

**PUBLIC AND PRIVATE LAW  
IN THE GLOBAL ADJUDICATION  
SYSTEM: THREE QUESTIONS  
TO THE PANELISTS**

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OPENING REMARKS  
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In its recent decision in *Medellin v. Texas*, the U.S. Supreme Court had to decide whether the conviction of a murderer should be reopened in light of U.S. obligations under public international law.<sup>1</sup> After a Texan Court had found the petitioner, a Mexican citizen, guilty of capital murder and sentenced him to death, the International Court of Justice (ICJ) had decided that the Court had violated Medellín's rights under the Vienna Convention to notify the Mexican Consulate, and ordered the United States "to provide, by means of its own choosing, review and reconsideration of the conviction[] and sentence[]." <sup>2</sup> The U.S. Supreme Court, however, denied Medellín's appeal to have his conviction reopened.

Among the many fascinating aspects in the opinion, one concerns the effect of the ICJ decision. The Court refused Medellín's contention that "giving the Avena judgment binding effect in domestic courts simply conforms to the proposition that domestic courts generally give effect to foreign judgments,"<sup>3</sup> with the response that "Medellín does not ask us to enforce a foreign-court judgment set-

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1. *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

2. Case concerning *Avena* and Other Mexican Nationals (Mex. V. U.S.), 2004 I.C.J. 12 (Mar. 31), at 72, cited in *Medellin*, 128 S. Ct. at 1355.

3. *Medellin*, 128 S. Ct. at 1366.

ting a typical commercial or property dispute.”<sup>4</sup> This must mean that there is, in the Court’s view, a crucial difference between the enforcement of a private law judgment (commercial or property), which is almost a matter of course, and a public law judgment, which requires special justification. Further, the fact that no real argument follows suggests the difference must be so obvious that it needs no further discussion; merely pointing it out seems enough.

The difference is indeed normally viewed as obvious, but on closer thought it is anything but that. After all, in *domestic* law, the public/private distinction is widely discarded. Legal realism taught us long ago that private law is “really” public law. Property and contract are not truly private institutions; they are expansions of state sovereignty, public powers vested in rightsholders to engage the state’s help in enforcing their interest. Private law performs public functions of the state, and it is administered by public institutions, namely the courts of the state. Many private law scholars will discuss their fields with public functions in mind: economic efficiency and social welfare maximization, deterrence of socially undesirable conduct, etc.

Occasionally, similar claims that private and public are now merged are made in the international realm. By and large, however, the distinction between private and public *international* law still holds. In fact, public and private international lawyers rarely even talk to each other. Public international lawyers focus on the relations between sovereign states. When they look to private actors, their question is whether these actors can be viewed as subjects of international law, not whether they threaten the essentially public character of public international law altogether. When they speak about human rights, they think of public rights in the relation between states and individuals, not of private rights between individuals. Mostly, private transactions are not an issue for public international law. Private international lawyers, by contrast, are aware of the significant impact that public international law has on their field, especially through treaties and through doctrines like sovereign immunity, the act of state doctrine, and others. They are also concerned with the effect of human rights on private law. In fact, international conflict of laws is sometimes thought of as part of public international law. But traditionally, private international lawyers do not care much about those debates in public international law that have no immediate impact on their field.

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4. *Id.*

International courts and customary international law seem irrelevant to them.

The *Duke Journal for International and Comparative Law* thus chose a highly important and topical topic for its annual conference, from which the contributions to this issue are derived. In fact, when my colleague Curtis Bradley and I discussed the topic, we both agreed that the public/private distinction in the international realm was undertheorized, although our own intuitions led us in opposite ways: Curt thought the private should be treated more like the public, I felt the public should be treated more like the private. At the same time, the conference was the result of a very fruitful cooperation between the journal and Duke's Center for International and Comparative Law, where the *Journal* was involved in the programmatic planning and organization and the Center provided financial and institutional support. The result was a successful conference and an impressive journal issue. The debate between public and private international lawyers is so fruitful because it helps go beyond the superficial and somewhat trite insight that public and private international law overlap and mutually influence each other. Instead, I would argue, three big questions emerge. They run through all panels and almost all contributions.

The first question is an *educational* one: What can public and private international law learn from each other? Where do parallel debates in public and private international law exist that should be linked? To what extent are experiences made in one field fruitful for the other?

We find this addressed in all panels. Take the question of the third panel: private arbitral decisions and international court judgments. Decisions by arbitral tribunals are regularly enforced; decisions of public international courts, by contrast, receive merely "respectful consideration." Is this consistent? Does it help to say one is private and the other public, given that U.S. courts will even enforce arbitral awards dealing with U.S. public international law (antitrust law)? Or take the question of the fourth panel: acceptance and enforcement of private and public international law. We regularly enforce foreign private law through conflict of laws, but we hesitate with regard to foreign and international public law. Is this justified? Can the current discussion on the role of public international law in domestic law learn from the debate in choice of law, seventy years old, on the role of foreign law in domestic proceedings?

