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Comity in Private International Law and Fundamental Principles of Justice

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A. Introduction

In 2011, Adrian Briggs delivered a ground-breaking series of lectures concerning the common law principle of comity in private international law.¹ The published version of these lectures represent the most careful consideration of this principle in the history of private international law. This essay focuses upon the same topic. As is usual with consideration of any of Professor Briggs' work on private international law, this essay owes a great debt to his work. We do not purport to, and cannot in the space of this essay, descend to the detail of his comprehensive examination of the principle of comity in his published lectures. Instead, as Australians for whom legal notions of comity are embedded in s 118 of our Constitution, we develop his approach by considering the underlying rationale for the principle of comity and explaining the meaning and operation of a widely accepted limit to the principle.

As Professor Briggs has observed, the foundation for the principle of comity in private international law is the respect for the territorial sovereignty of other states.² In an international legal system based upon competing sovereignties, it is generally implied that each state consents to respect each other. But there are limits to this implied consent. The perspective we offer in this essay concerns the limit where comity runs contrary to fundamental principles of justice. We consider why this limit exists and how to identify such fundamental principles. The difficulty of identification of such fundamental principles is then illustrated by reference to the principle of privacy, a principle which, almost uniquely in Australia, has not been instantiated directly into a legal rule.

The essay is divided into three parts. The first part considers the meaning of comity and the role that it should play in a court's decision-making process in

¹ Adrian Briggs, 'The Principle of Comity in Private International Law' (2012) 354 *Recueil des Cours* 65 (hereafter Briggs, *Hague Lectures*).

² Adrian Briggs, *Private International Law in English Courts* (OUP 2014) [3.139] (hereafter Briggs, *Private International Law in English Courts*).

private international law cases. As Briggs has powerfully argued, although comity is difficult to define because it has been used in different senses over time it has a core meaning concerned with mediating respect for the territorial sovereignty of all states with a stake in a private international law matter.³ Understood in this way, comity is the basal principle underlying many rules of private international law. However, it is not a principle that is capable of direct application in any particular case. Rather, it is one consideration to be taken into account in the application of open-textured rules and in deriving and developing concrete rules.

The second part of this essay considers one limit to the principle of comity which in turn limits the development and application of rules based upon that principle. Given that the principle of comity is based upon one sovereign impliedly consenting to respect the territorial sovereignty of another, comity only operates to the extent that consent can reasonably be implied. No reasonable implication of consent could be implied for a state to give effect within its territory to actions of another sovereign taken within that sovereign's territory if those acts are contrary to fundamental principles of justice. This is often referred to, somewhat misleadingly, as a 'public policy' exception to certain rules of private international law. There are relatively few cases in which courts have applied this exception, and as a result there is a lack of clarity about how courts ascertain when a foreign act is contrary to a fundamental principle of justice. Fundamental principles are usually directly reflected in legal rights and freedoms in all just systems of law. But different states protect these rights and freedoms to different degrees when resolving their conflict with other principles. It is always possible to countenance a degree of departure from fundamental rights and freedoms in a foreign legal system without concluding that the foreign system has failed to respect an underlying fundamental principle of justice. The ultimate limit to the concept of comity therefore depends upon an exercise of judgment about the extent to which a derogation from a fundamental right or freedom means that the foreign legal system does not respect a fundamental principle of justice. Such a conclusion will be rare.

The third and final part of the essay considers how new fundamental principles of justice might be identified. From the perspective of Australia, where the law recognises no direct right to privacy, the principle of privacy forms the ideal case study to assess whether new fundamental principles of justice might arise and, if so, how they might be recognised.

³ See Briggs, *Hague Lectures* (n 1) 80; Briggs, *Private International Law in English Courts* (n 2) [3.139].

B. The Meaning and Role of Comity

The principle of comity is a concept of ‘very elastic content’.⁴ It has variously been described as a principle ‘formulated by reference to the principles of sovereignty and territoriality’,⁵ a principle of ‘deference and respect due by other states to the actions of a state legitimately taken within its territory’,⁶ a principle of ‘respect for … legitimate authority’,⁷ a ‘a species of accommodation’ which ‘involves neighbourliness, mutual respect, and the friendly waiver of technicalities’,⁸ and a principle that is conditioned upon the reciprocal treatment by states of one another’s judgments.⁹ As Professor Briggs has observed, the varying definitions have led some writers to express the view that the principle of comity is unusable or useless as a component of legal reasoning.¹⁰ Nevertheless, as he also observes, it has an important purpose.¹¹ That purpose is common to all principles that underlie legal rules. They provide reasons for rules and elucidate how the rule might be developed. At its core, comity is a principle concerned with respect for the territorial sovereignty of all nations. As Millett LJ said in *Credit Suisse Fides Trust v Cuoghi*,¹² ‘It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other’s jurisdiction.’ This principle informs the existence and development of many rules of private international law.

1. Respect for territorial sovereignty based upon implied consent

As a general principle of such elastic content, comity is not susceptible of precise definition in the same way as most legal rules that are capable of direct application.

⁴ Lord Collins and others (eds), *Dicey, Morris and Collins, The Conflict of Laws* (16th edn, Sweet & Maxwell 2018) [1-008] (hereafter *Dicey, Morris & Collins*).

⁵ Briggs, *Private International Law in English Courts* (n 2) [3.139].

⁶ *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, 1095. See also *Nevsun Resources Ltd v Araya* 2020 SCC 5 [45], [50] (hereafter *Nevsun*); Donald Earl Childress III, ‘Comity as Conflict: Resituating International Comity as Conflict of Laws’ (2010) 44 University of California Davis L Rev 11, 31 (hereafter Childress, ‘Comity as Conflict’).

⁷ Timothy Endicott, ‘Comity among Authorities’ (2015) 68 Current Legal Problems 1, 10.

⁸ James Crawford, *Brownlie’s Principles of Public International Law* (OUP 2019) 21 (hereafter *Brownlie’s Principles of Public International Law in English Courts*).

⁹ *Hilton v Guyot* 159 US 113, 228 (1895) (hereafter *Hilton*).

¹⁰ Briggs, *Private International Law in English Courts* (n 2) [3.138], referring to Albert Venn Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens and Sons, Sweet and Maxwell 1896) 10; also Briggs, *Hague Lectures* (n 1) 80–1, discussing James Fawcett, Janeen Carruthers, and Peter North, *Cheshire, North & Fawcett, Private International Law* (14th edn, OUP 2008) 5.

¹¹ Briggs, *Private International Law in English Courts* (n 2) [3.138].

¹² [1998] QB 818, 827.

It would be futile to attempt a precise definition that could be directly applied.¹³ However, in order to understand the boundaries of the principle and the way that it influences the development of legal rules it is necessary to understand its theoretical foundations. These were cogently outlined in the seminal works of Ulrich Huber and Joseph Story from which the common law conception of comity developed. The theoretical foundation of comity is that it mediates respect for the territorial sovereignty of both the forum state and all other states with an interest in a private international law matter based upon the implied consent of the forum state to give effect to acts of another sovereign within the forum state's territory. This understanding of comity has been adopted by courts throughout the common law world and continues to inform their use of comity in the development of legal rules.

In *De Conflictu Legum Diversarum in Diversis Imperiis*,¹⁴ Ulrich Huber outlined three basic axioms of private international law. Huber's first two axioms were concerned with the sovereignty that each state has within its own borders:¹⁵

1. 'The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.'
2. 'All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.'

However, Huber's focus on territorial sovereignty gave rise to a problem:¹⁶ if a state has absolute sovereignty within its own territory (and, it follows, in relation to the laws to be applied in its courts), how can that court apply a law of another sovereign state? This was resolved by a third axiom, or the principle of comity, which permits respect for rights acquired within the territorial sovereignty of another state:¹⁷

3. '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.'

Huber's axioms were adopted as 'general maxims' by Joseph Story.¹⁸ Story then explained the ultimate foundation of the principle of comity as lying in implied

¹³ Childress, 'Comity as Conflict' (n 6) 13; Thomas Schultz and Niccolò Ridi, 'Comity in US Courts' (2018) 10 Northeastern University L Rev 280, 285–6 (hereafter Schultz and Ridi, 'Comity in US Courts'); also Briggs, *Hague Lectures* (n 1) 181.

¹⁴ Ernest G Lorenzen, 'Huber's *De Conflictu Legum*' in Ernest G Lorenzen (ed), *Selected Articles on the Conflict of Laws* (Yale University Press 1947) 162 (hereafter Lorenzen, 'Huber's *De Conflictu Legum*').

¹⁵ Ibid 164.

¹⁶ Childress, 'Comity as Conflict' (n 6) 21.

¹⁷ Lorenzen, 'Huber's *De Conflictu Legum*' (n 14) 164.

¹⁸ J Story, *Commentaries on the Conflict of Laws* (Hillard, Gray, and Company 1834) (hereafter Story, *Commentaries*). See Childress, 'Comity as Conflict' (n 6), 23–5.

consent. Referring to the third axiom or maxim, he argued that the recognition or local enforcement of a foreign sovereign act within the territory of another state required the consent of the latter state:¹⁹

[W]hatever 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.

It followed, according to Story, that comity ‘is derived altogether from the voluntary consent of [the state where the law is sought to be recognised]; and is inadmissible, when it is contrary to its known policy, or prejudicial to its interests’.²⁰ Story emphasised that it was for the ‘nation’, rather than the ‘courts’, to consent to giving the laws of another nation force within its borders, but considered that courts could assess whether the ‘nation’ had consented by ‘presum[ing] the tacit adoption of [foreign laws] by their own government, unless they are repugnant to its policy, or prejudicial to its interests’.²¹

By treating comity as a principle that is founded upon implied consent of the sovereign and capable of influencing the development of legal rules, Story’s approach explains why comity does not require the recognition or local enforcement of a foreign sovereign act in every circumstance. Since the principle of comity derives from consent it would not prevent a court from enforcing a law passed by the forum state that prohibits the recognition of any foreign judgment.²² Nor would a court recognise or enforce a foreign sovereign act where to do so would undermine the operation of the laws of the forum state.²³ And, in perhaps the most significant limit upon the operation of comity, it could not require a state to ‘enforce doctrines, which, in a moral, or political view, are incompatible with its own safety or happiness, or conscientious regard to justice and duty’.²⁴ The way in which this limitation has been adopted by the courts is discussed in part two of this essay.

