Towards a Public International Perspective on Private International Law: Variable Geometry and Peer Governance

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Abstract

This paper argues that private international law rules constitute a form of international ‘public’ ordering or global governance, and it explores some of the implications of this argument for the international development of private international law. It begins by examining the theoretical foundations for this perspective as well as its historical context and justification, arguing that it is more coherent and more consistent with pre-modern conceptions of the subject. It then turns to examine recent developments in federal systems – the European Union, Canada and Australia – which demonstrate the emergence of a similar ‘public’ perspective on private international law at a regional level. The paper then considers two major problems with the idea that developments within federal systems can be transplanted or applied by analogy at the international level, as well as the potential of two ideas which present responses to these problems. The first problem is that of hierarchy – the complexity of the relationship between federal and international developments – and the idea examined in response is that of variable geometry. The second problem is that of heterarchy – the absence of institutional structures comparable to those in federal systems to support international developments – and the idea of peer governance is examined as a response to this issue. The paper concludes that these ideas have a potentially important impact on a range of international law questions, and that they should form a key part of the research agenda for studies of global governance both within and beyond the context of private international law.
Towards a Public International Perspective on Private International Law: Variable Geometry and Peer Governance

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1. Pluralism and Private International Law

In an increasingly globalised world, experiencing an intensification of the international movement of people, property and capital, disputes with cross-border elements are ever more common. Private international law is thus a subject of increasing practical importance. Yet at the same time, the purpose and function of rules of private international law remain heavily contested, and it continues to invite its infamous old description as “one of the most baffling subjects of legal science”1.

One starting point for analysing private international law is to reflect on how it might contribute to ideas of ‘justice’ – surely a touchstone for evaluating any law. On closer examination it is, however, not obvious what appeals to ‘justice’ mean in the context of private international law. The idea that ‘justice’ could operate as a justification for private international law seems to be question-begging, since the problem is determining which idea of ‘justice’ – which sets of national law rules, procedural and substantive – should be applied.

The usual meaning of ‘justice’ may tell us little about private international law – but private international law reveals something immensely important about our ideas of justice. If justice is indeed compatible with the application of foreign substantive law, or a deferral to a foreign court’s jurisdiction, this presupposes an underlying acceptance that the outcome determined by a foreign law or court may, depending on the circumstances, be more ‘just’ than local law2. 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

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* Lecturer, Faculty of Laws, University College London, a.mills@ucl.ac.uk. Parts of this paper draw on arguments previously developed in Mills, A, The Confluence of Public and Private International Law – Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law (Cambridge University Press, 2009), as well as ideas presented at the International Law Forum of the Chinese Academy of Social Sciences in Beijing in November 2011.


2 “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).
in a foreign territory and was governed by foreign law. This reveals an underlying commitment to what is referred to in this paper 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 or objectivism on the one hand, and value relativism on the other. Under this conception, the 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, there is no universal ‘just’ resolution of a form of dispute, but an incommensurable variety of values, embodied in different national private laws.

Private international law should thus be viewed as embodying a principle of ‘tolerance of difference’, not in a paternalistic or permissive sense, but in the sense of respect between equals. It is no coincidence that the term ‘mutual recognition’ has also been adopted in the European Union to describe the obligations of respectful engagement between Member States. Recognition of a foreign law and its products is an acknowledgment of the value of both the foreign state and its people, an acceptance of the coexistence of states, and of the diversity of their values, in international society.

From this perspective, the problem of private international law is a governance problem – the appropriate allocation of regulatory authority, in the sense of which state should hear a dispute, whose law should be applied, and whether a foreign judgment should be enforced locally. Determining whether English or French law applies should not involve a determination of whether English or French law gives a more ‘just’ result. It involves an examination of whether English or French law should be applied to the resolution of the dispute. Private international law essentially articulates the standards by which we may

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evaluate the degree of connection between a dispute and a forum or legal system, in a
world in which diverse and potentially overlapping legal orders coexist.

These standards are not only important for what they do, but for how they do it. It is not
enough to avoid potentially inconsistent legal treatment of a dispute by selecting any
single source of regulatory authority – it matters which source is chosen. Private
international law, properly understood, is about determining the most ‘just’ distribution
of regulatory authority – rules of private international law are thus not ‘primary rules’,
dealing with the outcome of a dispute, but ‘secondary rules’, dealing with determinative
powers\(^7\). 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).

