resolution of a given dispute one way or the other.' The authors do, however, suggest (at pp. 963–4) examples where this factor does have direct effect, including the principle of forum neutrality in private international law (see 1.4 above), the defence of 'foreign compulsion' in tort law, and the *lex situs* rule for assignments of personal property.

[20] They go on to argue that 'Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them. In formulating rules of choice of law, a state should have regard for the needs and policies of other states and of the community of states. Rules of choice of law formulated with regard for such needs and policies are likely to commend themselves to other states and to be adopted by these states. Adoption of the same choice-of-law rules by many states will further the needs of the interstate and international systems and likewise the values of certainty, predictability and uniformity of result.' See also Maier (1982) pp. 286ff.

[21] Leflar (1966) pp. 282ff; see 4.3.2 above.

of policy have, however, had limited influence. It has been argued that they justify a focus in private international law on international legal rights or norms, such as the right against discrimination.[22] Other scholars have argued for the development of 'transnational community policies', reflected in the development of a new 'law of nations' like that which existed prior to the division of public and private international law.[23] There is, however, little evidence that US courts have adopted such approaches in practice.

The cases in which these factors are given prominence tend to focus on disputes between States of the US, rather than international disputes – adopting the federal systemic perspective analysed in Chapter 4, rather than the international systemic perspective examined in this Chapter. A typical example is the Minnesota Supreme Court's decision of *Jepson* v. *General Casualty Co. of Wisconsin* (1994), which held that:

> In discussing … the maintenance of interstate order, we are primarily concerned with whether the application of Minnesota law would manifest disrespect for North Dakota's sovereignty or impede the interstate movement of people and goods. An aspect of this concern is to maintain a coherent legal system in which the courts of different states strive to sustain, rather than subvert, each other's interests in areas where their own interests are less strong.[24]

The *Third Restatement (Foreign Relations)* (1986) deals with a range of matters including questions traditionally covered by both public and private international law. The very existence of the Restatement, which is examined more closely below,[25] implicitly recognises the importance of international considerations in shaping domestic private international law rules. For present purposes, it is particularly notable that the Restatement includes a variety of systemic factors which a court should take into consideration in determining whether an exercise of 'jurisdiction' (in the international sense, discussed below[26]) is 'reasonable'. These factors include 'the importance of the regulation to the international political, legal, or economic system'[27] and 'the extent to which the regulation is consistent with the traditions of the international system'.[28]

[22] Reese and Cheatham (1952) p. 963; see further 5.4 below.
[23] See Tetley (1999) p. 316; McDougal (1990).
[24] 513 NW 2d 467 at 471. [25] See 5.3 below. [26] See 5.3.1 below.
[27] *Third Restatement (Foreign Relations)* (1986) s. 403(2)(e). [28] *Ibid.* s. 403(2)(f).

These provisions are not infrequently cited, but this is only rarely accompanied by further analysis.[29] Commonly, the needs of the international system are cited as a relevant factor, but then disclaimed as irrelevant to the case at hand,[30] or interpreted in a way which emphasises local interests.[31] While both these Restatements overtly acknowledge the importance of adopting an international perspective on private international law, the prominence of these factors should, therefore, not be given too great a significance.

A systemic perspective is also intermittently adopted by judges in the US independently of the Restatements, particularly in inter-State disputes as examined in Chapter 4. For example, in *World-Wide Volkswagen Corp*. v. *Woodson* (1980),[32] the Supreme Court considered 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies' as a relevant consideration in determining the appropriate allocation of jurisdiction between States of the US, and this has been extended to international cases.[33] In dealing with the recognition and enforcement of foreign judgments, it has been held that 'the increased internationalization of commerce requires "that American courts recognise and respect the judgments entered by foreign courts to the greatest extent consistent with our own ideals of justice and

[29] Examples where some analysis and discussion occurs include *Sosa* v. *Alvarez-Machain* (2004) 542 US 692; *John Doe* v. *Unocal Corp*. (2002) 395 F 3d 932 at 949; *Hughes* v. *Wal-Mart Stores Inc*. (2001) 250 F 3d 618 at 620; *Maxwell Communications Corp*. v. *Société Générale (In re Maxwell Communications Corp. Plc)* (1996) 93 F 3d 1036 at 1053; *Neely* v. *Club Med Management Services, Inc*. (1995) 63 F 3d 166 at 182ff, 198; *Nesladek* v. *Ford Motor Company* (1995) 46 F 3d 734 at 738–9; *Judge* v. *American Motors Corporation* (1990) 908 F 2d 1565 at 1572; *Harris* v. *Polskie Linie Lotnicze* (1987) 820 F 2d 1000 at 1004; *Myers* v. *Government Employees Insurance Co*. (1974) 225 NW 2d 238 at 242; *Franklin Supply Co*. v. *Tolman* (1971) 454 F 2d 1059 at 1076; see also Martinez (2003) p. 507; Maier (1982) pp. 295ff.

[30] See e.g. *Miller* v. *Pilgrim's Pride Corp*. (2004) 366 F 3d 672; *Thornton* v. *Sea Quest Inc*. (1998) 999 F Supp 1219 at 1223; *Seizer* v. *Sessions* (1997) 132 Wash 2d 642 at 652; *Simpson* v. *Liberty Mutual Insurance Co*. (1994) 28 F 3d 763; *Kenna* v. *So-Fro Fabrics, Inc*. (1994) 18 F 3d 623.

[31] See e.g. *United States of America* v. *Usama Bin Laden* (2000) 92 F Supp 2d 189, which, in the context of criminal jurisdiction, argues (at p. 223) that 'in light of the prominent role played by the US in "the international political, legal, and economic systems," the protection of United States facilities – regardless of their location – is highly important to the stability of these systems.'

[32] 444 US 286 at 292.

[33] See *Asahi Metal Industry Co*. v. *Superior Court of California* (1986) 480 US 102 at 113–16; *Burger King Corp*. v. *Rudzewicz* (1985) 471 US 462 at 477; *Lauritzen* v. *Larsen* (1953) 345 US 571; see further 4.3.5 above.

fair play"'.[34] Acknowledging the role of international law in both interpreting domestic competition regulation and shaping private international law, Judge Learned Hand famously stated that 'it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws".'[35] In *Société Nationale Industrielle Aérospatiale* v. *United States District Court for the Southern District of Iowa* (1987), a case dealing with questions of foreign evidence in a US civil suit, a strong minority of the Supreme Court exhorted their colleagues to look to the 'mutual interests of all nations in a smoothly functioning international legal regime'.[36] A crude internationalism, or rather bilateralism, is also reflected in the occasional adoption of reciprocity requirements in rules on the recognition and enforcement of foreign judgments.[37]

It is, however, unusual for a systemic perspective to be explicitly adopted or acknowledged in US judicial or academic writing on private international law. Although historically international and systemic perspectives were prominent in private international law rules in the US, as explored in Chapter 4, the modern discussion of the international effects of private international law in US scholarship centres on the fundamentally ambiguous and problematic concept of 'comity'.[38]

The recent growth in law and economics scholarship applied to private international law, particularly but not exclusively in the US, may suggest

[34] *Ackermann* v. *Levine* (1986) 788 F 2d 830 at 845, citing *Tahan* v. *Hodgson* (1981) 662 F 2d 862 at 868.

[35] *United States* v. *Aluminum Co. of America* (1945) 148 F 2d 416 at 443.

[36] 482 US 522 at 555. [37] See 1.3.3 above; Childs (2005).

[38] Paul (1988) argues (at p. 173) that 'Comity acknowledges the public side of private international law' – but as an acknowledgment it is at best ambivalent. See 2.3.4 above; Collins (2006); *Société Nationale Industrielle Aérospatiale* v. *United States District Court for the Southern District of Iowa* (1987) 482 US 522. Note, however, the arguments of the minority (at p. 556) that there are 'three categories of interests relevant to a comity analysis – foreign interests, domestic interests, and the interest in a well-functioning international order', and (at p. 567) that 'The final component of a comity analysis is to consider if there is a course that furthers, rather than impedes, the development of an ordered international system', suggesting an approach to comity open to the systemic perspective. See also *Laker Airways Ltd* v. *Sabena, Belgian World Airlines* (1984) 731 F 2d 909, describing comity (at [107]) as 'a complex and elusive concept' which (at [106]) 'serves our international system like the mortar which cements together a brick house', and (at [108]) 'compels national courts to act at all times to increase the international legal ties that advance the rule of law within and among nations'.

a resurgence in international systemic analysis.[39] While concerns of justice must remain paramount in evaluating both the distribution of regulatory authority effected by rules of private international law and the often implicit normativity of economic analysis itself, economics provides an additional analytical tool that may profitably be applied. Following the models of the US and EU explored in Chapter 4, the ordered distribution of regulatory authority through private international law can be linked with market efficiencies, or the (potential) economic benefits of regulatory competition. While some economic analysis may approach the subject at a purely national level, globally-minded economists evaluating the economic effects of private international law rules at an international level necessarily adopt and promote a systemic analysis of the function and effects of rules of private international law.

5.2.3. *Common law states and the European Union*

Chapter 4 examined the way in which ideas of private international law as a system of ordering have evolved within various federal contexts. In the recent development of these ideas in Australia and Canada, a systemic perspective in private international law has been extended beyond the federal system to the international domain. Thus, recent cases in Canada have noted (in the context of jurisdiction) that 'Developing … coordination in the face of diversity is a common function of both public and private international law',[40] and that 'international comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law'.[41] This change was even more clearly articulated in the context of choice of law in *Tolofson* v. *Jensen* (1994), in which the Court stated that 'in dealing with legal issues having an impact in more than one legal jurisdiction, we are not really engaged in [a] kind of interest balancing. We are engaged in a structural problem.'[42]

In the context of the recognition and enforcement of foreign judgments, *Hunt* v. *T&N* (1993) similarly held that:

> the old common law rules relating to recognition and enforcement were rooted in an outmoded conception of the world that emphasized

[39] See e.g. Basedow and Kono (2006); Muir Watt (2003a); Guzman (2002); Buxbaum (2002); Richardson (2002); Trachtman (2001); Whincop and Keyes (2001); Allen and Ribstein (2000); Allen and O'Hara (1999); Brand (1997).

[40] *Hunt* v. *T&N* [1993] 4 SCR 289 at 295–6.

[41] *Beals* v. *Saldanha* [2003] 3 SCR 416 at [28].

[42] *Tolofson* v. *Jensen* [1994] 3 SCR 1022 at 1047. A similarly international perspective is adopted by many Chinese private international law scholars: see e.g. Zhang (2006) pp. 304ff.

> sovereignty and independence, often at the cost of unfairness. Greater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe.[43]

As in the US, there is a reliance on the equivocal term 'comity', and the ambiguity of this concept avoids addressing whether these changes are voluntary or reflect principles of international order.[44] However, the emphasis here is on comity viewed more as a product of interdependence and globalisation rather than reflecting a voluntarism derived from the positivist conception of state sovereignty.[45] Thus, comity 'must be permitted to evolve concomitantly with international business relations, cross-border transactions, as well as mobility',[46] and is 'grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner'.[47]

Similar sentiments have been expressed in Australian courts. In *Oceanic Sun Line Special Shipping Co.* v. *Fay* (1988), considering the evolution of the *forum non conveniens* test in Australia, Justices Wilson and Toohey noted that 'this century has witnessed such a transformation in communications and travel, coupled with a greater importance attaching to considerations of international comity as the nations of the world become more closely related to each other'.[48] In the context of choice of law in tort, Justice Kirby in *Régie National des Usines Renault SA* v. *Zhang* (2002) made perhaps the most forceful statement of this idea by an Australian judge, stating that:

> the rule in *Phillips* v. *Eyre*, as it came to be applied, now appears as a 'breath from a bygone age'. It is left over from an earlier phase of private international law, that never gained acceptance beyond the United Kingdom and its dominions and colonies. It is a rule inappropriate to a time of global and regional dealings, technological advances that increase international conflictual situations and attitudinal changes that reject, or at least reduce, xenophobic opinions about the worth and applicability of the law of other jurisdictions.[49]

[43] *Hunt* v. *T&N* [1993] SCR 289 at 322. [44] See 2.3.4 above.

[45] See 3.2.1; Wai (2001). In the context of worldwide freezing orders, it has been argued that 'although the English courts have used the language of "comity", it is submitted that the true principle is the permissible extent of subject matter jurisdiction as a matter of public international law' – McLachlan (2004) p. 612; see also Collins (2002).

[46] *Beals* v. *Saldanha* [2003] 3 SCR 416 at [27].

[47] *Morguard Investments Ltd* v. *De Savoye* [1990] 3 SCR 1077 at 1096; see Wai (2002) pp. 225ff.

[48] 165 CLR 197 at [23].

[49] *Régie National des Usines Renault SA* v. *Zhang* (2002) 210 CLR 491 at [132] (footnotes omitted).

In English law, explicit references to a systemic perspective on private international law are rare, and the courts typically display the same reliance on the ambiguity of 'comity' exhibited in other common law systems.[50] In EU law, although a systemic perspective on private international law is highly developed with respect to internal private international law disputes between Member States, as explored in Chapter 4, this has not been extended to private international law internationally. For example, the application of the *Rome Convention* (1980) to disputes involving parties from outside the EU is analysed and justified purely in terms of its effects on the internal market system, not in contemplation of the effects of the adoption of these rules on the international system.[51]

5.2.4. Conclusions

References to the 'international system' in private international law rules are unusual, and where they exist they do not necessarily reflect an unambiguous adoption of a systemic perspective. Nevertheless, they are difficult to accommodate within accounts of private international law that emphasise its characterisation as private law concerned with private justice between the parties. The lack of use of these provisions in practice may be explained by the problem that it is frequently not obvious what 'the needs of the international system' are, and insufficient work has been done to develop these ideas. The remainder of this Chapter begins redressing this concern, by exploring in more detail the horizontal (structural) and vertical (rights protection) implications of a systemic perspective on international private international law, drawing on ideas of public international ordering.

5.3 Constitutional structure

Chapter 4 introduced the idea of private international law functioning as an aspect of the horizontal distribution of regulatory authority within a federal system. This section examines the public international law rules

[50] See e.g. Collins (2002); see further 2.3.4 above. An exception is the statement in *Adams* v. *Cape Industries Plc* [1990] Ch 433 at 522 that 'the society of nations will work better if some foreign judgments are taken to create rights which supersede the underlying cause of action, and which may be directly enforced in countries where the defendant or his assets are to be found'.

[51] See 4.6 above.

dealing with horizontal 'constitutional' structure, an idea developed in Chapter 3, and applies this analytical perspective to private international law internationally.

5.3.1. *International regulation of regulation*

As discussed in Chapter 3, the positivist perspective on international order, which emphasised state sovereignty conceived as a matter of *a priori* state freedom, was not conducive to the development of ideas concerning limitations on state authority.[52] The classic expression of this idea of 'positive' sovereignty is the *Lotus* case, in which the PCIJ (controversially) held that international law is 'far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property or acts outside their territory', but rather 'leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.'[53] Particularly if interpreted broadly,[54] such a conception of sovereignty tends to emphasise factual rather than legal restrictions on state power, accepting widely overlapping areas of regulatory authority rather than attempting to define discrete realms.

If the positivist *Lotus* idea of sovereignty was ever tenable, then, as argued in Chapter 3, this is no longer the case. The regulatory authority of states is also increasingly recognised as the product of, and subject to, limits defined by international norms through public international law rules of jurisdiction. This is not to deny that overlapping jurisdiction remains under these rules; the overlap is, however, limited by international law.[55] As discussed in detail below, these rules authorise

[52] Thus, according to Stevenson (1952) p. 579, 'The concept of sovereignty can … serve only to confuse a discussion of the relationship between the norms of private and public international law.'

[53] *SS 'Lotus' (France* v. *Turkey)* (1927) PCIJ Ser A, No. 10 at 18–19; see discussion in Lowe (2006) pp. 340ff; Koskenniemi (2006) pp. 255ff; Akehurst (1973) p. 167; Mann (1964) pp. 33ff.

[54] A narrow interpretation is that the statement was not intended to apply to the question of enforcement jurisdiction, which is necessarily territorially limited – see further the Dissenting Opinion of Judge *ad hoc* Van den Wyngaert in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)* [2002] ICJ Reports 3 at [49].

[55] The issue is illustrated by the position of the UK's *Protection of Trading Interests Act* (1980), which attempts (by relying on the idea of 'foreign sovereign compulsion') to

jurisdiction in limited and defined circumstances. This authorisation could only be necessary if a regulatory act is prohibited in its absence. The rules are, however, more than technical prescriptions for limiting regulatory conflict. The collective recognition of these rules constitutes a process of mutual recognition of the legitimacy of each state as part of an international society of states. Within international law, they formalise the 'tolerance of difference', the acceptance of pluralism, which provides the foundations for private international law.

'Prohibitive' rules on jurisdiction of the type envisaged under the *Lotus* case do continue to exist under international law – most prominently in the form of international rules governing the immunities of states, diplomats and international organisations.[56] While these rules are not examined in detail in this book, it is worth highlighting that they are international law rules developed and applied by national courts acting from an international systemic perspective, derived 'from the sovereign nature of the exercise of the state's adjudicative powers and the basic principle of international law that all states are equal'.[57] It is argued below that rules of private international law have, at least to some extent, a similar character. They are limits of international law jurisdiction developed by national courts, and applied both externally and reflexively. Although developed by national courts, their foundations lie in principles of international ordering; they exemplify the phenomenon of *dédoublement fonctionnel* explored in Chapter 3.[58]

The exclusion of the 'private' from public international law, explored in Chapter 2, has meant that study of the international limitations on state regulatory authority has largely focused on questions of public or

allow parties subject to English jurisdiction to evade what are viewed as unlawful exercises of jurisdiction by foreign states; see also the *EC Counter-measures Regulation* (1996). One US judge's reaction to the UK legislation forcefully restated the claim that their exercise of jurisdiction was lawful, arguing that 'the principles of comity and international accommodation … must form the foundation of any international system comprised of coequal nation states. The British Government's invocation of the Protection of Trading Interests Act to foreclose any proceeding in a non-English forum brought to recover damages for trade injuries caused by unlawful conspiracies is a naked attempt exclusively to reserve by confrontation an area of prescriptive jurisdiction *shared concurrently by other nations*' – *Laker Airways Ltd* v. *Sabena, Belgian World Airlines* (1984) 731 F 2d 909 at 954 (emphasis added). See further Lowe (1984); Meessen (1984); Lowe (1981).

[56] See e.g. Fox (2006); Wickremasinghe (2006); Fox (2002).

[57] *Holland* v. *Lampen-Wolfe* [2000] UKHL 40, per Lord Millett. Where such immunities apply, the disputes often fall outside the scope of private international law rules: see e.g. *Grovit* v. *De Nederlandsche Bank & Ors* [2007] EWCA Civ 953.

[58] See 3.4.1 above.

quasi-public law, particularly on criminal and competition law. The application of limiting principles of international jurisdiction in these fields is particularly prominent, because they are likely to give rise to direct conflicts of regulatory policy between governments. In cases concerning public law, courts almost exclusively apply the substantive law of the forum state, and the questions are thus focused on the interpretation of the scope of that law and the validity of the assertion of jurisdiction. The international jurisdictional principles commonly applied by courts in this context are, however, equally applicable in the field of regulation of international private disputes (which are, in any case, ultimately dependent on criminal enforcement). Particularly in the US, the approaches to international jurisdiction in public law disputes, which have largely arisen in the context of competition law, have influenced and been influenced by the development of choice of law rules.[59] Comparatively little work has been done, however, on the direct application of ideas of international jurisdiction to the realm of private law, where they intersect with the concerns of private international law.[60]

There has thus been a neat but artificial division of labour, whereby international public disputes are the concern of public international lawyers (who ignore the domain of private law), and international private disputes that of private international lawyers (who conceive of their subject as part of national law, ignoring its international dimensions, and traditionally exclude rules of public law from recognition and

[59] See e.g. *Timberlane Lumber Co.* v. *Bank of America* (1976) 549 F 2d 597; *United States* v. *Aluminum Co. of America* (1945) 148 F 2d 416; Dodge (2008); Symposium, 'Extraterritoriality of Economic Legislation' (1987); Lowe (1985); Lowe (1984); Meessen (1984); Lowenfeld (1979). See further 5.3.6 below.

[60] But see Hill (2003); Strauss (1995); McLachlan (1993); Maier (1982); Lowenfeld (1979); Akehurst (1973) pp. 170ff; Mann (1964) pp. 73ff; Fitzmaurice (1957) pp. 218ff (who argues that the reason for inattention to civil jurisdiction is widespread compliance with international requirements). Lowenfeld (1996) argues (at p. 3) that private international law is 'misunderstood by those who regard [it] as sharply distinct from public law or public international law' or 'who define [it] as the collection of rules applicable solely to private persons in their international relations'. Kelsen (1966) analyses the role of international law in determining the 'spheres of validity' of national legal orders, but (at pp. 378ff) doubts their application to private law. Katzenbach (1956) discusses (at pp. 1109ff) the connection between private international law and emerging 'constitutional' principles of international jurisdiction. Brown (1942) argues (at p. 450) that 'Private international law must no longer be relegated to a separate and an inferior status. There is no clear line of demarcation between it and public international law. Both are integral parts of the law of nations.' There are also a number of important works in French, including Vareilles-Sommières (1997); Mayer (1979); Bartin (1930); Frankenstein (1930).

application as part of private international law[61]). The potential for private international law techniques to expand to regulate areas of law normally considered as 'public' is not the concern of this book, but it should be noted that some cases suggest a weakening of the traditional exclusion, a change also advocated by numerous scholars.[62] The distinction between public and private here, as is so often the case, obscures more than it reveals about these areas of law.[63] In reality, both public and private international lawyers are concerned, from different perspectives, with the same underlying principles governing the allocation of regulatory authority between states.[64]

i) Public international law rules of 'jurisdiction'

The limits on the regulatory authority of states are expressed in public international law through the concept of 'jurisdiction'. The boundaries of public international law jurisdiction are a matter of some controversy, but there is broad agreement on its general framework.

In public international law the term 'jurisdiction' is used in a much broader sense than in private international law. In the context of the rules on the regulatory authority of states, three types of public international law jurisdiction are usually distinguished.[65] These frequently overlap and

[61] Dicey, Morris and Collins (2006) pp. 100ff; Oppenheim (1992) pp. 488ff; *Attorney-General (United Kingdom)* v. *Heinemann Publishers Australia* (1988) 165 CLR 30; *Attorney-General (New Zealand)* v. *Ortiz* [1984] AC 1 at 20–1 (Lord Denning MR); *Regazzoni* v. *KC Sethia (1944) Ltd* [1958] AC 301; *Government of India* v. *Taylor* [1955] AC 491; *Huntington* v. *Attrill* [1893] AC 150.

[62] See e.g. *Robb Evans of Robb Evans and Associates* v. *European Bank Ltd* [2004] NSWCA 82; *United States of America* v. *Ivey* (1996) 30 OR 3d 370; see further Dodge (2008); Burston (2004); Muir Watt (2003) p. 402; Basedow (1994); Bermann (1986); Lowenfeld (1979); Riphagen (1961). It has been suggested, however, that the rule reflects the public international law restrictions on enforcement jurisdiction, discussed below; a state cannot enforce its law beyond its territory, even indirectly through the courts of a foreign state. See *Mbasogo* v. *Logo Ltd* [2006] EWCA Civ 1370; Mann (1987); Mann (1971) pp. 166ff; Mann (1964) pp. 141ff. The better view is probably that public international law *authorises* a state to refuse to allow proceedings to enforce a foreign public law, but does not *require* it, and thus that the rule is a part of English constitutional law which exercises an international right (but is not an international obligation); see further Mills (2007); Carter (1989).

[63] See 2.6 and 3.4.1 above.

[64] Reed (2003); Schachter (1998); McLachlan (1993); Mann (1984) p. 28; Maier (1982); Lowenfeld (1979); Mann (1964) pp. 19–20; Vallindas (1959); Jessup (1956); Katzenbach (1956); Schoch (1939).

[65] See generally *Third Restatement (Foreign Relations)* (1986); Lowe (2006) pp. 337ff; Brownlie (2008) pp. 299ff; Capps (2003); Meessen (1996); Oppenheim (1992) pp. 456ff; Mann (1984); Akehurst (1973); Mann (1964).

thus the distinction is not always easy to maintain, nor is it universally accepted as reflecting international law. First, jurisdiction to prescribe or legislate, or (roughly) the limits on the law-making powers of government.[66] The issue here is the permissible scope of application of the laws of each state; in private law disputes, this may be viewed as related to the private international law problem of the determination of the applicable law. Second, jurisdiction to adjudicate, or (roughly) the limits on the judicial branch of government.[67] In private disputes, this is evidently closely related to the idea of jurisdiction in private international law. Third, jurisdiction to enforce, or (roughly) the limits on the executive branch of government. This limit is directly concerned with the acts of authorities implementing law, such as police or bailiffs. In the private law context, it is related to the pragmatic question of whether the court can enforce any judgment by exercising physical power over the defendant or their property. The limits on enforcement jurisdiction thus provide policy reasons why a national court might decide not to exercise jurisdiction, even when it had prescriptive jurisdiction under international law.[68] If the judgment could not be enforced consistently with international law, because neither the individual nor their property were present in the territory, then a court might take this into consideration in deciding whether it is the appropriate forum to hear the dispute. Because the limits on enforcement jurisdiction mean that a judgment is only directly effective within the judgment state, they also necessitate mechanisms for the enforcement of foreign judgments in private international law.[69] The correspondence in structure between the three aspects of public international law rules of 'jurisdiction' and the three basic components of private international law (jurisdiction, applicable law and the recognition and enforcement of judgments) suggests their underlying commonality.