In the two centuries since the publication of his *Commentaries*, three key criticisms of Story’s theory have emerged. None undermines it, although they require the theory to be adapted. The first criticism is that the first maxim is contradicted by the power of states to legislate extraterritorially in certain circumstances.²⁵ This is undoubtedly true but there is usually a general presumption that a state’s jurisdiction is territorial. Story’s territorial theory of jurisdiction can be refined so

¹⁹ Story, *Commentaries* (n 18) § 23.

²⁰ Ibid § 38.

²¹ Ibid § 38.

²² Briggs, *Hague Lectures* (n 1) 145.

²³ Compare the majority and the minority in *XX v Whittington Hospital NHS Trust* [2020] UKSC 14, [2020] 2 WLR 972.

²⁴ Story, *Commentaries* (n 18) § 25.

²⁵ See eg Ernest G Lorenzen, ‘Story’s Commentaries on the Conflict of Laws—One Hundred Years After’ (1934) 48 Harvard L Rev 15, 37 (hereafter Lorenzen, ‘Story’s Commentaries’).

that it is now perhaps better expressed as requiring a ‘genuine connection between the subject matter of jurisdiction and the territorial base or reasonable interests of the state in question’.²⁶ The decision of the Supreme Court of the United States in *Hartford Fire Insurance Co v California*,²⁷ discussed below, illustrates that a state may legitimately legislate extraterritorially in relation to matters that have a substantial effect within the state’s territory. However, even with this refinement of the territorial principle, the principle of comity will still be required in most cases to explain how a sovereign act in one state can have force in another.

The second criticism takes aim at Story’s view that states consent (albeit often implicitly) to afford comity to one another. It has been suggested that this view is based upon a misunderstanding of Huber, who, properly understood, argued that comity is an imposed legal obligation.²⁸ Putting aside the question of whether Story did in fact diverge from Huber in this respect,²⁹ Story’s conception of comity as a matter of consent is entirely consistent with the view in Anglo-American law that rules of private international law are not imposed on states by some superior authority, but are rather ‘voluntarily accepted by each sovereign state’.³⁰

The third criticism is that it is unclear what Story’s third maxim requires of courts in determining whether the ‘nation’ had impliedly consented to giving effect to the laws of another state within its borders. Story’s suggestion that there was no implied consent where affording comity was not in the forum state’s ‘interests’ is said to create difficulty for courts to assess.³¹ This is also undoubtedly true. But it merely illustrates the nature of Story’s maxims as principles from which concrete rules are derived or open-textured rules are applied. They are not rules that are to be applied directly to the facts of a case. As Schultz and Ridi argue, ‘it is unthinkable to resolve cases involving comity considerations with the simple application of Story’s maxims’.³² Or, as Schultz and Holloway put it, comity is ‘a springboard from which [courts] proceeded to develop a highly organized and sophisticated set of choice of law rules’.³³ This aligns with the role of comity for which Briggs powerfully argued in his Hague lectures.

²⁶ Brownlie’s *Principles of Public International Law in English Courts* (n 8) 440–1.

²⁷ 509 US 764 (1993) (hereafter *Hartford*).

²⁸ Alan Watson, *Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws* (University of Georgia Press 1992) 22 (hereafter Watson, *Comity of Errors*); also Lorenzen ‘Story’s Commentaries’ (n 25), 35–6.

²⁹ Watson, *Comity of Errors* (n 28) 22; Schultz and Ridi, ‘Comity in US Courts’ (n 13) 298; also Hessell E Yntema, ‘The Comity Doctrine’ (1966) 65 Michigan L Rev 9, 29–30. cf Lorenzen, ‘Huber’s *De Conflictu Legum*’ (n 14) 138–9.

³⁰ Lorenzen, ‘Story’s Commentaries’ (n 25) 36. This principle has long been established: see eg *Holman v Johnson* (1775) 1 Cowp 341, 343; 98 ER 1120, 1121; *Dalrymple v Dalrymple* (1811) 2 Hagg Con 54, 58–9; 161 ER 665, 667.

³¹ Childress, ‘Comity as Conflict’ (n 6) 29–30.

³² Schultz and Ridi, ‘Comity in US Courts’ (n 13) 300.

³³ Thomas Schultz and David Holloway, ‘Retour sur la comity, deuxième partie: La comity dans l’histoire du droit international privé’ (2012) 139 Journal du Droit International 571, 593–4, quoted in Schultz and Ridi. ‘Comity in US Courts’ (n 13) 355.

Story's theory has been referenced by courts throughout the common law world,³⁴ including in the decision of the Supreme Court of the United States *Hilton v Guyot*³⁵ which has remained a central authority for more than a century, both in the United States and abroad.³⁶ In that case, a French court had given judgment against Hilton and others, who removed their assets to the United States during the course of the litigation. The issue before the Supreme Court of the United States was whether to enforce the French judgment. The Court's starting point was in essence a restatement of Story's first and third maxim: it held that '[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived', and it followed that 'the extent to which the law of one nation ... shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations"'³⁷ In what remains the most cited statement on the principle of comity in the United States,³⁸ the Court held that comity 'is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other' and that it entailed 'the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its laws'.³⁹

From this general statement, the Court distilled a number of more specific rules relating to the enforcement of foreign judgments: for example, a judgment *in rem* adjudicating the title to a ship or other movable property is treated as valid everywhere, as is a judgment affecting the status of persons, such as a decree confirming or dissolving a marriage unless this is contrary to the policy of the forum state.⁴⁰ Childress suggests that the Supreme Court in *Hilton* set the principle of comity adrift from its historical moorings by stating a number of rules which required the application of foreign law in certain circumstances without consideration of what was in the forum state's sovereign interests.⁴¹ This may be so, but in our view the manner in which the Supreme Court used Story's theory of comity largely aligns with what we say remains its most appropriate use today. Comity is not a principle of direct application: it is insufficiently hard-edged for a Court to determine

³⁴ See eg United States: *Bank of Augusta v Earle* 38 (13 Peters) US 519, 569, 589 (1839); *Walworth v Harris* 129 US 355, 364 (1889); *Hartford* (n 27) 817. United Kingdom: *Castrique v Imrie* (1870) Law Rep 4 HL 414, 428–29; *British South Africa Co v Cia de Moçambique* [1893] AC 602. Canada: *Spar Aerospace Ltd v American Mobile Satellite* [2002] 4 SCR 205, 217–18 (hereafter *Spar Aerospace*). Australia: *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479, 501–2.

³⁵ 159 US 113 (1894).

³⁶ The Supreme Court of Canada has adopted the definition of comity outlined in *Hilton*: see *Spar Aerospace* (n 34) 219.

³⁷ *Hilton* (n 9) 163.

³⁸ Joel R Paul, 'Comity in International Law' (1991) 32 Harvard Law Journal 1, 9.

³⁹ *Hilton* (n 9) 163–4.

⁴⁰ *Hilton* (n 9) 167.

⁴¹ Childress, 'Comity as Conflict' (n 6), 33–4.

a case on the basis of what ‘comity’ requires by some global assessment of whether affording comity is in the sovereign’s interests in a given case. Rather, it is a general principle that explains the theoretical basis for one sovereign giving effect to the laws of another, from which concrete rules are distilled.

The *Hilton* decision did however depart from the concept of comity we advocate here in one respect: the Court ultimately refused to enforce the French judgment on the basis that France would not have enforced an equivalent judgment of the United States, and thus conditioned comity upon reciprocity.⁴² As Briggs argues, comity has nothing to do with reciprocity.⁴³ This has now been recognised in the United States.⁴⁴

Although it has been suggested that, as a result of the criticisms discussed above, comity is no longer the ground of conflict of laws theory,⁴⁵ the powerful force of Story’s theory maintained its gravitational pull upon the Supreme Court in *Hartford Fire Insurance Co v California*,⁴⁶ a century after its decision in *Hilton*. In that case, the principle’s operation in relation to statutory interpretation was effectively based by both the majority and by the minority upon the implied consent of the United States to treat with respect the territorial sovereignty of another state.

In *Hartford Fire Insurance*, the State of California brought proceedings against reinsurers who were based in London under a law of the United States, the Sherman Act 1890, alleging that the reinsurers had engaged in various conspiracies to impact the American insurance market. The relevant conduct had occurred in London and was not prohibited under English law. On its face the Sherman Act was not limited to conduct that occurred in the United States. This raised questions as to whether comity required that the Sherman Act not apply to activities undertaken in London, and whether, even if it did so apply, the Court should refrain from exercising its jurisdiction for reasons of comity. The Court divided and, as Briggs notes, both camps appeared to understand that comity was on their side.⁴⁷

The majority, comprised of Rehnquist CJ, White, Blackmun, Stevens, and Souter JJ, considered that the Act applied to the foreign acts in issue due to their ‘substantial’ effect on the markets of the United States.⁴⁸ The majority did not appear to view considerations of comity as any impediment to the Act having extraterritorial effect. Further, the majority considered that it was not necessary to determine whether it would be appropriate for the court to ‘refrain from the exercise of jurisdiction on grounds of international comity’ because, given that the conduct

⁴² *Hilton* (n 9) 228.

⁴³ Briggs, *Hague Lectures* (n 1) 89–91.

⁴⁴ See *Direction der Disconto-Gesellschaft v US Steel Corp* 300 F 741, 747 (1925); *Johnston v Compagnie Générale Transatlantique* 152 NE 121, 123 (NY 1926).

⁴⁵ Childress, ‘Comity as Conflict’ (n 6) 30; Eugene F Scoles and others, *Conflict of Laws* (4th edn, Thomson West 2004) 20.

⁴⁶ *Hartford* (n 27).

⁴⁷ Briggs, *Hague Lectures* (n 1) 102.