Adopting and exploring this perspective, this paper argues that private international law
rules, although formally part of national law, constitute a form of international ‘public’
ordering, or global governance. It begins by examining the historical context and
justification for this claim, arguing that it is more consistent with pre-modern
conceptions of the subject. It then turns to examine recent developments in federal
systems – the European Union, Canada and Australia – which demonstrate the
emergence of a similar ‘public’ perspective on private international law at a regional level.
The paper then considers two major problems with the idea that developments within
federal systems can be transplanted or applied by analogy at the international level, as
well as the potential of two ideas which present responses to these problems. The first
problem is that of hierarchy – the complexity of the relationship between federal and
international developments – and the idea examined in response is that of variable geometry.
The second problem is that of heterarchy – the absence of institutional structures
comparable to those in federal systems to support international developments – and the
idea of peer governance is examined as a response to this issue. The paper concludes that
these ideas have a potentially important impact on a range of international law questions,
and that they should form an important part of the research agenda for studies of global
governance both within and beyond the context of private international law.

This paper forms part of the author’s broader project which is, essentially, an argument
for a revitalisation of private international law as a discipline, through a renewed
understanding of its public international dimension. It is an argument that private
international law should not be dismissed as a technical part of civil procedure, or even
viewed as principally part of national law, but rather be recognised as a system of global

governance for the management of private law legal pluralism – a system that could play a crucial role in the international legal order as a counterpoint to the universalist claims and aspirations of public international law.

2. The History of Private International Law

The earliest origins of private international law are generally considered to be around the time of the Italian renaissance – a time when, as in the present, an expansion of international trade and commerce led to an increase in disputes with significant foreign elements. Italian city-state legal systems adopted Roman law as a common ‘natural law’, but 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. 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 – a problem which is today replicated and amplified on a global scale. 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 address the risk of conflicting legal treatment of private disputes, while accommodating a degree of pluralism. Private international law rules were identified as a distinct part of the universal natural law, ‘secondary’ norms which facilitated and supported the existence of diverse local legal systems. This point is worth emphasising – private international law was first conceived of not as part of the local law which differed from city-state to city-state, but as part of a universal (natural) international law system, encompassing the modern territory of both

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public and private international law, designed to address the problem of coordinating legal diversity.\(^{10}\)

This idea of private international law has sustained and defined the discipline throughout most of its history. Under the statutist approach, perhaps the earliest idea of private international law, the potential for conflict between legal systems was addressed by attempting to develop a principled and analytical way of determining the scope of the effect of different laws, based on the idea that each statute ‘naturally’ belongs to one of two categories of laws, either personal or territorial. The division between types of laws was intended to reflect a natural division operating in all legal systems, thus conceiving of private international law as part of a universal and international system of law.\(^{11}\)

Later scholars adopted different methods of defining this distinction, variously emphasising the importance of territorial or personal characteristics, while retaining the essential character of the discipline. The two dominant nineteenth century figures in private international law, at least outside the Anglo-American tradition, may be singled out as influential archetypes. In the early nineteenth century, the German scholar Savigny rejected the statutist focus on the characterisation of the laws themselves, arguing 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”\(^{12}\).

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.\(^{13}\)

The Italian scholar and political figure Mancini, working later in the nineteenth century, 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

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10 See further eg Berman, HJ, “Is Conflict of Laws becoming passé? An Historical Response”, in Rasmussen-Bonne et al (eds), Balancing of Interests: Liber Amicorum Peter Hay zum 70 Geburtstag (Frankfurt am Main: Verlag Recht und Wirtschaft, 2005).

11 Berman (2005), supra n 10; de Nova, R, “Historical and Comparative Introduction to Conflict of Laws” (1966-III) 118 Recueil des Cours 435 at p.442ff.


disputes to states. This was based on a conception of the nation as founded on personal connections (embodifying 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. 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 law of a community of nations rather than Savigny’s community of territorial states. In both cases, rules of private international law were essentially characterised as serving an international function of global ordering or governance, coordinating relations between different legal orders.

Despite the dominance of this universal, internationalised conception of private international law up to at least the early nineteenth century, over the course of the nineteenth century there was in fact a significant increase in the diversity of national approaches to the subject. Two factors may be highlighted as contributing to this phenomenon. First, this in part reflected a divergence resulting from the competing views concerning the appropriate basis for ordering regulatory authority – whether, for example, the law applicable to a person should be based on territorial criteria (emphasised by Savigny), aspects of their personal identity such as nationality (emphasised by Mancini), or a connection combining elements of the two such as domicile or habitual residence (often favoured in the common law tradition). Second, it also in part reflected changes in public international law, which by the end of the nineteenth century had become reconceptualised as purely the law operating between states, excluding private parties and their disputes from consideration. The diversity of private international law in fact coincided with and contributed to the abandonment of its universalism in theory. The foundations of private international law were instead located in ideas of private ‘vested rights’ – that it was a subject concerned with ensuring the protection of private acquired rights, even if those rights were acquired under foreign law – missing the point that it is rules of private international law which determine when such rights are or are not acquired. The technical methods of Savigny and Mancini remained influential, but their idea of a universal system of private international law as part of an international community of law was transformed into diverse and discrete national private international law projects.

