EDITED BY

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Private International Law and Public Law

VOLUME I

PRIVATE INTERNATIONAL LAW 2

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Volume I

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PRIVATE INTERNATIONAL LAW

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Introduction

Horatia Muir Watt

I. Preliminary Thoughts on the Public/Private Divide

The topic which federates the texts assembled in this book appears to assume both the possibility of a definition of 'private' international and 'public' law, and the problematical nature of their encounter. The sharp distinction between the public and private legal spheres was indeed a characteristic of what has come to be known, in the American legal tradition, as the period of 'classical legal thought'[1] and to this day remains a dominant epistemological feature of Continental European legal theory, despite multiple developments in positive law which tend to belie its relevance. Under the most widely held and continually pervasive definition, public law is seen to involve both the organization of the state and its institutions (constitutional law) and the relationship between the state and its individual or corporate citizens (charters of rights and administrative law), whereas private law is 'horizontal' insofar as it governs relationships between the latter (under the categories of contract, tort and, in some traditions, family).

This divide is reflected in the separation between the public and private branches of *international* law, the former concerning the reciprocal external relationships between sovereign states, whereas the latter is seen to deal only with the interaction between private actors. However, the lines blur rapidly in each of these instances. In the domestic context, even contract law, the most emblematic area of the liberal legal framework for the market economy, can hardly be seen to stand alone from public regulation and enforcement,[2] whereas international law struggles to make sense of the heterogeneity of actors and interests which appear beyond the confines of the state, and the different guises under which the latter is seen to act.

In the United States, the significance of the public/private divide in domestic law diminished radically during the early decades of the twentieth century under the influence of legal realism and the rise of the 'social'; as a result of this regulatory turn, choice of law methodologies became attuned within the federal context to the consideration of state or 'governmental' interests and were then seen to implicate the federal Constitution. By contrast, in an international setting, the reach of economic regulation in respect of private actors has continued to be determined in isolation from public international law, which is still perceived to govern only the reciprocal relationships between sovereign states. Meanwhile, in Europe, the dense regulation by the European Union of fields previously occupied by traditional codified or common private law, along with the contemporary constitutionalization of the latter and the methodological impact of fundamental rights, has not displaced the formal attachment of private international law to a scheme of thought in which the distinction between public and private law remains strongly entrenched.

Private international law, then, presupposes a distinction between both itself and its public international counterpart and, in the domestic (non-public) sphere with which it deals, between

public and private law. It refuses to encroach upon political dealings between sovereign states, while excluding public regulatory policies from its remit as being irrelevant to the governance of private interests. Public law is thus as 'taboo'[3] under this liberal model as is embedded the correlative conviction that the cross-border activities or relationships of non-sovereign actors or citizens are of no import to public international law. While this double 'isolation' of private international law[4] was certainly reflected in the great European codes, which have inspired European Union secondary legislation on this point,[5] the common law tradition has tended to bolster a similar separation by reason of the largely commercial nature of disputes which have made up the bulk of the conflict of laws, along with a particular reluctance of the courts to hear claims framed in foreign public law.[6] Thus, the separation of regulation and market within the domestic political economy has found a powerful echo in the international legal order through the dissociation of the sovereign and the private.

However, the publications selected here are designed to show not only how these various assumptions came into being, but also how they have been progressively called into question over the last half-century. They also attempt to illustrate the extent to which contemporary changes affecting the liberal state in a domestic context, the emergence of fundamental rights and associated public law methodologies (such as balancing or proportionality), the shifting horizons of public international law (which now encompasses trade, development and cultural concerns with an obvious private law dimension) and the new development of 'post-national' norm-production in various forms beyond the state have radically reshaped the foundational categories which supported the liberal state and the (Westphalian) public international legal order, upsetting in turn the classical foundations of private international law.

This is why the book begins, rather than with any attempt at definition, by drawing attention to the various uncertainties surrounding a distinction which dies hard. Thus, the first, preliminary part in Volume I gives voice to doubts as to the substance, and indeed the supposed naturality, of the distinction between the public and private legal spheres,[7] particularly in view of the relativity of (Western, particularly European) cognitive frameworks.[8] Emphasizing the difficulties attendant upon the ways in which the domestic divide between public and private law plays out in international law, it also seeks to show how some of the foundational myths about the public international/private international divide have been deconstructed by bringing to the surface a 'private history' of state and sovereignty.[9] Thus, it is now argued that the first informal transnational empire grew out of private international contract regimes,[10] while modern liberal public international law continues to mirror the close connection between (public) sovereignty and (private) property.[11] Given the common roots of the public and private in Western legal thought, it is hardly surprising that public law has always reared its head, albeit problematically, in a discipline supposedly devoted to the peaceful resolution of transnational private interests. And since the various elements of the story are highly interconnected, it is no more surprising that increasing public regulation of domestic markets has led, too, to the decline of the liberal model in its international dimension.