⁴⁸ *Hartford* (n 27), 796.

was not prohibited in England, there was no true conflict between the laws of England and the United States.⁴⁹ It has been suggested that in so holding the majority ‘dealt comity a near death blow’.⁵⁰ However, as Briggs notes, on one view the majority’s holding is consistent with comity: as noted above, the refinement of the territorial principle suggests that it is legitimate for states to regulate matters that have a substantial impact within their territory, and on this basis it could be argued that ‘international comity tolerated the application of US law’.⁵¹

The minority, comprised of O’Connor, Scalia, Kennedy, and Thomas JJ, held that the question was not whether the court should ‘refrain’ from exercising its jurisdiction but was instead how the legislature intended the Act to apply, which included considerations of comity.⁵² Citing Story, the minority held that ‘comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted’.⁵³ Since the foreign acts were committed by British subjects in Britain, and Britain had ‘established a comprehensive regulatory scheme governing the London reinsurance markets’, it was ‘unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable’ and ‘inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion’.⁵⁴ The minority’s decision was therefore also influenced by considerations of respect for England’s territorial sovereignty to regulate conduct within its borders without foreign influence. Similarly, the Supreme Court of Canada has suggested that courts may use comity as ‘an interpretive tool’ that requires laws to be interpreted ‘in a manner respectful of the spirit of international co-operation and the comity of nations’.⁵⁵

The nature of comity as a principle of respect for territorial sovereignty based upon implied consent is also evident in the United Kingdom. In *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)*,⁵⁶ the Court of Appeal considered whether it should recognise an Iraqi decree that purported to divest Kuwait Airways of its aircraft present within Iraqi territory as one part of Iraq’s purported annexation of Kuwait. In a decision that was upheld by the House of Lords, the Court of Appeal held that there is a rule of English law, ‘founded primarily on a view as to the comity of nations’, that ‘a foreign sovereign is to be accorded that absolute authority which is vested in him to act within his own territory as a sovereign

⁴⁹ Ibid 799.

⁵⁰ Spencer Weber Waller, ‘The Twilight of Comity’ (2000) 38 *Columbia Journal of Transnational Law* 563, 564; also Schultz and Ridi, ‘Comity in US Courts’ (n 13) 312–13.

⁵¹ Briggs, *Hague Lectures* (n 1) 102.

⁵² *Hartford* (n 27) 813, 817.

⁵³ Ibid (n 27) 817, citing Story, *Commentaries* (n 18) § 38.

⁵⁴ *Hartford* (n 27), 819.

⁵⁵ *R v Hape* [2007] SCR 292 [47]–[52].

⁵⁶ *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19, [2002] 2 AC 883 [318] (hereafter *Kuwait Airways*); see also *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964 [225] (hereafter *Belhaj*).

acts.' The implied consent reflected in this rule was however limited. As the Court of Appeal noted, each sovereign affords comity to the other by saying: 'We will respect your territorial sovereignty. But there can be no offence if we do not recognise your extraterritorial or exorbitant acts'. We return to what exactly constitutes an exorbitant act in part two of this essay. We conclude then, with Adrian Briggs, that:⁵⁷

[T]he principle or doctrine of comity may be formulated by reference to the principles of sovereignty and territoriality: as a principle which asserts or admits and avers, according to context, that the exercise of jurisdiction and legislative power, by state and court, is properly territorial and that exercises of sovereign power within the sovereign's own territory are bound and entitled to be respected by other states and other courts.

2. A principle that influences the development of legal rules

Some authors consider that the implied consent of sovereigns to respect the territorial jurisdiction of other States is a matter of concern to executive government and legislatures but not to courts because 'comity is a matter for sovereigns, not for judges required to decide a case according to the rights of the parties'.⁵⁸ As Perram J said in *Habib v Commonwealth*,⁵⁹ considering the Commonwealth of Australia's argument that international comity was relevant to whether to *exercise* jurisdiction to consider allegations of the Australian government's complicity in alleged acts of torture: 'No doubt comity between the nations is a fine and proper thing but it provides no basis whatsoever for this Court declining to exercise the jurisdiction conferred on it by Parliament'.

Story agreed that is for the nation rather than the courts to afford comity, but argued that it is nevertheless appropriate for a court's reasoning to be informed by considerations of whether the nation had implicitly consented to affording comity in certain situations.⁶⁰ This was to be 'ascertained in the same way, and guided by the same reasoning, by which all other principles of the municipal law are ascertained and guided'.⁶¹ Since comity can be taken into account in the application of open-textured rules such as the process of statutory interpretation undertaken by the minority in *Hartford Fire Insurance*, so too it should be able to be taken into

⁵⁷ Briggs, *Private International Law in English Courts* (n 2) [3.139], [6.137]–[6.138]. See also Briggs, *Hague Lectures* (n 1) 181; Adrian Briggs, 'Recognition of Foreign Judgments: a Matter of Obligation' (2013) 129 *Law Quarterly Review* 87, 91.

⁵⁸ Paul Torremans and others (eds), *Cheshire, North & Fawcett, Private International Law* (15th edn, OUP 2017) 4.

⁵⁹ (2010) 183 FCR 62 [37].

⁶⁰ Story, *Commentaries* (n 18) § 38.

⁶¹ *Ibid* § 38.

account in the assessment of other open-textured rules such as whether jurisdiction should be exercised. In *Mannington Mills Inc v Congoleum Corporation*,⁶² a decision cited by the majority in *Hartford Fire Insurance*,⁶³ the United States Court of Appeals (Third Circuit) indicated that it was appropriate for courts to take considerations of comity into account when determining whether to exercise jurisdiction. Further, as a general principle it should be capable of influencing the development of legal rules in private international law.⁶⁴ Schultz and Mitchenson argue that comity 'will be relevant in any circumstances where the application of law or the exercise of judicial power (be it domestic or foreign) has the potential to have an effect outside the jurisdictional boundaries of the State'.⁶⁵ They analyse in detail the various areas of private international law in which the principle of comity plays an important role including: statutory and treaty interpretation; adjudication on the laws and acts of foreign states; recognition of foreign judgments; judicial co-operation; request for pre-trial discovery orders; and assistance in bankruptcy and insolvency proceedings. For present purposes, it suffices to consider in the second part of this chapter the influence that comity has had on the development of the rules of private international law in two areas that are particularly relevant to the discussion of the limits of the principle comity.

The first area concerns the true principle underlying the common law recognition of foreign judgments and enforcement of them by local orders. There is a line of English authority, described by Briggs as based upon the adoption of a 'thoughtless non-definition of what comity really is',⁶⁶ in which courts have rejected comity as a basis for the common law recognition of foreign judgments.⁶⁷ For instance, while recognising that comity was the original rationale for common law recognition of foreign judgments it has been said that, in 1845, Baron Parke placed recognition of foreign judgments on the different footing that the foreign judgment gave rise to a legal obligation.⁶⁸ But this does not explain *why* the foreign legal obligation is recognised by the local court. As Lord Collins said, the principle of comity can be said to be 'the basis for the enforcement and recognition of foreign judgments'.⁶⁹ When comity is understood as a principle of respect for territorial sovereignty based upon implied consent, there is an undeniable link between the principle of comity and the rules governing common law recognition of foreign judgments. As

⁶² 595 F2d 1287, 1296 (3rd Cir 1979).

⁶³ *Hartford* (n 27) 797 fn 24.

⁶⁴ See Briggs, *Hague Lectures* (n 1); Briggs, *Private International Law in English Courts* (n 2) [3.139]. See also D P [Daniel Patrick] O'Connell, *International Law* (2nd edn, Steven & Sons 1970) vol 1, 20.

⁶⁵ Thomas Schultz and Jason Mitchenson, 'Rediscovering the Principle of Comity in English Private International Law' (2018) 28 European Review of Private Law 311, 315.

⁶⁶ Briggs, *Hague Lectures* (n 1) 148.

⁶⁷ See eg *Adams v Cape Industries plc* [1990] Ch 433, and discussion in Dicey, Morris and Collins (n 4) [14.007]–[14.009].

⁶⁸ *Rubin v Eurofinance SA* [2010] EWCA Civ 895, [2011] Ch 133 [34]–[35], citing *Williams v Jones* (1845) 13 M & W 628, 633. See also *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 [9].

⁶⁹ *Agbaje v Agbaje* [2010] UKSC 13, [2010] 1 AC 628, 671 [54].

outlined above, the Supreme Court's decision in *Hilton* gives examples of various rules, distilled from the principle of comity, relating to the common law recognition of various kinds of judgments. The same can be said of English rules on common law recognition of foreign judgments. As to recognition of foreign judgments, a judgment given in a foreign court has no application on its own within England.⁷⁰ Only English judgments can directly apply within England, so in order to be given force the judgment must be converted to a local judgment.⁷¹ As to recognition of foreign judgments at common law, an English court will generally recognise a foreign judgment given against a person who was within the foreign territory at the time that proceedings were commenced.⁷² As Briggs argues, these rules are 'fundamentally justified by the principle of comity and territorial sovereignty' because they embody 'the oldest and most deeply seated sense that sovereign acts are territorial, and when a sovereign has so acted, his judgments are to be recognized'.⁷³

The second area in which the application of the principle of comity is particularly relevant to illustrate its limits is the rule that courts will not enquire into the validity of foreign sovereign acts (whether legislative or executive) done in relation to property that is within the foreign sovereign's territory.⁷⁴ As the High Court of Australia acknowledged in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd*,⁷⁵ this rule rests partly on international comity. In England this rule has been referred to as a part of the act of state doctrine.⁷⁶ An example of the application of this rule is that courts are generally required to accept as valid confiscations of property by foreign governments within the territory of a foreign state. Hence, in *Aksionairnoye Obschestvo A M Luther v James Sagor & Co*,⁷⁷ the House of Lords refused to inquire into the validity of a Russian decree issued during the Russian Revolution that purported to vest property in all mechanical sawmills above a certain capital value and all woodworking establishments in the Republic because the United Kingdom had recognised the Soviet Government as the de facto Government of Russia before the date of the decree. The House of Lords also applied this rule in refusing to assess the validity of the seizure on behalf of the Sultan of Muscat of British goods on board a British ship that was located within the territorial waters of Muscat.⁷⁸

⁷⁰ Dicey, Morris & Collins (n 4) [14.002].

⁷¹ Briggs, *Hague Lectures* (n 1) 149.

⁷² Dicey, Morris & Collins (n 4) [14R.054].

⁷³ Briggs, *Hague Lectures* (n 1) 150.

⁷⁴ See eg *Oetjen v Central Leather Company* 246 US 297, 304 (1917) (hereafter *Oetjen*); *Aksionairnoye Obschestvo A M Luther v James Sagor & Co* [1921] 3 KB 532 (hereafter *Luther*).