The effects of this conception of private international law as national law include the diversity of modern rules of private international law, the understanding of private international law as a mechanism for the enforcement of private rights, and hence the problematic focus in modern private international law theory on ‘justice’ and ‘fairness’.

Under this modern and more limited model, private international law does not contribute to (and is not typically perceived as impacting upon) the ordering or systematising of international private relations – questions of global governance. This idea of private international law bears neither the character nor the function which was envisaged for private international law by the statutists, Savigny or Mancini. It is out of step with the reality that private international law, even in its present largely fragmented form, effects a public ordering of global regulatory authority.

3. Private International Law and Constitutional Law in Federal Systems

There is, however, one arena in which the original conception of private international law (as public law dealing with the ordering of relations between legal systems) has endured, and recently even been revived. Within federal systems, the idea has been developed that 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. In this context, we see the re-emergence (or continuation) of the view of private international law rules not as ordinary legal norms, which should be determined by national ideas of fairness or justice, but as ‘secondary’ legal norms, which reflect or govern the distribution of regulatory authority.

This idea was influential in the United States in the early part of the twentieth century, as the constitutional provisions of ‘full faith and credit’ and ‘due process’ played a significant role in shaping federalised private international law rules. In 1926, it was suggested that the “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”\(^\text{15}\). 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”\(^\text{16}\), acting “to coordinate the administration of justice among the several independent legal systems which exist in our Federation”\(^\text{17}\). For various reasons, this ‘public’ perspective has (perhaps regrettably) since then become less prominent in US thinking on private international law\(^\text{18}\). Other federal systems have, however, revived


\(^{17}\) Jackson (1945), supra n 16, at p.2.

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these ideas, and this section examines recent developments in the European Union, Canada and Australia in particular.

3.1. The European Union

Within the European Union, private international law has undergone a dramatic recent growth, which reflects an increasing recognition of the important role it plays in a pluralist European legal order. While 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, acknowledging instead the public function of private international law rules as secondary legal norms with a systemic character and effects. Under this perspective, private international law is part of the process of defining the European legal order and facilitating the efficient functioning of the internal market. If there are to be areas in which the diverse laws of the Member States of the European Union will operate, then private international law is required to delimitate the scope of their regulatory authority.

The view of private international law as a technique for the legal development of the internal market is reflected in the treaties of the European Union. In 1999, the Treaty of Amsterdam gave the institutions of the European Union a new competence in the field of private international law. As amended and renumbered by the Lisbon Treaty (2009), Article 81(2) of the Treaty on the Functioning of the European Union (previously the Treaty on the European Community) now provides (in part) that:

the European Parliament and the Council . . . shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases; [and]

(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction

19 Ibid., at p.387ff.


This enhanced regulatory capability has received expression in an active legislative programme which sees private international law developing an increasingly prominent role in the European legal system. The Brussels I Regulation (2001), which updated and strengthened the Brussels Convention (1968), is perhaps the most prominent use of the new powers. 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 I Regulation (2008), which took effect from December 2009, was the culmination of a project to update the Rome Convention (1980) and bring it more clearly within the European legal framework. The Rome II Regulation (2007), which took effect from January 2009, introduced harmonised choice of law rules for disputes involving non-contractual obligations. A new Rome III Regulation has recently been adopted, to come into effect in 2012 in certain Member States (under enhanced cooperation rules), dealing with choice of law in divorce and legal separation. A proposal for a Regulation on succession and wills was presented in 2009, and two further proposals for Regulations on matrimonial property and the property

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consequences of registered partnerships were presented in March 2011. This wave of regulation reflects the importance of private international law as a specialised technique of legal coordination within the European legal order.

The significance of this European regulation is not merely a change in the sources of rules of private international law, but a transformation in their character. Within the European Union, private international law rules clearly serve a public ordering function, allocating regulatory authority between Member States in the service of the internal market. This is a rediscovery of the original function of rules of private international law. Although transplanted to a federal context, it has provided an important renewal of private international law’s traditional public dimension, and a revitalisation of private international law as an academic discipline.

