

*SUBSTANCE AND PROCEDURE IN PRIVATE INTERNATIONAL LAW* BY RICHARD GARNETT (OXFORD, UK: OXFORD UNIVERSITY PRESS, 2012) 456 PAGES. PRICE £110.00 (HARDBACK) ISBN 9780199532797.

The substance/procedure distinction is fundamental to private international law, both practically and theoretically. Theoretically, this distinction goes to the intellectual heart of the discipline: why apply a foreign law in domestic courts in the first place? Curiously, in private international law, this question refers to matters of substance, rather than procedure. Almost universally recognised, the so-called *lex fori regit processum* doctrine has provided for centuries that procedural matters shall be governed almost exclusively by the domestic law of the forum ('*lex fori*').<sup>1</sup> What is so special about procedure that makes it immune to the application of foreign law? Furthermore, the *lex fori* solution to matters of procedure sheds light on the practical centrality of the substance/procedure distinction. As the most preliminary phase of judicial analysis in private transnational litigation, the substance/procedure distinction plays a key role in determining the identity of the law to be applied.

From this point arises the significance of Professor Richard Garnett's far-reaching book, which provides a useful guide to the substance/procedure distinction in the context of private international law. It provides a careful and very detailed overview of the distinction in a wide spectrum of areas such as:

- service and jurisdiction (ch 4);
- questions of parties' capacity (ch 5);
- court proceedings, lawyers' fees and creditors' rights (ch 6);
- evidence (chs 7 and 8);
- statutes of limitation (ch 9); and
- remedies (ch 10 and 11).

Throughout these chapters Garnett gives a comprehensive presentation on the current state of law in the following jurisdictions: Australia, Canada, the European Union, Hong Kong, New Zealand, Singapore and, to a considerable degree, the United Kingdom and the United States.

Over fifteen years ago, Professor William Reynolds commented on the state of confusion of the discipline. As he put it: 'The confusion is complete. The poor lawyer who gives advice to clients on choice-of-law matters meets with stares of disbelief'.<sup>2</sup> The opposite is true with respect to Professor Garnett's work. By presenting an accurate and intelligible analysis of the substance/procedure distinction in the area of private international law, this work provides an excellent guide for Commonwealth lawyers advising their clients on a broad range of issues. No lawyer who has carefully reviewed Professor Garnett's book will be left with any unanswered questions. For this, private international law

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<sup>1</sup> Richard Garnett, *Substance and Procedure in Private International Law* (Oxford University Press, 2012) 1, 5–6.

<sup>2</sup> William L Reynolds, 'Legal Process and Choice of Law' (1997) 56 *Maryland Law Review* 1371, 1371.

scholarship owes much to Garnett for such a wonderfully detailed and comprehensive work.

In this book review, I would like to comment on Garnett's several substantive remarks on the future of the substance/procedure distinction in private international law, which according to his view correlates frequently with recent developments in the field. More specifically, he seems to do the following:

- (i) support the recent development of Australian and Canadian jurisdictions that have challenged the traditional English right-remedy distinction as a key to the conceptual distinction between matters of substance and procedure in private international law;<sup>3</sup>
- (ii) challenge the claim about the traditional exclusive application of the abovementioned universal *lex fori regit processum* doctrine alongside a suggestion to expand the cases in which foreign procedural rules are applied;<sup>4</sup> and
- (iii) incorporate a public policy doctrine as an appropriate basis for the substance/procedure distinction, together with the rejection of the traditional view under which this doctrine is to be invoked only in extraordinary circumstances.<sup>5</sup>

Accordingly, this review proceeds as follows: first, it makes some brief comments on the nature of the substance/procedure distinction. It then addresses each of Garnett's claims. Briefly stated, I freely accept Garnett's first claim, but, with all due respect, must disagree with the other two.

I shall start with some tentative observations on the nature of the substance/procedure distinction. The interaction between private persons often gives rise to various categories of private law: contract law; tort law; restitution; and fiduciary duties. Different legal systems have different rules of private law. While some jurisdictions have incorporated punitive damages in the area of tort law, others have refused to do so. While some systems have adopted a strictly objective test for the concepts of 'offer' and 'acceptance' in the area of contract law, other systems have grounded this test in subjective elements as well.<sup>6</sup> Some systems have remained loyal to the fault liability regime of traffic accidents. Others have converted their system to the no-fault scheme.<sup>7</sup> This is what we refer to as 'substance'.

Procedural rules, are however of a different order. Legal systems have developed these rules for the proper application of specific substantive rules to the facts. This is what underpins the fundamental distinction between the

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<sup>3</sup> See generally Garnett, above n 1, 2, 7–10, 28–35, 167, 261–3.

<sup>4</sup> *Ibid* 7, 36–7, 43, 67, 223.

<sup>5</sup> *Ibid* 339, 362. See also at 58–63, 64–5, 238, 272, 319.

