

## Choice of Law and the Doctrine of Renvoi

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If a central object of our legal system is to provide equal justice to all who come before our courts, then it is necessary to develop principles of law so that, in so far as possible, similar cases will lead to similar decisions. This requirement of uniformity and consistency runs through all branches of law, but the problems which it generates become particularly acute in those cases which may require the application of rules of law that are foreign to our courts. In cases having elements that connect them with other jurisdictions, one of the questions that arises is whether foreign rules of law should be reflected in the decision of the court, and if so, to what extent. In essence this is a question of choice of law.

This paper will seek to examine the choice of law problem. This will involve a brief discussion of "characterization" and its relationship to the choice of law, a critical examination of the *renvoi* doctrine, and finally, some suggestions towards a reformulation of choice of law concepts.

### 1. *Characterization*

Once a court has decided to accept jurisdiction in a case, it will normally take into consideration the foreign elements raised by any of the facts. According to Graveson, to ignore them, "would make a travesty of justice".<sup>1</sup> Most courts will therefore refer to the appropriate foreign system of law whenever they are asked to attach legal consequences to a situation that has been created under foreign law. This reference to foreign law may be motivated by a desire for "justice" between the parties, or by a feeling for what is desirable among countries in a world community. Whatever the cause, the result is that each *forum* has developed a set of conflicts rules which, when certain classes of issues arise, may lead the court to apply foreign law.

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<sup>1</sup>R.H. Graveson, *The Conflict of laws* (6th ed.), p. 65.

The process of characterization is intimately related to the selection of the proper foreign system of law. In many cases the way in which the question before the court is "characterized" will pre-determine the choice of foreign law and hence, the substantive law that is applied to the question. For this reason, the technique of characterization is fundamental to the ultimate choice of law.

According to the late Dean Falconbridge, in the first phase of characterization, "The court must characterize, or define the nature of the legal question, or each of the legal questions, involved in the factual situation..."<sup>2</sup> A number of potential problems may arise in this initial step of characterization. In defining the "question", the court may be led to look to the general nature of the legal problem before it (e.g. is the case in torts or contracts?), or the court may look directly to the issues raised by the case. Usually this will not lead to any *internal* inconsistencies since the courts of any one country will almost always categorize similar legal problems in a similar manner. For this reason, courts may tend not to discuss the more general question at all, but will look directly to the issues raised by the case. Among those countries having similar legal traditions no inconsistency is likely to arise in this examination and categorization process. On the other hand, where countries have different legal traditions, a case involving say, breach of promise to marry, may be characterized by some as a contract action, and by others as a tort action.<sup>3</sup> But since discrepancies like this are generally inevitable, and are often predictable, they should not be a matter of great concern.

Having decided the nature of the legal issues raised, the second phase of characterization involves the determination of a connecting factor. This is done by fixing on "some outstanding fact which establishes a natural connexion between the factual situation before the court and a particular system of law".<sup>4</sup> This selection and use of particular facts to lead to a system of foreign law reflects an application of the conflicts rule of the *forum*.<sup>5</sup> Thus in cases concerning title to land, the English conflicts rule is to use the *situs* of the land as the connecting factor to lead the court to the proper foreign system of law. Similarly, in deciding those cases which question the formal validity of a foreign marriage, the law of the *locus celebrationis* will be used. Having thus been led to another

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<sup>2</sup> J.D. Falconbridge, *Essays on the Conflicts of Laws* (2nd ed.), p. 51.

<sup>3</sup> G.C. Cheshire, *Private International Law* (7th ed.), p. 41.

<sup>4</sup> *Ibid.*, p. 40.

<sup>5</sup> See for example, Falconbridge, *supra*, n. 2, pp. 38-39.

system of law, the court of the *forum* must then examine the potentially applicable rules of law, and then apply those rules that it has selected. In this manner, foreign law becomes the *lex causae*.

## 2. Choice of "law"

Unfortunately, while the conflicts rules of the *forum* may be clear in leading a court to the proper foreign country, they generally do not indicate which of the foreign rules of law should be applied to the case. The problem may be one of defining the word "law". Perhaps as a result of overworking phrases such as *lex loci celebrationis* or *lex situs*, the traditional use of Latin has obscured the meaning to be given to its English counter-part. In any event, one of the first questions to be faced when a court is referred by its conflicts rules to foreign "law", is what foreign law? In most instances the court entertains little doubt. The law referred to is a substantive rule of law of the foreign country.<sup>6</sup> But in the early nineteenth century an English court attempted to decide the case before it in the same manner as it believed the foreign court would decide it.<sup>7</sup> This "foreign court" approach has, ever since, led to conjecture on whether or not foreign "law" properly means the entire body of foreign law, including, in addition to the substantive law rules, the conflicts of law rules. Many of the questions raised by this problem of choice of "law" have been subsumed by various approaches to the doctrine of *renvoi*.

As indicated, a reference to foreign "law" presents a court with several alternatives. Consider a simple, two country model. The first alternative open to the court of say, Utopia, is to consider a reference through a connecting factor to the "law" of Ruritania to mean the internal substantive law of Ruritania. This option is illustrated in Fig. 1. The internal conflicts rules of Utopia indicate that since the case before the courts contains foreign fact elements, there may be a need to refer to foreign law. The *forum's* set of choice of law rules are then examined in light of any connecting factors that may be present in the case. Since we assume a connecting factor is present and is recognized by the choice of law rules of Utopia as leading to the "law" of Ruritania, there is then a reference to the substantive laws of Ruritania. This is the approach taken by most courts when they are referred to foreign "law".<sup>8</sup> It is simple

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<sup>6</sup> A.V. Dicey and J.H.C. Morris, *The Conflict of Laws* (8th ed.), p. 62.