3.2. Canada and Australia

Canadian and Australian courts have not been precipitate in recognising the possibility that common law private international law rules inherited from England might be affected by their new federal contexts. There are, however, signs that this neglect is finally being addressed. Canadian courts have recently taken a leading role in recognising and articulating the potential interaction between federal constitutional principles and private international law rules – the role that private international law might play in ordering the diversity of legal orders within Canada.

The Canadian ‘revolution’ in private international law began with Morguard Investments Ltd. v. De Savoye (1990), a case concerned with the enforcement of an Alberta civil judgment in the courts of British

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Columbia. Under the common law approach, which was “firmly anchored in the principle of territoriosity”\textsuperscript{37}, 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\textsuperscript{38}. The Supreme Court, however, rejected this approach, emphasising that it would be inappropriate to continue to apply rules 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”\textsuperscript{39}.

The status of this principle was confirmed in\textit{Hunt v. T&N} (1993)\textsuperscript{40}, which established that private international law must be guided by Canadian constitutional imperatives of order and fairness. Adopting and extending the language of\textit{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”\textsuperscript{41}. The reasoning of the Canadian Supreme Court in these cases has provided an explicit recognition of the structural role of private international law in a federal context – its character as public law, closely related to constitutional law – and a recognition that private international law rules operate as secondary legal norms, concerned with the distribution of regulatory authority rather than the enforcement of private rights.

Recently, the Australian High Court has also begun to recognise federal constitutional implications for private international law. The Court accepted a constitutional effect on choice of law rules in\textit{Pfeiffer v. Rogerson} (2000)\textsuperscript{42}, holding that the constitutional idea of a unitary federal system with territorially limited State sovereigns implied a strict \textit{lex loci delicti} rule for choice of law in Australian inter-State tort disputes. 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.

\textsuperscript{37}\textit{Morguard Investments Ltd. v. De Savoye} [1990] 3 SCR 1077 at 1095.

\textsuperscript{38} At 1092.

\textsuperscript{39} At 1101.

Although at least part of the motivation for this change in approach was clearly a desire to reform the anachronistic common law choice of law rule in tort, the reasoning adopted appears to signal a broader willingness by the High Court to develop federal choice of law rules, and a 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 also 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, towards a conception of private international law as a set of secondary legal rules, concerned with systemic or structural issues.

4. Pursuing a ‘Federal’ Analogy in the Internationalisation of Private International Law

As examined in section 2 above, the idea of private international law as part of a broader corpus of the ‘law of nations’ dominated the early theoretical development of private international law. This ‘public’ conception of private international law, as a technique of legal coordination, may have been neglected in a global sense, but (as examined in the previous section) it has continued and been revived in the form of the idea of private international law as part of the constitution of federal systems. In the nineteenth century, Savigny and Mancini argued that private international law rules should be derived from the existence of a community of states or nations. In a very similar 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 a key part of the architecture of federalism.

The question, then, is whether this move may be reversed – whether the public law reconceptualisation of private international law experienced in the European Union, Canada and Australia could or should serve as inspiration for a rediscovered public international perspective on private international law globally. While this would be a continuation of the approaches of classical private international law scholars such as Savigny and Mancini, it can find foundations not only in the 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.

Just like federal constitutions, international law can be seen to contain norms that define the architecture of the international system – secondary norms, concerned with the distribution of regulatory authority. The regulatory authority of states is increasingly recognised as the product of, and subject to, limits defined principally by public international law rules of jurisdiction. These public international law rules on jurisdiction are thus ‘secondary’ legal norms. 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 collective acceptance of these rules constitutes a mutual recognition of the legitimacy of each state as part of an international system. Within international law, rules of jurisdiction formalise the ‘tolerance of difference’, the acceptance of pluralism, which provides the foundations for private international law. The limitation of state regulatory authority serves the function of minimising the possibility of inconsistent legal treatment between states by minimising regulatory overlap, accepting the legitimacy of each other state’s sphere of regulatory competence – also, in essence, the function of private international law. 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.

It is, of course, not claimed that the ideas of ‘public’ or ‘systemic’ private international law recently sustained within federal systems may easily be translated to the international level. The remainder of this paper addresses two possible problems with such a translation, which are referred to as the problem of hierarchy and the problem of heterarchy. It also identifies and examines two ideas which may respond to these problems, the idea of variable geometry and the idea of peer governance, which it is argued should form part of the research agenda for private international law scholarship.