<sup>6</sup> For discussion of these issues, see, eg, Catherine Valcke, 'Convergence and Divergence between the English, French and German Conceptions of Contract' (2008) 16 *European Review of Private Law* 29.

<sup>7</sup> See, eg, Craig Brown, 'Deterrence in Tort and No-Fault: The New Zealand Experience' (1985) 73 *California Law Review* 976.

categories of 'substance' and 'procedure'.<sup>8</sup> Issues like rules of proceedings, admissibility of evidence, witnesses, functions of the judge, burden of proof, pleadings, discovery, trial, mode of argumentation, joinder, rules of jurisdiction, appeal and preclusion must be treated as procedural issues.<sup>9</sup> Viewed as a 'technical part'<sup>10</sup> of litigation, procedural issues are related to the manner in which the court regulates its proceedings rather than to the litigating parties' substantive rights and duties. In other words, procedural rules are the means by which the courts apply their substantive rules to the particular circumstances of the case.

One can speak of a tripartite structure of procedural rules, based on the following three interrelated notions:

- (i) the accuracy notion;
- (ii) the cost notion; and
- (iii) the transactional equality notion.<sup>11</sup>

A certain balance between the first two notions lies at the basis of procedural rules. The primary function of the procedure system is the achievement of a proper balance between an accurate application of particular facts to the substantive rules of a particular system and the costs involved in such processes.<sup>12</sup> Various systems have reached different equilibrium points in balancing and weighing these two notions. Some systems have implemented efficient, clear-cut litigation cost rules giving rise to the danger that the outcome might not be accurate relative to the substantive private law provision of that

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<sup>8</sup> As Michael Bayles states: 'Procedural justice is contrasted with substantive justice. Most people have a common-sense grasp of the difference. Procedure concerns the process or steps taken in arriving at a decision; substance concerns the content of the decision. The two are conceptually distinct': Michael D Bayles, *Procedural Justice: Allocating to Individuals* (Kluwer Academic, 1990) 3. For further discussion on the fundamental distinction between matters of substance and procedure in traditional and contemporary private international law literature, see, eg, Lawrence Collins et al (eds) *Dicey, Morris and Collins on the Conflict of Laws* (Sweet and Maxwell, 14<sup>th</sup> ed, 2006) 177. George Panagopoulos has called the distinction between matters of substance and procedure an 'unquestioned principle of private international law': George Panagopoulos, 'Substance and Procedure in Private International Law' (2005) 1 *Journal of Private International Law* 69, 69. For the related American tradition of the 'substance/procedure' classification, see Eugene Scoles et al, *Conflict of Laws* (Thomson, 4<sup>th</sup> ed, 2004) 127–9.

<sup>9</sup> See, eg, Collins et al, above n 8, 183–90; J J Fawcett and J M Carruthers (eds), *Cheshire, North and Fawcett: Private International Law* (Oxford University Press, 14<sup>th</sup> ed, 2008) 80–109; Garnett above n 1, 143–4.

<sup>10</sup> Fawcett and Carruthers, above n 9, 76: 'The field of procedure constitutes perhaps the most technical part of any legal system'.

<sup>11</sup> The tripartite structure of procedural rules presented in this and the following paragraphs reflects my tentative understanding of the subject. The three components of this structure (especially the accuracy and cost Notions) however are not innovative. Appearing under identical or related terminology, these notions can be traced in a wide spectrum of judicial decisions and related theoretical literature on the nature of procedural rules. For a discussion of these issues, see, eg, Lawrence B Solum, 'Procedural Justice' (2004) 78 *Southern California Law Review* 181, 181–92, 237–73; Martin H Redish and Lawrence C Marshall, 'Adjudicatory Independence and the Values of Procedural Due Process' (1986) 95 *Yale Law Journal* 455, 470–91; Bayles, above n 8, 115–39.

<sup>12</sup> See, eg, Redish and Marshall, above n 11, 476, 497.

system. Others have adopted a comprehensive system of civil procedure rules that are costly, but that are designed to give the most accurate results. No system can guarantee that its procedural rules will fully approximate a given case to the system's substantive rules. And almost every equilibrium point between the accuracy and cost notions can be considered reasonable.

Furthermore, and in order to add a degree of complexity, one may invoke the third element in the structure of procedural rules: that of transactional equality. While the appropriate balance between the accuracy and cost notions may vary between systems, it seems to be a universal requirement that within this balance sustains the transactional equality between the particular plaintiff and defendant.<sup>13</sup> In other words, while different systems may adopt a different balance between the aspiration to achieve accurate outcomes and the costs imposed by the procedural rules, every system has to guarantee the incorporation of the value of Transactional Equality as an indispensable part of procedural rules.<sup>14</sup>

These comments on the nature of the substance/procedure distinction have several further implications. First, in line with Garnett,<sup>15</sup> I think that an attempt must be made to draw a conceptual distinction between matters of substance and procedure. While it would be a mistake to draw an absolute, clear-cut line for all types of cases, it would be an even more serious mistake to reject any coherent distinction between the two as some scholars and judges have suggested.<sup>16</sup> Secondly, my position is to entirely reject the so-called 'outcome-determinative' test whereby all issues that might affect the outcome of

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<sup>13</sup> For discussion of the notion of transactional equality within the structure of procedural rules, see Redish and Marshall, above n 11, 484–5; Bayles, above n 8, 131–2.