⁷⁵ (1988) 165 CLR 30, 41 (hereafter *Heinemann*). See also *Belhaj* (n 56) [225] (Lord Sumption).

⁷⁶ See *Belhaj* (n 56) [35] (Lord Mance), [228]–[229] (Lord Sumption), although Lord Neuberger queried whether this particular rule actually falls within the doctrine at [120].

⁷⁷ *Heinemann* (n 75). See also *Princess Paley Olga v Weisz* [1929] 1 KB 718.

⁷⁸ *Carr v Fracis Times & Co* [1902] AC 176.

This rule is however limited by the same factors that limit the principle of comity upon which the rule of non-enquiry into foreign sovereign acts derives. Courts have refused to apply this rule where to do so would be contrary to fundamental principles of justice, as the discussion of *Oppenheimer v Cattermole*⁷⁹ below illustrates. But, as a further illustration of its foundations in the principle of comity, the rule is limited to the exercise of sovereignty within territory. For instance, in *Laane and Balster v Estonian State Cargo & Passenger SS Line*,⁸⁰ the Supreme Court of Canada refused to give extraterritorial effect to a 1940 decree of the Estonian Soviet Socialist Republic that purported to nationalise all Estonian ships (including those in foreign ports) in respect of a ship that was docked in a Canadian port.

C. Fundamental Principles of Justice as a Limit on Comity

1. The limit as a matter of principle

The principle of comity, or respect for sovereign acts taken within the territory of another state, is not absolute. Although this respect is so well established as to be nearly ubiquitous, it is still only a principle that arises by implication rather than a mandatory rule. As a principle that is implied based upon assumed consent of the sovereign it cannot operate where it would be unreasonable for that consent to be implied. It is plainly reasonable for many differences in legal result to be tolerated by a local legal system on the ground that although the local system does things differently it can respect the different approach taken by others. Hence, a court will not be justified in refusing to recognise a foreign sovereign act merely because that act is contrary to either a principle of the domestic law of the forum state or of international law. It will only be so justified where the foreign act is contrary to a fundamental principle of justice. Cardozo J made this point in respect of domestic law in *Loucks v Standard Oil Co of New York*:⁸¹

We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home ... The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expedience or fairness. They do not close their doors, unless help would

⁷⁹ [1976] AC 249 (hereafter *Oppenheimer*).

⁸⁰ [1949] SCR 530. Cf *Lorentzen v Lydden & Co* [1942] 2 KB 202, a decision not followed by the Court of Appeal in *Peer International Corporation v Termidor Music Publishers Ltd* [2004] CH 212, [2003] EWCA Civ 1156.

⁸¹ 120 NE 198, 201–2 (NY 1918). See also *Kuwait Airways* (n 56) [114].

violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.

2. Recognition of this limit by courts

Courts have variously suggested that they would be justified in refusing to recognise foreign laws that are ‘so barbarous or monstrous’,⁸² ‘so contrary to moral principle’⁸³ or ‘so repugnant to British ideas of international personal morality’⁸⁴ that they should not be recognised, or where the recognition of the law would ‘outrage [a court’s] sense of justice or decency’⁸⁵ or ‘would lead to a result wholly alien to fundamental requirements of justice as administered by an English court’.⁸⁶ Although examples where the courts have actually done so are relatively rare, there are three cases in which the House of Lords and Supreme Court of the United Kingdom have given detailed consideration to the issue in the course of developing what is widely described as a ‘public policy’ exception to rules of private international law based on comity. The examples are valuable although the label, ‘public policy’, is unfortunate given that the court’s task in considering whether the exemption is applicable (and the judicial task generally⁸⁷) is to make decisions based upon principle, rather than policy. As Lord Radcliffe said:⁸⁸

[p]ublic policy suggests something inherently fluid, adjusted to the expediency of the day, the proper subject of the minister or the member of the legislature. The considerations which we accept as likely to weigh with them are just not those which we expect to see governing the decisions of a court of law. On the contrary, we expect to find the law indifferent to them, speaking for a system of values at any rate less mutable than this.

However, despite the unfortunate label of the public policy exception, the courts’ focus is as a matter of substance upon questions of principle.

The first case is *Oppenheimer v Cattermole*.⁸⁹ The issue was whether the appellant, a naturalised British subject, was also a German national for the purpose of claiming an income tax exemption. This required the Court to consider whether to recognise a 1941 German decree that purported to deprive all German Jewish

⁸² *Cammell v Sewell* (1860) 5 H & N 728, 743; 157 ER 1371, 1377.

⁸³ *Luther* (n 74) 559.

⁸⁴ *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA ('The Playa Larga')* [1983] 2 Lloyd's Rep 171, 190.

⁸⁵ *In the Estate of Fuld, decd* (No 3) [1968] P 675, 698.

⁸⁶ *Kuwait Airways* (n 56) [16].

⁸⁷ Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 69.

⁸⁸ Lord Radcliffe, *The Law & Its Compass*, (Northwestern University Press 1960) 43–4.

⁸⁹ *Oppenheimer* (n 79).

people who were living overseas of both their citizenship and any property within Germany. The Court ultimately dismissed the appeal on the basis that the appellant had ceased to be a German citizen by operation of a later, non-discriminatory, law. However, Lord Cross, with whom Lords Hailsham, Hodson, and Pearson agreed, observed that the 1941 decree ‘constitute[d] so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all’.⁹⁰ Lord Salmon did not state the principle so broadly, but rather considered that the Court would be justified in refusing to give effect to the Nazi decree because England was at war with Germany at the time the decree was made and it would not be contrary to ‘international comity … 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’.⁹¹

The second case is *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)*.⁹² When Iraq invaded and occupied Kuwait in August 1990 it directed the defendant to fly ten of the claimant’s aircraft from Kuwait to Iraq. The Iraqi government then passed Resolution of the Revolutionary Command Council No 369 ('RCC 369'), which purported to dissolve the claimant and transfer its assets to the defendant. One issue was whether to recognise RCC 369 as part of the *lex situs*. The House of Lords unanimously held that RCC 369 should not be recognised in the United Kingdom. Each of their Lordships considered that the decree was contrary to public policy on the basis that (a) the seizure and assimilation of the plans ‘were flagrant violations of rules of international law of fundamental importance’,⁹³ and (b) all member states of the United Nations had been called upon to refrain from actions that may be taken as an indirect recognition of the annexation of Kuwait.⁹⁴ For Lord Nicholls, there was also an analogy with *Oppenheimer*, whereby an English court would not enforce or recognise ‘a law depriving those whose property has been plundered of the ownership of their property in favour of the aggressor’s own citizens’.⁹⁵

The third case is *Belhaj v Straw*,⁹⁶ where the Supreme Court heard together two cases, both concerning individuals who had been subject to severe mistreatment, including unlawful abduction and torture, by foreign States. It was alleged that officers of the United Kingdom had been complicit in these acts. One issue was whether the defendants could rely on the non-justiciability limb of the doctrine of foreign act of state to bar the claims. The defendants relied upon the doctrine,

⁹⁰ Ibid 278.

⁹¹ Ibid 282–3.

⁹² *Kuwait Airways* (n 56).

⁹³ Ibid [20] (Lord Nicholls), [114] (Lord Steyn), [125] (Lord Hoffmann), [148] (Lord Hope), [192] (Lord Scott).

⁹⁴ Ibid [20] (Lord Nicholls), 1102–3 (Lord Steyn), [125] (Lord Hoffmann), [146] (Lord Hope), [192] (Lord Scott).

⁹⁵ Ibid [29].

⁹⁶ *Belhaj* (n 56).

asserting that the adjudication of the claims would necessarily involve English courts adjudicating on the lawfulness of acts of foreign sovereigns taken within the territory of those sovereigns. A majority of the court (Lord Sumption dissenting on this point)⁹⁷ held that the foreign act of state doctrine did not apply because the claims were only brought against United Kingdom officials, so it was not strictly necessary for the court to consider the public policy exception. However, Lord Mance, Lord Neuberger, and Lord Sumption (with whom Lord Hughes agreed) each concluded that the public policy exception would have applied to this case. Whilst this case related to the non-justiciability limb of the foreign act of state doctrine, rather than the question of whether a foreign law applies, the Court's discussion of the public policy exception is equally informative as to how that exception might apply to a claim for the application of a foreign law.

3. The Source of fundamental principles of justice

In *Belhaj*, Lord Mance, Lord Neuberger and Lord Sumption each accepted that whether the public policy exception applied was a matter of domestic law.⁹⁸ This is plainly correct because, as we outlined in part one of this essay, a corollary of each state's territorial jurisdiction is that it can determine when to give acts of other sovereigns effect within its own territory. Rules such as the act of state doctrine, and any exceptions to those rules, are a matter of domestic law. But this does not answer the question of how courts ascertain what are 'fundamental principles of justice'.

The Court in *Belhaj* took varied approaches to this question. Lord Mance looked to 'individual rights recognised as fundamental by English statute and common law', rather than considering whether the conduct in issue was contrary to *ius cogens* norms.⁹⁹ His Lordship noted that freedom from arbitrary detention was enshrined in Magna Carta, and that freedom from torture was another long-standing fundamental right in English law.¹⁰⁰ In contrast, Lords Neuberger and Sumption considered international law to be relevant or decisive in determining whether the conduct was contrary to principles that were sufficiently fundamental.¹⁰¹ Lord Sumption considered that, generally speaking, if a norm is *ius cogens* then it will be a fundamental principle of justice.¹⁰² For this proposition his Lordship adopted the words of Le Bel J in *Kazemi Estate v Islamic Republic of Iran*,¹⁰³ where, in the context of determining whether an international obligation was a fundamental principle of

⁹⁷ Ibid [233], [238].

⁹⁸ Ibid [98] (Lord Mance), [154]–[155] (Lord Neuberger), [257] (Lord Sumption).

⁹⁹ Ibid [107].

¹⁰⁰ Ibid [98]–[99].

¹⁰¹ Cf Lord Mance: ibid [107].

¹⁰² Ibid [257].