5. The Problem of Hierarchy and the Idea of Variable Geometry

The problem of hierarchy arises from the fact that even if private international law developments in federal systems provide inspiration for international developments, it does not necessarily appear that the two will coexist easily – in fact they may be at least apparently in tension with one another. Developments in private international law at a

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43 In turn, through the general acceptance of the effectiveness of choice of court and choice of law agreements, states have also generally accepted the legitimacy of individual autonomy as a basis of determining the forum or law which will govern a dispute – suggesting that the public international law model of jurisdiction requires updating to reflect the reality of the allocation of authority under private international law.


federal level are necessarily defined by their federal context – the greater commonalities which exist between members of a federal union may mean that these developments go further in many respects than would be achievable or even desirable at the international level. To some extent this issue can be addressed through variability in the application of doctrines such as public policy, which may be more readily applied at the international level (where the diversity of foreign systems is more likely to reach the limits of the ‘tolerance of difference’ in private international law) and more restricted in an intra-federal context (as a consequence of mutual trust and a greater degree of similarity between states).\(^46\) However, the ‘public’ conception of private international law which is necessarily adopted as part of its federalisation means in addition that the private international law rules adopted may not merely be deeper, but also reflect particular characteristics of the public ordering of a specific federal system. For example, the strict territorialism of the Australian choice of law rule in tort\(^47\), adopted based on the High Court’s interpretation of Australia’s territorial constitutionalism, may be contrasted with the more flexible (and perhaps more market-focused) approach to choice of law in tort in the Rome II Regulation, which prioritises (limited) party autonomy as well as the consideration of the habitual residence of the parties to the dispute\(^48\). The internationalisation of private international law may thus appear, from a federal perspective, a regressive step – expanding beyond the federal context may appear to risk a ‘lowest common denominator’ approach. This invites us to examine what relationship there should be between federal and international developments.

One concept which appears to provide at least a partial response to this problem is the idea of variable geometry\(^49\). This idea has been recently popularised in two particular contexts in which analogous governance problems have arisen.

Perhaps most prominently, it has been adopted in the context of European governance, in connection with the idea of a ‘multi-speed Europe’, under which different Member States of the European Union might integrate at different speeds or to different extents. This concept is reflected at a practical level in two principal ways, which mirror each other. The first is through ‘opt-out’ mechanisms, where particular states may refuse to participate in particular regulatory initiatives which are otherwise universally applicable.

\(^46\) See further Mills (2008), supra n 4.
\(^47\) See 3.2 above.
\(^48\) See 3.1 above.

\(^49\) It has been suggested that the term has been borrowed from aeronautical engineering, where it refers to an aircraft with wings which may change their configuration to alter their aerodynamic characteristics. If true, such an analogy might seem auspicious (helping global governance to ‘take flight’?), but in fact no modern aircraft uses adjustable wings because the added weight and complexity is considered to outweigh any advantages presented by their greater flexibility.
Well known examples include the abolition of some internal EU border controls through the Schengen Agreement, now replaced by the Schengen Area, and the limited adoption of a common European currency through the European Monetary Union. The second practical reflection of the idea of variable geometry is through ‘enhanced cooperation’ procedures, introduced by the Treaty of Amsterdam, which are designed to permit a limited number of Member States to ‘opt-in’ to pursuing ‘deeper’ integration. As noted above, one of the most prominent such initiatives is in fact taking place in the realm of private international law – ‘enhanced cooperation in the area of the law applicable to divorce and legal separation’, through the Rome III Regulation. Such initiatives carry a degree of controversy in Europe, as they may be considered to run contrary to the universalist aspirations of much EU thinking (membership of both the Schengen Area and European Monetary Union has tended toward expansion, but neither look likely to achieve universal application in European Member States). But they nevertheless suggest a mechanism to allow for the coexistence of different degrees or intensities of legal regulation – one which is itself carefully regulated as part of the EU treaties, through the dual mechanisms of opt-out and opt-in, and which has already found application in the sphere of private international law.

The second governance context in which the idea of ‘variable geometry’ has received recent notable attention is in the realm of international trade law. As the Doha Round of trade negotiations has experienced a period of prolonged stagnation, alternative strategies toward freeing up global markets have received increasing consideration under the label of ‘variable geometry’, including differentiated integration through special regional or multilateral agreements, or through obligations which are themselves variable (for example, differing between ‘developed’ and ‘developing’ states). Such initiatives are, once again, controversial – there is, for instance, disagreement about the extent to which regional developments are pathways or obstacles to global agreement, or about whether distinguishing between categories of states is possible or advisable as a means to

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51 See 3.1 above.