Public international law rules on jurisdiction are expressed as being applicable to the state as a whole. In practice, however, different aspects

[66] These may be exercised by a legislature, judiciary, or executive. The limits here also play a role in the interpretation of domestic rules by national courts, as explored in 3.4.1 above.

[67] This refers to the judiciary acting in an adjudicative rather than lawmaking capacity. Sometimes this category is considered part of a broader 'prescriptive' jurisdiction, which also includes legislative jurisdiction. The same international law rules apply to the acts of the parliament and the judiciary; the differences which arise in practice largely reflect domestic constitutional concerns.

[68] This reflects the distinction between the *existence* and the *exercise* of jurisdiction, discussed in 1.2.2 above; see e.g. *R* v. *Hape* [2007] SCC 26.

[69] See 5.3.2 below.

of the rules are directed to and typically restrain different branches of national government. In examining the development of these rules and questions of state compliance, the division between international and national law is patently unhelpful.[70] Although public international law does not specify the structures of state governments, it is the actions of domestic institutions, including national legislative measures and judicial decisions, that constitute the acts of the state for the purpose of these international obligations. As explored more generally in Chapter 3, the actions of national legislatures and courts can constitute *state practice* for the purposes of the development of international customary law or for the determination of 'the general principles of law recognized by civilized nations',[71] as well as constituting acts of the state for the purposes of determining whether a breach of an international legal obligation has occurred. Their role in both international and national law reflects, as Scelle described it, their *dédoublement fonctionnel*.[72]

In the context of private international law, as elsewhere, the rules and adjudications of national legislatures and courts directly affect both international law compliance and international lawmaking in public international law rules of jurisdiction.[73] It is not always obvious that there is a global system of governance at work here, because, as discussed in Chapter 3, it is not centralised to a global government but distributed between all states, a form of 'peer governance'. It is also more difficult to see because it usually takes the reflexive form of self-restraint; the limits on each state are implicit in their own rules of private international law, and may coexist with domestic policies limiting the *exercise* of jurisdiction. One exception is the existence in some states of anti-suit injunctions, which, although formally addressed to the parties, may be viewed as a more obvious (although sometimes problematic) method of

[70] Thus, 'the doctrine of jurisdiction … stands somewhere on the borderline between international and municipal law and cannot be treated in isolation from either' – Mann (1964) p. 23; see further 3.4 and 3.5 above.

[71] *Statute of the International Court of Justice 1945*, Art. 38(1)(c). As noted above, in the *Serbian and Brazilian Loans* cases, *France* v. *Yugoslavia; France* v. *Brazil* (1929) PCIJ Ser A, Nos. 20–1, Judgments 14–15, the Court applied private international law rules without identifying any national source for those rules, arguably on the implicit basis that they represented generally accepted principles: see further Stevenson (1952) pp. 568ff.

[72] See 3.4.1 above.

[73] The importance of the overlap between public and private international law in this area is acknowledged in the development in the US of the *Third Restatement (Foreign Relations)* (1986), which covers issues traditionally classified under each of these areas of law: see Lowenfeld (1998).

horizontal enforcement of limitations on the jurisdiction of other states.[74] In any case, each time there is an exercise of national jurisdiction, each time that national legal institutions engage in regulating disputes or relationships that raise issues of private international law, this can never be viewed as a purely domestic, 'private law' act of regulation – because they are also necessarily asserting public international law jurisdiction.

An important consequence of this, and a clear but largely unacknowledged feature of the public international law rules on jurisdiction, is that, as norms dealing with the allocation of regulatory authority, they are *secondary* legal norms – norms of 'meta-justice'.[75] In regulating the behaviour of legislatures and courts, public international law rules on jurisdiction are not regulating ordinary state actions, they are regulating state *regulatory* actions, limiting the circumstances in which a state may legislate, adjudicate or enforce its law. The significance of this identification is revealed throughout the analysis below.

ii) Foundations for the assertion of regulatory authority

Two types of structural ideas dominate public international law rules on jurisdiction – ideas of *territoriality* and *personality*. Chapter 2 explored the central role of these two organising principles in the history of the development of private international law. The focus of the analysis in this section is on the contemporary role of these ideas in public international law, and their reflection in private international law. Before each is considered in turn, three important qualifications should be acknowledged.

First, the usual public international law limitations on the jurisdiction of states may exceptionally be inapplicable. This may occur where essential or vital interests of the state are at stake – a category of circumstances that must necessarily be interpreted narrowly.[76] More commonly, the usual limitations may not apply in the context of universal jurisdiction in respect of certain internationally recognised crimes, where it is accepted that no territorial, personal or other type of connection is necessary for a

[74] See e.g. *Midland Bank Plc* v. *Laker Airways Ltd* [1986] QB 689; *Airbus Industrie GIE* v. *Patel* [1998] 2 All ER 257; *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897.

[75] See 1.4.2 above.

[76] This is described as the 'protective principle', but may be better viewed as an example of territorial jurisdiction concerning conduct where the effects are felt within the territory. See *Third Restatement (Foreign Relations)* (1986) s. 402(3); Lowe (2006) pp. 347–8; Oppenheim (1992) pp. 470–1; Akehurst (1973) pp. 157ff.

state to exercise jurisdiction over a dispute.[77] Universal jurisdiction remains somewhat controversial, as it endorses individual states acting as enforcers of international law in respect of events unconnected with them, usually through criminal prosecutions. There is even greater controversy concerning whether the development of 'universal jurisdiction', particularly in the context of norms of *jus cogens*,[78] should be a separate basis for the exercise of national jurisdiction in civil proceedings.[79] In the US, the *Alien Tort Statute* of 1789 (notably dating from a time when federal common law was thought to overlap with the law of nations[80]) and the *Torture Victims Protection Act* of 1992 permit civil claims to be brought by foreign nationals based on internationally unlawful activities outside US territory, implicitly relying on a conception of universal civil jurisdiction.[81] If broadly accepted, this would provide a clear expansion of the permissible national grounds for civil jurisdiction under international law. The US practice has, however, been much criticised, and practice by other states is limited.[82]

[77] *Third Restatement (Foreign Relations)* (1986) s. 404; Lowe (2006) pp. 348–9; Oppenheim (1992) pp. 469–70; Akehurst (1973) pp. 160ff.

[78] See 3.3.1 above.

[79] See generally Ryngaert (2007); Parlett (2007); Donovan and Roberts (2006); Symposium, 'Universal Civil Jurisdiction – The Next Frontier?' (2005). The *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (2000) prepared for the Hague Conference on Private International Law controversially included (in Art. 18(3)) a clause permitting states to exercise exceptional civil jurisdiction in respect of serious international crimes; see Rosner (2004) p. 203.

[80] See 4.3.1 above.

[81] See e.g. Nolte (2006); Engle (2006); Ochoa (2005); Shaw (2002); Steinhardt and D'Amato (1999). The *Alien Tort Statute* has recently come under challenge in the US – see e.g. Symposium, 'The Alien Tort Claims Act under Attack' (2004) – but its validity was affirmed by the Supreme Court in *Sosa* v. *Alvarez-Machain* (2004) 542 US 692, although limited (at p. 732) to claims with 'definite content and acceptance among civilized nations'. Jurisdiction under the Act is subject to sovereign immunity restrictions, a further limit on national court jurisdiction under international law: see e.g. *Argentine Republic* v. *Amerada Hess Shipping Corporation* (1989) 488 US 428. It may also be stayed on *forum non conveniens* grounds, which perhaps acknowledges the controversial character of this basis for jurisdiction, as well as reflecting national policies on the exercise of jurisdiction: see 1.2.2 above; Baldwin (2007).

[82] 'While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally' – joint judgment of Judges Higgins, Kooijmans and Buergenthal, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)* [2002] ICJ Reports 3 at [48]. In *Jones* v. *Minister of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26 at [99] Lord Hoffmann stated that the *Alien Tort Statute* cases 'are in my opinion contrary to customary international law and the Immunity Convention and not in accordance with the law of England'. Note also the interventions in *Sosa* v. *Alvarez-Machain* (2004) 542 US 692 by the European Commission and (jointly) Australia, Switzerland and the UK.

Second, it is not claimed that territoriality and personality are the only ideas of ordering which are possible – only that, at least at present, these are the most prominent and influential. The division of the world through ideas of territoriality and personality in this way seems to reflect an intuitive importance of connections of place or community, reflected in the history of international law explored in Chapter 2.[83] It must be recalled, however, as discussed in Chapter 3, that there is increasing recognition of the complexity of the relationship between international and national law and individual sovereignty or identity. This is reflected in the recognition of both individual human rights and rights to a collective (including but not limited to national) identity as part of international law. The recognition of these ideas in private international law theory, explored below, presents a fundamental challenge to the traditional international law attitude to jurisdiction as an issue purely of state territorial or personal power.[84]

Third, it is not claimed that these two types of ordering provide a clear or objective way of categorising types of laws. In fact, a purely personal or territorial interpretation of the intention of any law is possible, as is an interpretation mixing these ideas. The laws of contract, tort or marriage, for example, may be viewed as governing the relationships of people, or the conduct of activities within a territory. A court might therefore apply the law of the place where key events occurred, or the law of the common nationality of the parties. It might determine the applicable law through a concept that combines these two ideas, looking at the territorial connections of the parties, typically under a test of residence or domicile.[85] The adoption of rules of private international law is not determined by the belief that an area of law is intrinsically personal or territorial, or even that a particular statute is intended to operate in one of these ways.[86] It is a policy choice based on the extent to which it is thought that the division of regulatory authority *ought* to be made based on ideas of personality or territoriality. This choice may be different in different fields. While

[83] It might be argued that a different type of horizontal distribution is adopted in the concept of the 'flag state' in the context of the law of the sea. The view that a ship flying (or entitled to fly) the flag of a nation is part of its legal 'territory' is evidently a legal fiction; an alternative and perhaps preferable fiction is the idea that the ship possesses 'nationality', a view supported by Arts. 91 and 92 of the *United Nations Convention of the Law of the Sea* (1982). It might also be viewed as reflecting a type of unilateral private choice of law: see 5.6 below.

[84] See 5.3.4 below; Brilmayer (1995) pp. 219ff. [85] See 5.3.3 below.

[86] This rejects the statutist approach discussed in 2.2.2 above, and the approach of some adherents of interest analysis in the US discussed in 4.3.2 above and 5.3.6 below.

diversity between private international law rules in different states undermines the systematic effectiveness of private international law, diversity between the rules applicable to different types of legal disputes is a mark of specialisation. It does not necessarily suggest a defective systematisation, but rather indicates that for each type of dispute there is a different policy consideration of whether personal or territorial criteria are the most appropriate for determining the applicable legal order.

As the following analysis will show, public international law rules on jurisdiction determine the types of connections that may be given significance in private international law – the permissible 'sources' of jurisdiction, or grounds for its assertion. They define the conceptual terrain within which private international law must operate, and outside of which it is characterised as 'exorbitant', without dictating its form in strict terms. A useful image is to think of public international law rules on jurisdiction as defining a 'map' of the globe. Because these rules are not defined strictly in territorial terms, however, the jurisdictional map is not a simple territorial demarcation of states, a map made of *lines* reflecting political boundaries. It is more like a map of 'cultures', a map made of *shades*. A map of the cultures of the world would contain a variety of subtle and overlapping elements, with different shades flowing across state boundaries and around the globe, reflecting the movement of people and ideas. Law is also a dimension of culture, embodying community values, and public international law rules on jurisdiction define the map of the legal cultures of the world, a domain of overlapping and competing sources of regulatory authority. The ordering thus defined is partially territorial but also flows across state boundaries and around the globe, reflecting the movement of individuals carrying the legal implications of their nationality or place of residence with them, and the ebb and flow of competing legal systems. As the following sections will explore, private international law rules reflect and define this map, this underlying theory of international order. They are an imperfect and largely unacknowledged articulation of principles of international ordering in the context of private law.

5.3.2. Territoriality

i) Territoriality in public international law

The primary source of regulatory authority for states in public international law is usually considered to be territorial. A state has jurisdiction

to act within its territory, including in respect of events or things in its territory, and, more controversially, acts which have effects within that territory.[87] Sometimes the effects doctrine is considered a separate basis for jurisdiction, although it is probably better viewed as a particular type of territorial connection.[88] Territoriality particularly dominates in the case of jurisdiction to enforce, where it is normally considered to be the exclusive basis for jurisdiction.[89] In the context of jurisdiction to prescribe or adjudicate, territoriality is supplemented by other bases of jurisdiction, but even in those areas the dominant way in which state authority is defined and justified – that is, by which the division of international regulatory authority is organised – is by reference to territorial criteria.

It is sometimes claimed that the public international law rules governing jurisdiction are subject to an overriding requirement of 'reasonableness', although this is not universally accepted.[90] The idea of a secondary requirement of 'reasonableness' has been criticised for giving courts too much flexibility.[91] It may be better interpreted not as a separate test but as a consideration going to the *degree* of connection required to establish

[87] See, generally, *Third Restatement (Foreign Relations)* (1986) s. 402(1); Parrish (2008); Lowe (2006) pp. 342ff.; Brownlie (2008) pp. 309ff; Oppenheim (1992) pp. 458ff; Akehurst (1973) pp. 152ff.

[88] See e.g. *Ingmar GB Ltd* v. *Eaton Leonard Technologies Inc*. [2000] ECR I-9305, Case C-381/98 (Opinion of the Advocate General) (characterising the effects doctrine as establishing a territorial link). Neale and Stephens (1988) also argue (at pp. 176ff) that the idea of 'effects' as a special basis of jurisdiction should be dropped in favour of simply expanding the idea of objective territorial jurisdiction, to cover actions with intended or foreseeable consequences in the territory. The effects doctrine was largely developed in the context of the extraterritorial application of US anti-trust laws: see generally Dodge (2008); Baetge (2007); Born (1996) pp. 435ff. It has arguably also been occasionally adopted outside the US: see e.g. *Ahlström (A) Osakeyhtiö* v. *EC Commission* [1988] ECR 5193, Case 89/85 (note particularly the Opinion of the Advocate General); *Competition Act 1998* (UK) s. 2; Lowenfeld (1996) pp. 33ff; Basedow (1994).

[89] Lowe (2006) pp. 356ff; Akehurst (1973) pp. 145ff; see further the Dissenting Opinion of Judge *ad hoc* Van den Wyngaert in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)* [2002] ICJ Reports 3 at [49].

[90] See e.g. *Third Restatement (Foreign Relations)* (1986) s. 403; *Timberlane Lumber Co*. v. *Bank of America* (1976) 549 F 2d 597; Lowenfeld (1996); Oppenheim (1992) pp. 457–8; Born (1992); Mann (1984) p. 30; Meessen (1984). Brownlie (2008) argues (at p. 311) that the principles of territoriality and nationality are subject to the qualification that 'extraterritorial acts can only lawfully be the object of jurisdiction [of a national court if there is] … a substantial and bona fide connection between the subject matter and the source of the jurisdiction'.

[91] Neale and Stephens (1988) suggest (at p. 211) that if such a rule operates with too much flexibility it is 'not a rule of law'.

jurisdiction.[92] Here the influence of territoriality is clear; the requirement of reasonableness is said to necessitate consideration of territorial connections such as 'the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory'.[93]

The dominant status of territorialism as a basic rule of public international law jurisdiction reflects the modern emphasis, explored in Chapter 2, on territory as the organising principle behind the division of the world into states. As is evident in the following section, these rules of public international law jurisdiction are derived from the same norms which gave rise to the territorialism underlying the private international law rules of Huber and Story.[94] The rules of public international law jurisdiction do not prevent overlapping or conflicting claims from arising – many events are connected with more than one territory, and there is more than one accepted way to establish a territorial link. Nevertheless, these rules serve to limit such conflicts by placing objective restraints on the regulatory authority of states.

ii) Territoriality in private international law

The influence of territoriality in private international law is pervasive. The accepted grounds for the exercise of jurisdiction or the choice of a particular applicable law in national courts are predominantly territorial, although these can take a number of different forms. While territoriality is behind a variety of private international law rules, these rules may thus reflect a range of interpretations of what territoriality means in practice and in different contexts, and different views on the extent to which legislatures should decide these questions generally or leave them to the courts to work out in each case. The study of their interaction is not merely useful because public international law rules on jurisdiction help explain the rules of private international law, but also because the rules of

[92] It is sometimes viewed more as a separate 'interest balancing' test, which mirrors US choice of law jurisprudence, discussed further in 5.3.6 below. *Asahi Metal Industry Co.* v. *Superior Court of California* (1987) 480 US 102, for example, notes (at p. 115) the need to take into consideration both 'the procedural and substantive interests of other nations' and 'the Federal government's interest in its foreign relations policies' as a basis for the test of reasonableness in jurisdiction.

[93] *Third Restatement (Foreign Relations)* (1986) s. 403(2)(a). Connecting factors that emphasise 'personality' are also considered – see 5.3.3 below.

[94] Neale and Stephens (1988) p. 12; see 2.3.4 above.

private international law provide an important source of state practice for the development and understanding of the rules of public international law.

An extreme example of a territorial approach is found in the common law and US rule that the presence of the defendant within the territory is sufficient to constitute jurisdiction, regardless of the tenuousness or transitory character of the link between the defendant and the territory.[95] This idea of territoriality is rightly controversial, because it does not seem to reflect the public international law conception of territorial jurisdiction. The territorial connection on which jurisdiction is based is not in respect of the act or thing to which the dispute relates, but merely the subsequent presence of the defendant. Because presence is only required at the time of commencement of proceedings, not at the time of any events related to the dispute, it bears no necessary relation to the question of whether the proceedings are connected in any way with the forum state. Presence establishes only a physical capacity for effective jurisdiction, perhaps based on the outdated conception that an exercise of civil jurisdiction may necessitate the use of physical force against the person of the defendant. If this is a meaningful consideration at all, it is relevant only to the question of the enforcement of the judgment (which may ultimately depend on criminal sanctions), not to the assertion of jurisdiction. It seems to confuse the question of enforcement jurisdiction under international law, the capacity of a state to exercise physical control over its territory, with adjudicative jurisdiction, the capacity of the state to assert its authority to hear proceedings.[96] Alternatively, it appears to reflect an old fashioned 'positivist' view of jurisdiction, based on absolute sovereignty – the only limits on state jurisdiction are practical or self-imposed limits; where jurisdiction is physically possible (because of the presence of the defendant) it is acceptable.

In practice common law and US courts have tended to move away from this position, and the risk of an unjustified exercise of jurisdiction is reduced, because jurisdiction asserted on this basis may be subject to the possibility of a discretionary stay of the proceedings under the doctrine of *forum non conveniens*. This discretion involves the consideration of a

[95] See e.g. *Maharanee of Baroda* v. *Wildenstein* [1972] 2 QB 283; *Burnham* v. *Superior Court of California* (1989) 495 US 604; *Grace* v. *MacArthur* (1959) 170 F Supp 442 (in which presence in State airspace was sufficient to found jurisdiction); *Pennoyer* v. *Neff* (1879) 95 US 714; Akehurst (1973) pp. 170ff; Von Mehren (1983). The US rule is moderated by the constitutional requirement for 'minimum contacts' – see 4.3.5 above.

[96] See e.g. O'Keefe (2004).

range of factors connecting the dispute to the forum as well as to other, possibly more appropriate, forums. These factors include a mixture of international and national elements, relating both to the objective character of the dispute and to the private interests of the parties. Factors such as the location of the relevant events and the nationality of the parties go towards the *international* question of whether the state has regulatory authority over the dispute, that is, whether the dispute is connected with the forum in such a way that its courts have the power to exercise jurisdiction over it. In addition to these factors, other factors such as the interests and convenience of the parties and the location of witnesses and evidence go towards the *national* question of whether (assuming it has jurisdiction in the international sense) the state should assert jurisdiction in this particular case, that is, whether these particular proceedings should be allowed to go ahead. Although it is ostensibly concerned with the *exercise* of jurisdiction, the use of *forum non conveniens* thus may also constitute an implicit recognition that, for example, the mere presence of the defendant is not sufficient to justify the assertion of jurisdiction by national courts. The decision whether or not to stay proceedings is a mixed question of both international law, the question of the *existence* of jurisdiction, and national policy, the question of whether jurisdiction should be *exercised* in this case.[97] The doctrine of *forum non conveniens* adds flexibility to common law jurisdictional rules, by allowing the courts to restrain any inappropriate assertions of jurisdiction based merely on later presence. It has also obscured the recognition that international law imposes limits on the regulatory authority of states and thus rules of jurisdiction are not discretionary when viewed from an international perspective, even if those international obligations may be met through a discretionary test at a national level.

The types of connections considered in a *forum non conveniens* discretion, those between the disputed event or thing and the forum, are also often used as the basis for founding jurisdiction itself. The central role of territoriality in jurisdiction under English common law rules is typical. Jurisdiction is available where the plaintiff claims under a contract 'made within the jurisdiction'[98] or 'made by or through an agent trading or residing within the jurisdiction',[99] or where it is claimed that there is 'a breach of contract committed within the jurisdiction',[100] but never in

[97] See further 1.2.2 above.
[98] *Civil Procedure Rules* 6.36, PD 6B, 3.1(6)(a).
[99] *Ibid*. 6.36, PD 6B, 3.1(6)(b).
[100] *Ibid*. 6.36, PD 6B, 3.1(7).

respect of title to immovable property outside the jurisdiction.[101] Claims in respect of intellectual property may similarly be territorially restricted.[102] Jurisdiction in tort is available where 'damage was sustained within the jurisdiction' or 'the damage sustained resulted from an act committed within the jurisdiction'.[103] Claims in property are allowed where 'the whole subject matter of a claim relates to property located within the jurisdiction'.[104] Similar rules exist under French law, where domestic rules of 'territorial competence' are given an adapted effect in international cases,[105] permitting jurisdiction over a contractual dispute in the place of delivery of goods or performance of services, and over a tortious dispute in the place of the wrongful act or the place where direct damage is suffered.[106] Where title to immovable property is directly in dispute, exclusive jurisdiction is granted to the courts (French or foreign) where it is located.[107] Where immovable property is indirectly involved, non-exclusive jurisdiction is granted to the courts of its location.[108] In the *Brussels Regulation* (2001), similar rules grant exclusive jurisdiction over disputes involving immovable property[109] and non-exclusive jurisdiction to the place where a contract was to be performed, or, in a tort claim, the place where the harmful event occurred.[110] US statutes exercising 'long-arm' jurisdiction typically involve consideration of the same factors.[111]

Many choice of law rules similarly depend directly on territorial factors, selecting the 'law of the country in which the events constituting the tort or delict in question occur',[112] or the *lex situs* of movable or immovable property.[113] Where more flexible 'proper law' approaches are

[101] *British South Africa Co.* v. *Companhia de Moçambique* [1893] AC 602. The rule has been abolished in New South Wales by the *Jurisdiction of Courts (Foreign Land) Act 1989*, but it remains open to a judge to decline jurisdiction on the same grounds: see Tilbury (2002) pp. 921–3.

[102] See generally *Pearce* v. *OVE ARUP Partnership Ltd & Ors* [1999] EWCA Civ 625; *Potter* v. *The Broken Hill Proprietary Company Limited* (1906) 3 CLR 479; Fawcett and Torremans (1998).

[103] *Civil Procedure Rules* 6.36, PD 6B, 3.1(9). [104] *Ibid.* 6.36, PD 6B, 3.1(11).

[105] See generally e.g. Audit (2006) pp. 276ff.

[106] *Nouveau Code de procédure civile* Art. 46.

[107] *Ibid.* Art. 44. [108] *Ibid.* Art. 46. [109] *Brussels Regulation* (2001) Art. 22.

[110] *Brussels Regulation* (2001) Art.5. [111] See 4.3.5 above.

[112] *Private International Law (Miscellaneous Provisions) Act 1995* s. 11(1); see also the *Rome II Regulation* (2007).

[113] See e.g. *Winkworth* v. *Christie, Manson & Woods* [1980] Ch 496; *Glencore International A/G* v. *Metro Trading* [2001] All ER (Comm) 103; *French Civil Code*, Art. 3; Staker (1987).

adopted, as is usually the case for choice of law in contract, these still frequently emphasise territorial factors such as the place of formation or performance of contractual obligations[114] or the location of affected property.[115]

Rules regarding the enforcement of foreign judgments typically emphasise territoriality even more strongly. The very need for such rules reflects the strict territoriality of international law limits on jurisdiction to enforce.[116] Governmental authorities that might seize assets to enforce a judgment are unable to do so outside the territory of the judgment state. Separate 'enforcement' action is, as a result, required to obtain a judgment of the state in which the assets are located.

