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Res Judicata and Multi-State Integration

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CIVIL JUDGMENT RECOGNITION AND THE INTEGRATION OF MULTIPLE-STATE ASSOCIATIONS: CENTRAL AMERICA, THE UNITED STATES OF AMERICA, AND THE EUROPEAN ECONOMIC COMMUNITY. By *Robert C. Casad*. Lawrence: The Regents Press of Kansas. 1981. Pp. xiii, 258. $25.

When Central America comes up in conversation these days, it isn't usually with regard to the law of res judicata. For this reason, Robert Casad's recent book on civil judgment recognition is likely to provoke some strange reactions. True, the book's title suggests that its subject is European and American law in equal proportions with Central American. But sources on European and American law are relatively easy to find: the book's distinctive contribution, to which most of its pages are dedicated, is its description and analysis of the law of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama. During this time of political unrest and human rights controversy, a book on local judgments law has a macabre tinge. Res judicata is a quintessentially technical subject, while the profound political controversies the area has generated transcend mere legalisms, to say the least. Yet if Casad's hypotheses are sound, this apparently technical book is more timely than at first it might appear.

The book treats civil judgment recognition as one manifestation of the extent of integration of member states into a federated union. Civil judgment recognition is taken as a sign of healthy intra-federation relations. The first chapter, accordingly, is a summary historical account of the recurrent efforts of the Central American nations to organize politically into a common union. Special attention is given to the frequent reciprocal promises, in treaty provisions, to honor the judgments of other Central American nations, and to attempts to found a super-national judicial apparatus to implement these treaties. These attempts all failed eventually, although the interim success of some was considerable. Casad does not clearly spell out the reasons for the failures. In at least one case, the disintegration was attributable to United States interventionist policies (pp. 8-9). Although it is hard to know for certain, the other failures may have

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been caused by the social and cultural differences among the nations, which the author develops at the outset in order to refute appearances of homogeneity (pp. 1-2). It would have been interesting had Casad pursued this inquiry further — but then, he did not intend to write a history book.

Most of the remainder of the book concerns the Bustamonte Code, a treaty governing interstate judgment recognition in Central America, and the meaning the Code has been given in the various Central American nations. If the book contained no more than this material, it would nevertheless be a significant contribution to the literature. Solely as an introduction to one system's judgment law, it would constitute a useful reference book. Americans, of course, have few opportunities to acquaint themselves with this material. Language differences are not the primary problem, although, of course, it doesn't help that the primary and secondary literature is in Spanish. More significant is the fact that the concepts, while sometimes bearing familiar names, are actually quite different. One example Casad discusses is "cosa juzgada," which sounds like "res judicata" but bears an entirely different, civil law, meaning (p. 45). Various jurisdictional doctrines pose the same problem.[1] To be honest, I found myself as mystified after the author's explanations of the concepts as before. But then, the author himself acknowledges the difficulties and ambiguities — and would any nutshell explanation of American collateral estoppel be completely clear to citizens of civil law countries? If nothing else, one gains an appreciation of the fact that differences exist, and that one ought not to take apparent similarities for more than they are worth.

One reason, then, to read the book might be to learn some law from a part of the world that has not thus far been of sufficient commercial interest to spawn a large legal literature. It is not entirely clear, however, what will be the practical utility of a working knowledge of Salvadoran judgment law. At any rate, the book aims higher. Its title, after all, is general: "Civil Judgment Recognition and the Integration of Multiple-State Associations." Its subtitle is scarcely less general, denominating Central America, the European Community, and the United States. Thus the second chapter, preceding the material on the laws of the various Central American nations, sets out theoretical and policy considerations underlying the law of judgments. And the tenth chapter, following the descriptive material, sets out to gauge the effectiveness of the Central American apparatus by comparing its operation to that of the United States and the European Common Market. The fact that there are only cursory descriptions of those two systems, in contrast to the wealth of detail on the individual Central American nations, is not a problem.

1. See, for example, his discussion of competency. P. 45.

The typical reader brings to such a book so much more knowledge of American and European systems than Central American arrangements that detailed description of the former might be a waste of time. Yet, setting aside the contrasting numbers of pages spent, one still comes away with the sense that this is, really, just a book on Central American judgments law. The reason, I think, is that the overarching theoretical analysis is so thin.

Casad describes how in each system a judgment for money damages rendered in a sister-nation would be enforced. He mentions, for instance, the fact that in the United States a judgment enforcement action is a contentious adversary proceeding (pp. 138-39), while in Europe the defendant is not in the first instance entitled to notice and an opportunity to defend. This tends to make judgment enforcement less automatic, less certain, and more costly in the United States than in the European Community. Proceedings in Central American countries are more contentious still, since Article 426 of the Bustamonte Code gives the state itself a right to intervene (p. 140). Such comparisons are highly interesting: they challenge forcefully our unexamined notions about how things "have" to be. Yet for two reasons, these thoughts just whet the reader's appetite.

First, we would want to know the true relationship between friendly foreign relations and cooperative enforcement of judgments. This is a question about how legal doctrine and the cultural, social, and political order influence each other. It seems somewhat plausible that effective judgments enforcement might be symptomatic of harmonious international relations, and harmonious relations a sign of social homogeneity or at least cultural understanding. Conversely, countries at odds might decline to recognize one another's sovereign acts. But is this true? And if it is true, then how true? For instance, how much must relations deteriorate (or cultures diverge) before an impact is felt on mutual judgment enforcement? The hypothesized connection in fact might be quite tenuous.