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achieving ultimate uniformity of obligations. Because variable geometry has arisen as a response to frustrations with the Doha Round, the focus of analysis has tended to be on the possibilities it offers as a negotiating technique – whether it offers a better pathway than the traditional ‘consensus’ model of trade negotiations to achieving agreement on universal rules. Similar arguments may arise with respect to private international law, between those who aspire to universal international regulation of private international law issues, and those who would expect differing obligations to find continuing application in different contexts. There is, therefore, significant disagreement in the context of international trade law, and the potential for similar disagreement among private international law scholars, as to whether variable geometry is an end in itself or the means to an end which includes its own elimination. But the debate which is taking place nevertheless positions variable geometry as a conceptual technique when dealing with global governance problems in which special regional rules (including those of federal systems) are to be accommodated, at least temporarily.

One evident downside of such developments is the potential creation of difficult ‘boundary’ problems. Specialised rules for a federal system may face difficulties if a particular governance issue or problem raises concerns both within and outside the system – potentially falling within both the realm of federal and international regimes. This is a problem familiar to private international lawyers, particularly those in the European Union. The Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments has faced particular difficulties concerning its scope of application. The terms of the Regulation determine its applicability principally on the basis of the domicile of the defendant in any civil or commercial litigation – potentially encompassing claims against EU domiciled defendants which are otherwise entirely unconnected with the internal market. However, the rules of the Regulation are drafted only with internal market problems in mind – giving no consideration, for example, to the effect of jurisdiction agreements in favour of non-Member States, subject matter connections with non-Member States, or prior proceedings in non-Member States. The particular problem with the Brussels I Regulation is a failure for its rules to match up to its scope (both as interpreted by the European Court of Justice) – a problem which the European Commission has proposed to address (partially) through additional rules (and perhaps unsurprisingly not through a reduction in its scope of application, which might seem a more propitious avenue of reform).


55 This well-known problem follows from the ECJ decision in Owusu v Jackson [2005] ECR I-553.

The broader lesson offered by this experience is that the boundary issues created by variable geometry require careful consideration. This may affect both regional and international developments in private international law. Potential federal or other regional developments in private international law, as elsewhere, need to be cognisant of variable geometry issues – the regulatory contexts in which the rules will operate, both within and potentially beyond the federal order itself. Any ‘enlarged’ rules added to the Brussels I Regulation to deal with non-EU domiciled defendants, or other disputes which have connections outside the internal market, will need to be adapted to their international context. They will also need to be consistent with existing and future international obligations which apply between Member States (individually or collectively) and third states. Issues on this front may already be anticipated in respect of the Hague Convention on Choice of Court Agreements 2005, signed but not yet ratified by the European Union, whose obligations would not appear to be satisfactorily implemented in the current Brussels I Regulation, at least with respect to agreements in favour of non-Member States. A further lesson in the danger of extending federal rules to an ‘external’ context may be drawn from the Australian experience with a strict lex loci delicti rule in tort. Within the Australian federal system it has been determined that the application of this rule is constitutionally mandated57, but its extension to international disputes58 was ill-advised and regrettably led the High Court to adopt renvoi as a method of practical circumvention59.

Proposals to develop international rules on private international law equally need to be conscious of the fact that their rules will overlay those which apply or which may apply in future in particular federal or regional arrangements. These problems are by no means insoluble – various mechanisms may be developed or adopted to address them, and the experience of applying these ideas in the EU or WTO context may be drawn upon. Existing agreements may be specifically accommodated through ‘carve-out’ clauses. International agreements may themselves recognise variable categories of states within them. More flexible opt-in or opt-out devices may be used to allow for variability in obligations between states who are parties to the same treaty – a device adopted, for example, in Articles 19 to 22 of the Hague Convention on Choice of Court Agreements 2005, which permit certain optional extensions of or derogations from the Convention by states through unilateral declarations. A further strategy may be the careful design of rules to avoid inconsistent obligations from arising (even where one set of obligations

57 See supra n 42.


may be more extensive than the other) – although this may be difficult to achieve where international law rules overlay a variety of distinct federal approaches.

The problems raised by the complexity of the interaction of federal and international governance should not be understated. The purpose of the analysis above is to highlight the importance of developing a legal vocabulary and analytical framework, centred around the idea of variable geometry, to allow for the coexistence of different levels of regulation – both within private international law and more generally. In the context of private international law, such problems may be described as problems of the ‘conflict of conflict of laws’ – rules which define the relationship between different private international law regimes, determining which set of private international law rules apply. They therefore operate as ‘tertiary rules’, at a level higher than private international law rules which are themselves ‘secondary rules’ dealing with the allocation of regulatory authority in (primary) substantive private law.