Under the common law, the traditional view is that a foreign judgment is only enforceable where the defendant was actually present in the foreign territory at the time jurisdiction was taken,[117] unless there was submission to the jurisdiction.[118] The key role of 'presence' in this rule, which has been rejected in Canada, is rightly controversial.[119] There is a strong argument, as discussed above, that the presence of the defendant at the time of commencement of proceedings is not a sound basis for asserting jurisdiction under international law, but represents an outdated positivist conception of jurisdiction flowing from state power, confusing

[114] See e.g. *Definitely Maybe (Touring) Ltd* v. *Marek Lieberberg Konzertagentur GmbH* [2001] 4 All ER 283; *Marconi Communications International Ltd* v. *PT Pan Indonesia Bank Ltd* [2005] 2 All ER (Comm) 325.

[115] Article 4(3) of the *Rome Convention* (1980) establishes a presumption that a contract concerning immovable property is most closely connected with the country where the property is situated; see similarly the *Rome I Regulation* (2008) Art. 4(1)(c).

[116] It has been argued that the decision whether or not to enforce a foreign judgment on the grounds of its jurisdiction 'might be regarded as acting as an enforcement agency of the international community' – Stevenson (1952) p. 580.

[117] *Adams* v. *Cape Industries Plc* [1990] Ch 433 at 553; *Schibsby* v. *Westenholz* (1870) LR 6 QB 155. There has been some debate about whether nationality or residence, without presence, might be sufficient – see 5.3.3 below. Mann argues that the standards of jurisdiction applicable to foreign courts to determine the enforcement of foreign judgments should mirror those of local courts: 'The legal ideal and, perhaps, the legal rule should be complete congruity between these two problems' – Mann (1984) p. 70; see also Mann (1964) pp. 75ff. The converse proposition should arguably also be true – a foreign court's failure to comply with international jurisdictional standards should give rise to an obligation not to enforce the foreign judgment: see further 5.4.4 below.

[118] Submission is a form of party autonomy – see further 5.6 below. Emphasising the territoriality requirement even further, a foreign judgment concerning immovable property outside the territory of the judgment court will never be enforceable: Dicey, Morris and Collins (2006) pp. 611ff.

[119] See further 4.5.1 above; Oppong (2007); Monestier (2005); Briggs (2004).

regulatory and enforcement jurisdiction. This is supported by the fact that presence is now neither necessary nor sufficient for establishing jurisdiction under the common law. It is not necessary because of the existence of a range of additional bases, both territorial (discussed above) and personal (discussed below), for asserting jurisdiction. Equally, it is not sufficient, because, also as discussed above, a *forum non conveniens* discretion exists to determine whether the dispute is actually sufficiently connected to the forum to justify the assertion of jurisdiction. The use of presence as a test for the existence of valid foreign jurisdiction fails to recognise the inherent role of *forum non conveniens* as part of the test for the existence (not merely the exercise) of jurisdiction by common law courts themselves. Since the idea that presence might be a necessary or sufficient basis for jurisdiction has been abandoned by common law courts, its continued role in the enforcement of judgments is potentially both too narrow and too wide. It may at times potentially be unfair to defendants to enforce against them a judgment founded on mere presence. At other times, by excluding alternative bases for jurisdiction it may be a chauvinistic and unjustifiably narrow basis on which to limit the effect given to foreign judgments. Older English authority supports the argument that the test ought to be whether the foreign court had jurisdiction under international law.[120] This would correctly recognise that a foreign judgment should only be enforced where the jurisdiction of the judgment court was supported by the objective rules of international jurisdiction.

Approaches to the recognition and enforcement of foreign judgments in other states tend to adopt a more flexible test, allowing consideration of whether there were sufficient territorial and personal connections between the dispute and the judgment court to justify its assertion of jurisdiction. In the US, State laws generally permit recognition and enforcement of foreign judgments obtained based on a variety of jurisdictional grounds. In many States the jurisdiction of the foreign court need only be tested against the constitutionally derived requirement of 'minimum contacts'.[121] In France, foreign judgments are enforceable provided there was a sufficient link or connection between the foreign

[120] See e.g. *Pemberton* v. *Hughes* [1899] 1 Ch 781.

[121] See 4.3.5 above; Chao and Neuhoff (2001); *Third Restatement (Foreign Relations)* (1986) s. 482(1); *Ackermann* v. *Levine* (1986) 788 F 2d 830 (also holding that service of process must satisfy the foreign law under which it is effected). Many States have adopted the *Uniform Foreign Money Judgments Recognition Act*, which recognises (in s. 5) a range of valid grounds for foreign jurisdiction.

court and the dispute, as long as that jurisdiction was not claimed for an improper purpose and French courts did not claim exclusive jurisdiction over the dispute.[122] German courts may enforce foreign judgments whenever jurisdiction was taken consistently with German rules on jurisdiction.[123]

Chapter 2 traced the way in which the foundational thinkers of modern private international law, including Huber, Story and Savigny, drew heavily on ideas of territorial sovereignty in international law in formulating their approaches and rules, emphasising the effectiveness of laws within the territory of a state but not beyond. Modern judges and jurists similarly draw on underlying ideas of territoriality, arguably leading to 'a convergence of public international law notions of "territorial integrity" with private international law requirements of sufficient connection'.[124]

To understand the role of international norms of territoriality in influencing private international law, it is useful to draw on the analogy with private international law in federal systems. The ideas of territoriality embodied in public international law rules affect private international law much in the same way that the Full Faith and Credit clause of the US constitution (according to its modern interpretation) affects the private international law rules of the States.[125] It has not been held that the Full Faith and Credit clause necessitates the adoption of particular rules of jurisdiction or choice of law by the States. Rather, it operates as a basic standard, requiring certain 'minimum contacts' before jurisdiction may be taken or a particular law applied. It polices the 'outer limits' of private international law, leaving significant scope for the States to determine the detailed approach to be taken, but making it clear that a

[122] See *Simitch* v. *Fairhurst* (Cass, 1e civ, 6 February 1985); Rosner (2004) pp. 231ff. The latter limitation was historically important because Art. 15 of the *French Civil Code*, dealing with proceedings against French nationals, was viewed as giving French courts exclusive jurisdiction over any such proceedings, preventing any foreign judgment against French nationals from being enforced in France – see Audit (2006) pp. 299ff, 378ff. This interpretation of Art. 15 has recently been rejected in *Prieur* v. *de Montenach* (Cass, 1e civ, 23 May 2006); see also *Pajot* (Cass, 1e civ, 22 May 2007). A further traditional restriction on the recognition and enforcement of foreign judgments in France, the requirement that the foreign court apply the same law as that which would have been applied under French choice of law rules, has also recently been rejected – see *Avianca* (Cass, 1e civ, 20 February 2007). See note by Cuniberti (2007).

[123] *Zivilprozessordnung*, s. 328(1)(1); Rosner (2004) pp. 271ff.

[124] McLachlan (2004) p. 612.

[125] See 4.3.3 above. But see Laycock (1992) for an argument that US constitutional principles of territoriality provide sufficient foundation for federal choice of law rules.

degree of deference to the courts and laws of other States is demanded by the constitution as a matter of legal obligation. In the same way, public international law rules on jurisdiction provide a sort of minimum contacts requirement for the various private international law rules of states around the world.[126] With the possible exception of the territorial *lex situs* rule concerning immovable (and perhaps also movable and intellectual) property,[127] they do not mandate the adoption of particular rules. The role of international territorial norms in private international law may thus be contrasted with the role of constitutional territorial norms in Australia and Canada, where, as explored in Chapter 4, the territorial foundations of the division of regulatory authority within the federation dictate the adoption of strictly territorial choice of law rules in tort.

Such a directly prescriptive approach is not replicated at the international level. The character of the division of regulatory authority between states is more complex (also including, for example, personal elements[128]) and more contested. International regulation of state regulatory authority is permissive rather than mandatory – it gives states the right, not the obligation, to regulate a particular case. As explored in Chapter 1, different states have different conceptions of the function of their courts, and different national theories of justice, which affect the circumstances in which they will exert regulatory authority, and whether the decision to do so will be made by the legislature or by the courts. This fact goes some way towards explaining both the failure of recent attempts to negotiate a general international convention on jurisdiction[129] and the persistent blindness to the role of international norms in modern theoretical perspectives on private international law.

Nevertheless, it is clear that public international law norms of territoriality exert a fundamental influence over the development of private international law as an aspect of their role in delimiting the horizontal structure of the division of regulatory authority between states. They police the limits within which private international law may operate, establishing the degree of deference to other courts and laws required under international law.[130] These rules provide that states do not have unlimited regulatory authority with respect to civil proceedings. Rather,

[126] Mann (1984) p. 32; Lauterpacht (1970) pp. 38ff; Mann (1964) p. 19; Mann (1954).
[127] Staker (1987). [128] See 5.3.3 below.
[129] See the *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (2000), prepared for the Hague Conference on Private International Law; Gottschalk (2007); Rosner (2004) pp. 184ff; Von Mehren (2001).
[130] See Mann (1984) p. 32; Mann (1964) p. 12.

their regulation is subject to the principles that govern the coexistence of states as regulatory systems under public international law. The limits are particularly strict in the context of immovable property, reflected in strongly territorial private international law rules, but the analysis above shows that national private international law rules are in all contexts shaped, although seldom explicitly, by public international law norms. The limitation of state regulatory authority serves the function of minimising the possibility of inconsistent legal treatment between states by minimising regulatory overlap – the function of private international law.

The analogy between a 'full faith and credit' obligation and the role of international norms in placing limits on private international law is not new. In the late nineteenth century, the US scholar Field argued for the development of a codified set of international law rules, both public and private, which included the adoption of an international 'full faith and credit' clause.[131] Similar ideas had received judicial support even earlier,[132] and although not widely accepted, it is an argument that continues to attract support.[133]

iii) Territoriality and globalisation

The analysis set out above should not be taken as a claim that territoriality is a stable foundation for public or private international law. Many have contested whether territoriality is, or remains, an appropriate mechanism for the division of regulatory authority, particularly in the context of the range of phenomena referred to as 'globalisation'. They argue that the decline of the state and the rise in new communications

[131] Field (1876) at [666]; Juenger (1992) pp. 62ff; see 2.4.2 above.

[132] 'It is against the law of nations not to give credit to the judgment and sentences of foreign countries … For what right hath one kingdom to reverse the judgment of another?' – *Kennedy* v. *Cassillis* (1818) 36 ER 635 at 640, quoting *Cottington's Case* (1678) 3 Car 2, 2 Swanst 326; see also *Hilton* v. *Guyot* (1895) 159 US 113 at 167–8; but see Akehurst (1973) pp. 232ff.

[133] Thus, 'just as the credit due to a sister-state judgment is controlled by national law – i.e., the law of full faith and credit … so, too, should the credit due to a foreign country judgment be governed by a national standard incorporating international law' – Lowenfeld (1998) p. 129; see also Berman (2005c) p. 1869. The potential impact of the idea is also illustrated by a Canadian case in which the US government was seeking to recover the costs of an environmental cleanup from a Canadian company. The Ontario courts, allowing the action to proceed, held that 'In an area of law dealing with such obvious and significant transborder issues, it is particularly appropriate for the forum court to give full faith and credit to the laws and judgments of neighbouring states' – *United States of America* v. *Ivey* (1995) 26 OR 3d 533, affd (1996) 30 OR 3d 370.

technologies such as the internet undermine territorial norms, by making territorial connections less significant and in many cases incidental or fortuitous.[134]

Others, however, have suggested that globalisation is not a challenge to the territoriality of public and private international law, but a reason to reassert that territoriality.[135] Perhaps the clearest expression of this idea comes again from the Canadian courts. In deciding that a territorial choice of law rule should be applied for international torts (selecting the *lex loci delicti*), the Supreme Court considered that 'it is to the underlying reality of the international legal order … that we must turn if we are to structure a rational and workable system of private international law',[136] and that:

> on the international plane, the relevant underlying reality is the territorial limits of law under the international legal order. The underlying postulate of public international law is that generally each state has jurisdiction to make and apply law within its territorial limit. Absent a breach of some overriding norm, other states as a matter of 'comity' will ordinarily respect such actions and are hesitant to interfere with what another state chooses to do within those limits. Moreover, to accommodate the movement of people, wealth and skills across state lines, a by-product of modern civilization, they will in great measure recognize the determination of legal issues in other states. And to promote the same values, they

[134] The extensive literature includes: Symposium, 'The New Federalism: Plural Governance in a Decentered World' (2007); Svantesson (2007); Nuyts and Watté (2005) p. 7; Michaels (2007); Michaels (2005); Berman (2005); Berman (2005c); Symposium, 'Law beyond Borders: Jurisdiction in an Era of Globalization' (2005); Raustiala (2005); Slot and Bulterman (2004); Reimann (2003); Berman (2002); Wai (2002); Murphy (2002); Hugot and Dalton (2002); Castel (2001); North (2001); Basedow (2000a); Geller (2000); Slaughter and Zaring (1997); Burnstein (1996); Mann (1964) pp. 36ff. In *Dow Jones* v. *Gutnick* [2002] HCA 56, Justice Kirby, at [199], argued that 'simply to apply old rules, created on the assumptions of geographical boundaries, would encourage an inappropriate and usually ineffective grab for extra-territorial jurisdiction'. Mustill has asked 'Does the concept of a legal discipline entitled "the conflict of laws" have any meaning, now that in cyberspace national boundaries are almost irrelevant?' – unpublished lecture, cited in McLachlan (2004) p. 580. Buxbaum (2006) argues that globalisation of the economy and thus of economic misconduct challenges the traditional restrictions on economic regulation by national courts.

[135] Parrish (2008); Goldsmith and Sykes (2007); Muir Watt (2003); Kohl (1999); Goldsmith (1998); Laycock (1992) pp. 315ff. In *Dow Jones* v. *Gutnick* [2002] HCA 56, the majority held (at [39]) that 'pointing to the breadth or depth of reach of particular forms of communication may tend to obscure one basic fact. However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have.'

[136] *Tolofson* v. *Jensen* [1994] 3 SCR 1022 at 1047–8.

> will open their national forums for the resolution of specific legal disputes arising in other jurisdictions consistent with the interests and internal values of the forum state. These are the realities that must be reflected and accommodated in private international law.[137]

This line of argument suggests that globalisation will not undermine territoriality in either public or private international law, but will increasingly blur the line between them.[138]

Territoriality is, and is likely to remain, a central norm in private international law, reflecting the continued influence of the idea of territoriality in the international horizontal ordering of regulatory authority between states. The diversity of territorial rules reflects the range of contexts in which this principle is engaged by rules of private international law and the differing interpretations of its effects. The adoption of territorial rules in private international law is not a claim that the law or jurisdiction selected by such rules is superior; it is a 'meta-justice' claim that regulatory authority ought to be based on the territorial foundations established by public international law rules on jurisdiction. The theory and the development of international law would benefit from the acknowledgement that the variety of territorial rules in private international law both reflect and give effect to this underlying normative choice.

5.3.3. Personality

i) Personality in public international law

Although international law rules on jurisdiction are dominated by ideas of territoriality, there is also a strong role for ideas based on aspects of the identity of the parties. This approach views state regulatory power as connected not with territorial control but with the influence of legal culture, in particular as part of individual identity; state authority does not end at the national border, but follows the people of the nation.[139]

The clearest example of this approach in practice is the bundle of different rules referred to as the 'nationality' principle. The presence

[137] *Tolofson* v. *Jensen* [1994] 3 SCR 1022 at 1047. This quote was also cited with approval by the majority judgment of the High Court of Australia in *Régie Nationale des Usines Renault SA* v. *Zhang* [2002] HCA 10 at [64].

[138] Bederman (2007); Weeramantry (2004) pp. 169ff; Schachter (1998) p. 23; Paul (1988).

[139] This idea is related to the historicist tradition (and its predecessors) which, as explored in 2.5 above, orders the world into nations, embodied by peoples, rather than territorial states.

(or absence)[140] of nationality affects both international and national law in various ways and determines a broad range of rights and duties between individuals and states. The significance of nationality in domestic law varies from state to state, typically affecting taxation, social security and voting entitlements. Nationality also has various effects in international law, for example, on the exercise of diplomatic protection. Although each state has its own rules concerning the determination and acquisition of nationality for domestic purposes, international standards may also apply where the determination is made for the purposes of a rule of international law.[141]

Under the rules of international law jurisdiction, the nationality of the person over whom jurisdiction is claimed is a clearly accepted basis for the assertion of regulatory authority by a state.[142] This is typically exercised in the context of criminal law, where a state criminalises conduct by its nationals[143] regardless of where their acts are committed.[144] This is, however, usually only in the context of serious crimes – suggesting a degree of deference to the primacy of territorial jurisdiction. Jurisdiction based on nationality is also evident in the assertion by some states of a right to tax nationals living and working overseas.[145] Although it has had a larger effect in the context of public law regulation, nationality equally plays a role in the assertion of regulatory authority in the context of private law, as discussed below.

The idea of personality also operates as a basis for jurisdiction in international law through the more controversial rule of 'passive

[140] The absence of nationality is, for example, a condition for the existence of obligations owed by states to foreign nationals: see 5.4.1 below.

[141] In the *Nottebohm Case (Liechtenstein* v. *Guatemala)*, Second Phase [1955] ICJ Reports 4, the Court appeared to recognise a requirement for a 'real and effective' link between the individual and the state in order for nationality to be established for the purposes of international law, although this has subsequently been doubted. See Brownlie (2008) pp. 407ff; *Third Restatement (Foreign Relations)* (1986) s. 211; Mann (1977) pp. 39ff; but see Lowe (2006) p. 346 (who argues that the requirement is limited to the exercise of diplomatic protection).

[142] See generally *Third Restatement (Foreign Relations)* (1986) s. 402(2); Lowe (2006) pp. 345ff; Oppenheim (1992) pp. 462ff; Akehurst (1973) pp. 156ff.

[143] More rarely, some states have asserted jurisdiction over conduct of their permanent residents – see Akehurst (1973) pp. 156–7.

[144] *Offences Against the Person Act 1861* (UK) ss. 9, 57; *Sexual Offenders Act 1997* (UK) s. 7; *Crimes (Child Sex Tourism) Act 1994* (Aus); *XYZ* v. *The Commonwealth* [2006] HCA 25; *Trial of Earl Russell* [1901] AC 446; *United States* v. *Clark* (2004) 315 F Supp 2d 1127; *United States* v. *Harvey* (1993) 2 F 3d 1318. See, generally, Hirst (2003); Arnell (2001); Gilbert (1992).

[145] See *Third Restatement (Foreign Relations)* (1986) s. 412; Mann (1984) pp. 30ff.

personality'. This is the claim that a state may assert jurisdiction in protection of its own nationals, for example, in respect of crimes committed or directed *against* its nationals by foreigners outside its territory.[146] Such an entitlement is increasingly asserted in the context of acts of terrorism.[147]

As discussed above,[148] it is sometimes argued that the international law rules on jurisdiction are subject to a secondary requirement of 'reasonableness'. The factors suggested for consideration in determining whether an exercise of jurisdiction is reasonable include 'the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect'.[149] This may be viewed as a more flexible expression of the nationality and passive personality principles – connections of nationality (and residence) are invoked to justify both regulation and protection of nationals outside the territory. As discussed above in the context of territoriality, the test for 'reasonableness' may be better viewed not as a separate requirement but as indicating the degree of connection necessary to establish jurisdiction under other principles. In either case, it reflects the key role for personality as an organising principle in the distribution of state regulatory authority.

ii) Personality in private international law

Public international law principles of personality, like those of territoriality, provide both justifications and limits for the exercise of regulatory authority by states which are reflected in rules of private international law. The relationship between these areas of law is complicated by the existence of competing ideas of nationality, residence and domicile, whose origins were examined in Chapter 2.

Nationality The history of nationality as a connecting principle in private international law was briefly discussed in Chapter 2, noting its

[146] See generally Lowe (2006) pp. 351–2; Watson (1993); Oppenheim (1992) pp. 471–2; *United States* v. *Rezaq* (1998) 134 F 3d 1121; *United States* v. *Vasquez-Velasco* (1994) 15 F 3d 833; Gilbert (1992). Note e.g. the *Comprehensive Crime Control Act* (1984) 18 USC 1203.

[147] See e.g. the *International Convention for the Suppression of the Financing of Terrorism* (1999) Art. 7(2)(a); *Omnibus Diplomatic Security and Anti-Terrorism Act* (1986) 18 USC 2231. This is, however, often in conjunction with the assertion that these crimes are subject to universal jurisdiction – see 5.3.1 above; see e.g. *United States* v. *Yunis (No. 2)* (1988) 681 F Supp 896; *United States* v. *Usama Bin Laden* (2000) 92 F Supp 2d 189.

[148] See 5.3.2 above. [149] *Third Restatement (Foreign Relations)* (1986) s. 403(2)(b).

popularisation through the historicist tradition of international law. It has a relatively limited role in common law states, but has been an important part of civil law rules of private international law.

In France, for example, the mere nationality of the defendant has traditionally been seen as a sufficient basis for the courts to assert jurisdiction in private disputes.[150] This is evidently a direct reflection of the nationality principle of public international law jurisdiction, that is, the power of the state to assert regulatory authority over its nationals. The French nationality of the plaintiff has traditionally and controversially also been viewed as a sufficient basis for the courts to take jurisdiction in private disputes.[151] This may arguably be viewed as a reflection of the controversial passive personality principle in public international law jurisdiction, that is, the authority of the state to assert regulatory authority in protection of its nationals.

English law contains a few examples of private international law rules that depend on connecting factors related to the nationality of the parties. The nationality of the parties may be relevant to the determination of which law is most closely connected to a dispute.[152] The formal

[150] The *French Civil Code*, for example, provides in Art. 15 that 'French persons may be called before a court of France for obligations contracted by them in a foreign country, even with an alien' (translation from www.legifrance.gouv.fr). See Audit (2006) pp. 276ff; Mann (1964) p. 79. Traditionally this was considered an exclusive ground for jurisdiction, preventing the enforcement of foreign judgments against French nationals, but this has recently changed – see 5.3.2 above.

[151] The *French Civil Code* provides in Art. 14 that (inter alia) 'An alien, even if not residing in France, may be … called before the courts of France for obligations contracted by him in a foreign country towards French persons' (translation from www.legifrance.gouv.fr). See further Audit (2006) pp. 276ff; Clermont and Palmer (2006); Rosner (2004) pp. 235–6; Von Mehren (1983); Akehurst (1973) pp. 172ff; Mann (1964) pp. 79ff. Historically, this provision was not widely used unless the defendant had connections with France, for example, property located within the jurisdiction. This is because it was understood that a judgment based on Art. 14 jurisdiction would be unlikely to be enforceable in a foreign state. Although, under the *Brussels Regulation* (2001), this basis for jurisdiction is no longer available against parties domiciled in an EU Member State, an evidently unintended effect of the Regulation is that a French judgment granted against a party domiciled outside the EU, based on jurisdiction under Art. 14, will be readily enforceable in other Member States. Such jurisdiction will not only be available to French nationals, but also, following Art. 2(2) of the *Brussels Regulation* (2001), to French domiciles. It would not be surprising to see an increase in the use of this basis of jurisdiction to take advantage of the increased scope and effect given to it in the *Brussels Regulation* (2001), which is ironic given its implicit characterisation as exorbitant.

[152] The nationality of one of the parties was, perhaps questionably, used as a reason not to apply the law of their common domicile pursuant to the exception in s. 12 of the *Private International Law (Miscellaneous Provisions) Act 1995* in *Harding* v. *Wealands* [2004] EWCA Civ 1735 (overturned on other grounds at [2006] UKHL 32).

validity of a will may be determined by the nationality of the testator.[153] A foreign divorce may be recognised where the only connection between the parties and the court which ordered the divorce is the nationality of one of the parties.[154] The enforcement of a foreign judgment has sometimes controversially been viewed as permissible where the foreign court took jurisdiction by virtue of the nationality of the defendant.[155]

Residence and domicile In common law systems, however, the use of nationality as a connecting factor in private international law is comparatively rare. The idea that the regulatory authority of states should be limited by some aspect of individual identity is more commonly expressed through the concepts of residence or domicile.[156] Even in France, the traditional prominence of nationality as a connecting factor has been diminished, as rules of 'territorial competence', which allow proceedings to be commenced in the courts of the domicile of the defendant (among other places), have been viewed as the primary basis for jurisdiction.[157] The domicile of the defendant is also the basic rule of jurisdiction in the EU under the *Brussels Regulation* (2001).[158] The usual territorial rule of choice of law in tort, that is, the application of the law of the place of the tort, may be displaced in many legal systems by the joint law of residence of the parties.[159] In family law, the domicile or residence

[153] *Wills Act 1963* s. 1. The fact that nationality is used as a connecting factor probably reflects the civil law influence on the 1961 *Hague Convention on the Formal Validity of Wills*, which the *Wills Act* implements.