II. The Liberal Ideal

The second part of Volume I bears witness to the liberal ideal, which shaped the public/private divide in the law during the first half of the twentieth century. Under what could be seen as the

separatist paradigm, the private sphere, sheltered from the contingencies of the political, developed its own specific axiology and method in the transnational arena. Foreign public law, associated with the exercise of sovereign prerogatives,[12] was 'taboo' in that it was inapplicable by private law courts[13] and incompatible with private international law tools.[14] While this feature was initially shared by the heritage of both Story and Savigny, and therefore common to both sides of the Atlantic,[15] a more conceptual framework developed within the civilian tradition led to a higher degree of celebration of private law technique and a more deliberate repugnance for policy considerations. Thereafter, when legal realism swept away the last vestiges of territorialism in the conflict of laws in the United States and induced a shift to functionalism and neo-statutism, the European tradition remained staunchly opposed to the interference of 'governmental interests' in conflict of laws methodology.[16] Here, it was only marginally that the prevailing multilateralist and private law view came to be challenged by the 'unilateralists', arguing that only an approach conceived in terms of policy and scope could accommodate the claims of public law in international cases.[17]

Interestingly, ideas about judicial or adjudicatory jurisdiction followed the reverse pattern, in respect of the relationship between public power and private law values in an international setting.[18] The twist reflects the traditional difference between Continental and common law philosophical and cultural traditions as to the proper role for judicial law-making. It took half a century for American theories of jurisdiction to shift from a model based on territorial principles attributed to public international law to an ideal of convenience or appropriateness grounded in private or commercial law, which gained salience with the rise of international trade.[19] By contrast, the latter conception had been espoused without further ado in civilian doctrine, for which international jurisdiction raised scarcely more than an issue of geographical venue, of which the significance was largely eclipsed by the primacy of choice of law.

Of course, even under the sway of the most orthodox liberal model, a gangway had always existed, in the practice of the courts, between public policy and private ordering, in the highly malleable and controversial guise of Comity.[20] Familiar in the domestic context as a limit to private contracting, the Continental European concept of *ordre public* in private international law fulfilled a more ambitious function, serving either to counter foreign policies or values considered morally intolerable or politically hostile to those of the forum, or on the contrary to allow the introduction of foreign institutions that might otherwise have been rejected outright. This is the avenue through which claims framed by foreign sovereigns in the private law terms of restitution after the Second World War and in the aftermath of decolonization began to fall outside the ambit of the public law taboo.[21]

III. The Rise of the Regulatory State

The third part of Volume I of the book tracks the decline of the public/private divide subsequent to the rise of the regulatory state.[22] Well documented in domestic law, at least in the American tradition,[23] the changing relationship between regulation and market, which had induced a predominance of policy analysis in the conflicts of laws,[24] led progressively to a displacement of focus from interstate conflicts to the international or extraterritorial reach of public economic regulation,[25] with the subsequent emergence of 'transnational regulatory litigation'.[26] Paradoxically, given the influence of the separatist paradigm on European legal thought, the

spectacular rise in market regulation within the European Union constituted the most significant challenge in this context to the public/private distinction, heralding significant inroads into the private international sphere through 'lois de police' bearing public economic and social interests.[27] Gradually, on both sides of the Atlantic, the market itself became the connecting factor for conflicts of economic and financial legislation,[28] bringing to the fore in private disputes the economic and political implications of private international law rules. In turn, collisions of public interests through private disputes were bound to impact upon public international law, blurring the public/private divide so as to melt the two disciplinary branches of international law into what has been conceptualized as a single quest for reasonableness.[29] Cross-border judicial and administrative cooperation[30] began to be deployed in order to reduce the escalation of highly politicized private disputes;[31] like all procedural issues, enforcement itself tended to straddle the public/private divide.[32]

IV. The Privatization of Global (Public) Commons

The first part of Volume II of the book documents a further reversal of the relationship between the public and private spheres – and specifically between private international law and public law. The new paradigm remains largely relevant today. On the one hand, celebration of party autonomy in international contracts,[33] along with a liberalized regime for free movement of judgments and arbitral awards allows private actors to sidestep regulatory policies through strategic choice of (public or private) forum. On the other hand, inter-systemic competition, stimulated and arbitrated by private investors, tends to transform public goods (including regulation) into private products, available on a global market. To a significant extent, the very principle of freedom of contract, which has encouraged systemic barrier-crossing from the public to the private, has simultaneously ensured the loss of the regulatory function of private international law.[34] Largely condoned by neo-liberal law-and-economics doctrines,[35] the principle of party autonomy and its avatars in the field of judicial services,[36] including international arbitration,[37] have led the economy to a horizon of what has been aptly described as 'global liftoff'.[38] The subsequent disempowering of individual states within a global private economic order brings with it the risk of widespread privatization of the (public) commons.

