SUBSTANTIVE PUBLIC POLICY IN CROSS-BORDER LITIGATION: A COMMON LAW STUDY

A Thesis submitted by

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ABSTRACT

This thesis examines the evolution of the substantive public policy exclusion in the cross-border litigation of major Anglo-common law jurisdictions.

The substantive doctrine of public policy in its domestic and cross-border spheres of operation has long courted criticism for its uncertainty, ambiguity, and unruliness. As a means by which to exclude foreign law or deny recognition to a foreign judgment, cross-border public policy ultimately involves a moral evaluation of foreign law. This thesis sets out to deepen existing scholarly understanding of the historical and theoretical development of the substantive exception in cross-border litigation in Anglo-common law jurisdictions. In addition, it aims to rehabilitate the reputation of substantive public policy, which is still occasionally characterised as an 'unruly horse' in need of taming.

It fulfils this aim by examining substantive public policy's modern content in the jurisprudence of major Anglo-common law jurisdictions and recommending two new species of exception: public international law and foreign governmental interests.

CERTIFICATION OF THESIS

This Thesis is entirely the work of SARAH LOUISE MCKIBBIN except where otherwise acknowledged. The work is original and has not previously been submitted for any other award, except where acknowledged.

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Date

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Principal Supervisor

Student and supervisor's signatures of endorsement are held at the University.

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This thesis is dedicated to my late dad, Stephen (Steve) McKibbin.

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CHAPTER 1: INTRODUCTION

I INTRODUCING THE SUBSTANTIVE PUBLIC POLICY EXCEPTION AT COMMON

This thesis is a study of the evolution of the *substantive* public policy exception in Anglo-common law private international law.[1] At common law, the doctrine of public policy in its substantive sense is traditionally assumed to have two spheres of operation.[2] The first sphere is occupied by public policy in its internal or domestic sense. This type of public policy is applied to wholly domestic cases. A body of case law involving internal public policy has developed around contracts and succession to property.[3] In internal or wholly domestic litigation, public policy may be invoked to justify the non-enforceability of a contract, to strike down a testamentary disposition, or to invalidate a trust disposition.[4] The second sphere of operation is international or, as is preferred in this thesis, cross-border[5] public policy — the function of public policy in private international law. This type of public policy, involving the application of domestic or international policy norms to override a foreign law or judgment, is more narrowly drawn than domestic public policy. Anglo-common law courts are, as Lord Simon observed in *Vervaeke v Smith*, 'even slower to invoke public policy in the field of conflict of laws than where a purely municipal legal issue is involved'.[6] Public policy in its domestic sense has long offered a breeding ground for 'equine metaphors' counselling against the doctrine's unrestrained use.[7] Anglo-common law judges fear that an unfettered discretion to displace the law will 'let loose the "unruly horse" of public policy to a "blind gallop through the doctrinal forests of [the law]".'[8] Likewise, cross-border public policy has incurred the reproach of judges and scholars for its 'uncertainty' and 'ambiguity'.[9] It has

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1 All references to public policy in this thesis are to substantive, not procedural, public policy.

2 See R D Leslie, 'Aspects of Public Policy in the Conflict of Laws' (PhD Thesis, The University of Edinburgh, 1979) 4–6, 16–17.

3 *Cattanach v Melchior* (2003) 215 CLR 1, 85–6 [234]–[235] (Hayne J).

4 Ibid.

5 Cross-border public policy is the term preferred in this thesis to describe this second sphere of operation.

6 *Vervaeke v Smith* [1983] 1 AC 145, 163 (Lord Simon).

7 *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215, 232 (Kirby J). See, eg, *Richardson v Mellish* (1824) 2 Bing 229; 130 ER 294, 303 (Burrough J); P B Carter, 'The Rôle of Public Policy in English Private International Law' (1992) 42 *International and Comparative Law Quarterly* 1, 1: 'Public policy historically has been, and continues to be today, only one of several fairly well-trodden escape routes.'

8 *Fitzgerald v F J Leonhardt Pty Ltd* (n 7), quoting Hugh Stowe, 'The "Unruly Horse" has Bolted: *Tinsley v Milligan*' (1994) 57(3) *Modern Law Review* 441, 449.

9 See, eg, Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4(2) *Journal of Private International Law* 201, 202; Kenny Chng, 'A Theoretical Perspective of the Public Policy Doctrine in the Conflict of Laws' (2018) 14(1) *Journal of Private International Law* 130, 131; Mark Hirschboeck,

been characterised in a predictably equine manner as one of private international law's 'fairly well-trodden escape routes'.[10]

This thesis centres on the doctrine's second sphere of operation. The successful invocation of public policy inevitably involves scrutinising the substantive content of, otherwise applicable, foreign law. This scrutiny could lead a court, exceptionally, to deny recognition to a foreign judgment or exclude foreign law directed by the usual application of choice of law rules. Within private international law, public policy has had the most exposure in cases involving contract and status.[11] Though this short description reveals cross-border public policy to be inherently exclusionary or negative, it *may* have positive or 'creative' functions (explored in Chapter 8).[12] However, as this thesis explores, modern appeals to cross-border public policy have been overcome by judicial reluctance to engage the exception, admonitions, and appeals to international comity. Public policy has, over the years, become a measure of last resort primed 'for foreign laws of surpassing evil or equivalent objection'.[13] The foreign law or foreign judgment must be manifestly incompatible with the domestic legal order to engage public policy.[14] It must 'offend some moral, social, or economic principle so sacrosanct in [the forum's] eyes as to require its maintenance at all costs and without exceptions'.[15]

This thesis has two main purposes. First, it seeks to deepen existing scholarly understanding of the historical and theoretical development of the substantive public policy exception in Anglo-common law private international law. Secondly, it seeks to rehabilitate the 'maligned'[16] exception by outlining public policy's modern content and proposing future directions for the exception. Although this thesis inevitably builds on

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'Conceptualizing the Relationship between International Human Rights Law and Private International Law' (2019) 60 *Harvard International Law Journal* 181, 192.

10 Carter, 'The Rôle of Public Policy' (n 7) 1.

11 See Lord Collins (ed), *Dicey, Morris & Collins on the Conflict of Laws* (Sweet and Maxwell, 15th ed, 2012) vol 1 102 [5–008].

12 See, eg, *Lorentzen v Lydden* [1942] 2 KB 202, 215–6 (Atkinson J); F A Mann, 'Extraterritorial Effect of Confiscatory Legislation (Note)' (1942) 5(3) *Modern Law Review* 262, 263; Adrian Briggs, 'Public Policy in the Conflict of Laws: A Sword and a Shield? A Note on *Kuwait Airways Corp v Iraq Airways Co [Nos 4 and 5]*' (2002) 6 *Singapore Journal of International and Comparative Law* 953, 977. Cf *Bank voor Handel v Slatford* [1953] 1 QB 248, 263–4, 266 (Devlin J); *Peer International Corp v Termidor Music Publishers Ltd* [2004] Ch 212, 222 [31] (Aldous LJ), 234 [62], [63] (Mance LJ). See also Bobby Lindsay, 'Resuscitating the Positive Aspects of Public Policy in Private International Law' (Conference Paper, Society of Legal Scholars PhD Conference, 4 December 2016).

13 Briggs (n 5) 956.

14 Carter (n 4) 2; Mills (n 9) 201.

15 James Fawcett and Janeen M Carruthers, *Cheshire, North & Fawcett: Private International Law* (Oxford, 14th ed, 2008) 140.

16 *Richardson v Mellish* (n 7) 303 (Burrough J): 'I, for one, protest, as my Lord has done, against arguing too strongly upon public policy;—it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.'

existing scholarship, it aims to give a more nuanced historical and theoretical understanding of the substantive exception than the scholarship currently provides.

The remainder of this Chapter is arranged into four parts. Part II provides a background to existing scholarship on cross-border public policy. The research questions of this thesis are canvassed in Part III. Part IV outlines the research methodology employed in this thesis to develop its structure and content. The question of this thesis's originality and contribution to research is answered in Part V. Finally, the structure of this thesis is set out in Part VI.

II NAVIGATING PUBLIC POLICY'S PLACE, SCOPE, AND CONTENT

The scholarship, for the most part, derives from American law journals published well over half a century ago.[17] Though much of the existing private international law scholarship on public policy is dated, some themes are nevertheless discernible. This Part foregrounds two themes that encouraged the development of this thesis' structure and argument. These themes are, first, the place of public policy and, secondly, its scope and content.

A *Its Place in Theory*

The first theme is the place of public policy in territorial models of private international law. These scholarly models of private international law originate in the territorialism inherent in Ulrik Huber's *De Conflictu Legum*. Huber's short work supplied the theoretical backbone for 19th century English and American treatises on private international law. By the early 20th century, American scholars were emphasising the public policy exception to highlight flaws in these territorial-based theories, such as Joseph Beale's vested rights theory, then predominating in the United States.[18] Ernest G Lorenzen summarised the

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[17] See John K Beach, 'Uniform Interstate Enforcement of Vested Rights' (1918) 37 *Yale Law Journal* 656, 661; J Kosters, 'Public Policy in Private International Law' (1920) 29 *Yale Law Journal* 745; Ernest G Lorenzen, 'Territoriality, Public Policy and the Conflict of Laws' (1924) 33 *Yale Law Journal* 736; Herbert F Goodrich, 'Public Policy in the Law of Conflicts' (1930) 36 *West Virginia Law Quarterly* 156; David F Cavers, 'A Critique of the Choice-of-Law Problem' (1933) 47 *Harvard Law Review* 173, 183–4; Note, 'The Public Policy Concept in the Conflict of Laws' (1933) 33 *Columbia Law Review* 508; Charles B Nutting, 'Suggested Limitations of the Public Policy Doctrine' (1935) 19 *Minnesota Law Review* 196; Milton J Rappoport, 'Public Policy in the Conflict of Laws' (1936) 10 *University of Cincinnati Law Review* 473; Note, 'Public Policy of the Forum as Ground for Enforcement of Foreign Contract Discharged by Discriminatory Foreign Decree' (1937) 23 *Virginia Law Review* 288; Herbert F Goodrich, 'Foreign Facts and Local Fancies' (1938) 25 *Virginia Law Review* 26, 35; Monrad G Paulsen and Michael I Sovern, 'Public Policy in the Conflict of Laws' (1956) 56 *Columbia Law Review* 969.

[18] See Ernest G Lorenzen, 'Validity and Effect of Contracts in the Conflict of Laws' (1921) 30 *Yale Law Journal* 655, 673; Lorenzen, 'Territoriality, Public Policy and the Conflict of Laws' (n 17) 746; Cavers, 'A Critique of the Choice-of-Law Problem' (n 17) 183. See also Shirley A Wiegand, 'Officious Intermeddling, Interloping Chauvinism, Restatement (Second), and Leflar: Wisconsin's Choice of Law Melting Pot' (1998) 81 *Marquette Law Review* 761, 764; Luther L McDougal, 'Leflar's Choice-Influencing

substance of this criticism in his 1923–4 article, 'Territoriality, Public Policy and the Conflict of Laws', noting that:

> [t]he notion that the rules of the Conflict of Laws can be derived from some general principle or theory is responsible for another doctrine—that of 'public policy' … Realizing that the logical deductions from their *a priori* theory could not be justified in all cases, the theoretical writers have allowed the ordinary rules, which govern 'on principle,' to be set aside under certain circumstances by the rules of 'public policy' or 'public order.'[19]

Likewise, John K Beach (1918) complained that the public policy exception might be invoked between states of the United States over 'minor matters of expediency, and to debatable questions of internal policy'.[20] Sustained scholarly criticism of territorial-based theories of private international law, in particular the incorporation of the vested rights theory into the *First Conflicts Restatement*,[21] contributed to the later 20th century American conflicts 'revolution'. American scholarship on public policy has waned as a result of the predominance of interest-based theories of private international law, one product of the 'conflicts' revolution. These theories downplay public policy as part of their process.

On the other hand, British private international lawyers reject theory and, instead, adopt a pragmatic approach. To some extent, this thesis is pragmatic. Pragmatists

> do not see an overarching theory that satisfactorily explains why States apply the rules of foreign legal systems, or why they limit their own jurisdiction, or recognise the decisions of foreign courts. They know that for many hundreds of years this has happened and assume that it will continue to happen. Their attention… 'is mainly concentrated on the details of private international law in force which have increased greatly …'[22]

Accordingly, rules of private international law are to be tested in an empirical or pragmatic way with justice and convenience as fundamental aims.[23] The focus is on developing 'clear rules properly applicable to the generality of cases in a particular field', rather than tailoring 'individual… solutions for each case'.[24] The sidelining of territorial-based theories by

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Considerations: Revisited, Refined and Reaffirmed' (1999) 52 *Arkansas Law Review* 105, 110. McDougal described public policy as a 'cover-up gimmick' when courts were in fact applying the best law in a 'contemporary socio-economic sense': at 110.

19 Lorenzen, 'Territoriality, Public Policy and the Conflict of Laws' (n 17) 746.

20 Beach (n 17) 662.

21 See Lorenzen (n 18); Walter Wheeler Cook, The Logical and Legal Bases of the Conflict of Laws (1924) 33 *Yale Law Journal* 457; Walter Wheeler Cook, '"Substance" and "Procedure" in the Conflict of Laws' (1933) 42 *Yale Law Journal* 333; Walter Wheeler Cook, 'The Jurisdiction of Sovereign States and the Conflict of Laws (1931) 31 *Columbia Law Review* 368.

22 A E Anton and P R Beaumont, Private International Law: A Treatise from the Standpoint of Scots Law (W Green, 2nd ed, 1990) 42.

23 PM North and JJ Fawcett, *Cheshire and North's Private International Law* (Oxford University Press, 13th ed, 1999) 32.

24 Ibid.

American scholars and by, for different reasons, British scholars is unfortunate, because it conceals the influence institutional writers have had on the shape of the modern doctrine of public policy in private international law.

B *Its Scope and Content*

The second theme is the scope and content of the public policy exception, which spills over into four related scholarly inquiries.

The first scholarly inquiry concerns the reasons for the narrow scope of public policy at common law. Kosters (1920) and Husserl (1938) offered an early comparative perspective on this theme, noticing that the continental concept of *ordre public* was more expansive than public policy at common law.[25] During this period, mandatory rules were subsumed by *ordre public* — comparable to but not the same as common law public policy.[26] Some continental legal orders followed the Romanic school which applied the principle of nationality. Nationality was personal, had extraterritorial effect, and trailed 'the person wherever he goes'.[27] The Romanic school required the application of forum law 'if the law in question is one concerning public policy'.[28] Husserl also posited that the *lex fori* had a larger role at common law than it had in continental legal systems.[29] English conflicts scholar, P B Carter, subsequently reprised this argument. In two journal articles, Carter hypothesised that public policy's narrow scope in English law was attributable to the forum-orientated bias 'built into many English choice of law rules themselves'.[30] This bias enabled English courts properly to avoid foreign law without having to retreat to the doctrine.[31] Countering this theory is the contention that English courts have exhibited a 'spirit of internationalism' in the interpretation of the public policy exception.[32]

A second scholarly concern is the categorisation or delimitation of case law on public policy. In the past, some scholars have suggested that this end is ultimately futile.[33] This theme is encapsulated in *Dicey, Morris and Collins' Conflict of Laws*: 'no attempt to define the limits of that reservation has ever succeeded'.[34] Dicey's text nevertheless concludes that

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25 J Kosters, 'Public Policy in Private International Law' (1920) 29 *Yale Law Journal* 745; Gerhart Husserl, 'Public Policy and Ordre Public' (1938) 25 *Virginia Law Review* 37.
26 Husserl (n 25) 40.
27 Kosters (n 25) 750–1; Husserl (n 25) 61.
28 Nelson Enonchong, 'Public Policy in the Conflict of Laws: A Chinese Wall Around Little England' (1996) 45 *International and Comparative Law Quarterly* 633, 635.
29 Husserl (n 25) 47.
30 Carter (n 7) 3; *contra* Enonchong (n 28).
31 Ibid.
32 Enonchong (n 28) 660.
33 Lorenzen, 'Territoriality, Public Policy and the Conflict of Laws' (n 17) 747; Husserl (n 25) 40–1.
34 Collins (n 4) 102 [5-008].

'[a]ll that can be done, therefore, is to enumerate the cases in which the recognition or enforcement of rights arising under foreign laws has been refused on this ground'.[35] As a corollary, however, some scholars have suggested that it is in fact possible to devise 'principled boundaries' to discipline the courts' exercise of the public policy exception.[36]

A third scholarly inquiry explores positive or creative functions of public policy. Two positive functions have been suggested. First, an English court might supply a legal right or claim where none is otherwise available.[37] Briggs considered that this particular function of public policy 'is a most uncommon occurrence, but no basis for contending that the power is non-existent'.[38] The second function is for public policy to intervene in the *renvoi* process.[39] For example, the forum court's transmission of a question to the law of a third place is considered by the court to be unacceptable on public policy grounds.[40] This thesis nevertheless maintains that public policy should only be used negatively in a manner consistent with the historical foundation and function of the exception.

A fourth outcome of scholarship on public policy's content and scope is to consider whether there is a transnational dimension to cross-border public policy. Some scholars, arguing that transnational public policy is a 'subset' of cross-border public policy, suggest that it should be informed by principles of international law as well as 'universal principles of justice and morality'.[41] However, the metes and bounds of this dimension of public policy and the difficulties associated with international law's recognition in this sense are the subject of little scholarship. This topic is explored in Chapter 8.

III RESEARCH QUESTIONS

This thesis pursues the argument that scholarship in private international law has exerted a significant influence on the shape of the modern public policy exception. The supporting role of Anglo-common law judges in delimiting the modern substantive exception, shown in their reluctance to invoke public policy and their repeated appeals to international comity as an abstract concept, is scrutinised as a related argument.

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35 Ibid.

36 See, eg, Carter (n 7); Mills (n 9); Chng (n 9).

37 Briggs (n 5) 977. See also Janeen M Carruthers and Elizabeth B Crawford, '*Kuwait Airways Corporation v Iraqi Airways Company*' (2003) 52 *International and Comparative Law Quarterly* 761, 766–9.

38 Briggs (n 5) 977.

39 Joost Blom, 'Public Policy in Private International Law and its Evolution in Time' (2003) 50 *Netherlands International Law Review* 373, 376.

40 Ibid.

41 See Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4(2) *Journal of Private International Law* 201, 214–5; Adeline Chong, 'Transnational Public Policy in Civil and Commercial Matters' (2012) 128 *Law Quarterly Review* 88; Jan Oster, 'Public Policy and Human Rights' (2015) 11(3) *Journal of Private International Law* 542; Kenny Chng, 'A Theoretical Perspective of the Public Policy Doctrine in the Conflict of Laws' (2018) 14(1) *Journal of Private International Law* 130.

This thesis addresses four main research questions. The first question posed is the content of the substantive exception, the answer to which depends on an analysis of historical and contemporary sources on domestic and cross-border public policy. The second question concerns the extent to which writers of private international law have shepherded the common law's development of cross-border public policy. This raises several other issues including the status of academic scholarship in common law courts and whether judicial citation of a legal treatise elevates its authority. The third question concentrates on the factors which inform the reluctance to apply the exception in multistate cases. The fourth question is whether there is any scope left for the development of new exceptions or the recognition of different functions of public policy.

IV METHODOLOGY

To address these research questions, this thesis involves qualitative research of a doctrinal and comparative nature.

The thesis mainly employs doctrinal legal analysis to explore the origins, evolution, and future of the substantive public policy exception in private international law. The term 'doctrine' takes on a special meaning in the study of law, referring to 'legal concepts and principles of all types – cases, statutes, and rules'.[42] A doctrinal analysis is an expected and understandable focus of this thesis. Not only is legal research still largely doctrinal in Australia,[43] law itself is a normative discipline which pays great respect to established legal norms derived from case law and statute.[44] Since the doctrinal method is an 'implicit' or 'tacit' part of legal research methodology, few law students or academics 'verbalise' the method.[45] For this key reason, the doctrinal methodology has attracted little scholarly attention[46] and, at times, criticism.

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42 Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 84.

43 Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Printing Service, 1987) 309 ('Pearce Report').

44 Ibid.

45 Hutchinson and Duncan (n 42) 99.

46 See, eg, Dan Jerker B Svantesson, 'The Hypocritical Hype about "Hypothesis"' (2014) 39 *Alternative Law Journal* 259; Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Taylor and Francis, 2013) 7; Martha Minow, 'Archetypal Legal Scholarship: A Field Guide' (2013) 63(1) *Journal of Legal Education* 65; Hutchinson and Duncan (n 42); Terry Hutchinson, *Researching and Writing in Law* (Lawbook Co, 3rd ed, 2010); Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 16; Pearce, Campbell and Harding (n 43); Ernest M Jones, 'Some Current Trends in Legal Research' (1962) 15 *Journal of Legal Education* 121.

Despite the dearth in literature, it is still clear that doctrinal research requires 'rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials'.[47] In this thesis, the doctrinal methodology is employed to confront 'an alleged lack of coherence, disputed issue of application or normative shortcoming in a defined area of law'.[48]

The methodology's focus on extracting principles and drawing conclusion from primary materials has led to its characterisation as 'internal' since it is undertaken by 'an insider in the system'.[49] The intuitivism of this approach, developed from scholars' 'legal-professional socialisation',[50] makes it an 'easy target' for criticism from scholars in other disciplines.[51] Nevertheless, the methodology is well-adapted to the aims of this thesis. The doctrinal methodology is used to identify, categorise, and define the private international law of public policy. However, the methodology requires more than just an identification of relevant case law or statute; it also requires analysis and synthesis.

This thesis accordingly uses the two-part process devised by Hutchinson and Duncan for doctrinal research.[52] For the first part, relevant sources of law are located.[53] The second part of the method involves a 'synthesizing process once the documents are located and read'.[54] The research for this thesis is drawn from a number of sources. In addition to statute and common law, relevant secondary sources are used. Older legal treatises, journal articles, and textbooks illuminate the historical context in which private international law's public policy exception emerged. Meanwhile, case law and academic comment shed light on the exception's potential.

In addition to this doctrinal methodology, a comparative element is introduced in Chapters 7 and 8. One purpose of this method is to 'analyze objectively and systematically the solutions which the various systems offer for any given legal problem'.[55] The thesis employs one species of comparative law study — 'micro-comparison' — to understand

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47 Council of Australian Law Deans, *Statement on the Nature of Legal Research* (October 2005) Council of Australian Law Deans <https://perma.cc/BG2X-S57R>.

48 Theunis Roux, 'Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour' (2014) 24 *Legal Education Review* 173, 182.

49 Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 *Legal Quarterly Review* 623, 624.

50 Roux (n 48) 182.

51 Ibid 174; Lee Epstein and Gary King, 'The Rules of Inference' (2002) 69 *The University of Chicago Law Review* 1, 9–10.

52 Hutchinson and Duncan (n 42) 110.

53 Ibid 110.

54 Ibid 111.

55 Walther Hug, 'The History of Comparative Law' (1932) 45 *Harvard Law Review* 1027, 1027.

the legal position adopted for substantive cross-border public policy and international law in particular jurisdictions.[56]

English law is, as a matter of course, the point of reference for this common law study of cross-border public policy. The five other legal systems chosen in this study — Australia, New Zealand, Singapore, Hong Kong and Canada — belong to, or are influenced by, the English common law tradition.

A *Delimitation*

This thesis deals only with substantive, rather than procedural, aspects of public policy according to the Anglo-common law rules of private international law. The common law of the jurisdictions discussed in this thesis treat the denial of natural justice or procedural fairness as a separate defence to the recognition or enforcement of a foreign judgment at common law and under statutory regimes.[57] However, the public policy exception has a wider import under continental European law, embracing fraud[58] and breaches of procedural fairness.[59] Procedural public policy thus focuses on 'situations where the specific proceedings leading to … judgment were incompatible with fundamental principles of procedural fairness' of the jurisdiction in which recognition or enforcement is sought.[60]

Given the wider import of public policy under continental European law, substantive and procedural aspects of public policy fall within the scope of the defence in European Union ('EU') private international law instruments,[61] international conventions on arbitral

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56 Peter de Cruz, *Comparative Law in a Changing World* (Routledge Cavendish, 3rd ed, 2007) 242–6.

57 See, eg, *Pemberton v Hughes* [1899] 1 Ch 781, 790 (Lord Lindley) (CA); *Far East Bank and Trust Co v King Poo Koo* [1980] HKC 377, 380, 381 (Bewley J); *Adams v Cape Industries plc* [1990] Ch 433, 564–6; *Kemp v Kemp* [1996] 2 NZLR 454, 455 [3]; Hong Pian Tee v Les Placements Germain Gauthier Inc [2002] 2 SLR(R) 515, 519 [12]; *Boele v Norsemeter Holding AS* [2002] NSWCA 363, [24] (Giles JA); *Beals v Saldanha* [2003] 3 SCR 416, 440 [35], 441 [40], 448–51 [59]–[70] (Major J); *Pro Swing Inc v Elta Golf Inc* [2006] 2 SCR 612, 624 [12] (Deschamps J), 653 [89]–[90], 654 [92], 663 [119] (McLachlin CJ) (dissenting); *Reeves v OneWorld Challenge* [2006] 2 NZLR 184, 193 [37] (O'Regan J); *Poh Soon Kiat v Desert Palace Inc (t/a Caesars Palace)* [2010] 2 LRC 549, 561 [14]; *Ross v Ross* [2011] NZAR 30, 33–4 [13], 34 [14]; C F Forsyth, *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (Juta, 5th ed, 2012) 460 (n 315); *Chevron Corp v Yaiguaje* [2015] 3 SCR 69, 117 [77] (Gascon J); *Henderson v Henderson* [2016] HKCU 874, [48] (Au-Yeung J); *LFDB v SM [No 3]* [2017] FCA 80, [102]–[124] (Griffith J) ('gross denial of procedural fairness'); *LFDB v SM* (2017) 256 FCR 218, 226 [29]; *Eilenberg v Gutierrez* [2017] NZFLR 471, 481 [30] (Harrison J).

58 Lord Collins (ed) (n 11) 732 [14–146].

59 See especially *Bamberski v Krombach* [2001] QB 709, 728–9, 731 (ECJ); *Régie Nationale des Usines Renault SA v Maxicar SpA* (C-38/98) [2000] ECR I-2973; *Maronier v Larmer* [2003] QB 620, 630 [30].

60 See, eg, *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015) art 9(e) ('*2005 Choice of Court Convention*'); *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, opened for signature 2 July 2019 (not yet in force) art 7(1)(c) ('*HCCH Judgments Convention*').

61 See *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)* [2012] OJ L

awards,[62] and recently concluded Hague Conventions that are strongly influenced by EU instruments.[63] Explanatory reports for the *Hague Convention on Choice of Court Agreements* (2005) and *Hague Convention on the Recognition and Enforcement of Foreign Judgments* (2019) explain the express inclusion of procedural matters in the defence by observing that 'in some countries fundamental principles of procedural fairness (also known as due process of law, natural justice or the right to a fair trial) are constitutionally mandated'.[64]

V ORIGINALITY AND CONTRIBUTION TO KNOWLEDGE

This thesis makes at least four contributions to the existing scholarship on the public policy exclusion.

First, this thesis closely examines the historical development of substantive public policy in common law private international law. This thesis thus provides more meaningful analysis than Lorenzen's incidental remark that 'theoretical writers' bear some responsibility for the place occupied by public policy in territorial models of private international law.[65] In particular, this thesis analyses accounts of public policy in historical scholarship on private international law to make out its contours, theoretical undercurrents, and compatibility with legal precedent.

Secondly, this thesis' scrutiny of specific classes of domestic public policy (Chapter 2) goes beyond the existing scholarship in three ways. First, this thesis paints a clearer and fuller historical picture of domestic public policy by identifying and examining the classes that emerged in English, Scottish, and Irish case law of the 17th through to the early 19th century. Secondly, this thesis determines the extent to which historical scholarly accounts of the private international law exclusion were compatible with existing conceptions of

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351/1 art 45(a) ('*Brussels I Recast*'); *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations* [2008] OJ L 177/7 art 21 ('*Rome I Regulation*'); *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations* [2007] OJ L 199/40 art 26 ('*Rome II Regulation*'). See also Burkhard Hess, Thomas Pfeiffer and Peter Schlosser, 'Report on the Application of Regulation Brussels I in the Member States' (Study JLS/C4/2005/03, 2008) 249–50 [559]–[560]; Paul Beaumont and Emma Johnston, 'Can *Exequatur* be Abolished in Brussels I Whilst Retaining a Public Policy Defence?' (2010) 6(2) *Journal of Private International Law* 249; Jerca Kramberger Škerl, 'European Public Policy (With an Emphasis on *Exequatur* Proceedings)' (2011) 7(3) *Journal of Private International Law* 461.

62 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) art V(2) ('*New York Convention*').

63 See, eg, *2005 Choice of Court Convention* art 6(c); *HCCH Judgments Convention* art 7(1)(c).

64 See Trevor Hartley and Masato Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements* (Explanatory Report, Hague Conference on Private International Law, 2007) 831 [189]–[190]; Francisco Garcimartín and Geneviève Saumier, 'Judgments Convention: Revised Draft Explanatory Report', *Hague Conference on Private International Law* (December 2018) <https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf> 64–5 [291].

65 Lorenzen, 'Territoriality, Public Policy and the Conflict of Laws' (n 17) 746.

domestic public policy in English, Scots, and Irish law. Thirdly, it examines the durability of these scholarly accounts of public policy in case law and scholarship.

Thirdly, analysis of judicial citation in Chapter 5 corroborates the perception in private international law scholarship that certain texts have had, and still possess, a persuasive value in deciding cross-border cases.[66] The thesis takes this one step further by returning to the public policy doctrine to specifically identify the weight attached to scholarly accounts of public policy in common law decision-making.

Fourthly, this thesis critically examines public international law as a category of cross-border public policy to propose that public international law should be a detached exception. It elaborates on the content of this proposed public international law exception and highlights difficulties associated with the domestic recognition of international law. The Australian exception of foreign governmental interests serves as a useful point of comparison.

VI MAPPING THE THESIS

This thesis is divided into nine chapters. This first chapter has introduced the thesis by outlining the research problem, its methodologies, the thesis' originality and contribution to scholarship, and — now — its structure.

Chapter 2 (Common Law Origins) provides a historical perspective on domestic public policy by tracing its origins and the contexts in which it arose. The first half of the Chapter chronicles this historical background by briefly outlining medieval sources and writings that may have influenced its form. The first half concludes by considering the sustained criticism of public policy, as it emerged in the early 19th century. Reasons for this treatment are explored along with some of the more common uses of public policy in this period. The second half of Chapter 2 identifies specific classes of contracts considered contrary to public policy in English, Irish, and Scottish courts between the 17th and 19th centuries. The cases are arranged thematically to include cases involving corruption, the commission of a crime or tort, and sexual immorality.

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[66] See, eg, Frederic Harrison, *On Jurisprudence and the Conflict of Laws* (Oxford University Press, 1919) 102; C K Allen, *Law in the Making* (Clarendon Press, 1927) 154–6; Richard Fentiman, 'Legal Reasoning in the Conflict of Laws: An Essay in Law and Practice' in Werner Krawietz, Neil MacCormick and George Henrik von Wright (eds), *Prescriptive Formality and Normative Rationality in Modern Legal Systems: Festschrift for Robert S Summers* (Duncker & Humblot, 1994) 458; C G J Morse, 'Making English Private International Law' in James Fawcett (ed), *Reform and Development in Private International Law: Essays in Honour of Sir Peter North* (Oxford University Press, 2002) 273, 282–5; Mary Keyes, 'Order, Illumination and Influence: *Dicey, Morris & Collins on the Conflict of Laws, Fourteenth Edition*' (2007) 3 *Journal of Private International Law* 355, 356–8.

Chapter 3 (Theoretical Origins and Sources) addresses the structure that historical scholarly accounts of private international law gave to the public policy exception. It intends to develop the thesis' major argument that scholars constructed cross-border public policy or, at least, exerted a considerable influence on its modern shape. Scholarly accounts of cross-border public policy have not been closely examined in the literature. Chapter 3 accordingly considers the coverage of public policy in Ulrik Huber's *De Conflictu Legum Diversarum in Diversis* ('*De Conflictu Legum*'), followed by Joseph Story's *Conflict of Laws*, John Westlake's *Treatise on Private International Law*, and A V Dicey's *Conflict of Laws*. Instances of overlap between the classes of cases identified in Chapter 2 and content within the scholars' accounts are highlighted. In addition, Chapter 3 prises out elements of natural law visible in Story's account of public policy as well as the influence of Austinian positivism on later 19th century accounts of public policy.

Chapter 4 (Institutional Writers as a 'Source of Law') involves a slight detour from the focus of Chapters 2 and 3. It provides the platform upon which to examine the influence of scholars on the contours of cross-border public policy. Chapter 4 thus responds to the emphasis in Chapter 3 on historical scholarship by bearing down on the argument that unusual weight has been attached to scholarly accounts in this field. The Chapter provides a cameo on the Scots concept of 'institutional writings' — works conferred special authority by virtue of judicial citation. During the 19th century, judicial citation became the benchmark against which to assess institutional status in Scotland. Before the 19th century, writings were conferred this status using different standards. The Chapter borrows factors thought to have contributed to the appearance of institutional writings in Scotland to discern whether these factors were also present in the United States of America and England. The Chapter situates these factors alongside 19th century improvements to university legal education in the United States, England, and Ireland.

Chapter 5 (Institutional Writers on Modern Doctrine) underscores the unusual influence of scholarship obtaining in private international law jurisprudence. The Chapter first identifies three 19th century writers of private international law as 'institutional'. Secondly, it analyses the judicial citation of these writers' works to discern their contributions to modern doctrine. The purpose of emphasising these scholarly contributions is to reinforce the argument that institutional writers have not only assumed a special authority in private international law but have had a determinative role in shaping the public policy exception.

Chapter 6 (The Formative Role of Public Policy) considers the influence of institutional writers' accounts of public policy on the premature crystallisation of the traditional choice of law rules for torts and marriage. Where institutional writing influenced decision-making, Chapter 6 draws attention to this influence. The Chapter also highlights the modern status of these choice of law rules, emphasising elements which may be seen as embedding or reinforcing considerations of public policy.

Chapter 7 (The Modern Private International Law of Public Policy) considers the contraction of public policy in common law private international law and suggests its modern content. The Chapter offers international comity as one prominent factor that has neutralised appeals to public policy. However, it also examines factors that may encourage Anglo-common law courts to apply the exception with some degree of confidence. The discussion in Chapter 7 ends with an examination of two patterns of public policy, including transnational public policy, and a brief consideration of the case for the exception operating in a positive sense.

Chapter 8 (The New Species of Exception) advances international law and foreign governmental interests as two new species of private international law exception. First, Chapter 8 evaluates whether now is an appropriate time to denude public policy of its transnational or international law dimension to establish a separate exception. Secondly, the Chapter considers English developments on the 'other public law' rule together with readier acceptance of Australia's foreign governmental interests doctrine. It emphasises that 'other public laws' and its Australian successor have arisen as a direct consequence of scholarship.

Chapter 9 is the Conclusion, which brings together points made throughout the thesis and reflects on future research directions.

The next Chapter — Chapter 2 — provides an historical perspective on domestic public policy to ground the discussion of cross-border public policy that follows in Chapters 3, 6, 7, and 8.

CHAPTER 2: COMMON LAW ORIGINS

> Looking back over the past through the wrong end of the telescope, one has the impression—which detailed reference to the law reports would doubtless disprove—that at certain times different types of cause have dominated the work of the courts. Thus, I tend to think of the typical eighteenth-century case as involving an improvident heir seeking to sell his expectancy, that of the nineteenth as involving a disputed will, that of the early twentieth as involving some society fracas …[1]
>
> SIR THOMAS BINGHAM

I INTRODUCTION

Eighteenth century and early 19th century courts, particularly in England and Scotland, focused on surrounding circumstances that would render an agreement unenforceable by reason of illegality or public policy. The particular circumstances of the transaction — rather than any fixed and rigid categories of public policy that later took shape — were fundamental. For instance, active participation in smuggling or a landlord's knowledge of their tenant's prostitution at the time of the lease invariably transformed an otherwise legal contract into an illegal one.[2]

The fact that analogical reasoning connected these specific classes of cases to public policy is a reflection, in relative terms, of the disordered state of 19th century English legal thought.[3] The English textbook tradition of the mid- to late-19th century, which was aimed at legitimising legal scholarship and the teaching of law at English universities, is in all likelihood responsible for the current systemisation of older cases under the heading of public policy.[4] In other fields of law such as trusts, legal historians have connected the demise of forms of action in the second quarter of the 19th century to the emergence of "'principled" legal treatises… to define their subject matter analytically and arrange material around coherent explanatory principles'.[5] This 19th century trend of systemisation is also exhibited in the nominate reports of judgments that were selected for publication

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1 T H Bingham, "'There is a World Elsewhere": The Changing Perspectives of English Law' (1992) 41 *International and Comparative Law Quarterly* 513, 513.

2 See, eg, *Lloyd v Johnson* (1798) 1 Bos & P 340; 126 ER 939; *Bowry v Bennett* (1808) 1 Camp 348; 170 ER 981; *Walker v Falconer* (1759) Mor 9543; *More v Steven* (1765) Mor 9545, 9546; *Clugas v Penaluna* (1791) 4 D & E 466; 100 ER 1122; *Holman v Johnson* (1775) 1 Cowp 341; 98 ER 1120.

3 See generally David Sugarman, 'Legal Theory, The Common Law Mind, and the Making of the Textbook Tradition' in William L Twining (ed), *Legal Theory and Common Law* (Blackwell, 1986) 26.

4 The textbook tradition is considered in Chapter 4.

5 Michael Lobban, 'Mapping the Common Law: Some Lessons from History' (2014) *New Zealand Law Review* 21, 58.

in the Revised Reports and the English Reports.[6] The editors of these reports sought "'to weed [the nominate reports] of decisions that are in contradiction with one another; where there are opposing decisions, to settle those which ought to remain; and to cleanse out and get rid of all matters that are not warranted by the present state of the law, or applicable to the existing condition of society'".[7] Footnotes subsequently inserted into these curated collections of nominate law reports identify the subject matter or the contracting position of the parties of a case under an ordering principle of public policy.[8] In sizeable footnotes, public policy is recognised as the implicit reason that compositions with creditors, marriage brokerage bonds, sales of offices, and transactions between guardian and ward were set aside in specified Chancery cases.[9]

The reports also capture arguments of counsel or judges analogising the circumstances of one case to another sometimes, but not necessarily, 'on the score of public policy'.[10] Analogical reasoning saw a bond given to acquire a public office delivered up, for it was 'within the reason of' marriage brokerage bonds.[11] Connections to public policy are made explicit in *Stone v Lidderdale* where Samuel Romilly, as counsel, argued the soundness of public policy as 'a good ground of defence in equity, whether it is so at law or not; as in marriage brokage bonds, bonds in fraud of marriage settlements, cases on offices not included in the [*Sale of Offices Act 1551*, 5 & 6 Edw VI, c 16], and many others'.[12] Similarly, usurious contracts and gaming transactions were identified as proceedings in violation of public policy.[13]

Toward the end of the 18th century, Scots law on public policy shifted from a pro-enforcement attitude, notwithstanding subject matter, to a trend of striking down contracts for being *contra bonos mores*.[14] The Scottish position aligned with the practice of English courts in cases involving the same or similar circumstances. The hardening of judicial attitudes towards certain transactions emerged clearly in the early 1760s with the

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6 For some background on this process, see Veeder van Vechten, 'The English Reports, 1292–1865' (1901) 15(1) *Harvard Law Review* 1.

7 Ibid 1.

8 See *Ive v Ash* (1702) Prec Ch 199; 24 ER 95; *Duke of Hamilton v Lord Mohun* (1710) 1 Salk 158; 91 ER 147; *Osmond v Fitzroy* (1731) 3 P Wms 129; 24 ER 997.

9 See *Osmond v Fitzroy* (n 8).

10 See *Law v Law* (1735) Cas t Talb 140; 25 ER 705, 706 (Lord Hardwicke LC); *Baldwin v Rochford* (1748) 1 Wils KB 229; 95 ER 589, 589–90 (Lord Hardwicke LC); *Debenham v Ox* (1749) 1 Ves Sen 276; 27 ER 1029, 1030 (Lord Hardwicke LC); *Hanington v Du-Chatel* (1781) 1 Bro C C 124; 28 ER 1028, 1028 (Lord Thurlow LC); *Heathcote v Paignon* (1787) 2 Bro C C 167; 29 ER 96, 102 (Scott) (during argument); *Atkinson v Folkes* (1792) 1 Anst 67; 145 ER 802, 803 (Burton, Hollist, and Plumer) (during argument), 804 (Hotham B); *Stone v Lidderdale* (1795) 2 Anst 533; 145 ER 958, 960 (Romilly) (during argument).

11 *Law v Law* (n 10).

12 *Stone v Lidderdale* (n 10) 960 (Romilly) (during argument).

13 *Atkinson v Folkes* (n 10) 803 (Burton, Hollist, and Plumer) (during argument).

14 William W McBryde, *The Law of Contract in Scotland* (Thomson/W Green, 3rd ed, 2007) 488–9.

Scottish Court of Session finding an Aberdeen wool-combers' association — a workers' 'combination' — 'to be of dangerous tendency, and consequently *contra bonos mores*'.[15] Though it had some laudable aims — like collecting money for the poor — the workers' combination was thought to be an attempt to 'cramp[] trade, and tending to make them independent of their employers'.[16] England and Ireland shared this policy against workers' combinations in statutory form where workers' combinations were rendered unlawful by legislation enacted throughout the early 18th and 19th centuries.[17]

Contracts involving smuggling,[18] the sale of public offices,[19] buying pleas,[20] and wagers[21] were also invalidated, despite 17th and 18th century authorities to the contrary. McBryde gives two reasons for this shift in attitude towards illegal contracts in Scots law: first, membership of the Court of Session remained stable over the period in question and, secondly, 'utility' as a philosophical term was used to justify contractual invalidity.[22]

Part II of this Chapter gives an account of the historical development of public policy at common law and in Scots law. The next part begins with a brief outline of the historical antecedents of public policy. Eventually, English courts settled on two terms, 'public policy' or 'policy of the law', in the last half of the 18th century. It ends by considering how imprecision of language armed 18th century English judges with varied grounds upon which to attack the legitimacy of public policy. Part III addresses the judicial treatment of specific classes of public policy appearing in English, Irish, and Scottish cases between the 17th and 19th centuries. Before 1922, Irish courts were bound by the principles of English courts on the common law doctrine of public policy.[23] For this reason, Part III also draws attention to specific cases in which the Irish position on public policy diverged from English principle. This Chapter concludes by examining the consolidation of specific classes of cases under the heading of public policy in the 19th century.

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15 *Procurator-Fiscal v Wool-Combers in Aberdeen* (1762) Mor 1961, 1961. Cf *Kirkman v Shawcross* (1794) 6 D & E 14; 101 ER 410.

16 *Procurator-Fiscal v Wool-Combers in Aberdeen* (n 15) 1961.

17 *Journeymen Tailors, London Act 1720*, 7 Geo 1 sess 1, c 13; *Woollen Manufactures Act 1725*, 12 Geo 1, c 34, s 1; *Frauds by Workmen Act 1748*, 22 Geo 2, c 27; *Combination of Workmen Act 1824*, 5 Geo 4, c 95. See also Patrick Park, 'The Combination Acts in Ireland, 1727–1825' (1979) 14(2) *Irish Jurist* 340; John V Orth, 'English Combination Acts of the Eighteenth Century' (1987) 5(1) *Law and History Review* 175.

18 *Duncan v Thomson* (1776) 5 Bro Sup 531; *Duncan v Thomson* (1776) Mor 9546.

19 *Dalrymple v Shaw* (1786) Mor 9531; *McLure v Paterson* (1779) Mor 9546; *Sibbald v Wallace* (1779) 5 NS 532.

20 *McKenzie v Forbes* (1774) 5 BS 528.

21 *Bruce v Ross* (1787) Mor 9523.

22 McBryde (n 14) 488–9.

23 Mary Mathews, 'Aspects of the Irish Law of Contract' (1972) 7(2) *Irish Jurist* (NS) 292, 300.

II HISTORICAL BACKGROUND OF PUBLIC POLICY

A *Medieval Sources and Writings on Public Policy*

The term 'public policy' first emerged in law reports during the 18th century.[24] The first recorded use of the term was by (the later) Lord Mansfield in *Stanhope v Cope*.[25] Before this period, no more than 'wide generalizations' typified the introduction of public policy in English courts.[26] Even so, successful appeals to 'public policy' emerged only in *specific* classes of cases. Knight contended that an antecedent phrase for public policy, 'encounter common ley', appeared in a 15th century case, *Dyer's Case*, dealing with a restraint of trade.[27] That was followed by similar expressions recorded in law French in late 16th and early 17th century English cases.[28] These expressions ranged from a condition being declared 'encounter de ley… encounter le necessity del commonwealth'[29] or 'encounter le ley de Dieu',[30] and one which was 'against the benefit of the commonwealth'[31] or the other 'covenant ou condition encounter Ley est void'.[32]

It is arguable that the works of English institutional writers, most notably *Coke on Littleton*,[33] sowed 'the seeds of formal ideas' about public policy as it later developed.[34] However, conflating natural law — the idea of ascertaining objective moral standards by human reason[35] — with the modern idea of public policy is a possible danger of speculating meaning that was neither intended nor foreseen by the writers of these early modern texts. Indeed, references in the works of Bracton to impossibility and Littleton to inconvenience and reason reflect the religious overtones of medieval common law.[36] Sir John Fortescue, for instance, argued that 'all laws of men acquire their force by influence of the law Divine'.[37] Likewise, in *Coke upon Littleton*, it was argued that 'reason is the life of the Law, nay the Common Law itselfe is nothing else but reason, which is to

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24 See, eg, *Stanhope v Cope* (1742) 9 Mod 358; 88 ER 505, 506 (Mr Murray) (during argument); *Baldwin v Rochford* (n 10) 590 (Lord Hardwicke LC); *Debenham v Ox* (n 10) 1030 (Lord Hardwicke LC).

25 *Stanhope v Cope* (n 24) 506 (Mr Murray) (during argument)

26 W S M Knight, 'Public Policy in English Law' (1922) 38 *Law Quarterly Review* 207, 207.

27 (1414) 2 Hen V, f 5, pl 26; Knight (n 26) 207. Mr Justice Hull added that the agreement was against common law 'et per Dieu se le plaintiff fuit icy il irra al prison tanque il ust fait fine au Roy.'

28 Knight (n 26) 207.

29 Ibid.

30 Ibid.

31 Ibid 208.

32 Ibid.

33 See *Egerton v Brownlow* (1853) 4 HL Cas 1; 10 ER 359, 416 (Pollock CB).

34 See P H Winfield, 'Public Policy in the English Common Law' (1929) 42 *Harvard Law Review* 76, 82.

35 Michael Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 9th ed, 2014) 76.

36 Ibid.

37 Thomas Fortescue, *The Works of Sir John Fortescue, Knight: Chief Justice of England and Lord Chancellor to King Henry the Sixth* (1869) vol 1, 242.

be understood of an artificiall perfection of reason, gotten by long studie, observation and experience and not of every mans naturall reason'.[38] Coke employed the maxim, *nihil enim quod est inconveniens est licitum*, to argue that law chooses the public good over private good.[39] Medieval Scottish writers also used impossibility as the touchstone for contractual illegality.[40] In discussing the historical position of Scots law towards illegal contracts (*pacta illicita*), Macgregor has argued that, as sources, Justinian's *Institutes*, papal decretals, and the Roman law on impossibility may well have given support for this position.[41]

The standard of reasonableness was used by the Court of King's Bench in *Le Case de Tanistry* to refuse recognition of the Brehon or Irish custom of tanistry — succession to the 'most worthy' male descendant of a common male ancestor.[42] That custom was 'unreasonable, & va en destruction del commonwealth'.[43] Throughout the case, tanistry was described as 'unreasonable', 'encounter common droit, or purement encounter ley',[44] 'trove injurious al multitude', and 'prejudicial al commonwealth'.[45] It was not until legal thought and method systematised and the modern doctrine of precedent settled in the 19th century that these specific classes of cases were organised under the heading of public policy.[46]

The origins of the Scottish counterpart of public policy may, on the other hand, be shortly stated. Based on two medieval sources, a dishonest agreement or one causing the soul's imperilment would be incapable of enforcement.[47] Categories meeting this description were not considered in these medieval sources. Likewise, no classification is featured in the discussions of Scottish institutional writers on the impossibility of performing illegal, dishonest, immoral, or unlawful contracts.[48] Once a considerable body of case law had developed, a rudimentary classification of illegal contracts was attempted for the first time in George Joseph Bell's text, *Principles of the Law of Scotland* (1829).[49]

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38 Sir Edward Coke, *The First Part of the Institutes of the Laws of England* (1628) 97b, s 138.

39 Knight (n 26) 208; Winfield (n 34) 82.

40 Laura J Macgregor, '*Pacta Illicita*' in Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland* (Oxford University Press, 2000) vol 2, 129, 129–30.

41 Ibid.

42 See Shaunnagh Dorsett, 'Since Time Immemorial: A Story of Common Law Jurisdiction, Native Title, and the Case of Tanistry' (2002) 26 *Melbourne University Law Review* 32, 44.

43 *Le Case de Tanistry* (1607) Dav 28; 80 ER 516, 522.

44 Trans: 'against common right, or absolutely against law.'

45 *Le Case de Tanistry* (n 43) 520.

46 See, eg, M H Hoeflich, 'Law and Geometry: Legal Science from Leibniz to Langdell' (1986) 30 *American Journal of Legal History* 95; Harold J Berman and Charles J Reid Jr, 'The Transformation of English Legal Science: From Hale to Blackstone' (1996) 45 *Emory Law Journal* 437.

47 Macgregor (n 40) 129–30.

48 Ibid 130–1.

49 Ibid 131, citing George Joseph Bell, *Principles of the Law of Scotland, For the Use of Students in the University of Edinburgh* (1st ed, 1829).

B *Nineteenth-Century Treatment of Public Policy*

By the 19th century, the explosion of arguments based on public policy corresponded with the emergence of judicial disapproval of the term. Judicial censure was perhaps a salient factor contributing to the 19th century reorganisation of public policy. In *Richardson v Mellish*, Burrough J famously described public policy as 'a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail'.[50] Sir William Best CJCP was 'not much disposed to yield to arguments of public policy' either, questioning the extent to which the doctrine had travelled in the common law courts for something that was a peculiarly legislative concern.[51] Burrough J's metaphor has eclipsed other less florid, but equally relevant, criticisms of public policy.[52]

The 'unruly horse' metaphor, however, had no immediate effect. Between *Richardson v Mellish* and the House of Lords' decision in *Egerton v Brownlow*, only one reported English case referred to the dangers of riding the 'unruly horse'.[53] In the 1830 English case of *Newberry v Colvin*, the defendant considered that it was 'much safer to abide, as nearly as possible, by the contract of the parties' because arguments founded on public policy could be 'well compared to an unruly horse'.[54] But this argument was not taken up in the decision of Sir Nicholas Tindal CJCP.[55] The metaphor was revived from the late 1880s to foster a degree of judicial care in enlivening public policy.[56] By this stage, judicial complaints against public policy had taken more shape with courts reintroducing the metaphor to consolidate and define the boundaries of its objection: past authorities conflicted with each other, the doctrine escaped definition, the content of policy was obscure, and policy opinions varied over time.[57]

Thoughtful reasons for discounting public policy arguments figured in an early 19th century Admiralty decision, *The Elsebe*.[58] Sir William Scott rebuffed public policy for two reasons. First, considerations of public policy should be resolved by 'wise legislative

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50 *Richardson v Mellish* (1824) 2 Bing 229; 130 ER 294, 303 (Burrough J).
51 Ibid 299 (Sir William Best CJCP).
52 *The Elsebe* (1804) 5 Ch Rob 174; 165 ER 738.
53 *Newberry v Colvin* (1830) 7 Bing 190; 131 ER 73. In the intervening years, courts in other common law jurisdictions had referred to the metaphor.
54 *Newberry v Colvin* (1830) 1 Cr & J 193; 148 ER 1388, 1395 (Campbell) (during argument).
55 Ibid.
56 See, eg, *Davies v Davies* (1887) 36 Ch D 359, 364 (Kekewich J); *Mogul Steamship Company Ltd v McGregor, Gow & Co* [1892] AC 25, 45 (Lord Bramwell); *Re Kelcey; Tyson v Kelcey* [1899] 2 Ch 530, 534 (Kekewich J).
57 *Davies v Davies* (n 56) 364–5 (Kekewich J).
58 *The Elsebe* (n 52).

provisions elsewhere', not judges charged with interpreting legislative provisions.[59] Secondly, and notably, his Lordship pointed out its unpredictability.[60] Arguments based on public policy arguments were 'too vast, and too obvious, not to present themselves to every man's imagination'.[61]

English judges' inclination was to recast public policy using a 'proper ground' of law.[62] Indeed, in *Egerton v Brownlow*, Cresswell J witheringly 'presume[d] we are not asked our opinions as to public policy, but as to the law'.[63] His Lordship thought that public policy had been 'used somewhat inaccurately instead of "the policy of the law"' in law reports.[64] Instead of violating public policy, contracts in restraint of trade were illegal and preferences to specific creditors prior to entering bankruptcy were fraudulent and void against bankruptcy laws.[65] This was the nature of an argument led by Attorney-General Rolt in *Howard v Earl of Shrewsbury*: 'it is said that the transaction was against the policy of the law, but to shew it to be against the policy of the law it must be shewn to be against law'.[66]

Authorities formerly decided on public policy grounds, like *Cole v Gower*,[67] were reinterpreted. According to common law judges in *Egerton v Brownlow*, the 'proper ground' of *Cole v Gower* was statutory interpretation, rather than the substantive public policy objections that were raised by the judges 50 years earlier.[68] The object of the *Bastardy Act 1733*, as considered in *Cole v Gower*, was the indemnification of a parish against the costs of maintaining an ex-nuptial child.[69] The Act contained no authorisation allowing parish officers to take security for a 'sum certain'.[70] The parish officers had acquired an absolute security from the putative father of the child,[71] even though it was not for them 'to speculate, but to take the security as a matter of public duty in the form prescribed by the Act: and taking it in the form they have done is contrary both to the direct letter and to the *general policy of the law*'.[72]

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59 Ibid.
60 Ibid.
61 Ibid.
62 See, eg, *Cole v Gower* (1805) 6 East 110; 102 ER 1229, discussed in *Egerton v Brownlow* (n 33) 391 (Williams J).
63 *Egerton v Brownlow* (n 33) 394 (Cresswell J).
64 Ibid.
65 Ibid.
66 *Howard v Earl of Shrewsbury* [1867] LR 2 Ch App 760, 769 (Sir John Rolt, Attorney-General) (during argument).
67 *Cole v Gower* (n 62).
68 *Egerton v Brownlow* (n 33) 391 (Williams J).
69 *Cole v Gower* (n 62) 1232 (Le Blanc J).
70 *Egerton v Brownlow* (n 33) 391 (Williams J).
71 *Cole v Gower* (n 62) 1231 (Lord Ellenborough CJKB).
72 Ibid (emphasis added).

Notwithstanding criticism, public policy was 'saved' by the House of Lords in *Egerton v Brownlow*.[73] An entire rejection of public policy as a doctrine would have been 'altogether too late in the development of the common law' and would have constituted a rejection of the choices common law judges 'must make… about the way in which the common law is to develop'.[74] The struggle of the common law judges hearing the reference from the House of Lords in *Egerton v Brownlow* was reconciling past decisions on public policy in a coherent manner.[75] Two aspects of the criticism of public policy in the reference are notable: its uncertainty and its incompatibility with legislative and judicial functions. The common law judges argued that the doctrine was 'capable of being understood in different senses; it may, and does, in the ordinary sense, mean "political expedience," or that which is best for the common good of the community'.[76] The House of Lords defended the continued existence of public policy, casting off criticisms that it was 'too uncertain or vague to be capable of practical application by Judges', because 'there is the same difficulty in regard to the application of many other rules and principles admitted to the established law'.[77] Judicial discretion determined whether a case fell within the 'well-established rule of law'.[78]

The reference to the 'different senses' in which public policy was invoked, apart from its traditional use in specific classes of cases (explored in Part III), offers an explanation for the trenchant criticism the doctrine weathered. Public policy was appealed to as a paramount principle to which the law must conform or as a mere flourish in argument. The term was more commonly given an interpretative function — it provided a basis for a particular rule of law or a 'probable reason' for the making of specific legislative schemes.[79] It was this function which Cresswell J attacked in *Egerton v Brownlow*.[80] Thus, the *Registry Acts* — requiring registration of all merchant ships engaged in local and foreign trade — stemmed from public policy.[81] Specifically, the Acts were enacted with the purpose of restricting 'to British subjects and to British built ships the benefit of British

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73 Susan Kiefel, 'The Role of Policy in the Law of Obligations' in Charles E F Rickett (ed), *Justifying Private Law Remedies* (Hart Publishing, 2008) 79, 80.

74 *Cattanach v Melchior* (2003) 315 CLR 1, 82–3 [226] (Hayne J).

75 *Egerton v Brownlow* (n 33) 394 (Cresswell J).

76 Ibid 409 (Parke B).

77 Ibid 437 (Lord Truro).

78 Ibid 423 (Lord Lyndhurst).

79 Ibid 410 (Parke B).

80 Ibid 394 (Cresswell J).

81 See, eg, *Shipping Act 1786*, 26 Geo 3, c 60; *Merchant Shipping Act 1794*, 34 Geo 3, c 68; *Hay v Monkhouse* (1817) Holt 603; 171 ER 355, 356; *Cox v Reid* (1824) Ry & M 199; 171 ER 993, 993 (Sir William Best CJCP).

trade'.[82] If at all, in *Robinson v Macdonnell*,[83] Lord Ellenborough CJKB thought the consequential 'notoriety' of the Acts was 'a consequence of the measures adopted to effect the policy of the State'.[84] In the same vein, public policy was thought to have grounded s 6 of the *Statute of Frauds 1677*,[85] considered in one case to have barred service of process on a Sunday.[86] In *The Swift*, Lord Stowell thought 'public policy and convenience… are good interpreters of that which is doubtful'.[87] The failure to separate the limited classes of traditional public policy from other 'inaccurately' described functions meant that the doctrine arguably yielded undeserved criticism.

III CATEGORIES OF PUBLIC POLICY IN EARLY ENGLISH, SCOTTISH, AND IRISH CASES

In the late-18th and early-19th centuries, marriage brokerage bonds[88] and the assignment of an officer's pay were specific classes or species of contracts considered contrary to public policy in equity and, later, at common law.[89] During the earlier period, courts of equity did not pause before intervening in these instances when it was 'thought' the common law courts could not offer a suitable remedy.[90] As Lord Eldon LC remarked in *Mayhew v Crickett*,[91] 'many questions [eg, marriage brokerage bonds] … formerly exclusive subjects of equitable jurisdiction, have, since Lord Mansfield's time become subjects of the jurisdiction of courts of law'.[92]

English, Irish and Scots law had comparable categories to relieve against contractual unfairness from the 17th century to the mid-19th century. In the 18th and early 19th centuries, these categories included contracts that involved: (A) restraints of trade; (B) public and political corruption; (C) the commission of a crime or a tort; (D) smuggling; (E) agreements affecting the administration of justice; (F) sexual immorality and matrimonial affairs; (G) betting, gambling and wagers; (H) usury; and (I) expectant heirs.

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82 *Robinson v Macdonnell* (1816) 5 M & S 228; 105 ER 1034, 1038 (Lord Ellenborough CJKB).
83 Ibid.
84 Ibid.
85 29 Car, c 7, s 6.
86 *Taylor v Phillips* (1802) 3 East 155; 102 ER 556, 557 (Lord Ellenborough CJKB).
87 *The Swift* (1813) 1 Dods 330; 165 ER 1325, 1335–6.
88 See, eg, *Cole v Gieson* (1750) 1 Ves Sen 503; 27 ER 1169.
89 See *Layng v Paine* (1745) Willes 571; 125 ER 1326; *Morris v McCullock* (1763) Amb 432; 27 ER 289; *Garforth v Fearon* (1787) 1 Bl H 327; 126 ER 193; *Flarty v Odlum* (1790) 3 D & E 681; 100 ER 801; *Barwick v Reade* (1791) 1 H Bl 627; 126 ER 357; 100 ER 801; *Lidderdale v Duke of Montrose* (1791) 4 D & E 248; 100 ER 1000; *Stone v Lidderdale* (n 10); *Collyer v Fallon* (1823) Turn & R 459; 37 ER 1177.
90 See *Layng v Paine* (n 89); Peter Sparkes, 'Morality, Amorality and Equity' (1990) 5 *Denning Law Journal* 91, 92.
91 *Mayhew v Crickett* (1818) 2 Swanst 185; 36 ER 585.
92 Ibid 587 (Lord Eldon LC). See also *Cock v Richards* (1805) 10 Ves Jr 429; 32 ER 911, 915 (Lord Hardwicke LC).

For these identifiable factual situations, Chancery judges could offer equitable relief based on 'one of the three traditional heads of Chancery jurisdiction': fraud.[93] In *Earl of Chesterfield v Janssen*,[94] Lord Hardwicke LC outlined five species of fraud, the fourth of which is connected with public policy as a reason and a justification for equitable intervention.[95] The fourth species of fraud included marriage brokerage bonds, advantageous deeds of composition with individual creditors, and 'catching bargains' with expectant heirs.[96] Equity intervened to prevent the introduction of 'an unworthy object for an unworthy consideration'.[97]

A *Contracts in Restraint of Trade*

From the early 15th century, an absolute prohibition at common law on agreements in restraint of trade was based on the doctrine of public policy.[98] This ancient application of public policy can be traced to *Dyer's Case*. Here, Hull J held that a bond restraining a dyer from his trade for six months was contrary to common law and, as noted subsequently, 'clearly and absolutely void'.[99] In the *Tailors of Ipswich*, Lord Coke CJKB offered public interest as a reason underlying the judge-made prohibition:

> at the common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil, *otium omnium ritiorum mater*, and especially in young men, who ought in their youth, (which is their seed time) to learn lawful sciences and trades, which are profitable to the commonwealth, and whereof they might reap the fruit in their old age, for idle in youth, poor in age; and therefore the common law abhors all monopolies, which prohibit any from working in any lawful trade.[100]

Lord Coke CJKB added that restraints of trade were 'prejudicial to the commonwealth'.[101]

In *Mitchel v Reynolds*, Lord Parker CJKB qualified the prohibition laid down in *Dyer's Case*: if reasonable consideration was given, bonds given in partial restraint of trade were enforceable.[102] However, general bonds were 'a general mischief to the publick', 'against the policy of the common law, and contrary to *Magna Charta*'.[103] In explaining social and

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93 Warren Swain, 'Reshaping Contractual Unfairness in England 1670–1900' (2014) 35 *Journal of Legal History* 120, 126 ('Reshaping Contractual Unfairness').
94 (1751) 2 Ves Sen 125; 28 ER 82.
95 *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125; 28 ER 82, 100 (Lord Hardwicke LC).
96 Ibid 84.
97 Ibid 100.
98 *Cattanach v Melchior* (2003) 215 CLR 1, 81 [223] (Hayne J).
99 *Elves v Crofts* (1850) 10 CB 241; 138 ER 98, 103.
100 *Tailors of Ipswich* (1614) 11 Co Rep 53; 77 ER 1218, 1219.
101 Ibid 1220.
102 (1711) 1 P Wms 181; 24 ER 347, 348, 351 (Sir Thomas Parker CJQB).
103 Ibid 348, 351.

economic evils accruing from these restraints, his Lordship used the example of a 'poor weaver' who, after suffering great losses, renounces his trade to a 'designing fellow' but must break the restraint to support his impoverished family and 'the cries of his children'.[104] Though Lord Parker agreed with the 'indignation that judge expressed [in *Dyer's Case*]', his Lordship did not agree with 'his manner of expressing it'.[105] By the end of the 18th century, the types of contracts that could be avoided on public policy grounds had broadened from those in restraint of trade to immoral and illegal contracts with an element of public detriment.

The bright-line distinction between general restraints and partial restraints — valid if based on 'sufficient or good and adequate consideration' — was maintained until refocused in the English Court of Appeal's decision of *Maxim Nordenfelt Guns and Ammunition Company v Nordenfelt*.[106] Lindley LJ considered the principle underlying the distinction between general and partial restraints more important than the division itself.[107] Even if a restriction in a covenant was unlimited as to space, it was not necessarily contrary to public policy to restrict an individual from engaging in a particular business.[108] Here, a covenant given for valuable consideration restricted Nordenfelt from the worldwide gun and ammunition business upon his company's takeover. Quite apart from public policy, so long as the restriction as to time and space was 'reasonably necessary for the protection of the interests of the covenantee' it would be valid.[109] The relaxation of the law on restraints of trade over the centuries was a reflection of the courts 'yielding to the progress of industry and commerce' and public policy bending to accommodate 'expansion or modification'.[110] Increased trade and new competition necessitated a modification of public policy underlying the law on restraints.[111]

The Scottish position on restraints of trade emerged in the late 19th century to mirror English law. Previously, few Scots cases were of assistance to define the circumstances in which a contract would be reduced or found unlawful for interference with someone's trade. In *Allan v Skene*, the Court of Session reduced a contract that charged the masters

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104 Ibid.

105 Ibid 353. 'Hall expressed himself thus: A ma intent vous purres aver demurre sur luy que le obligation est void, eo que le condition est encountre common ley, et per Dieu si le plaintiff fuit icy, il irra al prison tanq ; il ust fait fine au Roy.'

106 *Maxim Nordenfelt Guns and Ammunition Company v Nordenfelt* [1893] 1 Ch 530, 647 (Lindley LJ).

107 Ibid 650 (Lindley LJ).

108 Ibid.

109 Ibid 651 (Lindley LJ), 673 (A L Smith LJ).

110 Ibid 655 (Lindley LJ), 661 (Bowen LJ).

111 *Davies v Davies* (1887) 36 Ch D 359, 364–5 (Kekewich J). The vagueness of the covenant resulted in the Court of Appeal reversing the decision of Kekewich J.

and crews of several fishing boats an annual rate of £44 for using tacksmen's boats over a period of 'three nineteen years'.[112] The contract — 'being too great a restraint upon natural liberty' — was reduced on the grounds of minority and lesion.[113] In the earlier case of *Wedderburn v Monorgun*, it was held to be unlawful to agree to perpetual banishment of a person imprisoned for slaughter without obtaining the King's consent.[114] These cases seem to be the exception rather than the rule: the cases indicate that restraints of trade predating the late 18th century were considered lawful.[115] In the latter half of the 18th century, the Scots law on restraints of trade was treated as settled. The inference 'that the law of Scotland has at any time been otherwise treated' could not, according to Lord Kellachy in 1895, be maintained.[116] Rather, a restraint of trade limited to a given trade and place was legal 'and not against the liberty of trade'.[117] In comparison, unlimited restraint as to trade and place — one 'larger than is reasonably necessary' — would be unlawful.[118] The discussion of 'reasonably necessary' and the citation of English authorities reveals the extent to which English law was influential in shaping this category.[119]

B *Public and Political Corruption*

1 *Selling Offices*

The impression that the sale of offices was a common practice,[120] though one not tolerated outside Scotland, is clear from 17th and 18th century English and Scottish authorities.

In England, equity traditionally relieved against transactions involving the sale of public office that, though not prohibited by the *Sale of Offices Act 1551*,[121] were analogous to its statutory prohibitions and to established categories enlivening Chancery's jurisdiction to provide relief.[122] The 1551 Act penalised individuals for selling, 'or receiving or agreeing to receive Money for', particular public offices affecting the administration of

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112 *Allan v Skene* (1728) Mor 9454, 9454–5.
113 Ibid 9455.
114 *Wedderburn v Monorgun* (1612) Mor 9453.
115 See, eg, *Stalker v Carmichael* (1735) Mor 9455. This was an agreement between co-partners of a Glasgow bookselling business. After three years in partnership, either one was 'debarred' from bookselling in Glasgow. The Court of Session regarded this agreement as lawful and 'not contrary to the liberty of the subject'.
116 *Meikle v Meikle* (1895) 3 SLT 204, 204.
117 *Watson v Neuffert* (1863) 1 M 1110, 1112.
118 *Watson v Neuffert* (n 117) 1113; *Meikle v Meikle* (n 116) 204.
119 See *Meikle v Meikle* (n 116) 204.
120 See argument in *Dalrymple v Shaw* (1786) Mor 9531, 9531.
121 Ibid.
122 See *Law v Law* (1735) 3 P Wms 390; 24 ER 1114; *Morris v M'Cullock* (n 89); *Hanington v Du-Chatel* (n 10); *Parsons v Thompson* (1790) 1 H Bl 322; 126 ER 190; *Blachford v Preston* (1799) 8 D & E 89; 101 ER 1282, 1285.

justice, the monarch's revenue, and the oversight of major public places.[123] In the past, the Court of Chancery would not set aside bonds for the sale of offices not embraced by the Act but would rather order repayment of the principal sum advanced with interest.[124] However, in one late 17th century case, the Court ordered repayment but 'without interest or costs', a decree doubted by a report writer and by subsequent judges.[125]

In *Law v Law*, the procuring of a position with excise was construed to be comparable to the revenue restriction in the *Sale of Offices Act 1551* though excise 'was no part of the revenue at the time of making the statute'.[126] Relief was given because agreements of this nature encouraged corruption and extortion,[127] and failing to decree would also reward a candidate found wanting of '[m]erit, industry, and fidelity'.[128]

Likewise, in *Morris v M'Cullock*, the Court of Chancery ordered the plaintiff a refund for money advanced to the defendant to procure a commission in the Marines.[129] The plaintiff had been discharged from the Marines after six months. The original transaction was described as 'a contract of turpitude' and broadly analogous to established categories of marriage brokerage and 'post-obit' bonds.[130] Lord Henley LC established a rule that any sale of 'an office of trust or service under the Government' without Crown consent would be set aside.[131]

'Public policy' — as an expression to justify the granting of relief in these cases — did not, however, emerge until the last quarter of the 18th century. In 1781, the Court of Chancery explicitly employed public policy to relieve against the purchase of an office, though it was outside the *Sale of Offices Act 1551*.[132] In *Hanington v Du-Chatel*,[133] the Court of Chancery granted a perpetual injunction against a bond in which Lord Rochford sold his recommendation as Groom of the Stool for King George III. Though it was not a 'statutory' office, Lord Thurlow LC considered that the case related to '*a matter of public policy of the law*… similar to marriage brokage bonds' because it was a practice 'publicly

123 *Sale of Offices Act 1551*, 5 & 6 Edw 6, c 16, s 1.
124 *Symonds v Gibson* (1693) 2 Vern 308; 23 ER 800; *Purdy v Stacey* (1771) 5 Burr 2698; 98 ER 417; *Parsons v Thompson* (n 122) 192 (Lord Loughborough CJCP).
125 *Symonds v Gibson* (n 124) 800.
126 *Law v Law* (n 122) 1115 (Lord Talbot LC).
127 Ibid.
128 Ibid.
129 *Morris v M'Cullock* (n 89).
130 Ibid 871.
131 Ibid.
132 *Hanington v Du-Chatel* (n 10). See, eg, *Sale of Offices Act 1551* (n 123); *Great Seal Act 1688*, 1 Wm & M sess 1, c 21, s 7; *Sale of Offices Act 1809*, 49 Geo 3, c 126.
133 *Hanington v Du-Chatel* (n 10) 1028 (Thurlow LC).

detrimental' even if 'the parties are private persons'.[134] The relief afforded at common law was different but justified on the same grounds.

The equitable rationale that offices should be 'given to those most worthy'[135] was followed in courts of law. While the Court of Chancery would decree repayment, a common law court would find no cause of action arising from an illegal contract for the sale of an office.[136] In *Blachford v Preston*, Lord Kenyon CJKB held that the sale of the command of a ship in the service of the East India Company without its consent was against public policy and a fraud on the Company.[137] With the East India Company treated as an office or arm of government,[138] Lord Kenyon CJKB followed *Hanington* to hold that 'no money-consideration ought to influence the appointment to … offices [which the public has an interest in]'.[139] As a corollary, providing monetary inducements could result in persons not 'best qualified' filling offices.[140] This represented a departure from the former practice at common law of enforcing such contracts lying outside the *Sale of Offices Act* in order to uphold a private transaction.[141]

In the second half of the 18th century, the toleration that the Court of Session had previously shown towards the practice ended.[142] In *Dalrymple v Shaw*, the Court declared such sales '*contra bonos mores*, and illegal',[143] a conclusion that agreed with the English position that had by that point identified an explicit public policy rationale for interfering with the practice. Strengthening the Scottish position was the *Sale of Offices Act 1809* that extended the English *Sale of Offices Act 1551*[144] to Scotland.