6. The Problem of Heterarchy and the Idea of Peer Governance

As examined above, the development of ‘public’ or ‘systemic’ perspectives on private international law in federal systems has been led principally by federal institutions – by federal courts in the case of Canada and Australia, and the various European Union institutions in the case of the EU. The problem of heterarchy follows from the fact that there are no obvious international equivalents to these institutions to lead the internationalisation of private international law. The United Nations has perhaps a quasi-governmental function in the international system, and plays some role in the regulation of international business through UNCITRAL, but this institution has focused its efforts on the development of international substantive law rather than private international law.

It has at various times been suggested that the International Court of Justice should have a role to play in supervising private international law – a dispute between Belgium and Switzerland on the interpretation of the Lugano Convention was recently on the Court’s docket, before being settled. But there is no real prospect of the ICJ adopting the type of judicially creative role played by the highest courts of Canada and Australia, who have, as noted above, introduced federal rules of private international law as a matter of constitutional implication. This raises the question as to whether an internationalisation of private international law can occur without these supporting institutions.

One response to this problem may be to highlight and encourage the further development of existing international institutions with relevant competence. There is, of course, an institutional embodiment of an international systemic perspective on private

international law, which continues to play a leading role in the international development of the subject – the Hague Conference on Private International Law, which works for the progressive unification of rules of private international law, principally through international treaties. This institution, which draws on a tradition of international conferences founded in the late nineteenth century, invites its participants to see private international law as global law, responding to global problems, requiring global solutions. As in the European Union, the harmonisation of private international law it pursues offers not merely a change in the source of private international law, but a change in its character and status – from private rules designed to deal with specific disputes, to a technique of public global governance. The Hague Conference plays a unique and fundamentally important role in the development of international rules of private international law. But its powers are limited – it serves principally as a forum or conduit through which states may be encouraged to reach agreement. The global harmonisation of private international law would no doubt be advanced if the Hague Conference were given greater resources, but there is no prospect of it being given powers equivalent to those of federal law-making institutions. It remains therefore open to question whether the absence of a better developed institutionalisation of international law-making provides an insurmountable obstacle to the pursuit of global private international law based on an analogy with developments within federal systems.

A second response to this problem is to query the need for such institutions. To support this argument, an analogy may be drawn from the world of computer networks. A traditional computer network functions analogously to a traditional government – through a hierarchy of power and rules (Figure 1).

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A centralised ‘server’ acts to coordinate the network, applying and enforcing the ‘rules’ of the system by limiting the powers of subsidiary ‘client’ computers. Such a network may thus be compared to a federal system in which centralised institutions serve the role of coordinating and demarcating the authority of subsidiary institutions. The difficulty with developing global rules of private international law explored in this section is that there is an absence of such an institutionalised hierarchy at the international level – there is, instead, a heterarchy of coexisting ‘sovereigns’ in the form of states.

In recent years, however, the world of computers has been revolutionised by the emergence of a competing network model – the idea of ‘peer-to-peer’ networking. This idea has become best known for its association with illegal file-sharing, but it may fairly be argued that it is the fundamental idea behind the internet itself. The internet does not have a centralised server which plays a coordinating function, but a variety of independent ‘nodes’ which perform this role together (Figure 2).

In a particular peer-to-peer network, ordinarily all computers attached to this network perform the role of both client and server. To put this another way, a peer-to-peer network is a network with only an abstract hierarchy – a coordinated system of computers bound by common (hierarchically superior) rules, but without any institutionalised authority. In internet regulation, this has given rise to the idea of ‘peer governance’ – the idea that a non-hierarchical network system might nevertheless operate according to self-governing rules administered in a distributed way throughout the network, rather than through a centralised ‘sovereign’.

This is an idea ripe for exploitation in the context of debates about global governance, where international law may itself be viewed as a system of abstract hierarchy (containing rules which claim superiority over domestic laws) which functions largely without institutional support – ‘governance without government’.

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strategic response to the heterarchical character of international law is of course the development of international institutions in an effort to replicate or find equivalents to domestic constitutional hierarchies. Thus, many arguments for the constitutionalisation of international law aspire to the development of particular international institutions (most often the United Nations, or World Trade Organisation) to serve public constitutional functions. If such strategies were to succeed, they might very well allow for the simple replication of federal developments at the international level – the legislation of common rules of private international law by an international parliament, or the articulation of public principles of private international law by an international constitutional court. But these are hardly realistic prospects. In many ways, international law is itself the ultimate ‘peer to peer network’, or instantiation of ‘peer governance’ – a horizontal self-governing network which operates between formally equal participants.