[154] *Family Law Act 1986*, s. 46; again this reflects the influence of international negotiations, as the Act (in this respect) implements the 1968 *Hague Convention on Recognition of Divorces and Legal Separations*. In the EU, the *Brussels II* bis *Regulation* (2003) generally uses nationality as a connecting factor, although in the case of the UK and Republic of Ireland, domicile is used instead: see Arts. 2, 7.

[155] *Emanuel* v. *Symon* [1908] 1 KB 302; but see *Vogel* v. *RA Kohnstamm Ltd* [1973] QB 133.

[156] English *Civil Procedure Rules* 6.36, PD 6B, 3.1(1); Dicey, Morris and Collins (2006) pp. 122ff; McClean (1996) pp. 36ff. Roth (1949) suggests (at p. 35) that there is an international law principle that the status of an individual is governed by the law of their domicile.

[157] *Nouveau Code de procédure civile*, Art. 42; see further Audit (2006) pp. 284ff. The concept of 'residence' dominates as a connecting factor in family law disputes: see *Nouveau Code de procédure civile*, Arts. 46, 1070–72, 1139, 1141.

[158] Art. 2. The *Brussels Regulation* (2001) excludes reliance on the traditional bases of jurisdiction of Member States, discussed above, against parties domiciled in any Member State.

[159] This rule was famously introduced into the law of the US through the case of *Babcock* v. *Jackson* (1963) 191 NE 2d 279 (NY); see Symposium, 'Comments on Babcock v. Jackson, a Recent Development in Conflict of Laws' (1963). English law is more flexible, expressed in the discretion of s. 12 of the *Private International Law (Miscellaneous*

of the plaintiff has been considered to be a sufficient basis for jurisdiction – arguably reflecting a combination of territorialism and the passive personality principle.[160] The concept of habitual residence has, under the *Rome Convention* (1980) and *Rome I Regulation* (2008), even become central to the determination of the applicable law in contracts in the absence of party choice.[161]

Some standard reasons are given for the preference for residence or domicile in the common law and the increasing influence of these ideas in civil law systems. Nationality may be a more stable personal attribute, but it may also be a relatively insignificant connecting factor when dealing with the greater mobility of populations in a globalised world. Nationality may also be unhelpful as a connecting factor when dealing with non-unified states, which is the case in many common law systems including the UK, US, Australia and Canada.[162]

Although these reasons are no doubt contributory, there is arguably a more important and fundamental basis underlying the common law preference for residence and domicile over nationality. As noted above, nationality is a personal legal attribute determined largely by the laws of each state. It does not necessarily require any direct or indirect territorial connection. Nationality may operate, therefore, in tension with and in opposition to territoriality as a connecting factor. Its assertion of personality as a principle of international ordering is conceived in a way that conflicts with ideas of international ordering through territoriality.

Residence and domicile are concepts that may be formulated in any variety of ways, even within a legal system.[163] However, such formulations usually include two crucial elements. First, there is frequently a subjective element relating to the individual, usually expressed through some idea of the individual's intentions or expectations.[164] This is not

Provisions) Act 1995, but the cases show a similar approach: see *Edmunds* v. *Simmonds* [2001] 1 WLR 1003. The rule has now been adopted as a presumption under the *Rome II Regulation* (2007) Art. 3(2). The Australian High Court rejected the operation of such an exception in Australian law (*Neilson* v. *Overseas Projects Corporation of Victoria* [2005] HCA 54), but the Court, somewhat unsatisfactorily, found and applied a similar exception as part of Chinese law: see further Mills (2006).

160 *Brussels II* bis *Regulation* (2003) Art. 3; see 5.3.1 above.

161 *Rome Convention* (1980) Art. 4(2); *Rome I Regulation* (2008) Art. 4(1).

162 Nadelmann (1969); see 4.2.1 above.

163 See e.g. Rogerson (2006).

164 See e.g. the *French Civil Code*, Art. 103. In French law the role of individual intentions in the concept of 'domicile' is taken further; for example, parties to a contract have traditionally expressed their choice of a forum by 'deeming' a particular place to be their domicile for the purposes of the contract: *ibid.* Art. 111; Herzog (1967) pp. 202–3.

related to either territorial or personal ideas of jurisdiction, but to ideas of party autonomy, explored below.[165] Second, and most importantly for present purposes, there is a requirement for an objective factual connection between the individual and the territory of the state in which residence or domicile is claimed. However this connection is precisely defined, residence and domicile are therefore a combination of ideas of personality and territoriality, reflecting a personal connection *with* a territory. This is the best explanation for the pervasive and increasing influence of these ideas, against the state-centred conception of nationality. By allowing the law to emphasise, to varying degrees, the personal and territorial elements of a dispute, residence and domicile allow a more subtle mediation between these competing ideas of international ordering.[166] The application of residence or domicile as a connecting factor allows an exercise of regulatory authority to be justified based on a combination of ideas of territoriality or personality. The private international law concepts of residence and domicile therefore evince a complex amalgamation of ideas of international ordering, and here suggest that public international lawyers should rethink the strictness of the dichotomy of territoriality and nationality in public international law rules of jurisdiction.[167]

iii) The temporal dimension of personality

In the discussion above on territoriality in jurisdiction, it was noted that there is a controversial common law rule which potentially permits the assertion of jurisdiction based merely on the presence of the defendant at the time of the commencement of the proceedings, a rule which does not seem in conformity with public international law rules on jurisdiction. When 'personality' is used as a basis for asserting jurisdiction there is

[165] See 5.3.4 and 5.6 below.

[166] Under the common law, a 'domicile of origin' may be displaced by a 'domicile of choice', which requires both residence and intention – see e.g. *Re Fuld's Estate (No. 3)* [1968] P 675; Fentiman (1991). The *Brussels Regulation* (2001) provides (in Art. 60) a definition of domicile for corporations that is based on their 'statutory seat', 'central administration' or 'principal place of business' – the latter two clearly involve a degree of choice by the company, and the first probably can be changed by the company, as a consequence of free movement principles – see 4.6.7 above. For natural persons, domicile is determined under the law of the putative domicile: Art. 59. For the purposes of the Regulation, a more factual 'substantial connection' test has been adopted in the UK under the *Civil Jurisdiction and Judgments Order 2001* (SI 2001/3929).

[167] Note that some states have suggested a role for residence in assertions of international personality jurisdiction – see 5.3.3 above.

even more scope for the emergence of a temporal problem because the personal characteristics of the parties, their nationality, domicile or residence, may change over time. This raises the important question of whether jurisdiction should be based on aspects of personality at the time of the relevant events under dispute or at the later time of commencement of legal proceedings.

The better view would seem to be that the test should be based on the status at the time of the relevant events.[168] A change in nationality should not retrospectively create new jurisdiction (in the international law sense) over a previous act, even if the new state of nationality asserts jurisdiction over its nationals.[169] Equally, it is unclear why an individual should become subject to the civil courts and the civil law of a state retrospectively, by virtue of changing their nationality, residence or domicile. It is further difficult to see why an individual who takes up a new nationality should be retrospectively entitled to *assert* jurisdiction if a state takes jurisdiction over civil proceedings *by* its nationals. The residence or domicile of an individual will probably be relevant for the question of whether a state has enforcement jurisdiction over them – whether they are actually able to seize their person or property. It will also affect the domestic question of whether jurisdiction, if it exists, should be exercised. But these are different issues from the prescriptive jurisdiction question of whether the state has the power to assert regulatory authority over the dispute. As in the context of the temporal problem in territoriality discussed above, the idea that jurisdiction can be asserted based on the domicile or residence of the individual at the time of the commencement of proceedings seems an unsatisfactory confusion of prescriptive jurisdiction (which should be determined at the time of the relevant events, and not affected retrospectively by subsequent changes in the personal status of the individual) and enforcement jurisdiction (which will always be based on the location of the individual and potentially their property at the time of proceedings).[170]

The argument appears strongest with respect to questions of the applicable law. If the nationality, residence or domicile of an individual was tested at the time of commencement of proceedings, an earlier

[168] See O'Keefe (2004) pp. 741ff.

[169] But note e.g. the effect of the *War Crimes Act 1991* (UK).

[170] Thus, 'the subsequent presence of the guilty person cannot have the effect of extending the jurisdiction of the state' – *SS 'Lotus' (France* v. *Turkey)* (1927) PCIJ Ser A, No. 10 at 35 (Dissenting Opinion of Judge Loder).

change in the relevant attribute could have the retrospective effect of changing the substantive law governing the rights and obligations of the parties, perhaps making past conduct newly wrongful and violating a basic principle of law. For this reason, when an aspect of personal status is used as a connecting factor in choice of law rules, it will almost invariably be determined as at the time of the relevant events in dispute.

The same argument could be applied in respect of national rules of jurisdiction, which might retrospectively and critically affect the procedural laws governing the determination of the dispute. In practice, however, in questions of jurisdiction (in the narrow private international law sense) there is no universally accepted answer to this problem, and often it is nationality, residence or domicile at the time of the commencement of proceedings that matters.[171] The limits on enforcement jurisdiction provide a strong practical reason why this approach might be adopted. If it were not, then individuals might evade jurisdiction by changing their place of residence or domicile (or perhaps even nationality) after incurring civil liability but before proceedings were commenced. If jurisdiction were based only on personal connecting factors at the time of the disputed events, this change might have the effect of denying a new place of residence or domicile any basis to assert jurisdiction, effectively creating a 'safe haven'. This would place a great deal of reliance on the system for the international enforcement of judgments.

The approaches to this temporal problem raise a broader and more important issue. They suggest that there may be greater flexibility in the concept of personality in international law, as compared with territoriality, as a basis for jurisdiction. Where territorial jurisdiction attempts to fix static boundaries between legal orders, personal jurisdiction contemplates changes in those boundaries over time, as the identity of each individual is defined, refined and redefined. This difference has implications not merely for technical questions of legal jurisdiction, but also for broader questions of cultural identity.

[171] See e.g. the *Brussels Regulation* (2001) Art. 2; *Canada Trust Co.* v. *Stolzenberg (No. 2)* [2002] 1 AC 1; English *Civil Procedure Rules* 6.36, PD 6B, 3.1(1); French *Nouveau Code de Procédure Civil*, Art. 1071; Audit (2006) p. 303. Note that in cases of diplomatic protection under international law and analogous treaty-based forms of investment protection, continuous nationality from the time of events giving rise to the claim until the end of the proceedings may (somewhat controversially) be required: see *Loewen* v. *United States*, ICSID ARB (AF)/98/3 (NAFTA) (Award, 26 June 2003); note the proposals in the *ILC Draft Articles on Diplomatic Protection* (2006) Arts. 5 and 10.

5.3.4. *Cultural identity and private international law*

Some private international law theorists have recently begun to acknowledge a further dimension to the ostensibly technical question of the use of personal and territorial connecting factors – their relationship with issues of multiculturalism and cultural identity.[172] From this perspective, the use of different connecting factors in private international law may be analysed based on their systemic effects as a method of social organisation – effective not only in disputes which come before the courts, but in the way they generally shape the regulation of identities.

The use of nationality as a connecting factor in choice of law rules facilitates the possibility that a person may live in a community, as a temporary visitor or permanent immigrant, but (in their private law relations) be governed by the laws of a foreign state – typically, their state of origin. The use of residence or domicile suggests that those settled in a community should be subject to the governing law of that community, but that those merely visiting should be subject to their laws of origin. Purely territorial connecting factors demand absolute uniformity of regulation for even temporary visitors. The selection of choice of law rules therefore also reflects the extent to which a community allows immigrants or foreign visitors to retain their original legal order in their private law relations, and the extent to which they must integrate according to local standards.[173] Equally, they affect whether a state views its own nationals, residents or domiciles as remaining under its private law while outside the territory of the state.[174]

[172] See e.g. Riles (2008); Berman (2005c) pp. 1856ff; Symposium, 'Law beyond Borders: Jurisdiction in an Era of Globalization' (2005); Kinsch (2004) p. 216; Jänterä-Jareborg (2004); Silberman and Wolfe (2003); Berman (2002); Murphy (2000); Jayme (1999); Jayme (1995); Fentiman (1991); Déprez (1988); Counter (1973).

[173] For example, choice of nationality or residence as the connecting factor may affect whether a marriage according to a foreign law, subsequent to which the parties have moved to England, may be dissolved under the rules and procedures of the foreign law or only according to English law. Particular difficulties arise because some interpretations of Islamic law recognise a divorce according to Talaq – a procedure whereby a husband may verbally divorce his wife. The fact that such a procedure is only available to the husband means that it raises issues concerning whether its recognition is contrary to local rules mandating public regulation of family law and prohibiting gender discrimination. See further Mills (2008) p. 226; Siehr (2004) p. 331; Von Bar (1999); Déprez (1988).

[174] This was arguably a factor in the English use of domicile as a connecting factor at the time of the British Empire, when a period of temporary service overseas was common, allowing those on service to remain under English private law – see Fentiman (1991) p. 457.

The application of a particular law system to private relations may be viewed as a component of an individual's identity or culture, because their life is shaped by the values embodied and given effect through the legal order. A private international law case is, from this perspective, concerned with a particular aspect of the determination of cultural spheres of influence and community boundaries.[175] The debates within private international law may thus be viewed as a replication of broader debates about cultural identity.[176] The choice of personal or territorial connecting factors raises the issue of whether cultural boundaries ought to be territorial, or purely matters of personal identity – whether states should be monocultural or multicultural.[177] More broadly, this is the issue of whether territorial or personal ideas of world ordering should be adopted.[178] One perspective is that the coexistence of a global diversity of cultures (legal and otherwise) requires territorial demarcation. Another is that such barriers create conflict, and that cultures (legal and otherwise) should be allowed to intermingle within multicultural societies. This is, therefore, yet another example of the way that private international law replicates ideas and debates about international ordering that are also reflected in public international law, an extension of the long established recognition by English courts that norms of international law are implicated in questions of personal status.[179] This is not to suggest that there is a straightforward answer to the question of which approach is 'better', or when each connecting factor will be appropriate. It is merely to highlight that the proper evaluation of private international law rules requires a change in perspective which enables recognition and examination of the justness of the public international legal ordering they effect.

As noted above, while tests for residence and domicile may vary, they frequently contain a subjective element related to the intentions of the individual.[180] This is an important additional feature in the consideration of the effects which these connecting factors have on global

[175] See generally Gessner (1996) pp. 8ff.

[176] On this issue note the resolution of the Institute of International Law on 'Cultural differences and ordre public in family private international law' (2005) (see www.idi-iil.org/idiE/resolutionsE/2005/kra_02_en.pdf); see also Murphy (2000).

[177] See generally Habermas (1994) pp. 135ff.

[178] The movement away from territorial factors towards personal factors was described as the 'substitution of the social for the geographical environment' in Kahn-Freund (1974) p. 411.

[179] *Re Luck's Settlement Trusts* [1940] Ch 864 at 891ff; *Re Goodman's Trusts* (1881) 17 Ch D 266 at 296–7; *Shaw* v. *Gould* (1868) LR 3 HL 55 at 96–7.

[180] See 5.3.3 above; McClean (1996) pp. 36ff.

ordering. Reliance on these factors enhances the ability of the individual to 'self-determine', thus affecting the balance between individual autonomy and cultural identity. This addresses, to some extent, the risk that a legal culture (for example, in an authoritarian regime or a system that does not protect minority rights) may not be a genuine reflection of shared values. Immigrants, in deciding whether their move is intended to be 'permanent', to some extent decide whether or not they wish to legally assimilate in a new culture, or to retain their past identity. The adoption of a test of residence or domicile, rather than nationality or a territorial rule, therefore partially devolves the power of determining identity from the state to the individual. The comparative difficulty in changing nationality means that rules using this factor limit the ability of parties to determine the law applicable to them, instead giving increasing control to the state of their nationality. The popularity of tests based on residence or domicile including a subjective component challenges the positivist emphasis on international law as the product of the acts of sovereign states, explored in Chapter 3. By giving effect to individual choices, private international law reflects and replicates the corresponding increase in the recognition of the 'sovereignty of the individual' in international law, as part of the movement, examined in Chapter 3 and discussed further below,[181] toward the broader recognition of individual, community, state and international sources of normativity.

5.3.5. Public policy

In applying foreign law or enforcing foreign judgments, national courts invariably retain a discretion to refuse the application or enforcement on the grounds of inconsistency with national public policy. The existence of such a discretion may even be implied as a matter of international law.[182] If public policy were unrestricted, it would be difficult to reconcile with the idea that there are international law limits on the regulatory authority of states that are reflected in private international law, and difficult to reconcile with the policy of pluralism behind private international law itself. The application of public policy is essentially an

[181] See 5.6 below.

[182] See *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands* v. *Sweden)* [1958] ICJ Reports 55, particularly the Separate Opinions of Judges Badawi, Lauterpacht and Quintana and the Declaration of Judge Spiropoulos. Judge Lauterpacht expressed the view (at p. 92) that '*ordre public* must be regarded as a general principle of law'; but see Lipstein (1959).

application of local norms – an implicit choice of local law.[183] It defines the limits of the policy of tolerance of difference underlying private international law.[184] If this is not to undermine private international law, the same principles of international law jurisdiction examined above should therefore govern both the existence of a public policy discretion in private international law and the limits of its operation.

Courts do not always appear to analyse these issues carefully or entirely avoid 'national exclusiveness and prejudice impatient of the application of foreign law'.[185] The fact that public policy is frequently described as a 'discretion' tends to lead to it being under-analysed, and the insufficient awareness of the principles behind public policy increases the likelihood that they will be breached. Norms that are clearly domestic political choices, for example, First Amendment free speech rights under the US constitution, are sometimes applied to situations that lack any significant connection with the forum state.[186] However, in practice most national courts have developed mechanisms that take an appropriately precautionary attitude towards imposing domestic values on international cases.[187] For example, as noted in Chapter 4,[188] public policy is 'attenuated' under some legal systems, and in others its strength varies depending on the domestic effects of the case. One of the limits on the application of national public policy to international disputes is thus the

[183] See further Mills (2008) pp. 207ff; Riphagen (1961) p. 261ff; Paulsen and Sovern (1956) p. 981.

[184] See generally Mosconi (1989); Kahn-Freund (1974) pp. 173ff; Lipstein (1972) pp. 170ff; Hambro (1962) pp. 26ff.

[185] *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands* v. *Sweden)* [1958] ICJ Reports 55 at 94 (Separate Opinion of Judge Lauterpacht).

[186] See in particular *Telnikoff* v. *Matusevitch* (1997) 702 A 2d 230; *Bachchan* v. *India Abroad Publications Inc.* (1992) 585 NY S 2d 661; see further Mills (2008) pp. 232ff; Berman (2005c) p. 1871; Youm (2000); Van Houweling (2003); Maltby (1994). The decision of the ECJ in *Ingmar GB Ltd* v. *Eaton Leonard Technologies Inc.* [2000] ECR I-9305, Case C-381/98 may be criticised on the same grounds, for extending the application of European regulation of agency arrangements to a relationship with minimal connections with the EU; see further 4.6.5 above.

[187] On the practice of the English courts see further Mills (2008); Dicey, Morris and Collins (2006) pp. 92ff; Carter (1993) pp. 4ff; Mosconi (1989) pp. 67ff; Mann (1971); Kahn-Freund (1954); Lloyd (1953) pp. 73ff; Nussbaum (1940). The relative underdevelopment of English rules of public policy is often attributed to the dominance of the *lex fori* in English law in matters dealing with family law or personal status, where many civil law systems would apply the law of common nationality of the parties, giving a greater role to public policy exceptions: but see Enonchong (1996).

[188] See 4.6.5 above.

degree of connection or proximity between the state and the dispute.[189] Where the dispute is very closely connected to the state but foreign law is nevertheless selected, local public policy may be applied relatively freely. Where the dispute is only connected in a very limited way, much greater caution should be applied. As discussed below, this also depends on whether the norm of public policy is itself international.[190]

In determining the proximity of a dispute, recourse must be had once again to the grounds for jurisdiction permitted under international rules. Thus, like any other application of local law, the invocation of public policy depends on an examination of the territorial or personal connecting factors operating between the dispute and the forum state. The restrictions on the application of national public policy reflect again the limits on regulatory authority established under public international law rules on jurisdiction. The way that private international law reflects and defines the horizontal ordering of national legal systems extends even to their public policies.

5.3.6. Interests and connections

Some recent approaches to private international law, particularly in the US, have moved away from choice of law rules based on territorial or personal connecting factors towards rules based on a broader 'interest analysis'.[191] Although it has its origins in the context of US inter-State disputes, this approach has also been applied more broadly to international cases. It seeks to resolve private international law disputes by reference to a comparison of the 'interests' of the affected states.[192] The

[189] Thus, 'the strength of a public policy argument must in each case be directly proportional to the intensity of the link which connects the facts of the case with this country' – Kahn-Freund (1954) p. 58; Lloyd (1953) pp. 81ff; see further Mills (2008) pp. 210ff. In *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands* v. *Sweden)* [1958] ICJ Reports 55, the Separate Opinion of Judge Lauterpacht expressed the view that international law defines limits on the permissible applicability of public policy, suggesting the need for a 'close territorial connection' (at pp. 97–8). The Separate Opinion of Judge Quintana considered (at p. 108) that 'before the *ordre public* of a country may be validly invoked against an international convention there must exist a substantive connection between the person concerned and the territory'.

[190] See 5.4.4 below. [191] See 4.3 above.

[192] A 'negative interest analysis' like the idea of comparative impairment in US law (see 4.3.2 above) has arguably had some influence in Australia – for example, in *Neilson* v. *Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54 at [17], Chief Justice Gleeson held that 'the Chinese authorities are totally unaffected by the outcome of the litigation, no Chinese interests are involved, and there appears to be no reason of policy

move to such a flexible approach, away from more fixed territorial or personal rules, presents a challenge to the argument of this section, that private international law rules reflect and replicate underlying theories of international order. It is at first glance difficult to see what theory of international order could be implicated here.

To answer this challenge it is necessary to distinguish three ideas of interest analysis. This differentiation is not always recognised in practice. Indeed, it is arguable that many adherents present an ambiguous account of what they mean by interest analysis. The distinction depends on recognising three possible meanings of 'interest'.

i) Subjective interests

The first is a subjective meaning. An 'interest' may be viewed as present only when a state (through a government)[193] has claimed or asserted that it wishes to exercise regulatory authority over the dispute.[194] To apply such a test, the judge must look only to whether the intended scope of the laws of the state would include the case at hand. This approach depends on the state having asserted or articulated its interest in a particular field, which may be express or implied in the text of a statute or a judgment. In practice, this view of interest analysis may be understood as closely related to the statutist approach explored in Chapter 2.[195] It seeks to resolve private international law disputes by interpretation of the scope of the potentially applicable substantive laws (or their underlying policies). Although it does not depend on the strict statutist classification of each law as territorial or personal, it nevertheless depends on determining some basis according to which a law would be intended to apply to the case at hand. Usually this basis would be found in an assertion that the law was intended to apply to the location of the relevant events or to the affected parties.[196]

for a Chinese court to resist the proposition that the rights and obligations of the parties should be determined according to the law of Western Australia'. Justice Kirby took a similar approach, but found (at [211]) that 'to the contrary, there are many such interests and policies at stake'.

[193] The frequent description of the interest analysis approach as 'government' interest analysis tends to emphasise this idea, focusing on interest claims through subjective government acts rather than the objective existence of an interest.

[194] See generally Brilmayer (1995) pp. 119ff; Posnak (1988); Sedler (1983).

[195] See 2.2.2 above.

[196] This is particularly clear in the case of choice of law in tort in the US, where a distinction is made between territorial 'conduct regulating' rules and personal 'loss-distributing' rules – see e.g. Symeonides (2004); *Babcock* v. *Jackson* (1963) 191 NE 2d 279 (NY) at 284.

This approach is often applied in the domain of public law, such as in the focus of US courts on the 'reach' of domestic statutes in competition law.[197] To some extent this reflects a justifiable judicial deference to legislative intention, particularly where the courts are recognising explicit limits on the intended scope of application of a statute. It is, however, more problematic when there is a possible issue of a statute exceeding internationally permissible jurisdiction. To some extent this is tempered by presumptions of legislative compliance with international law, including international limits on jurisdiction.[198] There may not, however, always be scope to apply such interpretative methods.