2 *Assignments of Half-Pay and Full Pay*

Public policy and paternalism were two reasons given in a small selection of 18th century cases inhibiting assignments of military salaries.[145] Despite some initial divergence, the position at common law and in equity converged in the 1790s so that assignments of both

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134 Ibid (emphasis in original).
135 *Blachford v Preston* (n 122) 1283 (Lord Kenyon CJKB) ('*detur digniori*')
136 *Garforth v Fearon* (n 89) 194 (Lord Loughborough).
137 *Blachford v Preston* (n 122). See also *East India Company v Neave* (1800) 5 Ves Jr 173; 31 ER 530; *Thomson v Thomson* (1802) 7 Ves Jr 470; 32 ER 190; *East India Company v Donald* (1809) 2 Hov Supp 167; 34 ER 1042; *Card v Hope* (1824) 2 B & C 661; 107 ER 529; *Richardson v Mellish* (n 50).
138 *Blachford v Preston* (n 122) 1284 (Lord Kenyon CJKB), 1285 (Lawrence J).
139 Ibid 1284 (Lord Kenyon CJKB).
140 Ibid.
141 See *Parsons v Thompson* (n 122) 193.
142 *Dalrymple v Shaw* (n 120) 9531.
143 Ibid 9532.
144 *Sale of Offices Act 1551* (n 123).
145 See *Flarty v Odlum* (n 89); *Lidderdale v Duke of Montrose* (n 89) 1002; *Barwick v Reade* (n 89) 357. Cf *Stuart v Tucker* (1777) 2 Wm Bl 1137; 96 ER 671.

full and half pay were illegal.[146] After *Stone v Lidderdale,* assignments of public pay were treated as bad in equity.[147] Assignments of a public grant such as officers' grants raised 'the general object of public policy', which 'general intent pervades the whole'.[148] In *Barwick v Reade*, the non-assignability of the full military pay at common law was premised on 'it being contrary to the policy of the law' to assign future services to someone who could not perform them.[149] The substance of this public policy was that office holders were granted public pay 'for the dignity of the State, and for the decent support of those persons who are engaged in the service of it'.[150] The honour and dignity of serving the Crown lent support to a general policy against such assignments.[151]

The earlier position in equity balanced the 'great inconveniences' of assignments with its advantages in individual cases.[152] Making provision for family or for accommodation while encamped abroad were advantages and legitimate ends encouraging assignment.[153] In *Gomez v Philips,* an assignment of pay to secure an annuity by a fort major in Nova Scotia 'made upon valuable consideration, and without fraud' was valid.[154] Enforcing the assignment, Lord Hardwicke LC noted that fraud, special inconvenience, or contrary practice might have invalidated the transaction.[155] While Lord Hardwicke LC left the task of 'a restraint against a general practice' to the legislature,[156] a general restraint was subsequently introduced at law and in equity.[157]

3 *Simoniacal Contracts*

In the 1750s, simony — the practice of buying and selling church positions — was roundly condemned as '*ob turpem causam*' in a single Court of Session decision.[158] Though English legislation had proscribed simony from Elizabethan times,[159] it took until the latter half of the 18th century before the position of English courts settled on a similar

146 See *Stone v Lidderdale* (n 10). See also *McCarthy v Goold* (1810) 1 B & B 387, 389 (Lord Manners LC) (High Court of Chancery in Ireland).
147 *Stone v Lidderdale* (n 10) 958.
148 Ibid 961.
149 (1791) 1 H Bl 627; 126 ER 357, 357.
150 *Flarty v Odlum* (n 89) 802 (Lord Kenyon CJKB).
151 Ibid 802 (Buller J).
152 *Gomez v Philips* (1741) 9 Mod 287; 88 ER 457, 459 (Lord Hardwicke LC).
153 Ibid 458.
154 Ibid 459.
155 Ibid 459.
156 Ibid.
157 See, eg, *Flarty v Odlum* (n 89) 802 (Lord Kenyon CJKB); *Stone v Lidderdale* (n 10) 961 (Macdonald CB); *Arbuckle v Cowtan* (1803) 3 Bos & P 321; 127 ER 177, 181 (Lord Alvanley CJCP).
158 *Steven v Lyell* (1759) Mor 9578, 9579 (Lord Ordinary Shewalton).
159 *Simony Act 1588*, 31 Eliz 1, c 6; *Simony Act 1713*, 13 Anne, c 11.

foundation to Scots law, 'the policy of the law'.[160] Not long after the *Simony Act 1588* was enacted, an Elizabethan court had held that the purchase of a vacant living was simoniacal.[161] Using this decision, clergy outmanoeuvred the Elizabethan statute by purchasing 'the next presentation at a time when the church was full'.[162] The purchase of a next presentation was eventually precluded by the *Simony Act 1713*, although the status of resignation bonds (under which a clergyman agreed to resign his living for a named person or generally at the future request of his patron) remained unsettled.[163]

Between the 16th and early 19th centuries, the English position on simoniacal contracts varied between the law courts, where bonds of resignation were generally valid,[164] and in the Court of Chancery, where their Lordships expressed hesitance at agreements suggestive of simony.[165] In comparison to this equivocation, the Scottish Court of Session had fastened to a personal and punitive solution: it coupled non-actionability of a simoniacal agreement with a fine to all those involved to be then applied to poor relief.[166]

Chancery decisions relating to this category were either equivocal or unequivocal in stating the legal position. In *Kirkcudbright v Kirkcudbright*, an agreement for taking holy orders elicited remarks on the need for 'purity of the Church establishment' and for the recommendation of meritorious persons to Church vacancies.[167] Lord Eldon LC did not doubt that these agreements were once against 'the policy and constitution of the country' and 'the policy of the law'.[168] It was the prevalence of buying and selling public office in 18th century England and Scotland that may have normalised the practice to 'men, who… would be the last to act incorrectly', especially in the absence of proper legal advice.[169]

During the reign of King George IV, decisive legislative action settled the English position on general and special resignation bonds. In the 1801 decision of *Legh v Lewis*, Lord Kenyon CJKB concluded that a resignation bond was 'good at law', but that Chancery would restrain the improper use of a resignation bond.[170] The later House of

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160 See *Ex parte Rainier; Rowlatt v Rowlatt* (1820) 1 Jac & W 280; 37 ER 382; *Fletcher v Lord Sondes* (1827) 1 Bli NS 144; 4 ER 826. Cf *Dashwood v Peyton* (1811) 18 Ves Jr 27; 23 ER 227, 234–5 (Lord Eldon LC).

161 John William Smith, *The Law of Contracts: In a Course of Lectures Delivered at a Law Institution* (T & J W Johnson, 1847) 87.

162 Ibid.

163 Ibid 88, 90.

164 See *Johns v Lawrence* (1610) Cro Jac 248; 79 ER 213; *Bishop of London v Fytche* (1781) 1 Bro CC 96; 28 ER 1008; *Bagshaw v Bossley* (1790) 4 D & E 78; 100 ER 904; *Partridge v Whiston* (1791) 4 D & E 359; 100 ER 1063; *Newman v Newman* (1815) 4 M & S 66; 105 ER 759. See also *Lewis v Legh* (1801) 1 East 391; 102 ER 151; *Lewis v Legh* (1802) 3 B & P 231; 127 ER 127. Cf *Grey v Hesketh* (1755) Amb 268; 27 ER 178.

165 See *Kirkcudbright v Kirkcudbright* (1802) 8 Ves Jr 51; 32 ER 269.

166 See *Steven v Lyell* (n 158) 9579; *Maxwell v Earl of Galloway* (1775) Mor 9580, 9583.

167 *Kirkcudbright v Kirkcudbright* (n 165) 273 (Lord Eldon LC).

168 Ibid 273, 274.

169 Ibid 273.

170 *Legh v Lewis* (n 164) 153 (Lord Kenyon CJKB).

Lords' decision in *Fletcher v Lord Sondes*,[171] where a special resignation bond was declared simoniacal and void, occasioned the enactment of the *Resignation Bonds Act 1827* and the *Clergy Resignation Bonds Act 1828*.[172] Under the 1827 Act, all resignation bonds made after 9 April 1827 were void.[173] Given the prevalence of resignation bonds, the 1828 Act clarified that special resignation bonds made before 9 April 1827 were not void if other conditions were fulfilled. A *bona fide* agreement to resign before that date was valid where one person *or* one or two persons related by blood or marriage to the patron was specifically named in it to succeed the incumbent.[174]

4 *Influencing Elections and Parliamentary Decision-Making*

By the beginning of the 19th century, agreements to withdraw opposition to a bill in Parliament with monetary inducement or to interfere with the conduct of elections were two species of political corruption condemned in English, Irish, and Scottish courts for public policy reasons. Common law intervention was a more prevalent occurrence before 19th century parliamentary reforms were introduced to check bribery and corruption in electioneering. In *Paterson v Magistrates and Town-Council of Stirling*, a bond between three men of a borough agreeing that only candidates first approved by them could stand for local election was *contra bonos mores*.[175] The Scottish Court of Session considered that the men unduly influenced the conduct of local elections for magistrates and counsellors.[176] When considering transactions 'against public policy as affecting the freedom of election', the Courts of Chancery acted 'to suppress the mischief'.[177] Relief on public policy grounds was 'given upon general grounds, where the public is interested'.[178] While legislation applicable to these countries reinforced the policy against similar agreements,[179] later English decisions upheld agreements that had no element of fraud on the individual or on the legislature.

Fraud as a requisite for contractual invalidity was affirmed in the Court of Chancery's decision in *Vauxhall Bridge Company v Spencer*.[180] Securities given by Vauxhall Bridge

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171 *Fletcher v Lord Sondes* (n 160).
172 *Clergy Resignation Bonds Act 1828*, 9 Geo 4, c 94.
173 *Resignation Bonds Act 1827*, 7 & 8 Geo 4, c 25.
174 Ibid ss 1, 3, cited in *Fletcher v Lord Sondes* (n 160) 866.
175 (1775) Mor 9427, 9529.
176 Ibid.
177 *Longfield v Aubrey* (1833) 2 Mol 426, 431 (Lord Manners LC) (Ire).
178 Ibid 431.
179 A whole suite of legislation reinforced the unacceptability of undue influence on electoral results, though this was before the great parliamentary reforms of the 19th century. These reforms abolished rotten boroughs, redistributed parliamentary seats, and extended the franchise so that undue influence was rendered more difficult in this context: see, eg, *Parliamentary Elections Act 1809*, 49 Geo 3, c 118.
180 *Vauxhall Bridge Company v Spencer* (1817) 2 Madd 356; 56 ER 366.

Company subscribers to induce the proprietors of the Battersea Bridge Company to withdraw opposition to a parliamentary bill for a prospective bridge construction over the Thames constituted a fraud upon parliament and were consequently contrary to public policy. Since it was 'the first time that this Court [had] been called on to redress frauds upon the Legislature', the defendants urged the judges not to extend the traditional categories of public policy to the case.[181] The Court accepted the plaintiff's assimilation of the factual circumstances to decisions on marriage brokerage bonds and the sale of offices, in which agreements were set aside for public policy reasons.[182] The appropriation of money collected from tolls to be used for certain purposes added an element of public interest to the secret agreement.[183] By trying to satisfy the Battersea Bridge proprietors' objections, the Vauxhall Bridge Company sought to apply appropriations for a purpose not contemplated by the Act as passed.[184] By employing 'the principle of the cases … cited' in the plaintiff's argument,[185] Sir Thomas Plumer V-C held that the secret agreement was 'a fraud upon the Legislature and contrary to principles of public policy'.[186] From the 1830s, intention to defraud at the time of contracting, not the secrecy of the agreement itself, proved to be the decisive factor to set aside an agreement of this nature.[187]

C *Commission of a Crime or Tort*

It was considered *contra bonos mores* or against the policy of the law to uphold agreements to commit or to conceal crimes and civil wrongs. This heading captured a broad range of conduct from printing libellous material[188] to stifling a prosecution.[189] Thus, agreements not to prosecute — the crime of 'theftboot' under Scots law — were treated as *contra bonos mores*.[190] While the crime was introduced into Scots law for public protection, the prohibition against these agreements had persisted in the mid-18th century 'upon the head of expediency'.[191] The practice of hiring white bonnets[192] to bid at auctions was condemned in the Scottish Court of Session on similar grounds.[193]

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181 Ibid 369 (Hart) (during argument).
182 Ibid 369 (S Romilly, Bell and Wingfield) (during argument).
183 Ibid 369 (Plumer V-C).
184 Ibid.
185 Ibid 370
186 Ibid.
187 See, eg, *Simpson v Francis* (1842) 9 Cl & F 61; 8 ER 338.
188 See *Fores v Johnes* (1802) 4 Esp 97; 170 ER 654.
189 See *Warrand v M'Pherson* (1756) Mor 15957; *Kennedy v Cameron* (1823) 2 S 192.
190 *Warrand v M'Pherson* (n 189) 15958.
191 Ibid.
192 The modern term for 'white bonnets' is 'shill bidders'.
193 See *Grey v Stewart* (1753) Mor 9560; *Elibank v Hamilton* (1827) 6 S 69, 72 (Lord Glenlee).

Nineteenth century English authorities were along the same lines. Knowledge that goods were being supplied for an illegal purpose as proscribed under the *Duties on Beer Act 1802* barred an action to recover for sale and delivery.[194] In addition to frustrating the statutory ends of public health and revenue, the agreement was 'entered into against the policy of the law'.[195] Smuggling and 'bricks sold under the statutable size' were perceived to be analogous to the purchase of supplies for brewing.[196]

Aside from the commission and concealment of crimes, agreements involving the commission of civil wrong were condemned on grounds characteristic of public policy. The value of caricature prints with 'immoral, obscene, or libellous' tendency were not recoverable in an action of assumpsit.[197] Offence to 'public morals and laws of the country' precluded recovery for work and labour done in printing the memoir of a prostitute.[198] A lessor could refuse to allow a plaintiff to use his rooms to deliver lectures critiquing Christianity lest it be 'a violation of the first principles of the law'.[199] By refusing to lend assistance, the courts showed their disinclination to 'take an account between two robbers on Hounslow Heath'.[200]

D *Smuggling*

While treated as contrary to public policy under English law, agreements to smuggle or to sell contraband goods were considered *pacta illicita* under Scots law. From the mid-18th century, the general tendency of the extant Scottish cases, which vastly outnumber any comparable English cases, was non-enforceability. Beforehand, the conventional course was to hold that actions of this nature were maintainable. In so holding, the Court of Session would routinely repel arguments proposing that no action could lie upon contraband goods, the suggestion being that each party was as 'guilty as sin'.[201]

Two factors emerged in the late 18th century Scottish cases that became decisive: the allegiance of the pursuer or the knowledge of the parties. Initially, foreign merchants could recover the value of contraband items in the Court of Session but, from the late 1770s, the position fixed upon actual knowledge or active participation.[202] Active participation in

194 *Langton v Hughes* (1813) 1 M & S 593; 105 ER 222.
195 Ibid 223 (Lord Ellenborough CJKB).
196 Ibid 223.
197 *Fores v Johnes* (n 188).
198 *Poplett v Stockdale* (1825) Ry & M 337; 171 ER 1041, 1041 (Best CJCP).
199 *Cowan v Milbourn* (1867) LR 2 Ex 230, 234 (Kelly CB).
200 *Poplett v Stockdale* (n 198) 1041 (Best CJCP).
201 See, for example, *Wilkie v M'Neil* (1740) Mor 9538.
202 See *Walker v Falconer* (n 2); *More v Steven* (n 2) 9546.

a smuggling enterprise prevented a seller, who packed goods in a particular way to avoid detection, from recovering.

The importance attached to intention and assistance in smuggling ventures was shared in English courts. In *Clugas v Penaluna*, collusion by packing contraband goods for the defendant precluded the plaintiff from recovery in England.[203] The 'immorality' of evading domestic law tainted the whole smuggling agreement, disqualifying it from judicial intervention.[204] This harmonised with Lord Mansfield CJKB's judgment in an earlier smuggling case, *Holman v Johnson*. There, his Lordship explained that public policy meant '*ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act'.[205] Parties at equal fault, thus, could not expect to recover on a smuggling agreement in Scottish and English courts from the late 18th century.[206]

E *Agreements Affecting the Administration of Justice*

1 *Maintenance and Champerty*

By the 19th century, the public policy basis underlying the ancient torts and crimes of maintenance and champerty had withered in importance. In *Stanley v Jones*, Sir Nicholas Tindal CJCP recognised that maintenance was 'in earlier times, and in all countries, an offence pregnant with great mischief to the public', as ancient statutes proved.[207] Various statutes enacted between the late-13th and mid-16th centuries, such as the *Statute of Westminster 1275*[208] and *Statute of Westminster 1285*,[209] focused on these two issues. The two *Statutes of Westminster* were a direct response to an increasing number of individual petitions complaining of land magnates' interference with pending litigation in order to enlarge their existing estates.[210] To achieve this aim, feudal magnates might fund another's suit for recovery of land in return for a share in the costs of litigation and joint ownership of the estate in question. In prohibiting this practice, Parliament aimed to reduce third party interference with litigation whether through the practice of promoting or supporting it ('maintenance') or, in aggravated form, of seeking a share in the profits of successful

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203 *Clugas v Penaluna* (n 2)
204 Ibid 1123 (Lord Kenyon CJKB).
205 *Holman v Johnson* (n 2) 1121 (Lord Mansfield CJKB).
206 See comments in *Vandyck v Hewitt* (1800) 1 East 96; 102 ER 39, 40 (Lord Kenyon CJKB).
207 *Stanley v Jones* (1831) 7 Bing 369; 131 ER 143, 146 (Tindal CJCP).
208 *Statute of Westminster 1275*, 3 Edw 1, c 25.
209 *Statute of Westminster 1285*, 13 Edw 1 St 1, c 49. Otherwise referred to as the *Maintenance and Champerty Act 1285*.
210 Jonathan Rose, *Maintenance in Medieval England* (Cambridge University Press, 2017) 2 n 6.

litigation ('champerty'). By the 19th century, arguments based on champerty and maintenance more often than not failed, spectacularly so in *Persse v Persse*.[211]

(a) Persse v Persse

In *Persse v Persse*, an indenture of covenant was upheld by the House of Lords despite the defendant's arguments that it was void or illegal by reason of champerty, maintenance, public policy, fraud, and want of mutuality.[212] All of these grounds failed.

Robert Persse was the heir presumptive of his cousin, Robert Parsons Persse ('R P P'). His wealthy cousin was unmarried and 'of unsound mind'.[213] On his death, Robert Persse would inherit the real estate and personal property of his cousin, R P P. Robert Persse's bankruptcy combined with the mental state of his cousin led Robert to enter into an indenture with his eldest son, Dudley Persse. By this indenture it was agreed that Dudley would prosecute and fund a commission of lunacy in his father's name against R P P. Upon his cousin's death, the agreement recited that Robert would convey his cousin's property to Dudley 'in consideration… of the natural love and affection which he bore' for his son.[214] R P P was declared a 'lunatic' and died in 1829. On the cousin's death, however, the father settled the remainder of the estate on his second son, Robert Henry, contrary to the indenture.

The father's first head of argument — that the agreement savoured of champerty and maintenance — was rejected out of hand. The lunacy suit was not being maintained and there was 'no property in litigation to be divided'.[215] The division of property would only take place on the cousin's demise. Furthermore, an agreement to prosecute a commission of lunacy was not contrary to public policy for the lunacy jurisdiction of the Court of Chancery was protectionist in nature.[216] Engaging the jurisdiction was to be encouraged since the object of it was the protection of the mentally ill person and their property.[217] It would frustrate that object if courts were to hold 'that all agreements relative to the costs of the proceedings or the ultimate division of the property were void'.[218]

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211 *Persse v Persse* (1840) 7 Cl & F 279; 7 ER 1073.
212 Ibid 1073.
213 Ibid 1074.
214 Ibid 1074.
215 Ibid 1089 (Lord Cottenham LC).
216 Ibid.
217 Ibid.
218 Ibid.

2 *Secret Compositions with Individual Creditors*

The policy of the law, public protection, violation of 'essential principles of justice' and fraud coalesced to invalidate secret bargains between bankrupts and individual creditors.[219] On principles of public policy, 19th century English, Irish, and Scottish courts would not sustain actions based on bargains advantaging one creditor — either by securing an entire discharge of a debt or receiving a larger sum than agreed — to the disadvantage of the others.[220] In *Jackman v Mitchell*, Lord Eldon LC ordered costs and decreed delivery up of a bond securing the bankrupt's largest creditor the deficiency of a composition, even though the parties were *particeps criminis*.[221] The intention of the bond was to induce the creditor to enter a deed of composition in which the bankrupt and his other creditors would agree to settle on a percentage of the total amount owed to them.[222] The relief premised on public policy was awarded 'on account, not of the individual, but of the public'.[223] This basis for granting relief was subsequently relied upon in other English cases on secret compositions.[224]

Language evocative of *particeps criminis* and public policy was employed with similar effect in the Scottish Court of Session. In *Cook v Montgomery*, the Court of Session set aside bills privately obtained from a bankrupt to condition a creditor's agreement to a voluntary composition and discharge.[225] Fraud and extortion were present in the transaction, which as exceptions to the general *ex turpi causa* doctrine induced the Court to decree restitution of the amounts paid.[226] This additional layer of *ex turpi causa* was absent in the later decision of *Robertson v Ainslie's Trustees*, where Lord Justice-Clerk Boyle treated an assignment of a bankrupt's whole effects to a single creditor as an illegal contract unenforceable in the courts.[227]

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219 See *Eastabrook v Scott* (1797) 3 Ves Jr 456; 30 ER 1103; *Mawson v Stock* (1801) 6 Ves Jr 300; 31 ER 106; *Jackman v Mitchell* (1807) 13 Ves Jr 581; 33 ER 412; *Wells v Girling* (1819) 1 Brod & Bing 447; 129 ER 795; *Cook v Montgomery* (1826) 4 S 499; *Robertson v Ainslie's Trustees* (1837) 15 S 1299; *Mare v Sanford* (1859) 1 Giff 288; 65 ER 923; *Atkinson v Denby* (1861) 6 Hurl & N 778; 158 ER 321; *Wood v Barker* (1865) LR 1 Eq 139.

220 See *Eastabrook v Scott* (n 219); *Mawson v Stock* (n 219); *Jackman v Mitchell* (n 219); *Wells v Girling* (n 219); *Cook v Montgomery* (n 219); *Robertson v Ainslie's Trustees* (n 219); *Mare v Sanford* (n 219); *Atkinson v Denby* (n 219); *Wood v Barker* (n 219); *Furlong v Fottrell* (1868–9) 3 IR Eq 432, 437 (Lord Walsh MR).

221 *Jackman v Mitchell* (n 219).

222 Ibid 412, 413.

223 Ibid 414 (Lord Eldon LC).

224 See *Wood v Baker* (n 219) 144, 145 (Sir John Stuart V-C); *McKewan v Sanderson* (1875) LR 20 Eq 65, 72–3 (Sir R Malins V-C); *Re McHenry; McDermott v Boyd* [1894] 3 Ch 365, 371 (Lord Herschell LC); *Re A Bankruptcy Notice* [1924] 2 Ch 76, 83 (Clayton KC) (during argument).

225 *Cook v Montgomery* (n 219);

226 Ibid 501–2.

227 *Robertson v Ainslie's Trustees* (n 219) 1304 (Lord Justice-Clerk Boyle).

F *Sexual Immorality and Matrimonial Affairs*

1 *Matrimonial Affairs: Marriage Brokerage Contracts*

From the early 17th century,[228] the Court of Chancery in England set aside transactions 'savouring of marriage brocage',[229] but the reason for doing so had not yet developed an explicit public dimension. That is, the equitable position had not at that stage crystallised to explicitly declare that these contracts, having caused 'much mischief to the public', were contrary to public policy.[230] These agreements were, however, considered a fraud on 'the open and public agreement of marriage'.[231] Throughout the 17th and the first quarter of the 18th century, these contracts — involving the payment of money as a reward for procuring a marriage — were described to be 'of Evil Example',[232] of 'very ill Consequence',[233] 'of dangerous consequence'[234] and, by their nature, 'odious'.[235] In *Roberts v Roberts*, Lord Jekyll MR supposed that the practice of relieving against these bonds in equity arose because marriage 'ought to be free and open'.[236] Later, these contracts were pronounced to be 'publicly detrimental'[237] and 'so objectionable on grounds of public policy'.[238]

The turn in language began in 1735. In *Proof v Hines*, Lord Talbot LC commented that equity relieved against these bonds because it 'will not suffer any advantage to be taken… of the strong bias to obtain what is desired'.[239] In addition, Chancery interceded not only for the party affected but, as many decisions affirmed, 'from a public consideration; marriage greatly concerning the public'.[240] It was 'on the Account of the Public, that the Court relieves; and 'tis on that Account, that it ought to relieve in the present Case'.[241] As

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228 See *Arundel v Trevillian* (1634) 1 Rep Ch 47; 21 ER 515; *Drury v Hooke* (1686) 1 Vern 412; 23 ER 553; *Hall v Potter* (1695) 1 Show PC 76; 1 ER 52; *Scribblehill v Brett* (1703) 4 Bro 144; 2 ER 97; *Keat v Allen* (1707) 2 Vern 588; 23 ER 983; *Cole v Gieson* (n 88); *King v Burr* (1810) 3 Mer 693; 36 ER 266.

229 *Cock v Richards* (1809) 2 Hov Supp 232; 34 ER 1071, 1071.

230 *Blachford v Preston* (n 122) (Lord Kenyon CJKB).

231 *Kemp v Coleman* (1707) 1 Salk 156; 91 ER 144, 144 (n 1).

232 *Hall v Potter* (n 228) 56.

233 *Drury v Hooke* (n 228) 553 (LC).

234 *Scribblehill v Brett* (n 228) 98, citing John Fonblanque, *A Treatise of Equity* (Byrne, J Moore, W Jones, E Lynch, and H Watts, 1793–5) vol 1, 253–55.

235 *Turton v Benson* (1719) 10 Mod 445; 88 ER 803, 805 (Lord Parker LC).

236 *Roberts v Roberts* (1730) 3 P Wm 55; 24 ER 971, 975 (Jekyll MR).

237 See *Hanington v Du-Chatel* (n 10) 1028 (Lord Thurlow LC); *Whittingham v Burgoyne* (1796) 3 Ans 900; 145 ER 1076, 1077 (Macdonald CB).

238 *Ainslie v Medlycott* (1809) 2 Hov Supp 139; 34 ER 1029, 1029. See also *Hanington v Du-Chatel* (n 10) 1028 (Lord Thurlow LC); *Scott v Scott* (1787) 1 Cox Eq Cas 366; 29 ER 1206, 1211 (Eyre CB) ('public inconvenience').

239 *Proof v Hines* (1735) Cas t Talb 111; 25 ER 690, 692 (Lord Talbot LC).

240 *Law v Law* (n 10) 706 (Lord Talbot LC). See also *Cole v Gieson* (n 88) 1171 (Lord Hardwicke LC).

241 *Walmesley v Booth* (1741) Barn Ch 475; 27 ER 726, 728. See also *Debenham v Ox* (n 10) 1029 (Lord Hardwicke LC).

the Irish Court of Chancery observed, equitable relief was available to a party 'involved in Difficulties, not *sui juris*, and compelled by Necessity to enter into the Terms' of the agreement.[242] Common law courts later took on this equitable exception based on public policy.[243]

The Scottish Court of Session, aligning with Chancery practice in England and Ireland as well as the language of public detriment, declared a marriage brokerage contract unenforceable for the first time in 1770.[244] In *Thomson v Mackaile*, the defender argued that, by upholding the contract, the Court of Session 'would give encouragement to interested and designing men to earn an infamous profit, by destroying the peace of families, by rendering children undutiful to their parents, and leading them to ruin unperceived till it was past redress'.[245] Even though the English position formed part of his argument,[246] the defender instead relied more on the approach of the civil law to 'immoral bargains between the sexes' or *proxenetism*.[247] The reward for such a bargain was not generally recoverable.[248] The Court of Session held that the contract in question was *contra bonos mores*.[249]

2 *Sexual Immorality: Prostitution and Adultery*

In Georgian England, contracts savouring of prostitution were regarded as immoral and contrary to public policy. Knowledge — or, rather, strong evidence being led on the plaintiff's knowledge of the contract's true nature — was the decisive factor that could make such contracts *contra bonos mores*. Thus, assumpsit for use and occupation was not maintainable where the plaintiff knowingly let rooms to a prostitute and gave her 'liberty to receive male visitors, for the purpose of prostitution'.[250] Recovery was also impermissible as soon as the plaintiff knew how his rooms were being used.[251] In contrast, rooms rented for the sole purpose of sleeping, and not 'to consort with the other sex', would ensure recovery.[252]

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242 *Shirley v Martin* (Lord Skinner CB), quoted in *Roche v O'Brien* (1813) 1 B & B 330, 358.
243 *Hermann v Charlesworth* [1905] 2 KB 123.
244 *Thomson v Mackaile* (1770) Mor 9519. See also Macgregor (n 40) 129.
245 *Thomson v Mackaile* (n 244) 9520.
246 Ibid.
247 Ibid.
248 Ibid.
249 Ibid.
250 *Girardy v Richardson* (1793) 1 Esp 13; 170 ER 265. See also *Appleton v Campbell* (1826) 2 Car & P 347; 172 ER 157.
251 *Jennings v Throgmorton* (1825) R & M 251, 252.
252 *Appleton v Campbell* (n 250) 157.

However, basic necessities, such as having shelter, trumped a plaintiff's knowledge of a defendant's sex work.[253] The plaintiff could recover the value of clothing sold[254] and for the work and labour of washing clothes, even with prior knowledge of the defendant's work.[255] In the former case, *if* the plaintiff had 'done something in furtherance of [the defendant's work]', the contract would have been 'corrupt and illegal'.[256] In the latter case, the impossibility of separating which clothes were used for which purpose and the defendant's basic need for 'clean linen' were such that the plaintiff could recover.[257]

Seventeenth and 18th century English and Scottish courts overwhelmingly enforced contracts involving adultery, particularly those for the maintenance of former mistresses and their ex-nuptial children. Rather than a blanket rejection on public policy grounds, English courts used a combination of policy factors, including the protection of affected mistresses, 'honour and conscience', and the difference between courts of law and equity,[258] to favour enforcement. In almost all English and Scottish cases, provision for the maintenance of ex-nuptial children was enough to sustain a cause of action.[259] English courts declared bonds given in past consideration of or to discontinue cohabitation,[260] and annuities granted for life upon separation,[261] good at law and sufficient to found a cause of action.[262] An agreement that formally marked the end of extra-marital cohabitation and provided the woman with an annuity conditioned on her leading a 'sole and chaste' life was good.[263] It was seen as comparable to the situation of a husband making provision for his wife in the event of his death.

However, moral consideration was judged insufficient to support an action to compensate a former mistress.[264] In *Beaumont v Reeve*, the plaintiff could not rely upon her injured character or being 'deprived of the means of procuring an honest livelihood' to support an action for assumpsit.[265] Whether the defendant was the 'seducer' leading the

253 See, for example, *Crisp v Churchill*, cited in *Lloyd v Johnson* (n 2) 939.
254 *Bowry v Bennett* (n 2).
255 *Lloyd v Johnson* (n 2)
256 *Bowry v Bennett* (n 2).
257 *Lloyd v Johnson* (n 2) 940.
258 See *Turner v Vaughan* (1767) 2 Wils KB 339; 95 ER 845, 846 (Clive J), 847 (Bathurst J).
259 See *Ross v Robertson* (1642) Mor 9470; *Hamilton v de Gares* (1765) Mor 9471*; Jennings v Brown* (1842) 9 M & W 496; 152 ER 210; *Linnegar v Hodd* (1848) 5 CB 437; 136 ER 948; *Hicks v Gregory* (1849) 8 CB 378; 137 ER 556. Cf *Durham v Blackwood* (1622) Mor 9469.
260 *Turner v Vaughan* (n 258); *Friend v Harrison* (1827) 2 Car & P 584; 172 ER 265.
261 *Gibson v Dickie* (1815) 3 M & S 463; 105 ER 684.
262 Cf *Binnington v Wallis* (1821) 4 B & Ald 650; 106 ER 1074. An agreement to discontinue cohabitation, but allowing for an annuity conditioned on the plaintiff leading a 'good and virtuous life and demeanour', was bad at law.
263 *Gibson v Dickie* (n 261).
264 See *Beaumont v Reeve* (1846) 8 QB 483; 115 ER 958, 959 (Lord Denman CJQB).
265 Ibid 958.

plaintiff to lose her virtue was irrelevant to the right of action or to distinguish between past comparable cases.[266]

G *Gambling: Betting, Gaming and Wagering*

Not until the late 18th century did public policy become the ground upon which English and Scottish courts found transactions relating to gambling unenforceable. Although the plaintiff could set aside an illegal transaction, the English and Irish Courts of Chancery refused to extend this public policy rationale to 'the costs of setting aside an illegal transaction which he has entered into with his eyes open'.[267] For Scotland, this change of position arrived in 1787 when the Court of Session found that a wager on the election of a Member of Parliament was not actionable.[268] The political nature of the wager was treated as 'a peculiarly improper subject'.[269] During the 1780s, the common law position also crystallised in a series of cases,[270] which clarified that the subject matter of a gambling agreement could be the agreement's death knell.[271] Before the *Gaming Act 1845* introduced restrictions on gaming and wagering agreements,[272] an action could be maintained at common law on a wager. However, if the subject matter was 'against public policy, against decency, or tending to affect the particular interests of individuals', the agreement would be illegal.[273] The subject matter of an idle wager[274] on the probable assassination of Napoleon Bonaparte between individuals having 'no special interest' was considered 'against public policy and of immoral tendency'.[275] A harmless — and arguably idle — wager of 'a good dinner and wine' was good at law.[276] The subject matter was not immoral nor did it affect a third person or require 'indecent evidence'.[277]

Formerly, these courts would leave scope for validity by engineering ways in which to circumvent legislation that proscribed gambling in its various forms of betting, gaming, and wagering.[278] By a 1621 Scottish Act, winnings over 100 merks gained 'at Cardes, Dyce,

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266 Ibid 959 (Coleridge J).
267 *Morgan v Bruen* (1835) 1 L & GtempSugd 180.
268 *Bruce v Ross* (n 21).
269 Ibid 9523.
270 See *Atherfold v Beard* (1788) 2 D & E 610; 100 ER 328; *Good v Elliott* (1790) 3 D & E 693; 100 ER 808; *Gilbert v Sykes* (1812) 16 East 150; 104 ER 1045.
271 *Good v Elliott* (n 270) 813 (Ashhurst J).
272 8 & 9 Vic, c 109.
273 *Good v Elliott* (n 270) 813 (Ashhurst J).
274 See *Micklefield v Hepgin* (1792) 1 Anst 133; 145 ER 823, 823 (Eyre CB).
275 *Gilbert v Sykes* (n 270) 1049 (Lord Ellenborough CJKB), 1049 (Grose J), 1050 (Le Blanc J), 1053 (Bayley J).
276 *Hussey v Crickitt* (1811) 3 Camp 168; 170 ER 1343.
277 Ibid 1344.
278 The triviality of the wager, however, was another matter.

and Horse Races' were to be donated to the church for distribution to the poor.[279] In *Park v Somervell*, the Court of Session made a debtor liable for a £100 bond representing 'money lost at cards and dice', but required it be consigned to 'the poor till'.[280] In another case, the *Gaming Act 1710* — that made bills and other securities given for gaming 'utterly void, frustrate and of none effect' — was found not to extend to Scotland.[281]

H *Usurious Transactions*

English and Irish cases of the 18th and 19th centuries indicate that usurious contracts were typically argued to be contrary to public policy on a similar footing to marriage brokerage bonds and smuggling contracts.[282] Until the *Usury Laws Repeal Act 1854*,[283] it was unlawful to charge above the maximum statutory rate of interest on a loan. Transactions treated as usurious, under the statutes of usury,[284] included those which involved 'taking, *directly or indirectly*, any benefit beyond the prescribed rate of interest, under any device, pretence, or shift, with other particulars expressed, including bargain and conveyance'.[285] In *Drew v Power*, Lord Redesdale LC in the High Court of Chancery in Ireland remarked that the statutory prohibition on usurious transactions was 'founded on great principles of public policy'.[286] It was observed that 'it is more advantageous to the public that persons who are in possession of money should use their own industry in the employment of their money, than that they should sit idle and take the benefit of it through the industry of others'.[287]

Until the abolition of usury in 1854, the Court of Chancery regularly intervened to set aside transactions in circumvention of the statutory prohibition on usury.[288] For breaches of the *Usury Acts*, courts of equity offered different remedies to courts of law.[289] Lord Redesdale LC, delivering the judgment of the Irish High Court of Chancery in *Drew v Power*, opined that the policy of the law would be:

> defeated if courts were not to be jealous of such transactions as these, and were not to watch them with severity, and be sure that they did not permit persons under cover of

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279 'Anent Playing at Cardes, and Dyce, and Horse-races.'
280 *Park v Somervell* (1668) 1 Bro Sup 574, 574.
281 *Kirk-Session of Dumfries v Kirk-Session of Kirkcudbright and Kelton* (1775) Mor 10580.
282 See *Atkinson v Folkes* (n 10) 804; *Cooke v Loxley* (1792) 5 D & E 4; 101 ER 2, 2; *Browne v O'Dea* (1808) 1 Sch & Lef 115; *Molloy v Irwin* (1808) 1 Sch & Lef 310; *Drew v Power* (1808) 1 Sch & Lef 182.
283 *Usury Laws Repeal Act 1854*, 17 & 18 Vict, c 90, s 1.
284 See, eg, *Usury Act 1660*, 12 Car 2, c 13; *Usury Act 1714*, 13 Anne, c 15; *Usury Act 1840*, 3 & 4 Vict, c 83; *Usury Act 1841*, 4 & 5 Vict, c 54; *Usury Act 1843*, 6 & 7 Vict, c 45, *Usury Act 1845*, 8 & 9 Vict, c 102; *Usury Act 1850*, 13 & 14 Vict, c 56.
285 *Moore v McKay* (1828) 1 Beat 282, 288 (Sir Anthony Hart LC) (emphasis added).
286 *Drew v Power* (n 282) 195.
287 Ibid.
288 *Moore v McKay* (n 285) 287.
289 Ibid.

> ordinary dealings between man and man, to obtain an advantage beyond the legal interest.[290]

Lenders' supplying goods, rather than money, for resale at an undervalue was one method of circumvention seen in the courts.[291] Another was the 'grant of annuities, upon a number of contingencies'.[292] In pre-1828 Irish Chancery decisions, contemporaneous transactions — by which a beneficial lease was granted with or in consideration of a loan of money — were routinely set aside as usurious.[293] The Irish practice was modified by the requirement — introduced in the 1828 Irish Chancery decision of *Moore v McKay* — of evidence beyond the mere contemporaneity of the transactions.[294] Public policy 'in cases of usury, illegal insurances, smuggling contracts', as the defendant in *Cooke v Loxley* explained, was an exception to the general principle that an individual could not rely on the illegality in a contract to which he was party.[295]

I *'Catching Bargains' with Expectant Heirs*

Throughout the late 18th century, the English Court of Chancery disapproved of 'catching bargains', seeing it as a practice prejudicial to heirs expecting an inheritance and injurious to the 'public weal'.[296] Transactions involving young heirs were 'interdicted for the wisest reasons'.[297] In *Baldwin v Rochford*, Lord Hardwicke LC observed that

> [i]n the cases of marriage brocage bonds, contracts with young heirs… this Court constantly sets aside such bargains, upon the principles of public policy, and because of the great inconveniences such contracts would be to the public if they were suffered to be valid.[298]

This special class described the practice of improvident young heirs entering unfair or unreasonable transactions affecting an expected inheritance. An heir might sell or mortgage his prospective inheritance or obtain loans premised on the future receipt of his inheritance. Bargains, exploiting youthful weakness or inexperience, provided the basis

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290 *Drew v Power* (n 282) 195.
291 See *Fairfax v Trigg* (1677) Rep t Finch 317; 23 ER 172; *Berney v Pitt* (1686) 2 Vern 14; 23 ER 620, 621 (Jeffreys LC).
292 *Heathcote v Paignon* (n 10) 101 (Hollist and Stratford) (during argument).
293 *Browne v O'Dea* (n 282); cf *Hunt v Potter*, cited in *Browne v O'Dea* (n 282) 119 n (a); *Molloy v Irwin* (n 282); *Drew v Power* (n 282).
294 *Moore v McKay* (n 285).
295 *Cooke v Loxley* (n 282) 2 (Erskine and Chambre) (during argument).
296 Thomas H Breeze, 'The Attitude of Public Policy towards the Contracts of Heirs Expectant and Reversioner' (1904) 13(5) *The Yale Law Journal* 228, 228.
297 *Morse v Royal* (1806) 12 Ves Jr 355; 33 ER 134, 140 (Lord Erskine LC).
298 *Baldwin v Rochford* (n 10) 589–90 (Lord Hardwicke LC).

for the modern law relating to unconscionable bargains.[299] Lenders used this method to circumvent usury laws that placed a ceiling on the rate of interest charged.[300] To protect young heirs from dissipating their future inheritances, or to prevent an heir's independence from their family,[301] early Chancery cases presumed that catching bargains given on unfair terms and without sufficient consideration were unenforceable.[302] If the Court of Chancery 'was satisfied that [the expectant heir] had not been adequately protected against the pressure put upon them by their poverty', the transaction would be set aside.[303] In *Twisleton v Griffith*, the Court of Chancery in England set aside a sale of a reversionary interest by an heir, acknowledging that this decision might strain familial relationships.[304] As Lord Cowper LC commented, it 'might force an heir to go home, and submit to his father, or to bite on the bridle, and ensure some hardships… [but] he might grow wiser, and be reclaimed'.[305]

The late 17th century Chancery practice of consistently rebuking these transactions made sense in a dominantly 'dynastic landholding' society.[306] The Court of Chancery might, for example, adopt the expedient of denying specific performance to protect the young heir's interest from an improvident sale.[307] In *Earl of Aylesford v Morris*, Lord Selborne LC explained that this presumption against validity arose 'from the circumstances or conditions of the parties contracting – weakness on one side, usury on the other, or extortion, or advantage taken of that weakness'.[308]

IV CONCLUSION

During the course of the 18th century, public policy took its form as a general invalidating principle in a series of analogous cases. The English Court of Chancery particularly led the charge by, in the first place, analogically identifying factual circumstances and unequal relationships that were unenforceable and, secondly, spelling out a public element that justified judicial interference. Though equity led the way, courts of law soon followed.

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299 See William Tetley, 'Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering' (2004) 35 *Journal of Maritime Law and Commerce* 561, 572; Fiona R Burns, 'The Equitable Doctrine of Unconscionable Dealing and the Elderly in Australia' (2003) 29 *Monash University Law Review* 336, 345.

300 Warren Swain, 'Power, History and the Law of Contract in Eighteenth Century England' in Kit Barker et al (eds), *Private Law and Power* (Hart Publishing, 2017) 31, 34.

301 Ibid 130.

302 Breeze (n 296) 228.

303 *O'Rorke v Bolingbroke* (1877) 2 App Cas 814, 822 (Lord Hatherley) (HL).

304 *Twisleton v Griffith* (1716) 1 P Wms 312; 24 ER 403, 404.

305 Ibid.

306 See Swain, 'Reshaping Contractual Unfairness' (n 93) 130.

307 *Johnson v Nott* (1684) 1 Vern 271; 23 ER 464. See also Swain, 'Reshaping Contractual Unfairness' (n 93) 125.

308 (1872–73) LR 8 Ch App 484, 489.

The common thread throughout the English case law is a perception and consequent avoidance of public detriment. Public detriment had different shades depending on the category of case involved. The public expected public offices to be 'given to those most worthy'.[309] It was improper to bet on serious subjects, but wagers on insignificant subjects stood up in courts of law. Marriage brokerage bonds were an unacceptable incursion on freedom to contract marriage, an institution in which the public had an interest. Young heirs needed protection from reckless transactions that might impact their future inheritances to personal and real property. While contracts in furtherance of prostitution were unenforceable, policy favoured the enforcement of contracts for the maintenance of former mistresses and ex-nuptial children.

By the close of the 19th century, the Scottish and English positions on these categories mostly coincided with one another. The trend of the Scottish Court of Session from the 18th century was to draw inspiration from English categories of public policy to invalidate transactions it had previously enforced. In the first half of the 19th century, the practice of the Irish High Court of Chancery — with the exception of usury — mirrored that of its English counterpart.

Chapter 2 has explored the development of public policy, both at common law and in Scots law. Public policy was exclusively a concept of internal litigation until 1835 when the term was first mentioned in a cross-border case.[310] Chapter 3 consequently examines the historical development of public policy in common law private international law and considers the areas of private international law most commonly affected by the public policy exception. Only a few categories of public policy discussed in this Chapter played a part in the exception's evolution in private international law. Consequently, Chapter 3 also considers whether factors besides case law have influenced the private international law of public policy.

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309 *Blachford v Preston* (n 122) 1283 (Lord Kenyon CJKB) ('*detur digniori*').
310 *Swift v Kelly* (1835) 3 Kn 257; 12 ER 648, 656 (Dr Lushington).

CHAPTER 3: THEORETICAL ORIGINS AND SOURCES

I INTRODUCTION

This Chapter focuses on the transformation of the public policy exception in historical private international law scholarship, beginning with the exception's coverage in Ulrik Huber's *De Conflictu Legum Diversarum in Diversis Imperiis* ('*De Conflictu Legum*') and ending with its consideration in A V Dicey's *Conflict of Laws*. It explores whether 19th century scholarship associated the common law understanding of public policy, considered in Chapter 2, with the private international law 'escape device'. It also scrutinises the influence of natural law and positivist theory on the approaches to public policy taken in the texts of Joseph Story, John Westlake, and A V Dicey.

Part II explores the combined influence of a continental conflict of laws' framework and natural law philosophy on Story's *Conflict of Laws*. Against this background, the relationship of natural law with Story's account of public policy will be outlined in Part III. Part IV discusses the influence of Austinian positivism on Westlake's *Private International Law* and Dicey's *Conflict of Laws*. The changing shape of public policy in successive editions of Westlake's *Private International Law* and Dicey's *Conflict of Laws* is then set out in Parts V and VI respectively.

II THEORETICAL INFLUENCES ON PUBLIC POLICY IN STORY'S *CONFLICT OF LAWS*

This Part sets out two underlying influences on the public policy exception in Story's *Conflict of Laws*. The first of these influences is the conflict of laws' framework supplied by Ulrik Huber's *De Conflictu Legum*. In particular, the focus of Section A is on Huber's prejudicial laws exception. The second influence is William Paley's *Principles of Moral and Political Philosophy* (1785), which supplied the substance of Story's natural law philosophy. In penning an anonymous article entitled 'Natural Law' for Francis Lieber's *Encyclopaedia Americana*, Story appropriated the essential ingredients of Paley's natural law philosophy, laying emphasis on some features over others.[1] Thus, the instances in which law and relationships contradict the law of nature in Paley's *Principles* are drawn out in Section C so that, in Section D, the extent of Story's borrowing may be highlighted.

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[1] See generally Bruce Wardhaugh, 'From Natural Law to Legal Realism: Legal Philosophy, Legal Theory, and the Development of American Conflict of Laws Since 1830' (1989) 41 *Maine Law Review* 307.

A *Prejudicial Laws in Ulrik Huber's* De Conflictu Legum

The foundation of early Anglo-American private international law were the three axioms in Ulrik Huber's *De Conflictu Legum*. These axioms were premised on territorial sovereignty and comity. By the first axiom, the laws of country A bound its citizens and property within its borders 'but not beyond'.[2] According to the second axiom, a sovereign's subjects as well as temporary visitors to the territory were subject to the power of the sovereign.[3] The third axiom had, at its centre, comity, ensuring foreign law could apply in another country. Whether foreign law applied was a matter for the sovereign's discretion or comity.[4] One limit to the sovereign's exercise of comity was prejudicial foreign laws.[5] That is, foreign laws were recognised so long as 'they do not cause prejudice to the power or rights of such government or of its subjects.'[6]

Huber foresaw contracts and marriage as areas in which the prejudicial laws exception might be engaged. In the first place, prejudicial marriages would displace the traditional *lex loci celebrationis* rule for marriage — an exception that would subsequently have a profound effect on the English law of cross-border marriages.[7] An incestuous marriage of a certain degree would fall within this category.[8] Manifest evasion of the law was given as a second example. Huber's illustration of evasion was of two young people, requiring their guardian's consent to marry in their home state, marrying instead in 'eastern Frisia or… some other place' where that consent was unnecessary.[9]

Similarly, the reservation would be engaged for foreign contracts of a prejudicial kind.[10] Using the example of smuggling, Huber gave three instances of invalidity. First, the sale of contraband goods in country A could not be enforced in its courts.[11] The inverse situation of the buyer seeking recovery of legitimate goods sold in country B in the courts of country A, where the goods were contraband, would be allowable.[12] Secondly, a seller could not recover the value of contraband goods delivered in country A.[13] The delivery

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2 Ernest G Lorenzen, 'Huber's *De Conflictu Legum*' (1919) 13 *Illinois Law Review* 375, 403.
3 Ibid.
4 Ibid.
5 Ibid 378, 404. See also Joel R Paul, 'The Transformation of International Comity' (2008) 71 *Law and Contemporary Problems* 19, 20, 21, 23; Alex Mills, 'The Private History of International Law' (2006) 55 *International and Comparative Law Quarterly* 1, 26.
6 Lorenzen (1919) (n 2) 403.
7 Ibid 410 [8]. See further n 16 for references to the *Brook v Brook* litigation.
8 Ibid 410 [8].
9 Ibid 411 [8].
10 Ibid 413 [11].
11 Ibid 406 [5].
12 Ibid.
13 Ibid.

was 'repugnant to the law and interests of the state prohibiting the sale of such goods'.[14] Thirdly, 'no action will lie no matter where it may be brought' to recover the value of contraband items sold secretly in country A.[15]

From Huber's base, ample scope was left to scholars to develop what was to become the public policy exception in common law private international law. Aside from marriage and contracts, no other areas of law or specific examples were proposed to engage the reservation. Despite the acceptance of Huber in English and Scottish courts throughout the 18th century, references to Huber's prejudicial law reservation are not identifiable in pre-19th century law reports — even those invoking public policy to discourage smuggling.[16]

B *Fundamental Policy and Institutions in Story's* Conflict of Laws

Joseph Story adopted Huber's three axioms in his *Conflict of Laws*. Story's first principle was that a country's laws were territorial.[17] Its laws could bind its own citizens and property within its borders only.[18] The second point was that no foreign law could have extraterritorial effect because all countries were equal to each other.[19] However, as a third principle, if a foreign law took effect in another country, it depended entirely 'upon [that country's] own express or tacit consent'.[20]

As a limitation to admitting foreign laws under the third principle,[21] a country could not, in Story's view, 'be justly required to yield up its own fundamental policy and institutions in favour of those of another nation'.[22] Nor could the reverse occur; it could not admit laws which were incompatible with its own. Story explained that a foreign law may be found in one country due to 'local or accidental circumstances',[23] and so it would be improper to 'engraft' it on another polity.[24] In illustrating this principle, Story distinguished between the laws of Christian countries and of 'heathen' countries.[25] It is

14 Ibid.
15 Ibid.
16 For references to the prejudicial law reservation in 19th century law reports, see *Doe v Vardill* (1826) 5 B & C 438; 108 ER 163, 165; *Brook v Brook* (1858) 3 Sm & G 481; 65 ER 746, 762 (Cresswell J); *Simonin v Mallac* (1860) 2 Sw & Tr 67; 164 ER 917, 923 (Cresswell J); *Brook v Brook* (1861) 9 HL Cas 193; 11 ER 703, 702 (Lord Campbell LC). For discussion of the common law smuggling cases, see Chapter 2.
17 Joseph Story, *Commentaries on the Conflict of Laws* (Hilliard Gray, 1st ed, 1834) 19.
18 Ibid.
19 Ibid 21.
20 Ibid 24.
21 Ibid 26.
22 Ibid.
23 Ibid.
24 Ibid.
25 Ibid.

through this distinction that Story, for example, thought a foreign law permitting polygamy or, even, incest could not be accepted by a Christian country.[26] He concluded by stating that 'there would be extreme difficulty in saying, that other nations were bound to enforce laws, institutions, or customs, so subversive of their own morals, justice, interest, or polity'.[27] Story's language of subversion finds an echo in the philosophy of William Paley.

C *Violating Natural Law in William Paley's* Principles of Moral and Political Philosophy *(1785)*

The moral and political philosophy of the English Anglican clergyman, William Paley (1743–1805), was highly influential in the early American republic, in England, and abroad.[28] Between the late-18th and mid-19th century, Paley's *Principles of Moral and Political Philosophy* (1785) was a standard text on the curriculum of many American colleges and English universities, including at Cambridge where Paley taught.[29] It was also set at universities within the British Empire: the University of Sydney and the University of Manitoba.[30] Paley's *Principles*, despite the author's clear loyalties to the British Crown, was cited favourably at two American constitutional assemblies of the late 1780s.[31] In the 1790s, law students at Yale, Brown, and Harvard were introduced to Paley's thinking.[32] Paley's plain writing style, combined with his liberal Christianity, utilitarianism, and natural rights position are thought to have attracted Americans to the text.[33]

Paley's *Principles* addressed the main ingredients of natural law over six books. In the first book, Paley defined natural law as a 'science which teaches men their duty and the reasons of it'.[34] Theological utilitarianism was the centrepiece of Paley's natural law framework. In Paley's *Principles*, the existence of God is assumed and human happiness is attributed to God's will. Civil society was seen as 'conducive to that happiness'.[35] Moral obligations — the topic of the second book — depended on the utility of a moral rule.[36] The will of God determined the correctness of action, and in civil society that was

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26 Ibid.
27 Ibid.
28 Mark Francis, 'Naturalism and William Paley' (1989) 10 *History of European Ideas* 203, 203.
29 See Wilson Smith, 'William Paley's Theological Utilitarianism in America' (1954) 11 *William and Mary Quarterly* 402, 402; Francis (n 28) 203; Niall O'Flaherty, 'William Paley's Moral Philosophy and the Challenge of Hume: An Enlightenment Debate?' (2010) 7 *Modern Intellectual History* 1, 3.
30 Francis (n 28) 203.
31 Smith (n 29) 404.
32 Ibid 404–5.
33 Ibid 403, 405, 406.
34 William Paley, *Principles of Moral and Political Philosophy* (W Green, 1817) 1.
35 Ibid 40.
36 Ibid 33.

determined by utility.[37] Rules in civil society ultimately originated from 'divine will'.[38] Whether the will of God supported certain human action required inquiry into the action's "'tendency… to promote or diminish the general happiness'".[39] Individuals reciprocated God's will by exercising virtue, consisting of '*doing good to mankind… and for the sake of everlasting happiness*'.[40] An individual owed duties to God,[41] to themselves,[42] and to others within society.

Under Paley's framework was a three-fold division of rights possessed by individuals. This included rights that were natural or adventitious; alienable or inalienable; and perfect or imperfect.[43] Belonging to every person and predating civil government, natural rights included 'a man's right to his life, limbs and property; his right to the produce of his personal labour; to the use in common with others, of air, light, water'.[44] Adventitious rights were an outgrowth of human society, such as 'a right… in any one man, or particular body of men, to make laws and regulations for the rest'.[45] Rights created by law were alienable; all other rights were inalienable.[46] Perfect rights could be 'asserted by force, or, what in civil society comes into the place of private force, by course of law.'[47]

Emanating from an individual's interpersonal relationships were 'relative' duties. These duties were categorised as determinate, indeterminate and of 'the constitution of the sexes'.[48] The right to property, the sanctity of oaths, the obligation to perform contracts, and wills were the province of determinate relative duties.[49] The obligatory force of promises and contracts derived from expectation — 'the expectations which we knowingly and voluntarily excite'.[50] Although Paley questioned its utility, the oath against simony[51] administered to Anglican clergy was considered to be 'binding upon the consciences of those who take it'. [52]

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37 Ibid 39.
38 Ibid.
39 Ibid 31.
40 Ibid 19 (emphasis in original).
41 Ibid 179–214.
42 Ibid 167–78.
43 Ibid 40.
44 Ibid.
45 Ibid.
46 Ibid 41.
47 Ibid.
48 Ibid 49–103, 104–29, 130–66.
49 Ibid 49–103.
50 Ibid 57, 58, 65–6.
51 As discussed in Chapter 2.
52 This refers to the buying or selling of religious offices and holy orders. Paley (n 34) 95–6.

Charity, used in the limited sense of '*promoting the happiness of our inferiors*', was the main concern of Paley's initial chapters on indeterminate relative duties.[53] Charity obliged a master to treat his servants or slaves with fairness.[54] Servants and slaves subjected to unjustified punishment, 'unnecessary labour or confinement', and insulting language was 'manifestly wrong; were it only upon the general principle of diminishing the sum of human happiness'.[55] Christianity placed limits on commencing civil litigation — another indeterminate relative law — for vindictive reasons.[56]

The final category — 'of relative duties which result from the constitution of the sexes' — encompassed marriage, impediments to marriage, parental duties, and the duties of children to their parents.[57] Paley underlined the tendency of fornication, seduction, adultery, incest, polygamy, and divorce to impair the institution of marriage.[58] Incest and polygamy were both 'forbidden by the law of nature'.[59] Restraints on obtaining divorce were considered proper and consistent with scripture.[60] A general right to divorce was 'contrary to the law of nature, which can be proved to be detrimental to the common happiness of the human species'.[61] As limited grounds of divorce, adultery, desertion and personal incapacity were, however, permitted by the law of nature.[62]

D *Story: Violation of Natural Law*

Two sources — an 1829 speech delivered at Harvard on the 'Value and Importance of Legal Studies'[63] and an anonymous article first published in Lieber's 1832 edition of *Encyclopaedia Americana* — reveal Story's natural law philosophy.[64] Natural law rested at 'the foundation of all other laws'[65] and was 'the philosophy of morals'.[66] It derived from 'human reason … to form his character, and regulate his conduct, and thereby insure his

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53 Ibid 104.
54 Ibid 105.
55 Ibid.
56 Ibid 124–5.
57 Ibid 131.
58 Ibid 13–148.
59 Ibid 140–4.
60 Ibid 145.
61 Ibid.
62 Ibid 146.
63 Joseph Story, 'The Value and Importance of Legal Studies' in William W Story (ed), *The Miscellaneous Writings of Joseph Story* (Charles C Little and James Brown, 1852) 503.
64 Wardhaugh (n 1) 308. Cf James McClellan, *Joseph Story and the American Constitution* (University of Oklahoma Press, 1971) 65–83.
65 Joseph Story, 'Legal Studies' (n 63) 503, 533. See also James McClellan, *Joseph Story and the American Constitution* (University of Oklahoma Press, 1971) 65.
66 Story, 'Legal Studies' (n 63) 503, 534.

permanent happiness.'[67] Natural law — 'supported and illustrated by revelation'[68] — united the subjects of Christian countries, and acted as a leveller.[69] It would 'check the arrogance of power, and the oppression of prerogative; and becomes the teacher as well as the advocate of rational liberty'.[70] The immortality of an individual's soul depended on virtuous conduct during the individual's lifetime because 'the present life is but the dawn of being'.[71] 'Can any man', thought Story, 'seriously doubt, that Christianity is recognised as *true*, as a revelation, by the law of England, that is by the common law?'[72] Natural law equipped individuals with 'duties, from whence they derive their rights'.[73]

In almost every respect, Story's natural law entry in Lieber's *Encyclopaedia Americana* was an abridgement of Paley's natural law philosophy. Just as it did in Paley's natural law framework, Story's natural law entry made assumptions about the existence of God, human happiness being God's will, an individual's need to exercise virtue, and man's duties to God.[74] Divided along the same lines as Paley's duties, the individual in Story's philosophy owed 'duties to God, to himself, to other men, and as a member of political society'.[75] Legal obligation and God's will coincided. An individual's relative duties or duties 'towards other men' brought about a three-fold division of rights.[76]

In Story's account, imperfect rights corresponded with Paley's indeterminate relative duties.[77] Thus, an individual was required 'to exercise charity in its largest sense; to be just, grateful, kind and benevolent'.[78] Masters were duty-bound not to insult or to impose unnecessary labour on their servants.[79] The institution of marriage was based upon the law of nature.[80] The benefits of marriage included private comfort, procreation, monogamy, and permanent family bonds.[81] The law of nature, just as Paley explored, prohibited anything that detracted from the institution: 'fornication, incest, adultery,

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67 Ibid 503, 533.
68 Ibid 503, 534.
69 Ibid.
70 Ibid.
71 Ibid.
72 Joseph Story, 'Christianity a Part of the Common Law' (1833) 9 *American Jurist and Law Magazine* 346, 348.
73 McClellan (n 64) 66.
74 Wardhaugh (n 1) 309.
75 Ibid.
76 Valerie L Horowitz (ed), *The Unsigned Essays of Supreme Court Justice Joseph Story: Early American Views on the Law* (Talbot Publishing, 2015) 261.
77 Ibid 262–5.
78 Ibid 262.
79 Ibid 263.
80 Ibid.
81 Ibid 264.

seduction and other lewdness'.[82] Divorce was rightly limited to adultery, but the grounds could 'perhaps' be broadened.[83]

Story's consideration of an individual's duties 'as a member of political society' differed from Paley's philosophy. Paley only separated duties into three areas: an individual's duties to themselves, to God, and to others (relative duties)[84] whereas, in Story's entry, splintering off relative duties was a fourth duty arising from an individual's membership of political society.[85] By surrendering to the authority of government, individuals — as members of that political society — owed certain duties, and in return they secured certain rights.[86] Story's fourth duty was to some extent distinguishable from Paley's *Philosophy* because Story treated these duties as having more weight in 'political society'.[87]

Aside from this difference, the content of Story's fourth duty mirrored determinate relative duties in Paley's *Philosophy*. It encompassed 'the right of property, the obligation of contracts, the duty of speaking the truth, the sanctity of oaths'.[88] While property rights were 'a creature of civil government', individuals were not free to do with their property as they pleased because the disposal of property depended on each society's internal laws.[89] Contracts were 'indispensable to the social intercourse of mankind'.[90] Consequently, the obligation to perform contracts depended upon precepts of natural law: morality, justness, and practicability.[91] In turn, natural law demanded of individuals 'good faith, and truth, and sincerity, in their intercourse with others'.[92] Specific circumstances could, however, destroy this obligation. The obligation would be limited if contracts

> are immoral, or which have resulted from fraud or oppression; contracts which require impossible things, or are repugnant to natural justice; or which are founded in essential mistakes, as to persons, characters, or things; or which involve the breach of other paramount obligations …[93]

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82 Ibid 265.
83 Ibid.
84 Paley (n 34) 49–166, 167–78, 179–214.
85 Horowitz (ed) (n 76) 265–78.
86 Anonymous, 'Natural Law' in Francis Lieber, *Encyclopædia Americana* (Carey and Lea, 1832) vol 9, 150, 154; McClellan (n 65) 68.
87 Horowitz (ed) (n 76) 265–6.
88 Ibid 265.
89 Anonymous, 'Natural Law' (n 86) 150, 156.
90 Ibid.
91 Horowitz (ed) (n 76) 273.
92 Ibid.
93 Ibid.

III NATURAL LAW AND PUBLIC POLICY IN STORY'S *CONFLICT OF LAWS*

The elaboration of Huber's prejudicial laws reservation in Story's *Conflict of Laws* embodied the author's natural law philosophy.[94] In Story's framework, comity reinforced the central role of state sovereignty. The ultimate decision to admit foreign law rested with 'every independent community', which 'will, and ought to judge for itself, how far that comity ought to extend'.[95] Through exercising comity, these communities would not 'suffer prejudice'.[96] No state was required to 'yield up its own fundamental policy and institutions in favour of those of another nation'.[97] For Story, though, Christian countries would not accept a foreign law permitting polygamy, incest, 'exercises of despotic cruelty', and contracts of moral turpitude.[98] The justification for the exception was that 'there would be extreme difficulty in saying, that other nations were bound to enforce laws, institutions, or customs, so subversive of their own morals, justice, interest, or polity'.[99] Though this exception had general application, it had more specific application in discrete subjects such as foreign contracts, personal capacity, marriage, and divorce.

A *Public Policy in Story's* Conflict of Laws

1 *Foreign Contracts*

A significant subject in which Story's reservation emerged was foreign contracts. The *lex causae* for contracts was the law of the place where the contract was made (*lex loci contractus*).[100] Domestic courts were not bound to apply the *lex causae* in contracts, according to Story, if it was 'injurious to their own interests, or to those of their own subjects.'[101] Story envisaged three heads to this form of public policy.[102]

The first head, modelled on Huber's evasion or fraud of the law exception in *De Conflictu Legum*, followed the trend of common law authorities on smuggling contracts.[103] Story drew upon relevant English case law — including *Holman v Johnson* and *Clugas v Penaluna* — to synthesise the legal position on smuggling.[104] Foreign contracts to smuggle

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94 The reservation was an extension of the comity doctrine. 'Prejudicial laws' was an antecedent term for public policy.
95 Story (1834) (n 17) 203.
96 Ibid.
97 Ibid 26.
98 Ibid.
99 Ibid.
100 Ibid 201.
101 Ibid 203.
102 Ibid 204.
103 Ibid 205–6.
104 Ibid 208 nn 2–3, 209, 210–1, 211 nn 1–3. See *Holman v Johnson* (1775) 1 Cowp 341; 98 ER 1120; *Clugas v Penaluna* (1791) 4 D & E 466; 100 ER 1122.

goods into the United States would be void 'as an intended fraud upon our laws.'[105] Like the position reached at common law as explored in Chapter 2, the parties' allegiance was immaterial.[106] Founding an action on a contract growing out of an illegal transaction would result in the litigant being 'justly punished for the immorality of the act'.[107] In contrast, contracts 'wholly unconnected with the illegal act, and… founded on a new consideration' could be valid.[108] Apart from discussing all of Huber's illustrations, Story's synthesis applied the distinction drawn in English smuggling cases — which Story footnoted — between actual knowledge or active participation and mere knowledge.[109] The degree to which the seller knew of the buyer's illegal purpose ultimately affected contractual validity.[110]

The second — 'good morals, or religion, or public rights'[111] — and third — against 'national policy or institutions'[112] — heads of contractual public policy are comparable to the modern pattern of courts refusing to recognise or enforce 'unacceptably repugnant' foreign laws.[113] Examples in Story's second head paralleled some common law grounds explored in Chapter 2 and the circumstances in which Story's natural law philosophy would be violated. Contracts involving sexual immorality;[114] the commission of a crime or tort; public and political corruption; or evading the administration of justice were 'excepted contracts'.[115] They were void for being 'founded in moral turpitude, and… inconsistent with the good order and interests of society'.[116] Story accompanied his statement that 'contracts for future illicit cohabitation and prostitution' were excepted contracts with footnotes to most of the English case law (discussed in Chapter 2) on prostitution and adultery.[117] However, no authorities were cited for the next six classes of cases:

> contracts for the printing or circulation of irreligious and obscene publications; contracts to promote or reward the commission of crimes; contracts to corrupt, or evade the due

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105 Ibid 205.
106 Ibid.
107 Ibid 206.
108 Ibid.
109 Ibid 208 nn 2–3 (English case law footnoted), 209. See also Chapter 2.
110 Ibid 210.
111 Ibid 213–4.
112 Ibid 204, 214.
113 P B Carter, 'The Role of Public Policy in the English Private International Law' (1993) 42 *International and Comparative Law Quarterly* 1, 3.
114 Story footnoted *Fores v Johnes* (1802) 4 Esp 97; 170 ER 654: Story (1834) (n 17) 204, 214 n 1.
115 Story (1834) (n 17) 214.
116 Ibid 204, 214.
117 Ibid 213 n 2. See Chapter 2 ('Sexual Immorality: Prostitution and Adultery').

> administration of justice; contracts to cheat the public agents, or to defeat the public rights …[118]

More extensive discussion followed for Story's third head of contractual public policy: contracts 'which are opposed to the national policy and institutions'.[119] The contract in *De Wütz v Hendricks*,[120] involving a loan raised to assist Greeks fighting against the Ottoman Empire, was considered 'inconsistent with a just and impartial neutrality'.[121] At the time, the United Kingdom was friendly with the Ottoman Empire.[122]

Story further supported this head by referring to actions involving unrecognised new governments, namely *Thompson v Powles* and *Jones v Garcia del Rio*.[123] However, because Guatemala was not recognised as an independent country, the action in *Thompson v Powles* failed.[124] In contrast, public policy was not decisive in the failure of the earlier action of *Jones v Garcia del Rio* involving the new and unrecognised Republic of Peru. Though a public policy argument was employed (as Story had identified),[125] the action failed because the plaintiffs 'had each a demand at law, and each a several demand in equity that they could not file a bill on behalf of themselves and the other holders'.[126]

Another instance of 'excepted contracts' under this third head were contracts used to engage in the slave trade or which promoted slavery if concluded by subjects of countries prohibiting that trade.[127] While the term 'public policy' was employed in *Jones v Garcia del Rio*, contract cases about slavery used language strongly paralleling the language of natural law. Story, despite the contrary Massachusetts decision of *Greenwood v Curtis*, concluded that slaving 'contracts would be held utterly void here… as inconsistent with our duties, our policy, or our institutions'.[128] The citation of *Madrazo v Willes*, however, supports Story's initial statement of law. In *Madrazo v Willes*, a Spanish slaver — under whose laws the slave trade was lawful — recovered damages against a British subject for seizure of Madrazo's cargo of slaves because domestic legislation against slavery only applied to British subjects.[129]

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118 Ibid 213–4.
119 Ibid 214.
120 (1824) 2 Bing 314; 130 ER 326.
121 Story (1834) (n 17) 204, 214.
122 *De Wütz v Hendricks* (1824) 2 Bing 314; 130 ER 326, 326.
123 *Jones v Garcia de Rio* (1823) T & R 297; 37 ER 1113.
124 *Thompson v Powles* (1828) 2 Sim 194; 57 ER 761, 768 (Shadwell V-C).
125 *Jones v Garcia de Rio* (1823) T & R 297; 37 ER 1113, 1114.
126 Ibid 1115 (Eldon LC).
127 Story (1834) (n 17) 215.
128 Ibid, citing *Greenwood v Curtis*, 6 Mass 358 (1810).
129 (1820) 3 B & Ald 353; 106 ER 692.

Clear statements of 'public policy' seldom occur in pre-19th century slavery cases. Thus, Story's reference to *Somerset v Stewart* to engage this principle is contentious.[130] Academic debate about the exact content of Lord Mansfield's judgment is ongoing.[131] While Hargrave, during argument, submitted that '[i]f the policy of our laws admits not of slavery, neither fact nor reason are for it',[132] Lord Mansfield did not speak to this point. As Lord Mansfield clarified in a later case, *Somerset's Case* went 'no further than that the master cannot by force compel him to go out of the kingdom.'[133] In other words, Lord Mansfield did not free all slaves in England; however, contemporary misinterpretation of the decision was rife. By remaining silent on emancipation and slavery in England, Lord Mansfield might have actively encouraged the public's misapprehension of the decision.[134] Moreover, though the term 'public policy' was not used in *Somerset's Case*, the language of natural law may have supplied an overriding norm of validity.[135]

Forbes v Cochrane, one of the cases cited, more clearly supports Story's statement of principle.[136] As with *Jones v Garcia del Rio*, though, the plaintiff's action failed on a different ground to public policy. It was an action between Forbes — a Scottish plantation owner resident in the Spanish territory of East Florida — and two admirals in the Royal Navy in command of a British warship, which had harboured some of Forbes' escaped slaves. Holroyd J held that foreign laws recognising slavery had no extraterritorial effect: the East Florida law was local.[137] Once the escaped slaves boarded the British ship, they were free.[138] While East Florida law on slavery was local, Best J used strong language paralleling modern public policy to condemn that law as 'an antichristian law, and one which violates the rights of nature, and therefore ought not to be recognized here'.[139] International comity could not 'prevail in any case where [the law] violates the law of our country, the law of nature, or the law of God'.[140]

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130 *Somerset v Stewart* (1772) Lofft 1; 98 ER 499 ('*Somerset's Case*'), cited in Story (1834) (n 17) 215.

131 James Oldham, 'New Light on Mansfield and Slavery' (1988) 27 *Journal of British Studies* 45, 45; George Van Cleve, 'Somerset's Case and Its Antecedents in Imperial Perspective' (2006) 24(3) *Law and History Review* 601, 637.

132 *Somerset's Case* (n 130) 501 (Hargrave) (during argument).