<sup>14</sup> It should be noted that the notion of transactional equality is not limited to procedural rules and runs through all private international law. Thus, for example, this notion sheds light on the exceptional cases in which common law courts have not recognised foreign judgments. Despite the multiplicity of doctrines such as 'natural justice' and 'public policy', one could argue that the courts tend to refer to the deficiencies related to the transactional inequality embedded in foreign decisions, rather than viewing foreign judgments as an invitation to evaluate the substantive provisions of foreign systems. Therefore, for instance, cases in which the defendant has proved that he or she had no proper opportunity to present his or her case before a foreign court or had not received due notice of the proceedings were considered representative examples of the 'natural justice' exception for the recognition of foreign judgments. For a discussion of these issues: see, eg, Fawcett and Carruthers, above n 9, 563–4. The exceptions to parties' choice in the so-called *party autonomy* principle provide another example. According to this principle, private parties can freely agree on the identity of the law to adjudicate their dispute. The courts tend to intervene in the scope of the potential choice under this principle in cases of inherently asymmetrical relationships between parties. Special provisions include mandatory consumer, employment and insurance contract requirements. For discussion of these issues: see generally Patrick J Borchers, 'Categorical Exceptions to Party Autonomy in Private International Law' (2008) 82 *Tulane Law Review* 1645. See also, Gisela Rühl, 'Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency' in Eckhart Gottschalk et al (eds), *Conflict of Laws in a Globalized World* (Cambridge University Press, 2007) 153, 167–76.

<sup>15</sup> Garnett, above n 1, 16–17, 154.

<sup>16</sup> For cases in which the possibility of a coherent distinction has been rejected: see, eg, *Erie Railroad Company v Tompkins*, 304 US 64, 92 (1938): 'The line between procedure and substance is hazy' (Reed J). See also Walter Wheeler Cook, "'Substance" and "Procedure" in the Conflict of Laws' (1933) 42 *Yale Law Journal* 333, 335–6.

litigation shall be classified under the ‘substance’ hat.<sup>17</sup> Of course, the procedural rules of evidence, proceedings and so on, often influence the outcome of civil litigation and may play a central role in setting the reasonable *ex ante* expectations of the litigating parties. Furthermore, as with many sociological factors, they may have an even greater effect than substantive rules in determining the outcome of the case.<sup>18</sup> No one can deny that. However, to base the distinction between substance and procedure on the ‘outcome-determinative’ test would be a fallacy.<sup>19</sup> The classification of substance and procedure categories is conceptual and goes to the very nature of the categories themselves, rather than being outcome-based.

The seeds of the abovementioned model of the substance/procedure distinction can be clearly traced in the recent decisions of the Australian High Court in *John Pfeiffer Pty Ltd v Rogerson*,<sup>20</sup> the Supreme Court of Canada in *Tolofson v Jensen*,<sup>21</sup> and the popular US *Restatement (Second) of Conflict of Laws*.<sup>22</sup> According to this distinction, procedural rules are related to the operation of the judicial machinery. Rules related to courtroom conduct, pleading requirements, pre-trial evidence collections and administration of evidence are all issues that fall within the scope of the court’s conduct and therefore must be classified as procedural.<sup>23</sup> Accordingly, while procedural matters deal with the machinery of proceedings, the substantive matters address the rights and duties of the litigating parties.<sup>24</sup>

This understanding of the substance/procedure distinction is at odds with the traditional position of English law which has classified matters of substance and procedure according to the right-remedy test.<sup>25</sup> According to this test the procedure category has been interpreted broadly and the entire scope of possible remedies (such as monetary relief or various types of injunctions) or related issues (such as heads and quantification of damages) falls within the scope of this category.<sup>26</sup> In line with the decisions of the Supreme Court of Canada and the High Court of Australia, I wholeheartedly concur with Professor Garnett in his rejection of the traditional English position. The disjunction between right and remedy is artificial and normatively reflects the other side of the same coin.

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<sup>17</sup> For an overview of the ‘outcome-determinative’ test for the substance/procedure distinction see Garnett, above n 1, 20–4.

<sup>18</sup> See also *ibid* 20–2 (criticising the ‘outcome-determinative’ test around similar lines, yet offering its incorporation as a ‘useful factor’: at 22).

<sup>19</sup> For extensive discussion of the failure of the outcome-based test to depict the conceptual distinction between procedure and substance, see Solum, above n 11, 199–206.