¹⁰³ [2014] 3 SCR 176, 248 [150]–[151].

justice for the purposes of s 7 of the Canadian Charter of Rights and Freedoms, His Honour observed that 'not all commitments in international agreements amount to principles of fundamental justice' but that 'jus cogens norms can generally be equated with principles of fundamental justice'. On this basis, Lord Sumption concluded that the allegations of torture enlivened the public policy exception,¹⁰⁴ but that the allegations of ill-treatment falling short of torture did not.¹⁰⁵

Lord Mance acknowledged that the differences in approach between his Lordship and Lord Sumption did not make any difference to the outcome of the case and was unlikely to make a difference in any case.¹⁰⁶ This instinct is revealing. It illustrates the point that fundamental principles of justice do not truly derive from either domestic or international law. Fundamental principles of justice are principles that are so fundamental, or so basic, that any legal system would be unjust without them. An example illustrates this point. English common law generally insists upon consideration before an agreement will be binding. Continental law generally does not. In a sense, the legal principle of consideration might be said to be fundamental to the English law of contract. But it is not a principle that is fundamental to the justice of the legal system. By contrast, a legal principle that is truly fundamental to the English legal system is one without which English lawyers would consider any legal system to be fundamentally unjust. The existence of such basic principles ought not, therefore, be identified solely by reference to the legal system of the forum. Such principles ought to be derived from reason and evident in many legal systems, and particularly in international law. Today they might be described as 'natural law'.

4. The Roman roots of fundamental or natural principles of justice

In Book One of his Institutes, Justinian, borrowing almost verbatim from Gaius,¹⁰⁷ wrote:¹⁰⁸

All peoples with laws and customs apply law which is partly theirs alone and partly shared by all mankind. The law which each people makes for itself is special to its own state. It is called 'state law', the law peculiar to that state. But the law which natural reason makes for all mankind is applied the same everywhere. It is called 'the law of all peoples' because it is common to every nation.

¹⁰⁴ *Belhaj* (n 56) [268].

¹⁰⁵ *Ibid* [280].

¹⁰⁶ *Ibid* [107].

¹⁰⁷ W M Gordon and O F Robinson (trs), *The Institutes of Gaius* (Duckworth 1988) 19 (hereafter Gordon and Robinson, *Institutes of Gaius*).

¹⁰⁸ Peter Birks and Grant McLeod (trs), *The Institutes of Justinian* (Duckworth 1987) 37, para 1.2.

These fundamental principles later came to be described as natural law. But to the Romans they were the law of ‘peoples’ or *ius gentium*. The law of peoples was not then given the label ‘natural law’ because it did not come naturally or instinctively. It required the hard work of reason. Since the rules of basic reason required an advanced mind, they were not natural to all animals. Hence, the rules derived by reason, fundamental to all peoples, were described as *ius gentium* or the laws of peoples. Natural law, as the Romans called it, was more like the law of base instinct. In a more detailed compilation in Justinian’s Digest, on ‘Justice and Law’, there is a passage from the first Book of Ulpian’s Institutes defining the two branches of public and private law. ‘Private law’, it was written, ‘is tripartite, being derived from principles of *jus naturale*, *jus gentium*, or *jus civile*.¹⁰⁹ *Ius naturale* for the Romans is the law common to all animals.¹¹⁰

Ulpian’s exposition of *ius gentium* is followed by a number of examples: from Pomponius, ‘religious duties toward God, or the duty to be obedient to one’s parents and fatherland’; from Florentinus, ‘the right to repel violent injuries’, the protection of bodily security, and the ‘grave wrong for one human being to encompass the life of another’; from Ulpian again, ‘manumissions’ (the granting of freedom to slaves); and from Hermogenian, the proliferation of commerce, ‘including contracts of buying and selling and letting and hiring’.¹¹¹ For completeness, Ulpian continued: ‘whenever to the common law we add anything or take anything away from it, we make a law special to ourselves, that is, *jus civile*, civil law.’

As Justinian and Gaius recognised, the law of a nation or a people is ‘partly its own and partly common to all mankind’.¹¹² When we speak of the common law in this sense, we speak literally of fundamental principles derived from reason that are *common* to the law of all peoples. Some of the ancient examples highlighted earlier—self-defence, the prohibition on murder, and the law of contracts—still hold true today. There is, of course, divergence in the manner in which those principles manifest themselves in rules in the law that becomes the *ius civile*, the State law. But the same fundamental principles underlie these rules across all jurisdictions.

Fundamental principles should not be identified merely by an examination of important matters of contemporary forum public policy. Rather their existence should be able to be derived by reason from the society in which we live and the rules which govern it. The notion of fundamental principles of law conceived by reason is both outward and inward facing. From an outward face, John Rawls described a doctrine of ‘public reason’ as that which a citizen may reasonably expect

¹⁰⁹ Alan Watson (tr), *The Digest of Justinian* (University of Pennsylvania Press 1985) vol 1, 1 (hereafter Watson, *Digest*).

¹¹⁰ Ibid 1.

¹¹¹ Ibid 1–2.

¹¹² Gordon and Robinson, *Institutes of Gaius* (n 107) 19. See Watson, *Digest* (n 109), 1.

other citizens to endorse.¹¹³ As to the inward facing aspect, John Locke defined reason as:¹¹⁴

[T]he discovery of the certainty or probability of such propositions or truths, which the mind arrives at by deduction made from such ideas, which it has got by the use of its natural faculties; viz by the use of sensation or reflection.

Whilst these principles are not determined by reference to contemporary public policy, what is considered to be a fundamental principle of justice can change over time because the source of these principles, reason, is imperfect. However, if, by the application of reason, it is deduced that one ought to have certain rights, it must follow that although the boundaries of those rights might vary, the underlying basic rights ought to be recognised universally regardless of the existence of national borders.

5. Fundamental principles of justice in international law

From roots in Roman law the earliest descriptions of the ‘law of nations’ in international law also distinguished the law of all nations derived by reason, or *ius gentium*, from the ‘law of nature’. For instance, Grotius¹¹⁵ and Blackstone¹¹⁶ spoke not merely of compacts within communities or the benefits of all people but also of the compacts *between* communities and between cities that are deducible by reason. As international law developed, the ‘law of nations’ was not confined to those principles within a State by which natural reason would dictate that people were entitled to expect others and the State to behave. It came also to include those principles by which States were entitled to expect other States to behave. As Judge Crawford expressed the expansion, the influential forebears of international law—in addition to Grotius there were Vitoria, Gentili, Pufendorf, Wolff, Vattel, and others—led to the inclusion of the ‘specialized body of legal thinking about the relations between rulers, reflective of custom and practice in such matters as treaty-making, the status of ambassadors, the use of the oceans, and the modalities of warfare’.¹¹⁷

International arbitral tribunals also recognised and applied the general principles of the law of nations between nations. In the *Antoine Fabiani Case* between France and Venezuela, the arbitrator defined these principles as ‘the rules common to most legislations or taught by doctrines [sic]’¹¹⁸ (emphasis added). Such

¹¹³ John Rawls, ‘The Idea of Public Reason Revisited’ (1997) 64 University of Chicago L Rev 765, 773.

¹¹⁴ John Locke, *An Essay Concerning the Human Understanding* (Clarendon Press 1894) vol 2, bk IV, ch VXIII, 416.

¹¹⁵ William Evans (tr), *De Jure Belli ac Pacis* (Thomas Baffet 1682) viii.

¹¹⁶ Blackstone, *Commentaries on the Laws of England* (1769) bk IV, 66–7.

¹¹⁷ Brownlie’s *Principles of Public International Law in English Courts* (n 8) 3–4.

¹¹⁸ *Antoine Fabiani Case* (1905) 10 RIAA 83, 117.

principles were also recognised in preamble to the Convention (IV) respecting the Laws and Customs of War on Land in 1907 at the Hague.¹¹⁹ It was against this background that Art 38(1)(c) of the Statute of the Permanent Court of International Justice declared the ‘law of nations’ as a basic source of international law. Art 38 of the Statute of the Permanent Court of International Justice was the foundation for Art 38 of the Statute of the International Court of Justice, the only addition to which was words in the chapeau which were calculated to emphasise the Court’s function to apply the enumerated sources as *international* law.¹²⁰ Art 38(1) of the ICJ Statute provides for four categories of source: (a) international conventions; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; and (d) subject to the provisions of Art 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Art 38(1)(c) uses the adjective ‘civilized’ apparently to describe the nations that accept these common principles. Today this is an unfortunate adjective. As Judge Crawford said in the latest edition of *Brownlie’s Principles of Public International Law*, ‘it is easy to see how that term could possess an unfortunate, even colonialist, connotation’.¹²¹ And as Judge Ammoun, in a separate opinion in the *North Sea Continental Shelf* cases, said, this distinction was ‘unknown to the founding fathers of international law’.¹²² Rather than focusing upon the adjective ‘civilized’ in Art 38(1)(c), the importance of the subsection should be recognised as lying in the reference to the general nature of the principles of law. The reference to civilised nations is really a loose expression of that which Hersch Lauterpacht called the ‘ultimate assumption of international law’, namely that general principles exist within an ‘interdependent community’ of States.¹²³ Lauterpacht described this assumption as combining two essential elements: ‘the law conceived as reason and the law conceived as will imposing itself upon the subjects’.¹²⁴ General principles of law are thus identified by reason and applied, by rules developed from those common principles, in all legal systems.

¹¹⁹ See Permanent Court of International Justice: Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee June 16th–July 24th 1920 with Annexes* (Van Langenhuyzen Brothers 1920) 323–4.

¹²⁰ Al-Farsy, ‘Report of the Rapporteur (Nasrat al-Farsy, Iraq) of Committee IV/1’ in *Documents of the United Nations Conference on International Organization San Francisco, 1945* (UN Information Organizations 1945) vol 13, 381, 392; Hugh Thirlway, ‘The Sources of International Law’ in Malcolm D Evans (ed), *International Law* (3rd edn, OUP 2010) 95, 98–9 (hereafter Thirlway, ‘Sources of International Law’).

¹²¹ *Brownlie’s Principles of Public International Law in English Courts* (n 8) 31 fn 89.

¹²² *North Sea Continental Shelf* [1969] ICJ Rep 3, 132–3 (Sep Op Ammoun).

¹²³ Lauterpacht (ed), *International Law: being the Collected Papers of Hersch Lauterpacht* (1970) vol 1, 58.

¹²⁴ Ibid 58.