133 *R v Inhabitants v Thames Ditton* (1785) 4 Doug KB 300, 301; 99 ER 891, 892 (Lord Mansfield): 'The determinations go no further than that the master cannot by force compel him to go out of the kingdom.'

134 Van Cleve (n 131) 638.

135 Note, 'American Slavery and the Conflict of Laws' (1971) 71 *Columbia Law Review* 74, 81-3; William M Wiecek, '*Somerset:* Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World' (1974) 42 *University of Chicago Law Review* 86, 107.

136 *Forbes v Cochrane* (1824) 2 B & C 448; 107 ER 450.

137 Ibid 456 (Holroyd J).

138 Ibid.

139 Ibid 460 (Best J).

140 Ibid.

2 *Personal Capacity*

Another area in which public policy presented itself was personal capacity or status. Public policy supplied a residual exception to Story's rules on status.[141] Since the admission of foreign laws was discretionary, the admitting country

> will not suffer its own subjects to evade the operation of its own fundamental policy or laws, or to commit frauds in violation of them by acts or contracts made in a foreign country; and it will judge for itself, how far it will adopt, or reject such acts or contracts.[142]

Furthermore, unless deriving from the law of nature, personal disqualifications were territorial.[143] One consequence of the territoriality of slavery was that its status could not be recognised in countries prohibiting it.[144]

3 *Marriage*

Although application of the *lex loci celebrationis* was the traditional choice of law rule for marriage, Story offered three exceptions to its application.[145] The first exception embraced polygamy and incest.[146] It was limited to marriages which 'by the general consent of Christendom' were polygamous or incestuous.[147] Story acknowledged the difficulty of reaching consensus between Christian nations on 'the point, at which the law of nature, or Christianity, ceases to prohibit marriages between kindred'.[148] Some marriages between relatives would be considered incestuous as 'against the law of God and sound morals'.[149] Laws 'positively prohibited by the public law of a country, from motives of policy' formed the second exception.[150] Prohibitions on the marriage of members of the royal family in the now-repealed *Royal Marriages Act 1772* provided an example of this exception.[151]

The Court of King's Bench decision in *Ruding v Smith* and two American decisions were the basis of the third exception.[152] Under this third exception, a marriage celebrated abroad was valid where compliance with local forms was impossible but English common law requirements of marriage were met.[153] In *Ruding v Smith*, two British subjects were married in a private house at the Cape of Good Hope in 1795. A licence had been

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141 Story (n 17) 98.
142 Ibid.
143 Ibid 97.
144 Ibid.
145 Ibid 103-4.
146 Ibid 104.
147 Ibid.
148 Ibid.
149 Ibid 105.
150 Ibid 104.
151 Ibid 108.
152 Ibid 109. See *Ruding v Smith* (1821) 2 Hag Con 371; 161 ER 774.
153 Story (1834) (n 17) 109.

obtained from the commander-in-chief of the occupying British forces. The Cape's Dutch law required parental consent for both parties of the marriage, which had not been obtained.[154] Arguing noncompliance with local forms, the husband sought an annulment. In upholding the 'marriage of twenty-five years' standing', Lord Stowell remarked

> [o]n the distinct British character of the parties—on their independence of the Dutch law, in their own British transactions—on *the insuperable difficulties of obtaining any marriage conformable to the Dutch law*—on the countenance given by British authority, and British ministration to this British transaction—upon the whole country being under British dominion—and upon the other grounds to which I have adverted … .[155]

Although Story linked this third rule to public policy 'aris[ing] in cases of moral necessity', the first two exceptions that Story named were more frequently explored in subsequent cases as the concerns of public policy.

4 *Incidents of Marriage and Foreign Divorces*

The residual exception of public policy appeared in Story's chapters on the incidents of marriage and foreign divorces.[156] For the incidents of marriage, the law of matrimonial domicile would fail to apply if the foreign country deemed the incidents to be incompatible with its policy and injurious to its interests.[157] One source, *Fergusson on Marriage and Divorce*, was cited to support this exception.

The relationship of marriage to Story's natural law philosophy is unmistakable in his chapter on foreign divorces. The benefits of the 'civil institution' of marriage were extolled as being consistent with Christianity.[158] Marriage promoted 'domestic affections, and the delicate relations and duties of parents and children'.[159] However, Story did not question the competency of domestic legislatures to provide for divorce.[160] Foreign divorces not rendered in the *locus celebrationis* could be refused recognition. The 'fundamental laws and policies' of the place of celebration would intervene.[161]

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154 *Ruding v Smith* (n 152) 777 (Lord Stowell).
155 Ibid 782 (Lord Stowell) (emphasis added).
156 Story (1834) (n 17) 161.
157 Ibid.
158 Ibid 168.
159 Ibid.
160 Ibid.
161 Ibid 188.

IV AUSTINIAN INFLUENCES ON LATER 19TH CENTURY WRITERS OF PRIVATE INTERNATIONAL LAW

In contrast to the natural law theory outlined in Part III, this Part appraises the influence of Austinian positivism on two 19th century writers of private international law: John Westlake and A V Dicey. Other significant influences likely to have affected these scholars are explored in Chapter 4.

In Section A, a brief background is given of Austin as a prelude to the discussion in Section B. Section B initially focuses on key elements of Austinian positivism. It will be seen that Austin's definition of law excluded custom, international law, and natural law from the province of jurisprudence, leaving statute law and the common law as its only concern. Section B ends by broaching the common law's place within, and its relationship to codification in, Austinian positivism. Section C identifies elements of positivism featured in the first and second editions of Westlake's *Private International Law*. As natural law theory waned and before the full implications of Austinian positivism were understood, Westlake's first edition of *Private International Law* (1858) appeared. The effect this had on Westlake's methodology between the first and second editions is analysed. Section D considers the extent to which Austinian positivism recurred in Dicey's *Conflict of Laws*, beginning with the first edition published in 1896.

A *Late-19th Century Resurgence of Austinian Positivism*

For close to a century, English jurisprudence was dominated by Austinian positivism or the 'analytical method'.[162] Late-19th century English jurisprudence, in the words of A V Dicey, 'generally and inevitably meant the study of Austin'.[163] The popularisation of John Austin's works in the early 1860s marked the beginning of this century-long dominance.[164] As professor of jurisprudence (1826–32) at the University of London, Austin (1790–1858) had published his first six lectures on jurisprudence in *The Province of Jurisprudence Determined* (1832) but, at the time, its publication did not receive much attention.[165] Austin's widow rekindled interest in her late husband's ideas by republishing *The Province of Jurisprudence*

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[162] See, eg, Richard A Cosgrove, *Rule of Law: Albert Venn Dicey, Victorian Jurist* (The University of North Carolina Press, 1980) 23; Michael Lobban, 'Was there a Nineteenth Century "English School of Jurisprudence"?' (1995) 16(1) *Legal History* 34; Neil Duxbury, 'English Jurisprudence between Austin and Hart' (2005) 91(1) *Virginia Law Review* 1, 15022.

[163] A V Dicey, 'The Study of Jurisprudence' (August 1880) 5(4) *Law Magazine and Review* 382, 386.

[164] Duxbury (2005) (n 162) 16.

[165] For some history, see Morton J Horwitz, 'Why is Anglo-American Jurisprudence Unhistorical' (1997) 17(4) *Oxford Journal of Legal Studies* 551, 564; Wilfrid E Rumble, *Doing Austin Justice: The Reception of John Austin's Philosophy of Law in Nineteenth-century England* (Bloomsbury Publishing, 2004); Duxbury (2005) (n 162).

Determined in 1861.[166] Its republication in 1861 was generally well received, and it was soon a set text at Oxford and Cambridge.[167] Two years later, Austin's full lectures appeared in *Lectures on Jurisprudence* (1863).

B *Key Elements of Austinian Positivism*

The attractiveness of Austinian positivism lay in its seeking 'to define law and legal ideas in abstract conceptual terms, focusing on the positive law or the command of the sovereign'.[168] Obedience to law thus depended not on some moral obligation — what the law ought to be — but rather the sovereign's power to command their subjects' obedience. The idea of law as a sovereign command was not new.[169] In *The Province of Jurisprudence Determined*, Austin initially distinguished between laws 'properly so called' and laws 'improperly so called'. Laws 'properly so called' were a '*species* of commands', deriving from God — 'divine laws' — or from a political superior.[170] The latter, described as positive laws or 'law set by political superiors to political inferiors', was Austin's jurisprudential concern.[171] Only statute and the common law were laws 'properly so called'.

Austin's conception of 'positive law' had three features: a political sovereign, commands and sanctions.[172] The sovereign was a determinate human superior, habitually obeyed by the majority of society and who owed no 'habit of obedience to a like superior'.[173] The term 'command' had three attributes: '[a] wish or desire conceived by a rational being, that another rational being shall do or forbear', consequences resulting from non-compliance, and '[a]n expression or intimation of the wish by words or other signs.'[174] Command, duty and sanction were considered to be 'inseparably connected terms'.[175] That is, all duties originated in the command of a political sovereign. Commands could be general or, alternatively, '*occasional* or *particular*'.[176] They could be express — 'signified by *words* (written or spoken)' — or tacit — 'signified by conduct (or by any signs

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166 Duxbury (2005) (n 162) 16.
167 Ibid 16–17.
168 Mark D Walters, 'Dicey on Writing the *Law of the Constitution*' (2012) 31(1) *Oxford Journal of Legal Studies* 21, 31.
169 Gerald J Postema, 'Law as Command: The Model of Command in Modern Jurisprudence' (2001) 11 *Philosophical Issue* 470, 470–3. Postema argues that it preceded Austin and Bentham, dating back to 17th century English jurisprudence to Justinian and to the Ancient Greeks.
170 John Austin, *The Province of Jurisprudence Determined* (John Murray, 1832) vii, 2, 4, 21, 22, 23, 26, 128 ('*PJD*').
171 Ibid 1.
172 Ibid 5–8.
173 Ibid 201–5.
174 Ibid 11.
175 Ibid 13.
176 Ibid 13.

of desire which are not words)'.[177] Sanctions followed from the performance of an official's duties; non-performance would likewise result in sanctions being imposed.[178]

C *Austin on International Law*

According to Austin's definition of law, international law was not law 'properly so called'; rather, it was positive morality.[179] In the absence of a political superior to command states and impose sanctions on an international plane, rules of international law did not have the quality of law.[180] By positive morality, Austin meant laws 'set by men to men, but not by men as political superiors'.[181] Positive morality though 'closely analogous to laws proper… are merely opinions or sentiments held by men in regard to human conduct'.[182] In consequence, only when domesticated could international law become law 'properly so called'.

D *Austin on the Common Law, Treatises, and Codification*

In fitting the common law within his command theory, Austin treated the common law as the tacit commands of the sovereign.[183] Significant to this conclusion was the sanctions that would necessarily follow in the event of a subject's noncompliance with 'principles or grounds of judicial decisions'.[184] By virtue of the delegating power of the sovereign, judges were empowered to make law.[185] Moreover, only when enforced by judges did custom become a *legal rule* — positive law — to be 'observed as rules of conduct'.[186] In rejecting Bentham's 'disrespectful' epithet for the common law ('sham law'), Austin argued that judicial legislation was 'far better made than that part which consists of statutes enacted by the legislature'.[187] Judicial lawmaking was 'highly beneficial and even absolutely necessary' to society.[188] Defects in 'judiciary law' nevertheless induced Austin to prefer codification.[189]

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177 Ibid 29.
178 Ibid 379.
179 Ibid 128–9, 130–2.
180 Ibid 136–7.
181 Ibid 129.
182 Ibid.
183 John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (Spottiswoode & Co, 3rd revised ed, 1869) 663 ('*LJ*').
184 Ibid.
185 Austin (1832), '*PJD*' (n 170) 28, 29.
186 Ibid 29, 30.
187 Austin (1869), '*LJ*' (n 183) 224, 667.
188 Ibid 224.
189 Ibid 669–704.

As a rule, English legal treatises were not sources of law.[190] In Austin's view, treatises 'merely expound' the proper sources of English law: statutes and case law.[191] English legal treatises were 'properly a legal literature drawn from or derived from the *sources*' of English law.[192] Thus, one of the 'inconveniences' of the common law was the standing of authoritative treatises, which Austin identified as a third source of the common law.[193] The authors of 'old and authoritative treatises' had through 'experience and reason' become influential in English judicial decision-making.[194] However, this was problematised: English courts had indiscriminately cited these treatises along with less authoritative texts.[195] To become law, authoritative treatises had to be codified.[196]

To open the way for codification, Austin presented four 'tenable objections' to the common law.[197] Identifying the legal rule from the *ratio decidendi* of a single case or, more commonly, a line of cases was the first objection.[198] The quantity and length of cases could make this process 'delicate' and 'difficult'.[199] The second objection on inadequate judicial deliberation was moderated by Austin's view that judges typically made and applied the law after proper reflection.[200] The retrospectivity of judiciary law was a third objection.[201] Fourthly, Austin was critical of the common law's unknowable, vague and inconsistent nature.[202] Two causes were identified for this fourth objection: first, 'the enormous bulk of the documents in which the law must be sought'[203] and, secondly, 'the difficulty of extracting the law (supposing the decisions known) from the particular decided cases in which it lies imbedded.'[204] For these reasons, Austin preferred codification; however, the Austinian ideal of codification was 'a question of time and place'.[205]

Austin's position on the codification of the English common law, as it resurfaced in the early 1860s, was that it was possible — and, better yet, 'expedient'.[206] In 1863, the Lord Chancellor argued for the revision of the law out of which a digest of statute law

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190 Ibid 215.
191 Ibid.
192 Ibid.
193 Ibid 215, 303.
194 Ibid 215.
195 Ibid 303.
196 Ibid 275.
197 Ibid 669–75.
198 Ibid 671–2.
199 Ibid 672.
200 Ibid 672–3.
201 Ibid 673–4.
202 Ibid 674.
203 Authoritative treatises were part of this 'bulk'.
204 Ibid 674.
205 Ibid 684.
206 Ibid 688.

and the common law could emerge.[207] Austin viewed the publication of legal treatises 'many of which are, in effect, codes' as pointing to the expediency of codification.[208] Rationalisation of statute law and systematisation of the common law would be indispensable to this process.[209] Being law 'properly so called', rules of the common law were 'the *general* grounds or principles (or the *rationes decidendi*) whereon the cases are decided'.[210] Extracting a principle of law from a decided case rendered it possible to do this on a *larger* scale — as in, for all decided cases.[211] This larger project would see the common law codified, 'compact and accessible'.[212]

E *Austinian Influences in Westlake's* Private International Law

General acceptance of the implications of Austinian positivism between Westlake's first and second editions could explain the methodological refinement of private international law in Westlake's revised first (or second) edition (1880).[213] Though not as methodologically polished as the second edition, the first edition of Westlake's *Private International Law* (1858) featured aspects of positivism. The introductory chapter identifies private international law as part of a country's domestic legal system, as concerning private rights, and as 'administered by judges commissioned by human superiors'.[214] The narrowing of private international law to the realm of domestic law is, however, only one sense in which positivism is understood.[215]

Predating the resurgence of Austinian positivism, Westlake's first edition was not a model example of analytical positivism. The comparative newness of English private international law meant that domestic case law was not exhaustive. In the absence of domestic authority, Westlake resorted to foreign authority or foreign scholarship. In borrowing language from English case law, Westlake adopted — perhaps unconsciously — the natural law language of *Forbes v Cochrane* to frame an exception to the choice of law

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[207] John Fraser Macqueen (ed), 'Speech of the Lord Chancellor on the Revision of the Law' (11 July 1863) 1863 *The Athenaeum* 43, 43; Anonymous, 'The Codification of the Law' (Jul 1865) 24(48) *London Quarterly Review* 432, 438.

[208] John Austin, *Lectures on Jurisprudence* (John Murray, 1863) vol 3, 277.

[209] Ibid; Austin (1869), '*LJ*' (n 183) 688.

[210] Austin (1869), '*LJ*' (n 183) 688.

[211] Ibid.

[212] Ibid.

[213] Some reasons for this inconsistency are explained in Chapter 3. One factor could be Westlake's youth. In the 21 years between the first and second editions' publication, Westlake had gained experience at the English Bar.

[214] John Westlake, *Treatise on Private International Law, or the Conflict of Laws, with Principal Reference to its Practice in the English and Other Cognate Systems of Jurisprudence, and Numerous References to American Authorities* (T & J W Johnson, 1st ed, 1859) 3.

[215] See Mills (n 5) 29–30.

rule for foreign contracts.[216] English courts would not 'hold transactions legal which it considers to be contrary to the law of nature, or hurtful to the purity of morals, notwithstanding that an opposite view may be taken of them elsewhere.'[217] From the early 1860s onwards, Austinian positivism predominated. This philosophy may well have brought greater internal coherence to Westlake's second edition (1880).

The hallmarks of positivism are more obvious in Westlake's second edition (1880); however, Westlake's confidence in Austinian positivism was mixed. Despite initially acknowledging the significance of 'Mr Austin's analysis of the nature of law', Westlake questioned the merits of Austinian positivism for novel legal questions.[218] The remaining Westlake editions maintained this latter objection. By the fourth edition, however, the initial emphasis of this section had been reconfigured; the reference to 'Austin's analysis of the nature of law' was removed.[219] Instead, Westlake foregrounded the concept of sovereignty, incidentally noting that it 'presents much analogy to Austin's analysis of national law'.[220]

As Austin had done in *The Province of Jurisprudence Determined*, Westlake's second edition initially clarified what was meant by 'law', distinguishing between natural laws and human laws.[221] Referring to the continental school of private international law,[222] Westlake asserted that students had 'often been cheated by the empty assertion of universal agreement.'[223] Key elements of the command theory also featured in Westlake's definition of municipal law. Municipal law was 'a body of rules, to be uniformly applied to the cases that fall within them, and of which the breach is redressed or published by a force irresistible to the individual subject, and regularly applied through courts of justice'.[224] Westlake pointed to the presence of sanctions as a defining characteristic of municipal

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216 See *Forbes v Cochrane* (1824) 2 B & C 448; 107 ER 450; Westlake (1859) (n 214) 180.

217 Westlake (1859) (n 214) 180.

218 John Westlake, *Treatise on Private International Law* (William Maxwell & Son, 1st ed rev, 1880) 330:

> And the only theoretical direction in which I have ever seen much hope is that of determining the true law of each matter by means of Mr Austin's analysis of the nature of law; but the more I have reflected on the affairs which courts of justice have to deal with, the more I have come to doubt whether that analysis, accurate though it be as an account of facts, is capable of throwing any light on what the decision should be on points that have not yet taken their place among the facts of jurisprudence.

219 John Westlake and Alfred Frank Topham (eds), *A Treatise on Private International Law, with Principal Reference to its Practice in England* (Sweet & Maxwell Ltd, 4th ed, 1905) 401.

220 See ibid 401; John Westlake and Alfred Frank Topham (eds), *A Treatise on Private International Law with Principal Reference to its Practice in England* (Sweet & Maxwell Ltd, 5th ed, 1912) 433; Norman Bentwich (ed), *Westlake's Treatise on Private International Law with Principal Reference to its Practice in England* (Sweet & Maxwell, 6th ed, 1922) 416.

221 Westlake (1880) (n 218) 1–2.

222 Dicey referred to this school as the historical school of jurisprudence.

223 Westlake (1880) (n 218) vi.

224 Ibid.

law, a feature absent from international law.[225] Private international law, being a part of national law, typically affected private persons and was 'administered by national courts'.[226] In resolving private international law questions, courts 'must apply any solution of these questions which its own national law may be found to prescribe'.[227]

An abundance of English case law between Westlake's first and second editions triggered a profound change in Westlake's presentation of English private international law.[228] Consistent with the Austinian conception of law, English statutes and cases featured prominently in Westlake's second edition. New case law had enabled Westlake to 'present the English view in a series of propositions or of topics'.[229] In the second edition's preface, Westlake observed that 'English authority has now touched almost every part of private international law'.[230] These decisions 'must now … be considered as a part of the national law, and therefore binding on the courts unless and until the legislature shall alter it.'[231] Acting consistently with the positivist's concern to state what the law *is*, Westlake rejected having to give 'the reasons why [received English doctrines] should be maintained or altered'.[232] A focus on foreign scholarship was likewise rejected for it 'would have involved more detail than it seemed proper to afford to … history'.[233]

F *Austinian Influences in Dicey's First Edition*

In outlining a 'method of treatment' for private international law in the 'Introduction' of the *Conflict of Laws* (1896), Dicey showed his support for Austinian positivism.[234] Dicey's earlier works had revealed the 'critical reverence' with which he regarded Austin.[235] Despite recognising Austin's 'extraordinary powers of logical analysis',[236] Dicey was equally aware of Austin's shortcomings.[237] Having focused his criticism on weaknesses in Austin's written expression and incomplete jurisprudential scheme, Dicey thought Thomas Erskine Holland's textbook, *Elements of Jurisprudence* (1880), had mitigated against

225 Ibid 2–3.
226 Ibid 3.
227 Ibid 7.
228 Ibid.
229 Ibid v.
230 Ibid.
231 Ibid 7.
232 Ibid v.
233 Ibid vi.
234 A V Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens and Sons, 1st ed, 1896) 15–22.
235 Dicey, 'Study of Jurisprudence' (n 163) 386-88; A V Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan and Co, 1st ed, 1885) 64–70. See also Duxbury (n 162) 18, 21, 29.
236 Dicey, 'Study of Jurisprudence' (n 163) 386.
237 Ibid 386–8.

these defects with a clearer written style and a better grasp of the law.[238] Nevertheless, Dicey singled out the 'positive method' as the appropriate sphere of scholarly activity in the *Conflict of Laws*.[239]

Dicey's view was that two methods had historically preoccupied scholars of private international law: the theoretical method and the positive method.[240] The theoretical school of private international law comprised continental scholars, including Savigny, whose focus was on what *ought* to be the rules of choice of law or, more broadly, of private international law.[241] In other words, the theoretical school aimed 'to construct a logically consistent body of rules, which actually do agree with the rules as to the choice of law upheld in different states, or *ought*, consistently with sound theory, to prevail in each state'.[242] An example of the theoretical method was the continental scholars' quest for the appropriate seat of a legal transaction.[243]

In contrast, scholars of the 'positive method', which included Story, Westlake and Phillimore, treated rules of private international law as '"laws" in the strict sense of that term, and that they derive their authority from the support of the sovereign in whose territory they are enforced'.[244] The rules of private international law were 'part of the municipal law of some given country'.[245] By aiming 'to discover not what ought to be, but what *is* the law', these scholars had rightly sought 'to study the statutory enactments and the judicial decisions which embody the law of England or France'.[246] Disciples of this school were consequently excused from having to rationalise the rules divined from statute and the common law.[247] A scholar was 'not required to be an apologist'.[248] Nevertheless, resort could be had to foreign decisions and institutional writers, such as Story, if statute and the common law provided no answer.[249]

Even Dicey's choice of title reflected the concerns of an Austinian positivist. The parallels to Austin are strong in Dicey's argument that 'private international law' was an unsuitable title for a subject concerned with private disputes having a foreign element.[250]

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238 Dicey, 'Study of Jurisprudence' (n 163) 388–9: 'Professor Holland's *Jurisprudence* precisely supplies what Austin fails to give.'
239 Dicey (1896), 'Conflict of Laws' (n 234) 18–19.
240 Ibid 15.
241 Ibid 15–18.
242 Ibid 16 (emphasis added).
243 Ibid 16.
244 Ibid 18, 19.
245 Ibid 18.
246 Ibid 19 (emphasis in original).
247 Ibid 20.
248 Ibid.
249 Ibid 20–22.
250 Ibid 15.

The 'international law' component of the subject title was rejected because rules of international law, which 'prevail between and among nations', were not derived from sovereign commands and so not laws 'properly so called'.[251] On the other hand, rules of private international law were 'commands proceeding from the sovereign of a given state'.[252]

V PUBLIC POLICY IN WESTLAKE'S *PRIVATE INTERNATIONAL LAW*

A *Public Policy in Westlake's First Edition*

Even if minimal attention was given to public policy in the first edition of Westlake's *Private International Law*, ideas underlying natural law are arguably evident.[253] In the first place, a distinction was made between diverse foreign laws offering different solutions to the same legal problem and foreign laws violating more fundamental or 'deep-seated moral ideas' of the interested country.[254] In the latter case, the domestic legal system was not bound to recognise a transaction 'it considered to be contrary to the law of nature, or hurtful to the purity of morals'.[255] In support of this statement, Westlake quoted Lord Wynford's speech in *Forbes v Cochrane,* which included the language of 'the law of nature'.[256] Underpinning the second aspect of Westlake's public policy formulation was a country's duty to sustain moral blamelessness and to prevent its citizens from being influenced by 'the evil example' of recognising a morally unacceptable foreign law.[257]

Huber's third axiom on vested rights was approved.[258] Vested rights 'can only be fully carried out between nations which possess common ideas on all topics with which law is conversant'.[259] The fulfilment of the vested rights theory depended upon similarities between the laws of different nations,[260] while '[d]ifferences on social matters' encouraged the public policy exception.[261] Muslim marriages,[262] gaming debts,[263] contracts that

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251 Ibid 14.
252 Ibid 15.
253 Westlake (1859) (n 214) 120–1.
254 Ibid 120.
255 Ibid.
256 Ibid.
257 Ibid.
258 Ibid:
> The fundamental maxim of private international jurisprudence, that a right which by the appropriate territorial law has once accrued shall thenceforth be universally recognized, can only be fully carried out between nations which possess common ideas on all the topics with which law is conversant. Whether between any two nations the jural intercommunion which the maxim would establish be in the main possible, is a question of degree, depending on the number and importance of their differences on social matters.

259 Ibid 120. Cf Wardhaugh (n 1) 323.
260 Westlake (1859) (n 214) 120.
261 Ibid.
262 Ibid.
263 Ibid 121.

'facilitate' divorce and custody proceedings,[264] and slavery[265] were given as examples of the exception in operation. Of all the examples, Westlake devoted the most attention to slavery.

In contrast to Story's short discussion, the legal status of slavery in 18th and early 19th century England is more accurately rendered in Westlake's textbook.[266] Westlake's account of *Smith v Browne* provides implicit recognition of the limitations of pre-1865 law reporting.[267] Here, the plaintiff claimed £20 in an action for *indebitatus assumpsit* 'for a negro sold to the defendant, in the parish of the Blessed Mary of the Arches, in the ward of Cheap'.[268] Though the sale took place in Virginia,[269] the plaintiff employed the ancient practice of 'laying, in foreign cases, a fictitious venue in England' to bring the matter within the jurisdiction of the English courts.[270] As Lord Holt CJQB noted, the substantive law of England freed a slave when they set foot in England.[271] However, his Lordship directed that the plaintiff amend his declaration to plead that, though the slave was sold in London, the slave was located in Virginia when the sale took place and, by the laws there, 'negroes are saleable'.[272] Counsel for the defendant in *Santos v Illidge*[273] interpreted this aspect of *Smith v Browne* to mean 'indebitatus assumptsit would at the time lie for a negro sold in a country where the possession of slaves was not illegal'.[274] In the Salkeld report, Lord Holt CJQB observed that Virginia was 'a conquered country' so 'their law is what the King pleases'.[275] Though the imprecision of the declaration saw the action in *Smith v Browne* fail, Westlake was under the impression that 'but for these objections the action would have lain'.[276]

In Westlake's text, the legality of slavery in the United States served as a useful counterpoint to the English position against slavery.[277] Whereas the legal position in England had gradually turned against slavery, the Supreme Court of Massachusetts' decision in *Greenwood v Curtis* reinforced that contracts facilitating the slave trade could be

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264 Ibid 120, citing *Hope v Hope* (1856) 22 Beav 351; 52 ER 1143.
265 Ibid 121.
266 Ibid.
267 See *Smith v Browne* (1706) Holt KB 495; 90 ER 1172.
268 Ibid 495; 1172. See also *Smith v Brown* (1705) 2 Salk 666, 666; 91 ER 566, 566: 'viz. *in parochial Beatæ Mariæ de Arcubus in warda de Cheape*'.
269 Ibid 495; 1173.
270 Alexander N Sack, 'Conflicts of Laws in the History of the English Law' in A Reppy (ed), *Law, a Century of Progress, 1835-1935* (New York University Press, 1937) vol 3, 342, 370.
271 *Smith v Browne* (1706) Holt KB 495; 90 ER 1172, 1173 (Holt CJQB).
272 Ibid.
273 (1859) 6 CBNS 841; 141 ER 681.
274 Ibid 845; Ibid 683.
275 *Smith v Brown* (1705) 2 Salk 666; 91 ER 566, 567 (Holt CJQB). See also Sack (n 270) 342, 385.
276 Westlake (1859) (n 214) 121.
277 Ibid.

enforced within the United States.[278] The case was for 'for assumpsit on a promissory note for the delivery of slaves [on demand] and the payment of bars… an African currency'.[279] The contract was concluded and the account stated in Guinea.[280] The defendant, having partly paid the plaintiff for the sale of cargo with slaves, promised to pay the remaining balance but, on demand, he did not. To avoid payment, the defendant argued that an action founded on a contract with the 'base and dishonest' purpose of purchasing slaves could not be maintained.[281]

The governing law for contracts — the *lex loci contractus* — was applicable here, though two important exceptions were noted in the Massachusetts judgment.[282] The first exception on smuggling and the second example given emulated Huber's illustrations of the prejudicial laws exception. For the second exception, the defendant had to show that the action was 'a *turpis causa*, furnishing a pernicious precedent, and so not to be countenanced'.[283] However, Parsons CJ, giving the judgment of the Supreme Court of Massachusetts, found that the slaving contract was not immoral.[284] A South Carolina merchant could legally recover the balance owed to him for the sale of cargo in Africa to be paid for in slaves.[285]

Another consideration was the effect that foreign allegiance with a power engaging in the slave trade had on legal proceedings.[286] Westlake summarised the finding in *Madrazo v Willes* accurately.[287] There, a Spanish slaver recovered damages for the value of slaves, stores and goods seized from his Spanish brig by Captain Willes of the Royal Navy.[288] Critical to the only issue in the case — the measure of damages — was the coverage of the *Abolition of Slave Trade Act 1807* and the *Slave Trade Act 1811*.[289] The Court of King's Bench with some hesitancy found that only British subjects were covered by its terms.[290] Though many 'States of Christendom have now consented to the abolition of the slave-trade', Best J pointed out that Spain had not.[291] As such, Spanish 'subjects could not legally be interrupted in buying slaves… and have a right to appeal to the justice of this country

278 *Greenwood v Curtis*, 6 Mass 358 (1810), cited in Westlake (1859) (n 214) 121.
279 Ibid 362–3.
280 Ibid 379.
281 Ibid 380.
282 Ibid 378–9.
283 Ibid 380.
284 Ibid.
285 Ibid 381.
286 Westlake (1859) (n 214) 121; *Madrazo v Willes* (1820) 3 B & Ald 353; 106 ER 692.
287 *Madrazo v Willes* (n 286).
288 Ibid 692.
289 47 Geo 3 sess 1, c 36; 51 Geo 3, c 23.
290 *Madrazo v Willes* (n 286) 693 (Abbott CJ), 693 (Bayley J), 694 (Holroyd J), 694 (Best J).
291 Ibid 694 (Best J).

for any injury sustained by them from such an interruption'.[292] The effect of *Madrazo* was to allow slavers from countries permitting the slave trade to recover compensation in English courts of justice.[293]

B *Public Policy in Westlake's Second Edition*

In the second chapter of Westlake's second edition (1880), public policy took a preeminent role. Public policy regulated 'all maxims of private international law'. [294] Articles of the Prussian Code, the Napoleonic Code, the Austrian Code and Italian Code were drawn upon in the second chapter to contrast private international law practice in Europe with English private international law.[295] Westlake's use of this comparative method highlighted the controlling influence of public policy in civilian legal systems.[296] Through this comparison, Westlake accepted the theoretical inevitability of a '[r]eservation in favour of stringent domestic policy'.[297] Thus, Westlake rejected that a system of private international law could exist between Christian states and 'nations, like the Turks or the Chinese' because of marked dissimilarities between their laws and practices and those of the English.[298]

In surveying the private international law of European countries, Westlake compared the 'reservation in favour of stringent domestic policy' with two provisions resembling mandatory rules in the Italian Code and Code Napoleon respectively.[299] Preliminary Article 12 of the Italian Code provided that

> neither the laws acts or judgments of a foreign country, nor private dispositions or contracts, can in any case derogate from prohibitive laws of the kingdom concerning property or acts, or from laws which in any way whatever regard public order or good morals.[300]

The similarly expressed '*ordre public*' exception in art 6 of the Code Napoleon conditioned the legality of private contracts on their compatibility with 'laws which interest public order and good morals'.[301] Apart from the treatment in the second chapter,

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[292] Ibid.
[293] Ibid 693 (Abbott CJ).
[294] Westlake (1880) (n 218) 24, 230.
[295] Ibid 24.
[296] Ibid.
[297] Ibid 39, 40.
[298] Ibid 40.
[299] Ibid 39–40.
[300] Ibid.
[301] Ibid 40.

however, the public policy reservation received little attention.[302] Limited treatment of public policy continued until the fourth edition.

C *Public Policy in Subsequent Editions of Westlake's* Private International Law

In contrast to past editions, Westlake's fourth edition (1905) contained a more meaningful discussion of public policy in a chapter on foreign contracts.[303] The discussion would have brought the textbook in line with more recent English case law and other private international law treatises, in particular Dicey's *Conflict of Laws*.[304] As in the second edition, the fourth edition maintained the reservation in favour of stringent domestic policy.[305] Thus, in enforcing contracts, the engagement of public policy relied upon 'conflicts with what are deemed in England to be *essential* public or moral interests'.[306] The essentiality of public and moral interests to apply the doctrine was for Westlake illustrated by the 'difference of opinion among judges' in *Kaufman v Gerson*.[307] In that decision, the primary judge upheld an agreement to settle a criminal charge legal under its governing law (France), rejecting arguments that the agreement offended public policy or otherwise pointed to duress. All the agreement's contacts were concentrated on France where the contract was made, where it was to be performed and where the parties were domiciled.[308] Nevertheless, on appeal the judges accepted the argument of public policy. By doing so, the judges rejected the application of French law that had the strongest connection to the agreement and favoured the forum's notions of public policy.

Together with this decision, public policy cases similarly invoked in Dicey's *Conflict of Laws* (discussed next in Part VI) were introduced,[309] each case representing a narrow contractual class within which public policy had settled. Westlake referenced the collusive agreement in *Hope v Hope*,[310] the champertous agreement in *Grell v Levy*,[311] and the contract

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302 Public policy was mentioned as Savigny's justification for the *lex fori* governing delicts, in relation to extradition, and for foreign judgments. See ibid 222, 312, 329.

303 Westlake and Topham (eds) (1905) (n 219) 283–4.

304 See, eg, John Alderson Foote, *Foreign and Domestic Law: A Concise Treatise on Private International Jurisprudence, Based on the Decisions in the English Courts* (Stevens and Haynes, 2nd ed, 1890) 367; John Alderson Foote, *Foreign and Domestic Law: A Concise Treatise on Private International Jurisprudence, Based on the Decisions in the English Courts* (Stevens and Haynes, 3rd ed, 1904) 383, 386–9; A V Dicey, *Digest of the Law of England with Reference to the Conflict of Laws* (Stevens and Sons, 1st ed, 1896) 558–9.

305 Westlake and Topham (eds) (1905) (n 219) 283.

306 Ibid 283 (emphasis added).

307 Ibid 284, citing *Kaufman v Gerson* [1903] 2 KB 114 (Wright J); [1904] 1 KB 591 (Collins, Romer and Mathew JJ).

308 Foote (1904) (n 304) 389.

309 See, eg, Dicey (1896), 'Conflict of Laws' (n 234) 558.

310 *Hope v Hope* (1867) 8 De GM & G 731; 44 ER 572.

311 *Grell v Levy* (1864) 16 CB NS 73; 143 ER 1052.

in restraint of trade in *Rousillon v Rousillon*.[312] By the *lex loci contractus*, each agreement was unquestionably legal; however, the public policy of the *lex loci solutionis* — England — prevailed.[313] An inference may be drawn that Dicey therefore has had the predominant influence on the shape of public policy.

VI PUBLIC POLICY IN DICEY'S *CONFLICT OF LAWS*

A *The Liberal Scheme of Public Policy in Dicey's First to Sixth Editions*

Of the six general principles that governed private international law in Dicey's first edition, the first and second general principles brought up questions of public policy and 'the maintenance of English political institutions'.[314] In the first edition, English private international law was considered to be a 'second branch' of English law concerned with 'the extra-territorial operation of law or recognition of rights'.[315] By reason of that, Dicey's first general principle was that English courts would recognise or enforce a right duly acquired in another 'civilised' country.[316] As a corollary, the same courts would not recognise or enforce a right which had not been duly acquired.[317]

For the second general principle, English courts would not recognise a right duly acquired in another country *if* its enforcement was 'inconsistent with the policy of the English law, or with the maintenance of English political institutions'.[318] Dicey thus framed the exception from two angles, 'the policy of English law'[319] and politics.[320] Dicey's former angle was consistent with the 19th century repackaging of public policy authorities using a 'proper ground' of law.[321] Dicey recognised that the term, though 'vague', would be 'familiar to English lawyers'.[322] By the second edition, Dicey had split the first ground into two, maintaining the terminology 'the policy of English law' but adding to it 'the moral rules *upheld by* English law'.[323] The phrase, 'the moral rules upheld by English law', had appeared in the first edition in reference to the collusive agreement in *Hope v Hope*

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312 Westlake and Topham (eds) (1905) (n 219) 284. See *Rousillon v Rousillon* (1880) 14 Ch D 351.
313 Westlake and Topham (eds) (1905) (n 219) 284.
314 Dicey (1896), 'Conflict of Laws' (n 234) xliii, 32.
315 Ibid 3.
316 Ibid 22.
317 Ibid.
318 Ibid 32, 33–6.
319 See Chapter 2.
320 See the expression altered in A V Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens and Sons, 2nd ed, 1908) 34; A V Dicey and A Berriedale Keith (eds), *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens and Sons, 3rd ed, 1922) 34.
321 See further Chapter 2.
322 Dicey (1896), 'Conflict of Laws' (n 234) 34.
323 Dicey (1908) (n 320) 34 (emphasis added).

and the *obiter* comment on a prostitute's price in *Robinson v Bland*.[324] For the second (but later third) angle, Dicey cited *Somerset's Case* on 'the status of persons in England',[325] two authorities on the double actionability rule for foreign torts, and the rule in *Birtwhistle v Vardill* on succession to heritable property in England.[326]

The five classes of public policy identified under the second general principle were far broader than the exception articulated in Story and Westlake's texts. Apart from the usual morality ground, public policy was seen to lie behind the *lex situs* rule for immovable property,[327] the *lex fori* rule for procedure, the double actionability rule for torts, and the non-recognition of foreign penal status.[328] The double actionability rule as expressed in *Phillips v Eyre* and its predecessor, *The Halley*, were cited by Dicey as supporting the second angle of public policy: inconsistency 'with the maintenance of English institutions'.[329]

Though Dicey explained it on a public policy footing, the *lex situs* rule for immovable property and, by extension, the rule in *British South Africa Co v Companhia de Moçambique* for foreign land was partially descended from the medieval procedural distinction between local and transitory actions.[330] Plaintiffs in local actions[331] had to plead the 'very county and place that [the action] really did happen'.[332] In transitory actions,[333] plaintiffs could 'declare in what county he pleases'[334] because, unlike local actions, there was 'no necessary connection with a particular locality'.[335] Actions affecting land were classified as local.[336] Until *Moçambique* was decided, however, it was thought that the *Supreme Court of Judicature Act 1873* had removed the procedural requirement to 'lay the venue' in local actions.[337]

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[324] Dicey (1896), 'Conflict of Laws' (n 234) 559 nn 2–3.

[325] Dicey and Keith (eds) (1922) (n 320) 36.

[326] Dicey (1896), 'Conflict of Laws' (n 234) 32 (n 5).

[327] This was maintained in the second and third editions: see, eg, Dicey and Keith (eds) (1922) (n 320) 37.

[328] Dicey (1896), 'Conflict of Laws' (n 234) 33–6.

[329] Ibid 32 (n 5). *The Halley* and *Phillips v Eyre* are discussed in Chapter 6.

[330] See, eg, W Rupert Johnson, 'The Mozambique Rule and the (Non) Jurisdiction of the Supreme Court of Western Australia over Foreign Law' (2003) 31(2) *University of Western Australia Law Review* 266, 286.

[331] William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1768) Book 3, Ch 12, 294. Examples of local actions include: 'where possession of land is to be recovered, or damages for an actual trespass, or for waste… affecting land'.

[332] Ibid.

[333] Ibid. Transitory actions included 'injuries that might have happened any where, as debt, detinue, slander, and the like'.

[334] Ibid.

[335] *British South Africa Co v Companhia de Moçambique* [1893] AC 602, 618 (Lord Herschell LC).

[336] Blackstone (n 331) Book 3, Ch 12, 294.

[337] See *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66, sch 1 O 36, r 1:

> There shall be no local venue for the trial of any action, but when the plaintiff proposes to have the action tried elsewhere than in Middlesex, he shall in his statement of claim name the county or place in which he proposes that the action shall be tried, and the action shall, unless a Judge otherwise orders, be tried in the county or place so named. …

See also B Welling and E A Heakes, 'Torts and Foreign Immovables: Jurisdiction in Conflict of Laws' (1980) 18(1) *University of Western Ontario Law Review* 295, 306.

On the other hand, convenience — 'not policy' — is the preferred contemporary explanation for Dicey's second class of public policy, the procedure rule.[338]

One of Dicey's uncontroversial — because longstanding — classes of public policy was morality. This class involved the projection of English standards of morality on not only domestic but foreign transactions.[339] The Appendix to Dicey's first edition footnoted more English authorities to demonstrate 'that an English Court will not enforce any contract which is opposed… to the morality supported by the law of England'.[340] An English court would not enforce 'transactions, wherever taking place, which our tribunals hold to be immoral'.[341] Two of the English authorities on prostitution, cited in Story's *Conflict of Laws* and discussed in Chapter 2, were used by Dicey to support this class of public policy.[342] *Pearce v Brooks* was cited in Dicey's first chapter in support of the principle that 'an agreement which, though innocent in itself, is intended by the parties to promote an immoral purpose'.[343] There, the plaintiff coachbuilders were unable to recover on a contract for hire of a brougham carriage, because they knew the defendant, a prostitute, was hiring it to solicit clients, considered 'an immoral purpose'.[344] Knowledge, as discussed in Chapter 2, was a decisive factor in 18th century cases on contracts savouring of prostitution. In another cited case, *Ayerst v Jenkins*, the legal position on contracts for past and future illicit cohabitation was considered.[345] While contracts for past illicit cohabitation upheld in courts of law and equity, promises made in consideration of future illicit cohabitation were void at law and in equity.[346]

With one exception, status was another of Dicey's uncontroversial classes of public policy. Dicey had concluded that a foreign status 'unknown to English law' would not be accorded recognition in English courts.[347] Further, in discussing foreign judgments, Dicey suggested that an English court would refuse recognition of a foreign judgment founded on a cause of action 'of such a character that it would not have supported an action in England (?)'.[348]

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338 Lord Collins et al (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol 1 100 [5–004].
339 Dicey (1896), 'Conflict of Laws' (n 234) 34.
340 Ibid 766.
341 Ibid 34.
342 Ibid 766 n 2.
343 Ibid 34. See also *Pearce v Brooks* (1866) LR 1 Ex 213.
344 *Pearce v Brooks* (n 343) 218 (Pollock CB).
345 *Ayerst v Jenkins* (1873) LR 16 Eq 275, 282 (Lord Selborne LC).
346 Dicey (1896), 'Conflict of Laws' (n 234) 34.
347 Ibid 35.
348 Ibid 419 (punctuation in original).

B *Public Policy Recast in Dicey's Seventh Edition*

Dicey's structure for public policy persisted until the seventh edition (1958), the second edition produced under J H C Morris' general editorship. Morris' seventh edition overhauled Dicey's original arrangement of the book and some of its key passages — public policy included.[349] Judicial diffidence towards public policy may have contributed to Morris' recasting of this particular passage, which has resisted meaningful change down to the current 15th edition.[350] In the seventh edition, the three limbs of Dicey's 'General Principle No 2' were reduced to one. It was reworked to provide that

> English courts will not enforce or recognise a right, power, capacity, disability or legal relationship created by the law of a foreign country which is ordinarily applicable in virtue of English rules of conflict of laws, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the *fundamental public policy* of English law.[351]

Moreover, the commentary attached to public policy in the first six editions, which had largely focused on the policy justifying general principles of private international law, was abandoned. The seventh edition argued that 'convenience' motivated the application of the *lex fori* in matters of procedure, unlike the public policy rationale given in earlier editions.[352]

Morris' new commentary on public policy only looked to the classes of cases suggested by English case law.[353] Morris cited mid-19th century authorities — *Grell v Levy*[354] and *Rousillon v Rousillon*[355] — that represented the categories of champerty and restraints of trade outlined in Chapter 2. Removing Dicey's original six categories, Morris identified status, contracts, and a small number of 'other cases' as characteristic of the doctrine's classes.[356] The commentary on contracts and status, the latter having received the most judicial attention, enumerated the situations in which the doctrine had been successfully engaged.[357] The usual suspects were implicated for contracts, including 'champertous contracts, contracts in restraint of trade, contracts entered into under duress or coercion,

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349 J H C Morris et al (eds), *Dicey's Conflict of Laws* (Stevens & Sons Ltd, 7th ed, 1958) vii–x.

350 New paragraph numbering and the addition of international conventions, EU instruments and new case law are the key changes to this section. See Lord Collins et al (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet and Maxwell, 15th ed, 2012) vol 1 100–6.

351 Morris (1958) '*Dicey's Conflict of Laws*' (n 349) 12 (emphasis added). The wording is the same in the 15th edition, commencing with the second half: 'if the enforcement or recognition'.

352 *Contra* ibid 13.

353 Ibid.

354 *Grell v Levy* (n 311).

355 *Rousillon v Rousillon* (n 312).

356 Morris (1958) '*Dicey's Conflict of Laws*' (n 349) 12–17.

357 Ibid 15–16.

or contracts involving collusive arrangements for a divorce…'[358] For each class of case, the authorities conventionally cited in legal textbooks appeared.[359] The penal character of disabilities imposed on the basis of religious vocation, religion, and race were identified for status.[360]

In a change suggested by the tenor of recent case law, Morris' new section counselled against the deployment of public policy. The space that Dicey carved out for public policy as the underlying reason for elementary doctrines of private international law was discarded. Instead, Morris introduced the reservation with the familiar warnings of Cardozo J in *Loucks v Standard Oil Co* and Lord Atkin in *Fender v St John-Mildmay* against public policy's use.[361] According to Cardozo J, foreign law could be rejected on the ground of public policy only when 'its application would "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."'[362] Lord Atkin warned that judges should only engage public policy 'in clear cases in which the harm to the public is substantially incontestable'.[363] Case law was what ultimately mattered because "'no attempt to define the limits of [public policy] has ever succeeded."'[364] Morris' scheme has remained with additions only made to reflect changed law.

VII CONCLUSION

This Chapter concentrated on the transformation of the public policy exception in historical texts of private international law. In the 19th century texts examined, some consolidation of the common law public policy doctrine into Huber's lacuna of 'prejudicial laws' occurred. Where this consolidation arose, prevailing theories of law — natural law and Austinian positivism — had considerable influence. For example, in his discussion of public policy, Story assimilated some of the common law grounds (explored in Chapter 2) with what constituted corruptions of natural law norms as understood in his Paleyan philosophical framework.

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358 Ibid 15. For these categories, see Chapter 2.

359 See, eg, *Grell v Levy* (n 311); *Rousillon v Rousillon* (n 312); *Kaufman v Gerson* (CA) (n 307); *Hope v Hope* (n 310).

360 Morris (1958) '*Dicey's Conflict of Laws*' (n 349) 15.

361 Ibid 13, quoting *Fender v St John-Mildmay* [1938] AC 1, 12 (Lord Atkin); *Loucks v Standard Oil Co*, 224 NY 99, 111 (1918) (Cardozo J).

362 Ibid, quoting *Loucks v Standard Oil Co*, 224 NY 99, 111 (1918) (Cardozo J).

363 Ibid, quoting *Fender v St John-Mildmay* (n 361) 12 (Lord Atkin).

364 Ibid, quoting Norman Bentwich (ed), *Westlake's Treatise on Private International Law with Principal Reference to its Practice in England* (Sweet & Maxwell, 7th ed, 1925) 51. See also Bentwich (1922) (n 220) 51.

While natural law philosophy in Story's *Conflict of Laws* was transparent, that same conclusion could not be applied to Westlake's work. The first edition of Westlake's *Private International Law* was published in 1858 before the heyday of Austinian positivism. This, combined with factors to be explored in Chapters 4 and 5, is offered as one factor behind the first edition blending elements of positivism with the language of natural law. Elements of Austinian positivism were much more palpable in Westlake's second edition. Austinian positivism was unquestionably Dicey's philosophy of law.

In line with leading theories of law, attitudes towards and the language associated with public policy shifted. Story would have rejected foreign law because it undermined institutions (such as marriage) that were important to his Paleyan philosophy, which was compatible with that era's generally accepted theory. Meanwhile, Westlake's treatment of public policy enlarged through successive editions as lawyers' understanding of Austinian positivism deepened.

An explanation of Austinian positivism prefaced this discussion, given its dominance for almost a century between the early 1860s and the 1950s. Westlake's first edition, published in 1858, appeared before Austin's theory flourished; however, the implications of Austinian positivism were better appreciated by the time of the publication of the second edition. In Westlake's first edition, close attention to English authorities on public policy perhaps involved the unwitting adoption of natural law language indicative of a philosophy that was losing currency. By drawing upon the language of European *ordre public* reservations, Westlake attenuated English public policy by attaching weight to whether the policy was sufficiently essential to be engaged.

Essentiality eventually became the focus of the public policy passage in the seventh edition of *Dicey's Conflict of Laws* (1958). Dicey's view on public policy — mainly that it underlay basic principles of private international law — had prevailed for the first six editions of *Dicey's Conflict of Laws* until Morris' general editorship introduced a substantive change. In the century and a quarter between Story's *Conflict of Laws* and the seventh edition of *Dicey's Conflict of Laws*, the direction of public policy had transformed from being the province of treatise writers to the province of judges. Initially premised by Story on the discretionary exercise of comity, public policy became the subject of fresh judicial warnings limiting its use to 'clear cases in which harm to the public is substantially incontestable'.[365] The absence of authorities on public policy in private international law afforded text writers an opportunity to advance their idiosyncratic views; whereas, judges

[365] *Fender v St John-Mildmay* (n 361) 12 (Lord Atkin).

in the early 20th century took the opportunity to reaffirm their reluctance to use the doctrine. The latter view has succeeded.

This thesis is proposing that unusual weight has been attached to institutional writings — especially Story and, above all, Dicey — in the development of public policy in its private international law sense. Thus, over the next two chapters, this Chapter's emphasis on public policy in historical private international law scholarship is further developed. Chapter 4 explores the meaning and taxonomy of 'institutional writings' — a source of law in Scotland. It also considers contributing factors leading to the judicial citation of 19th century treatise writers. With this deepened understanding of historical context, Chapter 5 discerns areas of law in which Story, Westlake, and Dicey's works were influential by reason of their judicial citation in English, Irish, and Scottish courts.

CHAPTER 4: INSTITUTIONAL WRITINGS AS A 'SOURCE OF LAW'

I INTRODUCTION

The prominence attached to public policy's transformation as an exception in private international law scholarship in Chapter 3 is continued in this Chapter from a different perspective. This Chapter lays some of the groundwork for the discussion in Chapter 5 on scholarly writing constituting a *de facto* source of law in common law private international law jurisprudence. It borrows the term 'institutional writings' from the Scottish legal system to describe preeminent legal treatises given standing through judicial citation.

In common law systems, scholarly work is not a recognised source of law; however, that is not the case in Scotland. For historical reasons, in Scotland, institutional writers are an additional source of law after legislation and case law.[1] Between the 17th and early 19th centuries, Scottish institutional writers were writing on national law as a Scottish 'national consciousness' and the contemporaneous teaching of national law at Scottish universities was developing.[2] Paralleling these strides, common law jurisdictions in the late-18th and 19th centuries were finding their national voice and seeking to improve the delivery of legal education.[3] Key to this improvement was the production of texts on national law and, later, subject-specific treatises.

Part II considers the meaning of 'institutional writings'. It first examines the special weight assigned to institutional writers in Scots law before and after the 19th century. The Scots position is then contrasted with the position under English and Irish law where institutional writings do not have the same standing. The reasons for this different treatment are explored. Parts III and IV consider factors contributing to the judicial citation of institutional writers during the first half of the 19th century. It examines the improving state of Anglo-American legal education and the parallel rise of subject-specific legal textbooks in the early 19th century.

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1 M C Meston et al, *The Scottish Legal Tradition* (Saltire Society and Stair Society, 1991) 12–13.

2 John W Cairns, 'Institutional Writings in Scotland Reconsidered' (1983) 4(3) *Journal of Legal History* 76, 89; John W Cairns, 'Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State' (1984) 4(3) *Oxford Journal of Legal Studies* 318, 324.

3 See Select Committee on Legal Education, Parliament of the United Kingdom, *Report from the Select Committee on Legal Education; Together with the Minutes of Evidence, Appendix and Index* (1846).

II THE MEANING OF 'INSTITUTIONAL WRITINGS'

A *Special Status of Institutional Writings under Scots Law*

For historical reasons, institutional writings are considered a primary source of Scots law together with legislation, case law, custom, and equity.[4] From the 17th to the early 19th century, institutional writings, in the main structurally similar to Justinian's *Institutes*, were published in Scotland to provide an elementary and sometimes comprehensive treatment of 'a whole system of law *treated as a national law*.'[5] The writings' elementary nature was indicative of the intended audience: law students or a general audience not particularly versed in the law.[6] To maximise their impact, the writings were written in English, rather than Latin.[7] Writing 'in the vernacular' was a trend shared by contemporaries writing 'institutes' of national law in France and Spain.[8] The structure of the text and the treatment of substantive law in institutional writings were 'simple' to be 'readily understood'.[9] Works given institutional status include — but are certainly not limited to or not necessarily agreed upon in all cases — Craig's *Jus Feudale* (1655), Stair's *Institutions of the Law of Scotland* (1681), Erskine's *An Institute of the Law of Scotland* (1773), and Bell's *Principles of the Law of Scotland* (1829).[10]

Institutional writings' special status grew out of a growing sense of Scottish national consciousness, ultimately contributing to the teaching of national law at Scottish universities during the 18th century.[11] The threat of a Cromwellian union, the Glorious Revolution Settlement, and the Union of 1707 may have galvanised some institutional writers' nationalist aims.[12] Institutional writers of this century intended not only to bring Scots law into order but also to set apart Scots law from English law.[13] In contrast to these aims, a characteristic feature of 18th century institutional writers was the holding of recently established chairs in national law at various Scottish universities.[14] Their writings

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4 Meston et al (n 1) 12–13.

5 Cairns, 'Blackstone, an English Institutist' (n 2) 324; cf Kenneth G C Reid, 'From Text-Book to Book of Authority: The *Principles* of George Joseph Bell' (2011) 15(1) *Edinburgh Law Review* 6, 19.

6 Cairns, 'Blackstone, an English Institutist' (n 2) 326.

7 Ibid 327.

8 Cairns, 'Institutional Writings Reconsidered' (n 2) 81–8.

9 Ibid 326.

10 See T B Smith, 'English Influences on the Law of Scotland' (1954) 3(4) *American Journal of Comparative Law* 522, 522; Cairns, 'Institutional Writings Reconsidered' (n 2); Cairns (n 2) 324; A A Paterson et al, *The Legal System of Scotland: Cases and Materials* (W Green/Sweet & Maxwell, 4th ed, 1999) 462; Reid (n 5).

11 Cairns, 'Institutional Writings Reconsidered' (n 2) 89; Cairns, 'Blackstone, an English Institutist' (n 2) 324.

12 Cairns, 'Institutional Writings Reconsidered' (n 2) 88, 90.

13 Ibid 90.

14 Ibid 95.

were teaching tools set as student texts.[15] By the mid-18th century, examination in national law was required for admission to the Scottish Faculty of Advocates.[16] Previously the norm was examination in civil law, which Faculty entrants had learnt at continental universities.[17] The emergence of institutional writings triggered the Faculty's proposal and requirement — from 1749 — for successful examination in national law.[18] The emphasis on learning national law necessarily contributed to the decline in Scots travelling abroad to study law.[19]

Originally conceived as a teaching tool, institutional writings enjoyed a new status as a source of law because of judicial recognition in 19th century Scotland. When recognised by Scottish courts as falling within the class of 'institutional writers', institutional writings became authoritative and binding sources of law.[20] Blackie attributed this to 'romantic nationalism', changes in attitude to scholarly work after the Scottish Enlightenment, scarcity of case law and legislation, and having to reconcile institutional writings with an emerging view of judicial precedent.[21] Cairns described the new status as one of 'judicial recognition, even creation': the focus shifted from comprehensiveness, structure, and the topics analysed to whether the institutional writing was 'recognised by the Scottish courts as specially authoritative.'[22] An institutional writer's opinion would be considered conclusive in Scottish courts if 'uncontradicted'.[23] In *Drew v Drew*, for example, Lord Benholme found this to be the case with Stair.[24] Favourable judicial pronouncements in 19th century Scottish courts gave the institutional writers a new authority, notwithstanding present reliance on these authorities being at a low ebb.[25]

B *Status of Scholarly Writing under English Law*

Scholarly writing is understood to have only persuasive value under English law. Case law and legislation are primary sources binding on English and other common law courts. However, secondary sources, though not technically binding nor enjoying the same status as institutional writings in Scots law,[26] are cited by English and other common law courts

15 Ibid.
16 Ibid 96.
17 Ibid 97.
18 Ibid.
19 Ibid 97–8. See also Smith (n 10) 523, 524–5.
20 John W G Blackie, 'Stair's Later Reputation as a Jurist' in David M Walker (ed), *Stair Tercentenary Studies* (Stair Society, vol 33, 1981) 207, 209.
21 Ibid 227.
22 Cairns, 'Institutional Writings Reconsidered' (n 2) 102.
23 *Drew v Drew* (1870) 9 M 163, 167 (Lord Benholme).
24 Ibid.
25 Paterson et al (n 10) 465.
26 *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 284 (Lord Diplock).

for various reasons – of which convenience, accessibility, and authorial eminence are key.[27]

Recent studies into judicial citation practices in common law jurisdictions also suggest that secondary sources can become '*de facto* primary authorities'.[28] The argument is that citation of certain secondary sources 'gives [it] authority to some degree and it will thus exert some influence on the way the law grows'.[29] Merryman labelled this use of scholarship as '"convenience" or "baseline" citations'.[30] Instead of 'reinventing the wheel', the judge uses the secondary source as a 'baseline' for subsequent legal analysis.[31] In this category, Smyth placed Archbold, Holdsworth, Blackstone and Kenny due to the scale of their citation in Australian state Supreme Courts and New Zealand courts over the 20th century.[32] Eminent subject-specific commentaries are also 'frequently cited in cases dealing with their specific subject matter'.[33] By placing 'the state of the settled law in fuller, richer perspective', whole-of-law and subject-specific legal treatises are arguably 'easier to cite'.[34]

Judicial citation studies, though focusing primarily on 20th century practices, could help to explain 19th century citation practices in English, Irish, and Scottish courts. Combined factors unsettled the typical assumption that scholarly writing was merely persuasive in the earlier century. These factors included the movement towards systematic study of law at universities, an increased output of legal treatises, and the contemporaneous uptake in judicial citation of these sources.

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27 See, eg, Russell Smyth, 'Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-Legal Periodicals in the High Court' (1998) 17 *University of Tasmania Law Review* 164; Russell Smyth, '"Other than Accepted Sources of Law"? A Quantitative Study of Secondary Source Citations in the High Court' (1999) 22 *University of New South Wales Law Journal* 19.

28 Smyth, '"Other than Accepted Sources of Law"?' (n 27) 24 (emphasis added).

29 John Henry Merryman, 'Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960 and 1970' (1977) 50 *Southern California Law Review* 381, 413. See also Wes Daniels, 'Far Beyond the Law Reports: Secondary Source Citations in United States Supreme Court Opinions Terms 1900, 1940, and 1978' (1983) 76 *Law Library Journal* 1, 27; Smyth, '"Other than Accepted Sources of Law"?' (n 27) 24; Russell Smyth, 'What do Intermediate Appellate Courts Cite – A Quantitative Study of the Citation Practice of Australian State Supreme Courts' (1999) 21 *Adelaide Law Review* 51, 55; Russell Smyth, 'Judicial Citations – An Empirical Study of Citation Practice in the New Zealand Court of Appeal' (2000) 31 *Victoria University of Wellington Law Review* 847, 855; Russell Smyth, 'The Authority of Secondary Authority — A Quantitative Study of Secondary Source Citations in the Federal Court' (2000) 9 *Griffith Law Review* 25, 29.

30 Merryman, 'Toward a Theory of Citations' (n 29) 413.

31 Ibid 413.

32 Russell Smyth, 'Citing outside the Law Reports: Citations of Secondary Authorities on the Australian State Supreme Courts over the Twentieth Century' (2009) 18 *Griffith Law Review* 692, 714.

33 Ingrid Nielsen and Russell Smyth, 'One Hundred Years of Citation of Authority on the Supreme Court of New South Wales' (2008) 31 *University of New South Wales Law Journal* 189, 193.

34 Merryman, 'Toward a Theory of Citations' (n 29) 413.

III INSTITUTIONAL WRITINGS AND LEGAL EDUCATION IN EARLY 19TH CENTURY AMERICA

A market for legal literature emerged in the early 19th century as organised legal education was taking hold in the United States.[35] Initially abortive attempts were made in the late 18th century to establish law schools in America, but more success was achieved during the second quarter of the 19th century.[36] Though other whole or subject-specific accounts had been printed,[37] Blackstone's *Commentaries* and Coke's *Institutes* were the legal treatises most commonly consulted by American students-at-law under the conventional apprenticeship model of this period.[38] The first three books of Blackstone's *Commentaries* adopted a familiar methodology harking back to the traditional division of civil law between the law of persons, things, and actions featured, notably, in Justinian's *Institutes*.[39] While Blackstone's 'Roman terminology' may have been 'a convenient extrinsic vehicle for the analysis of various kinds of rights',[40] the *Commentaries'* main attraction was its breadth, orientation towards practising lawyers, and focus on existing case law.[41] Indeed, to reflect the evolving nature of and increasingly distinctive edge to American law in this period, successive American editions of Blackstone's *Commentaries* contained annotations of the original text together with updates of English and American law.[42]

Later supplanting these treatises were American treatises on national law such as James Kent's *Commentaries on American Law*, the first edition of which appeared in 1826.[43] Of similar institutional character was Nathan Dane's eight-volume *Abridgement of American Law* (1823), which, though too voluminous to be practical for student use, 'influenced later treatise writers'.[44] By dealing comprehensively with 'national' law, Dane and Kent were differentiating American law from the English law outlined in the hugely popular — but increasingly outdated and unsuitable — Blackstone's *Commentaries*.[45]

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35 See John H Langbein, 'Chancellor Kent and the History of Legal History' (1993) 93(3) *Columbia Law Review* 547.

36 Steve Sheppard, 'Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall' (1996–97) 82 *Iowa Law Review* 547, 567–70.

37 Harold J Berman and Charles J Reid Jr, 'The Transformation of English Legal Science: From Hale to Blackstone' (1996) 45 *Emory Law Journal* 437, 485.

38 Sheppard (n 36) 561–2; M H Hoeflich, 'The Americanization of British Legal Education in the Nineteenth Century' (1987) 8(3) *Journal of Legal History* 244, 244.

39 Berman and Reid (n 37) 492.

40 Ibid 496.

41 Ibid 502.

42 Sheppard (n 36) 561–2.

43 Hoeflich, 'Americanization of 19th Century British Legal Education' (n 38) 249.

44 Sheppard (n 36) 575.

45 Hoeflich, 'Americanization of 19th Century British Legal Education' (n 38) 244.

From the 1830s, the production of subject-specific treatises by American writers was part of a general trend to 'legitimize' legal study at university and to present it as a better alternative to the apprenticeship model.[46] The 'geometric paradigm' or 'legal science', following the examples of science and mathematics, proved central to this aim of legitimisation.[47] By reinforcing legal study as a 'legal science' or 'deductive science', the American treatise writer consulted relevant legal sources, drew 'first principles' from the mass of material, and set out the law in a 'principled' and 'systematic' way.[48] Viewing law as a 'liberal science', American treatise writers fulfilled their goal and added legitimacy to legal education at university in America and, later, in England.[49]

With this prehistory considered, the trends exhibited by 17th and 18th century Scottish institutional writers were manifested in accelerated form in post-Revolutionary America. Salient elements of the Scottish institutional works — the emergence of national consciousness and consequent teaching of national law at university — were fermenting in America.[50] Before and for almost a half century after the American War of Independence, available legal treatises mainly dealt with English law. Subsequent American editions of Blackstone's *Commentaries* were reactive to this dearth of American legal material, with national law progressively added. Dane and Kent supplied the demand by publishing standalone accounts of national law in the early 1820s; these developments were followed by the successful founding of American law schools and university 'chairs' devoted to the teaching of national law. Resembling the position of 18th century Scottish institutional writers, the American writers published their notes as texts to prescribe as teaching material for university-taught law courses.[51]

A *Joseph Story's Conventional Legal Training in America: An Exemplar of 19th Century Legal Education*

Of particular moment in this respect is Joseph Story, Associate Justice of the Supreme Court of the United States and inaugural Dane Professor of Law at Harvard University. From the 1830s until his death in 1845, Story produced a series of 11 'systematic treatises' on various areas of law 'to serve as text-books' and to complement his teaching of

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46 Ibid 245.

47 M H Hoeflich, 'Law and Geometry: Legal Science from Leibniz to Langdell' (1986) 30 *American Journal of Legal History* 95, 108.

48 Ibid 96, 120, 121.

49 Ibid 118.

50 See Cairns, 'Institutional Writings Reconsidered' (n 2); Cairns, 'Blackstone, an English Institutist' (n 2).

51 See Sally E Hadden, 'Legal Publishing in Antebellum America, by M H Hoeflich: Book Review' (2011) 32 *Journal of Legal History* 349, 349.

commercial law, constitutional law, maritime law and equity at Harvard.[52] The series began with bailment (1832) and ended with the topic of promissory notes (1845); each of his legal treatises were revised and edited during his lifetime and by others afterwards.[53] Contributing to the treatises' overall structure was Nathan Dane's belief[54] that law 'should be taught systematically, as a science' to lift the profile of Harvard and to 'render effective service to the country and the profession'.[55] Story's initial frustrations with his own legal education and later 'enthusiasm for education' contributed to the 'scientific' approach taken in his subject-specific commentaries.[56]

Story's legal education in early 19th century Massachusetts was no exception to the prevailing apprenticeship model of legal education, of which he was highly critical. Eighteenth and early 19th century legal training demanded a period of apprenticeship with a practising lawyer and self-tuition comprising 'solitude, reading and copying from English law books'.[57] Articled to Congressman Samuel Sewall, Story 'was left to his own devices, studying up to 14 hours a day'.[58] Story busied himself with Blackstone's *Commentaries*, a collection of English law reports, and *Coke on Littleton*, over which Story initially 'wept bitterly' as the work was 'intricate, crabbed, and obsolete'.[59] But, unlike John Adams' legal training in the 1750s, Story had the benefit of Blackstone and Mansfield who had 'smoothed the path of the Student'.[60]

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52 Sheppard (n 36) 575–6; Morris L Cohen, 'Introduction' in Valerie L Horowitz (ed), 'The Unsigned Essays of Supreme Court Justice Joseph Story: Early American Views of Law' (Talbot Publishing, 2005) xii.

53 Cohen (n 52) xii.

54 Dane expressed this belief in a letter to Story inviting him to take up the newly established Dane Professorship.

55 William W Story (ed), *Life and Letters of Joseph Story, Associate Justice of the Supreme Court* (Charles C Little and James Brown, 1851) vol 2, 2.

56 Ibid 2; Select Committee on Legal Education (n 3) 350–1 ('Letter from Joseph Story to the Principal of the Dublin Law Institute').

57 W W Story (ed), 'Vol 2' (n 55) 69; Sheppard (n 36) 553. This remained the case throughout the 18th century. As a young lawyer in the late 1750s, John Adams recorded that his reading of civilian texts and common law classics 'had left but faint Impressions, and [a] very Imperfect system of Law in my Head': Daniel R Coquillette, 'Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758–1775' in G D Perrottet, *Law in Colonial Massachusetts, 1630-1800* (Colonial Society of Massachusetts and University Press of Boston, 1984) 370.

58 William W Story (ed), Life and Letters of Joseph Story, Associate Justice of the Supreme Court (Charles C Little and James Brown, 1851) vol 1, 72–3; David Lynch, The Role of Circuit Courts in the Formation of United States Law in the Early Republic: Following Supreme Court Justices Washington, Livingston, Story and Thompson (Hart Publishing, 1st ed, 2018) ch 5.

59 W W Story (ed), 'Vol 1' (n 58) 73, 74; Gary L McDowell, *The Language of Law and the Foundations of American Constitutionalism* (Cambridge University Press, 2010) 349. On finishing *Coke on Littleton*, Story wrote, 'I felt that I breathed a purer air and that I had acquired a new power': W W Story (ed), 'Vol 1' (n 58) 74.

60 Coquillette (n 57) 373.

Like many of his contemporaries,[61] Story was critical of the ungainliness of the common law written in *Coke on Littleton*, describing the feudal system as 'dark and mysterious'[62] and its processes and pleadings as 'repulsive and almost unintelligible'.[63] From this point, however, Story developed an 'enthusiasm for education' and a 'love of the law as a science', through being a bibliophile as well as through his service as a Supreme Court justice.[64]

IV AMERICAN LEGAL LITERATURE: ITS INFLUENCE ON 19TH CENTURY ENGLISH LEGAL EDUCATION AND LAW

Compared with the more advanced state of American legal education, legal education in early 19th century England and Ireland was in an embryonic state, but emerging from a sustained trough. By the late 17th century, rigorous common law study at the Inns of Court had fallen into desuetude.[65] Legal education at the Irish Bar was 'under still greater disadvantages'; Irish solicitors fared no better than their counterparts at the Bar.[66] As was common in 18th and 19th century America, solicitors in England and Ireland trained through apprenticeship,[67] the quality of which varied depending on the apprentice's master. Because an apprentice worked on 'matters their master happened to be dealing with at the time', gaps in legal knowledge were a natural corollary.[68] The apprentice would also engage in self-directed study 'to acquire a knowledge of their profession',[69] though that study might be 'entirely limited to the technicalities and forms of law.'[70]

In contrast, for those intending to practise law at Doctors' Commons in England, sustained study in canon and civil law at Oxford or Cambridge was a longstanding requirement. Even though Henry VIII prohibited the teaching of canon law in 1540, civil law study continued, leaving unaffected the training expected of civilian lawyers. Owing to this training, civilian lawyers were perceived to have special expertise, particularly in relation to civil and ecclesiastical courts over which they had exclusive jurisdiction. With

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61 See Charles Warren, *History of the Harvard Law School and of Early Conditions in America* (Lewis Publishing Co, first published 1908, 2008 ed) vol 1, 1412. Contemporaries sharing the same opinion on Coke as Story included Daniel Webster and John Quincy Adams.

62 W W Story (ed), 'Vol 1' (n 55) 73, 74.

63 Ibid.

64 W W Story (ed), 'Vol 2' (n 55) 2; Cohen (n 55) xiii.

65 Select Committee on Legal Education (n 3) xi.

66 Ibid xvi.

67 Ibid xvi; David Sugarman, 'Legal Theory, the Common Law Mind, and the Making of the Textbook Tradition' in William L Twining (ed), *Legal Theory and Common Law* (Blackwell, 1986) 29.

68 Fiona Cownie, 'Are We Witnessing the Death of the Textbook Tradition in the UK?' (2006) 3 *European Journal of Legal Education* 79, 79.

69 Select Committee on Legal Education (n 3) xi.

70 Ibid xvii.

civilian jurisdiction drained and appropriated by the common law, however, the demand for sustained study in the common law assumed more significance towards the mid-18th century.