<sup>20</sup> *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

<sup>21</sup> *Tolofson v Jensen* [1994] 3 SCR 1022.

<sup>22</sup> American Law Institute, *Restatement (Second) of Conflict of Laws* (1971) §122. For a discussion of the recent relative consensus on this understanding of the substance/procedure distinction, see Garnett, above n 1, 40–3, 263–5, 294.

<sup>23</sup> Garnett, above n 1, 143–4.

<sup>24</sup> *Ibid* 26. See also at 18–25.

<sup>25</sup> For a classical statement of this view, see Albert Venn Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens and Sons, 2<sup>nd</sup> ed, 1908) 708–13.

<sup>26</sup> For a detailed overview of the traditional English position see Garnett, above n 1, 7–10, 261–360.

Take for example the well-known English case of *Boys v Chaplin*,<sup>27</sup> which Garnett frequently cites.<sup>28</sup> Although viewed by all judges as a paradigmatic case for torts committed outside of England, paradoxically *Boys v Chaplin* was never a liability case. This case involved a car accident between English residents that took place in Malta. It was agreed between the parties that the plaintiff negligently drove his scooter, which led to its collision with the defendant's motor car.<sup>29</sup> The question of damages is what lay at the core of this case. Under the Maltese law, the remedies for personal injuries were strictly limited to special damages.<sup>30</sup> Thus, while the defendant was entitled to past and future financial loss, the Maltese provision rejected compensation for 'pain and suffering' or 'loss of amenities'.<sup>31</sup> Had the heads of damages been classified under the 'procedure' hat, the English law would have been applied, regardless of the identity of the law that would have been applied under private international law rules.

Should 'pain and suffering' and 'loss of amenities' be classified under the 'procedural' hat? Under the proposed substance/procedure distinction model, the answer to this question is 'no'. The issue of 'heads of damages' should be viewed as a part of tort liability itself and therefore should be classified in the 'substance' category. It simply does not relate to the procedural day-to-day court operations of pleading, the serving process, preserving objections to appeal and so on. The normative structure of tort law itself is what insists on a continuous normative link between tort liability and remedy. Under this structure, the remedy constitutes an inherent part of the defendant's substantive right that has been infringed by the plaintiff's negligent act. In other words, the remedy mirrors the right.<sup>32</sup>

Garnett's second claim challenges the universal doctrine by which issues related to procedure are to be governed almost exclusively by *lex fori regit processum*. Intriguingly, however, he does not deny the centrality of this doctrine in traditional and contemporary private international law thought and frankly admits that the vast majority of procedural issues have indeed been governed by the domestic law of the forum.<sup>33</sup> However, Garnett suggests amending this well-established doctrine. As he claims: 'A major contention of this work is that the scope and operation of the law of the forum in procedural matters should be

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<sup>27</sup> [1971] AC 356.

<sup>28</sup> Garnett, above n 1, 16, 286, 316–7.

<sup>29</sup> *Boys v Chaplin* [1967] 3 WLR 266, 268–9.

<sup>30</sup> *Ibid* 269.

<sup>31</sup> *Boys v Chaplin* [1971] AC 356, 373.

<sup>32</sup> On this point, I follow the so-called 'corrective justice' theory's conception of private law: see especially Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995); Ernest Weinrib, *Corrective Justice* (Oxford University Press, 2012). The intimate link between the right and the remedy, with several further important insights on the nature of private law remedies, is one of the central elements of this theory: see, eg, Ernest J Weinrib, 'Two Conceptions of Remedies' in Charles E F Rickett (ed) *Justifying Private Law Remedies* (Hart, 2008) 3. See also Russell J Weintraub, 'Choice of Law for Quantification of Damages: A Judgment of the House of Lords Makes a Bad Rule Worse' (2007) 42 *Texas International Law Journal* 311, 312 (claiming that the issue of heads of damages are 'universally regarded as substantive').

<sup>33</sup> See, eg, Garnett, above n 1, 87, 91–2, 95, 111, 143, 146, 188, 210–11.

reduced'.<sup>34</sup> Accordingly, a suggestion follows to greatly expand the operational scope of foreign procedural law in domestic courts.<sup>35</sup>

My position is however different. The primary aim of procedural rules is to provide the basis for the functional operation of the judicial authority of the relevant system. As such, these rules are closely concerned with the machinery of the courts as states' agents. In this way, while dealing with the appropriate balance between the accuracy and cost notions (and subject to transactional equality), the procedural rules intimately link themselves to the operational apparatus of the state. In this respect, the comments made long ago by John Westlake on this matter may be helpful:

if we examine the matter fundamentally, the laws of civil process are not like those which originated the rights ... they are commands addressed to the judge at the time of suit and by his [or her] own sovereign, as the conditions under which his [or her] justice is to be administered.<sup>36</sup>

Westlake's comments follow the abovementioned conceptual distinction between matters of substance and procedure. According to his view, the issue of procedure is not related to the primary function of the judicial authority: the manifestation of the litigating parties' rights and duties. Rather, procedural matters are about the mode of operation of the judicial authority, and are therefore fundamentally grounded in the notions of states' territoriality and sovereignty.<sup>37</sup> This explains why procedural matters are conceived of as purely domestic matters and why the application of the local procedural law (*lex fori*) follows.