During the 1960s legal scholars began to recognise that some of the certain general principles of law were peremptory or *ius cogens* norms.¹²⁵ Although there remains dispute about the source of *ius cogens* norms as superior norms of international law,¹²⁶ and although there is no general agreement as to which rules have this character,¹²⁷ such norms are identified in Art 53 of the Vienna Convention on the Law of Treaties as any ‘norm 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’. Despite the difficulties in characterising a norm as *ius cogens*, the fact that such principles are accepted by the international community and are non-derogable, highlights that they are principles without which a legal system is unjust. Although Lord Sumption suggested in *Belhaj*¹²⁸ that there could be instances where *ius cogens* norms did not fall within the ‘public policy’ exception based on fundamental principles of justice, the better approach is that they are a necessary part of a just legal system and can be equated with fundamental principles of justice, as Le Bel J recognised in *Kazemi*.¹²⁹

The rules to which these *ius cogens* norms have given rise represent a tiny fraction of those rules of customary international law, derived from general state practice and *opinio iuris*. The less fundamental rules of customary international law, based on general principles, are sometimes described as having been ‘automatically incorporated’ into domestic law unless inconsistent with other extant rules such as legislation or judicial decisions.¹³⁰ But in ‘view of the importance of the rights involved’ the obligations to which *ius cogens* norms have given rise are those in which ‘all States can be held to have a legal interest in their protection; they are obligations *erga omnes*’ which derive ‘from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination’.¹³¹ They are not principles from which any just legal system can permit departure in formulating its legal rules other than to the extent that the contours of the rules may be affected by other fundamental legal principles. Indeed, when Story recognised that ‘comity cannot prevail in cases, where it violates the law of our own country, the law of nature or the law of God’¹³² he relied upon Barnewall and Cresswell’s King’s Bench Report of *Forbes v Cochrane*,¹³³ where Best J had

¹²⁵ Brownlie’s *Principles of Public International Law in English Courts* (n 8) 581.

¹²⁶ See Thirlway, ‘Sources of International Law’ (n 120) 173–86.

¹²⁷ Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law* (9th edn, Longman 2008) vol 1, para 2.

¹²⁸ *Belhaj* (n 56) [257].

¹²⁹ *Kazemi Estate v Islamic Republic of Iran* [2014] 3 SCR 176.

¹³⁰ *Chung Chi Cheung v The King* [1939] AC 160, 168; *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 QB 529; *Nevsun* (n 6) [86]–[87], [211].

¹³¹ *Case Concerning Barcelona Traction, Light and Power Company (Belgium v Spain)* [1970] ICJ 1 [33]–[34].

¹³² Story, *Commentaries* (n 18) § 244.

¹³³ (1824) 2 B & C 448, 472–3; 107 ER 450, 459–60.

concluded that the slavery laws of East Florida were ‘against the law of nature and the law of God’ and therefore could not be recognised in an English court.

6. Fundamental principles of justice are illustrated by both international and domestic law

Within a domestic legal system, fundamental principles of justice might be concerned with regulating conduct within a nation: between people themselves and between people and the State. They are now also concerned with regulating principles of international conduct. In many cases, at an even higher level of generality, the same norms might govern both. For instance, the international principles that are the part of the law of nations which give rise to the prohibition of slavery or genocide,¹³⁴ self-determination,¹³⁵ and *uti possidetis iuris*¹³⁶ might also be seen as akin to interpersonal norms concerned with bodily liberty and integrity, freedom of expression, and private ownership of land—adapted to the scale and discourse of international relations.

In an interdependent international system, marked by comity, it would be unusual for fundamental principles of justice to differ across domestic legal systems and from international law. Such fundamental principles, deduced by reason, are usually therefore a source of both domestic law and international law. This is why the diverging paths taken by Lord Mance and Lord Sumption in *Belhaj* ultimately led to the same conclusion. The question will not usually be whether the relevant principle is a principle of domestic law or of international law. Rather, the question is whether the principle is a fundamental principle of justice which generally underlies domestic and international law.

7. The identification of fundamental legal principles and the balancing of them

The legal principles which are fundamental to systems of law can usually be identified by reference to rights or freedoms to which a legal system gives direct effect. As to the rights that arise from fundamental principle, more than a century ago in *Allen v Flood*¹³⁷ Cave J, following Blackstone, said

¹³⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep 15, 23.

¹³⁵ *Western Sahara* [1975] ICJ Rep 12 [59].

¹³⁶ *Frontier Dispute* [1986] ICJ Rep 554 [20].

¹³⁷ [1898] AC 1, 29.

The personal rights with which we are most familiar are: 1. Rights of reputation; 2. Rights of bodily safety and freedom; 3. Rights of property; or, in other words, rights relative to the mind, body, and estate; and, if the general word 'estate' is substituted for 'property' these three rights will be found to embrace all the personal rights that are known to the law; but in that case it must be admitted that the third class is very general, and embraces a good many subdivisions, which, however, like causes in natural science, are not to be unnecessarily multiplied.

To these basic rights can be added those that are based on the fundamental principle that binding undertakings should be respected and the principle that there will be circumstances where justice requires that a person be entitled to restitution of another's unjust enrichment at a person's expense. In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*¹³⁸ Lord Wright described the latter as a principle for which 'any civilized system of law is bound to provide remedies'. Basic freedoms to be added to this list are general liberties against the world at large although they are often expressed as freedoms from interference by the State. Freedoms that are generally recognised as fundamental include freedom of expression, freedom of association, and freedom of religion.

Although these fundamental rights and freedoms can be seen in many legal systems and in international law, as direct instantiation of fundamental principles of justice, comity will not always be limited by a foreign legal system's derogation from a fundamental right or freedom. One reason for this is that fundamental rights or freedoms are not absolute. For instance, one person's right to reputation qualifies another's right to freedom of expression. A person's right to exclude others from property is qualified by another's right to bodily safety. Another reason is that the extent to which the rights and freedoms are qualified by each other will be heavily dependent upon other characteristics of a society and its existing legal system. The extent to which fundamental legal principles are protected by the rights recognised by a legal system will vary across legal systems and also within a legal system over time.

In *Kuwait Airways*, Lord Nicholls held that 'The acceptability of a provision of foreign law must be judged by contemporary standards.'¹³⁹ In *Belhaj v Straw*, Lord Sumption acknowledged that 'the standards which public policy applies in cases with an international dimension have changed a great deal in the past half-century',¹⁴⁰ noting that United States courts abstained from adjudicating the lawfulness of the arbitrary detention and expropriation of property by foreign states in *Hatch v Baez*,¹⁴¹ *Underhill v Hernandez*,¹⁴² and *Oetjen v Central Leather Co*¹⁴³ on

¹³⁸ [1943] AC 32, 61.

¹³⁹ *Kuwait Airways* (n 56) [28], citing Lord Wilberforce in *Blathwayt v Baron Cawley* [1976] AC 397, 426.

¹⁴⁰ *Belhaj* (n 56) [251]–[252].

¹⁴¹ 7 Hun 596 (1876).

¹⁴² 168 US 250 (1897).

¹⁴³ *Oetjen* (n 74).

the basis that it was more appropriate that those matters be resolved by diplomats. Such an outcome in 1917 was necessitated by ‘the highest considerations of international comity and expediency’.¹⁴⁴ One hundred years later, the Supreme Court of the United Kingdom came to a very different conclusion in *Belhaj and Kuwait Airways* as to how it should weigh the same fundamental principles in issue in the American cases—the rights to liberty and property—against rules that were based upon considerations of comity.

A forum legal system can sometimes tolerate a different balance being struck between fundamental rights and freedoms without necessarily reaching the conclusion that the underlying principle is not respected by the foreign legal system. The question of whether the balance is one that denies sufficient respect to a fundamental principle of justice may depend upon the importance of the embedded principle in the forum. This is illustrated by *Bachchan v India Abroad Publications Inc.*¹⁴⁵ In that case the Supreme Court of New York refused to enforce an English judgment against the defendant for defamation on the basis that English laws of defamation lacked an equivalent to the First Amendment and ‘The protection to free speech and the press embodied in that amendment would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the US Constitution’.¹⁴⁶

D. New Fundamental Principles of Justice and the Example of Privacy

Many of the fundamental principles of justice outlined above have been recognised for centuries. But what about new fundamental principles of justice? There are two ways in which new fundamental principles of justice might be recognised. The first way is if the principle had always existed but took many years or centuries to be recognised. For instance, in a Roman society that thought deeply about which principles counted as fundamental due to natural reason, slavery was a shocking inconsistency. But that does not mean slavery only later became contrary to basic principle when society progressed. Rather, slavery was always contrary to natural reason. Even in Roman law, Ulpian had recognised this and, Justinian’s Institutes had recorded that slavery was contrary to natural right.¹⁴⁷ A future society might think the same way about the right to life for animals other than humans. A second way is where a fundamental principle of justice develops due to changes in society

¹⁴⁴ Ibid 303–4.

¹⁴⁵ 585 NYS 2d 661 (1992).

¹⁴⁶ *Bachchan v India Abroad Publications Inc* 585 NYS 2d 661, 665 (NY 1992).

¹⁴⁷ Inst 1.III.2.

creating a basic need that did not exist before. The line between the two is not always clear. This part focuses upon the possible recognition of a new fundamental principle of justice that might arguably fall within either category. The example is the principle of privacy which has only been afforded direct recognition relatively recently and in some domestic legal systems has not yet been treated as fundamental nor been given direct effect.

In the United States in 1890, Samuel Warren and Louis Brandeis published an article in the Harvard Law Review that was later described as having 'the unique distinction of having initiated and theoretically outlined a new field of jurisprudence'.¹⁴⁸ In it, they advocated a 'right "to be let alone"'.¹⁴⁹ They said that this right was necessitated by the invasion of 'the sacred precincts of private and domestic life' by 'Instantaneous photographs', 'newspaper enterprise', and 'numerous mechanical devices'.¹⁵⁰ However, their argument was not really that the principle of privacy only came into existence with mass media. Instead, their argument was that mass media meant that the existing protections afforded by common law and equitable doctrines were no longer adequate to protect individual privacy.¹⁵¹ Privacy had become too fundamental to be protected only indirectly.