Contributing to the eventual teaching of national law at English universities was the seizure of civilian jurisdiction for the common law courts, together with the decline of the Inns of Courts as a teaching institution by the late 17th century.[71] The foundation of the Vinerian Professorship of Common Law at Oxford in 1758 provided an early impetus for the revitalisation of English legal education and the common law's literature.[72] Other chairs in common law were established at the University of Dublin (1761) and at the University of Cambridge (1800).[73] The first Vinerian Professor, Sir William Blackstone, most notably delivered lectures on the common law and bringing it together in four volumes (1765–69) of his *Commentaries on the Laws of England*. Inspiring later legal treatises,[74] Blackstone's *Commentaries* demonstrated what could be achieved for law when taught in a university environment.[75] However, Blackstone's successors to the Vinerian Professorship were less successful, effectively taking the chair 'as a sinecure'.[76]

The chairs at Oxford and Cambridge proved insufficient to 'supply the defect… the whole has sunk into a mere matter of form' following the Inns of Courts' decline as a teaching institution.[77] Indeed, regulation of law apprentices was so minimal that, beyond attendance at Inns of Court term dinners from time to time, nothing else was demanded of apprentices.[78] Attendance at university lectures on law thus offered no incentive to students seeking to supplement their existing legal knowledge.[79] Subsequent attempts to revive English legal education occurred in the first quarter of the 19th century with the establishment of three chairs in law at University College, London.[80] In 1846, Oxford and Cambridge still had two chairs of law in civil law and on the common law.[81] Not until the middle of the 19th century, however, was serious, sustained enquiry made into the unfortunate state of legal education in England.[82]

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71 Cairns, 'Blackstone, an English Institutist' (n 2) 333–4.
72 Ibid 335.
73 Ibid.
74 See, eg, A V Dicey, 'The Teaching of English Law at Harvard' (1900) 13 *Harvard Law Review* 422, 422.
75 F S Sullivan, *An Historical Treatise on the Feudal Law, and the Constitution and Laws of England* (1772) 9–10, cited in Cairns, 'Blackstone, an English Institutist' (n 2) 335.
76 Ralph Michael Stein, 'The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction' (1981) 57 *Chicago Kent Law Review* 429, 435.
77 Select Committee on Legal Education (n 3) xi.
78 Ibid xvii.
79 Ibid.
80 Ibid viii; Hoeflich, 'Americanization of 19th Century British Legal Education' (n 38) 247.
81 Select Committee on Legal Education (n 3) iii–viii.
82 Hoeflich, 'Americanization of 19th Century British Legal Education' (n 38) 248.

American legal treatises from the early 19th century were highly regarded by the English judiciary and broader legal profession. Highly critical of legal education in England and Ireland, the *Report of the Select Committee on Legal Education* (1846) treated the American model for legal education – in which legal treatises featured prominently — as worthy of emulation. James Kent and William Story were singled out in the Report: Story for his subject-specific commentaries, which exemplified his knowledge and reputation as a jurist and academic, and Kent for similar reasons.[83] Regular and favourable citation of Story and Kent's work 'as authorities in Westminster Hall' was also noted.[84]

Commending the American model was its 'scientific' approach with less focus on procedure and precedents and more focus on legal principles.[85] Given the embarrassing state of 19th century English legal education, law academics' first task would be to legitimise university study through 'systematisation of law'.[86] By identifying the first principles of law to reduce into textbook form, academics had the facility to teach law students specific areas of law in a systematic way.[87] In that respect, the Committee Report recommended entrance examinations for admission to the Inns of Court and common law training at university.[88] None of these recommendations were adopted: the existing apprenticeship system remained.[89] From the 1870s, the image of university legal education as a poor alternative to apprenticeship began to rehabilitate in earnest.[90]

The importance of institutional writing in the development of private international law, and specifically in its influence on the place of public policy in the field, is marked by the significant role of A V Dicey in these developments. Dicey was an advocate for legal science and for the principled study of law.[91] Following his appointment in 1882 as Vinerian Professor of English Law at Oxford, Dicey delivered an inaugural lecture entitled, 'Can English Law be Taught at the Universities?'[92] In the lecture, Dicey labelled the existing system of instruction by apprenticeship 'deficient' because of its piecemeal

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83 Select Committee on Legal Education (n 3) 73, 264, 279, 290, 427.
84 Ibid 73.
85 Select Committee on Legal Education (n 3). Descriptions of law and legal education as 'scientific' or a 'science' appear through the Select Committee's Report.
86 Sugarman (n 67) 29.
87 Ibid 29.
88 Select Committee on Legal Education (n 3) xlvii; Stein (n 76) 436.
89 Stein (n 76) 436.
90 Ibid.
91 A V Dicey, *Can English Law be Taught at the Universities?* (Macmillan and Co, 1883).
92 Ibid.

and 'unsystematic' nature.[93] Legal education of the past 'never even aimed at the accurate analysis or definition of legal ideas'.[94]

University legal education could, however, 'supply all the defects which flow directly or indirectly from a one-sided system of practical training'.[95] The law academic's task would be 'to set forth the law as a coherent whole — to analyse and define legal conceptions — to reduce the mass of legal rules to an orderly series of principles, and to aid, stimulate and guide the reform or renovation of legal literature.'[96] By digesting the law in this manner, academics would be better placed to isolate the first principles governing whole departments of law.[97] Dicey thus concluded that English law could be taught at English universities 'if only the teachers are competent, and clearly perceive the limits and aim of their teaching'.[98]

Apart from this systematic exposition view, Dicey perceived that there was great potential for academic writers to have an impact on judges' decisions.[99] In *Law and Opinion*, Dicey observed that judges may unconsciously consult these writers 'in the search for principles' governing their cases, adding: 'If an author of ingenuity has reduced some branch of the law to a consistent scheme of logically coherent rules, he supplies exactly the principles of which a Court is in need'. [100] As the reader is reminded, the evolution of English law throughout the 19th century resulted from 'the writings of the authors who have produced the best text-books'.[101] Stephen's *Treatise on the Principles of Pleading*, Story's *Conflict of Laws*, and Westlake's *Private International Law* were supplied by Dicey as examples.[102]

Codification represented the other side to this understanding of an academic writer's influence. Dicey regarded codification as 'the most interesting and perhaps the most important sphere of professorial energy'.[103] With their textbooks acting as 'a kind of "natural code"', 19th century academics commanded an influence over the development

93 Ibid 2.
94 Ibid 12.
95 Ibid 18.
96 Ibid.
97 Ibid 20.
98 Ibid 31.
99 See, for example, Richard Fentiman, 'Legal Reasoning in the Conflict of Laws: An Essay in Law and Practice' in Werner Krawietz, Neil MacCormick and George Henrik von Wright (eds), *Prescriptive Formality and Normative Rationality in Modern Legal Systems: Festschrift for Robert S Summers* (Duncker & Humblot, 1994); Mary Keyes, 'Order, Illumination and Influence: Dicey, Morris & Collins on the Conflict of Laws, Fourteenth Edition' (2007) 3 *Journal of Private International Law* 355, 363.
100 A V Dicey, Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century (Macmillan and Co, 1st ed, 1905) 363 ('Law and Public Opinion').
101 Ibid.
102 Ibid.
103 O Kahn-Freund, 'Reflections on Legal Education' (1966) 39(2) *Modern Law Review* 121, 130.

of whole areas of law, such as contracts, public international law, and private international law.[104] The production of legal digests and codes was another consequence of this systematic ordering of law idea.[105] The presentation of Dicey's *Law of Domicil* text (1879) into the format of rules and exceptions was designed as a vehicle for the potential codification of the law of domicile.[106] Using this presentation, Dicey reflected that it could 'at once codify and explain a branch of English law which specifically needs systematic treatment'.[107] Two contemporaries sharing a similar codifying spirit as Dicey, Sir Frederick Pollock and Sir Mackenzie Chalmers, codified in the 1890s and early 1900s common law rules for partnerships, bills of exchange, sale of goods, and marine insurance.[108] Emerging during the 19th century codification movement, Dicey's *Conflict of Laws* (1896) has assumed 'quasi-legislative' status in contemporary English courts.[109] The 'rule, comment and illustrations' style of presentation lent itself to the practitioner and the judge searching for a clear statement of law.[110]

V CONCLUSION

This Chapter has highlighted that, before the 19th century, Scottish writers of 'institutes' or 'institutions' were not given special weight in Scottish courts. Rather, the Scottish courts' focus was on the breadth, depth and structural treatment of topics on national law in light of the writings' educational value and intended audience. That audience constituted members of the public and, most importantly, Scottish students studying national law. With the arrival of the 19th century, however, judicial citation became the new benchmark against which to measure the authoritativeness of Scottish institutional writers.

The factors that Cairns identified as contributing to the appearance of institutional writers in Scotland — the emergence of national consciousness and consequent teaching of national law at university — were manifest and accomplished quickly in post-Revolutionary America. From the 1820s, comprehensive treatises on national law were being published contemporaneously with the establishment of American law schools. In this light, a compelling argument can be made suggesting that Story acquired the status of

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104 Sugarman (n 67) 32.
105 Kahn-Freund, 'Reflections on Legal Education' (n 103) 130.
106 C G J Morse, 'Making English Private International Law' in James Fawcett (ed), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Oxford University Press, 2002) 280.
107 Ibid 279–81.
108 Ibid 283.
109 Ibid.
110 Ibid 285.

'institutional writer' in this legal system. The success in the early 19th century of American legal education, which lay stress on law as a 'science' and subject-specific legal treatises to supplement teaching at university, offered an ideal model for reforming the poor state of English and Irish legal education.

Scholarly writings, though not enjoying the same status in English-influenced common law jurisdictions as Scotland, were influential in improving the rigour of British legal education and directing common law judges to useful summaries of the law throughout the 19th century. Arguably, the scientific method of legal treatises would have been a boon for common law judges for they, like their American counterparts, would have learned the law haphazardly under the traditional apprenticeship model. As Chapter 5 explores, the writers of the 'best text-books' on private international law were influential in the development of the common law rules of private international law; the books supplied 'exactly the principles of which the [courts were] in need'.[111]

Dicey, in setting up conditions by which writers may be treated as authoritative in courts, anointed Story and Westlake as institutional writers. Story became a lawmaker because of the extent to which he pieced together continental thought and national law. And Westlake followed this tradition. The structure of *Law of Domicil* and *Conflict of Laws* show the ways in which Dicey was consciously positioning himself as an institutional writer. The designation becomes, in a sense, a self-fulfilling prophecy so far as stating law that is clear. However, given also the way he structured public policy and that he was not responding to the authorities, Dicey became a lawmaker.

The practice of judicially citing legal treatises on private international law is considered in the next chapter (Chapter 5). It connects factors contributing to the rise of institutional writers, as discussed in this Chapter, with increased judicial citation of private international law scholarship. It also identifies areas of private international law in which scholarship was influential.

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[111] Dicey, *Law and Public Opinion* (n 100) 363.

CHAPTER 5: NINETEENTH CENTURY INSTITUTIONAL WRITERS OF PRIVATE INTERNATIONAL LAW AND THEIR INFLUENCE ON MODERN DOCTRINE

> For the clashing of theories and dicta of professors there was substituted the authority of leading cases. The sphere of speculation at large was limited to cases not covered by authority.
>
> SIR WILLIAM HOLDSWORTH[1]

I INTRODUCTION

Whereas Chapter 4 focused on institutional writings generally, Chapter 5 has a more specific focus: the identification of three 19th century writers of private international law — Joseph Story, John Westlake, and A V Dicey — as 'institutional'. To provide this focus, this Chapter analyses the judicial citation of their works in English, Irish, and Scottish courts between the 19th and 21st centuries.[2] This Chapter also uses judicial citation to isolate and explain their significant scholarly contributions to the shape of selected doctrines of modern private international law. The purpose of doing so is to reinforce the argument that these institutional writers have been determinative in the development of the public policy doctrine in private international law. The 'institutional writings' concept, explored in Chapter 4, refers to works that are conferred special authority through judicial citation. While the emphasis of this Chapter is on judicial citation, it is acknowledged that this was not the only factor contributing to the emergence of institutional writings in Scotland or, by extension, in the United States and England. As this Chapter nevertheless reinforces, reviewing the practice of judicial citation in English, Irish, and Scottish courts verifies that special weight has been accorded to scholarship in this field. It may even be suggested that institutional writings, such as Dicey, have assumed a *de facto* authority, particularly so for English courts.

The first of the scholars examined in this chapter, Joseph Story (1779–1845), was introduced in Chapters 3 and 4. Story was an Associate Justice of the Supreme Court of

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1 Sir William Holdsworth, *History of English Law* (Methuen, 1922–72) vol 15, 336.

2 Westlaw UK, ICLR Online, Lexis, and Justis databases were consulted to retrieve the judicial citations of Story, Westlake, and Dicey in English, Scottish, and Irish cases. Keywords together with Boolean operators and modifiers were employed. For example, Story's name demanded wildcard searching, as some law reports misspelt his surname — 'Storey'. In addition, proximity searching of the specific author's name and textbook title and a defined date range proved to be highly useful search strategies. Next, the cases were arranged in tabular form. The table had five key features: case citations; judicial citation counts; judge or judges; subject matter; and the judicial comment to place the citation in context.

the United States (1811–1845), first Dane Professor of Law at Harvard University (1829–1845), and author of *Commentaries on the Conflict of Laws* (1834).[3] The second institutional writer identified in this chapter, A V Dicey (1835–1922), was Vinerian Professor of English Law at the University of Oxford (1882–1909) and author of the *Conflict of Laws*, the first edition of which was published in 1896.[4] As a counterpoint to Story and Dicey's substantial influence, the smaller — though still significant — contributions of another 19th century English scholar, John Westlake, are outlined.

This body of this Chapter is organised into two parts. Part II gives a brief background to the treatises written by Story, Westlake, and Dicey. Story's *Conflict of Laws*, which was first published in the United States in 1834, drew attention to the growing importance of developing a private international law in the United States. The publication had a 'knock-on effect', elevating the study and importance of private international law on the other side of the Atlantic. The English account of private international law that appeared in William Burge's *Commentaries on Colonial and Foreign Law* (1838) borrowed heavily from Story's *Conflict of Laws*.[5] However, the first comprehensive English treatise on private international law appeared with the publication, in 1858, of Westlake's *Treatise on Private International Law*.[6] The reasons for the indifferent reception of Westlake's *Private International Law* and the singular reception of Dicey's *Conflict of Laws* are explained in this second part.

Part III describes and analyses the judicial citation of Story's *Conflict of Laws* and Dicey's *Conflict of Laws* in English, Irish, and Scottish courts. Positioned between an overview of Story and Dicey's judicial citation, two of Westlake's contributions to English private international law are evaluated. Though judicial praise of Story's *Conflict of Laws* has diminished, the influence of successive editions of Dicey's *Conflict of Laws* has endured in Scottish and Irish courts but, more particularly, in English courts where the textbook is treated as a quasi-code.[7] In the result, as discussed in this Chapter, Dicey's *Conflict of Laws*

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3 For further analysis of Story's *Conflict of Laws*, see Chapters 3 and 4.

4 A V Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens and Sons, 1st ed, 1896). For a detailed analysis of Dicey, refer to Chapters 3 and 4.

5 William Burge, *Commentaries on Colonial and Foreign Laws* (Saunders and Benning, 1st ed, 1838).

6 John Westlake, *A Treatise on Private International Law, or the Conflict of Laws, with Principal Reference to its Practice in the English and Other Cognate Systems of Jurisprudence, and Numerous References to American Authorities* (T & J W Johnson & Co, 1st ed, 1859).

7 See, eg, B A Wortley, 'Dicey's Conflict of Laws' (1960) 5 *Journal of the Society of Public Teachers of Law* 148, 148; A J E Jaffey, 'Dicey & Morris on the Conflict of Laws' (1988) 104 *Law Quarterly Review* 470, 472, 473; Pippa Rogerson, 'Dicey and Morris on the Conflict of Laws' (2001) 60 *Cambridge Law Journal* 220, 221; Mary Keyes, 'Order, Illumination and Influence: *Dicey, Morris & Collins on the Conflict of Laws, Fourteenth Edition*' (2007) 3 *Journal of Private International Law* 355, 355, 357; Andrew Dickinson, 'Dicey, Morris & Collins: The Conflict of Laws' (2007) 123 *Law Quarterly Review* 314, 314.

has been judicially cited in well over 1000 English, Irish and Scottish cases.[8] Due to the extent of Dicey's citation in these courts, this Chapter merely illustrates various judicial uses of Dicey's *Conflict of Laws*. Part III concludes by reflecting on the continued judicial criticism of the 'other public law' category — or rule 3 — of Dicey's *Conflict of Laws* — which had a tangential role in the development of the modern public policy category.

II 19TH CENTURY 'INSTITUTIONAL WRITERS' OF PRIVATE INTERNATIONAL LAW

A *Joseph Story's* Conflict of Laws

1 *Publication and Reception in the British Isles*

Between 1811 and 1834, American jurisprudence on private international law multiplied to such a degree that there was a demand for a subject-specific treatise. The growth in jurisprudence was an upshot of a federal system in which States' 'political confederacy', and the diversity of state and federal laws loomed large.[9] In pre-Revolutionary America, the high volume of colonial legislation raised jurisdictional and subject matter conflicts, which was also encumbered by the applicability of existing English law.[10] By cultivating an environment for private cross-border jurisprudence to surface, the United States stood in contrast to its former sovereign, the United Kingdom. Scarcely appearing in law reports, cross-border cases before English and Scottish courts were often limited to the subjects of domicile, succession, or marriage.[11]

A look at Story's unfinished digest on private international law gives a good sense of the developing state of American jurisprudence in the field. The 1811 digest included 108 references to legal writers and Anglo-American decisions up to 1809.[12] Two-thirds of the decisions in the digest were American, most of which were from New York and from Pennsylvania.[13] Later, a report writer, Cowen, in a 22-page footnote to the 1825 decision of *Andrews v Herriot*,[14] noted the demand for a digest on the conflict of laws.[15] Cowen arranged the existing case law into twelve categories and cited continental authorities on

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8 As at 1 March 2017, 1088 English, Scottish and Irish cases have cited Dicey's *Conflict of Laws*. In this chapter, Dicey's *Conflict of Laws* is used as a shorthand for all editions of the text.

9 See *Andrews v Herriott*, 4 Cow 508 (NY Sup Ct, 1825); Frederic Harrison, *On Jurisprudence and the Conflict of Laws* (Oxford University Press, 1919) 118–9; Kurt H Nadelmann, 'Joseph Story's Contribution to American Conflicts Law: A Comment' (1961) 5 *American Journal of Legal History* 230, 235.

10 Nadelmann, 'Joseph Story's Contribution' (n 9) 235.

11 See, eg, on marriage: *Scrimshire v Scrimshire* (1752) 2 Hag Con 395; 161 ER 782; *Dalrymple v Dalrymple* (1811) 2 Hag Con 54; 161 ER 665. See generally Harrison (n 9) 118.

12 Nadelmann, 'Joseph Story's Contribution' (n 9) 236.

13 Ibid.

14 *Andrews v Herriott* (n 9).

15 Ibid.

the subject, drawing particular attention to Huber's *De Conflictu Legum*.[16] Moreover, scholarship on private international law issues was minimal.[17] Before Story's work was published, a minor chapter within a larger volume or a short interview published in a law journal was the extent of scholarship.[18]

First published in 1834, Story's *Conflict of Laws* was a significant milestone in the development of American and English private international law. Forsyth touted the text as 'one of the most successful efforts of all time to make bricks without straw'.[19] In 1879, Harrison wrote that 'hardly a single case on this subject in America or in England, and perhaps few on the Continent, have ever been decided without some reference to this learned book'.[20] Story lay emphasis on the three maxims of Huber's *De Conflictu* Legum, explained in Chapter 3, to support the structure of the subject in Anglo-American law.[21]

It is understandable that Huber's text was the theoretical basis for the first detailed exposition of private international law in the common law world. Huber's maxims had received the imprimatur of judges on both sides of the Atlantic dating as far back as 1711,[22] and the maxims added theoretical legitimacy to an evolving field of law. With Huber at its base, Story's *Conflict of Laws*, at a length of 557 pages, merged civilian writers' doctrines with 15 classical categories of the Anglo-American law.[23] Over 100 pages alone were devoted to foreign contracts. Domicile, capacity, marriage, real property, succession

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16 With a note: 'The subject in itself deserves a treatise, but I can do nothing more here than to arrange and refer to the authorities, giving the substance of some of them. Huberus, *in his title De conflictu legum* has broken the ground the most effectually, I believe, of all the European writers; but even yet, it must be considered as but little more than broken for the use of the American student'.

17 See Nadelmann, 'Joseph Story's Contribution' (n 9) 236–7; Joel R Paul, 'The Isolation of Private International Law' (1988–89) 7 *Wisconsin International Law Journal* 149, 159; G Blaine Baker, 'Interstate Choice of Law and Early American Constitutional Nationalism. An Essay on Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws' (1993) 38 *McGill Law Journal* 454, 466; M H Hoeflich, 'John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer' (1985) 29 *American Journal of Legal History* 36, 70. Llewelyn Davies considered that Henry's short treatise, which predated Story's *Conflict of Laws*, repeated existing continental scholarship and had little influence on Story's work: D J Llewelyn Davies, 'The Influence of Huber's *De Conflictu Legum* on English Private International Law' (1937) 18 *British Yearbook of International Law* 49, 49.

18 See Nadelmann, 'Joseph Story's Contribution' (n 9) 236–7; Paul, 'The Isolation of Private International Law' (n 17) 159.

19 Joseph Story, *Commentaries on the Conflict of Laws* (Arno Press, first published 1834, 1972 ed) 22, quoted in Christopher Forsyth, 'The Eclipse of Private International Law Principle — The Judicial Process, Interpretation and the Dominance of Legislation in the Modern Era' (2005) 1 *Journal of Private International Law* 93, 97.

20 Harrison (n 9) 119.

21 Christopher Forsyth, 'The Value of the Comparative Ethos to the Judicial Process in the Conflict of Laws' in Coenraad Visser, *Essays in Honour of Ellison Kahn* (Juta & Co Ltd, 1st ed, 1989) 151, 153.

22 Justice James Allsop, 'Comity and Commerce' [2015] *Federal Judicial Scholarship* 27. See also *Hamilton v Calder* (1706) Mor 2091; *Goddart v Swinton* [1711] Brn 848.

23 Story, '1972 ed' (n 19) 22, quoted in Forsyth (n 19) 97.

and judgments — perennial features of early Anglo-American conflicts — were also addressed. These existing categories were supported by 506 English and American cases.

Following its 1835 publication in Edinburgh,[24] Story's *Conflict of Laws* was well received in the English and Scottish legal professions. Lord Fraser, Lord Brougham, Lord Campbell, and Sir John Coleridge, each writing extra-curially, praised Story's ability.[25] In 1835, an *Edinburgh Law Journal* review described Story's text with adulation as 'altogether of so excellent a description, and betoken a mind so completely imbued with the purest principles of legal philosophy'.[26] Another reviewer welcomed the text

> not merely on account of its intrinsic beauties, but also as a means of promoting an interest in the study of jurisprudence. The power with which [Story] has balanced conflicting arguments, and the learning which he has displayed in travelling through the heavy labours of his predecessors, and extracting from them the pith of their reasonings, must delight every inquisitive mind, and justify us in a hope, which they who peruse the book will not think extravagant, that the Treatise on the Conflict of Laws may prove the foundation in this country of a school of jurisprudence.[27]

In a personal letter to Story, Coleridge observed that he had not read any 'modern treatise of our own [English] production with any thing like the pleasure and instruction it gave me'.[28] At the same time, advocates and judges in English and Scottish courts cited the text regularly with Irish courts soon following suit.[29]

English and Scottish courts' immediate attraction to the text can be simply stated. Story had 'set out so clearly and conveniently all that was valuable in the writings of Continental jurists that direct reference to their writings became unusual'.[30] Report writers, counsel

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24 Norman Clark published Story's *Commentaries* in two volumes in 1835.

25 See Anonymous, 'Intelligence and Miscellany' (1835) 14(27) *American Jurist and Law Magazine* 240, 246; William Wetmore Story, *Life and Letters of Joseph Story* (Little and Brown, 1851) vol 2, 334; Anonymous, 'Story's Commentaries' (1863) 25 *The Monthly Law Reporter* 565, 566.

26 Anonymous, 'Commentaries on the Conflict of Laws, Foreign, and Domestic, in regard to Contracts, Rights, and Remedies, and Especially in regard to Marriages, Divorces, Successions, and Judgments. By Joseph Story, LLD. Dane Professor of Law in Harvard University. Edin T Clark. 8vo, 1834' (1832–36) 2(11) *Edinburgh Law Journal* 427, 427.

27 Anonymous, 'Reviewal: Commentaries on the Conflict of Laws, Foreign and Domestic, in regard to Contracts, Rights, and Remedies, and especially in regard to Marriages, Divorces, Wills, Successions, and Judgments. By Joseph Story, LLD, Dane Professor of Law in Harvard University. London, RJ Kennett, 59, Great Queen Street' (1834–35) 4 *Legal Examiner and Law Chronicle* 512, 513.

28 W W Story (n 25) 334.

29 See *Re Littles* [1846] 110 IR Eq Rep 275.

30 PR Beaumont and PE McEleavy, *Anton's Private International Law* (Thomson Reuters, 3rd ed, 2011) 11. See also Forsyth (n 19) 97.

and judges resorted to Story's *Conflict of Laws* either for extracts from civilian writing within the text or for the writer's synthesis of first principles.[31]

Story's *Conflict of Laws* was not, however, free from criticism in the 19th century. Though praising the text's comprehensiveness, Harrison was critical of its organisation calling it 'one of the least scientific, and… least conclusive books'.[32] He was also critical of the author's failure to synthesise and evaluate competing scholarly opinions.[33] Remarking on Story's indiscriminating acceptance of scholarly opinion, Harrison concluded the text was 'a conflict of opinions… a book of reference, and not a critical work of judgement and authority'.[34] Hindsight also left others critical of Story's imprecision.[35] Nevertheless, as will be outlined in Part III, Story's *Conflict of Laws* was still extensively cited in 19th and 20th century English, Scottish, and Irish law reports — justifying his suggested status as an institutional writer in the field. Judges willingly accepted Story's statements of law.

B *Westlake's* Private International Law

The appearance of Westlake's *Private International Law* in 1858 was not met with the same judicial reception as Story's *Conflict of Laws* had two decades earlier.[36] Though an anonymous reviewer identified the market demand for Westlake's text, the reviewer observed that interest in private international law had 'hardly kept pace (in England at least) with its growing importance'.[37] Factors perhaps underscoring this less effusive judicial reception include the then-traditional 'living author' convention,[38] Westlake's youth and active membership at the English Bar as well as the first edition's comparative dimension and 'academic stiffness of style'.[39] In addition, as considered in Chapter 4, English and Irish legal education remained in the doldrums until its renaissance in the

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31 See R H Graveson, 'The Comparative Evolution of Principles of the Conflict of Laws in England and the USA' in Académie de Droit International de la Haye, *Recueil des Cours* (Nijhoff, 1960) vol 1, 21, 33; Forsyth (n 19) 97.

32 Harrison (n 9) 119, 120.

33 Ibid.

34 Ibid 120, 121.

35 A de Lapradelle, 'John Westlake: Tribute' (1914) 26 *Green Bag* 218, 218.

36 A V Dicey, 'Private International Law' (1912) 28 *Law Quarterly Review* 341, 341.

37 Anonymous, 'Art II – *A Treatise on Private International Law, or the Conflict of Laws, with Principal Reference to its Practice on the English and Other Cognate Systems of Jurisprudence*. By John Westlake, Esq, of Lincoln's Inn, Barrister-at-Law, and Fellow of Trinity College, Cambridge. London Maxwell, 1858' [1858–9] 12(2) *Law Magazine and Law Review, or Quarterly Journal of Jurisprudence* 229, 229, 234–5.

38 Dicey (n 36) 341.

39 Anonymous, 'Art II' (n 37) 236. The comparative dimension was excluded from the second edition. For similar criticisms of Westlake's writing style, see: Norman Bentwich, 'John Westlake, KC' (1913) 29 *Law Quarterly Review* 260, 262; H C Gutteridge, 'A New Approach to Private International Law' (1936–38) 6 *Cambridge Law Journal* 16, 16.

1870s and 1880s. Against this backdrop, Westlake's text was unlikely to find a market, or influence, amongst academics and students.

The 'incomplete and chaotic' nature of English private international law, described by Westlake 'as a department of municipal law', offers another perspective on the indifferent reception of Westlake's first edition.[40] Judges consulted Story because he was the only 'modern writer on the conflict of laws [that was] really well known'.[41] Even with the comprehensive treatment of private international law in Story's *Conflict of Laws*, mid-19th century judges inevitably faced novel areas that 'had received no reply either from statute law or judge-made law'.[42]

Westlake's first edition was a reflection of this background: the footnotes exposed the case sparseness of English private international law. To supplement this deficiency, Westlake's first edition quoted or cited the Americans Kent, Livermore and Story, and Savigny and other continental scholars — including Bartolus, the two Voets, and Huber — to support doctrinal analysis.[43] Dicey, in reviewing Westlake's fifth edition, observed that legislation governing areas such as jurisdiction or wills had not been enacted in 1858.[44] Legal principles were unexplored, unsettled, or divergent — such as for domicile and matrimonial capacity.[45] Significantly, the choice of law rules for movables and for the validity of marriages had not reached concrete form until the early 1860s, a few years after Westlake's first edition.[46] Eschewing continental sources and reinforcing the authority of English case law, successive editions of Westlake's text arguably cemented the text's reputation in England.[47]

Constraining the citation of Westlake's text during his lifetime, however, was the traditional judicial convention operating in the 19th and 20th century not to cite living authors.[48] Between 1858 and the author's death in 1913, five editions of Westlake's *Treatise* had been published, the last of which appeared in 1912.[49] The first identifiable judicial citation of Westlake's *Treatise* in 1882 is revealing to the extent that it shows how long it

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40 See Westlake (1859) (n 6) iii; Dicey, 'Private International Law' (n 36) 341.
41 Dicey, 'Private International Law' (n 36) 342.
42 Ibid.
43 Westlake's 1st edition cites at least 62 scholars from, among other places, America, England, Scotland, France, the Netherlands, Switzerland, Belgium and Italy.
44 Dicey, 'Private International Law' (n 36) 342.
45 Ibid 342–3.
46 Ibid 342, 343.
47 Bentwich (n 39) 262; *contra* Francis Wharton, 'Late Works on Private International Law' (1880–1) 6 *Southern Law Review New Series* 680, 681, 684.
48 See, eg, de Lapradelle (n 35) 220.
49 The publication history of Westlake's *Treatise on Private International Law* is: first edition (1858); second edition or revised first edition (1880); third edition (1890); fourth edition (1905); fifth edition (1912). See, eg, Bentwich (n 39) 262.

took for the text to bed down and 'obtain a real influence upon case law'.[50] Indeed, in the author's lifetime, Westlake's text was judicially cited in 12 English cases, but not always approvingly.[51] This stands in contrast with the author's posthumous citation in 30 decisions from English, Scottish and Irish courts, where citation was far more sympathetic.[52]

C *Dicey's* Conflict of Laws

Two factors may be singled out as significantly contributing to the immediate attention Dicey's *Conflict of Laws* received on its publication in 1896 and to its enduring legacy: the rebirth of English legal education in the late-19th century and the 'failed' Victorian codification movement.

First, the publication of influential English legal treatises[53] — giving a rational account of particular branches of, mainly private, law — was a direct consequence of a concerted effort to revitalise and justify the place of university legal education in the latter half of

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50 de Lapradelle (n 35) 219. The first identifiable judicial citation of Westlake's work was *De Geer v Stone* [1882] 22 Ch D 243, followed by *Re Kloebe; Kannreuther v Geiselbrecht* (1884) 28 Ch 175, 177 (Pearson J).

51 See generally *Gibbs (Antony) & Sons v La Société Industrielle et Commerciale des Métaux* [1890] QBD 399, 407 (Lord Esher MR), 410 (Lindley LJ) ('*Gibbs (Antony)*'); *Mayor, Alderman, and Citizens of Canterbury v Wyburn* [1895] AC 89, 98 (Lord Hobhouse); *Re Hayward; Hayward v Hayward* [1897] 1 Ch 905, 910 (Kekewich J); *Armytage v Armytage* [1898] P 178, 191–2 (Gorell Barnes J); *Pemberton v Hughes* [1899] 1 Ch 781, 791 (Lindley MR); *Re Martin; Loustalan v Loustalan* [1900] P 211, 238–9 (Vaughan Williams LJ); *Hope Vere v Hope Vere* 1906 13 SLT 774, 777 (Lord Salvesen); *Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co* [1901] AC 373, 383 (Lord Hobhouse); *Re Fitzgerald; Surman v Fitzgerald* [1903] 1 Ch 933, 940 (Joyce J); *Re Fitzgerald; Surman v Fitzgerald* [1904] Ch 573, 597 (Vaughan Williams LJ); *Kaufman v Gerson* [1904] 1 KB 591, 594 (Romer LJ), 599 (Collins MR), 599 (Romer LJ); *Kelly v Selwyn* [1905] 2 Ch 117, 122 (Warrington J).

52 See generally *R v Superintendent of Albany Street Police Station* [1915] 3 KB 716, 721 (Lord Reading CJ), 726 (Darling J); *Re Suarez; Suarez v Suarez* [1917] 2 Ch 131, 138 (Eve J); *Casdagli v Casdagli* [1918] P 89, 102 (Warrington LJ); *Casdagli v Casdagli* [1919] AC 145, 168 (Lord Finlay LC); *Mackinnon's Trustees v Inland Revenue* 1919 SC 684, 694; *Re McSweeney; McSweeney v Murphy* [1919] 1 IR 16, 21 (Molony CJ); *Celia (SS) v SS Volturno* [1921] 2 AC 544, 569 (Lord Carson); *Re British American Continental Bank Ltd; Credit General Liegeois' Claim* [1922] 2 Ch 589, 596 (P O Lawrence J); *Re Lorillard; Griffiths v Catforth* [1922] 2 Ch 638, 642–3 (Eve J); *Duff Development Co Ltd v Government of Kelantan* [1923] 1 Ch 385, 399 (Russell J); *Re Berchtold; Berchtold v Capron* [1923] 1 Ch 192, 205; *Republica de Guatemala v Nunez* [1927] KB 669, 699, 700 (Lawrence LJ); *Lendrum v Chakravarti* (n 52) 102, 103, 104 (Lord Mackay); *Grant v Grant* 1931 SC 238, 242 (Lord Fleming); *Re Vocalion (Foreign) Ltd* (n 52) 209 (Maugham J); *Naftalin v London, Midland and Scottish Railway Company* 1933 SLT 31, 32 (Lord Moncrieff) ('*Naftalin [No 1]*'); *Naftalin v London, Midland and Scottish Railway Company* 1933 SC 259, 261 (Lord Moncrieff), 275 (Lord Murray) ('*Naftalin [No 2]*'); *Dalziel v Coulthurst's Executors* 1934 SC 564, 570 (Lord Hunter); *Dharamal v Lord HolmPatrick* [1935] 1 IR 760, 763 (Johnston J); *MacDougall v Chitnavis* 1937 SLT 40 (Lord Jamieson); *Kennion's Executors* 1939 SLT (Sh Ct) 5, 8 (Sheriff-Substitute D R Scott KC); *Boissevain v Weil* (n 52) 490 (Denning LJ); *Kochanski v Kochanska* [1958] P 147, 154 (Sachs J); *Rainford v Newell-Roberts* [1962] IR 95, 99 (Davitt P); *Re Langley's Settlement Trusts* [1962] Ch 541, 557 (Lord Evershed MR); *Cheni v Cheni* [1965] P 85, 96, 98 (Sir Jocelyn Simon P); *Henderson v Henderson* [1967] P 77, 82 (Sir Jocelyn Simon P); *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 QB 34, 46; *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190, 200; *Royal Boskalis Westminster NV v Mountain* [1999] QB 674, 731 (Phillips LJ). It is highly likely that Westlake's text worked indirectly to inform English courts' decision-making as well: see, eg, *Coast Lines Ltd v Hudig* (n 52) 46 (Megaw LJ).

53 See comment regarding the real influence of textbooks in English law in George Whitecross Paton, *A Text-Book of Jurisprudence* (Clarendon Press, 1st ed, 1946) 200.

the 19th century.[54] Dicey, as well as taking part in this overhaul of legal education, acknowledged the influence or 'legislative role' a textbook writer could have with a text of quality.[55] Indeed, Dicey 'still rule[s] us from the grave':[56] the rules in *Conflict of Laws* are accepted more or less as axiomatic by English courts.[57] In cross-border cases, English courts are 'unusually ready to acknowledge their debt to academic literature'.[58]

As Chapter 4 discussed, Dicey was a strong advocate of university legal education. During the 1880s, Dicey and Sir Frederick Pollock separately advocated for law's teaching at English universities.[59] The need for a justification arose because, as law was traditionally studied through apprenticeships, the legal profession questioned the legitimacy of university legal education.[60] To gain 'professional legitimacy' and to mollify the detractors, English legal academics — like their American counterparts — wrote treatises (or textbooks) that would give a rational account of particular branches of the law for the benefit the texts' primary readership: law students and practising lawyers.[61] Through this readership, the textbook writer might enjoy a 'legislative role' through judicial citation.[62] In an 1883 lecture, Dicey regarded university legal education as the answer to contemporary problems in English legal education: it would improve 'the tone of the profession', converting a trade Dicey pilloried as 'unsystematic' and 'incomplete' into a science for a small 'elite'.[63] University legal education could 'supply all the defects which flow directly or indirectly from a one-sided system of practical training'.[64]

Secondly, the Victorian codification movement brought a standard form to 19th-century legal treatises — controlling rules and illustrations — which Dicey employed in his *Conflict of Laws*.[65] This presentation encouraged judicial citation, giving legal practitioners and judges a précis of doctrine. From the codification movement of the

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54 David Sugarman, 'Legal Theory, The Common Law Mind, and the Making of the Textbook Tradition' in William L Twining, *Legal Theory and Common Law* (Blackwell, 1986) 31

55 See ibid 32; Richard Fentiman, 'Legal Reasoning in the Conflict of Laws: An Essay in Law and Practice' in Werner Krawietz, Neil MacCormick and George Henrik von Wright (eds), *Prescriptive Formality and Normative Rationality in Modern Legal Systems: Festschrift for Robert S Summers* (Duncker & Humblot, 1994) 458.

56 Fentiman (n 55) 458.

57 Ibid 458. Part III explores this point in greater detail.

58 Ibid.

59 Sugarman (n 54) 30.

60 Ibid 31.

61 See ibid 29; Fiona Cownie, 'Are We Witnessing the Death of the Textbook Tradition in the UK?' (2006) 3 *European Journal of Legal Education* 75, 75.

62 See Sugarman (n 54) 32; Fentiman (n 55) 458.

63 Sugarman (n 54) 31; David Sugarman, 'A Special Relationship? American Influences in English Legal Education, c 1870–1965' (2011) 18 *International Journal of the Legal Profession* 7, 10.

64 Sugarman (n 54) 30.

65 Alan Rodger, 'The Codification of Commercial Law in Victorian Britain' (1992) 108 *Law Quarterly Review* 570, 570; Sir Roger Toulson, 'Law Reform in the Twenty-First Century' (2006) 26 *Legal Studies* 321, 321.

mid- to late-19th century — one which 'largely failed' in England[66] — emerged a standard structure for codifying legislation and legal treatises. Macaulay pioneered this standard structure in the Indian Penal Code — drafted in the late 1830s but which only came into operation in 1862 — that involved 'stating the law in general propositions accompanied by illustrations'.[67] Adaptations to this structure appeared in late-19th century legal treatises, such as in the works of Sir James Fitzjames Stephen, Mackenzie Chalmers, Frederick Pollock, and A V Dicey.

The codification 'experiment' reached its zenith in the last quarter of the 19th century with the result that several branches of commercial law were codified into statute. Codification was achieved primarily because of 'commercial lobbying' from key industry groups.[68] The success of this codifying legislation, some of which still survives today,[69] can also be attributed to the expertise of the authors chosen to draft the bills that became law. The Associated Chambers of Commerce and the Institute of Bankers engaged experts to draft 'clear and accessible commercial rules' in four predominant areas of 19th-century commercial activity: bills of exchange, factoring, sale of goods, and the law of partnership.[70] Mackenzie Chalmers, author of *Digest of the Law of Bills of Exchange* (1878), drafted the *Bills of Exchange Act 1882*[71] 'under instructions from the Institute of Bankers'.[72] The aim of the *Digest* — 'to reproduce the existing law… in a codified form' — was achieved.[73]

Chalmers' digest, which was an adaptation of Macaulay's standard design, had three key features: article, explanation, and illustration. Following the success of the 1882 Act, Chalmers drafted two other bills that became the *Sale of Goods Act 1893*[74] and the *Marine Insurance Act 1906*.[75] The draftsman of the *Partnerships Act*,[76] Frederick Pollock, was recruited to draft the partnerships bill following the publication of his legal textbook on the subject.[77] Pollock adopted the same structure used by Sir James Fitzjames Stephen in

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66 See comment in M D Chalmers, 'Experiment in Codification' (1886) 2 *Law Quarterly Review* 125, 125; Toulson (n 65) 321–2.

67 Frederick Pollock, *Digest of the Law of Partnership* (Stevens and Sons, 4th ed, 1888) iv.

68 Warren Swain, 'Codification of Contract Law: Some Lessons from History' (2012) 31 *University of Queensland Law Journal* 39, 45. See also Rodger (n 65) 578–9.

69 Examples include: *Bills of Exchange Act 1882*, 45 & 46 Vict, c 61; *Partnerships Act 1890*, 53 & 54 Vict, c 39; *Sale of Goods Act 1979* (UK); *compare Sale of Goods Act 1893*, 56 & 57 Vict, c 71.

70 Lord Irvine of Lairg, 'The Law: An Engine for Trade' (2001) 64 *Modern Law Review* 333, 335.

71 *Bills of Exchange Act 1882* (n 69).

72 M A Chalmers, *A Digest of the Law of Bills of Exchange* (Stevens and Sons, 2nd ed, 1881) iii.

73 Ibid.

74 *Sale of Goods Act 1893* (n 69).

75 *Marine Insurance Act 1906*, 8 Edw 7, c 41.

76 *Partnerships Act 1890* (n 69).

77 Pollock (n 67) 161.

Digest on the Law of Evidence and *Digest of the Criminal Code*. In adopting this structure, Pollock thought it 'almost superfluous to say that I agree with him in thinking the Indian Codes a desirable model for the exposition of English law'.[78]

The structural qualities of Dicey's *Conflict of Laws* were appealing to the legal profession.[79] Dicey chose a structure for the first edition of *Conflict of Laws* that was familiar to him: the same format that he used in his earlier treatise, *Law of Domicil*. Selected with a view to codification, this structure was first developed by Macaulay and improved upon by Sir James Fitzjames Stephen. In Dicey's *Law of Domicil,* the principles governing the law of domicile were 'systematically arranged' into rules, exceptions and 'when necessary, elucidated by comment and illustrations'.[80] The appearance of Dicey's *Conflict of Laws*

> as a general and comprehensive treatment of a relatively new subject expressed in the dogmatic form of a digest of principles and rules had the greatest influence on the course of judicial decision, for it satisfied urgent needs of its time, those for rationalisation of the system and proposals for its development.[81]

III JUDICIAL CITATION OF INSTITUTIONAL WRITERS IN 19TH CENTURY ENGLISH, IRISH AND SCOTTISH COURTS

A *Judicial Citation of Story's* Conflict of Laws

1 *Overview of Judicial Citation: Story's* Conflict of Laws

Between 1835 and 2013, 158 reported decisions of English, Irish, and Scottish decisions cited Story's *Conflict of Laws*. As **Figure 3.1** shows, judicial citation of Story's treatise was at its height in the 19th century. Since the first edition of Story's *Conflict of Laws* was published, Scottish and Irish courts have resorted to the treatise less frequently than English courts. This is probably best explained by the traditionally greater volume of litigation before English courts. From the 1900s, a gradual decline in the citation of Story's work in English courts is apparent because, from this point, Dicey's *Conflict of Laws* became the favoured text.

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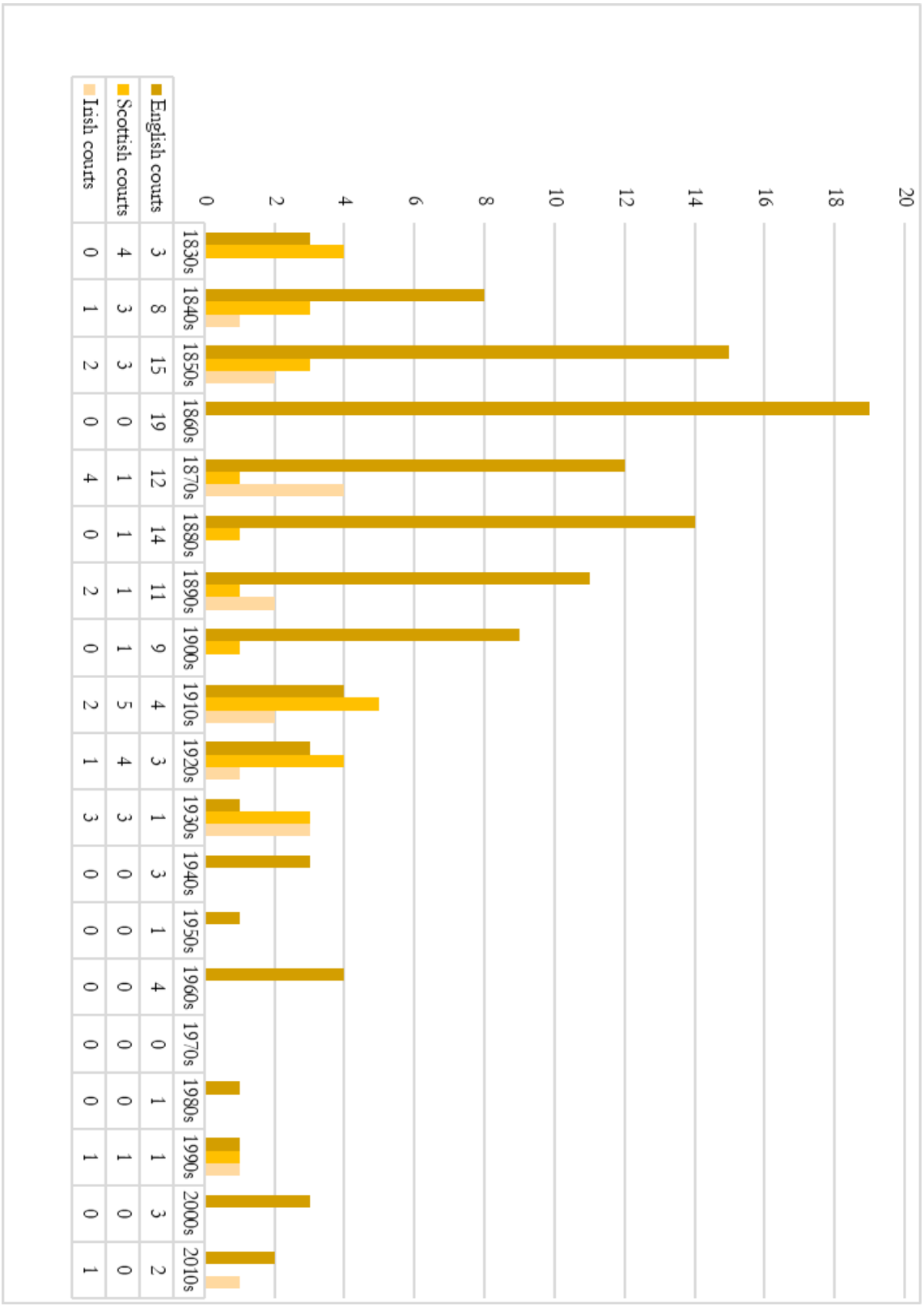
78 Ibid iii.

79 C G J Morse, 'Making English Private International Law' in James Fawcett (ed), *Reform and Development of Private International Law: Essays in Honor of Sir Peter North* (Oxford University Press, 2002) 282–5.

80 Dicey (1896) (n 4) v.

81 R H Graveson, 'Philosophical Aspects of the English Conflict of Laws' (1962) 79 *Law Quarterly Review* 337, 341–2.

Figure 3.1: Judicial citation of Story's *Conflict of Laws* in English, Irish and Scottish courts, 1835–2013



2 *Story as a Living Scholar*

During the author's lifetime,[82] Story's *Conflict of Laws* was cited in 57 English and Scottish decisions. Of these 57 decisions, 19 were Scottish,[83] three were Privy Council decisions,[84] and 35 were English.[85] In only 14 of these decisions, English and Scottish judges referred to Story's *Conflict of Laws*,[86] citing it as a general authority on a broad range of topics. These topics included limitation periods,[87] the law of domicile,[88] legitimation by subsequent marriage,[89] succession to property on death,[90] the exclusive application of the *lex fori* in procedural matters,[91] and the requirements of a common law marriage.[92]

It is significant that judicial citation of Story's *Conflict of Laws* took place during the author's lifetime. In the past, it was common for counsel and judges to avoid the citation of living authors by name or as authority.[93] During the first half of the 19th century,

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82 Joseph Story died on 10 September 1845 at Cambridge in Massachusetts.

83 *Lippmann v Don* (1836) 14 S 241; *Don v Lippmann* (1837) 5 Cl & F 1; 7 ER 303; *Southgate v Montgomerie* (1837) 15 S 507; *Munro v Munro* (1837) 16 S 18; *McDouall v Dalhousie* (1837) 16 S 6; *Cameron v Chapman* (1838) 16 S 907; *Kirkpatrick v Irvine* (1838) 16 S 1200; *Farrar v Leith Banking Company* (1839) 1 D 936; *Rutherford v Carruthers* (1839) 1 D 1109; *Lindsay v Paterson* (1840) 2 D 1373; *Ringer v Churchill* (1840) 2 D 307; *Brown v McDouall* (1840) 7 CL & F 817; *Allan v Glasgow's Trustees* (1842) 4 D 494; *White v Briggs* (1843) 5 D 1148; *Lusk v Elder* (1843) 5 D 1279; *Robertson v Burdekin* (1843) 6 D 17; *Alexander v Badenach* (1843) 6 D 322; *Arcus* (1844) 2 Broun 264; *Stewart and Wallace* (1845) 2 Broun 544.

84 *Clark v Mullick* (1840) 2 Moo Ind App 263; 18 ER 300; *Cockerell v Dickens* (1840) 2 Moo Ind App 353; 18 ER 334; *Cockerell v Dickens* (1840) 3 Moo PC 98; 13 ER 45.

85 Counted among the Scottish decisions are appeals to the House of Lords from the Court of Session.

86 *Huber v Steiner* (1835) 2 Bing NC 202; 132 ER 80; *Don v Lippmann* (n 83); *Southgate v Montgomerie* (n 83); *Munro v Munro* (n 83); *A-G v Bouwens* (1838) 4 M & W 171; 150 ER 1390; *Cameron v Chapman* (n 83); *Birtwhistle v Vardill* (1840) 7 Cl & F 895; 7 ER 1308; *Ringer v Churchill* (n 83); *Doe v Vardill* (1840) West HL 500; 9 ER 578; (1840) 6 Bing NC 385; 133 ER 148; *Johnstone v Beattie* (1843) 10 CL & F 42; 8 ER 657; *The General Steam Navigation Co v Guillou* (1843) 11 M & W 877; 152 ER 1061; *Robertson v Burdekin* (n 83); *R v Millis* (1844) 10 Cl & F 534; 8 ER 844; *Baron de Bode's Case* (1845) 8 QB 208; 115 ER 854.

87 *Huber v Steiner* (n 86) (Tindal CJCP)*; Don v Lippmann* (n 83) (Lord Brougham).

88 *Munro v Munro* (n 83) 44 (Lords Medwyn, Moncreiff and Cockburn), 61 (Lord Corehouse); *Ringer v Churchill* (n 83) 322 (Lord Medwyn).

89 *Munro v Munro* (n 83).

90 *Doe v Vardill* (n 86) 590 (Tindal CJCP); (1840) 6 Bing NC 385; 133 ER 148, 153 (Tindal CJCP).

91 *The General Steam Navigation Co v Guillou* (n 86) 1069 (Parke B).

92 *R v Millis* (n 86) 934–5 (Lord Campbell).

93 See *Donoghue v Stevenson* [1932] AC 563, 567 (Lord Buckmaster); Alfred Thompson Denning, 'The Restatement of the Law: Its Place in the English Courts' (1951) 37 *American Bar Association Journal* 329, 329; Gordon Bale, 'WR Lederman and the Citation of Legal Periodicals by the Supreme Court of Canada' (1993) 19 *Queen's Law Journal* 36, 51–2; Russell Smyth, 'The Citation Practices of the Supreme Court of Tasmania, 1905-2005' (2007) 26 *University of Tasmania Law Review* 34, 42; Alexandra Braun, 'Burying the Living – The Citation of Legal Writings in English Courts' (2010) 58 *American Journal of Comparative Law* 27.

In *R v Ion* (1852) 2 Den 475; 169 ER 588, the following exchange took place at 594:

'Metcalfe. That is going farther than the present case. There there would be an obtaining credit upon it. In the 11th edition of a work, formerly edited by one of your Lordships, Arch Crim Pl, by Welsby, Mr Welsby, who may be cited as authority, comments on the words, "utter or publish."

Pollock CB—Not yet an authority.

however, this historical convention was 'more honoured in the breach than in the observance'.[94] Lord Denning once suggested that the convention arose because living writers may intrude on the province of judges and shape the common law.[95] Another reason could be the 'non-authoritative' nature of living authors' work in the common law system.[96] However, common law judges — by acknowledging the accurateness of the principles in a living author's work — could indirectly violate this convention.[97] This supports Dicey's idea, explored in Chapter 4, that Story gained a special authority in the 19th century English courts. Story, as an American, clearly occupied a unique position in English courts. Though Story's treatises were not technically authority, Story's English counterparts clearly appreciated his legal expertise, particularly given his long tenure on the Supreme Court and his immense scholarly outputs.

During Story's lifetime, sections of his treatise were received into law.[98] Less than a year after *Conflict of Laws* was published in 1834, Story's right-remedy distinction for matters of substance and procedure was introduced into English law in *Huber v Steiner*.[99] Before Story's treatise was published, the distinction had received attention in the English courts but only through continental scholarship.[100] In *Huber v Steiner*, the Court of Common Pleas, in deciding whether a French limitation period was substantive or procedural, expressly relied upon the distinction in Story's newly published treatise. If the limitation period 'affected only the creditor's remedy, and not the merits of the contract' then the *lex fori* governed.[101] The *lex causae* would govern the rights of the parties if they were resident in the foreign jurisdiction while the limitation period was running there.[102] The House of Lords in *Don v Lippmann*, referring to the discussion in *Huber v Steiner*, approved the residence qualification that Story had advanced.[103] Story's distinction

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Metcalfe. It is no doubt a rule that a writer on law is not to be considered an authority in his lifetime. The only exception to the rule, perhaps, is the case of Justice Story.

Coleridge J—Story is dead.'

94 *R v Ion* (n 93) 594. See also Braun (n 93) 31.

95 See Denning (n 93) 329.

96 Braun (n 93) 40.

97 Ibid 37.

98 See *Huber v Steiner* (n 86) 83, 85 (Tindal CJ); Kurt H Nadelmann, 'An Appropriate Distinction in an English Citation' (1951) 38 *American Bar Association Journal* 253, 253.

99 See Llewelyn Davies (n 17) 50.

100 *British Linen Co v Drummond* (1830) 10 B & C 903; 109 ER 683 (Lord Tenterden CJ).

101 *Huber v Steiner* (n 86) 83 (Tindal CJCP); Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic* (Hilliard, Gray, and Co, 1st ed, 1834) 487–8.

102 *Don v Lippmann* (n 83) 309 (Lord Brougham).

103 Ibid.

received subsequent approval in *General Steam Ship Navigation Co v Guillou*[104] and on several other occasions after the author's death.[105]

Praise of Story's *Conflict of Laws* and its author was common during the author's lifetime. In *R v Millis*, Story was described as one of America's 'two greatest legal luminaries'.[106] In other decisions, the 'learned'[107] author was praised for his 'learning, acuteness, and accuracy'.[108] The treatise was 'admirable'.[109] Legal principles and distinctions drawn in Story's *Commentaries* were labelled as 'well founded',[110] 'excellent',[111] 'well digested',[112] 'well collated and observed upon',[113] and 'sound and just'.[114] The reported decisions imply that the treatise's authoritativeness resulted from its accurate and truthful account of existing English law.[115] By consolidating common law decisions with continental scholarship, Story's *Conflict of Laws* provided judges with an accessible source on private international law at a time when domestic authorities on it were either non-existent or scarce.[116] Positive descriptions continued after the author's death in 1845.

3 *Uses of Story's* Conflict of Laws*: Post-1845*

Following the author's death in 1845, judicial citation of Story's *Conflict of Laws* in English courts increased. For the rest of the 19th century, some of the leading uses of Story's *Conflict of Laws* included to reinforce general doctrine in passing, to highlight differences of opinion, and its use as an authority. In a late-19th century Irish decision, the judge observed that Story's treatises 'are always appealed to as of almost equivalent authority to actual decisions'.[117]

Of the first of these uses, the courts confirmed incidentally the accuracy of Story's statement of legal doctrine.[118] In *Leith v Leith*, Lord Cuninghame noted, before quoting

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104 (1843) 11 M & W 877; 152 ER 1061, 1069 (Parke B).
105 See, eg, *Ruckmaboye v Lulloobhoy Mottichund* (1852) 5 Moo Ind App 234; 18 ER 884; (1852) 8 Moo PC 4; 14 ER 2; *Jefferys v Boosey* (1854) 4 HL Cas 815; 10 ER 681, 683 (Lord Brougham); *The Zollverein* (1856) Sw 96; 166 ER 1038, 1039 (Dr Lushington); *Alverez de la Rosa v Prieto* (1864) 16 CB NS 578; 143 ER 1253, 1256 (Byles J); *The Halley* (1867–69) LR 2 A & E 3, 11, 12 (Sir Robert Phillimore).
106 *R v Millis* (n 86) 934 (Lord Campbell).
107 *Cameron v Chapman* (n 83) 914 n 12 (Lord Ordinary).
108 *Huber v Steiner* (n 86) 83 (Tindal CJCP).
109 *Birtwhistle v Vardill* (n 86) 1323 (Tindal CJCP); *Doe v Vardill* (n 86) 590 (Tindal CJCP).
110 *Huber v Steiner* (n 86) 83 (Tindal CJCP).
111 *Don v Lippmann* (n 83) 309 (Lord Brougham); *Munro v Munro* (n 83) 44 (Lords Medwyn, Moncrieff and Cockburn).
112 *Cameron v Chapman* (n 83) 914 n 12 (Lord Ordinary).
113 *Johnstone v Beattie* (n 86) 686 (Lord Cottenham).
114 *Cameron v Chapman* (n 83) 914 n 12 (Lord Ordinary).
115 See also Braun (n 93) 35–6.
116 See Forsyth (n 19) 98.
117 *Tighe v Tighe* [1877] 11 Ir Eq 203, 207 (Chatterton V-C).
118 See, eg, *R v Griffin* [1879] 4 LR Ir 497, 503 (Lawson J).

Story, that he was 'the best authority on' the question of land transfers complying with local formalities.[119] In another case, Lord Denman CJQB drew attention of counsel to an 'important note' in Story's text about illegality in contracts.[120] Dr Lushington did the same in *The Segredo* when considering whether a ship was sold out of urgent necessity.[121] Mid- to late-19th century judges, as in Story's lifetime, noted that '[a]ll the authorities are collected and very ably commented upon' or that the legal principles were 'so clearly stated' in Story's *Conflict of Laws*.[122]

Secondly, the courts indicated differences of opinion between Story and other treatise writers. In *Robertson's Trustee v Bairds*, the First Division of the Court of Session had to decide whether a Scottish seller of goods had a right of retention over property sub-purchased by another. The original buyer, having paid for the first order in England, owed money to the seller for subsequent purchases. Before delivery of the first order was effected, a Scottish buyer purchased the goods from the English buyer. Though a lien existed under Scots law, it did not under English law. Since the contract was concluded in England, Lord Cuninghame adopted Story's view that a court would not enforce a lien not found in the *lex loci contractus*: England.[123] Lord Ivory thought, contrary to Story, that the *locus solutionis* — Scotland — provided the law that applied to the enforcement of a contract.[124] The French author, Jean-Jacques Gaspard Foelix, disputed that the *lex loci contractus* regulated all incidents of a contract as Story had argued.[125] In another case, Story and Pardessus' treatment of the applicable law for bills of exchange was discussed but distinguished.[126] In *Gibbs v Fremont*, the Court of Exchequer held that Los Angeles' law applied to a bill of exchange drawn there once the defendant received notice of its dishonour in that jurisdiction. This was despite the view of Story that the indorsement of a bill of exchange in another place was a 'new drawing', while Pardessus considered that action was 'only a new drawing of the same bill'.[127]

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119 *Leith v Leith* (1848) 10 D 1137, 1187 (Lord Cuninghame).
120 *Bailey v Harris* (1849) 12 QB 905; 116 ER 1109, 1113 (Lord Denman CJ).
121 *The Segredo* (1853) 1 Sp Ecc & Ad 36; 164 ER 22, 34–5 (Dr Lushington).
122 *Bank of Australasia v Nias* (1851) 16 QB 717; 117 ER 1055, 1062 (Lord Campbell); *Duchess of Buckingham v Winterbottom* (1851) 13 D 1129, 1147 (Lord Murray).
123 *Robertson's Trustee v Bairds* (1852) 14 D 1010, 1019 (Lord Cuninghame).
124 Ibid 1021 (Lord Ivory).
125 Ibid 1020.
126 *Gibbs v Fremont* (1853) 9 Ex 25; 156 ER 11, 14 (Alderson B).
127 Ibid.

Thirdly, judges quoted tracts from Story's text as authority for general principles, particularly on domicile,[128] the substance-procedure distinction,[129] and general maxims of the field.[130] For domicile, courts cited Story on intention and residence required to acquire a domicile of choice,[131] to establish the revival of a domicile of origin doctrine,[132] to confirm that the *lex domicilii* governed succession to personal property on death,[133] and on the applicability of the *lex domicilii* to transfers of personal property.[134] Significant reliance was placed on Story to reach the conclusions in *Brook v Brook*[135] and in *British South Africa Co v Companhia de Moçambique* ('*Moçambique*').[136] In the latter case, the reasons of the Divisional Court, Court of Appeal and House of Lords bristle with references to Story's *Conflict of Laws*.[137]

Despite its overwhelmingly positive judicial reception, Story's *Conflict of Laws* was not immune from critical assessment during the 19th century. In *Forbes v Forbes*, Page-Wood V-C noted the absence of authorities on a principle in Story's *Conflict of Laws*, which had connected a married man's domicile with his family's residence over his place of business.[138] Later in the 1850s, Sir Richard Torin Kindersley V-C found fault in one of Story's Latin-to-English translations on the law of domicile, remarking that 'in order to give something intelligible he has sacrificed accuracy of translation'.[139] In *Brook v Brook*, Lord Wensleydale was unprepared to accept one of Story's exceptions to the traditional choice-of-law rule for marriage, the *lex loci celebrationis*, if Story meant to invalidate an

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128 *Jefferys v Boosey* (n 105) 727 (Parke B) (*lex domicilii* governing succession to personal property); *Forbes v Forbes* (1854) Kay 341; 69 ER 145, 155 (Page-Wood V-C); *Anderson v Laneuville* (1854) 2 Sp Ecc & Ad 41; 164 ER 296, 297–8 (Sir John Dodson); *Bremer v Freeman* (1857) 10 Moo PC 306; 14 ER 508, 527 (Lord Wensleydale).

129 See, eg, *Ruckmaboye v Lulloobhoy Mottichund* (n 105) 896–7 (Sir John Jervis) (statute of limitation); *The Zollverein* (n 105) 1039 (Dr Lushington); *Bremer v Freeman* (n 128) 527 (Lord Wensleydale).

130 See, eg, *Caldwell v Vanvlissengen* (1851) 9 Hare 415; 68 ER 571, 575 (Turner V-C).

131 See, eg, *Anderson v Laneuville* (n 128) 297–8 (Sir John Dodson); *Lord v Colvin* (1859) 4 Drew 366; 62 ER 141, 145 (Sir R T Kindersley V-C); *A-G v Kent* (1862) 1 Hurl & C 12; 158 ER 782, 787 (Martin B); *Re Capdevielle* (1864) 2 Hurl & C 985; 159 ER 408, 412 (Martin B).

132 See *Udny v Udny* (1866–69) LR 1 ScDiv 441, 451 (Lord Chancellor), 453, 454 (Lord Chelmsford), 459 (Lord Westbury).

133 *Anderson v Laneuville* (n 128) 297–8 (Sir John Dodson); *In the Goods of Margaret Gentili, Deceased* [1875] 9 Ir Eq 541, 543–4, 549.

134 *Jefferys v Boosey* (n 105) 683 (Parke B); *Lynch v Provisional Government of Paraguay* (1869–72) LR 2 P & D 268, 271 (Lord Penzance).

135 *Brook v Brook* (1861) 9 HL Cas 193; 11 ER 703, 710, 712 (Lord Campbell LC), 717, 718 (Lord Cranworth), 722, 723, 724 (Lord Wensleydale).

136 [1893] AC 602.

137 See, eg, *Companhia de Moçambique v British South Africa Co* [1892] 2 QB 358, 366 (Wright J), 394–5, 396, 398 (Lord Esher MR), 412 (Fry LJ), 419–20 (Lopes LJ); *British South Africa Co v Companhia de Moçambique* [1893] AC 602, 622–3, 623, 623–4, 624, 626–7 (Lord Herschell LJ), 631 (Lord Halsbury).

138 *Forbes v Forbes* (n 128) 155 (Page-Wood V-C).

139 *Lord v Colvin* (n 131) 145 (Sir R T Kindersley V-C).

incestuous marriage only if it was classified as such 'in universal Christendom'.[140] On the whole, however, such criticisms were uncommon.

4 *Derivative Citations to Story's* Conflict of Laws *in the 20th and 21st Centuries*

Most references to Story's treatise in the 20th and 21st centuries have been derivative citations — that is, to leading authorities relying upon Story's *Conflict of Laws*. Quotations in 20th and 21st century decisions drawn from *Brook v Brook*,[141] *Freke v Lord Carbery*,[142] *Huntington v Attrill*,[143] and *Moçambique*[144] attest to Story's continued legacy.

Great pains were taken in three modern English decisions to highlight the intellectual debt owed to Story's *Conflict of Laws* in the House of Lords' formulation of the *Moçambique* rule.[145] In *Lucasfilm Ltd v Ainsworth*, Lord Walker JSC and Lord Collins JSC expressly acknowledged this debt, noting that '[t]he speeches of Lord Herschell LC and Lord Halsbury (and, in the Court of Appeal, of Lord Esher MR, whose dissenting judgment was upheld in the House of Lords) are substantially based on *Story's Conflict of Laws*'.[146] In two earlier decisions, the debt was borne out through the courts' quotation of extracts from *Moçambique* relying upon Story's *Conflict of Laws*.[147] Derivative citations of Story's work highlight that his scholarship has shaped modern doctrine in private international law, even if that influence is now concealed within the reasons of leading judicial authorities.

B *Judicial Citation of Westlake's* Private International Law

1 *Overview of Judicial Citation: Westlake*

As **Figure 3.2** bears out, the citation of Westlake's *Private International Law* in English, Irish and Scottish courts has been negligible compared with the number of judicial

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140 *Brook v Brook* (n 135) 723 (Lord Wensleydale).

141 *Re Bozzelli's Settlement; Husey-Hunt v Bozzelli* [1902] 1 Ch 751, 754, 755, 757 (Swinfen Eady J); *Ogden v Ogden* [1908] P 46, 77 (Sir Gorell Barnes P); *Swifte v Swifte* [1910] 2 IR 140, 148 (Sir Andrew Porter MR); *Cheni v Cheni* (n 52) 99 (Sir Jocelyn Simon P); *Westminster City Council v C* [2009] 2 WLR 185, 208 (Wall LJ); *HAH v SAA* [2010] 4 IR 1, 35 [78] (Dunne J).

142 *Rea v Rea* [1902] 1 IR 451, 461 (Sir Andrew Porter MR); *Macdonald v Macdonald's Executrix* 1931 SC 644, 650 (Lord Hunter).

143 *R v Owen* [1957] 1 QB 174, 178 (Donovan J); *A-G (New Zealand) v Ortiz* [1982] QB 349.

144 *The Tolten* [1946] P 135, 141 (Scott LJ), 165 (Somervell LJ), Cohen LJ (168); *Cheni v Cheni* (n 52) 93, 94, 95, 96, 97, 98 (Sir Jocelyn Simon P); *Tyburn Productions Ltd v Conan Doyle* [1991] Ch 75, 81, 83 (Vinelott J); *Pearce v Ove Arup Partnership Ltd* [2000] Ch 403, 426, 429, 430, 431, 434 (Roch LJ); *Lucasfilm Ltd v Ainsworth* [2012] 1 AC 208, 230 [56]–[57] (Lord Walker JSC and Lord Collins).

145 *Tyburn Productions Ltd v Conan Doyle* (n 144) 81, 83 (Vinelott J); *Pearce v Ove Arup Partnership Ltd* [2000] Ch 403, 426, 429, 430, 431, 434 (Roch LJ); *Lucasfilm Ltd v Ainsworth* (n 144) 230 [56]–[57] (Lord Walker JSC and Lord Collins).

146 *Lucasfilm Ltd v Ainsworth* (n 144) 230 [56]–[57] (Lord Walker JSC and Lord Collins).

147 *Tyburn Productions Ltd v Conan Doyle* (n 144) 81, 83 (Vinelott J); *Pearce v Ove Arup Partnership Ltd* (n 144) 426, 429, 430, 431, 434 (Roch LJ).

citations to the private international law works of Story or Dicey. Between 1882 and 1999, 50 English, Irish, and Scottish reported decisions cited Westlake's *Private International Law* for guidance on topics ranging from the proper law of the contract to the requirements for a valid international marriage.[148] Use of Westlake was more frequent in England, chiefly between the 1890s and the 1920s. Except for the six decisions in the 1930s, Scottish courts seem to be underwhelmed by, or unaware of, Westlake's treatise.[149] More unremarkable still are the three Irish cases citing Westlake's *Treatise*.[150] Based only on citation count, Westlake's influence would appear to be small but, in practice, the truth of this is tested in two areas: the proper law of the contract and his criticism of Story's 'civilised nations' gloss on common law private international law.