Garnett, however, doubts whether the procedural rules can be grounded exclusively on the notions of sovereignty, territoriality and public law.<sup>38</sup> Frequently referring to Kahn-Freund's amorphous notion of 'enlightened'

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<sup>34</sup> Ibid 67.

<sup>35</sup> See *ibid* 223.

<sup>36</sup> John Westlake, *Treatise on Private International Law* (T and J W Johnson and Co, 1859) 241.

<sup>37</sup> In contrast to procedural matters, several choice-of-law scholars have rejected the sovereignty principle as a relevant principle for the parties' substantive rights in private international law: see generally Friedrich K Juenger, *Choice of Law and Multistate Justice* (Kluwer, 1993) 159–61; Gerhard Kegel, 'The Crisis of Conflict of Laws' (1964) 112 *Recueil Des Cours* 95, 184; Annelise Riles, 'Cultural Conflicts' (2008) 71(3) *Law and Contemporary Problems* 273, 278–84.

<sup>38</sup> Garnett, above n 1, 13–15. Garnett doubts the state-based foundation of procedural rules because of its alleged ignorance of the litigating parties' interests and because of its inability to explain exceptional cases where foreign procedure does play a role in the domestic courts operation: at 13–14. The proposed procedural rule model is however not completely disconnected from parties' interests. While the procedural rules are designated to regulate the operational activity of the courts as states' agents, the equilibrium between the notions of accuracy and cost is mitigated and subjected to the minimal threshold of the transactional equality notion that directly relates to the parties: see above nn 11–14 and accompanying text. Furthermore, as we will see, the exceptional cases where foreign procedural law has been incorporated to a certain degree into the domestic system does not challenge the state-based foundation of procedural rules but rather underpins the centrality of the sovereignty principle for grasping the nature of the procedural rules. For discussion of these issues, see below nn 49–54 and accompanying text.

*lex fori*<sup>39</sup> (which offers the creation of a special ad hoc procedural rule for private international law litigation),<sup>40</sup> Garnett takes a positive view of Stephen Szászy's suggestion,<sup>41</sup> which is to apply 19<sup>th</sup> century German scholar Friedrich Carl von Savigny's 'centre of gravity' idea to the matters of procedure.<sup>42</sup> According to this suggestion, the basic principle applied with respect to the procedure category has to be the procedural law of the country that has the most significant relationship to the litigating parties and the event.<sup>43</sup>

The reference to Savigny in this context is, however, striking. Indeed, Savigny developed a highly complex and comprehensive choice-of-law theory with the 'most significant relationship' principle at its core.<sup>44</sup> However, this theory addresses the substance of parties' rights and duties. Although Savigny acknowledges the difficulty in making an exact demarcation between matters of substance and procedure,<sup>45</sup> for him the distinction is conceptually fundamental.<sup>46</sup> Similarly to Westlake's abovementioned comments, Savigny makes a sharp distinction between private relationships and other sorts of interactions that he considered as being related to states' activity, such as civil procedure and criminal law.<sup>47</sup> Savigny is very explicit on this matter.<sup>48</sup> While his theory of choice-of-law applies with respect to matters of substance, he excluded from its scope matters related to procedure, which have to be governed by *lex fori*.

Garnett appears to have invested considerable effort in underlining those rare cases in which the foreign procedural law has been incorporated to a certain degree into the domestic system.<sup>49</sup> However, these cases do not prove Garnett's contention regarding the desirability of the extended application of the foreign procedural law. These are exceptional cases in which the operational mechanism of the domestic courts invoked the sovereignty interest of other states. Acquiring evidence abroad<sup>50</sup> and service out-of-jurisdiction where the control of the service is 'vested' to the country of service<sup>51</sup> are representative examples of such cases.

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<sup>39</sup> Ibid 3, 52, 73, 187, 213, 236.

<sup>40</sup> Kahn-Freund, 'General Problems of Private International Law' (1974) 143 *Recueil Des Cours* 139, 373–82.

<sup>41</sup> Stephen Szászy, 'The Basic Connecting Factor in International Cases in the Domain of Civil Procedure' (1966) 15 *International and Comparative Law Quarterly* 436.

<sup>42</sup> Garnett, above n 1, 36–7.

<sup>43</sup> Ibid 36; Szászy, above n 41, 452.