The ground-breaking article of Warren and Brandeis had little immediate effect in the courts. In 1902, the Court of Appeals of New York rejected a more generalised right of privacy.¹⁵² That case concerned the unauthorised use of a minor's image in a flour advertisement disseminated with 25,000 copies. A demurrer was allowed on the basis that she had no right to privacy. The decision was met with public outcry and a legislative prohibition upon the use of the name, portrait, or picture of another for commercial purposes without written consent.¹⁵³ Three years later, a Supreme Court of Georgia decision concerning essentially the same question recognised a distinct right of privacy 'derived from natural law'.¹⁵⁴ By 1931, the Restatement of Torts was able to say that '[a] person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other'.¹⁵⁵ By the time of Dean Prosser's famous article in 1960 there were 'over three hundred cases in the books'.¹⁵⁶

¹⁴⁸ Wilbur Larremore, 'The Law of Privacy' (1912) 12 Columbia L Rev 693, 693.

¹⁴⁹ Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 Harvard L Rev 193, 195 (hereafter Warren and Brandeis, 'Right to Privacy') quoting Thomas M Cooley, *A Treatise on the Law of Torts or the Wrongs which arise Independent of Contract* (2nd edn, Callaghan & Company 1888) 29.

¹⁵⁰ Warren and Brandeis, 'Right to Privacy' (n 149) 195.

¹⁵¹ Ibid 211.

¹⁵² *Roberson v Rochester Folding Box Co* 64 NE 442, 443, 447 (NY 1902).

¹⁵³ W Page Keeton and others (eds), *Prosser and Keeton on The Law of Torts* (5th edn, West Publishing Co 1984) § 117, 850–1 (hereafter *Prosser and Keeton*).

¹⁵⁴ *Pavesich v New England Life Insurance Co* (50 SE 68, 70 (Ga 1905). See *Prosser and Keeton* (n 152) § 117, 851.

¹⁵⁵ Restatement (First) of Torts (1939) § 867. See also *Melvin v Reid* (1931) 297 P 91, 92.

¹⁵⁶ William L Prosser, 'Privacy' (1960) 48 California L Rev 383, 388.

As in the United States, the development of a right to privacy in Germany began with distinguished academics in the late nineteenth century, particularly Josef Kohler in 1893 and Otto von Gierke in 1895.¹⁵⁷ However, at the turn of the century their advocacy for a right of general protection against interferences with personal interests was rejected by the drafting committee of *Bürgerliches Gesetzbuch* (BGB) on the basis that it would unacceptably ‘place non-material values on the same level as property interests’.¹⁵⁸ Consistently with this approach, s 823(1) of the BGB was said to be concerned only with proprietary rights.¹⁵⁹ That subsection provides that compensation is payable for unlawful injury to ‘the life, body, health, freedom, property or another right of another person’. However, following Arts 1 and 2 of the *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law) of 1949 which provided that ‘[h]uman dignity shall be inviolable’ and that ‘[e]very person shall have the right to free development of his personality insofar as he does not violate the rights of others’, the German courts held that s 823(1) contained a general protection against ‘invasions of the right of personality’.¹⁶⁰ The privacy of an individual is regarded as an aspect of this all-encompassing protection of the individual ‘in the exercise of his faculties in every conceivable direction’.¹⁶¹ As the Constitutional Court said in another right of personality case in 1973 concerning Princess Soraya:¹⁶²

Occasionally, the law can be found outside the positive legal rules erected by the state; this is law which emanates from the entire constitutional order and which has as its purpose the ‘correction’ of written law. It is for the judge to ‘discover’ this law and through his opinions give it concrete effect.

The German right of personality is broader in scope than the American right to privacy.¹⁶³ They both instantiate the general principle of privacy but Germany does so with a much broader right. An example of its breadth is the Constitutional Court’s 1973 *Lebach* decision.¹⁶⁴ The petitioner was an accessory to an armed

¹⁵⁷ Basil S Markesinis and Hannes Unberath, *The German Law of Torts: A Comparative Treatise* (4th edn, Hart Publishing 2002) 74 (hereafter Markesinis and Unberath, *German Law of Torts*).

¹⁵⁸ Ibid 74.

¹⁵⁹ H C [Harold Cooke] Gutteridge, ‘The Comparative Law of the Right to Privacy’ (1931) 47 Law Quarterly Review 203, 206 (hereafter Gutteridge, ‘Comparative Law’). Cf the particular provision of the Kunstruhebergesetz, s 22.

¹⁶⁰ ‘Verletzungen des Persönlichkeitsrechts’: Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 687 (hereafter Zweigert and Kötz, *Introduction to Comparative Law*).

¹⁶¹ Gutteridge, ‘Comparative Law’ (n 159) 203–4.

¹⁶² BVerfGE 34, 269 (1973). See Markesinis and Unberath, *German Law of Torts* (n 157) 31; Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke University Press 2012) 165–9.

¹⁶³ Harry D Krause, ‘The Right to Privacy in Germany—Pointers for American Legislation?’ [1965] Duke Law Journal 481, 484.

¹⁶⁴ BVerfGE 35, 202 (1973). See Zweigert and Kötz, *Introduction to Comparative Law* (n 160) 707; Markesinis and Unberath, *German Law of Torts* (n 157) 423–9.

robbery of a military arsenal, in which four soldiers were killed. Shortly before his release from six years' imprisonment, a television station commissioned a documentary about the robbery, incorporating the petitioner's name and likeness. The petitioner successfully obtained an interim injunction from Constitutional Court restraining broadcast of those details due to the documentary's likely impact on his ability to reintegrate into society.

During this period of development, international law also began to recognise a fundamental principle of privacy. In 1948 the General Assembly of the United Nations adopted the Universal Declaration of Human Rights which reflected 'general principles of law or elementary considerations of humanity'.¹⁶⁵ Art 12 includes protection against 'arbitrary interference' with privacy, family, home, or correspondence.¹⁶⁶ There was little discussion about the inclusion of this principle. It was said to be 'an obvious choice in a bill of rights that was supposed to reassert some venerable rights as well as come up with some new ones appropriate for a modern society'.¹⁶⁷ Although the Universal Declaration is not binding, a right to privacy was recognised in almost identical terms¹⁶⁸ in Art 17 of the International Covenant on Civil and Political Rights which was adopted by the General Assembly in 1966 and came into force in 1976, after its thirty-fifth ratification.¹⁶⁹ Today there are 173 State Parties.¹⁷⁰ The Universal Declaration was also the 'most significant normative influence' on the European Convention on Human Rights¹⁷¹ which was adopted in 1950 and came into force in 1953. Article 8(1) of that Convention, entitled 'Right to respect for private and family life', provides, subject to qualification in Art 8(2), that as against public authorities:¹⁷² 'Everyone has the right to respect for his private and family life, his home and his correspondence.'¹⁷³ The Supreme Court of the United Kingdom has recognised one of the 'fundamental values' protected by Art 8 to be 'the inviolability of ... the personal and psychological space within which each individual develops his or her own sense of self and relationships with other

¹⁶⁵ Brownlie's *Principles of Public International Law in English Courts* (n 8), 612.

¹⁶⁶ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) Art 12.

¹⁶⁷ Megan Richardson, *The Right to Privacy: Origins and Influence of a Nineteenth-Century Idea* (CUP 2017) 113. See also Oliver Diggelmann and Maria Nicole Cleis, 'How the Right to Privacy Became a Human Right' (2014) 14 *Human Rights L Rev* 441, 443 (hereafter Diggelmann and Cleis, 'Human Right').

¹⁶⁸ James Michael, *Privacy and Human Rights* (UNESCO 1994) 19; Diggelmann and Cleis, 'Human Right' (n 167) 449.

¹⁶⁹ See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 49.

¹⁷⁰ United Nations, 'Multilateral Treaties Deposited with the Secretary-General' ch IV, 4 <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf>> accessed 14 September 2020.

¹⁷¹ William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 1.

¹⁷² *P and S v Poland* App no 57375/08 (ECtHR, 30 October 2012) [94]. See also *Nunez v Norway* (2014) 58 EHRR 17, 534 [68].

¹⁷³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 8.

people.¹⁷⁴ Finally, Art 7 of the Charter of Fundamental Rights of the European Union, which took legal effect with the entry into force of the Treaty of Lisbon in 2009, has broadly the same meaning and scope as Art 8 of the ECHR.¹⁷⁵

In contrast with the direct application of the principles of privacy over this period in the United States, Germany, and international law, Anglo-Australian jurisprudence traditionally gave effect to principles of privacy, if at all, only indirectly by various rights that directly protected other interests. For instance, one way in which a privacy principle might be said to have been indirectly protected was through the protection given to property rights. In *Prince Albert v Strange*, the Prince Consort tried to prevent the exhibition of unauthorised copies of etchings made of the Royal Family. The Lord Chancellor, echoing earlier statements by Lord Eldon, said:¹⁷⁶

Upon the principle, therefore, of protecting property, it is that the common law, in cases not aided or prejudiced by statute, shelters the privacy and seclusion of thoughts and sentiments committed to writing, and desired by the author to remain not generally known.

Other ways in which the privacy principle might be said to have been given some indirect effect is through the protection given by legal doctrines including implied contract terms,¹⁷⁷ defamation,¹⁷⁸ trespass,¹⁷⁹ nuisance,¹⁸⁰ copyright,¹⁸¹ and breach of confidence.¹⁸² This incidental protection of privacy in the course of protecting other interests left gaps in any protection of privacy. For instance, in *Corelli v Wall*,¹⁸³ the Court refused an injunction to restrain publication and sale of postcards depicting the plaintiff in imaginary scenes in her life. The postcards were not defamatory and there was no authority to establish a right to restrain

¹⁷⁴ *Sutherland v Her Majesty's Advocate (Scotland)* [2020] UKSC 32 [27], quoting *R (Countryside Alliance) v Attorney-General* [2007] UKHL 52, [2008] 1 AC 719 [116].

¹⁷⁵ 'Explanations Relating to the Charter of Fundamental Rights' (2007) OJ C303/17, 20. See also Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Art 16; American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System* OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992) Art V; American Convention on Human Rights 'Pact of San José, Costa Rica' (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 1979 Art 11.

¹⁷⁶ (1849) 2 De G & Sm 652, 695; 64 ER 293, 312 (hereafter *Prince Albert*). See also *Southey v Sherwood* (1817) 2 Mer 435, 438; 35 ER 1006, 1007.