From an international perspective, a subjective claim of intended regulatory authority by a state is clearly not sufficient to justify its assertion of international jurisdiction. The emphasis on the assertion of state authority here reflects the underlying view of the international order adopted by positivist international legal theory[199] – the view, discussed and criticised in Chapter 3, that the primary determinants of the scope of authority are the will of states, expressed through the positivist conception of state sovereignty and here articulated in the form of a statute. Although the form of this approach appears novel, in practice it thus depends on historically familiar techniques, and, like other approaches, reflects and replicates recognisable, but in this case outdated, international norms.

ii) Objective interests

A second meaning of 'interest' does not focus on the subjective articulation of an 'interest claim', but on whether an interest is objectively identifiable or whether it is 'legitimate'.[200] Under this approach, the determination of whether an interest exists cannot depend on an examination of the relevant laws; it must be based on some factor outside the subjective expression of the will of the state. This approach therefore assumes that there is some external delimitation of the regulatory authority of states, which determines whether the application of the

[197] See 5.3.1 above.

[198] See 3.4.1 above; *R* v. *Hape* [2007] SCC 26; *F Hoffmann-La Roche Ltd* v. *Empagran SA* (2004) 542 US 155; *Hartford Fire Insurance Co*. v. *California* (1993) 509 US 764 (esp. Scalia J, dissenting); *United States* v. *Aluminum Co. of America* (1945) 148 F 2d 416; Baetge (2007); Dodge (1998); Born (1992).

[199] See e.g. Cox (2001) pp. 184ff.

[200] Such an approach is adopted from the perspective of international law by Jennings (1957).

law of the state is justifiable. It depends on a conception of state authority that is not based on the will or power of a state, but which is limited by, and the product of, international law. Of course, the subjective intention of laws must also be respected. No law should be applied beyond its intended scope, which may be determined as a matter of interpretation. Public international law rules on jurisdiction do not require its exercise, only permit it. However, the exercise of jurisdiction is subject to objective limits, which are not affected by the asserted interests of states as expressed through their laws. The application of international law rules on jurisdiction determines the legitimate scope of state interest and establishes a horizontal distribution of legal authority.

If interest analysis is adopted in this form, it depends on the existence of a sufficient nexus between the state and the relevant events. It therefore in practice reflects and replicates the international norms of territoriality and personality embodied in public international law that establish which interests or connections justify an assertion of regulatory authority. In this sense, any rule of private international law is the product and embodiment of an 'interest analysis'; it is a determination that a sufficient interest exists to justify an exercise of international regulatory authority. The 'interest analysis' approach to private international law developed in the US may in this way be interpreted as merely the product of the delegation of this determination to judges in individual disputes.

iii) Systemic interests

The idea of a systemic perspective on private international law, explored in Chapter 1 and further above,[201] gives rise to a third meaning of interest. Some critics of interest analysis have argued that governments are not really interested in private international law problems, and point out that it is only rarely that governments intervene in private international litigation to argue in favour of a particular forum or applicable law.[202] This argument, however, is the product of a view of private international law that focuses on its role

[201] See 5.2 above.

[202] Ehrenzweig (1967) p. 63; Akehurst (1973) pp. 170ff; but see *Hartford Fire Insurance Co.* v. *California* (1993) 509 US 764 at 798; *Laker Airways Ltd* v. *Sabena, Belgian World Airlines* (1984) 731 F 2d 909; *British Airways Board* v. *Laker Airways Ltd* [1985] 1 AC 58 (HL); *British Airways Board* v. *Laker Airways Ltd* [1984] QB 142 (CA); see discussion in Lowenfeld (1996) pp. 5ff. In *Lubbe* v. *Cape Plc* [2000] 4 All ER 268 the Republic of South Africa intervened in favour of the dispute being heard in *English* courts.

in determining 'private' rights in individual disputes. It is true that it is rare that *governments* will have sufficient political interest to intervene in the resolution of individual private disputes.[203] However, this should not be taken to be an argument against the interest of the *state* in the functioning of the system of private international law as a means for protecting its domain of regulatory authority.[204] The existence of such an interest is obvious from the mere fact that states have laws dealing with jurisdiction, the applicable law and the recognition and enforcement of foreign judgments. A 'functional' concept of interest is operating here. States are interested in the existence of limits in the application of their (and other state) laws, as a product of their concern in having an effective international system for the ordering of regulatory authority. The long-term interest in having such a system even explains the absence of government intervention in many individual cases. The short-term benefits of intervention in an individual case will in many circumstances be outweighed by the long-term interest in ensuring the stability of the system.[205] From this perspective, the interest of each individual state is the same as a collective international interest.[206] Although interest analysis tends to emphasise conflicting state interests, in fact it may also be understood as recognising the common interest of all states in the systemic ordering of their regulatory authority.

These last two ideas of 'interest' have in common an underlying inconsistency with the positivist approach to international law and with the subjective concept of a state interest that is an expression of

[203] Although note that the increasing importance of private international litigation means that it is likely that the number of cases will increase; and the increasing role of public norms in private international interactions suggests greater government interest in the resolution of private disputes: see Muir Watt (2003) p. 404.

[204] Berman (2005c) p. 1822, pp. 1850ff; Blom (2003) pp. 394ff; Symeonides (2001) pp. 24ff; Maier (1982). Note the similar idea of a 'constructive multistate compact' as a device for evaluating the unexpressed interests of states in Kramer (1990) pp. 315ff.

[205] Thus, for example, 'the ultimate justification for according some degree of recognition [of foreign judgments] is that if in our highly complex and interrelated world each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted' – Trautman and von Mehren (1968) p. 1603. Trautman and von Mehren also (at p. 1604) highlight the 'interest in fostering stability and unity in an international order in which many aspects of life are not confined to any single jurisdiction'; see also Hill (2000). The interest in cooperation is also demonstrated by game theory approaches: see e.g. Brilmayer (1995) p. 169; Kramer (1990).

[206] See e.g. Allott (2002) pp. 295ff; Maier (1983) p. 585.

the positivist emphasis on international law as the product of state will. Both the 'objective' and 'systemic' approaches to interest analysis depend on the definition or description of interests in a way which is independent of state self-interest.[207] This is not to say that they cannot also recognise subjective limits on interest. As noted above, a national law should self-evidently not be applied beyond its intended scope. However, whatever that intention may be, under these ideas of interest analysis a law is also subject to *objective* limits, defined by rules determining the legitimate scope of state regulatory authority as an expression of each state's interest in a functional system of private international law, and as an implication of underlying international norms of constitutional structure.

5.4 International rights protection

The previous section, dealing with the idea of private international law as part of the structural ordering of the international system, focused on the way in which the regulatory authority of each state is limited by the (horizontal) recognition of the authority of other states. This section is concerned with a different set of limitations on state regulatory authority, the limitations defined by the (vertical) distribution of power between international and national law. In particular, it is concerned with the way that private international law rules reflect and give effect to international private rights.

5.4.1. The development of international private rights

Traditional international law focused almost exclusively on the rights of states. The classical positivist model of international law emphasised the sovereign state as the exclusive international legal actor, and individuals were only represented through the discretionary exercise of diplomatic protection by their state. As discussed in Chapter 3, this has been challenged by the emergence of individuals as international actors and the articulation of international rights attributable to individuals and opposable to states.

International law has long recognised obligations owed by states in respect of the treatment of foreign nationals, well before the argument

[207] Brilmayer (1995) pp. 115ff.

of Kant in the eighteenth century for 'universal hospitality', meaning 'the right of a stranger not to be treated as an enemy when he arrives in the land of another'.[208] There is a long-standing dispute concerning the character of these obligations, including the question of whether they are relative (a right of national treatment, meaning non-discriminatory treatment compared with nationals of the state) or absolute (an international minimum standard of treatment).[209] The importance of the debate in modern international law has been reduced through the widespread adoption of bilateral investment treaties that set out the obligations owed by states to foreign investors, although the relationship between these treaties and customary international law is unresolved. Similarly, well-established rules of international law place limits or conditions on the nationalisation or expropriation of property by a state from foreign investors.[210] Thus, international law intervenes to affect the relationship between a state and the individuals claiming title to (movable or immovable) property situated within its territory. The international law rules regarding nationalisation of property regulate the obligations of states. They equally, however, regulate the rights of individuals with respect to their treatment by foreign states, dealing with an entitlement to property under international law. They establish international legal standards for the treatment of property that restrict the ability of a state to adopt its own property regulation, requiring it to recognise

[208] Kant (1795), Third Definitive Article for a Perpetual Peace. See further 2.4.1 above; O'Neill (2000) pp. 186ff. For a modern treatment see, for example, the *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country In Which They Live* (1985).

[209] McLachlan (2007); Sornarajah (2004) pp. 319ff; Ortino (2004) pp. 121ff; Verhoosel (2002); Roth (1949) pp. 62ff; Borchard (1939); Freeman (1938) pp. 32ff; Alexander (1931) pp. 4ff, pp. 135ff; Root (1910). This idea was developed in the US–Mexican General Claims Commission in the 1920s, on which see Roth (1949) pp. 95ff; Feller (1935); *Neer Claim* (1926) 4 UNRIAA 60; *Roberts Claim* (1926) 4 UNRIAA 77. International standards are likely to be based on national standards, so perhaps the difference between the two approaches is not as great as it would initially seem; see discussion in Root (1910a). Where international minimum standards exist, they are also likely to be applied with respect to the treatment of citizens of the state itself, because it is difficult to justify preferential treatment for foreigners. But some investment arbitral awards suggest that a 'pro-active' and 'favorable disposition towards foreign investment' may be required: see e.g. *Azurix Corp*. v. *The Argentine Republic*, ICSID ARB/01/12 (Award, 14 July 2006) at [372].

[210] See generally McLachlan (2007); Sornarajah (2004) pp. 239ff; Lowenfeld (2002) pp. 387ff.

international 'vested rights' of foreigners.[211] It is also possible to view these rights as a matter of procedure, expressing a requirement that the state must follow if it wishes to nationalise foreign-owned property.[212] In any case, these rights are increasingly recognised as rights held directly by individuals and not merely rights of states in respect of their nationals.[213]

The most obvious examples of substantive international private rights clearly attributed to individuals are international human rights, whose emergence as a fundamental new dimension of international law was discussed in Chapter 3. While debate inevitably persists concerning their exact scope and effects, there is nonetheless very extensive agreement that individuals possess a range of rights under international law. The ideas of individual freedom underlying human rights are also sometimes viewed as the foundation for international economic rights. Much discussion of international economic law focuses on systemic outcomes and the idea that economic law may assist in maximising general wealth or welfare.[214] Sometimes, however, as also discussed in Chapter 3, the values and objectives of international economic law are not expressed at a systemic level but at the level of individual rights. Thus, international economic law may be justified on the grounds that it gives effect to

[211] Roth (1949) pp. 166ff. Roth argues (at p. 172) that 'we can … state as a general rule of international law that infringement of vested rights obliges the State to indemnify the foreign owner'. The Hague Codification Conference of 1930 had as point III, No. 3 of its Bases of Discussion, 'Does the State become responsible in the following circumstances: Enactment of legislation infringing vested rights of foreigners?' – League of Nations Doc. C.75.M.69.1929, V. p. 33. The text and various national responses are in Rosenne (1975) Vol. II, pp. 455ff. As previously noted, and as noted by some of the responses, these rights must be derived from international law if this is to avoid the circularity of the old vested rights approach – see 2.4.2 and 4.2.4 above. On the basis of the responses, the topic was not on the agenda at the Conference itself. Under the modern law of investment arbitration, rights 'vested' through actions of the government of a state which subsequently expropriates them may be compensable, even if the rights are merely 'expectations': see e.g. *Metalclad Corp.* v. *United Mexican States*, ICSID ARB (AF)/97/1 (Award, 30 August 2000); see further 5.5 below.

[212] In the US, the constitutional requirement for the government to compensate any owner of nationalised property is part of the Due Process clause in the Fifth Amendment (dealing with the federal government), and has been implied from the requirements of the Due Process clause in the Fourteenth Amendment (dealing with State governments) – see 4.3 above. Thus, the requirement for fair compensation is viewed as an aspect of the requirement for due process.

[213] *Occidental Exploration & Production Company* v. *Republic of Ecuador* [2005] EWCA Civ 1116 at [17ff]; Douglas (2003); see 3.3.1 and 3.4.1 above.

[214] As in the analysis of the effect of the EU internal market on private international law – 4.6 above.

private rights, including rights of free movement of foreign investors or traders. Although there are doubts about whether these rights are truly universal or the product of particular political values and traditions, these economic freedoms might be identified as aspects of a broadly conceived right of individual self-determination, as examined in Chapter 3.

Another aspect of the development of international private rights is the emergence of international minimum standards of due process and procedural fairness.[215] The protection of rights requires judicial enforcement, meaning a right to a fair trial, which directly impacts on questions of jurisdiction in the same way that the right of access to justice in the ECHR has influenced questions of jurisdiction in the EU.[216] The modern development of these standards has revived the long-established idea of an international delict of 'denial of justice', which prescribes standards for treatment of foreigners in the domestic courts of states and requires 'adequate judicial protection and effective legal remedies for repairing invasions of rights'.[217] The idea of a denial of justice has been invoked in claims arising under the common investment treaty requirement of 'fair and equitable treatment' for foreign investors,[218] and it is also an idea traditionally viewed as part of customary international law.[219] In either case, the test is not whether local law has been complied with, but whether an international standard of 'justice' has been met.

[215] See generally Symposium, 'Transnational Civil Procedure' (2005), particularly Stürner (2005); *ALI/UNIDROIT Principles of Transnational Civil Procedure* (2006); Petrochilos (2004); Andenas (2004); Symposium, 'The Regulation of Foreign Direct Investment' (2003); Kessedjian (2001); Ruttley, MacVay and Weisberger (2001).

[216] See e.g. *ALI/UNIDROIT Principles of Transnational Civil Procedure* (2006) pp. 18ff (Principle 2), pp. 103ff (Rule 4), which adopt standards which reflect the public international law rules on jurisdiction explored in 5.3.1 above; Roth (1949) pp. 178ff; see further 4.6.5 above and 5.4.5 below. Note the *ICCPR*, Art. 14 and the Human Rights Committee's General Comment No. 32 of 23 August 2007, CCPR/C/GC/32.

[217] Roth (1949) p. 49; Paulsson (2005); Bjorklund (2005); Brownlie (2008) p. 529.

[218] Modern case law includes e.g. *International Thunderbird Gaming Corporation* v. *Mexico* (NAFTA) (Award, 26 January 2006); *Waste Management, Inc.* v. *Mexico (Number 2)*, ICSID ARB (AF)/00/3 (NAFTA) (Award, 30 April 2004); *Loewen* v. *United States*, ICSID ARB (AF)/98/3 (NAFTA) (Award, 26 June 2003); *Feldman* v. *Mexico*, ICSID ARB (AF)/99/1 (NAFTA) (Award, 16 December 2002); *Mondev International Ltd* v. *United States*, ICSID ARB (AF)/99/2 (Award, 11 October 2002).

[219] Adede (1976); Borchard (1940); Freeman (1938); Spiegel (1938); Lissitzyn (1936); Garner (1929).

It is difficult to determine the precise content of these standards, and claims about their status should be viewed cautiously.[220] In practice, international courts and tribunals have been and are likely to continue to be extremely hesitant in finding a denial of justice, because this would ordinarily imply serious criticism of national judges. A denial of justice is thus often expressed to require 'shocking' conduct, or 'manifest injustice'.[221] Nevertheless, the wide and expanding jurisprudence by international courts and tribunals could provide increasingly acceptable international standards against which to measure the conduct of national courts, suggesting a greater recognition of individual procedural rights as part of international law.

The development of international standards of procedural fairness has been primarily focused on the treatment of foreigners by states and the treatment of states themselves before international courts and tribunals.[222] However, a variety of international actors are now recognised as exercising regulatory authority in international law, including formal and informal international organisations. In parallel with the development of individual procedural rights with respect to treatment by foreign states, there is a movement towards developing procedural standards with respect to the treatment of individuals (and states) by international organisations, known as global administrative law. This is part of the development, discussed in Chapter 3, of norms of 'public' law in international law – norms which seek to govern the exercise of powers by international 'public' authorities. The idea that international regulatory authorities should be required to respect individual procedural rights recognised under international law is not new,[223] but it is an area of increasing attention and importance.[224]

[220] Sornarajah (2004) pp. 328ff; Roth (1949) p. 25.

[221] See e.g. *Elettronica Sicula SpA (ELSI) (United States* v. *Italy)* [1989] ICJ Reports 15 at [128] (need for 'an act which shocks, or at least surprises, a sense of juridical propriety'); Roth (1949) pp. 54ff; *Azinian* v. *Mexico*, ICSID ARB (AF)/97/2 (Award, 1 November 1999) at [102–3].

[222] See Brown (2007).

[223] On the early development of global administrative law see e.g. Hershey (1912) p. 55.

[224] See generally http://iilj.org/global_adlaw/; Symposium, 'Global Governance and Global Administrative Law in the International Legal Order' (2006); Symposium, 'The Emergence of Global Administrative Law' (2005). The issue has recently been prominent in the context of ensuring that fair review procedures are available for those designated by the Security Council as associated with terrorism: see *World Summit Outcome Document* (2005) [109]; *A More Secure World* (2004) [152].

International law thus increasingly recognises private rights in a variety of forms. This development may be viewed generally, following the analysis in Chapter 3, as a recognition of the sovereignty of the individual alongside, and in some circumstances even prior to, the state. This is analogous to the way that individual rights under the constitutions of federal systems qualify the powers of the States, as discussed in Chapter 4. As in federal systems, the establishment of international private rights functions as a vertical allocation of regulatory authority, in this case between the international and national spheres. The internationalisation of rights here is in tension with the pluralism respected by the principle of subsidiarity.

5.4.2. The domestic effect of international rights

If a state is under an international legal obligation, including an obligation to recognise international private rights, then, as noted above, this binds the state as a whole – it extends not only to the legislature and executive, but also to the courts.[225] Where rights have been disputed and determined at the international level, a judgment of an international court or tribunal is similarly, under international law, binding on national courts.[226] This idea is reinforced by the obligation under some treaties for states to treat judgments of international courts and tribunals as if they were domestic judgments.[227]

As explored in Chapter 3, in practice states take a variety of approaches to the relationship between international and national law, and often a variety of approaches are taken within a state depending on the source of international law. In states which do give international law

[225] See 5.3.1 above.

[226] Thus, 'the duty to carry out, or comply with, such a judgment is imposed upon the courts of a State party to litigation before the International Court no less than it is incumbent upon the other organs of that State, and if municipal courts are unable to do so, then the international responsibility of the State will be engaged' – Rosenne (1957) p. 88. See generally Fox and Franck (1996); Conforti (1993); O'Connell (1990); Schreuer (1981); Schreuer (1975); Reisman (1969); Schachter (1960).

[227] See e.g. *United Nations Convention on the Law of the Sea*, Art. 39; ICSID Rules, Art. 54; *Statute of the Central American Court of Justice*, Art. 39; *Liberian Eastern Timber Corp.* v. *Liberia* (1986) 650 F Supp 73; Alford (2003). Decisions of international courts and tribunals are generally accepted as 'binding' internationally (see e.g. Art. 94 of the United Nations Charter in respect of decisions of the ICJ), but the domestic consequences of this are frequently unclear. The idea of a general treaty providing for domestic enforcement of ICJ decisions has historically received some support – see e.g. Reisman (1969), which includes a draft protocol to this effect.

direct effect, the potential for international private rights to affect private international disputes (in the ways to be explored below) is obvious. It has been argued that some international law should be viewed as implying international mandatory rules binding on all states and prevailing over both domestic and foreign law.[228] More commonly, however, the relationship between international and national law, viewed from the perspective of a domestic court, is complex because it is mediated by a national constitution. International rights are not automatically incorporated as part of national law, because of domestic concerns regarding the distribution of powers – ensuring that an executive with treaty-making power is unable thereby to bypass parliament, and that the courts do not exceed their constitutional function in incorporating customary international law.[229] In federal states, the balance of power between federal and State law may also be implicated, preventing enforcement of international private rights by federal courts or under federal law.[230] National and international courts may even, in some circumstances, perceive themselves as operating in competition.[231]

While these concerns offer no excuse for non-compliance with an international obligation under international law,[232] they present a real practical barrier to the effectiveness of international private rights and their role in shaping private international law in national courts. It has been argued that judgments of international courts and tribunals should be enforced in the same way as judgments of foreign courts,[233] and such judgments have sometimes been viewed as having direct estoppel effects.[234] The usual analysis, however, is that they exist only on the international plane, which fundamentally limits their enforcement.

[228] Muir Watt (2003) has (at p. 384) argued for the emergence of a category of 'internationally mandatory provisions' or *lois de police*. It is sometimes argued that *jus cogens* norms should be given this effect – see van Hecke (1974) pp. 7ff; Kalensky (1974) p. 54; see further 3.3.1 above.

[229] *R* v. *Jones (Margaret)* [2006] UKHL 16; *R (on the application of Campaign for Nuclear Disarmament)* v. *Prime Minister of the United Kingdom* [2002] EWHC 2777; Martinez (2003) pp. 498ff; Alford (2003); Brownlie (2008) pp. 40ff; Bradley (1998).

[230] See e.g. *Medellín* v. *Texas* (2008) 552 US __; *Sanchez-Llamas* v. *Oregon* (2006) 548 US 331.

[231] See e.g. Shany (2006).

[232] See Art. 32 of the *ILC Articles on State Responsibility* (2001); Art. 27 of the VCLT; Brownlie (2008) pp. 34ff; Oppenheim (1992) pp. 82ff; see further 3.5.2 above.

[233] See further Martinez (2003); Alford (2003) pp. 715ff; O'Connell (1990) p. 915.

[234] *Occidental Exploration & Production Company* v. *Republic of Ecuador* [2005] EWCA Civ 1116; *Dallal* v. *Bank Mellat* [1986] 1 QB 441; Fox (1988).

Chapter 3 rejected the formalism of the conventional conceptual distinction between international and national law, arguing that it fails to reflect the increasingly pervasive impact of international law within the state. The collapse in this distinction also collapses the traditional boundary between rules of public and private international law. This provides the foundation for the argument in this section that international norms should be recognised and given effect in private international law, as they are in a number of cases analysed below, because of the special character of private international law as a set of national rules with an international systemic function. The following sections argue that international private rights have and should have an effect on private international law in two ways, drawing again (by analogy) on various aspects of the examination of federal systems in Chapter 4. First, they affect private international law rules themselves, the formulation of domestic rules on jurisdiction, the application of foreign law, and the recognition and enforcement of foreign judgments. Second, they affect the application of private international law rules in specific circumstances, through the idea of international public policy.

5.4.3. International rights in the formulation of private international law rules

The most obvious impact of international private rights on domestic rules of private international law is their direct application to the rules themselves. International rights place limits on the private international law rules of national systems, in much the same way as the structural effect of international law examined above.[235]

This can best be understood based on an analogy with the study of the relationship between private international law and constitutional law in federal systems in Chapter 4. An understanding of the impact of constitutional rights on private international law has been and is being developed in particular in the US (based on the Due Process clause), the EU (based on the ECHR and on the idea that weaker parties need special protection) and Canada (based on developing ideas of federal 'fair process', and the *Charter of Rights and Freedoms*). The US Due Process clause, for example, has been held to establish a requirement for minimum contacts between the forum State and the dispute in the context of both jurisdiction and applicable law, restricting the permitted scope of

[235] See 5.3 above.

internal private international law rules.[236] Just as federal constitutional law establishes minimum standards of treatment under State private international law, international law can be viewed as establishing minimum standards of treatment under national private international law.[237] Thus, 'A denial of justice may arise from the application of domestic notions of private international law where these conflict with public international law rules.'[238]

A conflict with international private rights could clearly arise overtly – for example, in a private international law rule that discriminated on the basis of race or gender.[239] The decline of the idea of a marital 'domicile of dependence', for example, thus reflects the emergence of rights of gender equality.[240] A conflict could also arise through the operation of a rule that does not, of itself, breach international requirements. Thus, while broadly discretionary rules of jurisdiction would not themselves be a breach of international law, an exercise of jurisdiction over a defendant, in circumstances where there is an insufficient connection between the dispute and the forum, could (just as it could be a violation of international law rules on jurisdiction[241]) constitute a breach of the defendant's rights of fair procedure.[242] Equally, however, a failure to exercise jurisdiction over a dispute could constitute a breach of a plaintiff's rights of access to a court as part of their international procedural rights, violating their right to a fair trial.[243] In determining whether or not to decline jurisdiction[244] (or to issue an

[236] See 4.3.3 and 4.3.5 above.

[237] Thus, if 'the court of a national with no relationship to the parties or the transaction were to entertain a suit against an absent foreigner … the opinion may be hazarded that the proceeding would fall short of the minimum standard of "international procedural justice"' – Cheatham (1941) p. 435; see also Riphagen (1961) p. 302.

[238] Wortley (1954) p. 310.

[239] See e.g. the Human Rights Committee's General Comment No. 32 of 23 August 2007, CCPR/C/GC/32 at [9].

[240] See e.g. *Domicile and Matrimonial Proceedings Act 1973* (UK) s. 1(1).

[241] See 5.3.1 above.

[242] Kahn-Freund (1974) pp. 180ff; Wortley (1954) pp. 315ff; Morgenstern (1951) pp. 340ff; Freeman (1938) pp. 269ff.