<sup>44</sup> Friedrich Carl von Savigny, *A Treatise on the Conflict of Laws, and the Limits of their Operation in Respect of Place and Time* (William Guthrie trans, Stevens and Sons 1880). For an extensive discussion of the fundamental elements of Savigny's theory, see Sagi Peari, 'Savigny's Theory of Choice-of-Law as a Principle of Voluntary Submission' (2014) 64(1) *University of Toronto Law Journal* (forthcoming).

<sup>45</sup> See Savigny, *A Treatise on the Conflict of Laws*, above n 44, 146.

<sup>46</sup> Ibid 146–7, 186–7, 249–50.

<sup>47</sup> See Friedrich Carl von Savigny, *System of the Modern Roman Law* (William Holloway trans, Hyperion Press, 1979) 17–22 [trans of *System des Heutigen Römischen Rechts* (first published 1840)].

<sup>48</sup> Ibid 18.

<sup>49</sup> Garnett, above n 1, 232–4. See also, 72–85.

<sup>50</sup> Ibid 223–34.

<sup>51</sup> Ibid 72–85.

Indeed, in these cases, foreign procedural law has been recognised.<sup>52</sup> However, the forum court does not operate as an isolated unit but rather as a constituent part of a certain international system comprised of a multiplicity of equal sovereigns.<sup>53</sup> It is precisely the centrality of the notions of states' sovereignty and territoriality to the nature of procedural rules that explains the rare recognition of foreign procedural law and that explains why in certain cases the forum applying its own procedural rules has to be aware of the foreign procedural law.<sup>54</sup> In other words, the admission of foreign procedural law into a domestic system is the other side of the same coin of the sovereignty principle in cases involving infringement of another state's sovereignty. It is precisely the notion of sovereignty that explains why the concerns of comity between nations are so important for these exceptional procedure cases.<sup>55</sup>

Garnett's third claim challenges another broadly accepted principle of private international law — that of the public policy doctrine. According to this principle the doctrine of public policy has a very limited scope of application and has typically been invoked in very exceptional cases. Similarly to the *lex fori regit processum* doctrine, Garnett frankly acknowledges the revolutionary nature of his proposal.<sup>56</sup> As he states, the doctrine of public policy 'has typically been reserved in common law rules of private international law for serious cases'<sup>57</sup> Garnett's proposal is, however, to assign a much greater role to this doctrine in a way that it will provide a conceptual basis for the substance/procedure distinction and will play a decisive role for the questions of inclusion and exclusion of foreign laws in the procedure category.<sup>58</sup> This position explains his further thesis according to which the substance/procedure distinction is greatly context dependent. For him, the substance/procedure categories must be classified differently in private international law cases compared to purely domestic cases.<sup>59</sup>

Once again, my position is different. As we have seen, the classification into categories of substance and procedure goes conceptually to the very nature of the categories themselves and therefore cannot be affected by the presence of one or more foreign elements in the factual matrix of the case. Furthermore, the reference itself to the public policy doctrine as a key to grasping the nature of the

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<sup>52</sup> Ibid 72–85, 232–34.

<sup>53</sup> The principle of state equality which views the structure of international order as comprised of a multiplicity of equal sovereign entities is one of the foundational principles of contemporary international thought: see, eg, *Charter of the United Nations* art 2(1); Ulrich K Preuß, 'Equality of States — Its Meaning in Constitutionalized Global Order' (2008) 9 *Chicago Journal of International Law* 17; Thomas H Lee, 'International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today' (2004) 67(4) *Law and Contemporary Problems* 147. On the centrality of the states' equality principle within private international law: see, eg, Douglas Laycock, 'Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law' (1992) 92 *Columbia Law Review* 249, 310–13.

<sup>54</sup> Garnett, above n 1, 52.

<sup>55</sup> Ibid 85, 216.

<sup>56</sup> Ibid 58–61.

<sup>57</sup> Ibid 338.

<sup>58</sup> Ibid 58–61.

<sup>59</sup> See *ibid* 2–3.

distinction is fundamentally flawed. For years common law jurisdictions have resisted the broad application of this doctrine. Because of its unpredictable and self-contradictory nature, they have mocked it as no less an ‘unruly horse’<sup>60</sup> and have traditionally refused to assign to it a central role in common law reasoning.<sup>61</sup>

The same is true to no lesser degree for private international law. Throughout Professor Garnett’s work, one can trace a wide spectrum of possible policy considerations. The majority of these considerations relate to the notion of predictability of results. In many places Garnett mentions the notions of ‘uniformity of outcome’, ‘simplicity and consistency’, ‘predictability’ and ‘deterrence of forum shopping’ as representing the underlying internal policy values of private international law.<sup>62</sup> These values are supposed to have a direct effect on the substance/procedure distinction. Thus, according to Garnett’s view, the considerations of ‘simplicity and consistency’ in certain cases are supposed to support the application of a single procedural law of the forum.<sup>63</sup> However, at other points in his work, Garnett also names additional policy-based considerations that should be taken into account. He therefore mentions the consideration of a ‘need to protect local residents from alien proceedings’<sup>64</sup> and the consideration of serving as a shield for local forum interests against so-called ‘offensive foreign laws’.<sup>65</sup>