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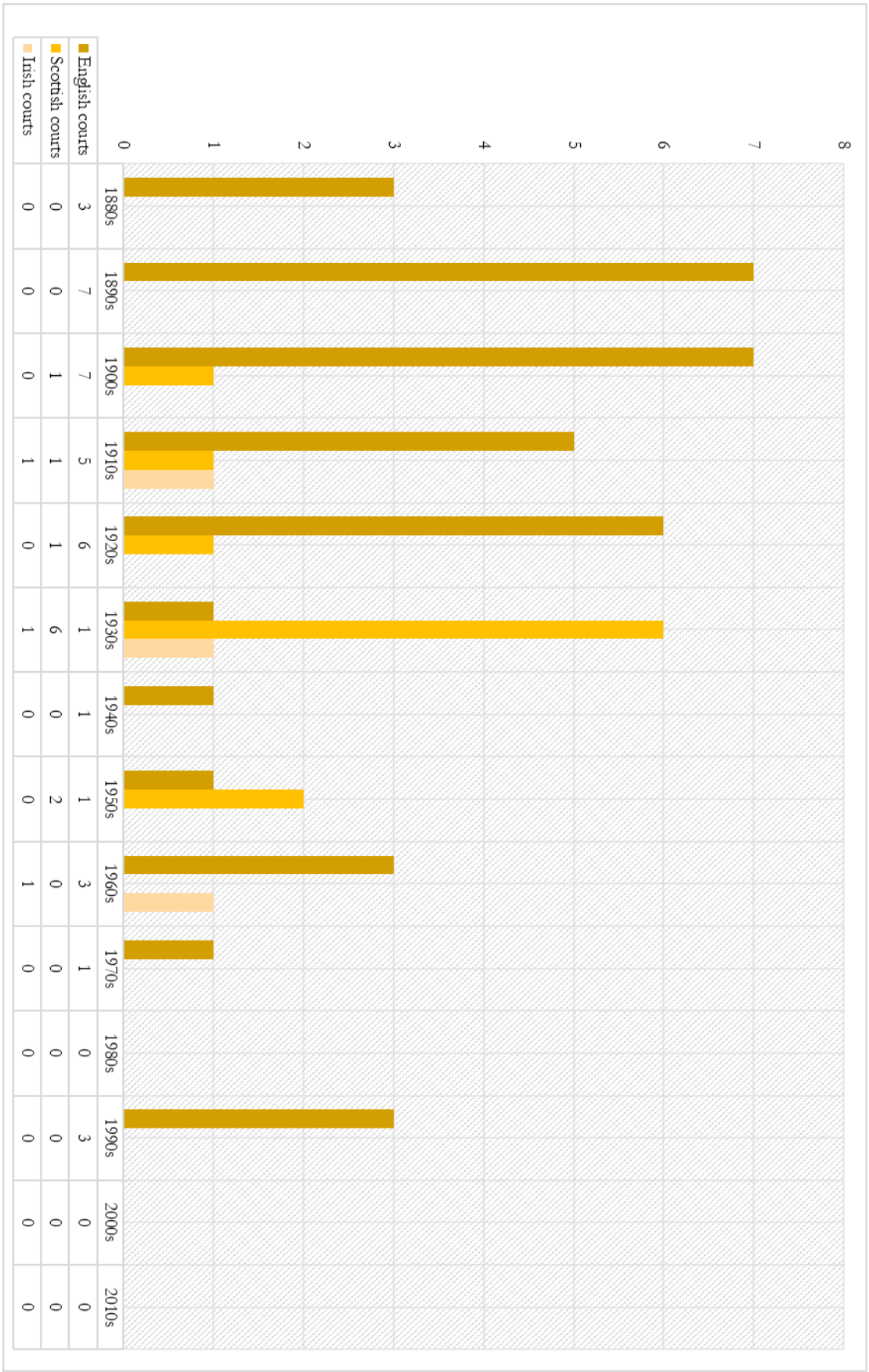
[148] **English cases:** *Royal Boskalis* (n 52); *Red Sea Insurance* (n 52); *Arab Monetary Fund v Hashim* (Chancery Division, Chadwick J, 11 October 1994); *Coast Lines Ltd v Hudig & Veder Chartering NV* (n 52); *Henderson v Henderson* (n 52); *Cheni v Cheni* (n 52); *Re Langley's Settlement Trusts* (n 52); *Kochanski v Kochanska* (n 52); *Boissevain v Weil* (n 52); *Re Vocalion (Foreign) Ltd* (n 52); *Republica de Guatemala v Nunez* (n 52); *Duff Development* (n 52); *Re Berchtold* (n 52); *Re Lorillard* (n 52); *Re British American Continental Bank Ltd* (n 52); *Celia v Volturno* (n 52); *Casdagli v Casdagli* [1919] (n 52); *Dynamit Actien-Gesellschaft v Rio Tinto Co Ltd* [1918] AC 260; *Casdagli v Casdagli* [1918] (n 52); *Re Suarez* (n 52); *R v Superintendent of Albany Street Police Station* (n 52); *Moulis v Owen* [1907] 1 KB 746; *Kelly v Selwyn* (n 51); *Re Fitzgerald* [1904] (n 48); *Kaufman v Gerson* (n 51); *Re Fitzgerald* [1903] (n 48); *Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co* (n 48); *Re Martin; Loustalan v Loustalan* (n 51); *Pemberton v Hughes* [1899] Ch 781; *Armytage v Armytage* (n 48); *South African Breweries Ltd v King* [1899] 2 Ch 173; *Re Hayward* [1897] Ch 905; *Mayor, Alderman, and Citizens of Canterbury v Wyburn* (n 51); *Heinemann & Co v S B Hale & Co* [1891] 2 QB 83, 87 (Cave J)*; Gibbs (Antony)* (n 51) 407 (Lord Esher MR), 410 (Lindley LJ); *Abd-ul-Messih v Farra* (1888) 13 App Cas 431, 440; *Re Kloebe* (n 50); *De Geer v Stone* [1882] 22 Ch D 243; **Scottish cases:** *Kennion's Executors* (n 52); *MacDougall v Chitnavis* (n 52); *Dalziel v Coulthurst's Executors* (n 52); *Naftalin [No 1]* (n 52); *Naftalin [No 2]* (n 52); *Grant v Grant* (n 52); *Lendrum v Chakravarti* (n 52); *Lord Advocate v Jaffrey* 1919 SC 684; *Hope Vere v Hope Vere* 1n 48); **Irish cases:** *Rainford v Newell-Roberts* (n 52); *Dharamal v Lord HolmPatrick* (n 52); *McSweeney v Murphy* (n 52).

[149] *Kennion's Executors* (n 52); *MacDougall v Chitnavis* (n 52); *Dalziel v Coulthurst's Executors* (n 52); *Naftalin [No 1]* (n 52); *Naftalin [No 2]* (n 52); *Grant v Grant* (n 52); *Lendrum v Chakravarti* (n 52); *Lord Advocate v Jaffrey* 1919 SC 684; *Hope Vere v Hope Vere* (n 48).

[150] *Rainford v Newell-Roberts* (n 52); *Dharamal v Lord HolmPatrick* (n 52); *McSweeney v Murphy* (n 52).

Figure 3.2: Judicial citation of Westlake's *Private International Law* in English, Irish and Scottish courts, 1882–1999



2 *Areas of Influence: The Proper Law of the Contract*

The 'closest and most real connection' test for determining the proper law of the contract in the absence of express choice originated in Westlake's *Treatise*.[151] Beginning with the revised first (or second) edition (1880), the *Treatise* had favoured a more nuanced rule for determining the governing law in contractual cases, instead of the automatic application of the *lex loci contractus*.[152] Based on Lord Mansfield's dictum in *Robinson v Bland*,[153] and influenced by Savigny's search for the proper seat,[154] Westlake suggested that the contractual *lex causae* had to be selected on more 'substantial considerations, preference being given to the country with which the transaction has the most real connection, and not to the law of the place of contract as such'.[155]

Westlake's test was accepted by another English private international lawyer, Cheshire,[156] whose formulation was taken up in *Boissevain v Weil* and in the Privy Council decision of *Bonython v Commonwealth of Australia*.[157] In *Bonython*, Lord Simonds, in adopting Cheshire's formulation,[158] defined proper law to mean 'the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connexion'.[159] The formulation became part of English private international law in 1961.[160] But, it was not until 1972 that Westlake's hand in shaping the proper law doctrine was finally judicially acknowledged.[161]

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151 See *Coast Lines Ltd v Hudig & Veder Chartering NV* (n 52) 46 (Megaw LJ). See also F A Mann, 'The Proper Law in the Conflict of Laws' (1988) 36 *International and Comparative Law Quarterly* 437, 443–4.

152 John Westlake, *Treatise on Private International Law* (William Maxwell & Son, 1st ed rev, 1880) 237; John Westlake, *Treatise on Private International Law* (Sweet and Maxwell, 3rd ed, 1890) 258; John Westlake and Alfred Frank Topham, *Treatise on Private International Law* (Sweet & Maxwell, 4th ed, 1905) 280, 285; John Westlake and Norman Bentwich, *Treatise on Private International Law* (Sweet & Maxwell, 6th ed, 1922) 288, 289; Norman Bentwich, *Westlake's Treatise on Private International Law* (Sweet & Maxwell, 7th ed, 1925) 304.

153 (1760) 1 Wm Bl 256; 96 ER 141, 141 (Lord Mansfield CJ). Paralleling Huber, Lord Mansfield suggested that the *lex loci contractus* would be displaced if contractual parties intended another place to govern.

154 Westlake (1880) (n 152) 237.

155 Ibid.

156 G C Cheshire, *Private International Law* (Clarendon Press, 3rd ed 1947) 312.

157 [1949] 1 KB 482, 490, 491 (Lord Denning); *Bonython v Commonwealth of Australia* [1951] AC 201, 219 (Lord Simonds). See also Joost Blom and Elizabeth Edinger, 'The Chimera of the Real and Substantial Connection Test' (2005) 38 *University of British Columbia Law Review* 373, 374–5.

158 *Bonython v Commonwealth of Australia* (n 78) 219 (Lord Simonds).

159 Ibid. See also *BSE Trading Ltd v Agroslavonija Work Organisation for Domestic and Foreign Trade* (High Court of Justice, Queen's Bench Division, Commercial Court, Thomas J, 10 December 1999), in which Westlake appears in a quote taken from the 12th edition of Dicey & Morris on the 'closest and most real connection' test.

160 *Re United Railways of Havana and Regla Warehouses Ltd* [1961] AC 1007, 1068 (Denning LJ), 1081 (Lord Morris of Borth-y-Gest).

161 *Coast Lines Ltd v Hudig & Veder Chartering NV* (n 52) 46 (Megaw LJ).

3 *Areas of Influence: Criticism of 'Civilised Nations' Concept*

Criticism of Story's 'civilised nations' gloss on marriage is another way that Westlake's *Treatise* has found its way into the law reports. In Story's *Conflict of Laws*, the *lex loci celebrationis* was given as the choice of law rule for marriage, though that was qualified.[162] One qualification to it was polygamy and incest; however, 'care must be taken to confine the doctrine to such cases, as by the general consent of Christendom are deemed incestuous'.[163] This and two other qualifications were discussed at length in *Brook v Brook*. Because the House of Lords' decision in *Brook v Brook* was the leading case for bifurcating the marriage choice of law rule,[164] Story's exceptions had re-emerged in the law reports as derivative citations.[165] Westlake was highly critical of this civilised nations gloss, arguing that '[t]here was no necessity to make an exception… because no country with which the communion of private international law exists has such marriages'.[166] Sir Jocelyn Simon P accepted the validity of this criticism — as Dicey was deign to do after the first edition's publication — in *Cheni v Cheni*.[167]

C *Judicial Citation of Dicey's* Conflict of Laws

The first judicial reference to Dicey's *Conflict of Laws* can be found in the 1898 decision of *Armytage v Armytage*.[168] That same year a Privy Council opinion approved Dicey's statement of the principle, *mobilia sequuntur personam*, and the personal connection required for it.[169]

From this point, judicial citation of the work has gradually increased.[170] Since 1898, more than 1000 Scottish, Irish and English decisions have cited Dicey's *Conflict of Laws*. It is thought that the convenience of the 'rule-commentary based format' has been part of its ongoing appeal to the legal profession and the judiciary.[171] Kahn-Freund considered

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162 Story (1834) (n 101) 102.

163 Ibid 104.

164 The reasons for doubting subsequent judicial and scholarly interpretations of *Brook v Brook* were explored in Chapter 3.

165 See, eg, *Re Bozzelli's Settlement; Husey-Hunt v Bozzelli* (n 141) 754–5 (Swinfen Eady J); *Ogden v Ogden* (n 141) 59, 70 (Sir Gorell Barnes P).

166 See, eg, Westlake and Topham (1905) (n 152) 60; Westlake and Bentwich (1922) (n 152) 58. See also *Cheni v Cheni* (n 52) 96 (Sir Jocelyn Simon P).

167 Ibid.

168 *Armytage v Armytage* (n 48) 186, 192 (Gorell Barnes J).

169 *Harding v The Commissioners of Stamp for Queensland* [1898] AC 769, 774 (Lord Hobhouse). Cf Andrew Dickinson (n 7) 314. Dickinson identifies *South African Breweries v King* (n 148) 179, 182 as '[t]he first traceable judicial approval of a statement in the work'; however, there is the earlier Privy Council opinion of *Harding*.

170 In 2001, Rogerson pointed out that Dicey's 'work has been referred to in at least 480 reported judgments, usually favourably'. See Rogerson (n 7) 221.

171 Dickinson (n 7) 317; William W Park, 'Rules and Standards in Private International Law: The Conflict of Laws, *Dicey, Morris and Collins*, 14th edition' (2007) 73 *Arbitration* 441, 441–2. Cf Rogerson (n 7) 221.

the format to have produced a 'private Code' of this field of law.[172] In addition, Foster observed that Dicey's *Conflict of Laws* was dangerous because courts were prone to take its 'always pontifical' rules for granted.[173] Indeed, in reviewing the 11th edition of the text, Jaffey reprised this point by observing that

> [t]he correctness of the rule is taken for granted. The relevant cases (admittedly few) are not discussed, nor is there any attempt to justify the rule. Not to apply the *Dicey & Morris* rule verges on the *per incurium*. If *Dicey & Morris* is presumed to be correct, it is not actually binding. … Perhaps the use of numbered rules, which could hardly be ventured today by a book of lesser reputation, increases the tendency of the courts to rely on the work, *for rules are easy to cite, and their form may provide a haven of certainty in a sea of doubt or controversy.*[174]

1 *Overview of Judicial Citation Practice: Dicey*

By looking at citation counts alone, **Figure 3.3** shows an increasing dependence on Dicey's *Conflict of Laws* with a marked upsurge towards the end of the 20th century. From the 1980s, judicial citation of Dicey's *Conflict of Laws* has demonstrably increased in England.

Two general observations may be made to explain this increase. First, law reporting has in recent decades expanded beyond the traditional law report series. More generalist and subject-specific law reports have emerged. Moreover, the internet has given the public and the legal profession greater access to reasons for judgment.[175] In particular, courts in common law jurisdictions began to publish their reasons for judgment online from the early 2000s.

As a result, the data in **Figure 3.3** extending from the early 2000s to 2017 is a reflection of the modern dependence on information technology. It includes unreported cases (official transcripts),[176] cases reported in official law report series (ICLR), cases reported

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172 O Kahn-Freund, *General Problems of Private International Law* (1974) 143 *Recueil des Cours* 139, 279, 280, 281; See also Morse (n 79) 283.

173 J G Foster, 'Some Defects in the English Rules of Conflict of Laws' (1935) 16 *British Yearbook of International Law* 84, 102–3.

174 Jaffey (n 7) 472, 473 (emphasis added).

175 See Petal Kinder, 'The Adoption and Use of Computerised Legal Research Information in Australia' (2005) 30 *Canadian Law Library Review* 68; Justice Stephen Gageler, 'What is Information Technology Doing to the Common Law?' (2014) 39 *Australian Bar Review* 146.

176 See, eg, *Transoceanic Shipping Co Ltd v Avery Midgen & Co* (Court of Appeal in England, Stephenson LJ and Sir Stanley Rees, 8 April 1981); *Janred Properties Ltd v Ente Nazionale Italiano Per Il Turismo (The Italian State Tourist Office)* (Court of Appeal in England, Dunn LJ and Slade LJ, 14 July 1983); *The Forum Craftsman* (Court of Appeal in England, Lord Justice Ackner, Lord Justice Browne-Wilkinson and Sir John Megaw, 20 December 1984); *Cramer v Cramer* (Court of Appeal in England, Stephen Brown LJ, Mustill LJ and Balcombe LJ, 1 January 1986); *Re the Evidence (Proceedings in Other Jurisdictions) Act 1975 v Re A Civil Action Now Pending Before the City Court of Sandefjord, Norway* (Court of Appeal in England, Kerr LJ, Glidewell LJ and Ralph Gibson LJ, 12 February 1986); *Adams v Cape Industries Plc* (Court of Appeal in England, Sir Nicolas Browne-Wilkinson V-C, Parker LJ and Ralph Gibson LJ, 18 March 1987);

in unofficial law report series,[177] and cases with a court-designated neutral citation after 2001.[178] Prior to the 1980s, very few non-ICLR law report series carried cases referring to Dicey.[179] In the 2000s, just over 70 per cent of the total number of English cases citing Dicey were unreported cases, in unofficial law report series, or neutral citations. For the 2010s, this figure was closer to 80 per cent.[180]

Secondly, from the early 1990s an increasing number of cases have concerned the interpretation of European Union instruments on private international law. It would appear that Dicey, Morris and Collins' *Conflict of Laws* was one of the few textbooks that comprehensively addressed the interpretation of these instruments.[181] For example, the 11th edition, published in 1987, dealt with the *Civil Jurisdiction and Judgments Act 1982* (UK) that implemented the *Brussels Convention* into British law. The implementation of the *Brussels Convention* '[brought] with it a mass of case law from the European Court, all fully and expertly expounded in both works'.[182]

The logical consequence is that counsel and judges have placed heavy reliance on Dicey, Morris and Collins' *Conflict of Laws* to cope with unsettled or new terrain brought about by the United Kingdom's entry into the European Economic Community in 1973. Before the Rome I Regulation took effect on 17 December 2009, much judicial attention was given to the interpretation of the Rome Convention in sch 1 to the *Contracts (Applicable Law) Act 1990* (UK).[183] Confidence was thus placed on the correctness of its treatment in Dicey, Morris and Collins' *Conflict of Laws*.

Two explanations may be suggested for the lesser weight given to Dicey in Scotland. First, lower volumes of international litigation in Scottish courts may account for the disproportionately large gulf between the citation of Dicey in English courts and in

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Naviera Amazonica Peruana SA v Compania Internacional De Seguros Del Peru (Court of Appeal in England, Kerr LJ, Russell LJ, Sir Denys Buckley, 10 November 1987).

177 See, eg, *Union Bank of the Middle East v Clapham* (1981) 125 SJ 497; *Flores v Scott* [1984] RTR 363; *Def Lepp Music v Stuart-Brown* [1986] RPC 273; *Degazon v Barclays Bank International Ltd* [1988] 1 FTLR 17.

178 See, eg, *Morgan Grenfell & Co Ltd v SACE* [2001] EWCA Civ 1932; *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd* [2001] EWCA Civ 2019; *Kuwait Oil Tanker Company SAK v Qabazard* [2002] EWCA Civ 34.

179 See especially *Zanelli v Zanelli* [1948] 64 TLR 556; *Re Wallach* [1950] 1 All ER 199; *Redwood Music Ltd v Francis, Day & Hunter Ltd* [1978] RPC 429.

180 As at 1 March 2017.

181 Other textbooks dealing with these changes included Cheshire and North and A E Anton and P R Beaumont, *Private International Law: A Treatise from the Standpoint of Scots Law* (W Green, 2nd ed, 1990) 248–59.

182 Jaffey (n 7) 471.

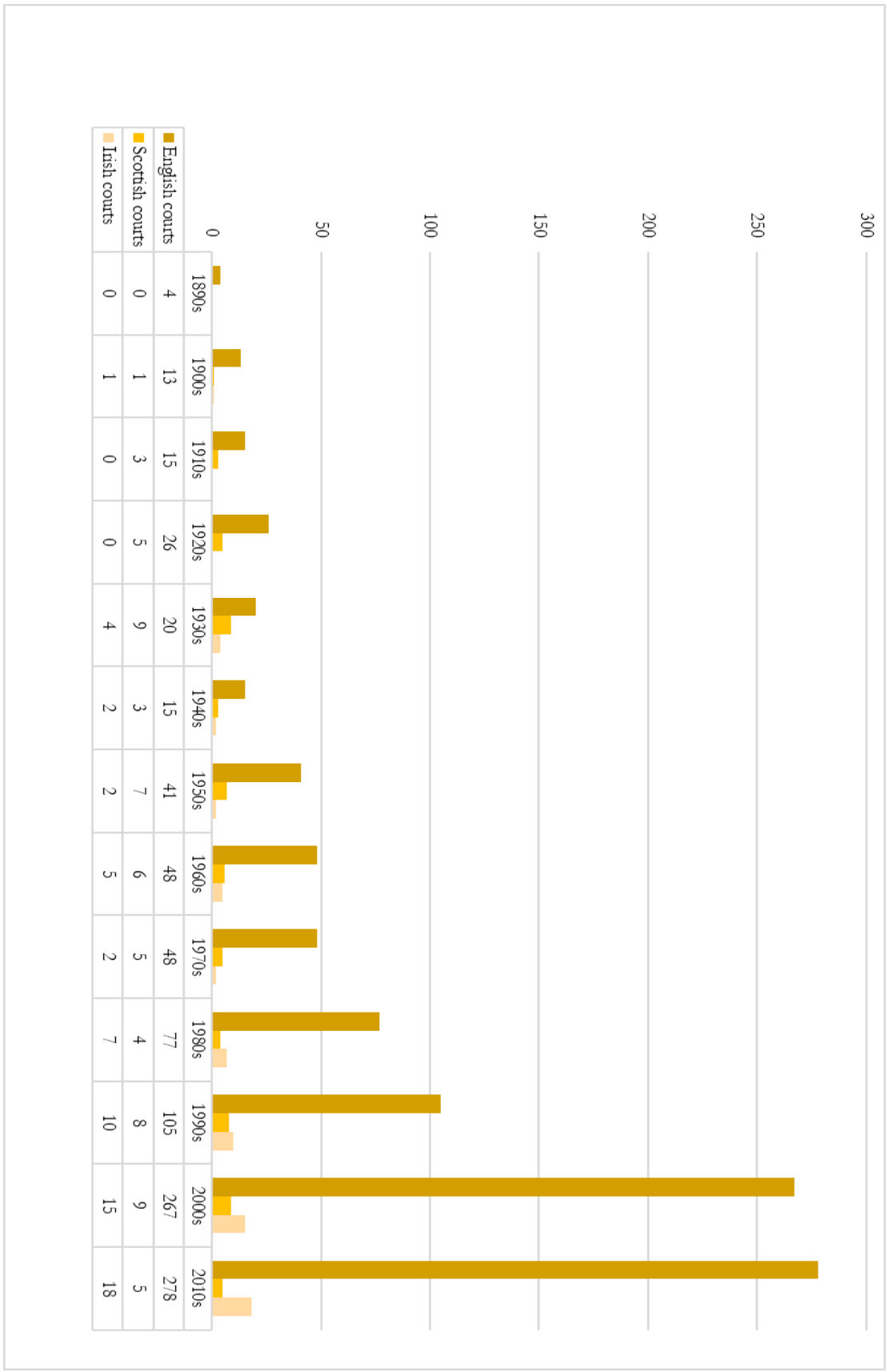
183 See, eg, *Bank of Baroda v Vysya Bank Ltd* [1994] CLC 41; *Egon Oldendorff v Libera Corp [No 2]* [1996] 1 Lloyd's Rep 380, 387; *Canada Trust Co v Stolzenberg [No 2]* [1998] 1 WLR 547, 556; *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH* [2001] 1 WLR 1745, 1748 [10] (Morison J); [2001] EWCA Civ 2019, [18], [25], [37], [43]; [2002] CLC 533, [25]–[26]; *Halpern v Halpern [Nos 1 and 2]* [2008] QB 195, 208–9 [21].

Scottish courts. Secondly, the publication of a Scottish textbook, Anton's *Private International Law*,[184] in 1967 may have contributed to the gradual displacement of Dicey's *Conflict of Laws*, the citation of which was already modest.[185]

[184] A E Anton, *Private International Law: A Treatise from the Standpoint of Scots Law* (W Green, 1st ed, 1967); Anton and Beaumont (n 181); Paul Beaumont and Peter McEleavy, *Anton's Private International Law* (Thomson/W Green, 3rd ed, 2011).

[185] Not long after the first edition's publication in 1967, Anton's *Private International Law* was judicially cited: see, eg, *Hoy v Hoy* 1968 SC 179, 183 (Lord Robertson); *Scottish National Orchestra Society Ltd v Thomson's Executor* 1969 SLT 325, 327, 328, 329 (Lord Robertson); *Brodin v A/R Seljan* 1973 SC 213, 217, 219, 220 (Lord Kissen).

Figure 3.3: Judicial citation of Dicey's *Conflict of Laws* in English, Irish and Scottish courts, 1898–2017



2 *Uses of Dicey's* Conflict of Laws*, 1898–2017*

The judicial uses of Dicey's *Conflict of Laws* may be distilled into five areas. First, judges are prone to simply 'adopt as correct' statements or rules within Dicey's *Conflict of Laws*.[186] Here, Jaffey's earlier noted criticism has force. Before or after introducing a quotation from Dicey's *Conflict of Laws*, judges usually declare that Dicey's statement of law is correct. In *Ralli Brothers v Compañia Naviera Sota y Aznar*, Dicey's rule on unlawful performance in the *lex loci solutionis* was accepted.[187] Lord Sterndale MR and Scrutton LJ prefaced their quotations by opining that 'the law is correctly stated by Professor Dicey'.[188] Likewise, responding to an agreement alleged to be *contra bones mores*, Lord Sorn in *Luszczewska v Luszczewska* accepted as correct the law 'so stated in Dicey' that courts would not 'apply any foreign law, if and in so far as its application would lead to results contrary to the fundamental principles of public policy of the *lex fori*'.[189] Similarly, in *Red Sea Insurance Co Ltd* v *Bouygues*, Dicey's reformulation of rule 203 — the double actionability rule — was endorsed as 'a correct statement of the law'.[190]

A second use, which is related to the first, is to cite Dicey as general support for a legal proposition: 'see Dicey'. This use started with the first judicial citation of Dicey and has continued throughout the 20th and 21st centuries.[191] Legal propositions concerning the

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186 See, eg, *Ralli Brothers v Compañia Naviera Sota y Aznar* [1920] 2 KB 287, 291 (Lord Sterndale MR), 295 (Warrington LJ), 300 (Scrutton LJ); *Re Korvine's Trust; Levashoff v Block* [1921] 1 Ch 343, 347–8 (Eve J); *Foster v Driscoll* [1929] 1 KB 470, 497 (Scrutton LJ); *Kleinwort, Sons & Co v Ungarische Baumwolle Industrie Aktiengesellschaft & Hungarian General Creditbank* [1939] 2 KB 678, 696–7 (du Parcq LJ); *Re Delhi Electric Supply and Transaction Co Ltd* [1954] Ch 131, 156 (Evershed MR); *Re Langley's Settlement Trusts* (n 52) 555 (Lord Evershed MR), 558 (Donovan LJ); *Re Flynn, deceased; Flynn v Flynn* [1968] 1 WLR 103, 115 (Megarry J); *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1970] AC 583, 612 (Viscount Dilhorne); 616 (Lord Wilberforce); *International Tank and Pipe SAK v Kuwait Aviation Fuelling Co KSC* [1975] QB 224, 232 (Denning MR), 234 (Browne LJ); *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1979] AC 508, 535, 541 (Lord Wilberforce); 542 (Lord Fraser of Tullybelton); *Coupland v Arabian Gulf Oil Co* [1983] 1 WLR 1136, 1147 (Hodgson J).

187 *Ralli Brothers* (n 186) 291 (Lord Sterndale MR), 295 (Warrington LJ); 300 (Scrutton LJ).

188 Ibid 291 (Lord Sterndale MR), 300 (Scrutton LJ).

189 *Luszczewska v Luszczewska* 1953 SLT (Notes) 73 (Lord Sorn).

190 *Red Sea Insurance* (n 52) 199, 206, 207 (Lord Slynn of Hadley).

191 See, eg, *Armytage v Armytage* (n 48) 186 (Gorell Barnes J); *Re Martin; Loustalan v Loustalan* (n 51) 232 (Lindley MR); *The Attorney-General v The Jewish Colonization Association* [1901] 1 QB 132, 142 (Stirling LJ); *Moulis v Owen* (n 148) 751 (Collins MR); *Emanuel v Symon* [1908] 1 KB 302, 306–7 (Lord Alverstone CJ); *British South Africa Company v De Beers Consolidated Mines Ltd* [1910] 2 Ch 502, 523 (Kennedy LJ); *R v Local Government Board; Ex parte Arlidge* [1914] 1 KB 160, 199–200 (Hamilton LJ); *Tingley v Müller* [1917] 2 Ch 144, 173 (Scrutton LJ); *Casdagli v Casdagli* [1918] (n 52) 109 (Scrutton LJ); *Guaranty Trust Company of New York v Hannay & Co [No 2]* [1918] 2 KB 623, 635 (Pickford LJ); *Sedgwick Collins & Co v Rossia Insurance Co of Petrograd Employers' Liability Assurance Corporation* [1926] 1 KB 1, 16 (Sargant LJ); *Von Lorang v Administrator of Austrian Property* 1926 SC 598, 612 (Lord President Clyde); *Hannah v Hannah* 1926 SLT 370 (Lord Moncrieff); *Lendrum v Chakravarti* (n 52) 102 (Lord Mackay); *Re Ross; Ross v Waterfield* [1930] 1 Ch 377, 406 (Luxmoore J); *Re Russian Bank for Foreign Trade* [1933] Ch 745, 768 (Maugham J); *Naftalin [No 1]* (n 52) 32 (Lord Moncrieff); *The Njegos* [1936] P 90, 102 (Sir Boyd Merriman P); *Scott v Scott* 1937 SLT 632, 633 (Lord Russell); *The State (Dowling) v Brennan [No 1]* [1937] 1 IR 483, 506 (Gavan Duffy J); *Spain v National Bank of Scotland* 1939 SC 413, 421 (Lord Jamieson).

scope of the natural justice defence for resisting the enforcement of foreign judgments,[192] the proper law for immovable and movable property,[193] and proof of foreign law[194] have all been supported with reference, not to leading authorities, but to Dicey instead.[195] In *Armitage v Armitage*, Dicey's first edition was used as general support for the legal principle that personal status generally depends on the *lex domicilii*.[196] Judges have supported the general principle that the respective antenuptial domiciles of each matrimonial party governs capacity to marry with statements from Dicey.[197] The text's commentary on public policy — for example, as a device used exceptionally to refuse recognition to a foreign adoption or to a foreign judgment — have also received the imprimatur of judges.[198]

Another common use is for a rule in Dicey to be discussed because it was put in issue by counsel.[199] For this use, courts invariably summarise submissions concerning an interpretation of legal principle in Dicey's *Conflict of Laws*. In *Republica de Guatemala v Nunez*, the Court of Appeal had to decide whether the law of England or Guatemala governed the validity of an assignment of money to the appellant, Nunez, who was a minor. The correctness of rule 153 of Dicey's *Conflict of Laws* was at the heart of the parties' arguments and the Court's decision.[200]

At the time, rule 153 of Dicey's *Conflict of Laws* provided that '[a]n assignment of a movable which cannot be touched, ie of a debt, giving a good title thereto according to

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192 *R v Local Government Board; Ex parte Arlidge* (n 191) 199–200 (Hamilton LJ).

193 See *British South Africa Company v De Beers Consolidated Mines Ltd* (n 191) 523 (Kennedy LJ); *Cripps Warburg v Cologne Investment* [1980] IR 321, 336 (D'Arcy J); *Castanho v Brown and Root (UK) Ltd* [1980] 1 WLR 833, 854, 857 (Lord Denning MR); *A-G (New Zealand) v Ortiz* (n 143) 364 (Staughton J).

194 See, eg, *Rossano v Manufacturers' Life Insurance Co* [1963] 2 QB 352, 374 (McNair J); *O'Toole v Whiterock Quarry Co Ltd* 1937 SLT 521, 522 (Lord Keith).

195 *R v Local Government Board; Ex parte Arlidge* (n 191) 200 (Hamilton LJ).

196 *Armytage v Armytage* (n 48) 186 (Gorell Barnes J).

197 See, eg, *Padolecchia v Padolecchia* [1968] P 314, 336 (Sir Jocelyn Joyce P); *Radwan v Radwan [No 2]* [1972] 3 WLR 939, 950 (Cumming-Bruce J); *Lawrence v Lawrence* [1985] Fam 106, 122 (Ackner LJ).

198 See, eg, *Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniya 'Naftogaz Ukrayiny'* [2011] EWHC 1820 (Comm), [31] (QBD); *JSC VTB Bank v Skurikhin* [2014] EWHC 271 (Comm), [29] (Simon J) (QBD); *Superior Composite Structures LLC v Parrish* [2015] EWHC 3688 (QB), [5] (McGowan J); *Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd* [2016] 1 All ER (Comm) 1034, 1062 [130] (Carr J); *OJSC Bank of Moscow v Chernyakov* [2016] EWHC 2583 (Comm), [5] (Cranston J); *Midtown Acquisitions LP v Essar Global Fund Ltd* [2018] EWHC 2545 (Comm), [24] (Moulder J); *Re A (Foreign Adoption Recognition)* [2018] EWHC 3468 (Fam), [8] (Theis J); *Process and Industrial Developments Ltd v Nigeria* [2018] EWHC 3714 (Comm), [63] (Bryan J); *Re N (A Child)* [2018] Fam 117, 147 [86] (Sir James Munby P); *XX v Whittington Hospital NHS Trust* [2019] 3 WLR 107, 130 [77] (McCombe LJ) (CA).

199 See, eg, *Republica de Guatemala v Nunez* (n 52) 683–4 (Bankes LJ), 692–3 (Scrutton LJ); *St Pierre v South American Stores (Gath v Chaves) Ltd* [1936] 1 KB 382, 390 (Grier LJ); *Shanks v Shanks* 1965 SLT 330, 331 (Lord Fraser); *Metal Industries (Salvage) Ltd v Owners of the ST 'Harle'* 1962 SLT 114, 116; *Sinclair v Sinclair* [1968] P 189, 224 (Scarman J); *Brodin v A/R Seljan* 1973 SC 213, 218–9, 220–1 (Lord Kissen); *Tee v Tee* [1974] 1 WLR 213, 215; *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* (n 186) 536 (Lord Wilberforce).

200 *Republica de Guatemala v Nunez* (n 52) 695 (Lawrence LJ).

the *lex situs* of the debt (in so far as by analogy a situs can be attributed to a debt) is valid'.[201] According to Dicey, the *lex situs* of "'[d]ebts, choses in action, and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or, in other words, debts or choses in action are generally looked upon as situate in the country where they are properly recoverable or can be enforced"'.[202] It was the appellant's argument that the debt in question was situate in England because it was contracted and payable in England. The respondents, on the other hand, pointed to Dicey's rule to draw attention to confusion in case law over which law governed for transfers of debt.[203]

Bankes LJ agreed with Dicey's proposition that choses in action had a location or quasi-location identifying the law applicable to the contract. His Lordship also remarked that Dicey's rule 153 'finds support under some circumstances'.[204] Lawrence LJ also found that rule 153 was a correct statement of law.[205] In scrutinising the authorities used to support rule 153, Scrutton LJ thought that criticism of the authorities by the primary judge and by Cozens-Hardy J in *Re Maudslay* was warranted.[206] The authorities did not support finding that an English debt, void by the law of the country where it was transacted and by the law of the parties' domicile, was 'valid in the country where the debt is deemed to be situated'.[207]

Fourthly, derivative or secondary citations of Dicey became more frequent during the 20th century.[208] The English courts' approval of Dicey's statement of foreign state immunity in *The Jupiter* and *Compania Naviera Vascongado v SS Cristina* has recurred.[209] Early editions of Dicey's *Conflict of Laws* expressed this principle as: 'The Court has no jurisdiction to entertain an action against any foreign sovereign. Any action against the

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201 Ibid 683 (Bankes LJ).
202 Ibid 674.
203 Ibid 677.
204 Ibid 684 (Bankes LJ).
205 Ibid 695–6 (Lawrence LJ).
206 See *Re Maudslay* [1900] 1 Ch 602, 610 (Cozens-Hardy J), cited in *Republica de Guatemala v Nunez* (n 52) 692 (Scrutton LJ).
207 *Republica de Guatemala v Nunez* (n 52) 693 (Scrutton LJ).
208 See generally *Kleinwort, Sons & Co* (n 186) 697 (du Parcq LJ); *United States of America v Dolffus Mieg et Cie SA* [1952] AC 582, 616 (Lord Radcliffe); *Nizam of Hyderabad v Jung* [1957] Ch 185, 203 (Upjohn J), 232 (Lord Evershed MR); *Rahimtoola v Nizam of Hyderabad* [1958] AC 379, 393–4 (Lord Radcliffe); *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, 555 (Lord Denning MR); *Belhaj v Straw* [2017] AC 964, 1128 [189].
209 See especially *The Jupiter* [1924] P 236; *Compania Naviera Vascongado v SS Cristina* [1938] AC 485. See also *United States of America v Dollfus Mieg et Cie SA* [1952] AC 582, 616 (Lord Radcliffe); *Ysmael (Juan) & Co Inc v Indonesian Government* [1955] AC 72, 86–7 (Earl Jowitt); *Nizam of Hyderabad v Jung* (n 208) 203 (Upjohn J), 232 (Lord Evershed MR). Note: the common law governed state immunity before the *State Immunity Act 1978* (UK) became law.

property of a foreign sovereign is an action or proceeding against such person'.[210] Immunity would hold at common law if a state was directly or indirectly impleaded 'in relation to property in its ownership'.[211]

In *The Jupiter*, the Russian Government successfully used the doctrine of foreign state immunity to set aside the plaintiff company's writ claiming ownership of the steamship *Jupiter*. Scrutton LJ agreed with Dicey's statement of the doctrine in concluding that the issue of the writ was an attempt to implead the Russian Government, which claimed a right in the steamship.[212] The circumstances of the *Cristina* case were factually similar to *The Jupiter*. Here, the ownership and possession of a vessel requisitioned by the Spanish Government was at issue. In the course of finding for the Spanish Government, Lord Wright approved of Scrutton LJ's quotation of Dicey in *The Jupiter*.[213] In contrast, Lord Maugham approached the question of sovereign state immunity 'with the greatest care', arguing that Dicey did not mean a blanket immunity from jurisdiction if proof of title was at stake.[214]

Following the *Cristina*, Dicey's sovereign immunity rule has been 'repeated religiously'.[215] In *Dollfus Mieg*, Lord Radcliffe approved of the rule as 'quoted with approval in *The Jupiter*'.[216] The rule was considered to be 'expressed as well as may be in Dicey's *Conflict of Laws*, 6th edition'.[217] What amounted in Dicey's rule to 'an action "against the property of a foreign sovereign" in any particular case' remained in question.[218] In any event, Lord Radcliffe was content with the clarity of the rule in Dicey's *Conflict of Laws*,[219] as was Viscount Simonds in *Rahimtoola v Nizam of Hyderabad*.[220] In the Supreme Court of the United Kingdom's recent decision of *Belhaj v Straw*, citation of Dicey's *Conflict of Laws* inevitably resulted from a consideration of the history of the state immunity doctrine at common law.[221]

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210 A V Dicey and A Berriedale Keith, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens and Sons, 3rd ed, 1922) 215, quoted in *The Jupiter* (n 209) 243 (Scrutton LJ).

211 *Belhaj v Straw* (n 208) 991 [35] (Lord Dyson MR), 1064 [15] (Lord Mance JSC), 1065 [18] (Lord Mance JSC), 1127 [187] (Lord Sumption JSC and Lord Hughes JSC). The common law is preserved in ss 6(4) and 10 of the *State Immunity Act 1978* (UK).

212 *The Jupiter* (n 209) 243 (Scrutton LJ).

213 *Compania Naviera Vascongado v SS Cristina* (n 209) 508 (Lord Wright).

214 Ibid 517 (Lord Maugham).

215 *Trendtex Trading Corporation v Central Bank of Nigeria* (n 208) 555 (Lord Denning MR).

216 *United States of America v Dolffus Mieg* (n 208) 616 (Lord Radcliffe).

217 Ibid.

218 Ibid.

219 Ibid.

220 *Belhaj v Straw* (n 208) 1129 [190] (Lord Sumption JSC and Lord Hughes JSC).

221 Ibid.

A fifth use is where judges corral together the scholarly authorities on a specific legal point. Leading reasons for judicially citing scholarly authorities include cases subject to adverse comment,[222] an absence of authorities,[223] scholarly consensus,[224] and scholarly conflict.[225]

Adverse comment of *Harris v Taylor*[226] led to considerable discussion of case law and scholarly writing in *Henry v Geoprosco International Ltd.*[227] In that case, the Court of Appeal enforced an Alberta default judgment and, in doing so, felt bound to follow 'the well-known and much criticised decision of the Court of Appeal in *Harris v Taylor*'.[228] The defendant's appearance before the Alberta court merely to invite the court in its discretion not to exercise jurisdiction was a voluntary submission to jurisdiction. Geoprosco had taken no further part in the Alberta proceedings after its application to set aside service and stay the proceedings failed in Alberta. Similarly, the earlier decision of *Harris v Taylor* saw the Court of Appeal enforcing a Manx default judgment on the ground that the defendant's conditional appearance was a voluntary submission to the jurisdiction of the Manx court.[229] The defendant's motion to set aside the writ and its service failed, after which the defendant took no further part in the proceedings and default judgment was obtained against him.[230] The appellant relied upon a statement from the second edition of Dicey's *Conflict of Laws* to argue that a protest against the court's jurisdiction did not amount to a submission to its jurisdiction.[231] This was rejected: the defendant could have 'done nothing' on being served, but 'he did something he was not obliged to do'.[232]

The courts in *Re Dulles' Settlement [No 2]* and *NV Daarnhouwer & Co Handelmaatschappij v Boulos* had approached *Harris v Taylor* with circumspection.[233] Denning LJ in *Dulles* limited *Harris v Taylor* to a question of *res judicata*, a reading challenged in *Geoprosco.*[234]

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222 See, eg, *Buchanan (Peter) Ltd v McVey* [1955] AC 516, 524 (Kingsmill Moore J); *Henry v Geoprosco International Ltd* [1976] QB 726, 746 (Roskill LJ).

223 See, eg, *J D'Almeida Araujo Lda v Sir Frederick Becker & Co Ltd* [1953] 2 QB 329, 333–4 (Pilcher J).

224 See, eg, *The Amazone* [1940] P 40, 45 (Slesser LJ); *In the Estate of Maldonado* [1954] P 223, 227 (Barnard J); 244–5 (Evershed MR); 247 (Jenkins LJ); *Abate v Abate* [1961] P 29, 32 (Lloyd-Jones J); *Carl Zeiss Stiftung v Rayner & Keeler Ltd [No 2]* [1967] 1 AC 853, 969 (Lord Wilberforce); *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1974] QB 660, 681 (Scarman LJ).

225 See, eg, *Leon v Leon* [1967] P 275, 283 (Baker J); *The Hollandia* [1982] QB 872, 887 (Ackner LJ).

226 *Harris v Taylor* [1915] 2 KB 580.

227 *Henry v Geoprosco* (n 222).

228 *Henry v Geoprosco* (n 222) 735 (Roskill LJ).

229 *Harris v Taylor* (n 226).

230 Ibid 581.

231 *Henry v Geoprosco* (n 222) 737 (Roskill LJ).

232 *Harris v Taylor* (n 226) 587 (Buckley LJ).

233 *Re Dulles' Settlement [No 2]* [1951] Ch 842, 849 (Evershed MR); 851 (Denning LJ); *NV Daarnhouwer & Co Handelmaatschappij v Boulos* [1968] 2 Lloyd's Rep 259.

234 See *Re Dulles' Settlement [No 2]* (n 233) 851 (Denning LJ); *Henry v Geoprosco* (n 222) 743–4 (Roskill LJ).

Megaw J's decision to follow *Re Dulles* in *Daarnhouwer* was also met with disapproval in *Geoprosco*.[235] However, in that decision, Megaw J was a puisne justice who was 'free to choose between two conflicting decisions of the Court of Appeal' and so he 'unhesitantly preferred' the reasoning in *Re Dulles*.[236] The editors of the ninth edition of Dicey and Morris' *The Conflict of Laws* opined that *Harris v Taylor* was "'revolting to common sense'"[237] and that *Re Dulles* had obviated the need to follow 'the supposed shackles of *Harris v Taylor*'.[238] Equally, the editor of Cheshire's *Private International Law* was of the view "'that to protest is not necessarily to submit. The tide is setting in the opposite direction.'"[239] But, insofar as Dicey and Cheshire criticised the correctness of *Harris v Taylor*, the Court of Appeal in *Geoprosco* disapproved.[240] The Court remarked that 'however distinguished the authors and editors of these textbooks, the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction'.[241]

3 *Dissent from Dicey's* Conflict of Laws

The foregoing discussion has revealed more discerning treatment of Dicey's *Conflict of Laws* in English courts than Jaffey's comments — noted in III(C) — suggest. Indeed, it is not unavoidably the case that '[t]he correctness of the rule [in Dicey] is taken for granted'.[242] In this section, an example of a notable judicial dissent is given, which is of relevance to the more specific question of public policy: Dicey's 'political law' or 'other public laws' exception.[243]

(a) 'Political Law' or 'Other Public Laws' Exception

Since being introduced, versions of Dicey's 'political law' and 'other public laws' exception have been criticised by judges and scholars alike.[244] The defence's recast from 'political law' to 'other public laws' in the seventh edition (1958) did little to curb judicial and

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235 *Henry v Geoprosco* (n 222) 742 (Roskill LJ).

236 *NV Daarnhouwer & Co Handelmaatschappij v Boulos* (n 233) 268.

237 J H C Morris (ed), *Dicey and Morris on the Conflict of Laws* (Stevens and Sons, 9th ed, 1973) 996, quoted in G Solomons, 'Enforcement of Foreign Judgments: Jurisdiction of Foreign Court' (1976) 25 *International and Comparative Law Quarterly* 665, 672.

238 *Henry v Geoprosco* (n 222) 742 (Roskill LJ).

239 P M North (ed), *Cheshire's Private International Law* (Butterworths, 9th ed, 1974) 638, quoted in G Solomons, 'Enforcement of Foreign Judgments: Jurisdiction of Foreign Court' (1976) 25 *International and Comparative Law Quarterly* 665, 672.

240 *Henry v Geoprosco* (n 208) 746 (Roskill LJ).

241 Ibid.

242 *Contra* Jaffey (n 7) 472, 473.

243 Chapter 8 considers this exception in light of foreign governmental interest analysis.

244 See generally F A Mann, 'Prerogative Rights of Foreign States and the Conflict of Laws' (1954) 40 *Transactions of the Grotius Society* 25; *Regazzoni v KC Sethia (1944) Ltd* [1956] 2 QB 490, 524 (Parker LJ).

scholarly criticism of the rule's ambiguity. Exceptionally, in *Spycatcher*, Brennan J resorted to public policy in preference to the 'other public laws' defence, though it has been similarly criticised — and for a longer period of time.[245] In the third edition of Dicey's *Conflict of Laws* (1922), the rule was that English courts had no jurisdiction to enforce 'either directly or indirectly' a penal or revenue law.[246] In the fourth edition (1927), 'political laws' followed 'revenue'.[247] Within a year of the addition, it was judicially mentioned.[248]

The correctness of the 'political laws' addition was first seriously questioned in obiter remarks in *Regazzoni v KC Sethia (1944) Ltd*.[249] Birkett LJ was content with the expressions 'revenue' and 'penal' in Dicey's rule, but thought 'political' was 'so vague that it is really difficult to attach to it any special or particular meaning'.[250] A similar problem has been traditionally recognised with the public policy defence.[251] Reservations were also expressed by Parker LJ, who commented that

> I share the difficulty to which my Lords have referred as to what in this connexion is meant by a political law. I have not discovered how the word "political" first crept into the rule referred to in Dicey, and it may be that it is merely dealing with the case of a foreign sovereign seeking to enforce some prerogative or sovereign right.[252]

In the House of Lords, Viscount Simonds expressed similar doubts about the extent to which the doctrine covered laws of 'a "political" or "public" character'.[253] In a case note on *Regazzoni*, Mann shared the same concerns as Birkett LJ by noting that [t]he uncertainty of the adjective is in itself sufficient to arouse suspicion, for in a sense any legal rule is "political."'"[254] In another case note, Jennings recommended clarification of the term 'if the term… is retained in the next edition'.[255]

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245 The ambiguities of both defences are explored in further detail in Chapters 7 and 8. See *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 ('*Spycatcher*').

246 Dicey and Keith, '3rd ed' (n 210) 230.

247 A V Dicey and A Berriedale Keith, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens and Sons, 4th ed, 1927) 224.

248 *Re Visser; HM The Queen of Holland (Married Woman) v Drukker* [1928] Ch 877, 882 (Tomlin J). It was only mentioned because the defendants were challenging the accurateness of the 3rd edition's addition of 'revenue' to the rule.

249 *Regazzoni v KC Sethia (1944) Ltd* (n 244).

250 Ibid 520 (Birkett LJ).

251 This is explored in Chapter 8.

252 Ibid 524 (Parker LJ). Chapter 8 will suggest a legitimate place for the foreign governmental interests exception — detached from public policy — as the flipside of foreign sovereign immunity.

253 *Regazzoni v KC Sethia* [1958] AC 301, 318 (Viscount Simonds).

254 Michael Mann, 'Decisions: *Regazzoni v K C Sethia (1944)* Ltd' (1956) 5 *International and Comparative Law Quarterly* 293, 294.

255 R Y Jennings, 'Conflict of Laws—Contract Illegal by Foreign Law—Whether Enforceable in England' (1956) 14 *Cambridge Law Journal* 141, 142.

The detractors remained with the substitution of 'political laws' to 'other public law' in the seventh edition (1958), which was 'intended to be equivalent to "prerogative right"'.[256] By the time of *Attorney-General of New Zealand v Ortiz*, the rule was expressed as: 'English courts have no jurisdiction to entertain an action (1) for the enforcement, either directly or indirectly, of a penal, revenue, or other public law of a foreign state'.[257] Staughton J, the trial judge in *Ortiz*, did not think there was a legal basis for Dicey's third category.[258] However, Denning LJ in the Court of Appeal agreed with Dicey and Morris' 'other public laws' formulation, proposing that it meant 'laws which are *eiusdem generis* with "penal" or "revenue" laws'.[259]

Recent English authority is, however, against a general 'other public law' category. The Court of Appeal in *Iran v Barakat Galleries Ltd* found that this residual category was only supported by dicta; there was no binding authority to support a 'rule which prevents the enforcement of all foreign public laws'.[260] Lord Phillips CJ observed that '[o]n the authorities as they now stand the only category outside penal and revenue laws which is the subject of an actual decision… is a claim which involves the exercise or assertion of a sovereign right'.[261] An English court's refusal to enforce a law involving 'the exercise or assertion of a sovereign right' echoed the High Court of Australia's decision in the *Spycatcher* case not to enforce a foreign government interest.[262] The Australian *Spycatcher* test was approved for being 'consistent with the English authorities' and 'a helpful and practical test'.[263]

IV CONCLUSION

This Chapter has examined the influence of three institutional writers — Story, Westlake, and Dicey — on the shape of modern doctrine in private international law. It has used judicial citation of their works in English, Irish and Scottish courts to measure this influence. In Chapter 4, judicial citation was identified as the key factor for assigning institutional status to writers under Scots law. Using this premise, Part II provided a background to each writer and, then, Part III studied the common uses of their works in courts of the British Isles.

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256 *Government of the Islamic Republic of Iran v Barakat Galleries Ltd* [2009] QB 22, 55 [113] (Lord Phillips CJ).
257 *Attorney-General of New Zealand v Ortiz* (n 143) 366, 368 (Staughton J).
258 Ibid 371 (Staughton J).
259 *Attorney-General of New Zealand v Ortiz* [1984] AC 1, 20 (Lord Denning MR).
260 *Government of the Islamic Republic of Iran v Barakat Galleries Ltd* (n 256) 57 [125] (Lord Phillips CJ).
261 Ibid.
262 Ibid 57–8 [125]–[126].
263 Ibid 58 [125]; *Spycatcher* (n 245) 50 (Brennan J).

Judicial citation of Dicey's *Conflict of Laws* has greatly exceeded the citation of Story's *Conflict of Laws* and, even more so, Westlake's *Treatise* — despite Dicey himself according those works an institutional eminence. By looking closely at the case law, however, Story's influence is still apparent in established doctrines of private international law such as the *Moçambique* rule and the penal laws exclusion. Following the first edition of Dicey's *Conflict of Laws*, English — and, to a lesser extent, Scottish and Irish — courts have routinely referred to it for confirmation of the law, adding force to Jaffey's complaint, noted in Part III(C), that the rules in Dicey's *Conflict of Laws* are 'taken for granted'.[264] Moreover, it would appear that in English courts '[n]ot to apply the *Dicey & Morris* rule verges on the *per incurium*'.[265] It was still observed that dissent from Dicey's views is not an uncommon occurrence in the law reports. While Westlake has not been given the weight that Dicey or Story have, two areas in which Westlake was signally influential were the 'closest and most real connection test' for the proper law of the contract and Westlake's influential criticism of the 'civilised nations' concept.

The next two chapters explore judicial considerations of public policy to reinforce two basic claims of this thesis. The first claim argues that Dicey structured the place of public policy in modern private international law. The second claim suggests that institutional writers gave public policy its initial content. These writers' influence on the public policy exception has remained derivative, although it has been qualified by judges' reluctance to apply it and the use of anti-Diceyan considerations of comity. Chapter 7 reinforces that today's common law judges have regulated the unrestrained use of private international law's public policy doctrine by employing countervailing factors that encourage the application of foreign law and the recognition of foreign judgments.

Accordingly, Chapter 6 evaluates the formative role that scholarly accounts of public policy played — at least initially — in the judicial development of choice of law rules in private international law. In Chapter 7, the focus shifts to the scope of, and limits on, the modern private international law of public policy. This Chapter draws attention to international comity as the main countervailing factor used to restrain courts from, on the score of public policy, disapplying foreign law or refusing to recognise foreign judgments.

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[264] Jaffey (n 7) 473.
[265] Ibid.

CHAPTER 6: THE FORMATIVE ROLE OF PUBLIC POLICY IN ENGLISH PRIVATE INTERNATIONAL LAW

I INTRODUCTION

This Chapter explores the formative role that scholarly accounts of public policy played in the development of traditional rules of common law private international law. As Chapter 5 clearly demonstrated, institutional writers had — and, indeed, still have — a significant influence on private international law decision-making. This was particularly apparent from Chapter 5's analysis of English decisions citing Dicey's *Conflict of Laws*. The analysis revealed an upward citation trend from the late-1990s through to the present day — a trend which shows no signs of continuing unabated.

This Chapter provides a supplement to this analysis by developing on Kahn-Freund's thesis about the 'premature crystallisation' of public policy into independent rules of English private international law.[1] Kahn-Freund's contention was that public policy, as a 'principle', encouraged the development of 'special rules applied without any reference to the idea of public policy in which they originated'.[2] This Chapter seeks to reinforce the influence of institutional writers on this 'premature crystallisation' with a particular focus on the formation of the traditional choice of law rules for torts and marriage. It also highlights the modern legal status of these rules, emphasising elements which may be seen as embedding or reinforcing considerations of public policy.

The body of this Chapter unfolds in two parts, with each part emphasising the public policy background of these two traditional choice of law rules. Part II focuses on the public policy dimension of the House of Lords' decision in *Brook v Brook*.[3] It argues that judicial reinterpretation of *Brook v Brook* — minus public policy — is responsible for the bifurcation of the traditional choice of law rule for marriage. The rule in *Sottomayer v De Barros [No 2]*,[4] regarded by Kahn-Freund as a crystallised rule of public policy, is given separate consideration. The first part concludes by exploring how mandatory statutory

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1 See Otto Kahn-Freund, 'Reflections on Public Policy in the English Conflict of Laws' (1953) 39 *Transactions of the Grotius Society* 39, 48–59.

2 Ibid 48.

3 *Brook v Brook* (1861) 9 HL Cas 193; 11 ER 703 (HL).

4 *Sottomayer v De Barros [No 2]* (1879) 5 PD 94 ('*Sottomayer [No 2]*').

requirements for marriage have crystallised in statutory form elements of the common law choice of law rule for marriage.

Meanwhile, Part III explores the inbuilt public policy dimension of the first limb of the double actionability rule or the rule in *Phillips v Eyre*,[5] which saw the *lex fori* applied to tortious liability.[6] In a subsequent section of Part III, the influence and decline of the first limb in the United Kingdom, Australia, Canada and New Zealand is explored. Central to this Chapter is the evolution of embedded public policy considerations in choice of law rules at common law.

II CHOICE OF LAW IN MARRIAGE

A Brook v Brook

Story's public policy-based exceptions to the traditional marriage choice of law rule — the *lex loci celebrationis* — proved signally influential in the *Brook v Brook* litigation. Between the 18th and mid-19th centuries, the exclusivity of the *lex loci celebrationis* rule for all questions on the validity of marriage had become settled law in England. The rule had been firmly established by a line of decisions from the ecclesiastical courts,[7] which possessed exclusive jurisdiction over marriage until the *Matrimonial Causes Act 1857*[8] transferred its jurisdiction to the new Court for Divorce and Matrimonial Causes. However, the possibility of exceptions to the traditional rule was first broached in English and Scottish decisions from the mid-1850s and 1860s.[9]

These exceptions were synthesised in section 113 of Story's *Conflict of Laws*, a text which — as examined in Chapter 5 — figured prominently in early English case law on private international law.[10] Story's seminal private international law text identified three exceptions to the *lex loci celebrationis* rule as was discussed in Chapter 3: first, marriages deemed polygamous or incestuous 'by the general consent of Christendom';[11] secondly, marriages 'positively prohibited by the public law of a country, *from motives of policy*';[12] and,

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5 *Phillips v Eyre* (1870) LR 6 QB 1.

6 Otto Kahn-Freund, 'Delictual Liability and the Conflict of Laws' [1968–II] *Recueil des Cours* 1, 24.

7 See, eg, *Scrimshire v Scrimshire* (1752) 2 Hag Con 395; 161 ER 782, 789 (Sir Edward Simpson); *Middleton v Janverin* (1802) 2 Hag Con 437; 161 ER 797, 801 (Sir W Wynn), quoting *Butler v Freeman* (1756) Amb 301; 27 ER 204 (Lord Hardwicke LC); *Dalrymple v Dalrymple* (1811) 2 Hag Con 54; 161 ER 665, 667 (Lord Stowell); *Ruding v Smith* (1821) 2 Hag Con 371; 161 ER 774, 781–4 (Lord Stowell).

8 *Matrimonial Causes Act 1857*, 20 & 21 Vict, c 85.

9 See especially *Fenton v Livingstone* (1856) 18 D 865, 878 (Lord Curriehill) (IH); *Brook v Brook* (HL) (n 3); *Simonin v Mallac* (1860) 2 Sw & Tr 67; 164 ER 917.

10 Joseph Story, *Commentaries on the Conflict of Laws* (Hilliard, Gray, and Co, 1st ed, 1834) 104.

11 Ibid.

12 Ibid (emphasis added).

thirdly, marriages 'celebrated in foreign countries by subjects entitling themselves under special circumstances to the benefit of the laws of their own country.'[13]

The first two of Story's exceptions were engaged in *Brook v Brook* against the backdrop of *Lord Lyndhurst's Act 1835*.[14] Passed on 31 August 1835, *Lord Lyndhurst's Act* proscribed future marriages within prohibited degrees of consanguinity and affinity as defined by canon law, the most prominent of which was the marriage of a widower to his deceased wife's sister.[15] At the heart of the *Brook v Brook* litigation was the validity of a marriage celebrated at Wandsbek, in the Duchy of Holstein, in 1850 between William Leigh Brook and Emily Armitage, who was the sister of William's deceased first wife, Charlotte.[16] This second marriage, while valid by the laws of Holstein, would have been void in the common domicile of the parties before and after the marriage, England. Wandsbek was a deliberate choice because, at least in theory, *Lord Lyndhurst's Act* had no extraterritorial effect.[17]

Until 1835, 'in-law' marriages were voidable if challenged in the ecclesiastical courts during the married couple's lifetime.[18] A 1533 Henrician statute was the source of the ecclesiastical procedure for annulling marriages within prohibited degrees of affinity.[19] With the enactment of *Lord Lyndhurst's Act*, marriages contracted before 31 August 1835 within prohibited degrees were validated. Future in-law marriages contracted after that date were void. The Act 'was passed primarily with the intention of protecting future inheritance lines' from the off-chance of a legal challenge.[20] Legal challenge was more probable for affluent families where inheritance to property might have depended on

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13 Ibid.

14 *Lord Lyndhurst's Act 1835*, 5 & 6 Wm 4, c 54.

15 For some background, see Nancy F Anderson, 'The "Marriage with a Deceased Wife's Sister Bill" Controversy: Incest Anxiety and the Defense of Family Purity in Victorian England' (1982) 21(2) *Journal of British Studies* 67; Charlotte Frew, 'The Marriage to a Deceased Wife's Sister Narrative: A Comparison of Novels' (2012) 24(3) *Law and Literature* 265, 265–6 ('Deceased Wife's Sister Narrative'); Maebh Harding, 'The Curious Incident of the Marriage Act [No 2] 1537 and the Irish Statute Book' (2012) 32(2) *Legal Studies* 78, 91–2.

16 Adam Kuper, *Incest and Influence* (Harvard University Press, 2009) 69: 'Affluent people regularly traveled abroad to marry in order to evade the English restrictions; a favored venue was Altona in Schleswig Holstein (then part of Denmark).' The reference to Altona as part of Schleswig Holstein is incorrect. Altona was in Holstein. At the time of the Brooks' marriage, Schleswig and Holstein were two independent duchies governed by Denmark. Following defeat in the Second War of Schleswig, Denmark ceded the two duchies, respectively, to the Kingdom of Prussia and the Austrian Empire in 1865.

17 *Brook v Brook* (1858) 3 Sm & G 481; 65 ER 746, 765.

18 For background, see Charlotte Frew, 'Marriage to a Deceased Wife's Sister in Australia and England, 1835–1907' (PhD Thesis, Macquarie University, 2012) ('Marriage to a Deceased Wife's Sister'); Frew, 'Deceased Wife's Sister Narrative' (n 15).

19 See Anderson (n 15) 67; Frew, 'Marriage to a Deceased Wife's Sister' (n 15) 51.

20 David G Barrie, *Sin, Sanctity and the Sister-in-Law: Marriage with a Deceased Wife's Sister in the Nineteenth Century* (Routledge, 2018). For similar comments, see Frew, 'Marriage to a Deceased Wife's Sister' (n 15) 49, 54, 55, 57, 94–5.

whether a child of a voidable marriage was legitimate or illegitimate.[21] For example, a 'scheming' relative might have brought a legal challenge knowing they stood to inherit a fortune if only the ecclesiastical courts would render their relative's affinal marriage void. In fact, Lord Lyndhurst introduced the bill into Parliament to protect the seventh Duke of Beaufort, whose second marriage in 1822 to his deceased wife's sister had produced an only son — the heir to the dukedom.[22] Despite opposition throughout the 19th century, the restriction on in-law marriages remained the law in England until the passage of the *Deceased Wife's Sister's Marriage Act 1907*.[23]

Though in-law marriages were void after 31 August 1835, a question mark remained over the validity of affinal and consanguineous marriages contracted abroad. Favouring Altona and Wandsbek in the Duchy of Holstein as marriage destinations, affluent British couples sought to evade the restrictions of *Lord Lyndhurst's Act* by contracting their otherwise void marriage abroad.[24] The potential invalidity of these marriages weighed heavily on the minds of Members of Parliament as parliamentary debates of the late-1840s reveal:

> He was aware especially of the great evils connected with foreign marriages of this nature. They had been told that it often happened that persons of wealth who were anxious to contract such marriages went abroad, and, above all, to Hamburg or Altona, and after a short residence were married. Were these marriages legal? What would be the effect of them upon the offspring?[25]

Following the deaths of Mr and Mrs Brook in 1855, an opportunity arose for the Crown to settle the law on these marriages by testing the validity of the Brooks' marriage. In his will, William Leigh Brook divided his property among the children of both marriages.[26] A son of the second marriage, Charles Armitage Brook, died in 1856. An issue arose as to how the deceased child's share of real estate and personal property would

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21 See Charlotte Frew, 'Marriage to a Deceased Wife's Sister in Australia and England, 1835–1907' (PhD Thesis, Macquarie University, 2012) 49, 54, 55, 57, 94–5.

22 Kuper (n 16) 66.

23 *Deceased Wife's Sister's Marriage Act 1907*, 7 Edw 7, c 47.

24 Roundell Palmer, *A Speech Delivered in the House of Commons, on Thursday, May 3, 1849, on the Motion for the Second Reading of Mr Stuart Wortley's Bill for Altering the Law of Marriage* (John Henry Parker, 1849) 29–30. For references to marriages celebrated in Altona, see United Kingdom, *First Report of the Commissioners Appointed to Inquire into the State and Operation of the Law of Marriage, as Relating to the Prohibited Degrees of Affinity, and to Marriages Solemnized Abroad or in the British Colonies; with Minutes of Evidence, Appendix and Index* (No 973, 1847–8) xvii, xviii, xxx, 2, 3, 13, 25, 26, 28, 79.

25 *Hansard's Parliamentary Debates: Third Series, Commencing with the Accession of William IV* (Cornelius Buck, 1850) vol 59, 435.

26 The will of William Leigh Brook describes the children of his second marriage as follows: 'to my reputed son Charles Armitage commonly so called to my reputed daughter Charlotte Amelia Brook commonly so called and to my reputed daughter Sarah Helen Brook commonly so called'.

be distributed.[27] The children of both marriages sought a declaration as to their rights to and interest in William Brook's estate. The Attorney-General put in issue the validity of the second marriage. The invalidity of the second marriage and the consequent illegitimacy of the children of that marriage would result in the deceased child's share escheating to the Crown.

1 *The First Instance Decision in* Brook v Brook

The statutory construction of *Lord Lyndhurst's Act* was the focus of the first instance decision in the new Court for Divorces and Matrimonial Causes. At this stage of the litigation, the central issue was whether the Act was extraterritorial in operation or otherwise imposed a personal disability 'wheresoever they may be abroad'.[28] The plaintiffs attributed the validity of marriage to the place of celebration exclusively, relying on English ecclesiastical authorities and scholarly opinion on marriage to this effect.[29] This argument failed; instead, the Court admitted exceptions to the traditional rule for marriage.

As English case law was silent on exceptions, the Court discussed three exceptions to the traditional *lex loci celebrationis* rule at section 113 of Story's *Conflict of Laws*. Cresswell J declined to apply Story's first exception — that is, marriages deemed polygamous and incestuous 'by the general consent of all Christendom' — because it tested the proper role of English judges. The criticism, repeated in the House of Lords' decision in *Brook v Brook*,[30] focused on the difficulties of defining incest and then on determining its treatment in different countries:

> How is a Judge sitting in an English Court of Justice, called upon to decide whether a marriage be incestuous or not, to be guided in his decision? Surely, if the law of his own country has already settled what is incestuous or the contrary, by that he must be governed. Is he to inquire into the opinions of all other nations in which Christianity exists, and to adopt that rule which is ascertained to prevail among the greater number, and to say that it

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27 Cf R S Welsh, 'Legitimacy in the Conflict of Laws' (1947) 63(1) *Law Quarterly Review* 65, 80; Brian Davis, 'The Marriage Amendment Act 1985 – The Reason Why' (1987) 11(1) *Adelaide Law Review* 32, 41–2; Wendy A Adams, 'Same-Sex Relationships and Anglo-Canadian Choice of Law: An Argument for Universal Validity' (1996) 34 *Canadian Yearbook of International Law* 103, 112. Mr William Leigh Brook was a wealthy Yorkshire cotton mill owner, railway speculator and magistrate. His will left real estate to his two sons and personal property to all his children. The deceased child's share in real estate might have been distributed to the son of the first marriage while his share in the personal property might have gone to the surviving next of kin of Mr Brook. The third alternative was that the son's whole share reverted to the Crown because the second marriage was invalid and the son of the second marriage was illegitimate. This was the end result of the litigation. The deceased child's share escheated to the Crown.

28 *Brook v Brook* (1858) (n 17) 748.

29 Ibid 750 (Sir F Kelly, Mr Malins, and Mr George Lake Russell) (in argument).

30 See, eg, *Brook v Brook* (HL) (n 3) 710 (Lord Campbell LC), 723–4 (Lord Wensleydale).

> shall be acted upon in defiance of the law of his own country? This would, indeed, be enlarging the *comitas gentium* to an extent hitherto unheard of.[31]

Sir John Stuart V-C's decision, which affirmed the legal opinion of Cresswell J, emphasised Story's second exception: marriages "'positively prohibited by the public law of a country, from motives of policy'".[32] Though Sir John Stuart V-C recognised the *lex loci celebrationis* rule, the 'settled principle of the law of England not to recognise or give effect to any contract illegal or immoral, or against public policy' applied.[33] For marriage, the principle meant that 'the law of the country where a marriage may happen to be celebrated cannot prevail where it is opposed to the municipal institutions of the country of the domicile and allegiance of the contracting parties'.[34] His Lordship concluded that *Lord Lyndhurst's Act* was 'an integral part of our law and public policy. Therefore, by the established principles of international law, it must have paramount effect, and cannot be evaded by having resort to the laws of any foreign country.'[35]

2 *The House of Lords' Decision*

The treatment given to Story's exceptions in the Court for Divorces and Matrimonial Causes continued in the House of Lords. Lord Campbell LC, Lord Cranworth, and Lord Wensleydale accepted the traditional choice of law rule for marriage, subject to Story's exceptions.[36] In other words, the *lex loci celebrationis* was retained as the general rule for choice of law in marriage. This reading of *Brook v Brook* to encompass Story's exceptions reflected the orthodox position in the United States during this period. This position on marriage (of a general rule coupled with exceptions) was adopted, compatibly with its emphasis on territoriality, in the United States' *Restatement (First) on the Conflict of Laws* (1935).[37] The entrenched territorialism in the Restatement reflected the private international law methodology of its American drafter, Joseph Henry Beale (discussed in Part II(B)(3)). Although four separate speeches were delivered in the House of Lords, subsequent consideration of *Brook v Brook* has focused almost exclusively on the leading speech of Lord Campbell LC.[38]

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31 *Brook v Brook* (1858) (n 17) 760 (Sir John Stuart V-C).
32 Ibid 767 (Sir John Stuart V-C), quoting Story (n 10) 104 s 113.
33 *Brook v Brook* (1858) (n 17) 767 (Sir John Stuart V-C).
34 Ibid.
35 Ibid.
36 *Brook v Brook* (HL) (n 3) 209–10; 710 (Lord Campbell LC); 224; 716 (Lord Cranworth); 241–2; 722 (Lord Wensleydale).
37 Peter D Maddaugh, 'Validity of Marriage and the Conflict of Laws: A Critique of the Present Anglo-American Position' (1973) 23(2) *University of Toronto Law Journal* 117, 123.
38 See Geoffrey Sawer, 'Conflict of Laws – Essential Validity of Marriage' (1939–41) 2 *Res Judicatae* 125, 127–8.

(a) Bifurcation of the Choice of Law Rule in Marriage

Bifurcation of the marriage choice of law rule is the orthodox interpretation of *Brook v Brook*.[39] This rule, suggested in Lord Campbell LC's speech, refers questions of the formalities of the marriage ceremony — formal validity — to the *lex loci celebrationis* and questions of legal capacity to marry — essential validity — to 'the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated'.[40] However, passages from Huber's *De Conflictu Legum* and Story's *Conflict of Laws* quoted in Lord Campbell LC's speech offered limited support for bifurcation.[41]

Lord Campbell's quotations to scholarship overwhelmingly supported a straightforward exception to the *lex loci celebrationis* rule. The first quotation in Lord Campbell LC's speech was of Huber's third axiom in Latin, which recognised the limit of comity in 'prejudicial laws' (discussed in Chapter 3), that is: 'Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere *so far as they do not cause prejudice* to the power or rights of such government or of its subjects.'[42] The next quotation, also from Huber, referred the validity of marriage to the *lex loci celebrationis* 'with the reservation that its example is not too revolting—for example… an incestuous marriage'.[43] The only support for the distinction between formal and essential validity was in the example of marriage that accompanied Huber's rule for contract:

> the place, however, where a contract is entered into is not to be considered absolutely; for if the parties had in mind the law of another place at the time of contracting the latter will control. Hence the place of matrimony is not so much the place where the ceremony is performed as the place where the contracting parties intended to live.[44]

The discussion of Story's three exceptions in Lord Campbell's speech offers the clearest support for 'the *lex loci celebrationis* with Story's exceptions' interpretation of *Brook v Brook*. While Lord Campbell LC criticised the 'general consent of Christendom' qualification to Story's first exception, his Lordship accepted Story's second exception

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39 See, eg, Richard Fentiman, 'The Validity of Marriage and the Proper Law' (1985) 44(2) *Cambridge Law Journal* 256; Adams (n 27) 110–15.

40 *Brook v Brook* (HL) (n 3) 709 (Lord Campbell LC).

41 Ibid 709–10. This is despite Lord Campbell LC's statement that '[t]his qualification upon the rule that "a marriage valid where celebrated is good everywhere," is to be found in the writings of many eminent jurists who have discussed the subject': at 709.

42 Ibid 709. For the leading Latin-English translation of Huber's *De Conflictu Legum*, see Ernest G Lorenzen, 'Huber's *De Conflictu Legum*' (1918–19) 13 *Illinois Law Review* 374.

43 *Brook v Brook* (HL) (n 3) 709.

44 Ibid 710.

relating to marriages 'positively prohibited by the public law of a country from motives of policy'.[45] The next section (II(B)(1)) considers how the marriage choice of law rule lost this dimension of public policy.