[243] Fitzmaurice (1957) p. 221; Freeman (1938) pp. 227ff.

[244] In *Connelly* v. *RTZ* [1998] AC 854 and *Lubbe* v. *Cape Plc* [2000] 4 All ER 268 at 281–2 the Court held that it could not stay proceedings in the UK because this would lead to a 'denial of justice' and (in *Lubbe*) a breach of Art. 6 of the ECHR; see also *Cherney* v. *Deripaska* [2008] EWHC 1530 (Comm); *Mohammed* v. *Bank of Kuwait and Middle East KSC* [1996] 1 WLR 1483. It is unclear whether the issue can arise in the context of the *Brussels Regulation* (2001), following the decision of *Owusu* v. *Jackson* [2005] ECR

anti-suit injunction)[245] a court may have to balance these rights, weighing the plaintiff's right to a forum against the defendant's right against unfair process, because a breach of either could constitute a denial of justice.[246]

Since the law of the forum generally governs questions of procedure, the choice of local or foreign law will not have direct implications for compliance with international procedural standards.[247] However, the application of a law insufficiently connected with the dispute would itself seem a clear example of a denial of justice or a breach of international procedural rights.[248] When English courts exercise a *forum conveniens* or *forum non conveniens* discretion, one relevant factor in determining whether foreign proceedings would be fair is the law that would be applied by the foreign court. The better view is that it is not necessary that the law be the same as that chosen by English choice of law rules, but an evaluation should be made of the 'justness' of the foreign choice of law rules. This cannot be based on an appraisal of the substantive law chosen, because the courts must not engage in a comparison of the 'justness' of the applicable laws.[249] However, foreign choice of law rules

I -1383, Case C-281/02. Some states expressly recognise a concept of a 'forum of necessity', taking jurisdiction over a dispute if no other forum is available: see e.g. Art. 3 of the *Swiss Federal Law on Private International Law*; Audit (2006) pp. 296ff; Herzog (1967).

[245] This was the controversial basis for the Court of Appeal decision in *British Airways Board* v. *Laker Airways Ltd* [1984] QB 142: the Court held that since British Airways could not lawfully comply with US discovery rules (by order of the UK Secretary of State), it would be a 'denial of justice' to allow the US proceedings to continue, and therefore granted an anti-suit injunction; but see *British Airways Board* v. *Laker Airways Ltd* [1985] 1 AC 58 (HL); Lowenfeld (1996) pp. 10ff. The difficulty in striking the balance here is demonstrated by the difference between the above Court of Appeal and House of Lords decisions, and between the House of Lords decision in this branch of the litigation (denying an anti-suit injunction) and *Midland Bank Plc* v. *Laker Airways Ltd* [1986] QB 689 (granting an anti-suit injunction, in part because English courts were an available alternative forum). See also *OT Africa Line Ltd* v. *Hijazy (The Kribi)* [2001] 1 Lloyd's Rep 76.

[246] Wortley (1954) p. 257. Note that the controversial Art. 18(3) of the *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (2000) prepared for the Hague Conference on Private International Law, permitting states to exercise civil jurisdiction in respect of serious international crimes, included a qualification suggesting that jurisdiction could only be exercised 'if the party seeking relief is exposed to a risk of a denial of justice because proceedings in another State are not possible or cannot reasonably be required'.

[247] But see 5.4.5 below.

[248] *Midland Bank Plc* v. *Laker Airways Ltd* [1986] QB 689.

[249] *Herceg Novi* v. *Ming Galaxy* [1998] 4 All ER 238; but see *Irish Shipping Ltd* v. *Commercial Union Assurance Co. Plc (The Irish Rowan)* [1991] 2 QB 206 at 230.

could be evaluated according to their compliance with individual due process rights under public international law, as those rights are more clearly developed and articulated, as well as their compliance with the 'structural' obligations explored above.[250]

5.4.4. International rights in the application of private international law rules – international public policy

The idea of European public policy, and its present and potential impact on European rules of private international law, was introduced and discussed in Chapter 4.[251] This section explores the analogous possibility of understanding and developing the relationship between international private rights and private international law through the mechanism of *international* public policy. International public policy provides an indirect mechanism through which national courts can incorporate and give effect to international norms – and contribute to the making of international norms – without confronting the traditional barriers between international and national law.

In 1959 it was said, in words which are even more apposite today, that:

> We are now approaching a new stage of development in which, as international judicial, legislative and administrative agencies and procedures play an increasingly important part in the development of the law, the concept of international public policy may assume a positive and constructive character comparable to the part which the concept of public policy has played in municipal law.[252]

This section argues that it should equally play an important part in the functioning and development of the international system of private international law by national courts, looking first at the idea of international public policy in theory, before examining its practical application by the courts.

i) The idea of international public policy

Public policy exceptions in private international law have been frequently criticised on the basis of their discretionary role and the difficulty

[250] See *Banco Atlantico SA* v. *British Bank of the Middle East* [1990] 2 Lloyd's Rep 504, in which (at p. 508) it was critical that 'there is no developed doctrine of conflict of laws in the United Arab Emirates'; *Britannia Steamship Insurance Association* v. *Ausonia Assicurazioni SpA* [1984] 2 Lloyd's Rep 98.

[251] See 4.6.5 above. [252] Jenks (1959) p. 88; see further Jenks (1964) pp. 428ff.

in identifying their substantive content. Thus, classically, public policy 'is a very unruly horse and when once you get astride it you never know where it will carry you'.[253] Critics of traditional approaches to private international law have claimed that public policy undermines the very existence of private international law rules, and that 'it is actually public policy which dictates what law will be applied in a certain case'.[254]

The application of national public policy to found a refusal to apply a foreign law or recognise a foreign judgment constitutes a rejection of foreign law or courts in favour of local norms. It expresses the limits of the tolerance of difference and the support of pluralism which are implicit in private international law. The unilateral assertion of national policies through public policy may thus risk being viewed as constituting 'an intolerable affectation of superior virtue'.[255] From a systemic perspective, it threatens to undermine the coherent ordering of regulatory authority by private international law, increasing the possibility of inconsistent legal treatment of a dispute in different states. Thus, as argued earlier in this Chapter, national public policy ought to be attenuated based on the degree of connection between the dispute and the state whose public policy is to be applied.[256] While courts may often not articulate clear policy foundations for invoking public policy exceptions in private international law, the use of public policy as an expression of national interests or policies is frequently discouraged[257] – just as it has been interpreted narrowly in its functioning between Member States of the EU, or between the States of the US, Canada or Australia, as explored in Chapter 4. This caution recognises the threat that national public policy poses to the international systemic functioning of private international law.

Public policy does not, however, necessarily refer only to national policies. A fundamentally distinct category of public policy is recognised in the idea of *international* public policy, meaning public policy derived from international law or broader international norms, sometimes referred to as 'transnational' public policy, or 'truly international public

[253] *Richardson* v. *Mellish* [1824] 2 Bing 229 at 252; see further Mills (2008).
[254] Wardhaugh (1989) p. 347, referring to the views of Lorenzen.
[255] Beach (1918) p. 662 (writing in the context of disputes within the US).
[256] See 5.3.5 above; see further Mills (2008).
[257] Note the resolution of the Institute of International Law on 'Cultural differences and *ordre public* in family private international law' (2005) (www.idi-iil.org/idiE/resolutionsE/2005_kra_02_en.pdf).

policy'.[258] While this idea has been developed most prominently in the context of international arbitration, where it has been used to recognise the public dimension of a dispute without submitting it to the policies of any state,[259] it is equally applicable in national courts faced with private international law disputes. If a foreign law or judgment is contrary to rights established under international law, the court has a choice. It may give effect to the foreign law or judgment, in accordance with the idea of international constitutional structure.[260] Alternatively, it may deny the foreign law or judgment effect, thus 'enforcing' the international law obligation which it breaches, and protecting international private rights. This argument applies regardless of whether the foreign legal system gives direct domestic effect to international law.[261] In this context two international obligations are competing: the (structural) obligation to recognise the regulatory authority of the other state (consistent with justice pluralism and subsidiarity) is in tension with and must be balanced against the obligation to recognise international private rights.

Where public policy is itself sourced from international norms, reflecting international private rights, it cannot be argued that the use of public policy is an instance of intolerance or a mechanism to impose domestic norms. Unlike national public policy, international public policy thus need not be attenuated in its effect.[262] The application of international public policy is not a 'horizontal' assertion of the policies of one state

[258] See further Mills (2008) pp. 213ff; Wahab (2005); Benvenisti (1993) pp. 171ff; German section, p. 12, in Rubino-Sammartano and Morse (1991); Mosconi (1999) pp. 67ff; Burger (1984); Dolinger (1982); Rigaux (1976). Mann (1971) notes (at p. 155) the argument that 'all rules of public international law are of necessity so fundamental and essential an element of the legal order that they are part of public order', but prefers the direct application of public international law 'without the interposition of public policy', in order 'to exclude the discretionary flavour which is inherent in *ordre public*'. Vest (2004) argues for the adoption of an international 'constitution-like' document to establish international standards of public policy, by analogy with the treaty relationship between the US federal government and tribal nations; see also Riles (2008).

[259] See e.g. *World Duty Free Company Ltd* v. *Kenya*, ICSID ARB/00/7 (Award, 4 October 2006) at [138–57], and references therein (focusing on the international public policy against bribery and corruption); McDougall (2005) pp. 1042ff; Craig (2000) pp. 338ff; Gaillard and Savage (1999) pp. 860ff, 953ff; Lagarde (1994) p. 57; Lalive (1986) pp. 257ff (and other articles at pp. 177ff).

[260] See 5.3 above.

[261] If it does, the argument is even stronger, because it is at least analogous with the established practice of refusing to enforce unconstitutional foreign laws: see Martin (2002); Lipstein (1967); Morgenstern (1951) p. 330; but see Bendor and Ben-Ezer (2004).

[262] See further Mills (2008) pp. 216ff; German section, pp. 16–17, in Rubino-Sammartano and Morse (1991); Mann (1977) pp. 28ff.

over another. It is a 'vertical' balancing of competing international policies, a claim concerning the hierarchy of international norms. It adds flexibility to choice of law rules to allow them to balance international private rights against the structural requirements of mutual recognition reflected in public international law rules on jurisdiction. The 'sovereignty' of the state and therefore the entitlement of its law to a pluralist respect may be viewed as qualified by its breach of international law. Although applying international public policy involves the claim that a foreign law is somehow illegitimate and disentitled to recognition, its invocation is not only negative, but also a positive conduit for international law. The application of international public policy should therefore not lead to more inconsistent legal treatment of disputes, and thus does not undermine the systemic objectives of private international law.

ii) International public policy in practice

This section examines the ways, present and prospective, that international public policy influences the application of private international law. These mirror the variety of roles for public policy in private international law that have been explored previously, including in the context of federal systems.[263] Public policy arises in two contexts, which are examined in turn: the application of foreign law, and the recognition and enforcement of foreign judgments.

While this section continues to adopt the international systemic view of private international law developed throughout this book, it should be noted that even within the traditional framework of private international law as purely domestic private law there are strong arguments for giving international private rights direct effect in this context.[264] As discussed above, the arguments against international rights being recognised by national courts predominantly centre on constitutional concerns regarding the distribution of powers – balancing domestic and international policies. Where a court is concerned with the application of *foreign* law

[263] See 4.6.5 and 5.3.5 above.

[264] Morgenstern (1951). Mann (1954) argues (at pp. 190ff) that because international law is mandatory it should be given direct effect through some other mechanism, rather than through the discretionary vehicle of 'public policy'. This is unnecessary if, as argued in this section, the application of public policy based on international law has a special mandatory character. Dolinger (1982) argues (at p. 192) for a rule that 'each jurisdiction shall treat as pre-eminent the principles that derive from the real international public order, understood as the common interest of mankind, even when to do so requires derogations from local public policy'.

or the recognition of a foreign judgment, such concerns are far more limited. This is because giving effect to international public policy involves balancing one international norm, the need to give mutual recognition to foreign law and judgments based on requirements of international constitutional structure, against another, the enforcement of international private rights.

Application of foreign law English courts have long refused to apply a foreign law selected by private international law rules where it is inconsistent with rights recognised under international law (particularly human rights),[265] 'not conformable to the usage of nations',[266] or violates 'some moral principle which, if it is not, ought to be universally recognised'.[267] These can clearly be analysed as cases where the courts have determined that the policy of mutual recognition behind choice of law rules is outweighed by the need to give effect to other norms of international law. In other words, 'The obligation to apply public international law overrides the ordinary rules of private international law.'[268] More recently, the courts have indicated a willingness to extend these ideas beyond the recognition that 'there may be an international public policy requiring states to respect fundamental human rights',[269] to a broader

[265] *Williams & Humbert* v. *W & H Trade Marks* [1986] AC 368 at 427ff (noting that international law rules, including human rights, limit the recognition by English courts of foreign expropriations); *Oppenheimer* v. *Cattermole* [1976] AC 249 (refusing to apply a discriminatory Nazi law depriving German Jews of their nationality – a case which might be viewed as giving effect to international law concerning discrimination, or international law concerning nationality: see 5.3.3 above; Mann (1954) pp. 185ff); *In re Claim by Helbert Wagg & Co.* [1956] Ch 323 (applying a foreign law only after determining that it was compatible with international law); *Novello and Co.* v. *Hinrichsen Edition* [1951] 1 All ER 779; *De Wutz v. Hendricks* (1824) 2 Bing 314. See further Mills (2008) pp. 220ff; Dicey, Morris and Collins (2006) pp. 93–4; Oppenheim (1992) pp. 371ff; Mann (1986) pp. 148ff; Morgenstern (1951) p. 333.

[266] *Wolff* v. *Oxholm* (1817) 6 M&S 92; *In re Fried. Krupp AG* [1917] 2 Ch 188.

[267] *Kaufman* v. *Gerson* [1904] 1 KB 591 at 598. See also *In re Meyer* [1971] P 298; *Royal Boskalis Westminster* v. *Mountain* [1999] QB 674 at 725; *In re Missouri Steamship Co.* (1889) 42 Ch D 321, holding (at p. 336) that 'where a contract is void on the grounds of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilised country would be called on to enforce it'. In *Somerset's Case (Somerset* v. *Stewart)* [1772] 20 State Trials 1, Lord Mansfield refused to recognise the property rights claimed by a resident of Virginia over a slave purchased in Virginia, holding that 'The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political.'

[268] Fachiri (1931) p. 103.

[269] *Kuwait Airways Corp.* v. *Iraqi Airways Co. (Nos. 4 and 5)* [2002] 2 AC 883 at [115]; Briggs (2002a).

requirement of compliance with international law. This suggests that other international private rights, as explored above, also have a role to play in shaping and constraining the application of private international law by national courts. National courts might equally consider the compliance of foreign law and judicial decisions with decisions of international courts and tribunals, where these affect the rights of private parties.[270] Here the obligation to recognise the international judgment should ordinarily outweigh the obligation to give mutual recognition to the law or judgment of a foreign state.

It has been argued that the usual reticence of domestic courts concerning the incorporation of international norms, particularly in respect of treaties, should be set aside in this special context as an implicit recognition of the international character of private international law rules.[271] Thus, the House of Lords has recognised, relying largely on foreign jurisprudence, that 'principles of international public policy (*l'ordre public veritablement international*) have been developed in relation to subjects such as traffic in drugs, traffic in weapons, terrorism, and so forth',[272] and held that, provided the rules of international law are sufficiently clear, 'In appropriate circumstances it is legitimate for an English court to have regard to the content of international law in deciding whether to recognise a foreign law.'[273] A similar approach can be identified in Germany, where it has been considered contrary to 'good morals' to enforce a contract that would be prohibited under

[270] See Mann (1971) p. 155. Note that in the case of *Anglo-Iranian Oil Co*. v. *Jaffrate (The Rose Mary)* [1953] 1 WLR 246 (discussed further below), the Court was influenced by the fact that the ICJ had granted interim protection measures in favour of the UK against Iran, although the ICJ ultimately declined to hear the merits of the case. See *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran)* [1952] ICJ Reports 93; *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran)* [1951] ICJ Reports 89.

[271] Mann (1967) p. 29.

[272] *Kuwait Airways Corp*. v. *Iraqi Airways Co. (Nos. 4 and 5)* [2002] 2 AC 883 at [115] (alluding towards the French development of the idea of 'truly international public policy' discussed above, and also noting references to similar ideas in the context of international arbitration); see further Mills (2008) pp. 222ff.

[273] *Kuwait Airways Corp*. v. *Iraqi Airways Co. (Nos. 4 and 5)* [2002] 2 AC 883 at [26]; note also the finding that it would be 'contrary to principle for our courts to give legal effect to legislative and other acts of foreign states which are in violation of international law as declared under the Charter of the United Nations' [145]. Note the criticism in Mann (1977) pp. 32ff of the decision in *Regazzoni* v. *KC Sethia (1944) Ltd* [1958] AC 301 (see 4.6.5 above), arguing that the Court should have questioned the application of an Indian law that may have been contrary to international law.

international law.[274] English courts may also refuse to apply foreign law (or recognise a foreign judgment) on the grounds that the government which purportedly made the law or the court which purportedly decided the case was not legitimate according to international law standards.[275] In each case, international law 'intervenes' in the private international law dispute on behalf of the individual and their international rights. State acts that are unrecognised in international law are equally excluded from the determination of private rights, shaping the exercise of regulatory authority by national courts.

The application of international public policy in determining the effect of foreign law on rights to property located in England is unproblematic. Indeed, the courts will refuse to give effect to any foreign legislative act purporting to determine title to extraterritorial property, wherever located.[276] Thus, for example, the House of Lords refused to recognise any proprietary effects of a purported nationalisation of aircraft, in occupied Kuwait, by Iraq.[277] The situation with respect to property located in the

[274] In the *Nigerian masks case* (BGH 22 June 1972 NJW), traditional masks were unlawfully exported from Nigeria; a shipping insurance contract for the goods was held to be unenforceable because this would be contrary to German 'good morals'. It was important in this case that the practice of illegal exports had been internationally condemned by UNESCO and through a draft Convention prohibiting such transactions, making this more a case of international public policy. See Dolinger (1982) p. 188; Schreuer (1981) p. 260; Rigaux (1976); Mann (1967) p. 32. Contrast the decision of *Attorney-General for NZ* v. *Ortiz* [1984] AC 1 regarding a similar prohibition on export of historic articles from New Zealand, characterising the prohibition as national law and refusing to give it extraterritorial effect.

[275] *Sierra Leone Telecommunications* v. *Barclays Bank* [1998] 2 All ER 821; *Caglar* v. *Billingham* (1996) 108 ILR 510; *Republic of Somalia* v. *Woodhouse Drake & Carey (Suisse) SA (The Mary)* [1993] 1 All ER 371; *Adams* v. *Adams* [1971] P 188; note the legal fiction deployed to evade the issue in *Carl Zeiss Stiftung* v. *Rayner and Keeler Ltd (No. 2)* [1967] 1 AC 853; *Gur Corporation* v. *Trust Bank of Africa Ltd* [1987] QB 599. But private rights may be recognised where necessary to achieve justice – see e.g. *Hesperides Hotels* v. *Aegean Turkish Holidays Ltd* [1978] 1 QB 205 at 217ff; *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276*, Advisory Opinion [1971] ICJ Reports 16 at [125] (excluding private rights, for example births, deaths and marriages, from an international law obligation of non-recognition).

[276] 'It is not disputed that our courts are entitled on grounds of public policy to decline to give effect to clearly established breaches of international law when considering rights in or to property which is located in England. A state lacks international jurisdiction to take property outside its territory, so acts of that kind are necessarily ineffective' – *Kuwait Airways Corp*. v. *Iraqi Airways Co. (Nos. 4 and 5)* [2002] 2 AC 883 at [144]; Staker (1987) pp. 192ff; Mann (1977) pp. 46ff.

[277] *Kuwait Airways Corp*. v. *Iraqi Airways Co. (Nos. 4 and 5)* [2002] 2 AC 883. The fact that Kuwait was unlawfully occupied suggests that this case is better interpreted as

foreign state itself is more complicated.[278] An act of expropriation, as a public act, will not be directly enforced by a foreign court, but the courts will ordinarily recognise its proprietary consequences.[279] However, if a case involves recognition of the consequences or effects of an *internationally unlawful* foreign act of expropriation, the court is faced with a dilemma. One approach would be to accept the expropriation as an effective act (under national law) on the basis that the act gives rise to secondary liability of the violating state (under international law) for compensation. Under this approach, the state of nationality of the (former) property owner would be entitled to take diplomatic action against the nationalising state.[280] This approach would also be suggested by the traditional territorial deference in private international law rules to the *lex situs* – thus, by the structural dimension of the constitutional ordering of private international law.[281]

However, the better approach, adopted by many courts, is to give direct effect to the international law rule prohibiting the particular expropriation, by refusing to acknowledge the proprietary consequences of an internationally unlawful nationalisation and instead recognising the rights established under international law as prevailing over the rights provided for by the *lex situs*.[282] If the affected property has now

concerning an ineffective extraterritorial act of expropriation, rather than a territorial act which was refused recognition.

[278] See generally Oppenheim (1992) pp. 371ff; Bogdan (1975); Mann (1954); van Hecke (1951).

[279] English courts have sometimes expressed the obligation to recognise the *effects* of foreign expropriations or revenue laws on property within the territory of the legislating state as an obligation of international law. This implies that refusal to recognise such effects could only be justified by a rule of international law. See *Williams & Humbert* v. *W & H Trade Marks* [1986] AC 368 at 433; Mosconi (1989) pp. 70ff.

[280] Lipstein (1972) p. 168. For an example of this approach see *Verenigde Deli-Maatschappijen* v. *Deutsch-Indonesische Tabak-Handelgesellschaft mbH* (1963) 28 ILR 16; Oppenheim (1992) p. 375; Domke (1960). In recent years there might also be the possibility of direct action under an investment treaty – see 3.4.1 and 5.4.1 above.

[281] See 5.3.2 above.

[282] See generally Mann (1977) pp. 46ff; Wortley (1956); Mann (1954) pp. 190ff. Staker (1987) argues (at pp. 219ff) that only truly international public policy should be invoked against the *lex situs* rule for choice of law in property, because of its international law foundations. English courts have expressed the view that international law does not affect nationalisations by a state of the property of its own citizens: see *Aksionairnoye Obschestvo AM Luther* v. *James Sagor & Co.* [1921] 3 KB 532 at 558–9; *Princess Paley Olga* v. *Weisz* [1929] 1 KB 718; but see Fachiri (1931). In Soviet writings on private international law, states which refused on the grounds of public policy to recognise Soviet nationalisations were criticised for using public policy to further the interests of the capitalist ruling class, against the correct functioning of private international law as an international law system: Garnefsky (1968) p. 19.

been moved outside the expropriating state, the recognition of proprietary rights is a far more effective mechanism for enforcing international law than the existence of an obligation to compensate, enforceable through diplomatic protection and state responsibility. To take this step, courts must recognise that international law has proprietary effects on individuals, that international law does not merely create rights for states, but international private rights. Thus, for example, the Supreme Court of Aden, at the time a British Crown colony, refused to recognise the proprietary effects of an unlawful purported nationalisation of foreign-owned oil in Iran by Iran when the oil was later seized in Aden.[283] A similar approach has been taken under Dutch[284] and French[285] law, in which the international law principles dealing with nationalisation of foreign property are considered to operate as part of the 'truly international public policy' discussed above.[286] The effect of these approaches is that an expropriation may be subject to 'review' by a foreign court – a review for compliance with the minimum standards established by international law. Foreign individuals may be seen as having internationally recognised proprietary rights, which override the normally applicable choice of law rules.

Giving effect to international private rights rather than applying foreign law is also consistent with the hierarchy embodied in the principle that national law can offer no defence for a breach of an international obligation.[287] Thus, for example, the legality of torture in a foreign state should not affect the availability of a remedy for torture victims. The ICTY has suggested that in the case of 'national measures authorising or condoning torture or absolving its perpetrators … the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act'.[288]

[283] *Anglo-Iranian Oil Co.* v. *Jaffrate (The Rose Mary)* [1953] 1 WLR 246; Holder (1968) pp. 936ff; Mann (1954) pp. 187ff; note that there were also proceedings before the ICJ, as discussed above. In the case of *In re Claim by Helbert Wagg & Co.* [1956] Ch 323 at 349, the Court found no incompatibility between the specific foreign expropriation and international law, but accepted that international law placed theoretical limits on the recognition of foreign law in English courts.

[284] See *Indonesian Corp PT Escomptobank* v. *NV Assurantie Maatschappij de Nederlanden van 1845* (1970) 40 ILR 7; *Senembah Maatschappij NV* v. *Republiek Indonesie Bank Indonesia and De Twentesche Bank NV* (1959) 30 ILR 28; discussed in Domke (1960).

[285] *SNTR* v. *CATA* (1984) 65 ILR 83; *Corp. del Cobre* v. *Bradden Copper Corp.* (1984) 65 ILR 57.