Let us take a closer look at the abovementioned list of policy considerations, which demonstrates the problematic nature of the policy-based analysis offered by Garnett. The consideration of predictability of results was a consideration that stood behind the Joseph Beale-inspired<sup>66</sup> rules of the once almost universally adopted US *Restatement (First) of Conflict of Laws*.<sup>67</sup> However, the lessons of reality have proved the fallacy of Joseph Beale’s approach. Its vague foundations and arbitrary results have been strongly shaken by academics,<sup>68</sup> it is nowadays barely followed by American courts<sup>69</sup> and has not been followed in Europe.<sup>70</sup>

<sup>60</sup> See, eg, *Richardson v Mellish* (1824) 2 Bing 294, 303 [252] (Burrough J).

<sup>61</sup> See, eg, *Fender v St John Mildmay* [1938] AC 1; G H L Fridman, *The Law of Contracts in Canada* (Carswell, 6<sup>th</sup> ed, 2011) 392 (discussing the traditional limiting scope of the doctrine of public policy in the area of contract law).

<sup>62</sup> Garnett, above n 1, 8–9, 17, 35, 175, 262.

<sup>63</sup> *Ibid* 175.

<sup>64</sup> *Ibid* 35.

<sup>65</sup> *Ibid* 61.

<sup>66</sup> J H Beale, *A Treatise on the Conflict of Laws* (Baker, Voorhis and Co, 1935) vol 1. The underlying jurisprudence of predictability of results follows from Beale’s choice-of-law approach which supported a set of single rigid connecting factors (such as place of injury or place of contractual formation) for each of the legal categories: at 45–7, 58, 62–3. For criticism of the rigidity, mechanical application and arbitrary results of this approach: see, eg, Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws* (Harvard University Press, 1942) 203; Symeon C Symeonides, *The American Choice-Of-Law Revolution: Past, Present and Future* (Martinus Nijhoff, 2006) 10.

<sup>67</sup> American Law Institute, *Restatement (First) of Conflict of Laws* (1934). On Joseph Beale’s decisive influence on the process of shaping the choice-of-law rules of the First Restatement, see Symeon C Symeonides, ‘The First Restatement Through the Eyes of Old: As Bad as Its Reputation?’ (2007) 32 *Southern Illinois University Law Journal* 39.

<sup>68</sup> See generally Cook, above n 66.

<sup>69</sup> See, eg, Symeonides, above n 66, 37–62.

The same point applies with Garnett's other policy consideration — the protection of local residents.<sup>71</sup> This notion seems to be even less acceptable in private international law and seems to be at odds with the rooted principle of so-called 'equal treatment'. According to this principle of private international law, no distinction should be made before the courts between local and foreign residents.<sup>72</sup> The case in which the local residents will receive certain preference over foreigners seems to be a clear infringement of this well-established principle of the discipline.

Finally, the consideration of foreign 'offensive laws' is not innovative but actually follows the traditional location of public policy doctrine in private international law generally and choice-of-law in particular. Under this conception, the doctrine has served as an exceptional tool for the ordinary choice-of-law process of connecting factors.<sup>73</sup> If a foreign provision conflicts with the public policy of the domestic system that is processing the case, the court refuses to follow the connecting factors that point to the foreign law. The application of domestic law consequently follows.<sup>74</sup> Thus, for example, if the judge thinks that the foreign law provision is incompatible with 'some prevalent conception of good morals', some 'deep-rooted tradition of the common weal'<sup>75</sup> or when the foreign private law provision 'shocks the morals of the forum',<sup>76</sup> the application of domestic law follows. In other words, public policy doctrine has been designed to serve as a 'superimposition' tool<sup>77</sup> for judges to disqualify the application of foreign law in favour of domestic law — the *lex fori*.

In this way, the acceptance of Professor Garnett's suggestion regarding extending the scope of public policy doctrine will not only challenge the conceptual distinction between the matters of substance and procedure, but will also mean challenging the *locus classicus* of choice-of-law jurisprudence as a jurisprudence of connecting factors. By denying the location of public policy doctrine as a subsidiary source and supporting its implementation as a primary source of choice-of-law process, Garnett suggests a reorientation of the discipline towards a policy-based analysis.

<sup>70</sup> See, eg, Ralf Michaels, 'The New European Choice-of-Law Revolution' (2008) 82 *Tulane Law Review* 1607, 1612 (mentioning the European rejection of vested rights theory).

<sup>71</sup> Garnett, above n 1, 35.

<sup>72</sup> See, eg, R H Graveson, 'Philosophical Aspects of the English Conflict of Laws' (1962) 78 *Law Quarterly Review* 337, 361. See also Michaels, above n 70, 1633–35.