B *Choice of Law in Marriage after* Brook v Brook

1 Sottomayer v De Barros [No 1] *and* [No 2]

An inability to contend with distinct premarital domiciles steered the English courts towards a bifurcated choice of law rule in marriage, which was readily demonstrated in the *Sottomayer v De Barros* litigation.[46] The three decisions comprising *Sottomayer v De Barros* promoted two unwieldly rules for choice of law in marriage.[47] For traditional writers in private international law, the Court of Appeal's decision in *Sottomayor v De Barros [No 1]* demanded a bifurcated choice of law rule for marriage; in other words, a consideration of the formal and essential validity of marriage.[48] Despite the Court of Appeal's assertion that this rule was 'well-recognised',[49] only Lord Campbell LC's speech in *Brook v Brook* provided some support for this claim. The rule in *Sottomayer v De Barros [No 2]* is the second rule. Kahn-Freund argued that it was 'a crystallised rule of public policy',[50] because its use inevitably leads to forum law being applied.[51]

The *Sottomayer* litigation concerned the validity of an 1866 marriage celebrated in England between first cousins of Portuguese descent, Ignacia Sottomayor and Gonzalo de Barros. At the time of contracting marriage, Sottomayor and de Barros were minors. Ignacia Sottomayor petitioned for an annulment, arguing that her domicile of dependence at the time of marriage, Portugal, prohibited such marriages without papal dispensation. At first instance, Sir Robert Phillimore upheld the marriage.[52] The Court of Appeal reversed the first instance decision in *Sottomayor v De Barros [No 1]*, remitting the matter to the Probate, Divorce and Admiralty Division to determine questions of fact. On the

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45 Ibid.

46 *Sottomayor v De Barros* (1877) 2 PD 81, 86–7 (PDA) ('*Sottomayor* (PDA)'); *Sottomayor v De Barros [No 1]* (1877) 3 PD 1, 5–6 (CA) ('*Sottomayor [No 1]*'); *Sottomayer [No 2]* (n 4). See also Davis (n 27) 53.

47 See, eg, J H C Morris (ed), *Dicey's Conflict of Laws* (Stevens and Sons, 6th ed, 1949) 758 r 168, 784 (exception 1). See also Ronald H Graveson, 'Matrimonial Domicile and the Contract of Marriage' (1938) 20(1, 4) *Journal of Comparative Legislation and International Law* 55, 65; Sawer (n 38) 126. Cf Edward I Sykes, 'The Essential Validity of Marriage' (1955) 4(2) *International and Comparative Law Quarterly* 159, 161.

48 See, eg, Sawer (n 38) 126; Graveson (n 47) 65; E I Sykes, 'Capacity and the Conflict of Laws' (1950) 1(2) *University of Western Australia Annual Law Review* 266, 268–9.

49 *Sottomayor [No 1]* (n 46) 5. Cf *Sottomayer [No 2]* (n 4) 100.

50 Kahn-Freund, 'Reflections on Public Policy' (n 1) 53, 55.

51 Ibid. See comment about it creating 'an ungainly exception to the dual domicile theory", here: P St J Smart, 'Interest Analysis, False Conflicts, and the Essential Validity of Marriage' (1985) 14 *Anglo-American Law Review* 225, 229.

52 *Sottomayor* (PDA) (n 46).

remittal reported as *Sottomayer v De Barros [No 2]*, Sir James Hannen P upheld the marriage. Evidence on the parties' respective domiciles at the time of marriage was central to the different outcomes.

In *Sottomayor v De Barros [No 1]*, the parties were assumed to have had a common Portuguese domicile at the time of marriage. The first instance judge, Sir Robert Phillimore, concluded that a court of the *lex loci celebrationis* was not 'bound to recognize the incapacities affixed by the law of the domicile on the parties to the contract, when those incapacities do not exist according to the *lex loci contractus*'.[53] The marriage was not void because the law of Portugal considered the union incestuous nor was the union, in light of section 114 of Story's *Conflict of Laws*, 'incestuous according to the general consent of Christendom'.[54] On appeal, this decision was reversed.[55] The Court of Appeal determined that the parties' personal law — their common domicile of Portugal — governed the essential validity of marriage. Cotton LJ pronounced that 'it is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile'.[56] As the *lex domicilii* governed essential validity, the marriage was invalid because the parties' common domicile considered it incestuous.[57]

However, by the time of the decision in *Sottomayer v De Barros [No 2]*, newly adduced evidence suggested that the husband had an English domicile at the time of marriage. The incapacity under Portuguese law only affected the wife. Despite the Court of Appeal's pronouncement on personal capacity, Sir James Hannen P referred the validity of the marriage to the *lex loci celebrationis* and upheld the marriage.[58] The earlier Court of Appeal decision was not applied because it was, in the language of the Court of Appeal, 'confined to the case where both the contracting parties are at the time of their marriage domiciled in a country the laws of which prohibit their marriage'.[59]

To this end, Sir James Hannen P rightly challenged the cogency of the proposition advanced by the Court of Appeal that the law of domicile governed personal capacity to marry.[60] His Lordship remarked that

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53 Ibid 87.
54 Ibid 86.
55 *Sottomayor [No 1]* (n 46).
56 Ibid 5 (Cotton LJ).
57 Ibid 5–6.
58 *Sottomayer [No 2]* (n 4) 104. See also J H C Morris (ed), *Dicey's Conflict of Laws* (Stevens and Sons, 7th ed, 1958) 264 n 41.
59 *Sottomayer [No 2]* (n 4) 99–100.
60 Ibid 100.

> the doctrine thus laid down has not hitherto been "well recognised." On the contrary, it appears to me to be a novel principle, for which up to the present time there has been no English authority. What authority there is seems to me to be the other way.[61]

The Court of Appeal's decision 'has only been to define a further condition imposed by English Law, namely, that the parties do not both belong by domicil to a country the laws of which prohibit their marriage'.[62] The case before Sir James Hannen P was distinguishable because it involved 'the marriage of a British subject in England, where the marriage is lawful, with a person domiciled in a country where marriage is prohibited'.[63] Accordingly, Sir James Hannen P felt that the authorities, which referred the question of validity to the *lex loci celebrationis*, 'remain[ed] with undiminished effect'.[64]

The rule that emerged from *Sottomayer v De Barros [No 2]* effectively validated any marriage lawfully celebrated in England between a person domiciled in England and a person with a foreign domicile, whose law imposes an incapacity unknown to English law.[65] This bias towards the forum led to the rule's criticism as 'anomalous', 'illogical' and 'xenophobic'.[66] However, the law on capacity to marry that developed subsequently would have invalidated the marriage.[67] English law, in any case, is still not free from doubt on the theory courts are to apply on capacity to marry.

2 *The Demise of Story's Incest Exception* – Cheni v Cheni[68]

In *Cheni v Cheni*, Sir Jocelyn Simon P brought an end to Story's exception on marriages incestuous 'by the common consent of all Christendom'.[69] The exception's appearance in *Cheni v Cheni* demonstrated that it had 'a certain tenacity in survival'.[70] The case concerned the validity of an uncle-niece marriage celebrated in the parties' domicile, Egypt, in

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61 Ibid.
62 Ibid 101.
63 Ibid.
64 Ibid 102.
65 Ibid 105.
66 See C M V Clarkson, 'Marriage in England: Favouring the *Lex Fori*' (1990) 10 *Legal Studies* 80, 85 and sources cited therein.
67 See eg, *Re Paine* [1940] Ch 46, 49 (Bennett J).
68 *Cheni v Cheni* [1965] P 85.
69 Ibid 98. Short shrift has been given to this aspect of the judgment in journal articles. See, eg, Michael J Higgins, 'Conflict of Laws: Conversion of Polygamous Marriage into Monogamous Union' (1963) 26(2) *Modern Law Review* 205, 208 n 20; P R H Webb, 'Potentially Polygamous Marriages and Capacity to Marry' (1963) 12(2) *International and Comparative Law Quarterly* 672, 678 n 26. Cf P E Nygh, 'Foreign Status, Public Policy and Discretion' (1964) 13(1) *International and Comparative Law Quarterly* 39, 45–7. Nygh described this exception as 'a dead letter', which 'was effectively disposed of by Sir Jocelyn Simon P in *Cheni v Cheni*, a decision on the validity of a marriage between an uncle and his niece: see Nygh (n 69) 46.
70 Nygh (n 69) 46. Still, Nygh commented that the exception was 'difficult to apply, and has therefore remained a dead letter': at 46.

accordance with Egyptian law and the religious law of the parties.[71] The wife petitioned for nullity of the marriage on the basis that the union was 'incestuous by the general consent of all Christendom, or… by the general consent of civilised nations or by English public policy'.[72] Sir Jocelyn Simon P found that this argument, based on Story's exception, did not represent English law.[73] As the judge noted, judicial treatment of Story's exception, starting with *Brook v Brook*, had been unfavourable.[74]

This judicial disapproval was contrasted with the seeming indomitability of the exception in scholarly writing. References to Story's exception had appeared in the first edition of Dicey's *Conflict of Laws* (1896), the 1910 edition of *Burge's Colonial and Foreign Law*, and a 1954 edition of *Halsbury's Laws of England*.[75] However, Dicey excluded the exception from subsequent editions of his *Conflict of Laws* 'in deference to Westlake's observation… that there was no necessity for it, "because no country with which the communion of private international law exists has such marriage"'.[76] Sir Jocelyn Simon P, in expressly adopting Westlake's criticism as valid, considered: 'the true rule to be that the courts of this country will exceptionally refuse to recognise and given effect to a capacity or incapacity to marry by the law of the domicile on the ground that to give it recognition and effect would be unconscionable in the circumstances in question'.[77]

3 *Concluding Remarks — Essential Validity of Marriage*

The English bifurcation of the marriage choice of law rule was resisted by the American scholar Joseph Henry Beale in his *Treatise on the Conflict of Laws* (1935).[78] Here, Beale observed that essential validity was not a long settled requirement of English law.[79] He challenged the accuracy of Cotton LJ's pronouncement in *Sottomayor v De Barros [No 1]* on personal capacity to marry, adding that 'previous authorities had been to the contrary'.[80] Rather, Beale's account of marriage reinforced the supremacy of the *lex loci celebrationis*, 'as stated by Story and Bishop', for all questions relating to the validity of marriage.[81] He remarked that 'American law is clear upon this point. Capacity to marry, being a condition

71 *Cheni v Cheni* (n 68) 93.
72 Ibid.
73 Ibid 98.
74 Ibid 94–6.
75 Ibid 96–7.
76 Ibid 98.
77 Ibid.
78 Joseph Henry Beale, *Treatise on the Conflict of Laws* (Voorhis & Co, 1st ed, 1935) vol 2.
79 Ibid 673.
80 Ibid.
81 Ibid 669.

of the marriage contract, is governed by the law of the place of marriage'.[82] Just as Story had done a century earlier,[83] Beale offered exceptions to the ordinary application of the *lex loci celebrationis* rule.[84] One of the exceptions, targeting the evasion of the law of domicile by one or both of the parties to marry, included familiar cases of polygamous, incestuous, and otherwise 'socially odious' marriages.[85]

In several common law jurisdictions, the bifurcated choice of law rule for marriage is maintained in one form or another. In Australia, for example, matters of essential validity are embedded in the *Marriage Act 1961* (Cth) in at least two ways. First, the common law rules are preserved in the *Marriage Act 1961* (Cth) for marriages solemnised in Australia before 7 April 1986 and, where the statutory grounds of recognition do not apply, for marriages solemnised outside Australia.[86] Secondly, while the statutory grounds of recognition assert the *lex loci celebrationis* as the general rule,[87] s 88D of the *Marriage Act 1961* requires that the marriage also be essentially valid under Australian law. This statutory requirement of essential validity under Australian law reinforces strong domestic policy requiring the parties' real consent to marry, a minimum marriageable age, and that the married parties not be in a statutorily prohibited consanguineous relationship.[88]

Statutory provisions requiring essential validity are not a uniquely Australian experience. New Zealand's *Marriage Act 1955* applies 'to the marriage of any person domiciled in New Zealand at the time of the marriage, whether the marriage is solemnised in New Zealand or elsewhere'.[89] Thus, a person domiciled in New Zealand at the time of their marriage would be unable to evade the Act's capacity requirements, such as marriageable age, simply by marrying abroad and returning to New Zealand. These provisions simply serve to elevate stringent domestic policy to the level of a mandatory rule.

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82 Ibid 673.
83 See Chapter 3, Part III(A)(3).
84 Beale (n 78) 678.
85 Ibid.
86 *Marriage Act 1961* (Cth) s 88E(1).
87 Ibid s 88D.
88 Ibid.
89 *Marriage Act 1955* (NZ) s 3.

III CHOICE OF LAW IN TORT

A *The Double Actionability Rule* — Phillips v Eyre

Until recently, the double actionability rule or the rule in *Phillips v Eyre* was the tort choice of law rule in most common law jurisdictions.[90] In this case, a resident of Jamaica, Alexander Phillips, brought an action against the former Governor of Jamaica, Edward Eyre, for trespass and false imprisonment committed during Eyre's suppression of a rebellion at Morant Bay in October 1865. Eyre relied upon an *Act of Indemnity*, passed by the Jamaican House of Assembly soon after the rebellion, which retrospectively validated acts done to suppress the rebellion. The Court of Queen's Bench found in favour of Eyre. On appeal, the Court of Exchequer Chamber affirmed the decision at first instance. Willes J, who delivered the Court of Exchequer Chamber's judgment, laid down the double actionability rule:

> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England … Secondly, the act must not have been justifiable by the law of the place where it was done.[91]

As originally stated, the rule in *Phillips v Eyre* required actionability under the law of the forum and proof that the act constituting the wrong was 'not justifiable' in the *lex loci delicti*.

After the decision in *Phillips v Eyre*, two conflicting views were expressed on the meaning of 'not justifiable'.[92] Under the first view, the expression 'not justifiable' merely indicated that civil actionability was required under the *lex loci delicti*.[93] That is, the rule demanded wrongfulness under the *lex fori* and the *lex loci delicti*.[94] The second view, obtained from *Machado v Fontes*,[95] suggested that 'not justifiable' meant 'not innocent'[96] or, alternatively, not 'authorised or innocent or excusable'.[97] During the 20th century, the correctness of the Court of Appeal's decision in *Machado v Fontes* was questioned in

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90 For a general background on the *lex loci delicti* regimes of Canada, Australia and the United Kingdom, see: Reid Mortensen, 'Homing Devices in Choice of Tort Law: Australian, British, and Canadian Approaches' (2006) 55 *International and Comparative Law Quarterly* 839, 839–41, 842–50. The double actionability rule is still law in Singapore and Hong Kong: see, eg, *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377, [53] (CA). The rule was recently statutorily abolished in New Zealand: see *Private International Law (Choice of Law in Tort) Act 2017* (NZ).

91 (1870) LR 6 QB 1, 28–9 (Willes J) (Exch).

92 *The M Moxham* (1876) 1 PD 107; cf *Machado v Fontes* [1897] 2 QB 231 (CA).

93 *The M Moxham* (n 92) 111 (Mellish LJ).

94 Ibid.

95 [1897] 2 QB 231 (CA).

96 Ibid 233 (Lopes LJ).

97 Ibid 234 (Rigby LJ).

Canada[98] and in Australia,[99] leading to its rejection by the High Court of Australia in *Koop v Bebb*.[100] *Machado* was subsequently overruled by the House of Lords in *Boys v Chaplin*.[101]

In *Boys v Chaplin*, Lords Hodson and Wilberforce developed a flexible exception to the 'general rule' of double actionability.[102] The issue in *Boys v Chaplin* was the measure of damages recoverable in an action arising from a motor accident in Malta between two members of the British armed forces temporarily stationed there. The general damages for pain and suffering available to the respondent under English law were far more substantial than under Maltese law. Maltese law only permitted special damages for proven loss of earnings and expenses. The respondent recovered the more substantial sum in the House of Lords. For Lords Hodson and Wilberforce, this flowed from the application of a flexible exception.

The parties' lack of connection with the place of accident, Malta, influenced Lords Hodson and Wilberforce's adoption of a flexible exception. It was adapted from the proper law of the tort theory and s 145(1) of the United States' *Restatement (Second) Conflict of Laws*. In exceptional circumstances, the law of the forum could have exclusive application if 'a particular issue between the parties' had 'the most significant relationship with the occurrence and the parties'.[103] The inverse situation — disapplication of the *lex fori* under the first limb of the double actionability rule — occurred in *Red Sea Insurance Ltd v Bouygues* ('*Red Sea*').[104] Whether the rule in *Phillips v Eyre* was a choice of law rule or imposed a threshold justiciability requirement also occupied courts of other major common law jurisdictions during the 20th century.

In Australia, the rule in *Phillips v Eyre* proved to be 'both venerable and notorious' until the High Court of Australia was able 'to kill it off'.[105] It was unclear whether the rule concerned justiciability, choice of law, or both.[106] It was also unclear whether there was a 'flexible exception' to it.[107] In the 1965 decision of *Anderson v Eric Anderson Radio & TV Pty Ltd*, the High Court evinced a strong forum bias by recognising that the rule imposed

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98 *Canadian Pacific Railway Co v Parent* [1917] AC 195 (PC).
99 See, eg, *Varawa v Howard Smith & Co Ltd [No 2]* [1910] VLR 509.
100 *Koop v Bebb* (1951) 84 CLR 629.
101 *Boys v Chaplin* [1971] AC 356, 377 (Lord Hodson) (HL).
102 Ibid 379–80 (Lord Hodson), 389–92 (Lord Wilberforce), cf 381 (Lord Guest), 383 (Lord Donovan).
103 Ibid 374 (Lord Hodson), 391 (Lord Wilberforce).
104 *Red Sea Insurance Co Ltd v Buoygues SA* [1995] 1 AC 190 (PC) ('*Red Sea*'). Though *Red Sea* was an appeal from Hong Kong, it is likely that this represented English law: see *Pearce v Ove Arup Partnership Ltd* [2000] Ch 403, 444 (Roch LJ).
105 Martin Davies, 'Exactly what is the Australian Choice of Law Rule in Torts Cases?' (1996) 70 *Australian Law Journal* 711, 719.
106 Ibid 712.
107 Ibid.

a threshold requirement of justiciability.[108] Once jurisdiction was established using the two limbs of the rule in *Phillips v Eyre*, the *lex fori* was applied as the tort choice of law rule.[109] For decades, the *Anderson* decision appeared to represent the Australian position because subsequent High Court authorities (emerging from the late-1980s) were plagued with a lack of unanimity.[110]

B *The First Limb of the Double Actionability Rule* — The Halley

The first limb of the rule in *Phillips v Eyre* has long been considered to be a form of public policy control — that is to say, 'a technique of forum control specifically applicable in tort cases'.[111] The first limb's requirement of actionability in the *lex fori* originated in *The Halley* as a public policy exception.[112] At issue in this case was a collision in Belgian waters between a Norwegian barque, *Napoleon*, and a British steamship, *The Halley*, which was under compulsory pilotage. Under Belgian law, the owners of a vessel under compulsory pilotage were vicariously liable for the pilot's negligent acts.[113] English law provided a complete defence to shipowners for the negligent or unskilful acts of a compulsory pilot.[114] The Privy Council refused to recognise the Belgian compulsory pilotage law, emphasising that it was

> alike contrary to principle and authority to hold, that an English Court of Justice will enforce a Foreign Municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed …[115]

1 *The 'Brooding Influence'[116] of 19th Century Scholarship in* The Halley

The influence of 19th century German scholars, Savigny and Wächter, and the American Story on the Privy Council's opinion in *The Halley* has been explored in scholarly writing

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108 *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20, 22–3 (Barwick CJ), 41 (Windeyer J).

109 See Frank Bates, 'Phillips v Eyre – Jurisdiction Test or Choice of Law Rule: Comment' (1981–83) 7(2) *University of Tasmania Law Review* 218, 219.

110 Davies (n 105) 713.

111 Moffatt Hancock, 'Torts in the Conflict of Laws: The First Rule in *Phillips v Eyre* (1939–40) 3(1) *University of Toronto Law Review* 400, 404, 407; A H Robertson, 'The Choice of Law for Tort Liability in the Conflict of Laws' (1940) 4(1) *Modern Law Review* 27, 33–4; John Swan, 'Tort Liability in the Conflict of Laws: The Case for and an Outline of a New Approach' (1967) 3(1) *University of British Columbia Law Review* 185, 189; David J Bederman, 'Compulsory Pilotage, Public Policy, and the Early Private International Law of Torts' (1989-90) 64 *Tulane Law Review* 1033, 1083; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 515 [49] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) ('*Zhang*').

112 *The Halley* (1867–69) LR 2 AE 3. See Bederman (n 111) 1083.

113 Ibid 3–4.

114 Ibid 4 (Brett QC and Cohen) (in argument).

115 *The Liverpool, Brazil, and River Plate Steam Navigation Co Ltd v Benham* (1868) LR 2 PC 193, 203 (Selwyn LJ) ('*The Halley* (PC)').

116 Moffatt Hancock, 'Torts Problems in Conflict of Laws Resolved by Statutory Construction: *The Halley* and Other Older Cases Revisited' (1968) 18(4) *University of Toronto Law Journal* 331, 344.

and judicial decisions.[117] In the mid-19th century, the law governing delictual liability, though unsettled, was dominated by two schools of thought. Under the first position championed by Savigny and Wächter, the *lex fori* — the 'positive stringent law of the forum'[118] — governed delictual liability. Similarity between tortious liability and crime influenced this choice. Westlake and von Bar offered a second perspective on the governing law in tort, under which the *lex loci delicti* applied to tortious liability.

For Savigny and Wächter, whether the *lex loci* or the *lex fori* applied to delictual liability depended on how the wrong was initially classified.[119] The *lex fori* applied if the wrong was penal and 'implicated both domestic and international public orders'.[120] The centrality of compensation and redress to a wrong could see the *lex loci delicti* applied.[121] The *lex fori* was Savigny's preference because delicts bore a striking resemblance to 'penal law, as part of the public law'.[122] As Westlake's revised first edition (1880) explained of Savigny's choice, 'all laws relating to delicts have such a close connection with public order as to be entitled to the benefit of what I have called the reservation in favour of a stringent domestic policy'.[123]

Sir Robert Phillimore, the judge at first instance in *The Halley*, rejected Savigny's *lex fori* characterisation.[124] Phillimore ascribed the determination of tortious liability to the *lex loci delicti*,[125] finding 'greater' support for his position in the writings of continental scholars.[126] Phillimore criticised Savigny's perception that obligations resulting from wrongs ('*obligatio ex delicto*') occasioned an exception in favour of the *lex fori*.[127] Savigny considered that the enforcement of an *obligatio ex delicti* 'border[ed] very closely upon the administration of

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117 See, eg, A H Robertson, 'The Choice of Law for Tort Liability in the Conflict of Laws' (1940) 4(1) *Modern Law Review* 27, 30–4; Hancock, 'Torts in the Conflict of Laws' (n 111) 404–5; J A Clarence Smith, 'Torts and the Conflict of Laws' (1957) 20(5) *Modern Law Review* 447, 454–5; Kurt H Nadelmann, 'Joseph Story's Contribution to American Conflicts Law: A Comment' (1961) 5(3) *American Journal of Legal History* 230, 252; Hancock, 'Torts Problems' (n 116) 331; O Kahn-Freund, *General Problems of Private International Law* (1974) 143 *Recueil des Cours* 139, 287; Sagi Peari, 'Better Law as a Better Outcome' (2015) 63(1) *American Journal of Comparative Law* 155, 177–8; *O'Connor v Wray* [1930] SCR 231; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 536 [74] n 183 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Zhang* (n 111) 510–12 [44]–[53] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

118 *The Halley* (n 112) 17 (Sir Robert Phillimore).

119 Ibid 18; Kurt H Nadelmann, 'Joseph Story's Contribution to American Conflicts Law: A Comment' (1961) 5(3) *American Journal of Legal History* 230, 252.

120 Bederman (n 111) 1089.

121 Ibid 1089.

122 Peari (n 117) 177; Pippa Rogerson, 'Choice of Law in Tort: A Missed Opportunity?' (1995) 44(3) *International and Comparative Law Quarterly* 650, 651.

123 John Westlake, *A Treatise on Private International Law* (William Maxwell & Son, 2nd ed, 1880) 222.

124 *The Halley* (n 112) 17–8 (Sir Robert Phillimore).

125 Hancock, 'Torts Problems' (n 116) 346.

126 Bederman (n 111) 1083.

127 *The Halley* (n 112) 17–8 (Sir Robert Phillimore).

criminal law'.[128] From Westlake's first edition (1858), Savigny's comparison to crime was challenged.[129] Likening torts to contracts, Westlake referred 'the obligation arising from a delict' to the *lex loci delicti*.[130] Despite this back and forth, however, support for the Privy Council's opinion in the appeal of *The Halley* ultimately derived from the general 'prejudicial laws' maxim in Story's *Conflict of Laws*.[131]

The parlous state of English private international law jurisprudence and 'mid-Victorian parochialism'[132] contributed to the Privy Council's characterisation of the compulsory pilotage law in *The Halley* as contrary to public policy.[133] Since the recognition of foreign law in early private international law depended on the simple notion of a sovereign's good will, domestic courts could just as easily justify rejecting a foreign law as 'prejudicial' to its country's interests. In addition to this early normative justification concerning foreign law, jurisprudence applying public policy to choice of law was undeveloped.[134] *The Halley* preceded the growth of 'case law precluding, on public policy grounds, what otherwise would be a choice of foreign law as the *lex causae*'.[135]

2 *The Intersection between Statutory Construction and 'Prejudicial Laws'*

Statutory construction techniques used before *The Halley* also influenced the outcome.[136] In *The Amalia*, it was held that the limited liability provision — s 54 — of the *Merchant Shipping Act 1854,* as amended in 1862, 'applied equally to British and Foreign vessels'.[137] Rules of statutory construction were used to extend the statute's application to foreign vessels.[138] The imposition of liability under Belgian law in *The Halley* thus conflicted with the domestic policy evinced in the domestic shipping legislation affording protection to English shipowners.[139] As Selwyn LJ explained in *The Halley*, assisted by a quote from para 31 of the fifth edition of Story's *Conflict of Laws* (1857): 'it is difficult to conceive upon

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128 Ibid 18.
129 Bederman (n 111) 1078.
130 John Westlake, *Treatise on Private International Law, or the Conflict of Laws, with Principal Reference to its Practice in the English and Other Cognate Systems of Jurisprudence, and Numerous References to American Authorities* (T & J W Johnson & Co, 1st ed, 1859) 144–5.
131 *The Halley* (PC) (n 115) 203 (Selwyn LJ).
132 A B Edwards, 'Choice of Law in Delict: Rules or Approach' (1979) 96(1) *South African Law Journal* 48, 62.
133 For a similar comment, see *Zhang* (n 111) 511 [49] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
134 *Zhang* (n 111) 511 [49] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
135 Ibid.
136 Hancock, 'Torts Problems' (n 116) 332.
137 *Cail v Papayanni; The Amalia* (1863) 1 Moo PC NS 471; 15 ER 778, 781 (Dr Lushington); Hancock, 'Torts Problems' (n 116) 342–3.
138 *The Amalia* (n 137) 781.
139 Hancock, 'Torts Problems' (n 116) 344.

what ground a claim can be rested to give to any Municipal law an extra-territorial effect, when those laws are *prejudicial* to the rights of other Nations or to those of their subjects'.[140] The assertion of public policy in *The Halley* using Story's general maxims of private international law is all the more remarkable given that Story's *Conflict of Laws* does not mention torts.[141]

C *The First Limb after* Phillips v Eyre

1 *United Kingdom*

Before the existing common law rules were replaced,[142] the first limb of the rule in *Phillips v Eyre* 'received unquestioned judicial acceptance' in England.[143] Application of the first limb yielded two principal objections focusing on the limb's inbuilt forum bias. First, the first limb denied recognition to foreign torts unknown to English domestic law.[144] Secondly, application of the first limb was not avoided simply because a real connection with the forum was lacking.[145]

The Privy Council in *Red Sea Insurance Ltd v Bouygues* weakened this objection without abandoning double actionability.[146] In *Red Sea*, the requirement of actionability in the first limb of *Phillips v Eyre* 'formed part of the ratio decidendi of an English decision' 'for the first time since *The Halley*'.[147] The Privy Council considered that exceptional cases might exist to demand the exclusive application of the *lex loci delicti* if that law 'had the most significant relationship with the occurrence and with the parties'.[148] The exception was applied in *Red Sea* to displace the *lex fori* — the law of Hong Kong — under the first limb of the double actionability rule. The law of Saudi Arabia, which had the most significant relationship with the claim, wholly prevailed.

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140 *The Halley* (PC) (n 115) 203 (Selwyn LJ), quoting Joseph Story, *Commentaries on the Conflict of Laws* (5th ed, 1857) 32.

141 Bederman (n 111) 1078.

142 *Private International Law (Miscellaneous Provisions) Act 1995* (UK) ss 9(1), 9(3), 10, 11, 13, 14(2), 15A, 15B; *Regulation (EC) No 864/2007 on the Law Applicable to Non-Contractual Obligations*. Section 13 of the 1995 Act preserves the common law rules for defamation claims.

143 Law Commission and Scottish Law Commission, *Private International Law: Choice of Law in Tort and Delict* (LC Report No 193; SLC No 129, 1990) 9 [2.11].

144 See Andrew Dickinson, 'Further Thoughts on Foreign Torts: *Boys v Chaplin* Explained? (*Red Sea v Bouygues*) (1994) *Lloyd's Maritime and Commercial Law Quarterly* 463; C G J Morse, 'Torts in Private International Law: A New Statutory Framework' (1996) 45(4) *International and Comparative Law Quarterly* 888, 900–1. Cf Jonathan Harris, 'Choice of Law in Tort — Blending in with the Landscape of the Conflict of Laws?' (1998) 61(1) *Modern Law Review* 33, 33.

145 See King Fung Tsang, 'Double Actionability: An Outdated Rule in Modern Times' (2017–18) 86(1) *UMKC Law Review* 73, 81. Cf *Red Sea* (n 104). See also *Private International Law (Miscellaneous Provisions) Act 1995* (UK) s 12.

146 *Red Sea* (n 104).

147 *Zhang* (n 111) 508 [35].

148 *Red Sea* (n 104) 206 (Lord Slynn).

Prioritisation of the *lex loci delicti* in the *Private International Law (Miscellaneous Provisions) Act 1995* (UK) eliminated the forum control previously inherent in the traditional choice of law rule for tort. Under the 1995 Act, the generally applicable law in tortious claims is the *lex loci delicti*, subject to a rule of displacement or flexible exception.[149] The general rule can be displaced in favour of the law of another country with a stronger connection to the dispute.[150] The common law rules were abolished,[151] except for defamation claims.[152] The traditional safeguard of public policy and the rule of non-enforcement for penal, revenue or other public laws was maintained in the 1995 Act.[153]

An explicit, narrowly defined public policy exception is recognised in the *Rome II Regulation*, the second major reform to English choice of law in tort. The general rule of the *Rome II Regulation* is the *lex loci damni* concept;[154] however, special rules and exceptions are admitted for individual torts.[155] Though the place of damage is at the forefront of the regime, application of the *lex loci damni* may be avoided if its 'application is manifestly incompatible with the public policy (*ordre public*) of the forum'.[156] The extraordinary role of the defence is reinforced by the words 'manifestly incompatible'.

2 *New Zealand*

The double actionability rule no longer forms part of the law of New Zealand. The *Private International Law (Choice of Law in Tort) Act 2017* (NZ), which abolished the rule, is modelled on the UK's 1995 Act.[157] The Act provides that the *lex loci delicti* is the general choice of law rule for *all* torts.[158] That general rule is subject to a 'rule of displacement' or flexible exception.[159] The exception — in line with the 1995 Act, *Boys v Chaplin*, and *Red Sea* — gives the New Zealand court a discretion to apply the substantive[160] law of another country with a more significant connection to the parties and the dispute.[161] Factors of significance in this determination include the parties,[162] 'any of the events that constitute

149 *Private International Law (Miscellaneous Provisions) Act 1995* (UK) s 11(1).
150 Ibid ss 11, 12(1)–(2).
151 Ibid s 10.
152 Ibid s 13.
153 Ibid s 14(3)(a)(ii).
154 *Rome II Regulation* art 4(1).
155 Ibid arts 5–12.
156 Ibid art 26.
157 *Private International Law (Choice of Law in Tort) Act 2017* (NZ) s 10.
158 Ibid s 8.
159 Ibid s 9.
160 Ibid s 9(4). If the general rule is displaced, only the substantive law of the other country applies. The choice of law rules of the other country are expressly excluded.
161 Ibid s 9(2)–(3).
162 Ibid s 9(3)(a).

the tort in question',[163] or 'any of the circumstances or consequences of those events'.[164] Moreover, public policy and the penal, revenue, or other public law exceptions may be applied to avoid the *lex loci delicti*'s application.[165]

3 *Australia and Canada*

The adoption of the *lex loci delicti* rule in Australia and Canada stimulated discussion of possible exceptions to its application. In both countries, the rule applies to intra-national and international torts. The only significant difference between the Australian and Canadian approaches to choice of law in tort is Canada's recognition of a flexible exception for international torts. In *Tolofson v Jensen*, the Supreme Court of Canada embraced the *lex loci delicti* rule as the governing law for interprovincial and international torts.[166] A flexible exception was recognised in international cases,[167] but not in interprovincial cases mainly because of federal and constitutional considerations.[168] In Australia, the abandonment of double actionability unfolded in two parts. First, the High Court in *John Pfeiffer Pty Ltd v Rogerson* adopted the *lex loci delicti* rule as the governing law for interstate torts.[169] Constitutional considerations encouraged the High Court to adopt the *lex loci delicti* rule and to reject a flexible exception for intra-national cases.[170] The same constitutional considerations prohibited a public policy defence within the Australian federation.[171] Secondly, the High Court extended the ruling in *Pfeiffer* to international torts in *Regie Nationale des Usines Renault SA v Zhang*.[172] The High Court rejected a flexible exception for international cases; however, a public policy exception was recognised.[173]

The insularity of the first limb of *Phillips v Eyre* received criticism in the Canadian and Australian decisions. In *Zhang*, the High Court of Australia frankly recognised the forum control or public policy considerations inherent in the first limb of *Phillips v Eyre*.[174] Maintaining the threshold requirement of actionability would require the court 'to favour, in Westlake's terms, "a stringent domestic policy"'.[175] The inherent forum control in the

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163 Ibid s 9(3)(b).
164 Ibid s 9(3)(c).
165 Ibid s 11(2)(a)(i)–(ii).
166 [1994] 3 SCR 1022, 1051–2.
167 Ibid 1053–5.
168 Ibid 1058–63, 1063–6.
169 (2000) 203 CLR 503.
170 Ibid 538 [79]–[80] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
171 Ibid 541 [191]; *Zhang* (n 111) 515 [59] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
172 (2002) 210 CLR 491.
173 Ibid 515 [60] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
174 Ibid 510–15 [44]–[60].
175 Ibid 512 [53].

first limb '[took] it beyond its public policy root'.[176] The arbitrariness of *The Halley* threshold requirement and a matured "'experience" of the law' encouraged the majority to reject a continued role for the first limb under Australian law.[177] Meanwhile, the Supreme Court of Canada in *Tolofson* portrayed the first limb as reflecting 19th century considerations of British rule, which 'probably led to the temptation, not always resisted, that British laws were superior to those of other lands'.[178] In the Canadian Supreme Court's view, the difficulties of proving foreign law and English courts' suspicion of foreign legal systems said to have influenced the first limb had diminished in relevance with advances in transportation and communication.[179]

IV CONCLUSION

This Chapter has explored the public policy dimension of the traditional choice of law rules in marriage and in tort. Throughout the Chapter, much emphasis was placed on the formative role of scholarship in the common law development of both these choice of law rules.

With respect to marriage, Part II argued that hard cases involving distinct premarital domiciles contributed to a clearly bifurcated rule referring questions of form to the *lex loci celebrationis* and questions of capacity to the *lex domicilii*. Two reasons were suggested for the emergence of the rule in *Sottomayer v De Barros [No 2]*. First, before the Court of Appeal's decision in *Sottomayer v De Barros [No 1]*, English courts nearly always referred questions of form and capacity to the *lex loci celebrationis*. Secondly, consideration of the parties' personal capacity to marry had not arisen before *Brook v Brook*. The public policy exception to the *lex loci celebrationis* was suppressed because of the English courts' fresh focus on domicile.

Moreover, Part II reinforced that the requirement at common law of essential validity embeds considerations of public policy into the positive choice of law rule for marriage. Statutory restrictions on capacity to marry are modern-day reflections of a country's stringent domestic policy on the classes of people who are capable of contracting matrimony. For example, while Australian law reform ensured the reappearance of the *lex loci celebrationis* as a general rule for the validity of overseas marriages, the general rule is tempered by the statutory requirement that the marriage be *essentially valid* under Australian law.

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176 Ibid 513 [54].
177 Ibid 512 [53].
178 *Tolofson v Jensen* [1994] 3 SCR 1022, 1053 (La Forest J).
179 Ibid.

Part III considered the public policy control in the first limb of the rule in *Phillips v Eyre*. The background to the litigation in *Phillips v Eyre* and *The Halley* prefaced this discussion. It briefly explored the uncertain effect of the rule and its inflexibility. Dissatisfaction with the rule's homeward trend led to its 'practically' complete abolition in the United Kingdom,[180] and its complete abolition in Canada and Australia, at the close of the 20th century. In 2017, New Zealand abolished the rule.[181] Except for Australia, each jurisdiction recognises a flexible exception to the *lex loci delicti* rule, enabling the application of the law of another country possessing a stronger connection with the parties and the dispute. In Australia, the reforms in choice of law in tort nevertheless required that public policy be treated as an exception. It is significant that, irrespective of the course of their choice of law reform, each jurisdiction recognises the residual and exceptional role of public policy if the *lex loci delicti* violates fundamental policy of the forum.

In the second half of the 19th century, English courts were prepared to apply the controlling principle of public policy, as expressed in 19th century institutional writings, to strike down foreign laws that it considered 'prejudicial' to England's interests. In *The Halley*, the Privy Council applied the general principle of public policy in Story's *Conflict of Laws* without any regard to its content or its applicability to foreign torts. The principle was used as a convenient device with which to exclude foreign law. The decision in *The Halley* also preceded the growth of 'case law precluding, on public policy grounds, what otherwise would be a choice of foreign law as the *lex causae*'.[182]As the choice of law rules matured at common law, the explicit foundation of the rules in public policy was abandoned. Considerations of public policy became crystallised, embedded in the structure of the choice of law rule.

The next Chapter sets out to examine the current scope of the public policy exception in private international law. It also seeks to explain why public policy is exceptionally applied and proposes international comity as a guiding principle encouraging the application of foreign law.

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180 The rule still remains for defamation claims.
181 Singapore and Hong Kong retain the double actionability rule.
182 *Zhang* (n 111) 511 [49] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

CHAPTER 7: THE MODERN PRIVATE INTERNATIONAL LAW OF PUBLIC POLICY

I INTRODUCTION

In the 19th century, public policy offered fertile ground on which to cultivate new rules of private international law. That was observed in Chapter 6 with the evolution of the choice of law rules for marriage and tort. Both rules metamorphosed from evincing the public policy reservation to secreting those concerns beneath a different façade. This Chapter, on the other hand, considers the narrowing of the private international law of public policy and, then, suggests its modern content. In private international law jurisprudence, arguments of public policy have been neutralised by the dangers of its unrestrained use, encapsulated in Burrough J's 'unruly horse' metaphor,[1] and the modern trend towards recognising foreign law.

Judicial consideration of public policy — characterised as one of private international law's 'fairly well-trodden escape routes'[2] — inevitably involves scrutinising the substantive content of foreign law that is otherwise applicable. This scrutiny could lead a court, exceptionally, to deny recognition to a foreign judgment or exclude a foreign law that is directed by the usual application of choice of law rules. It has, over the years, become a measure of last resort primed 'for foreign laws of surpassing evil or equivalent objection'.[3] Within private international law, public policy has had the most exposure in cases involving contract and status.[4] And, though public policy is functionally negative or exclusionary, it *may* have positive or 'creative' functions.[5]

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1 *Richardson v Mellish* (1824) 2 Bing 229; 130 ER 294, 303 (Burrough J).

2 P B Carter, 'The Rôle of Public Policy in English Private International Law' (1993) 42 *International and Comparative Law Quarterly* 1, 1 ('The Rôle of Public Policy').

3 Adrian Briggs, 'Public Policy in the Conflict of Laws: A Sword and a Shield? A Note on *Kuwait Airways Corp v Iraq Airways Co [Nos 4 and 5]*' (2002) 6 *Singapore Journal of International and Comparative Law* 953, 956 ('Public Policy in the Conflict of Laws: A Sword or a Shield?').

4 See Lord Collins (ed), *Dicey, Morris & Collins on the Conflict of Laws* (Sweet and Maxwell, 15th ed, 2012) vol 1 102 [5–008].

5 See, eg, *Lorentzen v Lydden* [1942] 2 KB 202, 215–6 (Atkinson J); F A Mann, 'Extraterritorial Effect of Confiscatory Legislation (Note)' (1942) 5(3) *Modern Law Review* 262, 263; Briggs, 'Public Policy in the Conflict of Laws: A Sword and a Shield?' (n 3) 977. Cf *Bank voor Handel v Slatford* [1953] 1 QB 248, 263–4, 266 (Devlin J); *Peer International Corp v Termidor Music Publishers Ltd* [2004] Ch 212, 222 [31] (Aldous LJ), 234 [62], [63] (Mance LJ). See also Bobby Lindsay, 'Resuscitating the Positive Aspects of Public Policy in Private International Law' (Conference Paper, Society of Legal Scholars PhD Conference, 4 December 2016).

Two types of public policy have been consistently assumed in academic writing.[6] The first type of public policy — domestic or internal public policy — has exclusive application in wholly domestic cases.[7] The second type is international public policy, which is the function of public policy in private international law.[8] At a broad level, this involves the application of domestic policy norms to override a foreign law or judgment. However, the doctrine is not freely invoked in common law jurisdictions because, as Lord Simon remarked in *Vervaeke v Smith*, 'the court will be even slower to invoke public policy in the field of conflict of laws than when a purely municipal legal issue is involved.'[9] Throughout this Chapter, the term 'cross-border public policy' is favoured over 'international public policy'. More recently, a third type of public policy has come into sharper relief. This third type is preoccupied with rules of international law and moral interests of universal applicability.[10] Suggested labels for it include 'transnational',[11] '*really* international',[12] '*truly* international'[13] or 'global'[14] public policy.

This Chapter re-examines cross-border public policy to define its current scope of operation. The aim of this Chapter is then to suggest additional constrictions on an already exceptionally applied exclusion in Anglo-common law private international law.[15] This point is developed in two parts. Part II of this Chapter expounds international comity as an important modern justification for applying foreign law and for recognising foreign judgments. This discussion therefore begins with historical background on comity to explain its development and its modern uses. International comity, connected with

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6 See, eg, Otto Kahn-Freund, *Selected Writings* (Stevens and Sons, 1978) 235; Adeline Chong, 'Transnational Public Policy in Civil and Commercial Matters' (2012) 128 *Law Quarterly Review* 88, 89–91 ('Transnational Public Policy'); Ebenezer O I Adodo, 'Enforcement of Foreign Gambling Debts: Mapping the Worth of the Public Policy Defence' (2005) 1(2) *Journal of Private International Law* 291, 295–6; Adeline Chong, 'The Public Policy and Mandatory Rules of Third Countries in International Contracts' (2006) 2(1) *Journal of Private International Law* 27, 29–30 ('Public Policy and Mandatory Rules'); Kenny Chng, 'A Theoretical Perspective of the Public Policy Doctrine in the Conflict of Laws' (2018) 14(1) *Journal of Private International Law* 130, 133.

7 Jacob Dolinger, 'World Public Policy: Real International Public Policy in Conflict of Laws' (1982) 17 *Texas International Law Journal* 167, 172; Chong, 'Transnational Public Policy' (n 6) 89; Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4(2) *Journal of Private International Law* 201, 213.

8 See, eg, Dolinger (n 7) 172; Mills (n 7) 213; Stavros Brekoulakis, 'Public Policy Rules in English and International Arbitration Law' (2018) 84(3) *Arbitration* 205, 211.

9 *Vervaeke v Smith* [1983] 1 AC 145, 164 (Lord Simon).

10 Dolinger (n 7) 172; Chong, 'Transnational Public Policy' (n 7) 90.

11 See Chong, 'Transnational Public Policy' (n 7) 90; Hossein Fazilatfar, 'Transnational Public Policy: Does It Function from Arbitrability to Enforcement' (2012) 3(2) *City University of Hong Kong Law Review* 289.

12 See, eg, Fazilatfar (n 7) 289; Ricardo de Carvalho, 'Homenagem a Pierre Lalive, Transnational (or Truly International) Public Policy and International Arbitration' (2014) 11(41) *Revista Brasileira de Arbitragem* 171 (emphasis added).

13 See Mills (n 7) 213, 215 (emphasis added).

14 See Dolinger (n 7) 172.

15 Mills (n 7) 207.

judgments and choice of law, is next reinforced as a restraint which consolidates the common law courts' reluctance to engage with public policy arguments.

Guided by this development, Part III identifies the present scope of the public policy doctrine. In this part, the salient considerations underpinning the doctrine's application and the normative categories of cross-border public policy are considered. The positive and negative consequences of excluding foreign law using public policy conclude this discussion in Part III.

II INTERNATIONAL COMITY IN MODERN PRIVATE INTERNATIONAL LAW

A *Origins of International Comity*

1 *Huber's Comity*

The modern conception of comity in private international law can be traced to the 17th century Dutch scholar, Ulrik Huber.[16] Following its asserted independence from Spanish rule in 1581,[17] the Dutch Republic had grown into an important trading nation. Expansion in trade increased contact and commercial intercourse with other nations, an inevitable consequence of which was conflicting laws between traders and between the Dutch provinces.[18] Seventeenth century Dutch jurists — including the Voets, Christian Rodenburg, and Huber — sought a solution to this problem of applying foreign law in domestic courts without damaging international commerce or impairing the independence of the newly independent Dutch Republic.[19] The solution was comity, which reconciled the application of foreign law in domestic courts with the imperative of absolute territorial sovereignty — limiting a sovereign's laws to its territorial borders.[20] The expansion of international commerce in the Dutch Republic, organised into independent provinces, thus provided the background to the comity principle developed in Huber's *De Conflictu Legum* (1689).

Comity featured prominently in the third axiom of Huber's *De Conflictu Legum*. Huber used three axioms to reconcile a nation's claim to absolute territorial sovereignty with the cross-border enforcement of laws. Comity, meaning 'a sentiment of friendship and

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16 Comity had a history before Huber: see, eg, Cameron Sim, 'Choice of Law and Anti-Suit Injunctions: Relocating Comity' (2013) 62(3) *International and Comparative Law Quarterly* 703, 715.

17 Independence was formally recognised by the Treaty of Westphalia in 1648.

18 Joel R Paul, 'Comity in International Law' (1991) 32(1) *Harvard International Law Journal* 1, 15.

19 See, eg, Hessel E Yntema, 'The Comity Doctrine' (1966–67) 65(1) *Michigan Law Review* 9, 20; Paul (n 18) 14.

20 See, eg, Paul (n 18) 14.

courtesy between sovereigns',[21] mediated this tension. Huber's first two axioms recognised the principle of absolute territorial sovereignty. The first axiom accepted that '[t]he laws of each state have force within the limits of that government, and bind all subject to it, but not beyond'.[22] By the second axiom, Huber bound people within the territory of a sovereign to that country's laws: 'All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.'[23] The third axiom resolved the critical issue of why the courts of one country might apply the strictly territorial laws of another sovereign. It was comity that explained why foreign laws might be applied by the courts of another country. Huber's third axiom provided: 'Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects'.[24]

The doctrine of comity in Huber's third axiom was more explanatory than 'practical' or 'prescriptive'.[25] Comity explained 'why a sovereign nation would choose to forego exercising its own power and recognise another state's power instead'.[26] The doctrine left the decision to admit foreign law entirely to the sovereign's discretion.[27] It operated 'out of a sense of hospitality and affability toward the foreigner', bringing to mind good neighbours lending each other a hand.[28] Huber also recognised the commercial expediency of applying foreign laws in domestic courts by observing that 'nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law'.[29] In the early 18th century, Huber's doctrine of comity was received into Scottish courts and subsequently progressed to English and American courts.

2 *Comity in the Eighteenth and Nineteenth Centuries*

In the 18th century, Huber's doctrine of comity was received into the common law world by way of Scotland.[30] Scottish students, who studied law at Dutch universities in the 17th and 18th centuries, were familiar with the writings of continental scholars which would

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21 Reid Mortensen, 'Comity and Jurisdictional Restraint in Vanuatu' (2002) 33(1) *Victoria University of Wellington Law Review* 95, 98.
22 Ernest G Lorenzen, 'Huber's *De Conflictu Legum*' (1918–19) 13 *Illinois Law Review* 375, 376.
23 Ibid.
24 Ibid.
25 Justice James Allsop, 'Comity and Commerce' [2005] *Federal Judicial Scholarship* 27 [25].
26 Ibid.
27 Ibid.
28 Paul (n 18) 17.
29 Lorenzen (n 22) 403.
30 See Kurt H Nadelmann, 'Introduction – The Comity Doctrine' (1966-7) 65(1) *Michigan Law Review* 1, 2.

have included Huber and the Voets.[31] In 1711, the Scottish Court of Session in *Goddart v Swinton* interpreted comity as demanding 'respect and civility, but not as excluding review'.[32] The Court recognised that foreign decrees were enforced out of comity, not '*ex necessitate*'.[33] To be enforceable, foreign decrees had to possess 'two qualities, viz That they be founded on principles agreeable to the law of nations, and contain nothing contrary to the particular laws of the place where they are craved to be put in execution'.[34] Reciprocity was identified as a condition for the enforcement of English decrees in Scotland: 'And there is no reason to sustain their decrees here, till the English pay the same respect to ours, which they do not.'[35]

In the 18th and 19th centuries, Huber's view of comity as courtesy provided the basis for private international law in the common law world. Scottish lawyers introduced the concept of comity to English courts.[36] In England, Lord Mansfield exposed the local legal community to the private international law scheme set out in Huber's *De Conflictu Legum*. Notably, in *Robinson v Bland* — a case involving the validity of a French gaming contract — Lord Mansfield observed that 'the general rule established *ex comitate et jure gentium* is, that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract'.[37] Comity's place within common law private international law was definitively recognised in Joseph Story's 1834 text, *Commentaries on the Conflict of Laws*.

Story's *Conflict of Laws* used Huber's three axioms as the basis for American private international law.[38] By adopting the doctrine of comity, which 'is, and ever must be uncertain',[39] Story continued Huber's idea that domestic courts applied interstate or federal law based on discretionary considerations, not from obligation.[40] Story observed that 'whatever force and obligation the laws of one country have in another, depends solely upon the laws, and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent'.[41] By placing comity at the forefront of private international law, Story provided 'a mediating principle

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31 D J Llewelyn Davies, 'The Influence of Huber's *De Conflictu Legum* on English Private International Law' (1937) 18 *British Year Book of International Law* 49, 53; Paul (n 18) 17–18.
32 *Goddart v Swinton* (1711) 4 Bro Sup 848, 849.
33 *Goddart v Swinton* (1713) Mor 4533, 4534.
34 Ibid 4535 (as in original).
35 *Goddart v Swinton* (1709) Mor 6445, 6445.
36 Llewelyn Davies (n 31) 53; Paul (n 18) 17–18.
37 *Robinson v Bland* (1860) 1 Bl W 256; 96 ER 141, 141 (Lord Mansfield CJ).
38 Joseph Story, *Commentaries on the Conflict of Laws* (Hilliard, Gray and Co, 1st ed, 1834) 30 s 29.
39 Ibid 29 s 28.
40 Ibid 33 s 33.
41 Ibid 24 s 23.

between free and slave states' which would 'save the republic'.[42] The focus of Story's *Conflict of Laws* was 'the internal tensions of federalism'.[43]

Story's interpretation of comity corresponded with his natural law framework discussed in Chapter 3. Story's characterisation of comity as an 'imperfect obligation like beneficence, humanity, and charity' used the recognisable language of Reverend Paley.[44] In recent scholarship, the 'imperfect obligation' language has been anachronistically attributed to Gray J in the 1895 Supreme Court of the United States' decision, *Hilton v Guyot*.[45] However, Story's natural law philosophy — gleaned from an anonymously written encyclopaedia entry (as outlined in Chapter 3) — contained a nuanced understanding of imperfect rights and obligations modelled after Paley's *Principles of Moral and Political Philosophy*. While imperfect rights were not enforceable by law, the obligations that arose from them were 'deemed as imperative, as if they also possessed the strongest earthly sanctions; since they arise from the commands of God, and are to be done in obedience to his will'.[46] This idea of imperfect obligation was the prism through which Huber's comity doctrine was understood. Comity in the private international law context arose 'from mutual interest and utility; from a sense of the inconveniences, which would result from a contrary doctrine; and from a sort of moral necessity to do justice, in order that justice may be done to us in return'.[47]

3 *Recharacterising Comity in the United States*

American conflicts scholars gradually abandoned Story's conception of comity as the theoretical basis for private international law.[48] Following the example of A V Dicey, Joseph Beale popularised the vested rights approach in early 20th century America. Vested rights removed any consideration of comity by focusing on whether a right vested in another forum, such as a cause of action, would be enforced in a domestic forum.[49] Story's comity doctrine was expressly rejected because it was an 'enabling principle' which

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42 Paul (n 18) 20, 22. See also the slavery example in Story (1834) (n 38) 28–9.

43 Paul (n 18) 25.

44 Story (1834) (n 38) 33 s 33. But see Paul (n 18) 24. Paul argued that Gray J in *Hilton v Guyot* was the one to interpret 'comity as relying on an imperfect obligation': at 24.

45 Paul (n 18) 24.

46 Valerie L Horowitz (ed), *The Unsigned Essays of Supreme Court Justice Joseph Story: Early American Views of Law* (Talbot Publishing, 2015) 262. Story's characterisation of comity as an 'imperfect obligation' reflects the terminology used in explaining his natural law philosophy, which drew on William Paley's *Principles of Moral and Political Philosophy*. For a summary of Paley's work, see Chapter 3.

47 Story (1834) (n 38) 34 s 35.

48 Donald Earl Childress III, 'Comity as Conflict: Resituating International Comity as Conflict of Laws' (2010–11) 44(1) *University of California Davis Law Review* 11, 35–46.

49 Ibid 35–9.

provided no guidance on the rule to be applied in a given case.[50] This scholarly 'unmooring' of comity continued with the spread of interest analysis in the latter half of the 20th century.[51] Unseating the vested rights theory, Currie's governmental interest analysis was concerned with identifying a sovereign's interest in litigation.[52]

Academic criticism has not, however, dissuaded the judiciary from continuing to invoke comity in American case law, making it possible to identify three species of comity.[53] Prescriptive comity — the first and earliest species of comity — indicates deference to foreign lawmakers.[54] In the first half of the 20th century, considerations of prescriptive comity were deemed relevant to the exercise of personal jurisdiction or the extraterritorial reach of domestic statutes.[55] This use of comity 'manifested' itself in tests requiring interest balancing or minimum contacts before exercising personal jurisdiction or before giving extraterritorial effect to domestic statutes.[56] The principle of reasonableness in the *Restatement of Foreign Relations Law of the United States (Third)* militates against the unreasonable exercise of personal jurisdiction by importing an interest balancing test.[57]

Deference to courts of another sovereign, generally referred to as 'comity of courts',[58] 'judicial comity'[59] or 'adjudicatory comity',[60] is the second trend of American case law.[61] Rules for recognising foreign judgments and for giving judicial assistance to foreign courts are leading examples of this second trend.[62] Adjudicatory comity is also considered to be the basis for the common law doctrine of *forum non conveniens*, which requires American courts to decline to exercise jurisdiction if another jurisdiction is 'more appropriate in the interests of justice'.[63] The third species of comity is sovereign party or executive comity,

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50 Joseph H Beale, *A Treatise on the Conflict of Laws* (1916) s 71, quoted in Childress (n 48) 37.
51 Childress (n 48) 35, 39–43.
52 Ibid 39–43.
53 Ibid 47.
54 N Jansen Calamita, 'Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings' (2006) 27(3) *University of Pennsylvania Journal of International Economic Law* 601, 606; Childress (n 48) 16; William S Dodge, 'International Comity in American Law' (2015) 115(8) *Columbia Law Review* 2071, 2099–2105.
55 Dodge (n 54) 2093–5.
56 Ibid.
57 Paul (n 18) 45.
58 *Hartford Fire Insurance Co v California*, 509 US 764, 817 (1993) (Scalia J).
59 Michael D Ramsey, 'Escaping "International Comity"' (1998) 83 *Iowa Law Review* 893, 897–906; Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44(1) *Harvard International Law Journal* 191, 194; Childress (n 48) 16.
60 Calamita (n 54) 606; Thomas Schultz and Niccolo Ridi, 'Comity in US Courts' (2018) 10(1) *Northeastern University Law Journal* 280, 325–42.
61 See, eg, Calamita (n 54) 606; Dodge (n 54) 2105.
62 Dodge (n 54) 2105; Allsop (n 25) [68]–[75].
63 Calamita (n 54) 631–41, 637.

which implicates deference to executive acts of foreign sovereigns.[64] For each species, comity can operate as a 'principle of recognition' or 'a principle of restraint'.[65] In other words, the application of domestic law or the exercise of the court's jurisdiction demands restraint 'to avoid unreasonable interference with the sovereign authority of other nations'.[66] However, comity also demands recognition be given to foreign law, foreign judgments, and foreign sovereignty.[67]

The justifications for comity in American law have changed over time. Public rationales for the comity doctrine became more pronounced in early 20th century decisions.[68] Not only did comity comprehend the commercial convenience of private parties, as Huber had conceived it, comity also implicated deference to foreign sovereignty and the maintenance of 'friendly relations'.[69] Initially, considerations of public interest manifested in 19th century American jurisprudence as 'a justification for *not* extending comity to foreign laws' considered prejudicial.[70] From the early 20th century, American courts began to appreciate that applying American laws extraterritorially or questioning a foreign act of state could be offensive to foreign sovereigns.[71] This revised conception of comity to justify restraint recognises that another country's courts might have a legitimate interest in resolving a dispute.[72]

The *Hilton v Guyot*[73] definition of comity is oft-quoted throughout the common law world as a definitive statement on comity. The context of the definition was the enforcement of a French executory judgment against a US citizen. A slim majority in the Supreme Court of the United States decided that its courts would only give full faith and credit to a foreign judgment if the foreign court granted reciprocal treatment to judgments of the United States,[74] which French courts did not do. In giving the majority opinion, Gray J observed that comity meant:

> neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive and judicial acts of another nation, having due regard both to

64 Childress (n 48) 47; Schultz and Ridi, 'Comity in US Courts' (n 50) 342–54.
65 Dodge (n 54) 2078, 2099.
66 *F Hoffman-La Roche Ltd v Empagran SA*, 542 US 155, 164 (2004).
67 Dodge (n 54) 2078.
68 Ibid 2095.
69 Ibid 2095–6, 2097–8.
70 Ibid 2096.
71 Ibid 2097.
72 Ibid 2098.
73 *Hilton v Guyot*, 159 US 113 (1895).
74 Ibid 228.

> international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[75]

4 *Decay and (Partial) Rehabilitation of International Comity in English Law*

Unlike its American counterpart, the English idea of comity is still relatively underdeveloped. This is in part due to the consolidated disdain of leading 19th and 20th century text writers towards the concept.[76] Dicey, in his first edition of *Conflict of Laws* (1896), described comity as 'a singular specimen of confusion of thought produced by laxity of language'.[77] Dicey rejected the implication that recognition or enforcement of foreign laws depended on comity, adding that the application of foreign law was 'not a matter of caprice or option'.[78] More guarded language appears in the 15th edition of Dicey, Morris and Collins in which comity is characterised as 'a term of very elastic content'.[79] Cheshire consolidated his disdain for the 'meaningless or misleading' term over several editions of his text.[80] From the sixth edition (1961) of his text, Cheshire questioned comity's consistency 'with the judicial function' because 'comity is a matter for sovereigns, not for judges required to decide a case according to the rights of the parties'.[81] Elsewhere, the concept was described as 'far too vague' and variable 'to serve as a satisfactory theoretical underpinning for a sophisticated system of private international law'.[82] As a consequence, it has been observed that '[r]eferences to comity… should only be made with caution, and preferably dropped altogether'.[83]

However, despite disdain from scholars and judges alike, the concept persists in the decisions of English and other common law courts where it has different connotations in different contexts.[84] Writing in 2000, Lord Collins observed that he had 'come across

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75 Ibid 163–4.

76 Lawrence Collins, 'Comity in Modern Private International Law' in James Fawcett (ed), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Oxford University Press, 2002) 89, 91; Adrian Briggs, 'The Principle of Comity in Private International Law' (2012) 354 *Recueil des Cours de l'Académie de Droit International* 65, 81–2; Sim (n 16) 715.

77 A V Dicey, *The Conflict of Laws* (Stevens and Sons, 1st ed, 1896) 10.

78 Ibid.

79 Collins, *Dicey, Morris and Collins* (n 4) 5 [1-008].

80 Sir Peter North and JJ Fawcett, *Cheshire and North's Private International Law* (Butterworths, 13th ed, 1999) 5, quoted in Collins, 'Comity in Modern Private International Law' (n 76) 89, 91.

81 North and Fawcett (n 80) 5, quoted in Collins, 'Comity in Modern Private International Law' (n 76) 89, 91–2.

82 J G Collier, *Conflict of Laws* (Cambridge University Press, 3rd ed, 2001) 379.

83 Peter Kaye, 'Jurisdictional Discretion of English Courts' (1990) 134(3) *Solicitors Journal* 703, 706. For a similar comment, see Briggs, 'Comity' (n 76) 87 ('It cannot be denied that there is an air of wariness associated to appeals to comity').

84 Collins, 'Comity in Modern Private International Law' (n 76) 89, 95; Ralf Michaels, 'Public and Private International Law: German Views on Global Issues' (2008) 4(1) *Journal of Private International Law* 121, 216.

more than thirty decisions in the British Commonwealth in the last twenty years citing *Hilton v Guyot* on comity, and more than 100 decisions in the United States in the same period'.[85] Lord Collins, in the Supreme Court of the United Kingdom's decision *Agbaje v Agbaje*, identified three uses for comity from the existing authorities.[86] In the first place, comity was 'sometimes used not simply in the sense of courtesy to foreign states and their courts, but also in the sense of rules of public international law which establish the proper limits of national legislative jurisdiction in cases involving a foreign element'.[87] Not unlike the trend of American authorities on prescriptive comity, this sense of comity constrains the application of United Kingdom legislation 'involving a foreign country when the United Kingdom has no reasonable relationship with the situation'.[88] Deference to foreign institutions characterises the second use of comity which requires that 'a court in one country should not lightly characterise the law or judicial decisions of another country as unjust'.[89] Thirdly, comity may provide 'the basis for the recognition and enforcement of foreign judgments'.[90]

In general, English courts employ the comity doctrine to limit the application of domestic laws or, in exceptional cases, 'to question, limit, or refuse the application of foreign laws'.[91] Comity is used to enjoin courts to exercise restraint and to show 'respect for the operation of different legal systems'.[92] For example, historically, English judges invoked comity to question the 'exorbitance' of jurisdiction claimed by English courts in service-out applications.[93] In more recent years, comity has been relevant to the granting of anti-suit injunctions with English courts reinforcing the 'great caution' required before one is granted.[94] English courts have recognised the reality that anti-suit injunctions, though *in personam*, indirectly interfere with foreign proceedings.[95] Comity interacts with

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85 Collins, 'Comity in Modern Private International Law' (n 76) 89, 95.
86 *Agbaje v Agbaje* [2010] 1 AC 628.
87 Ibid 671 [52] (Lord Collins).
88 Ibid.
89 Ibid 671 [53].
90 Ibid 671 [54].
91 See generally Briggs, 'Comity' (n 76) 96–115; Dodge (n 54) 2072.
92 See *Masri v Consolidated Contractors International (UK) Ltd [No 3]* [2009] QB 503, 514 [16] (Lawrence Collins LJ); *Ecobank Transnational Inc v Tanoh* [2016] 1 WLR 2231, 2261 [132] (Christopher Clarke LJ) (CA).
93 Collins, 'Comity in Modern Private International Law' (n 76) 99. For comments on the sufficiency of connections with the forum to counter questions of jurisdictional exorbitance, see *Re Paramount Airways Ltd* [1993] Ch 223, 239–40 (CA); *Masri v Consolidated Contractors International (UK) Ltd [No 2]* [2009] QB 450, [34]–[36]. For a more recent account, see *Tiger Yacht Management Ltd v Morris* [2019] FCAFC 8.
94 See, eg, Collins, 'Comity in Modern Private International Law' (n 76) 101; Sim (n 16) 713.
95 See, eg, *Airbus Industrie GIE v Patel* [1999] 1 AC 119, 139 (Lord Goff) (HL(E)); Collins, 'Comity in Modern Private International Law' (n 76) 101; Sim (n 16) 713.

anti-suit injunctions by insisting that 'the English forum should have a sufficient interest in, or connection with, the matter in question'.[96]

B *Comity in Modern Private International Law: Judicial Restraint and Public Policy*

In Anglo-common law jurisdictions, judicial application of cross-border public policy has been 'comparatively rare'.[97] Adverse judicial and scholarly comment has generally followed where Anglo-common law courts have applied the exclusion in commercial and family law cases.[98] For Australian courts, the reluctance to employ public policy is quite pronounced. *In the Marriage of El Ouiek* is the only reported case in which an Australian court has applied the public policy exception.[99]

The forum-orientated bias of English choice of law rules and English courts' increased internationalism have been ventured as distinctive reasons for the 'smallness' of English public policy (compared to its civil law counterpart).[100] In particular, the restriction of English public policy has been attributed to the predominance of the *lex fori* in family matters.[101] The converse argument is that modern-day courts are more amenable to foreign law in cross-border litigation than previously had been the case: "'judicial chauvinism has been replaced by judicial comity'".[102] As a corollary — the argument goes — the public policy doctrine is only exceptionally applied in many Anglo-common law jurisdictions.[103]

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96 *Airbus Industrie GIE v Patel* [1999] 1 AC 119, 139 (Lord Goff) (HL(E)).

97 For comments of this nature, see: Collins, *Dicey, Morris and Collins* (n 4) 100 [5–004]; Carter, 'The Rôle of Public Policy' (n 2) 3; Nelson Enonchong, 'Public Policy in the Conflict of Laws: A Chinese Wall Around Little England?' (1996) 45 *International and Comparative Law Quarterly* 633, 636–7.

98 See, eg, **Canada:** *Sangi v Sangi* [2011] BCSC 523, [287], [290] (Gray J), questioning the exception's application in *Vladi v Vladi* (1987) 79 NSR (2d) 356; Gerald B Robertson, 'Public Policy and Recognition of Foreign Divorces: *Zhang v Lin* and *Marzara v Marzara*' (2012) 49(3) *Alberta Law Review* 745, 748–9, critiquing the successful invocation of public policy in *Zhang v Lin* 2010 ABQB 420 [68] (Veit J) and *Marzara v Marzara* 2011 BCSC 408, [77], [79] (Ross J). Cf *Genova v Knight* [2005] 11 WWR 32 (the British Columbia Court of Appeal set aside a lower court's finding that child support provisions in a New Jersey divorce order were contrary to the public policy of British Columbia). **New Zealand**: *Reeves v OneWorld Challenge LLC* [2006] 2 NZLR 184, 198 [65], citing *Jones v Poffenroth* (High Court of New Zealand, Smellie J, 14 March 1986): 'in Jones v Poffenroth… Smellie J refused to enforce a judgment where the proceedings in the State of California had been tainted by maintenance and champerty. In our view, that set the bar too low, and the weight of judicial and academic authority would tell against such a low threshold'.

99 *In the Marriage of El Ouiek* (1977) 29 FLR 171.

100 Gerhart Husserl, 'Public Policy and *Ordre Public*' (1938) 25(1) *Virginia Law Review* 37, 47; Collins, *Dicey, Morris and Collins* (n 4) 100 [5–004]; Carter, 'The Rôle of Public Policy' (n 2) 3; Enonchong (n 97) 636–7.

101 Carter, 'The Rôle of Public Policy' (n 2) 3.

102 Enonchong (n 97) 642, quoting *The Abidin Daver* [1984] AC 398, 411, 411 (Lord Diplock). The quote from *The Abidin Daver* was given in the context of English courts' receptiveness towards the doctrine of *forum non conveniens*.

103 Enonchong (n 97) 642.

Indeed, 'extreme reserve'[104] has been the symptomatic response of Anglo-common law courts to public policy arguments. Avoidance of these arguments arguably casts a pall over the content of public policy — the circumstances under which the defence most likely applies. What is left is Anglo-common law courts' commentary on the unsuitability of public policy arguments, which emphasise the exception's narrow compass,[105] the high threshold required before the doctrine may be engaged in private international law[106] and the need for comity.

Anglo-common law courts have clearly indicated that differences in legal solutions between jurisdictions are 'not of itself sufficient' to engage the private international law doctrine.[107] As Atkinson J of the Supreme Court of Queensland observed in *De Santis v Russo*, 'different jurisdictions… adopt different solutions to similar problems without suffering the ignominy of being described as contrary to public policy'.[108] The well-known comments of Cardozo J in *Loucks v Standard Oil Co of New York* are apt in this context: '[w]e are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home'.[109]

1 *Comity and the Recognition of Foreign Judgments*

Motives of international comity militate against the public policy exception operating to deny recognition of a foreign judgment under common law principles and, to some extent, statutory regimes.[110]Comity expressed through 'the respect and recognition of the

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104 *Vervaeke v Smith* (n 9) 164 (Lord Simon).

105 See, eg, *Holt v Thomas* (1987) 38 DLR (4th) 117, 137 [26] (O'Leary J) (AB QB); *United States of America v Ivey* (1995) 26 OR (3d) 533, [52] (Sharpe J); *Old North State Brewing Co v Newlands Services Inc* (1998) 41 BLR (2d) 191, [48]; *Hebei Import and Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111, 139 (Mason NPJ); *Dymock v Bilbie* (1999) 2 NZPC 1013 (Doogue J); *Stern v National Australia Bank* [1999] FCA 1421, [140] (Tamberlin J) ('*Stern*'); *Society of Lloyd's v Meinzer* (2001) 55 OR (3d) 688, [60] (Feldman JA); *Norsemeter Holdings AS v Boele [No 1]* [2002] NSWSC 370, [44] (Einstein J); *Kuwait Airways Corp v Iraqi Airways Co [Nos 4 and 5]* [2002] 2 AC 883, 1101 [114] (Lord Steyn); *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 354, 372 [61] (Black CJ and Hill J); *Beals v Saldanha* [2003] 3 SCR 416, 453 [75] (Major J); *Reeves v OneWorld Challenge LLC* (n 98) 195–6 [50], 196 [56]–[57], 197 [58]–[61], [64] (Anderson P and O'Regan J), 206 [104] (William Young J) (dissenting); *Pro Swing Inc v Elta Golf Inc* [2006] 2 SCR 612, 664 [121] (McLachlin CJ) (dissenting); *ML v YJ* [2008] 3 HKC 362, 374 [48] (Lam J); *Lane v Questnet Ltd* [2010] NZAR 210, 219 [47] (Ellen France J); *Ross v Ross* [2011] NZFLR 440, 447–9 [28]–[29] (Allan J); *Sangi v Sangi* (n 98) [284] (Gray J); *Kok v Resorts World at Sentosa Pte Ltd* (2017) 323 FLR 95, 101 [18] (Martin CJ); *Mudajaya Corp Berhad v Chua* [2019] NZHC 1436, [69] (Fitzgerald J).

106 See, eg, *Block Bros Realty v Mollard* (1981) DLR (3d) 323, [17] (Craig JA) (BCCA); *Stern* (n 105) [143] (Tamberlin J) ('*Stern*'); *Genova v Knight* (n 98) [21], [24], [26] (Low J); *Vargo v Saskatchewan* 2006 SKQB 253, [24] (Gabrielson J).

107 *De Santis v Russo* (2001) 27 Fam LR 414, 419 [18] (Atkinson J); *International Farmers Fertiliser Cooperative v Legend International Holdings Inc* (2016) 52 VR 1, 14 [52]–[53] (Randall AsJ).

108 *De Santis v Russo* (n 107) 419 [18].

109 *Loucks v Standard Oil Co of New York*, 224 NY 99, 111 (1918) (Cardozo J).