[286] Benvenisti (1993); Riphagen (1961) p. 304.

[287] See 3.5.2 and 5.4.2 above.

[288] *Prosecutor* v. *Furundzija* (1999) 38 ILM 317 at [155].

The usual *lex loci delicti* rule should thus be overruled by the requirements of international public policy, to enforce the right against torture. Courts should be prepared, more generally, to refuse to recognise foreign law that is inconsistent with international obligations. If a national system recognised the consequences of an internationally wrongful act, giving effect to a foreign law (or judgment) in breach of international law, this could even lead to derivative responsibility for the wrong.[289]

Recognition and enforcement of foreign judgments International public policy may similarly intervene in the context of the enforcement of a foreign judgment. A judgment obtained in violation of international rights or consequential of such a violation may thus be unenforceable[290] – just as evidence obtained through violating fundamental rights must be inadmissible.[291] This idea is expressly adopted in some legal systems with codified rules regarding the enforcement of foreign judgments.[292]

[289] See Arts. 16 and 41 of the *ILC Articles on State Responsibility* (2001); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion [2004] ICJ Reports 135 (note in particular the separate opinions of Judges Higgins and Kooijmans); *X* v. *Belgium and the Netherlands* (1975) 7 D&R 75; Kinsch (2004) pp. 212ff; Wortley (1956) p. 592.

[290] See e.g. *In re Macartney* [1921] 1 Ch 522 (acknowledging the possibility of a foreign judgment being based on 'a cause of action so directly contrary to general morality as on that ground alone to be refused recognition in this country', but arguably misapplying the test on the facts – see further Mills (2008) pp. 231ff); *Simpson* v. *Fogo* (1863) 1 H&M 195 (refusing (at p. 248) to enforce a foreign judgment contrary to 'what is required by the comity of nations'); *Ainslie* v. *Ainslie* (1927) 39 CLR 381 (Australia, holding that 'a finding of a foreign Court … will not be enforced if it can be shown that … the foreign law, or at least some part of the proceedings in the foreign Court, is repugnant to natural justice'); see further Schreuer (1981) pp. 257ff; Kahn-Freund (1974) p. 177ff; Mann (1954) p. 190; but see Akehurst (1973) pp. 252ff.

[291] *A & Ors* v. *Secretary of State for the Home Department* [2005] UKHL 71.

[292] The *Indian Civil Procedure Code* provides in s. 13 that:

> A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except: …
>
> (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law … [or]
> (d) where the proceedings in which the judgment was obtained are opposed to natural justice.

Similarly the *Quebec Civil Code*, Art. 3155(5) provides that the courts of Quebec can refuse to enforce a foreign judgment if the outcome of the foreign decision is 'manifestly inconsistent with public order as understood in international relations'.

Perhaps the clearest context in which these approaches can be applied is in regard to international procedural rights. The effect of international procedural rights in the application of private international law is most likely to be felt in the possibility that a court will decline to enforce a foreign judgment on the well-recognised basis that it was obtained in breach of standards of procedural fairness or 'natural justice', a particular aspect of public policy.[293] This ground for refusing to recognise or enforce a foreign judgment is sometimes criticised on the basis that it is unclear when and why a foreign breach of local procedural standards should prevent enforcement of a foreign judgment. One way this problem could be addressed is through the development of internationally agreed standards of procedural fairness.[294] In the same way that national courts apply (or should apply) 'international' standards of jurisdiction when considering whether to enforce a foreign judgment,[295] they should apply international standards of procedural fairness in considering whether to refuse enforcement. The distinction between national and international public policy is, importantly, also applicable to procedural rights. Local norms of procedural fairness, like all national public policy, should be limited, based on requirements of proximity.[296] They should only be applied where the dispute is sufficiently connected with the state in which the judgment is being enforced. International procedural rights reflect universal values and should be applied regardless of the existence of any such connection.

iii) Distinguishing European and international public policy

The analysis of these problems in Europe is further complicated by the existence of the ECHR, which reflects common (but not necessarily universal) European values, mid-way between national and truly international public policies. The existence of these standards suggests that three different approaches to procedural fairness should be adopted for three different types of cases.

First, a judgment from a *non-Convention state* which is in breach of procedural rights established under the ECHR, in particular under Article 6(1), should not automatically be refused enforcement. It is true

[293] *Adams* v. *Cape Industries Plc* [1990] Ch 433; *Armitage* v. *Nanchen* (1983) 4 FLR 293 at 300.

[294] This might be assisted by the development of international treaties – note, for example, the *Hague Service Convention* (1965).

[295] See 5.3.2 above. [296] See 5.3.5 above.

that the act of enforcement is a local and to some extent 'autonomous' act.[297] However, a refusal to enforce also means a rejection of the law as applied in another state and an application of local values to an event that may have occurred in a foreign territory – a rejection of the policy of mutual recognition inherent in private international law.[298] In this context, local public policy should be attenuated for reasons of international constitutional structure, discussed above.[299] Thus, the application of local procedural rights may only be appropriate where their breach is 'proximate'[300] or 'flagrant'.[301]

Second, a judgment from another *Convention state* that is in breach of procedural rights established under the ECHR should not be subject to 'attenuated' public policy, because the values applied here are shared and equally applicable in both states.[302] However, between EU Member States there is an argument that the application of public policy should be restricted to reflect the greater requirements of mutual respect and trust. Between all Convention States there is also an argument that the European Court of Human Rights must be given priority as a mechanism for enforcing ECHR

[297] See e.g. *K* v. *Italy* (2006) 43 EHRR 50, in which it was held (at [21]) that in enforcing a foreign judgment a court is 'acting in an autonomous manner'; *Pellegrini* v. *Italy* (2002) 35 EHRR 2; Fawcett (2007); Juratowitch (2007); Dicey, Morris and Collins (2006) p. 632; Briggs (2005); Kinsch (2004) pp. 219ff.

[298] See 1.3.3 above. [299] See 5.3.5 above.

[300] For example, if the non-Convention state had exercised extra-territorial jurisdiction over events which occurred in a Convention state, the courts of a Convention state would and should clearly be more prepared to apply Convention standards to review the conduct of the proceedings.

[301] *Government of the United States of America* v. *Montgomery (No. 2)* [2004] UKHL 37; see further Mills (2008) pp. 229ff; Fawcett (2007); Briggs (2005). The judgment in *Pellegrini* v. *Italy* (2002) 35 EHRR 2 did not specify a requirement of flagrancy, but the breach was probably flagrant in any case. The requirement for 'flagrancy' was developed in cases involving the enforcement of criminal convictions between Convention states – states were held to be 'obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice' – *Drozd and Janousek* v. *France and Spain* (1992) 14 EHRR 745 at [110]; see also *Iribarne Perez* v. *France* (1996) 22 EHRR 153; Kinsch (2004). A requirement of 'flagrancy' may also be appropriate when a court is considering an anticipatory breach rather than an actual breach, to reflect the uncertainty of the prediction. Thus, extradition must be refused if it would result in a 'flagrant denial of a fair trial' (*Soering* v. *United Kingdom* (1989) 11 EHRR 439 at [113]) or 'flagrant denial of justice' (*Mamatkulov* v. *Turkey* (2005) 41 EHRR 25 at [91]). See also *Al-Bassam* v. *Al-Bassam* [2004] EWCA Civ 857 (refusal to grant an anti-suit injunction in respect of a prospective breach of the ECHR in a foreign trial).

[302] *Maronier* v. *Larmer* [2003] QB 620; see further 4.6.5 and 5.3.5 above.

standards.[303] Thus, it may be argued that the courts of Convention states should, at least in some circumstances, refrain from reviewing decisions of the courts of other Convention states for compliance with ECHR procedural rights, unless the breach is so serious that the need to remedy the breach outweighs the need to respect the usual procedures. This may again be expressed as a requirement that a breach must be 'flagrant' for it to be a sufficient basis to refuse enforcement of the judgment. Here the flagrancy requirement derives from institutional deference rather than the attenuation of the applicable norms.

Finally, if a court of a Convention state is faced with a judgment from *any state* that breaches *international* procedural rights, the situation is different again. The public policy to be enforced here is not local but universal, and thus a flagrancy requirement is not justified as a matter of attenuating local public policy. Equally, the existence of mechanisms designed to enforce the ECHR is not relevant to the breach of international procedural rights,[304] for which no effective international enforcement institution exists. Thus, a judgment in breach of international procedural standards should not be enforced by a national court, regardless of the seriousness of the breach or degree of local connection.[305] As discussed previously, the application of international public policy does not, from a systemic perspective, undermine the coherence of the private international law system – instead, it ensures that the system functions effectively as part of the broader international law endeavour to establish and protect international private rights.

iv) Conclusions

In their recognition of international public policy, courts do not merely ensure that private international law reflects international private rights. Private international law becomes a mechanism for defining and enforcing those rights, in tension with its structural effects in support of

[303] See further Mills (2008) pp. 217ff. Note also that non-compliance with Convention rights may be justified where this is proportionate and for a legitimate purpose. This may act to reinforce international norms where the purpose is compliance with an international convention – see *Prince Hans-Adam II of Liechtenstein* v. *Germany* [2001] ECHR 467; Delmartino (2006); Kinsch (2004) pp. 224ff.

[304] Unless the judgment is from another Member State and also breaches ECHR rights – in which case the analysis set out above applies.

[305] Carter (1993). A court might, however, give some deference to the view of the relevant international legal obligation taken by the foreign court in determining whether or not there is a breach, where the obligation is expressed in terms which allow a 'margin of appreciation' – see 3.5.3 above.

pluralism and subsidiarity. The rules of private international law, in invoking and giving effect to international public policy, operate as a system of rights protection in the same way, explored in Chapter 4, that internal private international law rules in federal systems protect constitutional rights. The scope of international private rights is expanding, and the idea of international public policy provides a conduit through which domestic courts should internalise and promulgate those norms. The idea of international public policy opens a window in the division between international and national law, providing a mechanism through which international rights may be enforced directly in international disputes before national courts.

5.4.5. International harmonisation of procedural law

The previous section explored the role of international procedural law as part of international public policy, and therefore as an exception to the usual obligations to apply foreign law or recognise and enforce a foreign judgment through private international law. The further development of international procedural rights would have a more general additional effect on private international law. It is universally accepted that, even when the applicable law of a dispute is foreign law, the law of the forum governs procedure, although there is much dispute about what is procedural and what is substantive.[306] One of the strongest arguments against characterising an issue as a matter of procedure rather than substance is that it increases the possibility of inconsistent legal treatment of a dispute between states, thereby creating incentives for forum shopping and undermining the systemic objectives of private international law discussed in Chapter 1.[307] Narrower interpretations of 'procedure' are more consistent with these objectives, and rules limiting the jurisdiction of national courts also go some way to addressing this concern by restricting the different procedural rules which might be applied. There frequently remains, however, the possibility of different national courts exercising overlapping jurisdiction and thus applying different rules of procedure. This is particularly problematic in cases where factual issues are at stake, and the applicable rules of evidence may be decisive in the dispute.

[306] See *Harding* v. *Wealands* [2006] UKHL 32; Weintraub (2007); note by contrast the *Rome II Regulation* (2007) Art. 15.

[307] See 1.4 above.

Although international standards of procedure are presently relatively undeveloped, it is evident that as they increase in scope and clarity and are given greater domestic effect this might diminish the differentiation in the procedural treatment of disputes between national courts. The application of the law of the forum to procedural questions will be of diminished significance if there are minimum international standards operating which effectively harmonise procedural law. This coordination of legal orders would not be achieved through private international law but through a harmonisation of law, an alternative strategy for preventing conflicting regulation which was discussed in Chapter 1.[308] From a systemic perspective, while the application of *national* procedural standards risks undermining the coherence and effectiveness of private international law, the harmonisation of procedural rights based on *international* standards assists in achieving the aim of minimising the possibility of inconsistent legal treatment of disputes. Such harmonisation of procedural rights, as with any development of international private rights, could, however, only be achieved at the cost of diversity in national procedural law, and is thus itself in tension with the principle of subsidiarity.

5.5 International economic law and private international law

The European common market and its associated freedoms have, as explored in Chapter 4,[309] provided the impetus for the adoption of European private international law rules on jurisdiction, the recognition and enforcement of foreign judgments, and choice of law. The objective of a free market is also increasingly accepted as an international norm and reflected in a range of international economic law, particularly dealing with international trade and investment.[310] This raises the obvious question of the impact of this law on private international law at the global level. Just as the European internal market affects private international law within the EU through the twin dimensions of structure and rights, the principles of international economic law define both structural principles and specific individual rights and freedoms, each of which has a potential impact on private international law.[311]

[308] See 1.5 above. [309] See 4.6 above. [310] See 3.4.1 and 5.4.1 above.

[311] See generally Michaels (2008) pp. 129ff (review in English of Leible and Ruffert (2006), in German); Bederman (2007); Vest (2004) p. 798; Weiler (2003) pp. 37–8; Perez (2001); Mengozzi (2001); Koh (1996) pp. 20ff; Paul (1995); Trachtman (1993).

The structural impact of international economic law is that it provides a further justification and impetus for the development of private international law according to an international perspective, and thus for its global harmonisation. Coordinated rules of private international law may be viewed as necessary for the smooth functioning of the global economy, in much the same way as they are deemed essential for the EU internal market. If the absence of coordinated private international law rules would constitute an intolerable barrier to free movement between EU Member States, then it seems evident that the absence of international equivalents must constitute a barrier to global trade. To some extent this is merely a restatement of one of the traditional systemic objectives of private international law as an aspect of the principles of 'conflicts justice' examined in Chapter 1 – the elimination of the inefficiencies occasioned by 'forum shopping'.

The impact of international economic law on private international law may also be analysed in a different way, as a source of rights and principles which potentially affect the content of rules of private international law. While the development of international economic law (particularly through the WTO) has focused on interstate disputes involving barriers to trade such as tariffs and subsidies, it is not difficult to imagine the principles having a wider application which might impact directly on private international law.

The issue here is related to the question, examined in Chapter 4, of the relationship between obligations of 'mutual recognition', particularly the country of origin rule, and rules of private international law in the EU.[312] One argument is that principles of international economic law could dictate choice of law rules, specifying the circumstances under which states can apply national law or foreign law. But the possible implications of this argument are difficult to determine. They are most likely to intersect with rules of private international law in the context of the legal treatment by a state of foreign nationals.

Two conceptions of international private rights in this area were noted above: a right of national treatment, and a right for an international minimum standard of treatment.[313] These competing principles may affect private international law rules in a variety of complex ways.[314] In a private international law dispute, the obligation to ensure national treatment might seem to imply the application of the law of the forum,

[312] See 4.6.7 above. [313] See 5.4.1 above.
[314] Mann (1977) pp. 36ff; Freeman (1938) pp. 504ff; compare 4.6.7 above.

to ensure that the foreigner will be governed by the same rules applicable to local disputes. The application of a foreign law based on a choice of law rule that was, for example, affected by the domicile, residence or nationality of a foreign party might be perceived as discriminating against foreign nationals. Obligations of economic non-discrimination (national or most favoured nation treatment)[315] established under bilateral or multilateral treaties dealing with international trade or investment may come to be seen as invalidating discriminatory rules of private international law in much the same way as the internationally recognised prohibition on racial discrimination.

However, the application of forum law in all circumstances will clearly lead to inappropriate results, not least a violation by the state of its obligations under international rules of jurisdiction.[316] If the dispute is not sufficiently closely connected with the forum state, the international minimum standard of treatment, or concerns of discriminating against local defendants,[317] may to the contrary seem to *require* the application of a foreign law which is much more closely connected to the dispute.

Perhaps the better view is that international economic law should be seen as establishing evolving principles of international public policy, in much the same way as the country of origin rule was interpreted as a rule of European public policy in Chapter 4. These principles would thus not affect private international law rules directly, but operate 'through' private international law, as a second stage of regulation. The ordinary application of choice of law rules should determine the applicable law, but then that determination may be rejected where, in the circumstances of the case, it would violate international economic obligations, such as obligations of national treatment or minimum standards of treatment.

The potential effects of international economic law on private international law are broad, and their scope has barely begun to be explored. As this influence develops, it will again be useful to draw on analogies with the role of private international law in federal systems and internal markets examined in Chapter 4. The needs of the internal market have provided the foundations for European private international law, for the idea that inter-State private international law is a constitutional issue in the US, and to some extent for the recent dramatic federalisation of private international law in Australia and Canada. International economic law, seeking to construct and perfect a global market economy,

[315] See 5.4.1 above. [316] See 5.3 above. [317] See e.g. Goldsmith and Sykes (2007).

may equally provide the foundations for a revolutionary internationalism in private international law.

5.6 Party autonomy

The development of international private rights discussed above and in Chapter 3, ranging from human rights to international economic rights, is part of the increasing recognition of the 'sovereignty' of the individual in international law. This provides an essential explanation for a fundamental and almost universal[318] feature of private international law: the ability for the parties to choose the court or applicable law governing their dispute, known as party autonomy.[319] This idea encapsulates a broad range of rules or techniques of private international law. In the context of jurisdiction, for example, it includes the ability to select a forum based on a jurisdiction clause in a contract,[320] submission at the time of commencement of proceedings,[321] or even an agreed or deemed domicile.[322] It is also arguably the best explanation, albeit one that is not entirely satisfactory, for the common law assertion of jurisdiction over contracts governed by the law of the forum.[323]

Historically, the existence of party autonomy has been viewed as a serious problem for theorists of private international law attempting to adopt an international perspective. Accounts of private international law attempting to identify its foundations in international law have depended on positivist models of international law in which state sovereigns are the only recognised actors. These accounts foundered when faced with the problem of providing an explanation for the autonomy of the parties in private international law rules. If jurisdiction and choice of

[318] Note the recognition of party autonomy by the PCIJ in the *Serbian and Brazilian Loans* cases, *France* v. *Yugoslavia; France* v. *Brazil* (1929) PCIJ Ser A, Nos. 20–1, Judgments 14–15 at 41. One state that retains a traditional civil law antipathy to party autonomy is Brazil – for criticism see Stringer (2006). France has a relatively restricted approach to party choice of forum – see the *Nouveau Code de procédure civile*, Art. 48; Audit (2006) pp. 323ff.

[319] See generally Nygh (1999); Yntema (1955); Yntema (1952).

[320] See e.g. the *Brussels Regulation* (2001) Art. 23.

[321] See e.g. *ibid*. Art. 24.

[322] See the *French Civil Code*, Art. 111; but note the limitations in the *Nouveau Code de procédure civile*, Art. 48. A degree of autonomy is also involved in the use of 'domicile' as a connecting factor, which in itself delegates an element of control to the individual – see 5.3.4 above.

[323] See e.g. the English *Civil Procedure Rules* 6.36, PD 6B, 3.1(6)(c). The US has similarly asserted jurisdiction over private parties based on 'submission clauses' – see Lowe (1984).

law are about state power, how can individuals choose the rules which apply? How can individuals give or take away the powers of states? Because jurisdiction based on submission by the parties requires no other connection with the state asserting jurisdiction, private international lawyers have traditionally viewed party autonomy as indicating that the only limits on the national regulation of private international law are those concerned with private justice or fairness – concerns which are met if the defendant has submitted. Faced with this argument, it might seem that the only alternatives are rejecting the idea that private international law is about the allocation of regulatory authority between states, which is the response taken in most private international law theory, or making unrealistic arguments against party autonomy.[324]

Contemporary international law, however, provides a simple explanation. Once the acknowledgement is made of an 'individual sovereignty' which is balanced against that of the state, the widespread recognition of party autonomy is clearly compatible with an argument that the foundations of private international law lie in broader international norms.[325] In fact, it provides a better explanation for party autonomy than the usual justifications based on 'justice' or 'party expectations', explored in Chapter 1. Although party autonomy has been a strong feature of the common law,[326] it was only with the introduction of European regulation that party autonomy became a universally accepted feature of private international law in questions of both jurisdiction and the

[324] Under Beale's *First Restatement (Conflicts)* (1934) approach to private international law, for example, party autonomy was rejected because otherwise individuals were acting as 'legislators'. This encouraged scepticism about private international law rules more generally – see 4.3.2 above.

[325] The deference to party autonomy in private international law was described as reflecting 'the sovereign will of the parties' by Judge Bustamente in his Separate Opinion in the *Serbian and Brazilian Loans* cases, *France* v. *Yugoslavia; France* v. *Brazil* (1929) PCIJ Ser A, Nos. 20–1, Judgments 14–15 at 53. Nygh (1999) argues at (p. 45) that party autonomy itself has the status of a rule of customary international law, although given the uncertain boundaries of the rule it is arguably more accurate to describe it as an implication of other international norms. Note the recognition of the affinity between international norms and private international law rules on party autonomy in the resolution of the Institute of International Law on 'The Autonomy of the Parties in International Contracts Between Private Persons or Entities' (1991) (see www.idi-iil.org/idiE/resolutionsE/1991_bal_02_en.pdf).

[326] Party autonomy may also provide the best justification for the controversial 'voluntary' character of private international law itself in English law – the fact that (generally) if the parties fail to prove foreign law, English law applies. One way of justifying this is as an implied choice of English law during the proceedings. See generally Fentiman (1998).

applicable law in contract across Europe.[327] This does not reflect a change in conceptions of ideas of private 'justice', but, in addition to the development of individual sovereignty in international law, a belief that party autonomy in private international law was a necessary consequence of the economic freedoms incidental to the common market.[328] The international status of party autonomy in the context of jurisdiction has been confirmed by the preparation and adoption of the *Choice of Court Convention* (2005) by the Hague Conference on Private International Law.[329] Party autonomy is an abstraction of free movement principles. It enables a choice of legal regulation without the need for physical movement, de-territorialising the boundaries between regulatory systems and opening them up to competition.

One possible way of explaining the role of party autonomy in private international law is to view it as an example of the idea of international public policy discussed above,[330] but in the positive form of a mandatory rule. Party autonomy may be characterised as a universal international norm, reflecting international private rights, which would override inconsistent rules of national private international law, including the selection of a law or jurisdiction contrary to party choice. In this case, the norm is so well accepted by states that it is typically expressly adopted as a preliminary and overriding part of national private international law rules. This characterisation raises the difficult question of whether there is an international norm requiring adherence to party autonomy in national law. Such a position would be controversial, but would be consistent with the growing recognition of individual rights and autonomy in international law. This would, however, still be potentially subject to national forms of public policy, both positive (through mandatory rules) and negative (through the refusal to apply foreign law), which are in fact recognised limits on party autonomy. The difficulty of determining priority in the relationship between these norms demonstrates the lack of a clear hierarchy between international, national and individual sources of normativity, as explored in Chapter 3.

[327] *Brussels Regulation* (2001) Art. 23, which replaced the similar Art. 17 of the *Brussels Convention* (1968); *Rome Convention* (1980) Art. 3; *Rome I Regulation* (2008) Art. 3.

[328] The special status of party autonomy is also reflected in US law, where party autonomy probably has the status of federal common law, reflecting the national interest in the smooth operation of commerce: *The Bremen* v. *Zapata Off-shore Co*. (1972) 407 US 1; Maier (1982) pp. 312ff; see further 4.3.2 above.

[329] Concluded on 30 June 2005; not yet in force.

[330] See 5.4.4 above.

The limits of party autonomy have frequently been contentious. For example, it has been unclear whether parties can choose a law or court completely unconnected to their dispute[331] or a law which is not the law of any state.[332] These points of dispute highlight the intimate connection between private international law rules and the regulation of the global economy. Chapter 2 discussed the separation of private and public international law as part of the construction of a 'private' global market in the late nineteenth century. It also examined the way that earlier private international lawyers accepted party autonomy because they viewed individual autonomy as an essential part of the law of nations which unified public and private international law, a part of natural law. This argument can be updated for the twenty-first century with the view that party autonomy is prior to national law, to the sovereignty of states, because it is part of the international law which defines and qualifies that sovereignty.[333]

Rules of private international law strike a balance between facilitating internationally recognised individual autonomy and respect for state regulatory authority – between individual freedom and collective cultural identity.[334] As explored in Chapter 3, the implicit recognition of pluralism underlying private international law does not merely involve a plurality of state legal orders. In an authoritarian regime or one that does not respect minority rights, state law may not in any case be a legitimate

[331] *Vita Food Products Inc.* v. *Unus Shipping Co.* [1939] AC 277. There are no such limits under the *Brussels Regulation* (2001), but the *Choice of Court Convention* (2005) retains (in Art. 19) a discretion for national courts to decline jurisdiction over a dispute unconnected to the forum state, and (in Art. 20) a discretion for national courts to decline to recognise a foreign judgment awarded in the court chosen by the parties but otherwise unconnected to the judgment state. A distinct 'interest-based' approach is adopted in some US jurisdictions. If there is no connection between a dispute and New York, the selection of New York courts or law is only automatically enforced if the dispute concerns a contract worth more than a threshold amount, $250,000 for a choice of law and $1,000,000 for a choice of forum: *New York General Obligations Law* ss. 5–1401, 5–1402; but this is subject to constitutional limitations – see *Lehman Brothers Commercial Corp.* v. *Minmetals International Non-Ferrous Metals Trading Co.* (2000) 179 F Supp 2d 118.

