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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.