Of course, one of the effects of economic globalization has been to draw attention to the artificiality of traditional state-based boundaries and institutional structures in many settings, and has been salutary in allowing the recognition of infra- and trans- national communities, secreting social norms beyond the state.[39] This may have significant consequences for the redefining of jurisdiction, to the extent that territory could conceivably be replaced by community as the defining parameter.[40] If such an evolution were to enhance a sense of political identity and responsibility, it might, possibly, constitute a form of resistance against the alienating effects of global privatization. However, at the same time, the phenomenon of 'post-national' rule-making by multifarious unaccountable private actors, either directly through standard-setting or indirectly through the influence of scientific expert knowledge, or bench-marking,[41] brings with it the risk of a widespread crisis of legitimacy in international law-making and raises the delicate question of the interaction between the tools of state-based private international law and new forms of private transnational normativity. These difficulties are particularly acute within the international investment regime, where arbitration by private

experts determines the scope of the public regulatory concerns of host countries. It is unclear at this stage, in the wake of a succession of financial crises, whether the sirens of private ordering can be channelled,[42] or whether international economic law, largely protective of foreign direct private investment in the third world, can cast off the private law model on which it is fashioned.[43]

V. Publicization through Constitutionalization

It seems, however, that the international community is looking to forms of global constitutionalism as at least a partial response to the confiscation of the public sphere beyond the state. Constitutionalization of private international law may be taking place imperceptibly, moreover, in settings where the discipline is infused with federalist concerns.[44] As the second part of Volume II of this book shows, this entails a yet further reversal of the relationship between the public and the private spheres.

The move involves the reconnection of private international law to a political (public) horizon. It is indeed surprising that, by and large, the discipline has not assumed the governance of private conduct in a transnational context. For example, there has been as yet little use of its tools to prevent or sanction multinational corporate torts in a global risk society. Moreover, as seen above, the wielding of economic power by private actors may not take the form of tortious conduct, but may reside in informal rule-making through contractual devices in areas such as the internet where state regulation is unable to reach, or indeed has deliberately conceded regulatory authority to the market. It is doubtful that the existing legal framework of private international law is adequate to apprehend the various forms in which informal power is exercised. To date, it has offered more facilitative than disciplinary potential for the global shadow economy.

This is maybe why courts appear to be turning to fundamental rights for inspiration. At least within the European context, there is a growing acceptance of an inevitable alignment of private international law on fundamental rights (whether those of the European Convention or of the Union Charter) with the ensuing emergence of proportionality as a judicial tool to ensure their appropriate reach. The methodological implications of this move are significant, since the question of the 'reach of rights'[45] becomes part of a balancing process, which pushes public interests – largely repressed, or marginalized as exception, under traditional methodology – to the fore. To a certain extent, it implies the return of functionalism – initially rejected in Europe for reasons linked to the supposed 'nature' of private law – within the proportionality test itself. Thus, a right will be given effect to the extent that the interests of its bearer are significantly affected by the conduct of a state (or by private conduct which occurs within the sphere of influence of such a state). In cross-border situations, this implies a weighing of the various connections between the right-bearer and the violating state. The methodology inherent in proportionality also accompanies a renewed epistemology carried by human rights, which owes much to the idea of *recognition*.[46] It brings about a change of perspective in legal reasoning, in the form of a turn away from the formal rationality of the law in favor of open-textured and deliberative normative modes, arguably more sensitive than abstract or deductive methodologies to the life experiences with which it interacts.

It is quite probable that the spread, in domestic legal systems, of overt judicial balancing processes, such as proportionality (considered in contemporary legal theory to have reached the status of meta-narrative), will absorb many of the considerations hitherto ascribed to private international law, such as the variable legitimacy of a given legal system to impose its policies or values in a transnational case, given the intensity of its geographical or personal links with the facts. Indeed, such reasoning is already used to determine the relative strengths of conflicting rights in a homogeneous constitutional context (that is, when all the rights invoked are part of a single constitutional charter). Therefore, it is predictable that as long as legal argument is couched in the language of rights, it will progressively extend to cases involving heterogeneous constitutional environments. For example, if it is to be decided whether the freedom of the press is to take precedence over privacy in a particular situation, it matters little whether the correlative claims are grounded on the same text or set of principles, or whether one issues from, say, the European Convention and the other the federal Constitution of the United States.

