THE RELATION BETWEEN PRIVATE INTERATIONAL LAW AND CONSTITUTIONAL LAW IN FEDERAL SYSTEMS

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Abstract

This article is exploring and analogy, its purpose is not to identify or comment on the present rules or practice of private international law in federal systems, but rather to examine the ideas and theories relating to private international law which have been developed in these states as a result of their federal structure, the ways in which the ideas of private international law have been affected by or are part of the constitutional ordering of the federal systems. These ideas are operative and they may still be usefully applied by way analogy in the context of the emerging idea of international federalism.

The idea involves secondary norms which deal with distribution of regulatory authority between states and between the international and national realms. By looking at the effect on private international law of equivalent norms within federal systems, the article identifies a conceptual framework which provides the foundations for a new perspective on international private law.

Keywords: *constitutional law, private international law, federal systems*

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1. Introduction

International law has traditionally constructed a conceptual barrier between the realms of their international and the national (between the universal and the particular), viewing them as operating in distinct contexts. Although international law has moved beyond its private conception through the assertion of further universal norms, there is an opposition and increasing internal engagement with the problem of limits of that universality, a recognition that there are normative boundaries to international law (Mills, 2009).

Rather than existing in discrete realms, international and national law are in dynamic tension; the pull of constitutional law, represented the "ideal" of universal regulation, may be contrasted with the pull if individual states, represented in the ideals of pluralism, diversity and national self-determination.

This development, which provides a conceptual framework for international law that rejects both positivist (apologist) dependence on a priori

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state sovereignty and the (utopian) commitment to limitless universalization, can best be described as part of a process of international constitutionalisation (Weiler&Wind, 2003, p. 115).

Conflicts law must address three principal questions. First, when a legal problem touches upon more than one country, it must be determined which court has jurisdiction to adjucate the matter. Second, once a court has taken jurisdiction, it must decide what law it should apply to the question before it. The rules governing the court may direct it to apply its own law or call for the application of the law of another country. Third, assuming that the court ultimately renders a judgment in favour of the plaintiff, conflicts law must address the enforcement of the judgment.

In the event that the defendant has insufficient assets locally, recognition and enforcement of the judgment must besought in a country where assets do exist (Weiler & Wind, 2003, p. 15).

2. The role of private international law in federal systems

The idea of federal private international law identifies and discusses the basic differences between internal and international private law and suggests reasons why the recognition of the impact of federal systems, introducing special role of private international law has been slow.

The possibility of federal private international law as modern approach to private international law is based on positivist theory which emphasis on state sovereignty led to the view of private international law. The change in theory and practice created the possibility that private international law, as a national discipline, could reflect the characteristics of each state, its local context, conditions and values. In particular, it created the possibility that private international law could reflect the characteristics of each state, its local context, conditions and values.

The inherent complexity of federal systems creates special problems for private international law, both internally and externally. Much of significant development in private international law theory emerged out of federal or quasi-federal systems – at different stages in history, those of Italy, France, the Netherlands and Germany. In federal systems, the combination of internal diversity and unifying mutual respect, difference and deference, creates what has been called conflict of laws paradise and laboratory of private international law experimentation.

The continued existence of federal states such US, Australia, Canada, and growth of federal regional organizations such as EU mean that federal systems have retained their importance for private international law throughout the twentieth and into twenty-first century. Historically, the different States of

federal systems have been treated simply as if they were separate countries for the purposes of private international law (Stone, 2006, p. 4).

The characterization of private international law rules discretionary had an impact on the characterization of private international law rules in States and federal systems. The problematic view of international private international law as a matter of discretion for each state was even more problematically transplanted to the view that private international law within a federal system also ought to be a matter of discretion for each State. In the EU, national resistance to Europeanized private international law rules is part of continued assertions of Member State sovereignty. As in the US, this corresponds with more general political concerns regarding the rights of States in the balance of power within the federal system.

The effect of this perspective has been to slow the development of conceptions of private international law which might place limits on the discretion of States by virtue of their federal context (Broude&Shany, 2008, p. 17).

Choice of law rules try to find a single most closely connected law to a dispute, although there can be disagreement on how such a connection should be measured. Even if there were complete agreement difficulties in proving the content of foreign law and differences in the procedural law of the forum could still lead to inconsistent legal treatment of disputes, although the likelihood os such differences is minimised by the concurrent application of the rules which limit jurisdiction.

At the same time, foreign judgments are frequently recognised and enforced, reducing the likelihood that inconsistent judgments will arise through duplicated local proceedings. But a foreign judgment will only be enforced when it is final, not merely an interim award which could be varied by the judgment court, a requierment clearly motivated by the desire to avoid increasing the possibility of inconsistent judgments.

3. Applicable law in different jurisdictions

The development of private international law within a federal system may thus be neglected or rejected on the basis that it represents an undue centralization of power – the opposite of the idea of universalism considered above, but with identical effect.

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

The vertical division of regulatory authority in federal system determines which powers are centralized and which are distributed to the States. Although one purpose of a federal system is to centralize the powers in pursuit of common goals, any federal system is premised on the idea that unification of law is not necessary possible. Localised systems of regulation may also be more desirable because of concerns about accountability, legitimacy and cultural diversity – ideas which may be encapsulated in the concept of subsidiarity.

The division of powers between the federal and State governments is a source of legal and political contestation in every federal system. The conflicts are traditionally part of domain of constitutional law although in some federal systems they may be characterized as private international law problems and addressed though private international law methodology or arise in the context of private international disputes.

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

These two dimensions of the distribution of regulatory authority in a federation create the possibility for special role of private international law. In the last fifteen years in particular, new ideas concerning the relationship between private international law and federal constitutional law have been developed, particularly in Australia, Canada and EU, with old antecedents in the constitutional jurisprudence of the US. These approaches have developed new ideas of private international law by viewing it through its relationship with the two dimensions of the architecture of federal system – horizontal and vertical divisions of regulatory authority (Petersmann, 2006, p. 45).

Conclusions

The establishment of constitutional rights as part of federal system is a part of vertical division regulatory authority. A State is not merely requiered to recognise constitutional rights. These rights are qualifications of regulatory authority of the State and this idea recognises that private international law must be subject of State regulatory authority in federal constitution.

The analysis of private international law in federal systems is most clearly articulated in the opinion of Alex Mills throug the jurisprudence of the Canadian Supreme Court wich states: “Legal systems and rules are a reflection

and expression of the fundamental values of society, so to resoect diversity of societies it is important to respect differences in legal systems. But if this is to work in our era where numerous transactions and interactions spill over the borders defining legal communities in our decentralized world legal order, there must also be a workable method of coordinatinating this diversity. Otherwise, the anarhic system's worst attributes emergem and individual litigants will pay the inevitable price of unfairness. Developing such coordination in the face of diversity is a common of both public and private international law.

It is also one of the major objectives of the division of powers among federal and provincial governments in a federation it raises issues that lie at the confluence of private international law and constitutional law". (Mills, 2009, p. 207)

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