For instance, even if two nations were at war they might routinely enforce one another's judgments. The reason would be that disregard for judgments is not a particularly effective pressure tactic. If anything, it is symbolic. And the impact is mainly felt by litigants, who may not have anything to do with the cause of the international friction and who may even, in fact, be from the country in which enforcement is sought. Casad recognizes this last point: he argues that reciprocity is not a wise requirement in enforcement law for just this reason (p. 20). Yet doesn't this suggest that enforcement is a purely private matter, advancing or hindering the interests of litigants with no discernible effect on public interests? Why, indeed, does the rendering state "care" about its judgments — *its* resources are not being wasted by a second litigation. *Its* resources are a sunk

cost, and if the enforcing state compels relitigation its waste of time is its own problem. To put it bluntly, does judgments law matter, even in the context of international relations?

Second, the comparisons that Casad makes are not the only ones possible. In fact, they may be the wrong ones. He focuses primarily on the ease of enforcement of a sister-state judgment in the various systems. But ease of enforcement of a sister-state judgment may only reflect the enforcing state's attitude toward that kind of judgment as a matter of local res judicata law. An example will illustrate this problem. Many states of the United States treat child custody awards as readily modifiable; they are difficult, in other words, to enforce as rendered because states recognize a variety of defenses such as changed circumstances.[2] Assume that all of the member states in System I enforce child custody awards automatically while all of the states in System II enforce them only after reconsideration. Then if we compare the intra-systemic enforcement of such cases in System I to intra-systemic enforcement in System II, we might erroneously conclude that System I is more cooperative, more tightly integrated, than System II. Yet the "cooperativeness" thus identified in System I is only an artifact of the more restrictive local foreclosure rules in System I. The fact that interstate recognition of judgments in the United States is a cumbersome adversary process shows nothing about relations among the states if *intra*-state recognition is an equally cumbersome adversary process. Comparisons between the former and non-adversary European proceedings may be misleading.

I am not suggesting that Casad is unaware of this sort of refinement: there is no evidence that he has confused these issues, except for the fact that he does not himself attempt to disentangle them. The major disappointment of this book is not its failure of cultural or political analysis, to which it does not seem to seriously aspire. Its greatest fault is the incompleteness of the theoretical analysis of doctrine, at which the book makes an ambitious start and for which it provides a wealth of raw material. In the effort to show the analytic potential of Casad's creative choice of topic, I would venture a few more thoughts about how intra-systemic cooperation in the context of judgments enforcement might be analyzed.

In evaluating intra-systemic coordination, we must take into account purely local effects. Treatment of sister-state judgments may reflect only an attitude toward judgments generally, when what we are really interested in is the treatment of sister-state judgments as such. In other words, we are interested in a comparison between comparisons. Within each system, we can compare the way each

2. *See generally* R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS ch. 6 (3d ed. 1981).

state treats its sister-state's judgments. To measure the degree of integration of a system, we need to compare this degree of cooperation (itself a comparison) to the degrees found in other systems, such as the amount of respect accorded to domestic judgments:

$$\text{Degree of Integration} = \frac{\text{Deference to Prior Court in sister state (interstate recognition)}}{\text{Deference to Prior Court in same state (local res judicata rules).}^{3}}$$

Actually, there are at least two further refinements. The first is that increased interstate recognition may be a product of adoption of the rendering state's res judicata rules. The above model suggests that the most fully integrated system is the one in which a state treats a foreign judgment as it would treat its own: a nondiscrimination model. In fact, however, a cooperative state might attempt to give a sister-state's judgment exactly the same effect as the *rendering* state would have, adhering to the rendering state's res judicata rules along with its judgment. Thus interstate recognition (the extent of the present court's deference to the prior decision in a sister-state) might be compared to a hypothetical present court of that sister-state addressing enforcement of the judgment in question. The measure of integration would then be:

$$\text{Degree of Integration} = \frac{\text{Deference to Prior Court in sister state (interstate recognition)}}{\text{Deference to present sister-state determination (sister-state res judicata rules).}}$$

Neither measure of integration is obviously the better, or the more "cooperative." The first focuses on the presence or absence of discrimination. The second measures the extent to which rights vest.[4] If two systems aspire to different ideals of cooperation, then comparing them involves comparing apples and oranges. Each may be marvelously cooperative in its own sort of way.

As a second refinement, if we truly wish to measure the degree of integration within a system, we might compare rules regarding completely foreign judgments. For example, Alabama may be perfectly happy to enforce New York's judgments. But in determining

3. The division sign is used here metaphorically, to indicate comparison of relative strengths. It does not signify that actual number values might be assigned.

4. *See* Brilmayer, *State Forfeiture Rules and Federal Review of State Criminal Convictions*, 49 U. CHI. L. REV. 741 (1982).

whether this evidences intra-systemic cooperation within the United States, we might be interested to know whether this fact is attributable to New York's status as a member of our federal union. How, in comparison, does Alabama treat French judgments? We might therefore construct another measure of cooperation:

$$\text{Degree of Integration} = \frac{\begin{array}{l}\text{Deference to Prior Court}\\ \text{in sister-state (inter-}\\ \text{state recognition)}\end{array}}{\begin{array}{l}\text{Deference to Prior Court}\\ \text{in non-federated state.}\end{array}}$$

This would express the purely intra-systemic aspects of the degree of integration.

Obviously, there is a great deal that might be said about cooperation within groups of nations. By drawing attention to the similarities and differences among three sets of cooperating sovereign entities, Casad's book raises powerful issues that any conflict of laws or international law scholar should want to address. By failing to provide theoretical structure, however, it falls short of success at its ambitious project.