Perhaps the educational question becomes most pertinent in the first panel, concerning the role of custom in public and private international law. Public international law observes a hot debate about customary international law, addressed in this issue by Patrick Kelly. Does customary international law exist at all? If so, is it law? What are its sources, especially what is the role of state consent versus state practice? If practice, where can we find such practice – in texts and official pronouncements, or in actual conduct of states? Is customary international law legitimate as opposed to law formally sanctioned by the state? Is a return to natural law unavoidable? And what is its role in domestic courts?

The private international lawyer observing this debate feels a certain *déjà vu*. Private international law has viewed a very similar debate for decades now, relating to customary private international law in the form of *lex mercatoria*, the alleged customary law of international commerce, addressed here by Jan Dalhuisen. All the topics of the customary international law debate can be found in the *lex mercatoria* debate. Does *lex mercatoria* even exist outside the heads of professors who proclaim it? Is *lex mercatoria* actually law or merely custom? Are its sources in state law or in commercial practices? And if the latter, can we find it in texts, most notably the UNIDROIT Principles of International Commercial Contracts? Or must we search in actual commercial conduct? Is *lex mercatoria* legitimate, given that it is not established in democratic procedures? Is it some kind of natural law of commerce? And what is the role of *lex mercatoria* in domestic courts? Can it be applied under a choice-of-law analysis?

A second question is *practical*. It concerns the mutual substitutability of public and private international law and institutions. Can public and private international law, public and private adjudicatory bodies perform similar functions? And if so, which of them is preferable? Can we substitute one for the other?

Again, this is a topic for all panels. But it is addressed especially in the second panel that compares courts and arbitration. Investment disputes are an obvious example. Some investors go to domestic courts to bring suit against defaulting sovereigns, for example Argentina. Others use arbitration to bring the same claims. Is one of them more appropriate than the other? Should we worry that arbitrators might give too little deference to state sovereignty? Or is it perhaps even the case that appears arbitrators give more deference to sovereignty than state courts? The competition is not confined to adjudicatory bodies; it also goes to the applicable law. If Argentina claims in-

ability to pay because it needs the money to provide its sovereign functions, is this a public international law claim or a private law claim? A public sovereign cannot go into insolvency, but an argument can be made that it should retain the power to fulfill its sovereign functions first. A private creditor can of course become insolvent, but outside of this, he cannot usually rely on shortage of assets or on competing obligations. We may want to say that if the problems at stake are mostly political, they belong into international courts; if they are largely commercial, they should go to arbitration. But are investment disputes not intrinsically both?

Thomas Carbonneau emphasizes the private character of arbitration and suggests this guarantees its superiority for business relations. Christopher Whytock by contrast focuses on the eminently public function of transnational governance that courts perform even where they adjudicate private transactions. Charles Brower, finally, demonstrates how the character of international dispute solution shifted over time, from a private understanding to a much more public one. Quite ironically, private law was long adjudicated by public courts, whereas public international law usually found its way into quasi-private arbitration. Only recently have we seen a shift – private law goes to private arbitration, public international law to public international courts. Now, public and private adjudication stand in competition, especially for areas that transcend public/private law.

A third set of questions, finally, is *theoretical*. It goes back to what I began with: the public/private distinction on the international sphere. Is the distinction dead here as well? And if not, what are its specificities? The third and the fourth panel address these questions, but really they transcend all panels.

One view would be to ignore the insights from the domestic question and maintain that, at least on the international sphere, public and private are essentially different. Thus, Mark Movsesian argues that arbitration is essentially private and consensual and thus raises no great issues of legitimacy, or of enforcement; public international law by contrast is highly political and therefore problematic. Ernie Young agrees on the distinction and goes even one step further: if international law is the highest law, he argues, its interpretation must largely be exercised by domestic courts. So, private law can be transnational; public law, including public international law, remains domestic.

Another view would directly translate the insights from the domestic sphere into the international sphere. If the public/private di-

vide is dead, then we should treat arbitral tribunals and international law exactly the same. Maybe we should enforce foreign public law in the same way in which we traditionally enforce foreign private law, and so on. Bill Dodge does not go this far, but he does question the public law taboo, the doctrine that rejects the application of foreign public law. Ron Brand also questions the distinction, especially in light of the US experience with private enforcement of public law. Melissa Waters, finally, discusses various ways in which the relationship between domestic law and the ICJ should be conceptualized – some borrowed from public, some from private international law.

A third possibility is that the public/private distinction exists, but in a way different from that in the domestic sphere. It is not even exactly clear what the public and what the private is. Are states representatives of common, public interests? Or are they individual actors, engaging in essentially private relations with other states? Is contract still an expansion of sovereignty? Or is sovereignty an expansion of contract, if the state's competence to adjudicate and regulate is based on a choice of law and choice of court agreement by private parties, and if states, in order to receive credit, must contract out their sovereign rights? If this is so, the global adjudication system looks importantly different from the domestic system, and it is high time to start understanding it.

What can public and private learn from each other? To what extent can we substitute public and private for each other? In what way are public and private distinct or similar on the transnational sphere? These are not easy questions, and the fact that they have rarely been asked so far does not make it easier to respond to them. The contributions in this issue bring us closer to a response, and this is huge progress.