To understand and develop the international system as it exists, it might fairly be argued that efforts would be better focused on the idea of ‘peer governance’ – and in particular the ‘meta-governance’ question of the means by which rules are developed and applied in a horizontally distributed network. This may be described as a form of constitutionalisation, but it is a form which is unlikely to find helpful analytical support in the hierarchical structures of states or federal systems. The role of the Hague Conference on Private International Law may, from this perspective, be better understood as analogous not to federal law-making institutions, but to the various organisations through which internet governance is developed by processes of consultation and coordination, such as the Internet Governance Forum (IGF) and the Internet Society (ISOC) (which oversees groups including the Internet Research Task Force (IRTF) and the Internet Engineering Task Force (IETF)).

The implications of the analysis above for the purpose of the argument in this paper are that the translation of federal private international law developments to the international level presents more than simply a problem of scale. It also presents a problem of regulatory technique – the need to recognise that the processes which have achieved the systemic development of private international law in a federal context are unlikely to be

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65 This is not to underplay the continued relevance of states and their efforts to regulate aspects of the internet unilaterally, often in competition with global initiatives: see further eg Mueller, ML, “Networks and States: The Global Politics of Internet Governance” (Cambridge, MA: MIT Press, 2010).


67 http://www.internetsociety.org/.


69 http://www.ietf.org/.
mirrored internationally, in the absence of equivalent institutions. But this problem – the problem of heterarchy – is by no means insoluble. A combination of support for existing international institutions focused on private international law (in particular, the Hague Conference) as well as a greater focus on the ideas and strategies of ‘peer governance’ (an idea with potentially significant implications across international law) may offer a pathway to overcoming these difficulties.

7. Conclusions

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. Private international law is thus the legal embodiment of the idea of justice pluralism – a principle of tolerance and mutual recognition. Under this principle, and under private international law, 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 and accommodated.

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 shortcomings of policy and technique, the operation of private international law constitutes an international system of global regulatory ordering – a hidden (private) international law.

The analysis of the internal private international law of federal systems reveals that in this context the original ‘systemic’ idea of private international law has been preserved and revived. The development of federalised private international law rules within the European Union, Canada and Australia has involved an implicit recognition that private international law is closely connected with constitutional law and in some cases is the 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.

The central insight of the experiences of federal systems is thus that private international law can and should 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. Rules of private international law are not primarily concerned with questions of private justice or fairness, 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.

Can the experiences of federal systems, in recognising and giving effect to the public systemic dimension of private international law, be translated to the international level? The development of ideas of ‘federal constitutionalism’ at the international level might offer some encouragement. This paper has, however, sought to respond to two problems which may be raised against the extension of federal developments to the international plane in private international law (and more generally). First, the problem of hierarchy – the fact that international and federal developments must coexist and potentially overlap. It is true that layering the internationalisation of private international law on top of its federalisation creates difficult boundary problems. But, drawing on the idea of variable geometry which has been explored in the EU and WTO contexts, we may begin to identify a range of techniques for accommodating this complexity. The second problem is the problem of heterarchy – the fact that the international system lacks the institutional development to mirror the role performed by federal courts or legislators in transforming private international law. There is, however, at least one international institution which partially performs such a role – the Hague Conference on Private International Law. And through the idea of peer governance, there is scope for greater development of our understanding of how systemic rules may be developed and given effect in the absence of institutional hierarchy. Variable geometry and peer governance are ideas with potentially important broader implications for international law and research into global governance, which (it is argued) require much further exploration.

This paper is, however, principally concerned with private international law, and with understanding and exploring its potential role as part of the architecture of global governance. The deeper idea underlying this paper is that although private international law rules are formally adopted and developed by national law makers, 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 global governance. Private international law rules may not be universally agreed, but they are nevertheless 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 common perception that private international law rules are merely concerned with achieving justice in individual private disputes can only obstruct this function.
Viewed from this perspective, private international law should not be merely a discipline of narrow professional interest for academics and for specialist national practitioners dealing with international private relationships and dispute resolution. Private international law is – or at least might be – a global system for the pluralist international ordering of private law. In a world which is not (and ought not to be) homogenous, there are and must be limits on the assertion of universal norms through the rules and principles of public international law. As a technique for accommodating and supporting tolerance, and the acceptance and ordering of difference, private international law has the potential to play an extremely important role in the international law and global governance of the twenty-first century.