110 For general comments to this effect, see *Jenton Overseas Investment Pte Ltd v Townsing* (2008) 21 VR 241 243 [9], 246 [20] (Whelan J); *Kok v Resorts World at Sentosa Pte Ltd* (n 105) 100–1 [17] (Martin CJ). Cf

institutions of other sovereign states' discourages the operation of the public policy defence in Anglo-common law jurisdictions.[111] However, some care should be taken when using the term 'comity' in this context; 'international comity' and 'reciprocity' once prevailed as theoretical bases for recognition and enforcement at common law.[112] In any case, sufficiently strong grounds must be mustered before an enforcing court will refuse on public policy grounds to recognise a foreign judgment that is 'final and conclusive' and for a definite sum of money. A factor — or motive — consistently invoked in favour of sustaining foreign judgments is 'the public policy of acting consistently with international comity' or 'judicial comity'.[113] The court's refusal to 'go behind' a foreign judgment maintains the interests of comity with recognition serving the countervailing public policy of finality in litigation.[114] As Kirby P observed in *Bouton v Labiche*, '[t]he interests of comity are not served if the courts of the common law are too eager to criticise the standards of the courts and tribunals of another jurisdiction or too reluctant to recognise their order …'[115] In consequence, few reported Anglo-common law decisions have denied recognition to a foreign *in personam* judgment on the basis of public policy.[116] One outlier, though, is Singapore where foreign judgments on gambling debts have been denied recognition.[117]

A series of counterweights are required to tip the balance from international comity to non-recognition using the public policy defence. The defence is a blunt instrument because it involves passing judgment on the quality of foreign law. The enforcement of a foreign judgment can be prevented only if it 'is founded on a law contrary to the fundamental morality of the [domestic] legal system'.[118] Courts thus express extreme reserve towards public policy arguments and exercise restraint before invoking the doctrine. By rejecting arguments of this nature, courts emphasise the high threshold

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111 *Kok v Resorts World at Sentosa Pte Ltd* (n 110) 100–1 [17] (Martin CJ). See also Thomas Schultz and Jason Mitchenson, 'Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts' (2016) 12(2) *Journal of Private International Law* 344, 376–7.

112 The obligation theory still prevails: *Schibsby v Westenholz* (1870) LR 6 QB 155, 159 (Blackburn J).

113 See, eg, *Banque Indosuez v Bourgogne* (High Court of New Zealand, Wylie J, 12 January 1990) 9; *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740, 777.

114 See, eg, *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* (n 113) 753, 768, 771, 783.

115 *Bouton v Labiche* (1994) 333 NSWLR 225, 234 (Kirby P).

116 See, eg, *Banque Indosuez v Bourgogne* (n 113) 9; *Bank of Kiribati Ltd v Harrison* (1990) 1 NZPC 459, 459 (Gault J); *Society of Lloyd's v Meinzer* (n 105) [60] (Feldman JA); *Beals v Saldanha* [2003] 3 SCR 416, 453 [75]; *Reeves v OneWorld Challenge LLC* (n 98) 193 [40] (O'Regan J).

117 See, eg, *Star City Pty Ltd v Tan Hong Woon* [2002] 4 SLR 22; cf *Burswood Nominees Ltd (formerly Burswood Nominees Pty Ltd) v Liao Eng Kiat* [2004] 2 SLR(R) 436; *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2009] SGCA 60. See generally Ebenezer O I Adodo, 'Enforcement of Foreign Gambling Debts: Mapping the Worth of the Public Policy Defence' (2005) 1(2) *Journal of Private International Law* 291, 312–8.

118 *Beals v Saldanha* [2003] 3 SCR 416, 452 [72].

required before public policy counteracts the policies that are strongly in favour of enforcement.[119] The maintenance of international comity, the principles underlying statutory registration and enforcement schemes, and 'the inherent volatility of the notion of "public policy"' are policies encouraging enforcement.[120]

Judges are liable to point out that the offence to public policy must be 'fundamental' to the domestic forum to enliven the public policy defence.[121] Enforcement of the foreign judgment 'must offend some principle of [domestic] public policy so sacrosanct as to require its maintenance at all costs'.[122] Thus, the different solutions to legal problems taken in different jurisdictions are not sufficient to engage the defence.[123] Rather, the defence may be engaged if foreign law raises 'questions of moral and ethical policy; fairness of procedure, and illegality, *of a fundamental nature*'.[124] Because the content of public policy shifts over time, the relevant authorities take a broad view of the types of fundamental domestic norms that could engage the defence.

2 *Comity and Choice of Law*

Comity regulates the judicial discretion to accept or to reject foreign law suggested by the choice of law method. The multilateral approach demands that judges select the governing law based on objective criteria and apply that law without usually passing judgment.[125] The comity principle is implicated in the multilateral approach because the rejection of foreign law is 'exceptional'.[126] Private international law is concerned with public policy of a higher order than the domestic doctrine of public policy, the historical development of which was discussed in Chapter 2. Judges seldom 'evaluate' or 'conduct a quality audit' on the content of the selected law or the legal system from which that law derives, even if invited to do so.[127] For example, the common law gives effect to the confiscation of property located within the territorial jurisdiction and done in accordance with the law of

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119 *Stern* (n 105) [143] (Tamberlin J).

120 *Banque Indosuez v Bourgogne* (n 113) 9; *Jenton Overseas Investments Pte Ltd v Townsing* (n 110) 246 [20] (Whelan J).

121 *Jenton Overseas Investments Pte Ltd v Townsing* (n 110) 246–7 [22] (Whelan J).

122 *Stern* (n 105) [140] (Tamberlin J), quoting P M North and J J Fawcett, *Cheshire and North's Private International Law* (Butterworths, 12th ed, 1992) 129; *Reeves v OneWorld Challenge* (n 98) 197 [48], quoting Peter North and James Fawcett, *Cheshire and North's Private International Law* (Butterworths, 13th ed, 1999) 123. This sentiment was expressed by Cardozo J in *Loucks v Standard Oil Co of New York* (n 109) 110–1.

123 See *De Santis v Russo* (n 107) 420 [18] (Atkinson J); *LFDB v SM [No 3]* [2017] FCA 80, [107] (Griffiths J).

124 *Stern* (n 105) [143] (Tamberlin J).

125 Briggs, 'Comity' (n 76) 109, 114.

126 Sagi Peari, *The Foundation of Choice of Law: Choice and Equality* (Oxford University Press, 2018).

127 Briggs, 'Comity' (n 76) 109, 111–2.

a foreign country; the reverse is true for confiscations outside the territory's jurisdiction.[128] In certain circumstances, however, the content of the foreign law 'is so disgraceful that it really does not count as law at all'.[129] Here, the doctrine of public policy intervenes as a corrective against the regular application of the multilateral approach.[130]

III THE MODERN DOCTRINE OF PUBLIC POLICY

The initial focus of Part III is on the salient considerations that directly or indirectly inform an Anglo-common law court's discretion whether to refuse to apply foreign law or to recognise or enforce a foreign judgment using common law or statutory public policy. For this purpose, Mills' three parameters that suggest the circumstances in which public policy may be justified — proximity, relativity of the norm, and seriousness of the norm breached — are adopted.[131] Mills' model sees the application of public policy depend on the proximity of the dispute to the forum ('proximity'), the extent to which a norm is shared or absolute ('relativity'), and the degree to which the norm was breached ('seriousness of breach').[132] This third consideration — seriousness — will not be discussed: it aligns with modern judicial practice in many common law jurisdictions. In other words, courts are looking for something more than a minor breach of norms of public policy.

Despite adopting these parameters as relevant considerations, Part III assumes a different premise to Mills'. Instead of suggesting 'that the use of public policy must be restricted', this Part posits that public policy's use is, in fact, restricted.[133] As this restriction has been gradual, it has been possible for judges and scholars to calibrate established categories of public policy as well as to forecast new categories. Scholarly writing, for example, anticipated that violations of international law were within the doctrine's remit. The academic and judicial sidelining of notorious public policy decisions has also sharpened the 'continuum' of public policy norms — internal public policy, cross-border public policy, and 'truly international' public policy.[134] The latter two norms have been the focus of recent common law cases. Moreover, cross-border comity has been an important modern restraint. For example, 'international comity combines with English domestic

[128] Ibid 109–12. Briggs is reprising the language of Lord Cross in *Oppenheimer v Cattermole* [1976] AC 249, 278.
[129] Briggs, 'Comity' (n 76) 112.
[130] Ibid 115.
[131] Mills (n 7) 210–8.
[132] Ibid 219.
[133] Ibid 203.
[134] Ibid 213.

public policy to militate against [the] enforcement' of agreements that violate the law of a connected foreign country.[135] In the result, not only is the exercise of this exception exceedingly rare in Anglo-common law jurisprudence, the case law reveals that the discretion is not 'unrestrained' as critics have suggested.[136] Rather, the distinct impression to be had is of judicial *restraint* as a manifestation of cross-border comity.[137] Thus, the following discussion will also explore the content of public policy emerging from or suggested in common law decisions to sketch the modern normative content of the substantive doctrine in Anglo-common law private international law.

A *Salient Considerations*

1 *Relativity*

The concept of relativity is well-articulated in European legal scholarship on public policy. The concept recognises that the legal norms comprising public policy are inherently variable. In German and Swiss legal scholarship, relativity is evaluated against temporal, material, and territorial considerations.[138] Territorial relativity is analogous to proximity in Mills' framework. Temporal relativity or *zeitliche Relativität* responds to the issue of public policy's variability over time.[139] That is, the greater the impact of applying foreign law in the present, the more likely a court might invoke public policy.[140] Material relativity,[141] on the other hand, is concerned with whether the application of public policy relates to the main issue of the dispute or, instead, a preliminary or incidental matter.[142] A weak material

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135 See *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448, 461 (Phillips J); *Foster v Driscoll* [1929] 1 KB 470, 496 (Scrutton LJ), 510 (Lawrence LJ), 518, 519 (Sankey LJ); *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301, 319 (Viscount Simonds), 327 (Lord Keith) (HL).

136 Mills (n 7) 202.

137 See, especially, *Kok v Resorts World at Sentosa Pte Ltd* (n 110) 100–1 [17] (Martin CJ); *Indian Farmers Fertiliser Cooperative Ltd v Legend International Holdings Inc* (2016) 52 VR 1, 14 [52] (Randall AsJ); *Allardyce Lumber Company Ltd v Quarter Enterprises Pty Ltd [No 2]* (2012) 265 FLR 216, 242 [156] (Johnson J); *Ross v Ross* [2011] NZFLR 440, 448 [61] (Allan J); *ML v YJ* [2010] HKFLR 75, 93 [56] (Le Pichon JA dissenting); *United States of America v Yemec* (2009) 97 OR (3d) 409, [197], [207]; *Jenton Overseas Investment Pte Ltd v Townsing* (n 110) 246 [20] (Whelan J); *H v H (Validity of Japanese Divorce)* [2007] 1 FLR 1318, 1346–7 [91]–[92], 1368 [182] (Stephen Wildblood QC) (Family Division) (England and Wales); *Reeves v OneWorld Challenge LLC* (n 98) 196 [56], 197 [61]; *Society of Lloyd's v Meinzer* (n 105) [50], [60], [86]–[87] (Feldman JA); *Bouton v Labiche* (n 115) 234 (Kirby P); *Eroglu v Eroglu* [1994] 2 FLR 287, 290 (Thorpe J) (Family Division) (England and Wales); *Boardwalk Regency Corp v Maalouf* (1992) 6 OR (3d) 737, 742 (Carthy JA).

138 Ragne Piir, 'Application of the Public Policy Exception in the Context of International Contracts — The Rome I Regulation Approach' (2015) 23 *Juridica International* 26, 31–2.

139 Ibid 32.

140 Ibid.

141 German: 'sachliche Relativität'.

142 Daniel Gruenbaum, 'Foreign Surrogate Motherhood: *Mater Semper Certa Erat*' (2012) 60(2) *American Journal of Comparative Law* 475, 498–9; Piir (n 138) 32.

connection with the forum on an incidental or preliminary[143] issue is unlikely to enliven the exception.[144]

Mills' conception of relativity is narrower in its construction. Rather than subsuming other considerations, the consideration of relativity in Mills' framework merely refers to the degree to which public policy has a shared or absolute character.[145] It foresees that relativity may be reduced as norms of public policy are shared bilaterally, regionally, universally, or absolutely in the sense of 'essential national interests'.[146] For example, regional human rights norms in the European Convention on Human Rights are 'norms which are viewed as fundamental and shared between the states that are parties to the ECHR'.[147] The distinction drawn in scholarship between three categories of public policy — domestic, cross-border and 'truly' international public policy — simply represents 'positions on a continuum'.[148]

2 *Proximate Disputes*

The idea of territorial relativity articulated in German and Swiss scholarship closely relates to Mills' proximity factor.[149] The latter's consideration of proximity is informed by choice-of-law rules implicating some form of policy analysis, either of a legal system's greater interest in or closer proximity to the dispute.[150] Territorial relativity — *Inlandsbeziehung* (in Germany and Austria)[151] or *Binnenbeziehung* (in Switzerland) — subordinates the application of public policy by requiring that sufficient links with the forum are established.[152] Principles of public policy are violated only to the extent that an issue is closely connected to, or has significant effects (*effets sensibles*), in the forum.[153] The idea is that the forum has to have a fairly strong connection with the case before imposing public policy is to be regarded as legitimate. However, the more fundamental the principle of

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143 Jan Kropholler, *Internationales Privatrecht* (Mohr Siebeck, 6th ed, 2006) 246. Kropholler refers to mere preliminary questions, *'bloßen Vorfragen'*.

144 Gruenbaum (n 142) 498–9.

145 Mills (n 7) 213.

146 Ibid 215.

147 Ibid 214.

148 Ibid 213.

149 German legal writing refers to this type of relativity as 'räumlice Relativität' or 'Inlandsbeziehung'.

150 Mills (n 7) 210.

151 Katayoun Alidadi, 'The Western Judicial Answer to Islamic Talaq: Peeking through the Gate of Conflict of Laws' (2007) 5 *UCLA Journal of Islamic and Near Eastern Law* 1, 8. The notion of *effet attenué* is the French version of proximity.

152 Andreas Bucher, 'L'Ordre Public et le But Social des Lois en Droit International Privé' (1993) *239 Recueil des Cours* 9, 52.

153 Ibid.

public policy and the more serious the effect of its application, the lesser the weight that is usually attached to establishing a link between the issue and the forum.[154]

B *Patterns of Public Policy*

The previous section, Section A, considered salient considerations informing the court's discretion whether to refuse to apply foreign law, or to recognise or enforce a foreign judgment. The present section, Section B, is concerned with the durability of specific categories of cross-border and 'truly international' cross-border public policy in light of the relativity consideration.

1 *Cross-Border Public Policy — The Protection of National Interests*

Public policy cases centring on the protection of national interests are the focus of this discussion on cross-border public policy. The case law reveals two sides to this category, one of which is 'inward-looking' and the other is 'outward-looking' — concerned with the maintenance of international comity.

(a) Maintenance of International Comity

Transactions tending seriously to prejudice international relations in 'deliberate violation of the laws of a friendly country' have been refused enforcement in English courts based on public policy and 'international comity'.[155] In *Foster v Driscoll*, a syndicate entered an agreement to smuggle whisky into the United States at the height of Prohibition.[156] English law was the governing law of the partnership agreement. The agreement, though not performed, was considered void by the English Court of Appeal on public policy grounds. Enforcement of the agreement 'would furnish a just cause for complaint by the United States Government against our Government… and would be contrary to our obligation of international comity as now understood and recognized, and therefore would offend against our notions of public morality.'[157]

This ratio was used by the House of Lords in *Regazzoni v KC Sethia (1944) Ltd* to refuse enforcement of a contract involving the export of jute bags from India to Genoa — 'officially' destined for resale in South Africa.[158] The parties to the agreement knew that performance could not be effected without violating Indian law, which prohibited the

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154 Ibid 53.
155 *British Nylon Spinners Ltd v ICI Ltd* [1955] 1 Ch D 37, 52 (Danckwerts J).
156 *Foster v Driscoll* [1929] 1 KB 470.
157 Ibid 510.
158 *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 (HL).

export of goods to South Africa due to the latter country's apartheid policies.[159] The governing law of the export contract was English law. The buyer claimed damages for the seller's failure to deliver the Indian jute bags. The seller company defended its non-performance by arguing that the sale breached Indian export controls; the buyer characterised the controls as penal and therefore not entitled to recognition. The seller succeeded before the High Court of Justice,[160] the Court of Appeal,[161] and the House of Lords.[162]

In the House of Lords, Lord Reid commented that 'it is quite impossible for a court in this country to set up as a judge of the rights and wrongs of a controversy between two friendly countries… if we tried to do so, the consequences might seriously prejudice international relations'.[163] Modelling the Court of Appeal's language in *Foster v Driscoll*, Lord Keith could 'see no escape from the view that to recognize the contract… would give a just cause for complaint by the Government of India and should be regarded as contrary to conceptions of international comity'.[164] The sense in which public policy was used in *Foster v Driscoll* and *Regazzoni v KC Sethia (1944) Ltd* was positive or outward-looking:[165] it was employed to prevent the English courts from causing harm to foreign and friendly nations (as those nations understand 'harm'). Though the contracts in both cases were governed by English law, it has been suggested that the outcome would have been the same even if the governing law was foreign.[166]

(b) Economic Duress — Repugnancy to Domestic Public Policy

Decisions invoking public policy to avoid international contracts obtained by means of economic duress are a specific example of the protection of national interests.[167] But in contrast to the internationalism in *Foster v Driscoll* and *Regazzoni v KC Sethia (1944) Ltd*, this example displays a more inward concern of maintaining forum policy. The touchstone for this example is offensiveness to 'essential principles of morality or justice' in the

159 Ibid 324 (Lord Reid), 327 (Lord Keith).
160 *Regazzoni v KC Sethia (1944) Ltd* [1956] 2 QB 490.
161 Ibid.
162 *Regazzoni* (n 158).
163 Ibid 326 (Lord Reid).
164 Ibid 327 (Lord Keith).
165 See, eg, S Lee, 'Restitution, Public Policy and the Conflict of Laws' (1998) 20 *University of Queensland Law Journal* 1, 4–6; Chong, 'Public Policy and Mandatory Rules' (n 6) 33.
166 See Lord Collins (ed) (n 4) [32–192]; PB Carter, 'Rejection of Foreign Law: Some Private International Law Inhibitions' (1984) 55 *British Yearbook of International Law* 111, 125; Chong, 'Public Policy and Mandatory Rules' (n 6) 33.
167 Martin Davies, Andrew Bell and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths Australia, 9th ed, 2014) 431–3.

forum.[168] A form of this expression, which was directly shaped by the scholarly writings of Story and Westlake, appeared in the early 20th century English decision of *Kaufman v Gerson*.[169]

In *Kaufman v Gerson*, the English Court of Appeal refused to enforce, on the basis of domestic public policy, a French contract procured by moral coercion. The plaintiff, domiciled in France, sought to recover from the defendant, also domiciled in France, the balance owing under a contract made in Paris. The defendant's entry into the contract was induced by threats of a prosecution against her husband for embezzlement. The defendant 'in consideration of the plaintiff's forbearing to prosecute her husband, … agreed that she would within a period of three years pay to the plaintiff the amount misappropriated by her husband'.[170] The contract was upheld at first instance because it was valid under the law of France where the contract was made (the *lex loci contractus*). However, the Court of Appeal would not uphold a contract, though valid in the *lex loci contractus*, which had been 'obtained in a manner which, in the case of an English contract, the law deems contrary to morality'.[171] According to Collins MR, the principle was 'well established by authority', using quotations from Story's *Conflict of Laws* and Westlake's *Private International Law* to bear this out.

The synthesised principle — what 'the law deems contrary to morality' — assimilated the natural law considerations implicit in Story's *Conflict of Laws* with Westlake's public policy reservation that had drawn inspiration from European *ordre public* clauses. This was explored in Chapter 3. The quotation that Collins MR extracted from the seventh edition of Story's *Conflict of Laws* bears the unmistakable imprint of the author's natural law philosophy, which had been eclipsed by the popularity of legal positivism in late-19th century England:

> all contracts which in their own nature are founded in moral turpitude or are inconsistent with the good order and solid interests of society: 'All such contracts, even though they might be held valid in the country where they are made, would be held void elsewhere, or at least ought to be, if the dictates of Christian morality, or of even natural justice, are allowed to have their due force and influence in the administration of international jurisprudence.'[172]

Further, the Court would not enforce a contract which — reprising Westlake's general reservation in favour of stringent domestic policy — "'conflicts with what are deemed in

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168 *Saxby v Fulton* [1909] 2 KB 208, 227–8 (Buckley LJ).
169 *Kaufman v Gerson* [1904] 1 KB 591.
170 Ibid 592.
171 Ibid 598 (Collins MR).
172 Ibid 598 (Collins MR), quoting Story's *Conflict of Laws* (7th ed) 292.

England to be essential public or moral interests… notwithstanding it may have been valid by its proper law'".[173] The moral coercion — the threat of prosecution of the plaintiff's husband and the accompanying shame on their family — was so great as to have offended 'an essential moral interest' of English law.[174]

Essential public or moral interests were not encroached in *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua*).[175] In this decision, the Court of Appeal found that ransom payments were not against English public policy. On 19 August 2008, the *Bunga Melati Dua* and its cargo were seized by Somali pirates en route to Rotterdam. The vessel, crew and cargo were released on payment of a US$2 million ransom. The piratical seizure, together with the ransom payment, occasioned a marine insurance claim for actual total loss of the vessel and its cargo. The claim of actual total loss was not made out since, as Rix LJ observed: 'It was not an irretrievable deprivation of property. It was a typical "wait and see" situation.'[176] The claimant's last-ditch argument was that the ransom payment, being contrary to English public policy, should be disregarded in determining actual total loss. The Court was unconvinced, finding that the payment of a ransom was neither illegal under British legislation nor against public policy.[177] In fact, ransom payments can be recovered as sue and labour expenses.[178] Conflicting public interests between pirates, commerce, and government uncovered

> morally muddied waters… no universally recognised principle of morality, no clearly identified public policy, no substantially incontestable public interest, which could lead courts, as matters stand at present, to state that the payment of ransom should be regarded as a matter which stands beyond the pale, without legitimate recognition.[179]

The point at which public policy draws the line between legitimate and illegitimate pressure in contractual bargaining and the legal consequences of duress was considered in *Royal Boskalis Westminster NV v Mountain* and, to a lesser degree, in *Dimskal Shipping Co SA v International Transport Workers Federation*.[180] In *Royal Boskalis Westminster*, Phillips LJ recognised 'a class of duress so unconscionable that it will cause the English court, as a matter of public policy, to override the proper law of the contract'.[181] The focus of *Royal*

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173 Ibid 598 (Collins MR), quoting John Westlake, *A Treatise on Private International Law* (Sweet & Maxwell, 3rd ed, 1890) 260 s 215.
174 Ibid 600 (Romer LJ).
175 [2011] 1 WLR 2012 (CA).
176 Ibid 2030 [56].
177 Ibid 2032 [63].
178 Ibid 2032 [64].
179 Ibid 2035 [71].
180 *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152 ('*Dimskal Shipping*'); *Royal Boskalis Westminster NV v Mountain* [1999] QB 647 ('*Royal Boskalis Westminster*').
181 *Royal Boskalis Westminster* (n 180) 729 (Phillips LJ).

Boskalis Westminster was the effect of duress on the validity of a finalisation agreement governed by Iraqi law and its bearing on the third and fifth plaintiffs' (the 'joint venture') insurance claim. Under the finalisation agreement, which had been entered following Iraq's invasion of Kuwait, two of the plaintiffs — a joint venture — waived their claims under a contract for dredging carried out at an Iraqi port in close proximity to Kuwait in 1990. The dredging contract included an arbitration clause. The joint venture negotiated the finalisation agreement with Iraqi authorities to ensure the safety of its personnel and fleet. Payments due under the finalisation agreement were made, so that the joint venture's personnel would not be used as 'human shields' by the Iraqi regime. If the waiver was ineffective, the joint venture's insurance claim would fail. If it was effective, the joint venture could recover for loss arising from the waived claims under the 'sue and labour' clause of the insurance contract.

The decision turned on the legal effect of duress where the proper law of the contract is foreign — a contrast to the proper law that governed in *Dimskal Shipping*. As a general rule, the proper law governs the essential validity of a contract, including the legitimacy and effect of duress.[182] In *Dimskal Shipping*, English law was the proper law of written agreements induced by the threatened and actual blacking of the respondents' ship, *Evia Luck*, while it was in Sweden. As the proper law of the agreements was English, the House of Lords in *Dimskal Shipping* only needed to consider the effect of the duress under English law. Under English law, the pressure exerted on the shipowners amounted to illegitimate economic duress.[183] The House of Lords was not having to determine whether to accept the consequences of duress under the law of Sweden, where the type of industrial action taken by the appellant trade union and the pressure exerted on the respondent shipowners was lawful.[184] On the other hand, in *Royal Boskalis Westminster*, the general choice-of-law position was complicated by a validly made foreign contract 'induced by a duress of a type which is offensive to English public policy',[185] in which case 'the distinctive policy of English law over any provision of foreign law' may predominate.[186]

The reference to 'the distinctive policy of English law' led the Court of Appeal to consider and accept two classes of duress suggested in *Dicey & Morris' Conflict of Laws*.[187]

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182 Ibid 728.
183 *Dimskal Shipping* (n 180) 164.
184 Ibid 164.
185 *Royal Boskalis Westminster* (n 180) 731.
186 Ibid 728.
187 Ibid.

The first class was of duress 'so shocking' that an English court would not enforce the contract, though valid under its proper law.[188] The second class represented 'a lesser form of duress', by which the legitimacy and effect of the duress were to be determined by the proper law of the contract.[189] An English court, as Phillips LJ recognised, would not 'automatically refuse to recognise the effects of a valid foreign law contract that has been procured by duress of a type which offends against English public policy'.[190] However, the threat in this case — using the joint venture's personnel as 'human shields' — was considered by Phillips LJ to be 'about as cogent and as unconscionable a form of duress as one can imagine' that the proper law was overridden.[191]

2 *'Truly International' or Transnational Public Policy*

Scholarship increasingly recognises transnational public policy as an 'emerging category of public policy' in private international law.[192] The seeds of transnational public policy were planted by the German émigré lawyer, F A Mann, who in 1954 predicted that breaches of international law were 'liable to become… of considerable practical importance' to municipal courts.[193] Critically, Mann argued that domestic courts should apply rules of public international law to foreign law 'if and in so far as it expresses or results from an international delinquency'.[194] Because its yardstick is international law, this category has been described as 'truly international' or 'really international' public policy.[195] The intensifiers distinguish this category from 'international public policy' or public policy in private international law, which implicates — as the previous section emphasised — highly forum-centric principles.[196]

However, transnational public policy is not just an abstract concept. Using English public policy, English courts have refused to recognise foreign laws in breach of international law. Until the House of Lords' decision in *Kuwait Airways Corp v Iraqi Airways Co [Nos 4 and 5]*,[197] there was some debate about whether public policy was limited to 'grave infringements of human rights'[198] or if it indeed went beyond this formulation to

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188 Ibid.
189 Ibid. See also Briggs, 'Public Policy in the Conflict of Laws: A Sword and a Shield?' (n 3) 967.
190 Ibid 731.
191 Ibid 730.
192 See, eg, Jacob Dolinger, 'World Public Policy: Real International Public Policy in the Conflict of Laws' (1982) 17 *Texas International Law Journal* 167; Chong, 'Transnational Public Policy' (n 6) 88.
193 F A Mann, 'International Delinquencies before Municipal Courts' (1954) 70(2) *Law Quarterly Review* 181, 184.
194 Ibid 202.
195 Chong, 'Transnational Public Policy' (n 6) 90.
196 Ibid 91, 92.
197 *Kuwait Airways Corp v Iraqi Airways Co [Nos 4 and 5]* [2002] 2 AC 883 ('*Kuwait Airways [Nos 4 and 5]*')
198 *Oppenheimer v Cattermole* [1976] AC 249, 278 (Lord Cross) (HL).

encompass violations of international law.[199] At least for English courts, *Kuwait Airways [Nos 4 and 5]* establishes that public policy has evolved 'with the times' to take in breaches of 'clearly established rules' of international law.[200] As the words 'clearly established rules' suggest, however, not all impugned foreign laws will discharge this standard of non-enforceability.[201] There is a higher expectation: it would not be sufficient merely to indicate that the foreign *lex causae* in some way contravenes rules of international law. Put simply, 'this sense of public policy is, and is intended to be, a rule resorted to only *in extremis*'.[202]

The domestic application of international norms had been foreshadowed in *Anglo-Iranian Oil Co Ltd v Jaffrate (The Rose Mary)*[203] and in F A Mann's 1954 article.[204] At first sight, this suggestion encounters some difficulties in a dualist legal system where international law is not automatically received or incorporated into domestic law (a point discussed in further detail in Chapter 8). Rather than directly apply international law to override foreign law, domestic courts are more likely to apply international law indirectly using the public policy doctrine.[205] Courts have evinced a 'reluctance to arrogate to themselves a supranational jurisdiction'.[206] Faced with conflicting forum and transnational public policies, a modern court would almost without doubt favour forum public policy over transnational public policy.[207]

Reservations about invoking transnational public policy deepen where the court engages highly relative norms of international law. This arguably occurred in *The Rose Mary*, where a foreign expropriation decree was evaluated against and denied recognition according to (ill-defined) standards of international law, which were apparently incorporated into the law of Aden. Though the reasoning of *The Rose Mary* has been doubted,[208] it is still acknowledged as the starting point for the development of this category at common law.

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199 *Kuwait Airways [Nos 4 and 5]* (n 197) 950 [239], 960 [275], 973 [323].
200 *Oppenheimer v Cattermole* (n 198) 277–278 (Lord Cross); Martin Davies, '*Kuwait Airways Corp v Iraqi Airways Corp*' (2001) 2(2) *Melbourne Journal of International Law* 523, 530.
201 *Kuwait Airways [Nos 4 and 5]* (n 197) 1101–2 [114] (Lord Steyn).
202 Briggs, 'Public Policy in the Conflict of Laws: A Sword and a Shield?' (n 3) 956.
203 [1953] 1 WLR 246.
204 Mann, 'International Delinquencies' (n 193).
205 Alan Brudner, 'The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework' (1985) 35(3) *University of Toronto Law Journal* 219, 244.
206 Ibid 246.
207 Chong, 'Transnational Public Policy' (n 6) 90.
208 *Re Claim by Helbert Wagg & Co Ltd* [1956] Ch 323, 346 (Upjohn J).

(a) The Rose Mary

In *The Rose Mary*, Campbell J in the Supreme Court of Aden relied upon international law to refuse recognition of an Iranian law nationalising the property of the Anglo-Iranian Oil Company ('AIOC'), which was majority-owned by the British government. Following the Second World War, the already tense relationship between Iran and AIOC dramatically worsened. In 1933, AIOC was granted a 60-year concession to extract oil in Iran. This replaced the D'Arcy Concession that was granted in 1901 by the Shah of Persia 'in exchange for a 16 percent annual royalty on net income'.[209] The Iranian government long suspected that AIOC — then called the Anglo-Persian Oil Company ('APOC') — was miscalculating its profits, which were used to calculate the annual royalty. In late 1932, Iran cancelled the D'Arcy Concession. Iran set its sights on a new concession with APOC, the terms of which would be more 'equitable and fair' to Iranian interests.[210]

Though significantly reducing the concessionary area and revising the royalty calculation,[211] the 1933 concession was still on terms highly favourable to APOC. The Iranian government soon realised that part of revised royalty calculation resulted in a similar return to that under the D'Arcy Concession.[212] With increased demand for oil after the Second World War, the royalties paid to the Iranian government plummeted to 'historically low levels'.[213] Indeed, between 1933 and 1951, APOC/AIOC paid more in taxes to the British government than in royalties to Iran.[214] Post-war efforts to renegotiate the 1933 concession failed. In early 1951, the Iranian government cancelled the 1933 concession, nationalised AIOC's assets, and created the National Iranian Oil Company.

The British government, which was still the majority shareholder in AIOC, reacted to the nationalisation with acts of intimidation against Iran and a worldwide boycott of Iran's nationalised oil.[215] The United Kingdom submitted a case to the International Court of Justice, which failed because the Court lacked jurisdiction. AIOC threatened legal action against any party that purchased Iranian oil.[216] In spite of the British blockade on Iranian

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209 Gregory Brew, 'In Search of "Equitability": Sir John Cadman, Rezā Shah and the Cancellation of the D'Arcy Concession, 1928–33' (2017) 50(1) *Iranian Studies* 125, 128.

210 See Brew (n 209) 131; Neveen Abdelrehim and Steven Toms, 'The Obsolescing Bargain Model and Oil: The Anglo-Iranian Oil Company 1933–1951' (2017) 59(4) *Business History* 554, 561.

211 Brew (n 209) 139.

212 Ibid 140.

213 Abdelrehim and Toms (n 210) 560.

214 Brew (n 209) 140.

215 Steve Marsh, 'HMG, AIOC and the Anglo-Iranian Oil Crisis: In Defence of Anglo-Iranian' (2001) 12(4) *Diplomacy and Statecraft* 143, 160–1.

216 Steve Marsh, 'Anglo-American Crude Diplomacy: Multinational Oil and the Iranian Oil Crisis, 1951–53' (2007) 21(1) *Contemporary British History* 25, 31.

oil, an Italian company, EPIM, purchased oil from the National Iranian Oil Company to be sold to a Swiss company, Bubenberg AG. An Italian tanker, *The Rose Mary*, loaded with a cargo of Iranian oil put to port in Aden. AIOC commenced an action in detinue in the Supreme Court of Aden. It claimed title to the oil, arguing that the Iranian nationalisation was confiscatory. AIOC contended that recognition of the foreign law in the forum would be contrary to 'public policy or essential principles of morality' or was 'contrary to international law or in flagrant violation of international comity'.[217]

The confiscation of foreign-owned property in violation of international law was considered sufficient to deny recognition being given to the Iranian nationalisation law. Campbell J was 'satisfied that, following international law *as incorporated in the domestic law of Aden*, this court must refuse validity to the Persian Oil Nationalization Law in so far as it relates to nationalized property of the plaintiffs which may come within its territorial jurisdiction'.[218] Campbell J reached this conclusion that expropriation of the property of non-nationals without compensation violated international law by distinguishing the facts of *The Rose Mary* from the general principle laid down in *AM Luther Co v James Sagor & Co*[219] and *Princess Olga Paley v Weisz*.[220] Under this principle, a forum court would validate acts of confiscation done within the territory of 'a sovereign State of the property of its nationals'.[221] In Campbell J's view, neither case had anything to say about 'property of those not its own subjects'.[222] This interpretation of *Luther* and *Princess Olga Paley* — that the general principle was limited to nationals — was criticised by Upjohn J in *Re Claim by Helbert Wagg & Co*.[223]

(b) Subsequent Developments: Laws Constituting 'Grave Infringements of Human Rights'

The residual power of domestic courts to disregard fundamentally unacceptable foreign laws was considered in *Oppenheimer v Cattermole*.[224] The main issue for determination was whether Meier Oppenheimer, a German-Jewish émigré, was entitled to double taxation relief in the United Kingdom, which was only available if he had dual British and German nationality. German nationality law would determine whether Oppenheimer lost or retained his nationality. The validity of a 1941 decree, by which Jewish émigrés were

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217 *Anglo-Iranian Oil Co Ltd v Jaffrate (The Rose Mary)* [1953] 1 WLR 246, 253 (Campbell J) ('*The Rose Mary*').
218 Ibid 260 (Campbell J) (emphasis added).
219 [1921] 3 KB 532.
220 [1929] 1 KB 718.
221 *The Rose Mary* (n 217) 253 (Campbell J).
222 Ibid 258.
223 [1956] Ch 323, 346 (Upjohn J).
224 *Oppenheimer v Cattermole* (n 198).

deprived of their German nationality, was examined — but the House of Lords 'need not have done so'.[225] Oppenheimer ceased to be a German citizen under post-Nazi legislation and, in the meantime, 'the Nazi decree had been abrogated'.[226] The willingness of the House of Lords to scrutinise the 1941 decree, though 'entirely obiter', 'imbued [it] with a special authority'.[227]

Lord Cross, in strong obiter comments, considered that public policy required English courts to apply clearly established rules of international law.[228] In some cases, it might be difficult to identify the rule of international law.[229] However, in this case, the decree was plainly discriminatory: only Jewish émigrés were stripped of their nationality. Then, the deprivation of nationality 'was used as a peg upon which to hang a discriminatory confiscation of their property'.[230] The 1941 decree was 'so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all'.[231] Similarly, Lord Salmon considered that it was not 'contrary to international comity or to any legal principles hitherto enunciated for our courts to decide that the 1941 decree was so great an offence against human rights that they would have nothing to do with it'.[232]

(c) Kuwait Airways Corp v Iraqi Airways Co [Nos 4 and 5][233]

The House of Lords in *Kuwait Airways [Nos 4 and 5]* found that international law forms part of English public policy. Indeed, the elevation of local values 'into public policy on the transnational level' was not done lightly.[234] The issue in this case was whether an English court would recognise a foreign law nationalising the property of a private company in clear violation of international law. In general, English courts decline to examine the validity of foreign legislative acts, such as title to property situate in another sovereign state or foreign nationalisation laws.[235] Furthermore, the *lex situs* determines

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225 *Kuwait Airways [Nos 4 and 5]* (n 197) 960 [274] (Brooke LJ).
226 Ibid.
227 Ibid.
228 *Oppenheimer v Cattermole* (n 198) 278 (Lord Cross).
229 Ibid.
230 Ibid 277.
231 Ibid 278.
232 Ibid 283 (Lord Salmon).
233 *Kuwait Airways [Nos 4 and 5]* (n 197).
234 Ibid 1101 [114] ('Local values ought not lightly to be elevated into public policy on the transnational level.'), 1103 [115] (Lord Steyn):
> … there may be an international public policy requiring states to respect fundamental human rights: American Law Institute's Restatement of the Law, section 701. The public policy condemning Iraq's flagrant breaches of public international law is yet another illustration of such a truly international public policy in action.

235 *Luther v Sagor* [1921] 3 KB 532 (CA).

ownership to property. Piecing these principles together, foreign nationalisation laws 'are only struck down in truly exceptional cases'.[236]

Kuwait Airways [Nos 4 and 5] concerned the commercial implications of the First Gulf War. Following Iraq's invasion of Kuwait in August 1990, ten aircraft owned by Kuwait Airways Corp ('KAC') were seized by Iraqi forces. In September 1990, the Revolutionary Command Council of Iraq enacted Resolution 369 to dissolve KAC and to transfer its assets worldwide, including the aircraft, to Iraqi Airways Co ('IAC'). The United Nations Security Council set a January 1991 deadline for Iraq to withdraw from Kuwait. Iraq's refusal to comply with this deadline prompted immediate coalition military action.

Between January and February 1991, coalition bombing destroyed four of the aircraft stationed at Mosul ('the Mosul Four'). The remaining six were evacuated to Iran for safekeeping ('the Iran Six'). Only after protracted negotiation, and the exchange of substantial sums of money, were the Iran Six returned to KAC. Yielding to international pressure and the demands of the United Nations to withdraw, Iraq enacted Resolution 55 in March 1991, under which Resolution 369 was repealed with retroactive effect.

Before the Security Council's deadline for withdrawal, KAC instituted proceedings in England against IAC for conversion of the ten aircraft. As the relevant tortious acts were committed before 1 May 1996, the double actionability rule — requiring actionability under the law of the forum and the law of the tort — applied to the English proceedings.[237] Applying the double actionability rule, without the flexible exception, would have been fatal to KAC's claim since Resolution 369 — part of the *lex situs* and the *lex loci delicti* — transferred ownership of the aircraft to IAC. IAC thus argued that, in accordance with Iraqi law, they had acquired good title to the aircraft. However, the double actionability rule was satisfied because the House of Lords denied recognition to Resolution 369 on the basis of English public policy. In the result, ownership of the aircraft had not transferred to IAC. In giving effect to English public policy, Resolution 369 was excised 'from the corpus of Iraqi law',[238] and the Iraqi law of usurpation was applied to IAC's conduct.

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[236] Michael J Whincop, 'Conflicts in the Cathedral: Towards a Theory of Property Rights in Private International Law' (2000) 50(1) *University of Toronto Law Journal* 41, 65.

[237] The double actionability rule had to be satisfied for tortious acts occurring before 1 May 1996. See *Private International Law (Miscellaneous Provisions) Act 1995* (UK) s 10 (abolition of the double actionability rule; *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II)* [2007] OJ L 199/40, art 4(1) ('Rome II') (the *lex loci damni* as the general rule). See further Chapter 6.

[238] *Kuwait Airways [Nos 4 and 5]* (n 197) 1100 [111] (Lord Steyn).

The reality of an 'ever more interdependent' world strengthened the House of Lords' conclusion that serious breaches of international law were the legitimate province of English public policy.[239] The House of Lords found that '[i]n appropriate circumstances it is legitimate for an English court to have regard to the content of international law in deciding whether to recognise foreign law'.[240] There was a 'need to recognise and adhere to standards of conduct set by international law'.[241] It would have been contrary to the United Kingdom's international obligations and domestic public policy, which incorporated its obligations under international law, to recognise Resolution 369.[242] From the outset, Iraq's purported annexation of Kuwait attracted 'universal international condemnation'.[243] The international response to the invasion and annexation was 'prompt and comprehensive'.[244] Shortly after the invasion, the UN Security Council had decreed the annexation 'null and void' and set a January deadline for Iraq to withdraw from Kuwait.[245] A series of United Nations Security Council Resolutions further denounced Iraq's actions 'as a breach of international peace and security'.[246] The aim of Resolution 369 was odious: not only was it 'a governmental expropriation of property', it was an 'attempt to extinguish every vestige of Kuwait's existence as a separate state'.[247]

Kuwait Airways [Nos 4 and 5] demonstrates that, while a dispute might lack proximity to the forum state, 'a strongly shared or absolute policy' — in the form of clearly established rules of international law — might be sufficient for a domestic court to invoke public policy and exclude a foreign *lex causae*.[248] When F A Mann wrote in 1954, he questioned whether public policy was a 'sufficient weapon' for domestic courts to use in order to combat international delinquencies.[249] The House of Lords' decision in *Kuwait Airways [Nos 4 and 5]* suggests that cross-border public policy can itself be a 'sufficient weapon' with which to combat 'flagrant violations of rules of international law of fundamental importance'.[250] Chapter 8 questions this proposition.

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239 Ibid 1081 [28] (Lord Nicholls).
240 Ibid [1081] [26].
241 Ibid.
242 Ibid 896 [1], 949 [239] (Brooke LJ).
243 Ibid 1116 [168] (Lord Hope).
244 Ibid 1099 [107] (Lord Steyn).
245 Ibid.
246 Ibid.
247 Ibid 1081 [28] (Lord Nicholls).
248 Mills (n 7) 222.
249 Mann, 'International Delinquencies' (n 193) 191.
250 *Kuwait Airways [Nos 4 and 5]* (n 197) 1079 [20] (Lord Nicholls).

C *Positive Functions of Public Policy*

The possibility that public policy may be used as a 'sword', rather than a shield against fundamentally objectionable foreign laws, has been broached in academic literature and, as in *Kuwait Airways [Nos 4 and 5]*, case law.[251] Ordinarily, public policy demands 'a pre-existing legal relationship between the parties which it then proceeds to modify'.[252] An alternative view of public policy would have it used to create a right or cause of action where otherwise absent from the foreign *lex causae*.[253] Whether public policy applies to 'enable' as well as to 'disable' has engendered two distinct theories on the potentially positive role of public policy.[254]

First, public policy may be invoked to give effect to foreign law despite there being a choice-of-law rule to the contrary. This theory emerged from *Lorentzen v Lydden*, an unorthodox wartime decision in which Atkinson J used English public policy to give extraterritorial effect to a foreign requisition decree.[255] In *Lorentzen*, the defendants, a London-based firm, agreed to charter a Norwegian ship to carry pulp between Oslo and Leith. In late 1939, the Norwegian Government issued a decree, which requisitioned (with compensation) all Norwegian-registered ships located outside Nazi-occupied territory. The decree also appointed a curator who was empowered to collect claims on behalf of the owners of requisitioned ships. The curator sued the charterers for breach of the charter party. The charterers challenged the curator's right to sue in England, arguing that the *lex situs* of the chose in action was English and, under English law, ownership of the chose had not transferred. Atkinson J held that, since England and Norway were 'engaged together in a desperate war for their existence' and the decree was not confiscatory, English public policy demanded that recognition be given to the decree.[256] Wartime

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[251] See F A Mann, 'Extraterritorial Effect of Confiscatory Legislation' (1942) 5 *Modern Law Review* 262, 263; Samuel Anatole Lourie and Max Meyer, 'Governments-in-Exile and the Effect of their Expropriatory Decrees' (1943) 11 *University of Chicago Law Review* 26, 45; Pieter Adriaanse, *Confiscation in Private International Law* (Martinus Nijhoff Publishers, 1956) 161; Briggs, 'Public Policy in the Conflict of Laws: A Sword and a Shield?' (n 3) 977. Compare F A Mann, 'The Confiscation of Corporations, Corporate Rights and Corporate Assets and the Conflict of Laws' (1962) 11 *International and Comparative Law Quarterly* 471, 478 n 23.

[252] Briggs, 'Public Policy in the Conflict of Laws: A Sword and a Shield?' (n 3) 974.

[253] Ibid 975–6.

[254] Cf *Rodriguez v Speyer Brothers* [1919] AC 59, 125 (Lord Sumner): 'Considerations of public policy are applied to private contracts or dispositions in order to disable not in order to enable.'

[255] *Lorentzen v Lydden* (n 5). For critical comment, see E F Q Henriques, 'Decisions of the English Courts during the Years 1932–42: Involving Points of Public or Private International Law' (1944) 21 *British Year Book of International Law* 180, 186; T Franck, 'The Extra-Territorial Jurisdiction of Foreign Requisitioning Degree [sic] – Non-Enforcement thereof by British Court' (1952) 1(6) *University of British Columbia Legal Notes* 249, 252, 253.

[256] *Lorentzen v Lydden* (n 5) 215–6 (Atkinson J).

conditions supplied the public policy norm which, according to Atkinson J, required the application of foreign law even though the *lex situs* was English.

Weathering occasional criticism, Atkinson J's decision in *Lorentzen* endured as an authority until the English Court of Appeal's decision in *Peer International Corp v Termidor Corp Music Publishers Ltd*.[257] In *Bank voor Handel en Scheepvaart NVv Slatford [No 1]*, a 1953 decision of the English Court of Appeal, Devlin J had been loath to recognise Atkinson J's formulation as a new head of public policy which, apart from being contrary to established precedent, required the court to assess the 'political merits' of foreign law.[258] Half a century after *Bank voor Handel*, the Court of Appeal in *Peer International* again declined to use public policy as an exception to the *lex situs* rule. The Court agreed with Devlin J's earlier criticisms and overruled *Lorentzen*.

Peer International concerned Cuban legislation which purported to confiscate the English copyright of musical works composed by Cubans. The claimants unsuccessfully argued that public policy supplied an exception to the general *lex situs* rule, which prevented foreign confiscatory legislation having any effect on property rights held in another sovereign country. In addition to *Lorentzen* being 'wrongly decided', Aldous LJ thought the decision was 'contrary to the overwhelming statement of judicial opinion' and, somewhat ironically, 'also contrary to public policy'.[259] The effect of recognising this exception would be to 'subordinate English property law to that of a foreign state' based on the variability and uncertainty associated with public policy.[260]

The second theory was suggested by the House of Lords' decision in *Kuwait Airways [Nos 4 and 5]*. In effect, it enables a forum court to excise offensive aspects of a foreign *lex causae* and, in its place, to graft on it either provisions of the *lex fori* or what is left of the *lex causae*. The latter was the course adopted by the House of Lords in *Kuwait Airways [Nos 4 and 5]*. As a result of that decision, Briggs suggested that an English court may fashion an appropriate remedy using the pretext of public policy if no legal claim or right is available under the *lex causae*, but should be in a particular case.[261]

Though an attractive concept to Briggs, the positive use of public policy is at variance with the 19th century institutional writers' conception of public policy as an exclusionary

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[257] *Bank voor Handel* (n 5); *Peer International Corp v Termidor Music Publishers Ltd* [2004] Ch 212 (CA). Compare *O/Y Wasa Steamship Co Ltd v Newspaper Pulp and Wood Export Ltd* (1949) 82 Ll L Rep 936.

[258] *Bank voor Hasndel* (n 5) 263–4 (Devlin J).

[259] Ibid 222 [31] (Aldous LJ).

[260] Ibid 230 [46].

[261] Briggs, 'Public Policy in the Conflict of Laws: A Sword and a Shield?' (n 3) 976, 977.

doctrine. As Chapter 3 examined, the exclusion of foreign law on the score of public policy was a corollary of comity and territoriality that underpinned 19th century Anglo-American private international law scholarship. Foreign law was only admitted insofar as it did not cause prejudice to the forum.[262] Effectively, domestic courts are finding the foreign *lex causae* to be so offensive to domestic public policy that it is left with no other choice but to withdraw so the courts are left with the *lex fori*. The idea of taking a 'blue pencil' to the *lex causae*, as suggested by Lord Hope in *Kuwait Airways [Nos 4 and 5]*, is inconsistent with this approach.[263] The better outcome in *Kuwait Airways [No 4 and 5]* would have been for the House of Lords to use public policy in its traditional sense, rejecting Iraqi law altogether and instead having recourse to the English law on conversion.

IV CONCLUSION

At the beginning of this Chapter, the maintenance of international comity was identified as an important modern restraint on courts invoking public policy to exclude a foreign law or to deny recognition to a foreign judgment. It was observed that, as a matter of course, common law courts reject arguments of public policy influenced not only by comity but also the trend of authorities — both domestic and international — stressing the formidably high threshold for the doctrine. However, the threshold required is far from transparent or, indeed, concrete. Consequently, the discussion moved to Mills' salient considerations that suggest a method by which modern courts might legitimately invoke public policy.

The subsequent discussion identified two patterns of public policy, suggesting that English courts are more likely to invoke the doctrine based on fundamental national interests or clearly established breaches of international law. The discussion in Part III closed by discussing two potentially positive functions for public policy. The first positive function is defunct. The second positive function, though it is not per se 'defunct', was rejected as contrary to the traditional understanding of public policy as 'exclusionary'. Even so, uncertainty in application is a compelling reason in itself to reject this second positive function.

The scope of transnational public policy, the second category of public policy examined in this Chapter, is explored in Chapter 8. This penultimate Chapter evaluates whether the 'time is ripe' for an international law exception as distinct from it being — as

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262 Ernest G Lorenzen, 'Huber's *De Conflictu Legum*' (1918–19) 13 *Illinois Law Review* 374, 376.
263 *Kuwait Airways [Nos 4 and 5]* (n 197) 985 [369] (Lord Hope).

it is now — a category of cross-border public policy. The Chapter also raises several issues with the recognition of a freestanding exception of this nature. Chapter 8 concludes by considering, as a point of comparison, the gradual recognition of 'other public laws' and foreign governmental interests.

CHAPTER 8: THE NEW SPECIES OF EXCEPTION

> The golden rule is that care must be taken not to expand its [the public policy exception] application beyond the true limits of the principle. These limits demand that, where there is any room for doubt, judicial restraint must be exercised. But restraint is what is needed, not abstention. And there is no need for restraint on grounds of public policy where it is *plain beyond dispute* that a clearly established norm of international law has been violated.[1]

I INTRODUCTION

Chapters 3, 6, and 7 underscored the increasingly exceptional role played by substantive, as distinct from procedural, public policy in the common law of private international law. Because public policy is sparingly deployed by courts in major Commonwealth jurisdictions, key English decisions have so far given a better sense of the doctrine's development. English courts have had the opportunity to examine and develop its content owing to the greater levels of cross-border litigation encountered by its courts, a fact which was observed in Chapter 5. A salient example of the doctrine's potential lies in the English courts' development of an international law dimension to public policy. It was observed in Chapter 7 that this pattern of public policy, involving clearly established breaches of international law, is comparatively recent in origin. The House of Lords' decision in *Oppenheimer v Cattermole* offered one of the earliest articulations of it, and was examined in Chapter 7 in light of other formative English cases on the subject.

This Chapter suggests the use of transnational public policy (Chapter 7) and the foreign governmental interests doctrine (Chapter 5) as new species of exception in private international law. First, this Chapter argues that public international law could be freed from the yoke of public policy to form a detached private international law exception.[2] This Chapter also draws on case law from major Anglo-common law jurisdictions that suggest a general judicial willingness to consider public international law in decision-making. Still, this penultimate Chapter emphasises that public international law is a fledgling, and potentially provocative, category of cross-border public policy. Courts, following the English trend of transnational public policy, will have to confront some broader issues that largely centre on the interaction between domestic law and

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1 *Kuwait Airways Corp v Iraqi Airways Co [Nos 4 and 5]* [2002] 2 AC 883, 1109 [140] (Lord Hope) (emphasis added) (House of Lords) ('*Kuwait Airways [Nos 4 and 5]*').

2 See generally F A Mann, 'International Delinquencies before Municipal Courts' (1954) 70(2) *Law Quarterly Review* 181.

international law. Secondly, this Chapter argues that the foreign governmental interests doctrine is — at least in Australia — already detached from the public policy exception.

Chapter 8 is devoted to these two suggested species of exception. Part II focuses on the international law dimension of cross-border public policy. After examining the formative English cases, Part II discerns the controlling principles of this pattern of public policy. The concluding portions of Part II discuss certain issues arising from a broader recognition of a distinct public international law exception; however, it also questions the logic of enclosing public international law in a public policy envelope. Partly informing this discussion of the distinct worth of public international law are legal developments in transnational human rights litigation post-9/11.[3] In contrast to Part II, Part III considers 'other public' laws and the foreign governmental interests doctrine as exceptions detached from public policy. The frame of reference for this discussion is the High Court of Australia's decision in *Attorney-General (UK) v Heinemann Publishers Pty Ltd* ('*Spycatcher*').[4]

II THE ROLE AND IMPORTANCE OF INTERNATIONAL LAW IN DEVELOPING PUBLIC POLICY

Academic literature supports the use of international law and 'universal principles of justice and morality' to inform the development of transnational public policy, which is regarded as a 'subset' or 'species' of cross-border public policy.[5] Mills considered that this form of public policy comprised absolute norms or 'norms shared in a universal sense'.[6] In the same literature, norms of customary international law and international human rights are consistently introduced as examples of this subset of public policy.[7] Aside from this scholarly discussion, two recent English decisions on the foreign act of state doctrine — namely *Belhaj v Straw*[8] ('*Belhaj*') and *Law Debenture Trust Corp plc v Ukraine*[9] ('*Law Debenture Trust*') — signal a greater receptivity towards using higher order norms of international

3 For a general discussion of this trend in Canada and the United Kingdom following 9/11, see François Larocque, 'Recent Developments in Transnational Human Rights Litigation: A Postscript to Torture as Tort' (2008) 46(3) *Osgoode Hall Law Journal* 605.

4 *A-G (UK) v Heinemann Publishers Pty Ltd [No 2]* (1988) 165 CLR 30 ('*Spycatcher*').

5 See Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4(2) *Journal of Private International Law* 201, 214–5; Adeline Chong, 'Transnational Public Policy in Civil and Commercial Matters' (2012) 128 *Law Quarterly Review* 88, 91–101; Jan Oster, 'Public Policy and Human Rights' (2015) 11(3) *Journal of Private International Law* 542, 546–9; Kenny Chng, 'A Theoretical Perspective of the Public Policy Doctrine in the Conflict of Laws' (2018) 14(1) *Journal of Private International Law* 130, 133, 134–6.

6 Mills (n 5) 214–5.

7 See Mills (n 5) 214–5; Chong (n 5) 100–1; Oster (n 5) 546–9; Chng (n 5) 135–6.

8 *Belhaj v Straw* [2017] AC 964 (Supreme Court) ('*Belhaj*').

9 *Law Debenture Trust Corp plc v Ukraine* [2019] 2 WLR 655 (Court of Appeal).

law (*jus cogens* or peremptory norms) from which no derogation is permitted to influence domestic conceptions of the public policy exception at common law.[10]

The English courts' consideration of public international law as a means of filtering cross-border claims arguably signals a qualified return to the natural law thinking that underpinned the public policy exclusion in Story's *Conflict of Laws* (as considered in Chapter 3). At its most basic, natural law requires laws to be judged by a higher standard of norm. Grave violations of human rights and public international law meet this basic definition.

The first section of Part II explores these recent English decisions with a view to then explaining the foothold of public international law on cross-border public policy. Supposing that this subset of cross-border public policy is recognised as a distinct common law concept in England, a strong argument follows for its application in other jurisdictions in the common law tradition. The second half of Part II is therefore devoted to examining whether major common law jurisdictions exhibit a corresponding degree of receptivity to international law in order to address some unresolved issues with international law's recognition as part of public policy. The first issue to be addressed is the status and treatment of public international law in dualist legal systems with a particular focus on the Canadian, Australian, and New Zealand positions. The identification of *jus cogens* or peremptory norms of international law is examined as a second issue. Examination of *jus cogens* is necessary because, although these 'super norms' of customary international law are brought up in these recent English decisions, the judgments are unclear on how to establish or to identify these norms.

A *Consolidating International Law*

The public policy invoked in *Kuwait Airways [Nos 4 and 5]* that condemned Iraq's actions as 'flagrant breaches of public international law' has been regarded as 'truly international'.[11] The House of Lords' approach to English public policy, which gave 'indirect effect' to international law,[12] could not therefore be characterised as parochial.[13] Rather, as Lord Steyn remarked in *Kuwait Airways [Nos 4 and 5]*, this approach was consistent with an outgrowth of French scholarship elucidating principles of truly international public policy 'in relation to subjects such as traffic in drugs, traffic in

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10 See especially ibid 704 [180] (Dame Elizabeth Gloster, Sales and David Richards LJJ).
11 *Kuwait Airways [Nos 4 and 5]* (n 1) 1103 [115] (Lord Steyn).
12 Chong (n 5) 94.
13 *Kuwait Airways [Nos 4 and 5]* (n 1) 1103 [115] (Lord Steyn).

weapons, terrorism, and so forth'.[14] The House of Lords' conclusion was assisted by the United Kingdom's obligations under the *Charter of the United Nations* ('UN Charter')[15] and 'the existence of several binding UN Security Council… resolutions condemning the Iraqi invasion of Kuwait' and Iraq's actions post-invasion.[16] All legal binding Security Council Resolutions are given effect in the United Kingdom through legislation.[17]

1 *The Obstacles of Public International Law*

However, as Chong and Ruys have adroitly highlighted, an appeal to rules of public international law is not without difficulty.[18] *Orams v Apostolides*[19] and *Peer International Corp v Termidor Music Publishers Ltd [No 1]*[20] accentuate some of these difficulties. Both, according to Chong, involved failed 'attempts to capitalise on the principle of *Kuwait Airways*'.[21] *Orams v Apostolides* concerned the enforcement of two Greek Cypriot default judgments in England under the *Brussels I Regulation*.[22] In the courts of the Greek Cypriot southern area of Cyprus (the internationally recognised Republic of Cyprus), Mr Apostolides claimed ownership of a plot of land located on the Turkish Cypriot northern area of the island, the de facto Turkish Republic of Northern Cyprus (recognised only by Turkey). He also sought damages for loss of enjoyment of the land. Following the Turkish invasion of northern Cyprus in 1974, Mr Apostolides was forced to vacate the land. In 2002, a British couple, Mr and Mrs Orams, purchased the land from a third Turkish Cypriot party, who was the then registered owner of the land.

The Orams resisted enforcement of the two Cypriot judgments pursuant to the public policy proviso in art 34(1) of the *Brussels I Regulation*. The British husband and wife argued that it was contrary to international public policy to enforce the judgments, referring to *Protocol No 10 on Cyprus* annexed to the 2003 *Act of Accession* by which Cyprus and nine other European countries acceded to the European Union.[23] *Protocol No 10* suspended the

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14 Ibid.

15 *Charter of the United Nations*, signed 26 June 1945, 557 UNTS 143 (entered into force 24 October 1945) ('UN Charter').

16 See Tom Ruys, 'Case Comment: The Role of State Immunity and the Act of State in the *NM Cherry Blossom Case* and the Western Sahara Dispute' (2019) 68(1) *International and Comparative Law Quarterly* 67, 85.

17 *United Nations Act 1946*, 9 & 10 Geo 6, c 45, s 1(1). See also *Charter of the United Nations Act 1945* (Cth) ss 6–11.

18 Chong (n 5) 96–8; Ruys (n 16) 85.

19 *Orams v Apostolides* [2011] QB 519.

20 *Peer International Corp v Termidor Music Publishers Ltd* [2004] Ch 212 (Court of Appeal) ('*Peer International*').

21 Chong (n 5) 98.

22 *Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* [2001] OJ L 12/1 (the '*Brussels I Regulation*').

23 *Orams v Apostolides* (n 19) 525 [6] (Advocate General Kokott) (European Court of Justice). See also *Act Concerning the Conditions of Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the*

operation of the *acquis communautaire* in the northern area of Cyprus. In recognising the 'Cyprus problem', *Protocol No 10* reaffirmed the Member States 'commitment to a comprehensive settlement of the Cyprus problem, consistent with relevant United Nations Security Council resolutions, and their strong support for the efforts of the United Nations Secretary General to that end'.[24] The Orams argued that, in light of the 'political sensitivities' of the Cyprus problem, enforcement of Cypriot judgments 'would be to prejudice peace negotiations and is thereby contrary to public policy in England and Wales which, reflecting UN Security Council resolutions, does not permit the process to be prejudiced in this way'.[25]

However, Advocate General Kokott was not prepared to infer from these appeals to UN Security Council resolutions or international consensus 'any obligation to refrain from recognising judgments of Greek Cypriot courts which relate to claims to ownership of land in the Turkish Cypriot area'.[26] The Court of Appeal agreed with the opinion of the Advocate General. The Orams had not identified a principle of international public policy 'requiring a conclusion that the enforcement of the Cypriot judgment would be manifestly contrary to public policy in the United Kingdom'.[27] It was one thing to identify an international consensus encouraging the peaceful settlement of the Cyprus problem; it was another — an overreach — to then suggest that all Cypriot judgments were 'manifestly contrary to public policy in the United Kingdom'.[28] Drawing this conclusion would be a 'very large step'.[29] The Court of Appeal was compelled to enforce Cypriot judgments by countervailing public policy considerations, such as mutual trust in the administration of justice within the European Union and the United Kingdom's obligations under international law.[30] The disconnect in *Orams v Apostolides* between encouraging a peaceful settlement of the Cyprus problem and the free movement of judgments under the Brussels enforcement regime point irresistibly to the conclusion that mere or slight breaches of international law will not be sufficient to engage English public policy.[31]

Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovakk Republic and the Adjustments to the Treaties on which the European Union is Founded [2003] OJ L 236/940.

24 *Orams v Apostolides* (n 19) 525 [6] (Advocate General Kokott) (European Court of Justice).

25 Ibid 571 [27]–[28] (Pill LJ) (Court of Appeal).

26 Ibid 532–3 [45] (Advocate General Kokott).

27 Ibid 577 [58] (Pill LJ).

28 Ibid 578 [59].

29 Ibid.

30 Ibid 578 [62].

31 Chong (n 1) 99.

The attempt in *Peer International* to take advantage of the *Kuwait Airways* principle likewise failed.[32] Cuban Law 860, which came into effect in August 1960, purported to divest Peer International of its UK copyright in thousands of Cuban musical works. The Peer companies had acquired copyright in Cuban musical works over the 1930s and 1950s allegedly through the exploitation of Cuban musicians.[33] The musicians were struggling to subsist on money earned from public performances in Cuba. Ralph Peer, the founder and owner of the Peer companies, was 'the only person seeking to exploit Cuban music'.[34] Peer's companies 'controlled all the music that was being exploited in Cuba and throughout the Caribbean'.[35] The failure of the Peer companies to pay royalties to Cuban musicians was a significant source of complaint.[36] Following the Cuban Revolution in 1959, the Castro regime sought to protect Cuba's musical culture by enacting Cuban Law 860 in order to 'control the exploitation of the copyright in Cuban music'.[37] Under the law, agreements signed between publishers and Cuban authors or composers had to be presented to Editora Musical de Cuba (EMC) for approval; otherwise, the rights of the publishers were forfeited.[38] Peer had not sought approval under the Cuban law.

The claimants, EMC, accordingly sought declarations claiming ownership of the UK copyright. EMC argued that there was a public policy exception to the general *lex situs* rule by which an English court would not give effect to a foreign law purporting to have extraterritorial effect on property located in England. The claimants were using the reasoning in *Kuwait Airways [Nos 4 and 5]* to argue that:

> [a]n English court can give effect to the legislation of a foreign state affecting property in the United Kingdom where that foreign state is regularising a matter of legitimate interest and the legislation accords with United Kingdom law and public policy widely accepted internationally.[39]

The Court of Appeal was not prepared to 'give positive effect to a foreign government's act in relation to property in England; and to elevate public policy to the level of an appropriate connecting factor, using it to displace the ordinary law of copyright applicable in the English situs'.[40] The construction offered by Peer would be to 'subordinate English property to that of a foreign state' through the use of a doctrine

32 Ibid 98.
33 *Peer International* (n 20) 217 [12] (Aldous LJ).
34 Ibid.
35 Ibid.
36 Ibid.
37 Ibid 218 [13].
38 Ibid 218–9 [16]–[19].
39 Ibid 229 [45].
40 Ibid 234 [63] (Mance LJ).

criticised for its changeable character over time.[41] By refusing to elevate public policy to a positive status, the Court not only spelt an end to the wartime decision of *Lorentzen v Lydden* but also rejected the claimants' contention 'that there is an internationally accepted view on public policy as to assignments of copyright'.[42]

2 *Belhaj v Straw*

The public international law dimension to the domestic public policy doctrine was again considered in the 2017 UK Supreme Court judgment of *Belhaj v Straw*.[43] The British government invoked the state immunity and foreign act of state doctrines to strike out the claims of Abdul Belhaj and his wife, Fatima Boudchar. Belhaj, a Libyan citizen and former political opponent of Colonel Gaddafi, and his wife, a Moroccan citizen, alleged that British officials were complicit in their unlawful abduction, kidnapping and removal to Libya. The claimants alleged that while on route to the United Kingdom to seek asylum they were detained and tortured in Malaysia and Thailand. When the couple were in Malaysia, British intelligence tipped off the United States' Central Intelligence Agency. From Bangkok, the claimants were then flown to Libya in a US-registered plane where their detention and torture continued. Boudchar, heavily pregnant at the time, was released after three months' detention. Belhaj was released six years later.

The British Government's strike out application failed. The Supreme Court held that the claims were not barred by the state immunity or the foreign act of state doctrine. Although Lord Mance gave the leading judgment, and Lords Neuberger and Sumption delivered concurring judgments, Lord Neuberger's view on the foreign act of state doctrine commanded majority support.[44] Lord Wilson agreed with the judgment of Lord Neuberger while Lady Hale and Lord Clarke agreed with the reasoning of Lord Neuberger. The Supreme Court held the foreign act of state doctrine was qualified by a public policy exception where there is 'a serious violation of international law'.[45] The case — 'assuming that the claimants were detained, kidnapped and tortured as they allege' — would engage the public policy exception.[46]

Four of the justices considered the role of international law in determining the content of domestic public policy. Lord Neuberger stressed that the public policy exception was

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41 Ibid 230 [46] (Aldous LJ).
42 Ibid 230 [46].
43 *Belhaj* (n 8).
44 Natasha Simonsen, '*Belhaj v Straw & Rahmatullah [No 1] v Ministry of Defence* (UK Sup Ct)' (2017) 56(5) *International Legal Materials* 951, 952–3.
45 *Belhaj* (n 8) 1119 [153] (Lord Neuberger).
46 Ibid 1122 [168].

grounded in 'domestic rule of law considerations'; however, 'generally accepted norms of international law are plainly capable of playing a decisive role'.[47] Lord Dyson similarly concluded that it was appropriate to consider the strength of the international prohibition on torture to assess 'the attitude of the public policy of the forum towards torture'.[48] Unlawful rendition, as Belhaj and Boudchar had experienced, 'must occupy a position high in the scale of grave violations of human rights and international law'.[49]

The extent to which English public policy absorbed breaches of *jus cogens* was a point of disagreement between Lord Sumption and Lord Neuberger. Neither Supreme Court justice gave details on what amounted to a breach of *jus cogens* which, as previously mentioned, are higher level norms of public international law from which derogation is not permitted. Instead, Lord Sumption was conscious that English law abides by the dualist theory of international law.[50] His Lordship added that '[r]ecognition of the influence of international law does not mean that every rule of international law must be adopted as a principle of English public policy, even if it is acknowledged as a peremptory norm (*jus cogens*) at an international level'.[51] Lord Neuberger, however, thought that 'any treatment which amounts to a breach of *jus cogens* or peremptory norms would almost always fall within the public policy exception'.[52] Lord Neuberger's uncritical acceptance of *jus cogens* is somewhat surprising, given (as will be later discussed) the relative newness of the international law concept and scholarly disagreement over which norms are in fact *jus cogens*.

Lord Mance was, by far, less willing to unite the public policy exception with the concept of *jus cogens*.[53] Those 'individual rights recognised as fundamental by English statute and common law' was Lord Mance's point of reference for analysing the public policy exception to the foreign act of state doctrine.[54] The common thread seems to be that, while international law may have some influence in determining the content of cross-border public policy, domestic considerations are paramount. In summary, the international law dimension to English public policy was disciplined by an appeal by some of the justices to domestic law analogues.

47 Ibid 1119 [154].
48 Ibid 1026 [116] (Lord Dyson).
49 Ibid.
50 Ibid 1159 [252] (Lord Sumption).
51 Ibid 1161 [257].
52 Ibid 1122 [168] (Lord Neuberger).
53 Ibid 1107 [107] (Lord Mance).
54 Ibid.

3 Law Debenture Trust Corp plc v Ukraine

In the latter half of 2018, Lord Neuberger's analysis of international law in *Belhaj v Straw* was re-examined by the English Court of Appeal in the *Law Debenture Trust Corp plc v Ukraine*. In a unanimous judgment, the Court of Appeal catalogued six reasons that cumulatively explained why the public policy defence to the foreign act of state doctrine was made out.[55]

The Law Debenture Trust Corp plc sought recovery of US$3 billion with interest from Ukraine owing under Eurobond notes held solely by Russia. The notes were issued under a trust deed governed by English law. Ukraine resisted Russia's application for summary judgment on several grounds including for duress. Russia claimed that the matter was non-justiciable because it involved a foreign act of state; meanwhile, Ukraine contended that the public policy exception to the doctrine applied. In that respect, Ukraine alleged that Russia exerted 'massive, unlawful and illegitimate economic and political pressure' to dissuade it from signing an association agreement with the European Union.[56] Rather than sign the EU association agreement, Ukraine was induced to accept Russian financial support.[57] To do this, Russia 'chose' a Eurobond for its loan relationship with Ukraine, which included English choice of law and choice of forum clauses.[58] Before Ukraine signed the loan agreement, Russia seized Crimea and, in addition, supported and encouraged insurgent military action in eastern Ukraine.[59]

The unanimous judgment reinforced — as a sixth reason for invoking public policy — the domestic character of the public policy doctrine, which was 'not restricted to cases of grave infringements of human rights'.[60] The justices highlighted 'an especially strong public policy in this country that no country should be able to take advantage of its own violation of norms of *ius cogens*'.[61] The Court expressed its position on peremptory norms widely 'by reference to the category of *ius cogens* itself', rather than confining itself 'to the particular norms relevant to the case'.[62] Here, Russia could not take advantage of its violation of art 2(4) of the UN Charter — that is, the prohibition against the use of force — because it was a norm 'fundamental to the system of international law and the principle

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55 *The Law Debenture Trust Corp plc v Ukraine* (n 10) 702 [174].
56 Ibid 663 [8].
57 Ibid.
58 Ibid 702 [175].
59 Ibid 703 [179].
60 Ibid 704 [180].
61 Ibid.
62 Ibid.

of the rule of law'.[63] For a strike out application, the Court of Appeal's cursory discussion of *jus cogens* was to be expected.

General judicial references to *jus cogens* are a promising sign for the future development of this species of exception, either as transnational public policy or as a distinct public international law exception. There is still a risk of oversimplification because, so far, English courts have only vaguely defined the *jus cogens* concept.

B *Elevating Customary International Law in Domestic Law*

From these recent English cases, at least three points may be gleaned about the English common law position. First, the public policy exception is domestic in nature, but an English court may derive assistance from generally accepted norms of international law.[64] By perceiving English public policy as thoroughly domestic in nature, English courts are implicitly rejecting F A Mann's suggestion, considered in Chapter 7, of a freestanding international law exception.[65] Secondly, norms of international law include peremptory or *jus cogens* norms, defined broadly by reference to the category of *jus cogens* and not restrictively on a case-by-case basis.[66] Thirdly, the public international law dimension to public policy is not confined to grave infringements of human rights.[67] While public policy plainly provides an indirect means of recognising norms of public international law under English law, the position is less clear in other Commonwealth jurisdictions — formerly dominions of the British Empire — that are based on the English common law tradition. The next Section identifies the strong persuasive value of these recent English decisions in other common law jurisdictions.