VI. The Current Mix Beyond the Schism?

If this is so, the question then arises as to the very survival of international law as a discipline, with or without its bicephalous architecture. The last series of publications, in the third part of Volume II, address this issue, either by pointing to the multiplication of grey areas,[47] or points of overlap,[48] between public and private international law,[49] or by observing, as social systems theory has already predicted,[50] that what we think of as the international legal order is composed in reality of a series of special transnational regimes[51] of varying focus – trade, cultural objects, environment – often equipped with their own *fora* for dispute resolution. These defy characterization as public or private if only because they crystalize a new conceptual difficulty, pertaining to whether or not they count as 'law' at all. Meanwhile, beyond nostalgia for an imagined coherent legal order, such fragmentation lends itself to the critique of the loss of political horizon.[52]

From the perspective of state courts, there has been some attempt to reimagine private international law as 'meta-regulation' of private norms.[53] But it seems unrealistic to look for a meta-choice of law rule in traditional conflict of laws methodology; the unilateralist version would certainly be more appropriate here.[54] In turn, however, like all expressions of pluralism, unilateralism runs into the difficulty of being merely apologetic. In other words, it avoids any preliminary determination of those norms which can make a plausible claim to govern. Indeed, given the possible conflicts of interests which lie behind various instances of private standard-making, it is difficult to presume the political legitimacy of any. This objection may prove too much, however. Firstly, outside the reassuring confines of a clear-cut definition of law, the legitimacy of any claim to govern – in other words, the acceptability of such a claim by the constituency it affects – needs to be redefined. Moreover, the lack of political legitimacy of a foreign jurisdiction from the standpoint of the forum – meaning the lack of democratic process – has never been a prerequisite for the operation of private international law (at least ever since it was extended beyond a 'community of laws'), which has always left to the judge, in each case, the task of identifying the demands of so-called 'conflicts justice'.[55] Furthermore, as the example of corporate codes of conduct show, private law tools such as tort or estoppel

have been brought back to the fore to tackle new instances of non-state norms.[56] Technically, in transnational cases, this is an example of incidental application or 'prise en consideration' which transforms the norm into fact before plying it to the case in hand. Obviously, the burden is, once again, on the forum to assess the requirements of reasonableness in each case. However, this is true, too, of proportionality and other balancing processes – and may well be a characteristic of the 'third globalization' of legal thought.[57]

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Notes

1. See Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000', in David M. Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal*, Cambridge: Cambridge University Press (2006), pp. 19–73. *Infra*, Chapter 7, Volume I.
2. See the early realist critique by Morris R. Cohen, 'Property and Sovereignty', 13 *Cornell Law Quarterly* 8 (1927). *Infra*, Chapter 4, Volume I.
3. For the terminology, see William S. Dodge, 'Breaking the Public Law Taboo', 43 *Harvard International Law Journal* 161 (2002). *Infra*, Chapter 22, Volume I.
4. Joel R. Paul, 'The Isolation of Private International Law', 7 *Wisconsin International Law Journal* 149 (1988–1989). *Infra*, Chapter 2, Volume I.
5. See Regulation 'Brussels I' (*EC*) No. 44/2001 of 22 December 2000 and Brussels I Recast No. 1215/2012 (on jurisdiction); and Regulations 'Rome I' No. 593/2008 and 'Rome II' No. 864/2007 (choice of law in contract and tort, respectively), which all exclude public law claims from their scope.
6. See Lord Collins (ed.), *Dicey and Morris on the Conflict of Laws*, Vol. 1, 15th ed., London: Sweet & Maxwell (2012), Rule 3 (1).
7. Ralf Michaels and Nils Jansen, 'Private Law Beyond the State? Europeanization, Globalization, Privatization', 54 *American Journal of Comparative Law* 843 (2006). *Infra*, Chapter 1, Volume I.
8. Onuma Yasuaki. 'History of International Law as Seen from a Transcivilizational Perspective', in *A Transcivilizational Perspective on International Law*, RCADI vol. 342, Leiden, the Netherlands: Martinus Nijhoff Publishers (2010), pp. 266–369.
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12. F.A. Mann, 'The Relationship between the Conflict of Laws and Foreign Public Law', in *Conflict of Laws and Public Law*, RCADI vol. 132, Leiden, the Netherlands: Martinus Nijhoff Publishers (1971), pp. 145–96. *Infra*, Chapter 14, Volume I.
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22. William S. Dodge, 'Breaking the Public Law Taboo', 43 *Harvard International Law Journal* 161 (2002). *Infra*, Chapter 22, Volume I.
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24. Symeon C. Symeonides, 'The American Conflicts Revolution: A Macro View', in *The American Choice-of-Law Revolution in the Courts: Today and Tomorrow*, RCADI vol. 298, Leiden, the Netherlands: Martinus Nijhoff Publishers (2002), pp. 357–416. *Infra*, Chapter 21, Volume I.
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