<sup>73</sup> On the classical conception of choice-of-law process as a jurisprudence of connecting factors, see Adrian Briggs, *The Conflict of Laws* (Oxford University Press, 2<sup>nd</sup> ed, 2008) 20–8; Collins et al, above n 8, 33–4.

<sup>74</sup> For an overview of the public policy exception rule within Anglo-American tradition: see, eg Briggs, above n 73, 49–50; Scoles et al, above n 8, 143–5. It should be noted that I do not address here the possibility that exists in the European public policy doctrine tradition of applying a law other than the forum's law: see Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 *Journal of Private International Law* 201, 208.

<sup>75</sup> As stated famously by Cardozo J in *Loucks v Standard Oil Co*, 224 NY 99, 111 (Ct App 1918).

<sup>76</sup> Herbert F Goodrich, 'The Public Policy and the Conflict of Laws' (1933) 33 *Columbia Law Review* 508, 35, quoted in Monrad G Paulsun and Michael I Sovern, 'Public Policy in the Conflict of Laws' (1956) 56 *Columbia Law Review* 969, 970.

<sup>77</sup> See Briggs, above n 73, 51.

In fact, there exists a choice-of-law approach that would welcome this suggestion: the American interest analysis. This sort of analysis rests on the basic presupposition by which the courts in general and the choice-of-law question in particular are supposed to serve as means for promoting and effectuating states' policies.<sup>78</sup> Since states in certain situations are interested in the application of their laws in private international law cases, choice-of-law methodology necessarily has to take these interests into account. This inherent embodiment of policy-based analysis explains why interest analysis supporters have warmly adopted the public policy doctrine as an integral component of choice-of-law process.<sup>79</sup> The interest analysis is all about policy-based considerations, which follows Professor Garnett's suggestion exactly.

The inherent complexity involved in the process of tracking the underlying and often self-contradictory policies of the involved states of interest analysis has raised serious doubts by academic scholars against it, both at the theoretical<sup>80</sup> and implementation levels.<sup>81</sup> Despite the support of several American scholars,<sup>82</sup> it has not been widely popular in American courts<sup>83</sup> and it has not been adopted by English authorities.<sup>84</sup> However, this is precisely what Garnett offers in his suggestion to widen the scope of public policy doctrine in general and as a key to grasping the nature of the substance/procedure classification. Although on the one hand Garnett seems to be clearly against interest analysis, stating: 'The interest analysis model, however, provides little certainty and guidance for courts and litigants in choosing the applicable law and for this reason has not generally been embraced outside the United States',<sup>85</sup> at his suggestion, the interest analysis de facto re-enters through the back door.

With certainty, Professor Garnett's book is a remarkable contribution to choice-of-law scholarship. By providing a careful and very detailed exposition of the private international law substance/procedure distinction in a broad spectrum of jurisdictions, it provides an invaluable guide to the present state of the law for anyone interested in the field. This review however has focused on what appear to be Garnett's suggestions on the future of the substance/procedure distinction. While it has joined his favourable position towards recent developments in

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<sup>78</sup> See especially Brainerd Currie, *Selected Essays on the Conflict of Laws* (Duke University Press, 1963) 64.

<sup>79</sup> See, eg, Larry Kramer, 'Rethinking Choice of Law' (1990) 90 *Columbia Law Review* 277, 339. More generally, the point of the inherent vague and often self-contradictory nature of policy-based analysis inherently embedded in the interest analysis approach has been pressed over the years by Professor Lea Brilmayer: see, eg, Lea Brilmayer, 'Governmental Interest Analysis: A House without Foundations' (1985) 46 *Ohio State Law Journal* 459.

<sup>80</sup> See generally Kegel, above n 37, 112–207.

<sup>81</sup> See generally Lea Brilmayer, 'Interest Analysis and Myth of Legislative Intent' (1980) 78 *Michigan Law Review* 392; Kermit Roosevelt III, 'The Myth of Choice of Law: Rethinking Conflicts' (1999) 97 *Michigan Law Review* 2448, 2477–9.

<sup>82</sup> See generally Herma H Kay, 'A Defence of Currie's Governmental Interest Analysis' (1989) 215 *Recueil Des Cours* 9; Kramer, above n 79.

<sup>83</sup> Symeonides, above n 66, 37–62.

<sup>84</sup> See, eg, Fawcett and Carruthers, above n 9, 29–30; C M V Clarkson and Jonathan Hill, *The Conflict of Laws* (Oxford University Press, 4<sup>th</sup> ed, 2011) 12–18.

<sup>85</sup> Garnett, above n 1, 42.

Australian and Canadian jurisdictions, the review has expressed some concerns with respect to Garnett's other two suggestions:

- (i) the application of public policy doctrine as an appropriate basis for grasping the nature of the distinction; and
- (ii) expansion of the cases in which foreign procedural rules should be applied.

Sometimes (albeit not always) the old law is still good law.

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