The following section sets the wider recognition of the international law dimension to public policy against the backdrop of three related issues, some of which were touched upon in the Supreme Court of Canada's 2014 decision of *Kazemi Estate v Islamic Republic of Iran*.[68] A key issue in *Kazemi* was whether there was an overriding exception to state immunity in Canada's *State Immunity Act* based on principles of fundamental justice, as recognised in the *Canadian Charter of Rights and Freedoms*.[69] The plaintiff unsuccessfully tried to establish that the international prohibition against torture represented a principle of

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63 Ibid.
64 *Belhaj* (n 8) 1119 [154] (Lord Neuberger).
65 Mann (n 2).
66 *The Law Debenture Trust Corp plc v Ukraine* (n 10) 704 [180].
67 Ibid.
68 *Kazemi Estate v Islamic Republic of Iran* [2014] 3 SCR 176 ('*Kazemi Estate*').
69 Ibid 214–5 [61] (Le Bel J); *State Immunity Act*, RSC 1985, c S-18; *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').

fundamental justice, reflecting customary international law which had been incorporated into Canadian law and, so it was argued, prevailed over inconsistent treatment in the *State Immunity Act*.[70] Giving judgment for the Court, Le Bel J observed that:

> not all commitments in international agreements amount to principles of fundamental justice. Their nature is very diverse. International law is ever changing. The interaction between domestic and international law must be managed carefully in light of the principles governing what remains a dualist system of application of international law and a constitutional and parliamentary democracy. The mere existence of an international obligation is not sufficient to establish a principle of fundamental justice. Were we to equate all the protections or commitments in international human rights documents with principles of fundamental justice, we might in effect be destroying Canada's dualist system of reception of international law and casting aside the principles of parliamentary sovereignty and democracy.[71]

Accordingly, the first issue to address is the definition and status of customary international law — as opposed to treaties — in legal systems that are part of the English common law tradition including Australia, New Zealand, and Canada.[72] Customary law, which has been described as 'international law's most controversial source',[73] is listed as one of four sources of international law in art 38(1) of the *Statute of the International Court of Justice*. A key question is whether customary international law automatically becomes part of the common law of a country (incorporation or adoption) or whether it is merely influential. A second issue is the interaction between international law and domestic law. For example, in the event of an inconsistency between norms of international law and a country's human rights instrument, which prevails?

A final issue for general discussion is the concept of *jus cogens*, which the English Court of Appeal mentioned in *Belhaj v Straw* and *Law Debenture Trust* within the context of generally accepted norms of international law. How is the concept defined? Which norms are *jus cogens* norms? By what means does a domestic court determine whether a doctrine of international law has received general acceptance or assent among the international community? Each of these issues is now discussed in turn.

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70 *Kazemi Estate* (n 68) 214–6 [59]–[63].
71 Ibid 248–9 [150].
72 The dualist system was discussed by Le Bel J in *Kazemi Estate* (n 68): at 248–9 [150]—[151].
73 See Niels Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law' (2017) 28(2) *European Journal of International Law* 357, 357.

1 *Definition and Status of Customary International Law in Dualist Legal Systems: Incorporation or Transformation?*

The status of customary international law in domestic law varies amongst the major common law jurisdictions. The English position at common law is a logical starting point for this discussion. English courts take the view that international law is 'part' of the common law, which is sometimes referred to as the doctrine of incorporation.[74] Blackstone considered international law to be part of the English law, observing that 'the law of nations (where any question arises which is properly the object of its jurisdiction) is here adopted in its full extent, and is held to be part of the law of the land'.[75] Although Blackstone wrote in an age of pervasive natural law thinking, the theory of incorporation remains the favoured theory in English law.

The emergence of a second theory of international law — the doctrine of transformation — coincided with a rising late-19th century interest in Austinian legal positivism. The doctrine originated in Cockburn CJ's judgment in the 1876 case of *R v Keyn*:

> For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. … Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorize the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law. In so doing we should be unjustifiably usurping the province of the legislature.[76]

Although this theory received some subsequent support,[77] Lord Denning MR in *Trendtex Trading Corp v Central Nigeria Bank* accepted the doctrine of incorporation as a correct statement of English law.[78]

Although the doctrine of incorporation has represented English law 'for nearly 300 years',[79] it has several important limits.[80] First, acts of parliament are 'supreme'.[81] Under English law, statutes are hierarchically superior to the common law, which takes in rules

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74 Andrew Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (Oxford University Press, 7th ed, 2012) 89, 91–2.
75 William Blackstone, *Commentaries on the Laws of England* (1765–69) 67.
76 *R v Keyn* [1876] 2 Ex D 63, 202–3 (Cockburn CJ).
77 Notably in *Chung Chi Cheung v The King* [1939] AC 160, 167–8 (Lord Atkin).
78 *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529, 554 (Lord Denning MR) ('*Trendtex*').
79 See *Buvot v Barbuit* (1737) Cas t Talbot 281; 25 ER 777 (Lord Talbot LC), approved in *Triquet v Bath* (1764) 3 Burr 1478, 97 ER 936, 938 (Lord Mansfield). See Clapham (n 74) 91–2.
80 Clapham (n 74) 92.
81 Ibid 92.

of international law.[82] Secondly, as a consequence of the principle of separation of powers, treaties do not automatically become part of domestic law.[83] Though the Executive possesses a prerogative power to conclude treaties, the legislative branch of government must transform a treaty into an act of parliament before it has any domestic effect.[84] Thirdly, British courts 'accept[] information from the Executive… on matters which they regard as falling within the Executive sphere';[85] for example, whether a country is recognised by the British Government. Fourthly, domestic law considerations will inevitably influence the domestic court that is addressing international law issues.[86] Finally, international crimes are not automatically received or recognised in domestic law without the imprimatur of the legislature.[87]

Canada also takes a hybrid approach to the reception of international law,[88] tempered in all cases by principles governing the country's constitutional and parliamentary democracy.[89] It is generally accepted that Canada is a dualist system for treaties and international conventions,[90] while Canada's system of receiving customary international law is in all likelihood monist.[91] The Canadian position on customary international law, though 'still not clear of all doubt',[92] seems to align with the English position which supports the doctrine of incorporation or adoption.[93] Treaties are not self-executing in

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82 Ibid.

83 Ibid 92–5.

84 Ibid 95–7.

85 Ibid 98.

86 Ibid 99.

87 Ibid 100.

88 Louis LeBel and Gloria Chao, 'The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law' (2002) 16 *Supreme Court Law Review* 24, 33 ('Fugue or Fusion?'); Gib van Ert, 'Dubious Dualism: The Reception of International Law in Canada' (2009–10) 44(4) *Valparaiso University Law Review* 927, 928 ('Dubious Dualism').

89 *Kazemi Estate* (n 68) 249 [150]–[151] (Le Bel J). Cf John H Currie, 'Weaving the Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law' (2008) 45 *Canadian Yearbook of International Law* 55, 59 ('Weaving the Tangled Web').

90 See *Kazemi Estate* (n 68) 248 [149] (Le Bel J); van Ert, 'Dubious Dualism' (n 88) 928–31; Stéphane Beaulac and John H Currie, 'Canada' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press, 2011) 116, 144–5.

91 LeBel and Chao, 'Fugue or Fusion?' (n 88) 33; Currie, 'Weaving the Tangled Web' (n 89) 60–71; Beaulac and Currie, 'Canada' (n 90) 145.

92 Beaulac and Currie, 'Canada' (n 90) 138.

93 See, eg, *Reference as to whether members of the Military or Naval Forces of the United States of America are exempt from Criminal Proceedings in Canadian Criminal Courts* [1943] SCR 483, 517:

> The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.

See also van Ert, 'Dubious Dualism' (n 88) 930; Beaulac and Currie, 'Canada' (n 90) 138.

Canada. For an international treaty to have direct legal effect in Canadian law, implementation by federal or, in some cases, provincial[94] legislation is required.[95]

Canadian law maintains a rebuttable presumption that legislation will 'comply with the values and principles of customary and conventional international law'.[96] In *R v Hape*, the presumption of conformity was considered to be an interpretative principle of domestic law.[97] International law's 'values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them'.[98] But, the presumption of conformity 'remains just that — merely a presumption'; it 'can be rebutted by clear words of the statute under consideration'.[99] It was in this context that LeBel J in *R v Hape* remarked: '[p]arliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation'.[100] Sources of international law may be "'relevant and persuasive sources'" that aid in the interpretation of provisions in the *Canadian Charter of Rights and Freedoms*.[101]

Australia is a 'strictly dualist' legal system in relation to customary international law although, unlike Canada and many other modern democracies, it has no federal-based human rights instrument.[102] One important consequence is that international law crimes, evidenced by treaty or custom, are not offences under Australian law until specifically implemented by domestic legislation.[103] Thus, the scheduling of the Genocide Convention to the *Genocide Convention Act 1949* (Cth) was not sufficient to transform the customary international law prohibition on genocide into an offence under Australian law until legislation amending the *Criminal Code Act 1995* (Cth) did so in 2002.[104] Moreover, customary international law is not a 'part' of the common law, but it is one of its sources.[105] Rules of customary international law are limited by inconsistent legislation and binding

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94 *A-G (Canada) v A-G (Ontario)* [1937] AC 326 (PC) ('*Labour Conventions* case').
95 Ibid 347 (Lord Atkin) (PC).
96 *R v Hape* [2007] 2 SCR 292, 323 [53] (LeBel J) ('*Hape*').
97 Ibid.
98 Ibid.
99 *Kazemi Estate* (n 68) 214 [60] (LeBel J). See also Gib van Ert, 'Dubious Dualism: The Reception of International Law in Canada' (2009–10) 44(4) *Valparaiso University Law Review* 927, 931–2.
100 *Hape* (n 96) 323 [53] (LeBel J).
101 See Benjamin Oliphant, 'Interpreting the *Charter* with International Law: Pitfalls and Principles' (2014) 19 *Appeal* 105, 107–8, quoting *Reference re Public Service Employee Relations Act (Alberta)* [1987] 1 SCR 313, 348 (Dickson CJ).
102 Alice de Jonge, 'Australia' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press, 2011) 23, 25, 26.
103 Ibid 26–7.
104 Ibid 27.
105 J L Brierly, 'International Law in England' (1935) 51 *Law Quarterly Review* 24, 31, cited in *Chow Hung Ching v The King* (1948) 77 CLR 449 (Dixon J) and *R v Jones* [2007] 1 AC 136, 155 (Lord Bingham).

judicial precedent 'inconsistent with the putatively adopted rule'.[106] Just as in Canada, constitutional design and the separation of powers principle place important limits on the incorporation of customary international law into the common law of Australia.

New Zealand adopts a dualist approach to treaties but is traditionally presumed to take a monist approach to customary international law.[107] New Zealand case law rests on the assumption that Blackstone's theory on the direct incorporation of customary international law is correct.[108] Using Blackstone's theory, rules of customary international law automatically become part of New Zealand's domestic law.[109] As both Hopkins and Dunworth highlight, however, New Zealand law textbooks accept Blackstone's proposition but 'few' offer evidence of its practical application.[110] Despite the dearth of New Zealand case law on customary international law,[111] it is probable that rules of sovereign immunity and the law of the sea fall within its remit.[112] According to Dunworth, Blackstone's theory requires adaptation by New Zealand courts to reflect a 'more complicated world'.[113] Dunworth argued that this may demand 'a self-conscious pedigree approach' by which New Zealand courts decide which rules of customary international law are received into the common law.[114]

Values fundamental to the New Zealand legal order, such as the right not to be deprived of life[115] or not to be subjected to torture or cruel treatment,[116] that correspond with international law are enshrined in the *New Zealand Bill of Rights Act 1990* (NZ). The Bill of Rights 'is intended to be woven into the fabric of New Zealand law'.[117]

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106 Stephen Hall, *Principles of International Law* (LexisNexis Butterworths, 5th ed, 2016) 160 [3.20].

107 Treasa Dunworth, 'Hidden Anxieties: Customary International Law in New Zealand' (2004) 2(1) *New Zealand Journal of Public and International Law* 67, 68; Chief Justice Sian Elias, 'The Impact of International Conventions on Domestic Law' (Speech, International Association of Refugee Lawyer Judges, 10 March 2000) <https://www.refugee.org.nz/IARLJ3-00Elias.html>; W John Hopkins, 'New Zealand' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press, 2011) 429, 442; Susan Glazebrook, 'Cross-Pollination or Contamination: Global Influences on New Zealand Law' (2015) 21 *Canterbury Law Review* 60, 62, 68–9. See also *Zaoui v A-G [No 2]* [2006] 1 NZLR 289, 302 [24], 321 [90] ('*Zaoui*').

108 W John Hopkins, 'New Zealand' (n 107) 442.

109 Chief Justice Sian Elias, 'The Impact of International Conventions on Domestic Law' (Speech, International Association of Refugee Lawyer Judges, 10 March 2000) <https://www.refugee.org.nz/IARLJ3-00Elias.html> [13].

110 Dunworth, 'Hidden Anxieties' (n 107) 68; W John Hopkins, 'New Zealand' (n 107) 443.

111 Dunworth, 'Hidden Anxieties' (n 107) 69.

112 Ibid 81, 83.

113 Ibid 84.

114 Ibid 83, 84.

115 *New Zealand Bill of Rights Act 1990* (NZ) s 8.

116 Ibid 9.

117 *R v Goodwin* [1993] 2 NZLR 153, 156 (Cooke P) (CA).

2 *Interaction between International Law and Domestic Law*

Common law presumptions of interpretation have been applied by courts in the United Kingdom, Australia, Canada, and New Zealand to ensure compliance with fundamental values of the legal order or conformity with international law.[118] To rebut the presumption of conformity to international law, clear statutory wording is required.[119] The common law presumption of compliance may be seen to 'reinforce' provisions within national human rights instruments requiring compliance with the fundamental values it enshrines.[120] On the other hand, the presumption of conformity with international law may be seen as a destabilising force on a country's constitutional order.[121]

In *Zaoui v Attorney-General [No 2]*, protections within the New Zealand Bill of Rights and New Zealand's 'closely related' international obligations against arbitrary deprivation of life and torture combined to condition the exercise of the Minister's power to deport under immigration legislation.[122] The decision centred on the judicial review of a security risk certificate issued under s 72 of the *Immigration Act 1972* (NZ) against an Algerian, Ahmed Zaoui, who had been granted refugee status in New Zealand.[123] The Minister intended to rely upon the certificate to have Zaoui deported.[124] Reviewing the certificate in light of New Zealand's international obligations, the Supreme Court of New Zealand read a limitation in s 72 using the common law presumption of consistency and s 6 of the *New Zealand Bill of Rights*.[125] Section 6 required an interpretation of s 72 that was consistent with the rights and freedoms contained in it,[126] including the right not to be deprived of

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118 See, eg, **England:** *Bloxam v Favre* (1883) 8 PD 101, 107 (Sir James Hannen P); *Salomon v Commissioners of Custom and Excise* [1967] 2 QB 116, 143 (Diplock LJ); *A-G (UK) v BBC* [1981] AC 303, 354 (Lord Scarman) (HL); cf ; *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, 771 (Lord Diplock): 'it is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority…'; *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696, 747–8 (Lord Bridge of Harwich); **Australia:** *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J); *Polites v Commonwealth* (1945) 70 CLR 60, 68–9 (Latham CJ), quoting Sir Gilbert H B Jackson, *Maxwell on the Interpretation of Statutes* (Sweet & Maxwell, 8th ed, 1937), 77 (Dixon J), 80–1 (Williams J); *Chow Hung Ching v The King* (1948) 77 CLR 449, 462 (Latham CJ): 'International law is not as such part of the law of Australia… but a universally recognized principle of international law would be applied by our courts'; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ), 53; **New Zealand:** *Cropp v Judicial Committee* [2008] 3 NZLR 774; *Zaoui* (n 107) 321; *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59 ('New Health New Zealand'); **Canada**: *Daniels v White* [1968] SCR 517, 541 (Pigeon J); *Ordon Estate v Grail* [1998] 3 SCR 437, 526 [137] (Iacobucci and Major JJ); *Schreiber v Canada (A-G)* [2002] 3 SCR 269, 293–4 [50] (LeBel J); *Hape* (n 96) 323 [53].

119 *Kazemi Estate* (n 68) 214 [60] (LeBel J).

120 *New Health New Zealand* (n 118) [293].

121 Oliphant (n 101) 117.

122 *Zaoui* (n 107).

123 Ibid.

124 Ibid 297 [6].

125 Ibid 321–2 [90]–[91].

126 Ibid 321 [90].

life and the right not to be subject to torture or cruel treatment.[127] The power in s 72 could not be exercised where the person being deported 'faces a real risk of torture or arbitrary deprivation of life'.[128] In the result, the Supreme Court found that the deportation of Zaoui would lead to New Zealand breaching its international obligations.[129]

The presumption of conformity with international legal obligations has also received attention in Canadian courts. Where domestic legislation is unambiguous, the presumption of conformity has no application.[130] Inconsistency with international law does not affect this result.[131] In *Kazemi Estate*, the Supreme Court of Canada refused to use a norm of customary international law as an exception to the general rule of state immunity, codified in the *State Immunity Act*.[132] The invoked sections of the *State Immunity Act* could not be characterised as 'genuinely ambiguous' or requiring 'clarification'.[133] If the statutory provisions were unclear, the Court could then consult the common law or international law.[134]

The materials and evidentiary methods employed by domestic courts to identify a customary norm also emerges as an issue worth briefly mentioning. As a general rule of Anglo-common law private international law, foreign law must be pleaded with sufficient detail and proved by expert evidence.[135] In contrast to this position, courts in Commonwealth countries adhering to Blackstone's theory of incorporation may take judicial notice of international law — including custom.[136] Thus, as Stephenson LJ observed in *Trendtex Trading Corp v Central Bank of Nigeria*:

> rules of international law, whether they be part of our law or a source of our law, must be in some sense "proved", and they are not proved in English courts by expert evidence like foreign law: they are "proved" by taking judicial notice of "international treaties and conventions, authoritative textbooks, practice and judicial decisions" of other courts in other countries which show that they have "attained the position of general acceptance by civilised nations".[137]

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127 *NZ Bill of Rights* (n 115) ss 8–9.
128 *Zaoui* (n 107) 321 [90].
129 Ibid 321–2 [91], 322 [93]. See also Philip A Joseph and Thomas Joseph, 'Human Rights in the New Zealand Courts' (2011) 18 *Australian Journal of Administrative Law* 80, 97.
130 Oliphant (n 101) 119.
131 Ibid.
132 [2014] 3 SCR 176.
133 *Kazemi Estate* (n 68) 216 [63] (LeBel J).
134 Ibid.
135 See generally I A Hunter, 'Proving Foreign and International Law in the Courts of England and Wales' (1977–78) 18(4) *Virginia Journal of International Law* 665, 666; James McComish, 'Pleading and Proving Foreign Law in Australia' (2007) 31(2) *Melbourne University Law Review* 400.
136 See Hunter (n 135) 674; Gibran van Ert, 'The Admissibility of International Legal Evidence' (2005) 84 *Canadian Bar Review* 31, 39.
137 *Trendtex* (n 78) 569 (Stephenson LJ).

Legal submissions and argument, as opposed to expert evidence, may be all that is necessary to prove international law.[138] Though Stephenson LJ's observation appears straightforward, it leaves unresolved — as Malcolm Shaw pointed out — the question of how a domestic court ascertains a rule of customary international law.[139] This problem is magnified by common law judges' natural focus on domestic cases and statute.[140]

Common law judges, who are accustomed to the analysis of domestic sources of law, are less skilled at examining foreign and international sources of law.[141] Before determining whether a rule is one of customary international law, these judges have the formidable task of 'sorting through and evaluating the conduct of states in order to determine both the existence of a state practice and the presence of the *opinion* [sic] *juris*'.[142] Indeed, in a recent qualitative study by Ryngaert and Hora Siccama, a large proportion of the domestic courts analysed truncated their analysis of state practice or *opinio juris* and, more often than not, took shortcuts to identify whether a norm constituted custom.[143] The courts — both civil law and common law — did so by consulting a larger range of sources as 'proxies for a thorough analysis of state practice and *opinio juris*'.[144] The ratification of multilateral treaties, the existence of non-binding instruments, scholarly doctrine, and the 'persuasive authority' of international case law were relied upon by the domestic courts analysed as evidence of the existence of a norm.[145] More exceptionally, some of the courts thoroughly analysed relevant legislation and case law of the connected place to determine state practice.[146] The standard of proof and standard of uniformity required to establish a rule of customary international law are related issues.[147]

C *Related Issues: Violation of* Jus Cogens *or Peremptory Norms of International Law*

Peremptory or *jus cogens* norms of international law may be considered to be functionally equivalent to cross-border public policy administered at a domestic level. Just as domestic conceptions of public policy draw on 'fundamental interests and sentiments' of the

138 Malcolm N Shaw, 'International Law: A System of Relationships' in *Collected Courses of the Xiamen Academy of International Law* (Brill Nijhoff, 2011) vol 3, 243, 284.
139 Ibid.
140 Ibid.
141 Ibid. See generally Hunter (n 135).
142 Shaw, 'A System of Relationships' (n 138) 284.
143 Cedric M J Ryngaert and Duco W Hora Siccama, 'Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts' (2018) 65(1) *Netherlands International Law Review* 1.
144 Ryngaert and Siccama (n 143) 3, 5.
145 Ibid 6–21.
146 Ibid 21–2.
147 Malcolm N Shaw, 'International Law: A System of Relationships' in *Collected Courses of the Xiamen Academy of International Law* (Brill Nijhoff, 2011) vol 3, 243, 284–5 ('A System of Relationships').

forum,[148] peremptory norms seek to protect norms and interests fundamental to and shared amongst the international community of nations. Whereas existing categories of norms of public policy preserve important domestic interests, peremptory norms — the 'super norms' of international law — are increasingly invoked in private law proceedings to denounce internationally egregious conduct where recourse before international courts or another foreign jurisdiction is inapt. This is primarily because multinational corporations lack legal personality before international tribunals. Alternatively, claimants from developing countries may be denied 'substantial justice' in their home jurisdiction because of combined factors including poverty and inadequate resources to fund large group litigation.[149]

1 *The Concept of* Jus Cogens *within International Law*

International law is 'a system of horizontal rules which are binding only if states in some way agree to be bound by them'.[150] A roadmap of the general sources of international law is provided in art 38(1) of the *Statute of the International Court of Justice*. These sources are international conventions, international custom, general principles of law, and judicial decisions as well as the teachings of publicists.[151] The first three items in art 38(1) — conventions, custom and general principles — are sometimes considered to be formal sources from which the actual content of international law is drawn.[152] Custom comprises two elements — consistent state practice (*usus*) and *opinio juris* — which are, respectively, objective and subjective.[153] For a rule to be considered customary international law, both elements must be satisfied.

Norms qualified as 'peremptory' or 'mandatory' challenge the common perception that international law is a system of horizontal rules under which no legal obligation is regarded as hierarchically superior to another.[154] However, writings on international law draw a distinction between a State's ability to derogate from or abrogate rules of international law (*jus dispositivum*) and a State's inability to derogate from rules fundamental to the

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148 Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, 2006) 24.

149 *Vedanta Resources plc v Lungowe* [2019] UKSC 20, [88], [89], [90].

150 Jure Vidmar, 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?' in Erika De Wet and Jure Vidmar, *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press, 2012) 13.

151 *Statute of the International Court of Justice*, opened for signature 26 June 1945, 33 UNTS 993 (entered into force 24 October 1945) art 38(1)(a)–(d).

152 See John Grant, *International Law Essentials* (Edinburgh University Press, 2010) 11; Hall, *Principles of International Law* (n 106) 29–30 [1.88]–[1.89].

153 Ibid 29. See also *North Sea Continental Shelf* [1969] ICJ 3 ¶77.

154 Vidmar (n 150) 13.

international order (*jus cogens*).[155] The latter suggests a system of vertical rules — a special category of norms that are 'intrinsically superior' to other norms, 'inalienable', and universal.[156] The International Court of Justice observed in the *Barcelona Traction case* that particular international obligations were 'the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*'.[157] The concept of *jus cogens*, denoting a non-derogable norm of fundamental importance to the international community of nations, falls within this category. From 2015, the International Law Commission has directed its attention to this topic, placing it on its current programme of work with almost full international support.[158]

The concept of *jus cogens* has flourished following its inclusion in the *Vienna Convention on the Law of Treaties* ('VCLT'), which was adopted in 1969.[159] It is considered by some to be analogous to the public policy exception in municipal legal orders.[160] The term *jus cogens* originated in a 1958 report on the law of treaties and, in this context, was used to describe a limitation on States' ability to depart from rules of international law.[161] Article 53 of the VCLT defines peremptory norms as norms '*accepted* and *recognized* by the *international community of States as a whole* as a norm from which *no derogation is permitted* and which can be modified only by a subsequent norm of general international law having the same character'.[162] Unpacked, art 53 suggests two criteria for the identification of a *jus cogens* norm.[163] First, the norm must be a norm of general international law.[164] Secondly, the norm must be 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted'.[165] Article 53 further provides

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155 Dire Tladi, Special Rapporteur, *First Report on* Jus Cogens, UN Doc A/CN.4/693 (8 March 2016) 39 [64].

156 Ibid 32. Orakhelashvili (n 148) 8.

157 *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain) (Preliminary Objections)* [1970] ICJ Rep 3, 32 [33].

158 See comments about the 'renewed interest' in peremptory norms in Thomas Kleinlein, '*Jus Cogens* Re-examined: Value Formalism in International Law (2017) 28(1) *European Journal of International Law* 295. France, the Netherlands and the United States have entertained doubts about the ILC's focus.

159 Dire Tladi, Special Rapporteur, *First Report on* Jus Cogens, UN Doc A/CN.4/693 (8 March 2016) 15 [28], 25 [46]. For comments about the enduring appeal of *jus cogens*, see Andrea Bianchi, 'Human Rights and the Magic of *Jus Cogens*' (2008) 19(3) *European Journal of Human Rights* 491.

160 See generally Orakhelashvili (n 148); *compare* Kleinlein (n 158) 298–9, 303.

161 Ibid 15 [29].

162 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 53 (emphasis added). See also Lisa Yarwood, *State Accountability under International Law: Holding States Accountable for a Breach of Jus Cogens Norms* (Routledge, 2011) 64.

163 Dire Tladi, Special Rapporteur, *First Report on* Jus Cogens, UN Doc A/CN.4/693 (8 March 2016) 38 [61] ('*First Report*'); Dire Tladi, Special Rapporteur, *Second Report on* Jus Cogens, UN Doc A/CN.4/706 (16 March 2017) 45–6 ('*Second Report*').

164 Tladi, *Second Report* (n 163) 16 [32].

165 Ibid.

that a treaty in conflict with a peremptory norm of general international law is void; meanwhile, article 64 makes provision for the emergence of new peremptory norms.

Article 53 is the typical frame of reference for international courts and tribunals seeking out criteria for the identification of *jus cogens* norms.[166] As the International Law Commission observed in 2017, many States also support using art 53 to develop criteria for *jus cogens*.[167] So, despite first being recognised in the context of treaty law, the concept of *jus cogens* extends beyond the Vienna Convention; the concept is no longer the exclusive province of treaty law.[168] *Jus cogens* norms can derive from custom evidencing a form of 'super-custom'.[169] While the existence of the *jus cogens* concept no longer engenders controversy, disagreement still surrounds its scope and content.[170] In particular, the main bone of contention appears to be the means by which peremptory norms are identified.

2 *Which Norms are* Jus Cogens *Norms?*

Though the concept of *jus cogens* is loosely defined, some consensus exists on the norms possessing a *jus cogens* character.[171] Prohibitions against the use of force,[172] aggression or aggressive force, and the denial of self-determination are commonly cited examples.[173] Other strong contenders include the prohibition against torture,[174] genocide,[175] slavery,[176] apartheid and racial discrimination, and crimes against humanity.[177] The International Court of Justice has recognised the prohibition on the use of force and genocide as *jus cogens* in both explicit and implicit terms.[178] Other courts and tribunals on international and domestic planes have also identified genocide as a peremptory norm.[179] Similarly, the

166 Ibid.
167 Ibid.
168 Vidmar (n 150) 28; Tladi, *First Report* (n 163) 24 [43]. See also Hall, *Principles of International Law* (n 106) 51 [1.151].
169 Tladi, *Second Report* (n 163) 47. See Grant (n 152) 25.
170 See Tladi, *First Report* (n 163) 5 [8], 23 [42]; Antonio Cassese, *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 162–4.
171 Yarwood (n 162) 68; Asif Hameed, 'Unravelling the Mystery of Jus Cogens in International Law' (2014) 84(1) *British Yearbook of International Law* 53, 54, 57.
172 See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)* [1986] ICJ Rep 14, 100 [190]; Hameed (n 171) 53, 54.
173 Cassese (n 170) 162.
174 See generally Erika de Wet, 'The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law' (2004) 15(1) *European Journal of International Law* 97; Bianchi (n 159) 495.
175 See, eg, Bianchi (n 159) 495; Hameed (n 171) 54.
176 See, eg, Bianchi (n 159) 495.
177 Cassese (n 170) 162. See also Grant (n 152) 24–5.
178 For the use of force, see *Military and Paramilitary* (n 172) 100 [190]. For the prohibition against genocide, see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda) (Judgment)* [2006] ICJ Reports 6, 31–2 [64]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 111 [161].
179 Tladi, *First Report* (n 163) 26–8 [47]–[48].

prohibition against torture has received support in domestic courts as a peremptory norm.[180] Beyond these norms, though, disagreement abounds — not simply in relation to the content of each recognised norm but, more generally, how norms of *jus cogens* are made.[181]

D *Conclusion: Assimilating International Law with Cross-Border Public Policy*

Three key points were addressed in this Part. First, the unique characteristics of *Kuwait Airways [Nos 4 and 5]* were identified to underline the difficulties of mounting a public policy argument based on public international law at common law. At the very least, the House of Lords' decision in *Kuwait Airways [No 4 and 5]* reveals the need for cogent evidence pointing to an international consensus or universal condemnation of a state's behaviour. Secondly, Part II identified that *jus cogens* may represent part of the public policy doctrine at common law. While English courts have referred to the *jus cogens* concept, they have not adequately addressed the general concept or specifically identified norms of *jus cogens*. As a third point, this Part focused on the amenability of Anglo-common law courts to matters of international law and issues related to this recognition. These points serve to highlight that public international law is a recognised, albeit fledgling and tendentious, category of public policy.

The authorities are clear on cross-border public policy; it 'exists within very narrow limits'.[182] The public policy exception, as Field J concluded in *Empresa Nacionale de Telecomunicaciones SA v Deutsche Bank AG*, 'is concerned with violations of international law and/or with breaches of fundamental universal human rights'.[183]

This Chapter has suggested that public international law is a recognised category of cross-border public policy in Anglo-common law jurisdictions. If it is a recognised category, then it is suggested that the logic of preserving its place within an envelope of public policy rapidly diminishes. Three arguments are raised here to promote public international law's detachment from the public policy exception at common law. First, an appeal to public international law has the same practical result as an appeal to the public policy exception, but without the reproach of 'palm tree' justice.[184] In the end, a law or, more rarely, a judgment *in personam* is excluded. As a second reason, a detached exception

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180 *Habib v Commonwealth of Australia* (2010) 183 FCR 62 [9] (Perram J).

181 Hameed (n 171) 55, 57–8.

182 *Empresa Nacional de Telecomunicaciones SA v Deutsche Bank AG* [2010] 1 All ER (Comm) 649, 654 [22] (Field J).

183 Ibid.

184 P B Carter, 'The Rôle of Public Policy in English Private International Law' (1993) 42(1) *International and Comparative Law Quarterly* 1, 10.

further narrows the Anglo-common law exception. It also strengthens the central claim of Chapter 7 that cross-border public policy is a severely constrained exception, which is only rarely and very exceptionally invoked in modern Anglo-common law jurisprudence. As a third reason, public international law is more precise in its focus than the public policy exception. Thus, using public international law may not incur the same reproach as the public policy exception. It does not involve riding the 'unruly horse' of public policy 'to wreak havoc in international pastures'.[185]

At the same time, this Chapter has highlighted a 'dualist' problem, deep 'uncertainty' about what constitutes customary international law, and what is encompassed by *jus cogens*. Thus, the argument pursued in this Chapter for a detached public international law exception is a potentially provocative one that will have to address three related problems. First, a standalone exception would appear to elevate all public international law to higher law. However, in dualist countries such as the United Kingdom, domestic statute receives priority over public international law. Secondly, treaty-based public international law has no status in domestic law unless a state becomes a party to it or some aspects of it become customary international law. Indeed, the conclusion and ratification of treaties falls within the prerogative of the Crown. Treaties have no effect until Parliament, in line with the separation of powers principle, passes enabling legislation. Thirdly, replacing public policy clauses, in existing international treaties and regional legislation with a public international law exception may be considered unreasonable. These clauses may encompass 'truly international' public policy already.

The foreign governmental interest exception is next introduced to complement this Part's analysis of public international law as a *potentially* new species of exception.

III FOREIGN GOVERNMENTAL INTERESTS

This Part explores the scope of the antipodean analogue to the residuary category of 'other public law' in English law: the foreign governmental interests doctrine. The 'other public law' category was originally foreseen as a limitation on courts' subject matter jurisdiction,[186] but recent English jurisprudence has interpreted the rule more broadly. A succession of English cases beginning with *Attorney-General of New Zealand v Ortiz* and concluding with *Islamic Republic of Iran v Barakat Galleries Ltd*[187] are considered in Part III to explain how the 'other public laws' rule has matured over time. This Part also discusses

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185 Ibid.

186 Mary Keyes, *Jurisdiction in International Litigation* (Federation Press, 2005) 75.

187 *Islamic Republic of Iran v Barakat Galleries Ltd* [2009] QB 22 ('*Barakat Galleries*').

the foreign governmental interests doctrine taken by the majority of the High Court of Australia in the *Spycatcher* case compared with Brennan J's public policy approach. Part III ultimately argues that the 'foreign governmental interests' doctrine is — at least from an Australian law perspective — already detached from the public policy exception.

A *The 'Other Public Law' Rule*

Within the context of judicial citation practices, Chapter 5 briefly explored the changing character of the 'other public law' rule in successive editions of Dicey's *Conflict of Laws*. The fourth edition (1927), edited for the first time by Arthur Berriedale Keith, introduced political law as a third restraint on subject matter jurisdiction alongside penal and revenue laws.[188] Aside from *Emperor of Austria v Day and Kossuth*, support for this add-on was minimal.[189] From the seventh edition (1958), 'other public law' replaced the term 'political law'[190] most likely prompted by the scholarly and judicial criticisms of F A Mann[191] and Parker LJ in *Regazzoni v KC Sethia (1944) Ltd*.[192] The replacement term (rule 21) in the seventh edition was 'intended to signify the residuary category of those rules which are enforced purely as an assertion of sovereign power'.[193] The 'other public law' category is now situate in rule 3(1) of Dicey, Morris and Collins, which reads:

> English courts have no jurisdiction to entertain an action: (1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state; or (2) founded on an act of state.[194]

At present, English law suggests three main uses for this category.[195] In the first place, a court declines to apply the foreign *lex causae* because it requires the application of a penal, revenue, or other public law.[196] Secondly, enforcement of a foreign judgment involves the

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188 A V Dicey and A Berriedale Keith (ed), *Dicey on the Conflict of Laws* (Stevens and Sons, 4th ed, 1927) lxxv, 224 [r 54] (emphasis added).

189 Ibid. See also *Emperor of Austria v Day and Kossuth* (1861) 3 De GF & J 217; 45 ER 861 ('*Emperor of Austria case*'); *Barakat Galleries* (n 187) 54–5 [112] (Lord Phillips CJ).

190 J H C Morris (ed), *Dicey's Conflict of Laws* (Stevens & Sons Ltd, 7th ed, 1958) 159 [r 21]. The reasons for this change of terminology are considered in Lord Collins et al (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol 1 115 (n 155).

191 F A Mann, 'Prerogative Rights of Foreign States and the Conflict of Laws' (1954) 40 *Transactions of the Grotius Society* 25 ('Prerogative Rights').

192 [1956] 2 QB 490, 524. This was considered in Chapter 5. See also *Barakat Galleries* (n 187) 55 [114] (Lord Phillips CJ).

193 Morris (ed), '7th ed (1958)' (n 190) 162.

194 Lord Collins et al (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol 1 107–8 [5R-019]. See also Lawrence Collins, 'Professor Lowenfeld and the Enforcement of Foreign Public Law' (2009) 42(1) *New York University Journal of International Law and Politics* 125.

195 See generally C J S Knight, 'Of Coups and Compensation Claims: *Mbasogo* Reassessed' (2008) 19(1) *King's Law Journal* 176.

196 *Barakat Galleries* (n 187). See also Knight (n 195) 176.

direct or indirect enforcement of a foreign penal, revenue or other public law.[197] Thirdly, a claim may be non-justiciable because it involves the exercise or assertion of a sovereign right.[198]

B *From* Attorney-General of New Zealand v Ortiz[199] *to* Spycatcher

Whether rule 3(1) extended to the non-enforceability of a foreign public law was considered in *Attorney-General of New Zealand v Ortiz*. *Ortiz* concerned the New Zealand Government's attempts to recover a Maori carving lawfully purchased in New Zealand but exported to England in violation of the *Historical Articles Act 1962* (NZ). Under the New Zealand statute, historical articles exported without permission were forfeited to the Crown in right of New Zealand. New Zealand argued that the 1962 Act provided for automatic forfeiture, which was rejected in both the Court of Appeal and the House of Lords. However, in the Court of Appeal, Lord Denning MR also concluded that the New Zealand statute was a public law that could not be enforced.[200] Upholding the 'other public law' category in rule 3 of Dicey and Morris, Lord Denning thought it was '*eiusdem generis* with "penal" or "revenue" laws'.[201] Further, claiming a distinction made by F A Mann, his Lordship suggested that claims involving acts performed 'by virtue of… sovereign authority' were not enforceable.[202] Lord Denning was, however, alone in holding that the rule covered foreign public laws.[203]

In the *Spycatcher* case, the New South Wales Court of Appeal and the High Court of Australia critically examined the third residual category of 'other public laws'.[204] The rule was examined in the context of a private law action brought by the United Kingdom government against Peter Wright and his Australian book publisher, Heinemann Publishers. The Attorney-General of the United Kingdom sought an injunction to restrain publication of Wright's memoirs, *Spycatcher*, alleging that the book contained confidential information acquired during his time with the British Security Service. The action could not be maintained. In the NSW Court of Appeal, Street CJ and Kirby P both thought the action was one which, in substance, involved the indirect enforcement of a foreign public

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197 F A Mann, 'Prerogative Rights of Foreign States and the Conflict of Laws' (1954) 40 *Transactions of the Grotius Society* 25, 36. See also Knight (n 195) 176.

198 See, eg, *Mbasogo v Logo Ltd* [2007] QB 846 ('*Mbasogo*'). Cf *Spycatcher* (n 4) 42–3.

199 [1982] QB 349.

200 Ibid. The other two appeal judges, Ackner and O'Connor LJJ, thought the New Zealand law was penal. The House of Lords concluded on an entirely different footing: forfeiture under the *Historical Articles Act 1962* (NZ) was not automatic. New Zealand's action consequently failed.

201 *A-G (NZ) v Ortiz* [1984] AC 1, 21 (Lord Denning MR) ('*Ortiz*'); *Mbasogo* (n 198) 868 [32].

202 *Ortiz* (n 201) 20–1 (Lord Denning MR).

203 *Spycatcher* (n 4) 42 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ).

204 Ibid 40–2. See also *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86,

law.[205] Kirby P characterised the other public law rule as one of private international law.[206] Reprising F A Mann, Kirby P also held that 'acts… done by a sovereign *jure imperii*, that is by virtue of sovereign authority, will not be enforced in the courts of other sovereign states'.[207] McHugh JA stated the principle differently by basing it instead on public policy.[208] He held that 'the courts of Australia have a right to refuse to entertain an action based on legal rights or obligations acquired or imposed by the law of a foreign country if the determination of that action is contrary to the national interest of Australia'.[209] This pattern of public policy was explored in Part III(B)(1)(a) of Chapter 7.

The High Court also held that the claim, *in substance*, involved an attempt to enforce a foreign 'governmental interest'.[210] The British Government's argument in *Spycatcher* that 'private, not public, obligations' were being enforced failed to 'withstand close examination'.[211] The *Spycatcher* majority reinforced that 'the action is to be characterized by reference to the substance of the interest sought to be enforced, rather than the form of action'.[212] To do otherwise would be 'to overlook the appellant's central interest in bringing the action'.[213] Consideration of F A Mann's article on prerogative rights influenced the High Court's preference for 'governmental interests' over 'other public law'. This preference was justified on the basis of 'the difficulty of identifying the foreign laws or rights that fall within the rule'.[214] It was considered 'more apt to refer to "public interests" or, even better, "governmental interests" to signify that the rule applies to claims enforcing the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government'.[215] Brennan J, in a concurring judgment, isolated public policy as the case's 'governing principle'.[216]

Following the *Spycatcher* decision, the governmental interest approach taken by the High Court was much criticised.[217] One major criticism centred on the equation of public

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205 *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (n 204) 116C (Street CJ), 181C (Kirby P).
206 Ibid 181C (Kirby P).
207 Ibid 136F.
208 Ibid 196B–D.
209 Ibid 196D.
210 *Spycatcher* (n 4) 42. See also Lord Collins et al (eds) (n 194) 118 [5-036]; *Pocket Kings Ltd v Safenames Ltd* [2010] Ch 438, 452–3 [36] (Michael Furness QC).
211 *Spycatcher* (n 4) 46.
212 Ibid.
213 Ibid.
214 Ibid 42.
215 Ibid; Reid Mortensen, 'Together Alone: Integrating the Tasman World' in Andrew Dickinson, Mary Keyes and Thomas John (eds), *Australian Private International Law for the 21st Century: Facing Outwards* (Hart Publishing, 2014) 136.
216 *Spycatcher* (n 4) 48 (Brennan J).
217 See F A Mann, '*Spycatcher* in the High Court of Australia' (1988) 104 *Law Quarterly Review* 497; P B Carter, 'Transnational Recognition and Enforcement of Foreign Public Laws' (1989) 48(3) *Cambridge Law Journal*

law with public interests or governmental interests 'since interests do not necessarily derive[] from laws'.[218] Another criticism concerned the 'theoretical or practical value' of insisting on foreign public law as an exclusionary principle because it 'often duplicated the exclusion of foreign laws on the basis of public policy'.[219] In *United States of America v Ivey*, Sharpe J of the Ontario Court of Justice rejected the defendants' public law argument following an extensive analysis of the doctrine.[220] His Lordship highlighted that, although Denning MR's judgment in *Ortiz* and the High Court of Australia's decision in *Spycatcher* 'represent the strongest judicial statements of the doctrine', it still had a 'rather shaky foundation'.[221]

Arguably, however, the governmental interest approach is 'more searching' in its nature than public policy or, indeed, the residual 'other public law' category.[222] First, the normative content of public policy is diffuse and, though a universally recognised reservation,[223] it really should be a last resort 'invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds'.[224]

Secondly, the foreign governmental interests doctrine is a more refined duplication of the pattern of public policy involving the protection of national interests.[225] Indeed, Brennan J's approach in *Spycatcher*, which hinged on the public policy exclusion, identified the domestic policy implicated in a similar way to the joint majority's — arguably more direct — approach. Brennan J pointed to 'the exigencies of public policy under the law of New South Wales' as 'preclud[ing] an Australian court from enforcing a claim which is damaging to Australian security and foreign relations'.[226] As Brennan J observed, a court was not in a position to assess whether the enforcement of a foreign government's claim was detrimental to the interests of the forum.[227] Prevented from making its own assessment, 'the court is constrained to seek and accept the opinion of the

417, 426, 430–31; Matthew Howard, '*Spycatcher* Downunder' (1989) 19 *University of Western Australia Law Review* 158; Ng Siew Kuan, 'The *Spycatcher* Saga: Its Implications and Effect on the Law of Confidence' (1990) 32 *Malaya Law Review* 1, 11–12; Wan Wai Yee, 'The Exclusion of Foreign Law: Public Policy in Choice of Law Process' (1995) 16 *Singapore Law Journal* 286, 311.

218 See P B Carter, 'Transnational Recognition and Enforcement of Foreign Public Laws' (1989) 48(3) *Cambridge Law Journal* 417, 426; Wan (n 217) 311–12.

219 Wan (n 217) 313.

220 (1995) 26 OR (3d) 533.

221 Ibid, [38].

222 Knight (n 195) 178.

223 *Spycatcher* (n 4) 49.

224 *Fender v St John-Mildmay* [1938] AC 1, 12 (Lord Atkin) (HL).

225 Wan (n 217) 313.

226 *Spycatcher* (n 4) 50.

227 Ibid 51.

[Commonwealth Government]' on the compatibility of the foreign government's claim with national security and foreign relations.[228] However, the courts' adoption of this practice could 'itself be a possible source of embarrassment to the Executive in the discharge of its responsibilities'.[229] In view of this potential embarrassment, Brennan J concluded that it was better 'to refuse to enforce all claims by a foreign government for the protection of its intelligence secrets and confidential political information'.[230] The approach adopted by the joint majority avoided the vagaries of the public policy doctrine. It also reinforces the gradual narrowing of the public policy doctrine, which was considered in Chapter 7.

Thirdly, the governmental interest approach extends the court's consideration beyond a 'law' — as in the residual 'other public law' category — to an 'interest'.[231] Finally, the recast of 'other public law' to governmental interest recognised as cogent F A Mann's distinction between prerogative and private rights belonging to sovereign.[232] If a claim involved a sovereign asserting the 'peculiar powers of prerogative', it was not enforceable.[233] However, if a sovereign was pursuing 'a right that by its nature could equally well belong to an individual', it was enforceable.[234]

C *Post*-Spycatcher *Cases:* Mbasogo v Logo *and* Islamic Republic of Iran v Barakat Galleries Ltd

The residual category of 'public laws' was applied in *Mbasogo v Logo*, a 2006 decision of the English Court of Appeal. The key issue was the justiciability of a private law claim, brought by the Republic of Equatorial Guinea and its President, in England. The claim stemmed from an unsuccessful coup in Equatorial Guinea involving British mercenary, Simon Mann, and companies alleged to have been involved in the coup.[235] Equatorial Guinea and its President, Obiang, sought an injunction restraining the defendants from another coup attempt. Further to that, damages were sought for the costs incurred to quell the coup; detain and prosecute suspects; preserve the commercial interests and infrastructure of Equatorial Guinea; and increase the country's security.[236] Suing in tort,

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228 Ibid.
229 Ibid.
230 Ibid.
231 Knight (n 195) 178.
232 Ibid 178; Mann, 'Prerogative Rights' (n 191) 34, quoted in *Mbasogo* (n 198) 870 [42].
233 Mann, 'Prerogative Rights' (n 191) 34, quoted in *Mbasogo* (n 198) 870 [42].
234 Ibid.
235 The third to fifth defendants were British citizens: *Mbasogo* (n 198) 846.
236 Ibid 862–4 [18]–[21] (Lord Clarke MR).

Obiang claimed general damages for 'severe emotional distress'[237] and for an alleged assault. The defendants argued that the plaintiffs' claims for damages were not justiciable because 'the claim is, in reality, an exercise of sovereign authority by Equatorial Guinea in the courts of England and Wales'.[238] The Court of Appeal agreed, holding that the claim was non-justiciable because it involved the exercise or assertion of a foreign sovereign right.[239]

In *Mbasogo*, the focus on jurisdiction in rule 3(1) was transformed into a question of justiciability. For the Court of Appeal, it was 'more important to understand the rationale which lies behind rule 3 rather than to resolve the vexed questions as to what the editors meant by the reference to "other public law" in rule 3(1) or what is meant by rule 3(2)'.[240] The decisive question was whether the courts would 'enforce or otherwise lend their aid to the assertion of sovereign authority by one state in the territory of another'.[241] The Court agreed with F A Mann's distinction between a foreign sovereign claim 'that by its nature could equally belong to an individual' and the enforcement of rights 'founded upon [a sovereign's] peculiar powers of prerogative'.[242] Here, the claims of Equatorial Guinea were not based 'on its property interests but were for losses suffered by virtue of an exercise of sovereign authority, which arose as a result of decisions taken by the state to protect the state and its citizens'.[243] Although it was unnecessary for the Court of Appeal in *Mbasogo* to adopt the foreign governmental interest approach,[244] it received the Privy Council's tentative approval in a related case — *President of the State of Equatorial Guinea v Royal Bank of Scotland International*.[245]

In *Barakat Galleries*, the Court of Appeal strongly approved of the *Spycatcher* test without, however, expressly adopting it. Iran brought an action for the tort of conversion in England, seeking to recovery from Barakat Galleries antiquities unlawfully excavated and exported from Iran. Title to the antiquities or movables was determined by Iranian law which was 'the *lex situs* … at the time of derivation of… title'.[246] Iran was found to have had an immediate right to possession[247] required to maintain the tortious action.

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237 Ibid 879 [83].
238 Ibid 862 [17].
239 Ibid 874 [50].
240 Ibid 866 [29].
241 Ibid 870 [41].
242 Ibid 870 [42].
243 *Barakat Galleries* (n 187) 57 [121] (Lord Phillips CJ).
244 *Mbasogo* (n 198) 874 [52]; *Barakat Galleries* (n 187) 57 [120].
245 [2006] 3 LRC 676, 685–6 [23]–[26].
246 *Barakat Galleries* (n 187) 30 [7], 50 [86].
247 Ibid 49 [84].

Barakat Galleries contended that the applicable *lex causae* — Iranian law — was a penal or a public law that should not be recognised.[248] In holding that the action could be maintained, the Court of Appeal accepted that the residual 'other public law' category had foundation in English law, though limited by the ratio in *Mbasogo*.[249] The approach of the High Court in *Spycatcher* was considered 'not only consistent with the English authorities, including the *Mbasogo* case in the Court of Appeal, but is a helpful and practical test'.[250] The ratio of *Mbasogo* was that 'a claim involving the exercise or assertion of a sovereign interest is not justiciable'.[251] Support continues for the test expressed in *Mbasogo* which is, as the Court of Appeal in *Barakat Galleries* observed, 'not far removed from the test adopted by the High Court of Australia' in *Spycatcher*.[252]

D *Present and Future Directions*

The approaches taken by Australian and English courts to the residual category in rule 3(1) are converging. Previously expressed reservations about the existence of the third category have been replaced by a readier acceptance of it; however, it has not received direct approval from the highest court in the United Kingdom: the Supreme Court. Older and more recent authorities also disclose the weight that has been attached to F A Mann's distinction between prerogative and private rights. Critically, adhering to this distinction has resulted in a largely consistent approach to the content and underlying rationale of the category reflected in the Australian 'governmental interest' and the English 'sovereign authority' approaches.

The foregoing discussion has left one crucial question unanswered: is the 'foreign governmental interests' doctrine detached from the public policy exception? In the two leading Australian texts on private international law, the doctrine is treated as a standalone exception.[253] The current editors of *Nygh's Conflict of Laws* associate the Australian formulation with Dicey, Morris and Collins' residual 'other public law' category.[254] This residual category 'recognises that the exercise by foreign states of governmental power cannot be confined to the traditional categories of revenue and penal laws'.[255] It comprises

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248 Ibid 30–1 [8].
249 Ibid 57–8 [125].
250 Ibid 57 [123].
251 Ibid.
252 Ibid. See also *Pocket Kings Ltd v Safenames Ltd* [2010] Ch 438, 453 [37] (Michael Furness QC).
253 M Davies, A S Bell, P L G Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 9th ed, 2014) 427–30 [18.29]–[18.34]; Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 4th ed, 2019) 238–41 [8.52]–[8.56].
254 Ibid 427 [18.29].
255 Ibid 427–8 [18.29].

the *Spycatcher* example of denying the claim of a foreign State which 'arises out of, and is secured by, an exercise of a prerogative of the Crown, that exercise being the maintenance of national security'.[256]

Meanwhile, the account in Mortensen, Garnett and Keyes' *Private International Law in Australia* elevates foreign governmental interests as part of 'a broader approach to laws considered unacceptable in the forum'.[257] This account, less wedded to *Dicey, Morris and Collins'* residual 'other public laws' category, emphasises the *Spycatcher* majority's focus on 'the substance of the [governmental] interest sought to be enforced, rather than the form of action'.[258] As Mortensen, Garnett and Keyes observe, '[i]t is the object of the proceeding as a pursuit of a foreign governmental interest that prevents enforcement of the law, whether it would ordinarily be considered public or private'.[259] On the strength of these two Australian texts, and with no signs of inconsistent treatment in Australian case law, the doctrine is detached from the public policy exception.

IV CONCLUSION

The discussion in this penultimate Chapter was split between two new species of exception in private international law: international law and the foreign governmental interest doctrine.

Part II started with a discussion of recent English case law on the international law dimension of cross-border public policy. In both *Belhaj* and *Law Debenture Trust*, general reference was made to the concept of *jus cogens*. It was next observed that, while this recognition is a promising sign for the development of a distinct public international law exception, the concept of *jus cogens* merits greater judicial attention. To legitimise the concept, one of the final sections of Part II provided background to the concept and identified some peremptory norms. English judges consider that, while public policy may be informed by international law, the exception is still domestic in nature. This led to a discussion of how public international law is received into dualist legal systems, which revealed a general judicial willingness by common law judges to consider public international law as an interpretative aid. Finally, Part II questioned the logic of public international law remaining as a category of cross-border public policy, effectively because an appeal to public international law would have the same outcome as an appeal to public

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256 Ibid 429 [18.33], quoting *Spycatcher* (n 4) 46–7 (Mason CJ, Wilson, Deane, Dawson, Toohey, and Gaudron JJ).
257 Mortensen, Garnett and Keyes (n 253) 238 [8.52].
258 *Spycatcher* (n 4) 46.
259 Mortensen, Garnett and Keyes (n 253) 239 [8.54].

policy. Recent judicial discussion in the Anglo-common law world of *jus cogens* augurs well for the future of international law as a species of cross-border public policy — or, perhaps even, of a distinct exception in favour of public international law. The concept of *jus cogens* was emphasised in this Chapter for its functional equivalence to cross-border public policy. The concept could arguably supply some of the exclusion's normative content. This would avoid elevating every rule of public international law to such importance as to constitute a fundamental interest of the state to block the application of a foreign law or preents the recognition of a foreign judgment.

Meanwhile, Part III discussed the English and Australian approaches to other public laws and to foreign governmental interests. The analysis revealed that Dicey's rule has gradually received acceptance in English courts with recent decisions leaning towards the more precise Australian *Spycatcher* formulation. Effectively, the Australian and English approaches are converging. While it may not be English law yet, the *Spycatcher* formulation of foreign governmental interests represents a species of autonomous exception in Australian private international law.

CHAPTER 9: CONCLUSION

I INTRODUCTION

This thesis has examined the evolution of the public policy exclusion in the common law of private international law. Chapter 1 diagnosed an underdeveloped historical understanding of public policy as contributing to the exclusion's poor image. The purpose of this thesis, as set out in Chapter 1, then was twofold. First, it sought to deepen existing scholarly understanding about the historical and theoretical development of the public policy exclusion in Anglo-common law private international law. Secondly, it set out to rehabilitate the image of public policy as an 'unruly horse' by examining its modern — and, in fact, seriously constrained — content in Anglo-common law jurisdictions and by suggesting opportunities to curtail the exclusion even further.

The doctrinal analysis in this thesis was accordingly conducted with four research questions in mind. The first question related to the content of the public policy exclusion over time. The second question concerned the extent to which, particularly Anglo-common law, writers of private international law shepherded the development of cross-border public policy in Anglo-common law private international law. The third question concentrated on the factors informing the known reluctance of Anglo-common law courts to invoke the public policy exception in multistate cases. The fourth research question asked whether there was any scope left for new exceptions to splinter off the public policy exclusion, or else the recognition of different functions of public policy.

In response to the purposes and research questions, Part II of this concluding Chapter draws out and elaborates on three major themes addressed in this thesis.

II MAJOR THEMES

This Part identifies and expands on the three major themes of this thesis. The first theme concerns the creation of the public policy exclusion by institutional writers of Anglo-common law private international law. The continued influence of natural law through the public policy exclusion is the second theme. The third thematic concern of this thesis has been the gradual narrowing of cross-border public policy in common law jurisdictions. Some related points to this final theme are the reasons for this contraction.

A *The Architects of Cross-Border Public Policy*

The original architects of the public policy exclusion were the institutional writers of Anglo-common law private international law. These architects, particularly Story, designed the blueprint of cross-border public policy by merging disparate elements into a consolidated whole, and inspired the structural reinforcement of choice of law rules using a public policy foundation.[1] Vestiges of this influence remain.

In exploring this theme, this thesis laid some further groundwork to show that institutional writers' accounts of public policy had a genuine impact on Anglo-common law jurisprudence. Chapters 4 and 5 showed that they did. Moreover, these chapters set out to explain how these writings secured that influence at common law.

1 *The Blueprint: Chapter 3*

The first theme clearly emerged in Chapter 3. Although the architecture of the institutional writers was expounded over several chapters, Chapter 3 in particular addressed the structure that historical private international law scholarship created for the public policy exclusion. This in turn responded to the first and second research questions set out in Chapter 1.

First, Chapter 3 elaborated on the content of cross-border public policy and its interaction with the content of domestic public policy that was detailed in Chapter 2. The discussion in Chapter 3 revealed that the parallels between domestic public policy and cross-border public policy were not always discernible. That is, only some categories of domestic public policy identified in Chapter 2 corresponded with 19th century scholarly accounts of the private international law exclusion. In fact, in the case of one scholar, Story, his account could be closely identified with his natural law philosophy. Thus, natural law and Austinian positivism were seen, despite the way they contradict each other, to have exerted a considerable influence on scholarly accounts of public policy in the 19th century.

Secondly, Chapter 3 explored the accounts of public policy in the works of Huber, Story, Westlake and Dicey, revealing the extent to which these writers fashioned the exclusion (in turn responding to the third research question). It was seen in Part II of Chapter 3 that Story fused the account of prejudicial laws in Huber's 17th century framework for private international law with his Paleyan-inspired natural law philosophy. Outside prejudicial marriages and smuggling contracts, Huber's prejudicial laws

[1] See Chapter 3 and Chapter 6.

reservation was in want of content which Story, in his scholarly account of the exclusion, supplied. Story interlocked certain categories of domestic public policy with his Paleyan-influenced natural law norms, which were integrated with Huber's prejudicial laws lacuna.

While natural law influenced the form of Story's public policy exclusion, Westlake and Dicey's works attempted to divest the exclusion of its natural law influence. Both works embraced key elements of Austinian positivism, outlined in Part III(B) of Chapter 3, though Dicey was the more enthusiastic adopter. Austin's views on international law and codification were outlined for further amplification in Chapters 4 and 5. Elements of Austinian positivism were more obvious in Westlake's second edition than the first edition, which preceded the resurgence in popularity of Austin's *The Province of Jurisprudence Determined*.[2] The language of natural law was reprised in Westlake's first edition through his discussion of the slavery case, *Forbes v Cochrane*.[3] In his second edition, Westlake borrowed from the language of *ordre public* from various European codes to elevate public policy to the position of a controlling principle coupled with an intensifier ('reservation in favour of stringent domestic policy').[4] From Westlake's fifth edition (1905), the treatment of public policy aligned with recent English case law as well as the account in Dicey's *Conflict of Laws*.

Starting with the first edition of Dicey's *Conflict of Laws* (1896),[5] public policy was placed on a different footing to earlier scholarly and jurisprudential accounts of the exclusion. Dicey identified six classes of public policy, the least controversial of which was morality (because that category had appeared in previous accounts of public policy). Dicey considered that public policy was the foundation upon which common law rules relating to immovable property, procedure, torts, and the non-recognition of foreign penal status were made.[6] Morris' editorship saw this structure overhauled. From that point, public policy was an exclusion preventing 'the enforcement or recognition of such right, power, capacity, disability or legal relationship [which] would be inconsistent with the *fundamental public policy* of English law'.[7] Convenience became the new explanation for the other rules which Dicey supposed were founded on considerations of public policy.[8]

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2 John Austin, *The Province of Jurisprudence Determined* (John Murray, 1832).
3 *Forbes v Cochrane* (1824) 2 B & C 448; 107 ER 450.
4 John Westlake, *Treatise on Private International Law* (William Maxwell & Son, 1st ed rev, 1880) 39–40.
5 A V Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens and Sons, 1st ed, 1896).
6 Ibid 33–6.
7 J H C Morris et al (eds), *Dicey's Conflict of Laws* (Stevens & Sons Ltd, 7th ed, 1958) 12 (emphasis added).
8 Ibid 13.

The institutional writers' influence on substantive public policy has, however, diminished. Anglo-common law judges have returned to instinct, limiting the circumstances in which public policy should conceivably arise and engaging with other better crystallised norms, such as foreign governmental interests and, more recently, public international law.

2 *Structural Reinforcement: Chapter 6*

Aside from Chapter 3, the first theme was also developed over other chapters. The categories of domestic public policy, set out in Chapter 2 and that were established before the publication of Story's *Conflict of Laws*, supported the subsequent discussion featured in Chapter 3.

Perhaps more meaningfully, the institutional writers' structure for the public policy exclusion was actually applied by judges. Reasons for this judicial citation were examined from a general perspective in Chapter 4 and from a more specific private international law perspective in Chapter 5. The judicial application of the institutional writers' structure was considered in Chapter 6. This Chapter explained the influence of the institutional writers on the public policy dimension of the choice of law rules for marriage and torts at common law.

In the case of the choice of law rule for marriage, Story had a profound influence on the outcome in *Brook v Brook*.[9] Excerpts from Story's *Conflict of Laws* maintaining the *lex loci celebrationis* for the formal and essential validity of marriage — subject to three exceptions — figured prominently in the House of Lords' decision. Save for the 'general consent of Christendom' exception, the House of Lords agreed entirely with Story's passages attaching primacy to the *lex loci celebrationis* subject to a few limited exceptions. This challenged the view that the bifurcated choice of law rule for marriage that now predominates in Anglo-common law jurisdictions originated in *Brook v Brook*. Rather, it was argued that the rule was conceived later — in the complex *Sottomayer v De Barros* litigation. Indeed, in *Sottomayor v De Barros [No 1]*,[10] Cotton LJ in the Court of Appeal attached a new meaning to Lord Campbell LC's rhetorical flourish in *Brook v Brook*, which merely reinforced Mr and Mrs Brook's shared domicile before and after matrimony. Cotton LJ concluded that the requirement to judge matrimonial capacity by the parties'

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9 *Brook v Brook* (1861) 9 HL Cas 193; 11 ER 703 (HL).
10 *Sottomayor v De Barros [No 1]* (1877) 3 PD 1 (CA).

domicile was a 'well-recognised principle of law',[11] a result questioned by Sir James Hannen P in *Sottomayer v De Barros [No 2]*.[12]

In terms of the choice of law rule for torts, the first limb of the double actionability rule, established in *Phillips v Eyre*,[13] concealed a public policy dimension by introducing an element of forum control. The first limb, requiring actionability under the *lex fori*, originated in the Privy Council's opinion in *The Halley*.[14] The Privy Council's case was ultimately decided through an application of Story's general 'prejudicial laws' maxim.[15] The application of this maxim was aberrant: the fifth edition of Story's *Conflict of Laws* relied upon by the Privy Council did not mention torts. It also stood in stark contrast to the erudite analysis of German scholarship on foreign torts by Sir Robert Phillimore at first instance.[16]

B *Public Policy: A Natural Law Evaluation of Foreign Law*

A second recurring theme explored in this thesis was the continued influence of natural law on the public policy exclusion. Public policy operates as an ultimate escape device, trumping foreign laws or judgments that is morally unacceptable to the forum. Not only does this suggest that law has at least in one sense a minimum moral content, it suggests that late-19th century institutional writers did not entirely succeed in their task of divesting the private international law exclusion of its natural law foundation. A system of positive law is not likely to have a public policy exclusion unless an external moral evaluation is involved.

The persistence of natural law in the exclusion was suggested in several chapters. Most obviously, Story's framework of natural law in Chapter 3 showed the traditional rules of private international law that Story developed were based on the external standard of natural law. For example, marriage was consistent with the law of nature; however, a general right to divorce and incestuous or polygamous marriages was forbidden by the law of nature for the tendency they had to undermine institutions crucial to Story's Paleyan philosophy. In addition, contracts founded in moral turpitude were contrary to the law of nature.

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11 Ibid 5 (Cotton LJ).
12 *Sottomayer v De Barros [No 2]* (1879) 5 PD 94, 100 (Sir James Hannen P)
13 *Phillips v Eyre* (1870) LR 6 QB 1.
14 *The Liverpool, Brazil, and River Plate Steam Navigation Co Ltd v Benham* (1868) LR 2 PC 193 (PC).
15 Ibid 203 (Selwyn LJ), quoting Joseph Story, *Commentaries on the Conflict of Laws* (5th ed, 1857) 32.
16 *The Halley* (1867–69) LR 2 AE 3, 17–8 (Sir Robert Phillimore).

Despite this natural law influence, the first edition of Dicey's *Conflict of Laws* incongruously associated Story with 'the positive method'.[17] Story did not, as Dicey claimed, 'discover not what ought to be, but what *is* the law'.[18] Story, moreover, did not treat rules of private international law as laws that 'derive their authority from the support of the sovereign in whose territory they are enforced'.[19] Story's public policy exclusion responded to a limited set of circumstances that impaired institutions identified by Paley, and Story, as consistent with the law of nature.

Dicey's structure for public policy, though most influential, had incongruent features. In the first place, Dicey conceived public policy as having structural qualities in addition to its traditional exclusionary role. Secondly, Dicey maintained morality as a class of public policy but, consistent with the aims of an Austinian positivist, morality had to be 'supported by the law of England' — held by English tribunals to be immoral and, given that tribunals had ruled, unlawful.[20]

Modern judges are reluctant to use cross-border public policy in a way which would project the forum's distinctive morality on foreign law. However, by using public international law, Anglo-common law judges have been able to implicate higher standards. With the passing of time, appeals to 'generally accepted norms of [public] international law'[21] — as a higher standard by which to evaluate foreign law — have matured.

In *Oppenheimer v Cattermole*,[22] the House of Lords engaged this category of cross-border public policy by considering, though it 'need not have done so',[23] the validity of a racially discriminatory Nazi decree. The 1941 decree was considered 'so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as law at all'.[24] In Lord Salmon's view, the depravity of the decree mitigated against the necessity of maintaining 'international comity'.[25] The international law dimension to public policy is not, however, confined to grave infringements of human rights.

In *Kuwait Airways [Nos 4 and 5]*, the House of Lords concluded that English courts could '[i]n appropriate circumstances… have regard to the content of international law in

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17 Dicey (1896), 'The Conflict of Laws' (n 5) 18, 19.
18 Ibid 19 (emphasis added).
19 Ibid 18, 19.
20 Ibid 34, 766.
21 *Belhaj v Straw* [2017] AC 964, 1119 [154] (Lord Neuberger).
22 *Oppenheimer v Cattermole* [1976] AC 249.
23 *Kuwait Airways Corp v Iraqi Airways Co [Nos 4 and 5]* [2002] 2 AC 883, 960 [274] (Brooke LJ) ('*Kuwait Airways [Nos 4 and 5]*').
24 *Oppenheimer v Cattermole* (n 22) 278 (Lord Cross).
25 Ibid 283 (Lord Salmon).

deciding whether to recognise foreign law'.[26] Iraq's annexation of Kuwait and confiscation of Kuwaiti property constituted 'flagrant violations of rules of international law of fundamental importance'.[27] More recently, English courts have resorted to peremptory or *jus cogens* norms which, as was observed in Chapter 8, is a promising sign for the development of a new exception detached from public policy. The main attraction of peremptory norms — higher level norms of public international law from which no derogation is permitted — has to be its similarity to the public policy exclusion. *Jus cogens* norms, as a body of 'superior' rules of public international law, are imbued with ethical and moral dimensions.

In 1954, F A Mann prophetically observed that breaches of public international law were 'liable to become… of considerable practical importance' to municipal courts.[28] Indeed, Mann developed the argument that domestic courts should apply rules of public international law to foreign law 'if and in so far as it expresses or results from an international delinquency'.[29] Public international law would effectively function as a 'super choice of law rule', overriding the ordinary application of rules of private international law.[30] Increasing encounters with 'international' delinquency may signal to Anglo-common law courts that they are ready for a detached public international law exception — an exception which would unquestionably include peremptory norms.

C *The Taming of Cross-Border Public Policy*

The public policy exclusion in Anglo-common law private international law is hardly ever successfully invoked. Reasons for this occurrence were addressed in Chapter 7. This Chapter highlighted that the Anglo-common law courts have tamed the so-called 'unruly horse' of public policy in two important ways. First, the maintenance of international comity has emerged as a modern restraint on Anglo-common law courts invoking the public policy exclusion to exclude foreign law or to deny recognition of a foreign judgment at common law. By using comity, these courts are encouraged to show respect for the different legal solutions offered by different — but connected — legal systems. Arguments of comity restrain the moral evaluation that is inherent in appeals to public policy. The resolution of conflicting laws is, after all, the *sine qua non* of private

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26 *Kuwait Airways [Nos 4 and 5]* (n 23) 1081 [26] (Lord Nicholls).
27 Ibid 1079 [20].
28 F A Mann, 'International Delinquencies before Municipal Courts' (1954) 70(2) *Law Quarterly Review* 181, 184.
29 Ibid 202.
30 Campbell McLachlan, *Foreign Relations Law* (Cambridge University Press, 2014) 62.

international law. Secondly, when rejecting arguments of 'substantive' public policy, Anglo-common law courts reinforce the high threshold to be met before the exclusion is engaged. However, the high threshold does not illuminate; indeed, it does little to explain public policy's content.

Chapters 7 and 8 thus considered the modern public policy exclusion at common law, revealing the restricted circumstances in which the exclusion is likely to be invoked. The restriction of public policy in Anglo-common law jurisdictions has been gradual. Time has allowed judges and scholars of the common law to consolidate their reluctance to apply public policy, to calibrate existing categories, and to forecast. Where a moral evaluation of foreign law has occurred, Anglo-common law judges have been more concerned with higher standards of norm. In recent years, English courts have singled out flagrant breaches of public international law and grave infringements of human rights. Through the use of peremptory norms, the content of the international law dimension of public policy has expanded. This offers a potentially important line of further enquiry.

The modern public policy exclusion at common law is a remnant of what it used to be. Its substantive content has reduced to such an extent that the usefulness of the public policy exception in Anglo-common law jurisdictions must now be seriously questioned. As Chapter 7 revealed, Anglo-common law courts are signally disinterested in public policy arguments, save where flagrant breaches of public international law are implicated. In the case of Australian courts, this disinterest is far more pronounced. *In the Marriage of El Ouiek* is the only reported case in which an Australian court has applied the public policy exception.[31]

When faced with a public policy argument in the *Spycatcher* case,[32] the High Court of Australia chose to characterise the action as the attempted enforcement of a foreign governmental interest. The foreign governmental interests doctrine, as discussed in Chapter 8, is a more refined duplication of the pattern of public policy involving the protection of national interests, discussed in Chapter 7. Using this doctrine, a court is to characterise the action 'by reference to the substance of the interest sought to be enforced, rather than the form of action'.[33] The action fails if the interest sought to be enforced arises 'from the exercise of certain powers peculiar to government'.[34]

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31 *In the Marriage of El Ouiek* (1977) 29 FLR 171.
32 *A-G (UK) v Heinemann Publishers Pty Ltd [No 2]* (1988) 165 CLR 30 ('*Spycatcher*').
33 Ibid 46.
34 Ibid 42.

The logic of public international law remaining a part of the public policy exclusion may also be challenged. Arguably, rules of public international law are now sufficiently concrete to justify a self-contained exception. Whether the Anglo-common law court appeals to public policy or a public international law exception, the outcome will be the same. That is, ultimately, a foreign law — and, every so often, a foreign judgment — is excluded.

The image of public policy as an 'unruly horse' has been glorified in Anglo-common law private international law scholarship. Over the course of the 20th century, courts in the Anglo-common law jurisdictions selected for this thesis have steadily tamed the exception.[35] The recognition of a public international law exception, detached from public policy, would merely reinforce contemporary assessments of cross-border public policy as severely constrained. Besides public international law, it is in any case difficult to imagine what other conduct would sufficiently engage the exception in Anglo-common law jurisdictions.[36]

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35 One of the only outliers is Singapore. Courts in Singapore have applied domestic conceptions of public policy to refuse recognition to foreign judgments involving gambling.

36 Cf Chapter 1, 'Delimitation' in which the substantive and procedural aspects of European public policy, as contained in several European Union private international law instruments, are mentioned.