¹⁷⁷ *Pollard v Photographic Co* (1888) 40 Ch D 345 (hereafter *Pollard*).

¹⁷⁸ *Monson v Tussauds Ltd* [1894] 1 QB 671, 687 (CA); *Pryce & Son Ltd v Pioneer Press Ltd* (1925) 42 TLR 29.

¹⁷⁹ *Morris v Beardmore* [1981] AC 446, 464 (HL).

¹⁸⁰ cf *Bernstein v Skyviews & General Ltd* [1978] QB 479, 489.

¹⁸¹ See eg *Williams v Settle* [1960] 1 WLR 1072 (CA).

¹⁸² *Prince Albert* (n 176); *Pollard* (n 177); *Argyll v Argyll* [1967] Ch 302; *Stephens v Avery* [1988] Ch 449.

¹⁸³ (1906) 22 TLR 532 (Ch).

publication of an unauthorised photograph.¹⁸⁴ In 1930, Greer LJ said in *Tolley v JS Fry & Sons Ltd*:¹⁸⁵

I have no hesitation in saying that in my judgment the defendants in publishing the advertisement in question, without first obtaining Mr Tolley's consent, acted in a manner inconsistent with the decencies of life, and in doing so they were guilty of an act for which there ought to be a legal remedy. But unless a man's photograph, caricature, or name be published in such a context that the publication can be said to be defamatory within the law of libel, it cannot be the subject-matter of complaint by action of law.

That decision was overturned on appeal to the House of Lords, but only on the basis that the imputation was defamatory.¹⁸⁶ In between the Court of Appeal's decision and the decision on appeal to the House of Lords, Winfield urged the recognition of an independent tort of privacy.¹⁸⁷ Although his plea was not accepted, the law of confidence developed in England to provide something close to direct protection of a central aspect of privacy by a tort of misuse of private information. This development arose after the House of Lords held that an obligation of confidence could arise from the knowing receipt of confidential information¹⁸⁸ and then subsequently, in a development influenced by the presence of European law, held that misuse of private information fell within the scope of this wrong.¹⁸⁹ In the latter case, which has been seen as the recognition of distinct causes of action protecting privacy on one hand and confidential information on the other,¹⁹⁰ Lord Nicholls said:¹⁹¹

Now the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.

¹⁸⁴ See also *Sports and General Press Agency Ltd v "Our Dogs" Publishing Co Ltd* [1917] 2 KB 125 (CA).

¹⁸⁵ [1930] 1 KB 467, 478 (CA).

¹⁸⁶ *Tolley v JS Fry and Sons Ltd* [1931] AC 333 (HL).

¹⁸⁷ Percy H Winfield, 'Privacy' (1931) 47 Law Quarterly Review 23.

¹⁸⁸ *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281 (HL).

¹⁸⁹ *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 (hereafter *Campbell*). In addition to the influence of the European Convention on Human Rights see also C-131/12 *Google Spain SL v Agencia Espanola de Proteccion de Datos* ECLI:EU:C:2014:317 where the CJEU applied the right to privacy to search engine providers, and held that there is a temporal aspect to the right (ie a 'right to be forgotten').

¹⁹⁰ *Douglas v Hello! Ltd (No 3)* [2007] UKHL 21, [2008] 1 AC 1 [255].

¹⁹¹ *Campbell* (n 189) [14].

In contrast with English law, Australian law has not yet developed any tort of misuse of private information or any other direct instantiation of a principle of privacy. The course of Australian law has been heavily influenced by a decision in 1937 when the High Court refused, in the *Victoria Park Racing* case, an injunction restraining the broadcast of a race meeting from a makeshift tower on land adjoining the race course.¹⁹² Before his retirement from the High Court, Callinan J extrajudicially called for that decision to be revisited¹⁹³ and judicially described the decision as having ‘the appearance of an anachronism, even by the standards of 1937’.¹⁹⁴ Two other justices have referred to the description of invasion of privacy as ‘one of the “developing torts”’,¹⁹⁵ and have observed that the *Victoria Park Racing* case involved a commercial company, not a private person, and that the claim against it was not based upon any breach of privacy but was concerned with breach of copyright, nuisance, and the rule in *Rylands v Fletcher*.¹⁹⁶

It is not necessary to consider in this essay how Australian law might develop. It suffices to say that there are at least four paths. First, it may be that Australian law will continue to follow the path of *Victoria Park Racing* on the basis that privacy is not a principle worthy of protection, with the argument that legal wrongdoing is not established by causing misery to others if that misery does not amount to established psychological harm that constrains independent action.¹⁹⁷ Secondly, it may be that Australian law could recognise privacy as a principle worthy of protection but not as one that gives rise to any direct right, thus preserving the status quo which only protects the principle in a patchwork way. Thirdly, it may be that Australian law will further develop other wrongs including the equitable wrong of breach of confidence to include the misuse of private information so as to directly instantiate a principle of privacy. There are suggestions of this in a decision in Victoria allowing recovery in an action arising from the publication of a videotape of sexual activities between the defendant and his ex-partner.¹⁹⁸ Fourthly, and finally, it may even be that direct protection of privacy is recognised in a new and independent tort. Whatever the view that is taken, the key point is that in many areas the development of such basic legal rules will need to proceed by considering

¹⁹² *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479. Whilst English law has given effect to the principle of privacy by the rules outlined above, like Australia it does not recognise that a person has a cause of action in nuisance arising from overlooking: *Fearn v Board of Trustees* [2020] EWCA Civ 104, [2020] 2 WLR 1081, 1100 [69].

¹⁹³ I D F (Ian David Francis) Callinan, ‘Privacy, Confidence, Celebrity and Spectacle’ (2007) 7 Oxford University Commonwealth Law Journal 1, 2.

¹⁹⁴ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 [318] (hereafter *Lenah Game Meats*).

¹⁹⁵ Ibid [106], quoting *Church of Scientology v Woodward* (1982) 154 CLR 25, 68.

¹⁹⁶ *Lenah Game Meats* (n 194) [107]–[111].

¹⁹⁷ Robert Stevens, ‘Damages for Wrongdoing in the Absence of Loss’ in Jason N E Varuhas and Nicole A Moreham (eds) *Remedies for Breach of Privacy* (Hart Publishing 2018) 97, 107–8. See *Day v Brownrigg* (1878) 10 Ch D 294.

¹⁹⁸ *Giller v Procopets (No 2)* (2008) 24 VR 1.

whether there exists, as many foreign jurisdictions and international law have recognised, an underlying principle of privacy.

The manner in which the law develops in countries such as Australia which have no direct privacy protection might be important for the limits of the principle of comity and the application of rules based upon those limits. The important point for the purposes of this essay is that if the increasing recognition of the fundamental nature of a principle of privacy by national and international courts and in basic human rights instruments were to lead now to its recognition as a fundamental principle of justice then a failure sufficiently to respect this fundamental principle could lead to denial of the application of the principle of comity.

A loose analogy might be drawn with the jurisprudence of the European Court of Human Rights which has held member States to be in violation of Art 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms for insufficiently affording protection to an individual's right to privacy. For instance, in *von Hannover v Germany*,¹⁹⁹ the European Court of Human Rights considered the decision of the German Constitutional Court which had held that the publication of photographs of Princess Caroline in public places was constitutionally valid. The European Court of Human Rights concluded that despite the margin of appreciation afforded to the German State, the Princess' privacy rights under Art 8 had been infringed and her privacy should be protected outside 'the sphere of any political or public debate'.²⁰⁰

An analogy with these Convention cases might be drawn if the principle of privacy comes to be recognised as a fundamental principle of justice. Then, to return to the two examples of the application of the fundamental principle of justice exception to principle of comity considered in this essay, the exception might be a basis for invoking a rule that denies common law recognition or local enforcement to a foreign judgment or foreign sovereign act which, despite a similar margin of appreciation as afforded in Convention cases, fails to afford sufficient respect to that fundamental principle of privacy.

E. Conclusion

Comity is not a hard-edged rule. It is a general principle that is based upon the implied consent manifested by one state to respect another's territorial sovereignty. Understood in this way, comity is a source for the development of many of our concrete rules of private international law. However, one instance where comity ends

¹⁹⁹ ECHR 2004-VI 41. See Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (n 162) 491–2.

²⁰⁰ *von Hannover v Germany* ECHR 2004-VI 41, 70. See also, *Bărbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) [108], [113]. *López Ribalda v Spain* App nos 1874/13 and 8567/13 (ECtHR, 17 October 2019) [110]–[113].

is where it is inconsistent with respect for fundamental principles of justice. The certainty of legal rules developed by reference to the principle of comity must give way where it would conflict with the ‘public policy’ of the legal system, particularly the foundational principles that make that system just. As Professor Briggs notes, ‘Public policy and legal certainty will never be the easiest of bedfellows, but no judge worth his or her salt will accept that an uncivilised answer is called for, and there is small sense in decrying the fact.²⁰¹ Hence, whilst it ordinarily does so, comity does not require that courts always accept without inquiry the validity of sovereign acts in another territory.

The identification of those fundamental principles of justice that underlie a legal system is not always a simple task. These fundamental principles are not solely principles of domestic or international law. They are principles reflected by the legal system which can only be discerned from natural reason based upon the society in which we live. They can often be seen in the widespread direct effect that they are given by enforceable legal rights and freedoms in many jurisdictions. However, two caveats must be made. First, the absence within a foreign legal system of rights and freedoms that directly apply a particular fundamental legal principle in a particular case is not always sufficient to deny the operation of legal rules based on comity to that foreign legal system if it still has some rules that uphold the fundamental principle. A domestic legal system can sometimes tolerate a different balance being struck between rights and freedoms by a foreign legal system without concluding that the foreign legal system has contravened a fundamental principle of justice. Secondly, in exceptional cases, fundamental principles might exist or develop even if there is not universal recognition of those principles or universal application of them through directly enforceable rights and freedoms. Those new principles will then form instances where insufficient protection is sufficient for a court to deny the application of the general principle of comity in areas such as common law recognition and local enforcement of foreign judgments or recognition of the acts of a foreign sovereign. A principle of privacy might become one such example.

²⁰¹ Adrian Briggs, ‘Public Policy in the Conflict of Laws: A Sword and a Shield?’ (2002) 6 Singapore Journal of International & Comparative Law 953, 978.