[332] See e.g. Brand (2006). It is generally accepted that the *Rome Convention* (1980), *Rome I Regulation* (2008) and *Rome II Regulation* (2007) require the selection of the law of a state. The *Rome I Regulation Proposal* (2005) controversially also permitted (in Art. 3 (2)) the selection of 'the principles and rules of the substantive law of contract recognised internationally or in the Community'. This drafting, which appears intended to support the development of unified European contract law rather than inspired by party autonomy, was not included in the *Rome I Regulation* (2008), but see Recital 14.

[333] Mostermans (1990) p. 123. [334] Wai (2002); see generally Gutmann (1994).

embodiment of shared community values, a reflection of a genuine legal culture, and thus a recognition of the state may actually deny recognition to the individual. The boundaries of party autonomy are thus not merely matters of doctrinal uncertainty, but points of tension between the view of private international law as constitutional structure and the view of private international law as a system of international rights protection – recognising the 'sovereignty' of individuals.

Where party autonomy has in the past presented a problem for theories attempting to explain the public international law foundations of private international law, such problems do not arise under the more complex, polycentric approach to international law developed in Chapter 3. The limits of party autonomy are a balance struck between the vertical and horizontal dimensions of international private international law.

5.7 Subsidiarity in private international law

Private international law rules are not perfect reflections of international norms. As noted in Chapter 1,[335] there is insufficient evidence to justify a claim that there are many, if any, universally agreed rules of private international law. To some extent this can be identified as the product of insufficient appreciation in private international law theory and practice of the connection between public and private international law, which this book has sought to address. There is, however, a deeper cause that must be acknowledged. The study of the relationship between private international law and constitutional law in federal systems in Chapter 4 once again, by analogy, provides an explanation for this phenomenon.

Chapter 4 examined the way that federal constitutions place limits on the jurisdiction of State courts, affect the construction of State choice of law rules, and impose requirements for inter-State recognition of judgments. In the EU, Canada and Australia, the adoption of a systemic perspective and the recognition of the function of private international law rules in the ordering of the federal system has led to the development of *federal* private international law rules. These systems demonstrate the necessity of approaching private international law as a 'public' system of ordering of regulatory authority. They also demonstrate how the shaping of private international law rules is driven by systemic policy objectives – in

[335] See 1.6 above.

the EU, for example, by the need for certainty and predictability to assist in the efficient functioning of the internal market.

However, in examining the international system and the international functioning of private international law, the most directly analogous federal system is the US. In the US, private international law is best understood as a complex blend of both federal (constitutional) and State law, rejecting the dichotomy constructed in older jurisprudence. Constitutional norms police the outer limits of private international law, but do not define private international law rules as a matter of direct constitutional implication. Similarly, in the international system, clearly defined private international law rules are not directly implied by public international law. Instead, international norms construct the architecture of private international law, placing limits on the regulatory authority of national courts, but permitting states to exercise discretion in the exercise of that authority. This hybrid character of private international law rules explains the long-running problems in characterising the subject – 'it is difficult to make Private International Law fit any one single conception, whether municipal law or international law, for in fact it is a complex of both'.[336]

Drawing again on the analysis of the US in Chapter 4,[337] an explanation for the limited influence of international norms on private international law is provided by the principle of subsidiarity. Private international law provides a method to maximise state interests in both retaining national substantive legal differentiation and ensuring a coordinated international system for the resolution of private disputes. It thus operates in support of the principle of subsidiarity, as applied to substantive private law. But the pursuit of systemic objectives, of international harmonisation and coordination of private international law, itself comes at a cost. The more that private international law is subject to international harmonisation, the less it is able to reflect different *national* perspectives on what the appropriate mechanisms of *global* ordering should be. Thus, universalisation of private international law rules is in tension with pluralism in ideas of international ordering and the possible benefits of regulatory competition between rules developed in different states which embody those ideas, that is, with the principle of subsidiarity as applied to private international law itself. The diversity of rules of private international law thus reflects the existence of a range of theories of international order, the existence of different views concerning the

[336] Starke (1936) p. 399. [337] See 4.3.7 above.

character of international law rules on jurisdiction. It is this more fundamental divergence of views that is behind the continuing debates over the meaning and extent of international limits of territoriality and personality in the varying contexts in which they arise in private international law.

This Chapter has not sought to provide a definitive answer to the question of whether the balance between international and national sources of authority for private international law is right – whether private international law ought to be 'more international'. It has also not sought to provide an answer to the question of what balance should be struck between competing territorial and personal ideas of global ordering. It has attempted only to reveal the competing norms underlying private international law and the grounds on which the evaluation of private international law ought to be made. The development and adoption of only limited principles of global ordering as part of international law, and thus the acceptance of a degree of diversity in different national rules of private international law, indicates that even within private international law there is a need to balance the costs and benefits of internationalisation against those of localised regulation. Private international law is not only part of the architecture of international ordering, but also subject to the competing values and principles whose influence it moderates.

6

Conclusions

The analysis of both public and private international law presented in this book undermines their usual separation into distinct disciplines, their perceived diffluence into parallel streams. The adoption of an international systemic perspective on private international law instead reveals that this division masks an essential confluence in the two branches of international law.

Private international law was, as explored in Chapter 2, invented and historically conceived as part of an international system of natural law, the law of nations, designed to accommodate pluralism in legal orders. The variety of theories in its early development variously emphasised the importance of territorial or personal connections, but they each had in common a 'systemic' conception of private international law as international in both character and function. Chapter 2 also examined the way that in the nineteenth century, under the influence of ideas of international positivism, private international law became reconceptualised as purely autonomous national law – an expression of the 'sovereignty' of the state. Modern perspectives on private international law predominantly view it as an aspect of national law reflecting domestic ideas of 'justice' and conceptions of private rights, and only equivocally acknowledge its international dimension through the concept of 'comity'. This approach is an unsatisfactory explanation of private international law, because it fails to acknowledge the implicit adoption of the idea of 'justice pluralism', introduced in Chapter 1. The very existence of rules of private international law implies an acceptance that a foreign conception of the outcome of a dispute may, depending on the circumstances, be more just than that embodied in local legal principles. Justice pluralism is a principle of tolerance and of mutual recognition. The differences between legal systems are not necessarily viewed as better or worse, but as variations of national legal culture whose very diversity is valued.

The failure to recognise this foundational principle has left private international legal theory and private international lawyers blind to the

critical role of international norms in private international law. Equally, it has left international lawyers oblivious to the important function of private international law, which is dismissed as 'merely' national, thereby decreasing the effectiveness of attempts to regulate the domain of private international disputes. Both public and private international lawyers fail to recognise that, for all its flaws and imperfections, its failures of policy and technique, the operation of private international law constitutes an international system of global regulatory ordering – a hidden (private) international law. This theoretical failing is both cause and effect of the diversification of private international law approaches in the twentieth century, which has undermined the effectiveness of private international law as a system, and instead constructed the 'conflict of laws' as an obstacle to international order.

The challenges to international positivism, explored in Chapter 3, show that the theoretical foundations for this idea of private international law are artificial and outdated. Under the influence of positivist ideas of *a priori* sovereign equality, the early development of public international law was characterised by a disproportionate reliance on private law analogies, engendering a tendency towards an anarchic international law system and a modern counter-movement towards greater universalism. International norms and institutions have increasingly been developed which constrain the sovereign will of states, creating a new idea of state sovereignty under law and thereby constructing an international public order that balances the demands of pluralism and universalism. Chapter 3 identified and advocated the further development of international 'secondary norms', limits of international public authority. It argued that these are emerging as part of the evolution at the international level of ideas of mutual recognition between a society of states – an international 'federal' constitutionalism. This suggests that the experiences of federal systems can provide alternative foundations for both public and private international law. The idea of distributed or peer governance further demonstrates that this does not depend on the existence of an international government. This book has explored an analogy between the international and federal levels, arguing that ideas of private international law established in federal systems should be applied in understanding and developing the role of private international law in the international legal order. It is a reinvention of the traditional internationalism of private international law explored in Chapter 2, founded not only on the aspiration of an international society of states, but on its legalisation through the constitutionalisation of international law.

The analysis of the internal private international law of federal systems in Chapter 4 reveals that in this context the original 'systemic' idea of private international law has been preserved. In the US, the early history of internal private international law emphasised its connection with constitutional norms, particularly the Due Process and Full Faith and Credit clauses. Although their influence after the middle of the twentieth century is relatively restricted, constitutional norms still shape rules of internal private international law, which blend together federal and State influences. In Australia and Canada, the historical restraints of the common law approach have begun to be shaken off in the last two decades, and each system has introduced federal private international law rules in direct recognition of the impact of principles of constitutional structure – private international law rules which are viewed as implications of the federal order. In the EU, the project of European regulation of private international law conceptualises it as inherently connected with principles of European federalism and legal obligations of mutual recognition, including both European rights and the principles underlying the internal market.

The development of federalised private international law rules within each of these systems has involved an implicit recognition that private international law is closely connected with constitutional law and is in some cases a direct implication of constitutional principles. Private international law rules are viewed as part of the definition of the architecture of the federal system, secondary norms which shape the distribution of the private law regulatory authority of States across both horizontal and vertical dimensions, embodying principles of constitutional structure and rights protection.

The central insight of the experiences of federal systems is thus that private international law must be understood and evaluated from a systemic perspective, as a form of international *public* law – a system of secondary legal norms for the allocation, the 'mapping', of regulatory authority. These norms are a response to the problem of potentially conflicting national substantive laws created by diversity in national regulatory systems, by the acceptance of 'justice pluralism'. The costs of this regulatory conflict create an incentive for more international harmonisation of substantive law. However, as explored in Chapter 3, the universalisation of norms also carries a price – its impact on local mechanisms of accountability and legitimacy, and on the ability of law to reflect and accommodate diverse local cultures. These values are expressed through the norm of subsidiarity, which is increasingly

adopted in a variety of contexts as a principle of international law. This reflects a wider acknowledgment of the need to moderate the tension between a range of sources of normativity, including individual, state and universal.

When viewed from a systemic perspective, the components of private international law, rules on jurisdiction, applicable law, and the recognition and enforcement of foreign judgments, are revealed to have a functional commonality that responds to this potential for regulatory conflict, in support of the principle of subsidiarity. They are each limited and imperfect techniques aimed at reducing the possibility of inconsistent legal treatment of disputes, by (respectively) reducing the number of states that can hear a dispute, increasing the likelihood that each state will apply the same substantive rules to resolve a dispute, and decreasing the likelihood that a dispute heard in one state will be re-heard in another state.

Pursued in combination, the components of private international law reinforce and support each other. The rules of jurisdiction and the applicable law operate in conjunction to determine the law applicable to a dispute, and thus implicitly the regulatory authority of the potentially applicable legal orders. Rules of jurisdiction determine the scope of application of procedural law, which governs the determination of facts. Rules of applicable law determine the scope of application of substantive private law. These rules together do not only decide which legal principles are applied to govern a dispute. They also constitute a process of mutual recognition of other states and the validity of their norms. The rules on the recognition and enforcement of foreign judgments involve further overlapping considerations. The decision whether to recognise or enforce a foreign judgment does not depend on an agreement with the substantive outcome of the foreign judicial process. When courts decide whether to recognise and enforce a foreign judgment, the primary question is not whether a local court would have made the same decision, but whether the judgment court had jurisdiction to make its determination. The recognition and enforcement of a foreign judgment therefore also essentially involves an endorsement of the jurisdiction asserted by the judgment court.

This analysis highlights the fact that rules of private international law are not primarily concerned with questions of private justice or fairness (although such concerns may arise in the question of whether jurisdiction will be *exercised*), but with the implications of justice pluralism, of 'meta-justice' – the acceptance that different legal orders may equally be

justly applied depending on the context, and the attempt to coordinate the consequential diversity of rules of private law. This is not to advocate a particular degree of tolerance between legal cultures, but merely to observe that private international law provides a set of tools which order and preserve the existence of diverse norms by minimising the potential for regulatory conflict.

As explored in Chapter 5, private international law effects this legal ordering by reflecting and embodying underlying international norms, defining the architecture of the international order across two dimensions. The horizontal dimension of constitutional structure deals with the distribution of regulatory authority between states, linked with principles of public international law jurisdiction. It is concerned with the way in which international norms operate 'behind' and 'through' private international law, providing the foundations for any assertion of regulatory authority by a state, including in the context of private law. This underlying structural order defines a global map of the regulatory authority of different states, of the overlapping and competing domains of influence of their legal 'cultures'. The vertical dimension of international rights protection deals with the distribution of regulatory authority between international and national law. It is concerned with the way in which international norms operate 'within' private international law, defining international rights which are recognised as part of the formulation and application of private international law rules.

Private international law rules are therefore fundamentally concerned with the allocation of regulatory authority between the international and national levels, and the balance between centralisation and diversity embodied in the principle of subsidiarity. In ordering the allocation of authority *between states*, private international law also minimises the potential negative effects of allocating authority *to states*, and reduces the need to address problems at the international level. By decreasing the incentives for substantive harmonisation, private international law acts as a *decentralising* influence in a legal order. This is safeguarded by the way that, as explored in Chapter 5, private international law also accommodates and reflects ideas of international rights protection that must be balanced against the demands of horizontal, structural norms. This balancing of norms does not demand that a fixed boundary be drawn between the international and national domains. It requires an understanding of the flexible and dynamic interaction between international and national levels of regulation, which necessitates an appreciation of the role of rules of private international law in constructing an international legal order constituted by national regulatory systems.

The international systemic perspective on private international law highlights the values of 'conflicts justice' and 'systemic justice' – the creation of a coherent legal order in the service of harmonious pluralism. This should not be taken, however, as a claim that 'harmonisation' *per se* is the only objective of private international law. The international legal order reflected and embodied in rules of private international law should not merely be evaluated on its effectiveness, that is, on the amount of harmonisation and the degree of order achieved. It must also be evaluated on the basis of the justness of the ordering it constructs, the fairness of the international structural norms and international rights embodied within it. The contents of private international law rules identify which types of connections are viewed as important in the applicable field of regulation. The division of regulatory authority is thus not merely a matter of 'rational' ordering between states. Rather, as suggested in Chapter 1, this division reflects a determination (of 'meta-justice') that a source of regulatory authority may be 'justly' brought to bear on a dispute.

In deciding what sorts of connections and context should determine which legal order governs a dispute, the rules of private international law embody a determination of what should be the appropriate ordering of international regulatory authority. In the history of public and private international law, this has primarily involved a contest between two fundamentally distinct ideas of global ordering – the personal division of the world into different peoples, and the territorial division of the world into geographical regions. The decision to adopt a rule of jurisdiction or a choice of law rule based on territorial or personal connecting factors thus serves two purposes. It is functionally designed to minimise overlapping domains of regulatory authority. At the same time, it implicitly reflects a determination that regulatory authority in that field should be ordered according to theories of territoriality or personality. This analysis reveals the hidden norms underlying rules of private international law – not norms of private justice or fairness, but norms concerned with the public international question, the international constitutional question, of the way in which the world should be divided into legal orders.

This is, of course, not to claim that all states agree on the form that this ordering should take. The diversity of private international law rules in different states not only reflects the blending of the international question of the existence of regulatory authority and the domestic question of its exercise, but indicates that there are different and discordant

approaches in different legal traditions. It also reflects the failure of private international law theorists and lawmakers to recognise sufficiently the importance of adopting a systemic perspective. Where such a perspective is adopted, differences in private international law rules may still exist between states, representing competing conceptions of global ordering, different 'territorial' or 'personal' ideas of the way that regulatory authority should be organised.

This does not, however, exclude the functional commonality of private international law rules, the fact that they serve the common systemic purpose of limiting the regulatory authority of states to minimise conflict between legal orders in the regulation of private disputes. It also does not undermine the legitimacy of viewing these rules as operating as a distributed system of international legal ordering, effected by national legal systems. The fact that such differences are possible reflects the fact that the international system of private international law is not a centralised network, which 'dictates' specific national law rules. Rather, private international law is a distributed 'peer network' constituted by rules of national law and decisions of national courts. The existence of differences in private international law rules between states does mean, however, that the effectiveness of the rules at performing their systemic function is diminished. The international ordering constituted by private international law rules is not coordinated, but fractured and dissonant.

There is an additional and distinct type of diversity in private international law rules: the existence of different rules for disputes involving different areas of law. However, while diversity between different states undermines the effectiveness of private international law, diversity between types of legal disputes reveals only a specialisation of rules. It does not necessarily suggest a defective systematisation, but rather indicates that for each type of dispute there is a different consideration of whether personal or territorial criteria are the most appropriate for determining the applicable legal order. This diversity merely reflects the fact that there is no universal answer to the question of whether personal or territorial criteria should form the basis of the international ordering of the regulatory authority of states. Instead, the justness of different theories of ordering varies across different aspects and subjects of legal regulation, and thus different criteria will be appropriate for different types of disputes.

This is particularly evident in the variety of choice of law rules, which may be viewed on a spectrum depending on the extent to which they reflect territorial or personal ideas of international ordering. At one

extreme are disputes involving immovable property, which are invariably regulated by a strictly territorial *lex situs* rule. This reflects a broad agreement on a territorial division of regulatory authority over land. The 'map' of regulatory authority for disputes involving immovable property thus corresponds to the territorial map of the geographical boundaries between states. By contrast, the modern approach to choice of law in contract (in the absence of party choice) invariably uses a flexible 'proper law' test which permits consideration of a range of personal and territorial elements, including the nationality, domicile and residence of the parties, as well as the location of events associated with the dispute, such as the place of performance of the contract. Choice of law in tort is similarly frequently governed by a territorial *lex loci delicti* rule, but this is subject to exceptions based on the nationality or residence of the parties. The adoption of these tests reflects a decision that in these areas of law neither personal nor territorial factors exclusively provide a sound basis for ordering the regulatory authority of states, but that instead this should be done flexibly taking both types of connections into consideration. By contrast again, questions of family law and individual status are almost always regulated by a law which is chosen on the basis of personal characteristics of the parties. This reflects a general view that in this field of law legal orders should not be subject to territorial divisions, but rather the allocation of regulatory authority should be made based on aspects of the personal identity of the individuals involved. Thus, individuals should not be automatically subject to the laws of the territory in which they are present, but to some extent can carry the law of their personal identity with them, by virtue of maintaining a different place of residence or domicile, or a foreign nationality. The 'map' of regulatory authority in these matters does not look like a geographical map of states, with fixed boundaries, but a map of cultures with a variety of overlapping shades of influence and effect.

This map is complicated further by the fact that, as explored in Chapter 5, rules of private international law also give effect to party autonomy in a variety of ways. Party autonomy has traditionally been difficult to reconcile with an international perspective on private international law, because it was unclear how the powers of states could be affected by the actions of individuals. The fact that individuals are able to choose the jurisdiction or applicable law governing their dispute does not deny that private international law rules serve the function of ordering regulatory authority. It merely indicates that private international law recognises, as does contemporary public international law, the

polycentric existence of a range of contesting 'authorities' in international law, explored in Chapter 3. Giving effect to jurisdiction and choice of law agreements gives individuals the power to determine the law (procedural and substantive) which applies to them, and thus to 'self-determine' an aspect of their own regulation, recognising that not only states but also individuals possess a form of 'sovereignty'.

When viewed from a systemic perspective, these different connecting factors – territoriality, nationality, residence, domicile and party autonomy – correspond to different ideas of international ordering, which reflect broader debates about personal identity and multiculturalism. Territorial connecting factors require all persons located or acting in a state to comply with the same regulatory system. When residence is used as a connecting factor in a rule governing jurisdiction or the applicable law, only people settled and living in that state will be required to follow the same laws, and be subject to the same courts. If nationality is used as the basis for jurisdiction or to determine the applicable law, migrants will be regulated by their national legal culture, and may be subject to their national courts regardless of where they choose to live. If domicile is used as the connecting factor, this will usually involve the combination of a territorial test of residence and the actual intentions of the individual involved. As with party autonomy, this gives the individual a say in the extent to which they participate in a legal culture. The use of these different connecting factors demonstrates the existence and application of different approaches to global ordering, reflecting different theories of the relationship between territory, personality, and individual and collective identity.

A universal feature of international private international law rules dealing with the application of foreign law and the recognition and enforcement of foreign judgments is that they allow for the possibility of a public policy exception. The fact that local laws and policies of the forum state can 'override' foreign law or a foreign decision in this way might seem to suggest that the application of foreign law or the recognition of a foreign judgment is discretionary. In reality, this perception is only the result of a pervasive under-analysis of the application of rules of public policy. Public policy has a role in expressing the limits of the policy of tolerance of difference implicit in private international law, a role which is diminished between the States of a federal system which are bound by stronger obligations of mutual respect, as explored in Chapter 4. However, the invocation of public policy is and ought to be subject to considerations of proximity and relativity that are generally

operative in practice but largely unarticulated, as explored in Chapter 5. The decision whether to apply public policy involves a determination of how closely connected the dispute is to the forum. This entails examining the same public international territorial and personal foundations involved in choice of law rules themselves. At the same time, there is a need to recognise the special function of international public policy and its particular role as part of the mechanism for the protection of international private rights. This is an aspect of the vertical division of regulatory authority between the international and national levels, in tension with the structural obligations which function in support of pluralism and subsidiarity.

This book has not set out to answer the essentially political question of how much tolerance there should be between legal orders, but to analyse the legal tools which articulate and shape the responses to this question. Viewed with this conceptual framework, the limits of public policy, the boundaries of tolerance, are revealed to be themselves shaped by norms of international law. The limiting role played by public policy does not undermine the idea that the foundations of private international law lie in theories of international ordering. While public policy does provide limits for the international public ordering of private international law, public policy is in fact itself constrained by that order and by the acceptance of 'justice pluralism'.

Viewed from the perspective of horizontal constitutional structure or vertical international rights protection, the difficulties in constructing rules and systems of private international law are thus not merely technical legal problems, but also reflect critical issues faced by any international ordering. They are complex political decisions concerning the balance between universalism (or absolutism) and pluralism, between the international and the national, between the state and the global economy, between territorial and personal conceptions of world ordering, between order and rights. Private international law rules are recognised not merely as the product of international norms, but as a manifestation of them, as part of their constitution. The dynamism, complexity and range of effects of private international law mean that it is affected by and part of the construction of identity at a range of levels explored in Chapter 5 – from shared international values, to cultural and multicultural identity, to the ideas of 'individual sovereignty' that account for party autonomy. Private international law is just one stage on which these conflicts are played out. The techniques of private international law are one method for their continuously evolving reconciliation.

While private international law rules are formally adopted and developed by national lawmakers, their functionality can only be comprehended from an international perspective, which sees past an autonomous national characterisation of private international law regulation to recognise its character as a regulatory system of distributed 'peer governance' constructed through a global 'network' of national actors. Private international law is not international in the sense that its rules are universally agreed, but in the sense that it is the embodiment of diverse, imperfect strategies which aspire to the universal value of reducing conflicts in the exercise of private law regulation by effecting a principled public international ordering.

The adoption of an international systemic perspective does not require a belief that private international law is 'really' international law or that private international law must necessarily be 'internationalised', similarly to the federalised private international law of the EU, Australia and Canada, explored in Chapter 4. The distinction between international and national conceptions of private international law is a false dichotomy constructed by international positivism. It is an intellectual cage in which international lawyers have too easily imprisoned themselves, and a conceptual wedge that has been driven between public and private international law. The analysis in Chapter 5 demonstrates that private international law is a blend of influences from national and international norms, like the blend of federal and State norms in US private international law examined in Chapter 4. The international perspective demands only that private international law be evaluated according to whether it is 'international enough' for it to achieve its objectives – to ensure the coordination of diverse national legal systems in a way which balances international structure and rights with respect for the diversity of values embodied in national legal orders. The common perception that private international law rules are merely concerned with achieving justice in individual private disputes can only obstruct this function.

While the argument in this book has significant implications for the development of private international law in both theory and practice, its purpose has not been to advocate specific changes in private international law rules to achieve 'compliance' with international law. It is an argument for a change in the consciousness of academics, judges, practitioners and legislators, to replace the idea of the 'conflict' of laws with the idea of the confluence of public and private international law. It has sought to replace the idea of private international law as an expression of national sovereign autonomy, concerned with private justice and private

rights, with the idea of private international law rules as a mutually constitutive international system of secondary norms, serving a public constitutional function. It is an argument for the elimination of the contradictions between private international law theory and the reality of private international law in practice, and thus for an acknowledgement that it functions as a system for the international ordering of regulatory authority, in pursuit of public values of 'justice pluralism' and subsidiarity. And, ultimately, it is an argument that this change of consciousness concerning private international law, through the adoption of an international systemic perspective, uncovers the hidden significance of its technical language. Private international law is not merely a discipline of narrow professional interest for specialist national lawyers and academics. It is a system for the pluralist international ordering of private law which raises profound questions of global justice.

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