<sup>7</sup> *Collier v. Rivaz*, 163 E.R. 608.

<sup>8</sup> See e.g., *Bremer v. Freeman*, (1857), 10 Moo. P.C. 306, where this view was adopted by the Privy Council. See also Cheshire, *supra*, n. 3, p. 55.

and straightforward, and although it may present problems in the determination of what the foreign substantive rules really are, the intricacies of the *renvoi* doctrine are avoided.

The second alternative open to the court is to adopt what has been characterized as "partial *renvoi*". In this case the court of Utopia, when referred to the "law" of Ruritania, looks at the whole of the law of Ruritania. But since the case may also contain fact elements foreign to Ruritania, the Utopian court will refer first to the choice of law rules of Ruritania. If the Ruritanian choice of law rules then indicate that in this case the substantive law of Ruritania would be applied, then the result, as shown in Fig. 2A, is the same as under the first alternative. Such a case might arise where the case litigated in Utopia concerns land situated in Ruri-

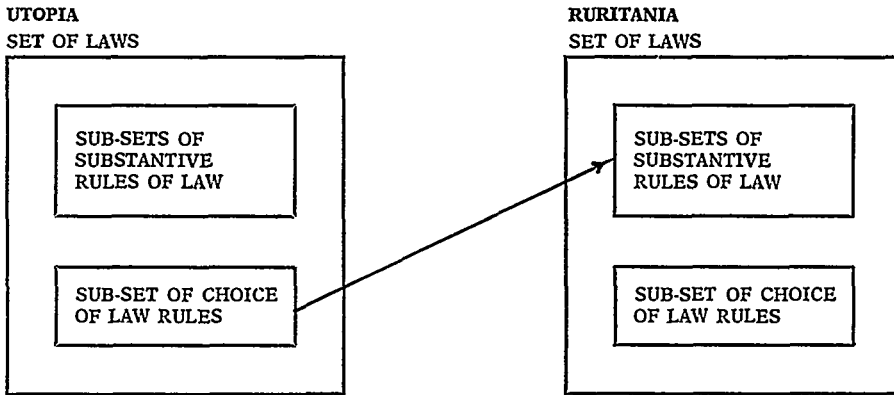


FIG. 1. Reference to the "Law" of Ruritania Means the Substantive Law of Ruritania.

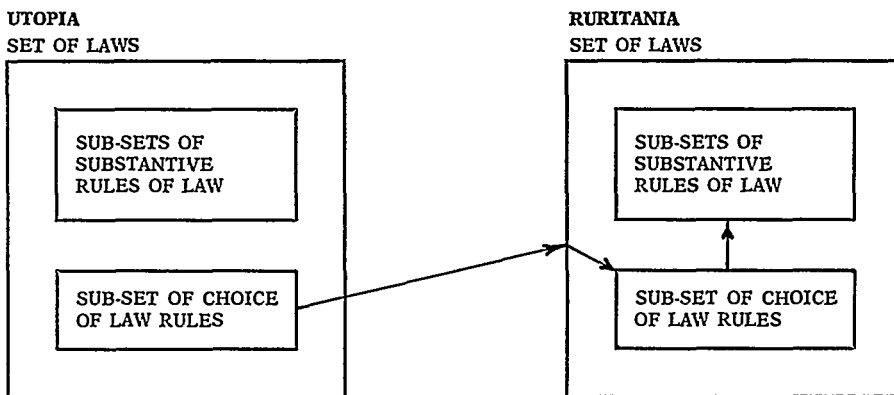


FIG. 2A. Partial Renvoi Avoided when both countries have an Identical Choice of Law Rule.

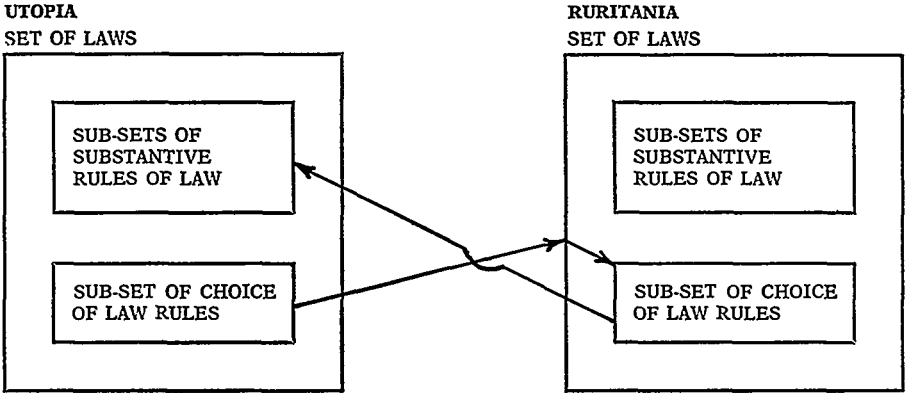


FIG. 2B. "Partial Renvoi".

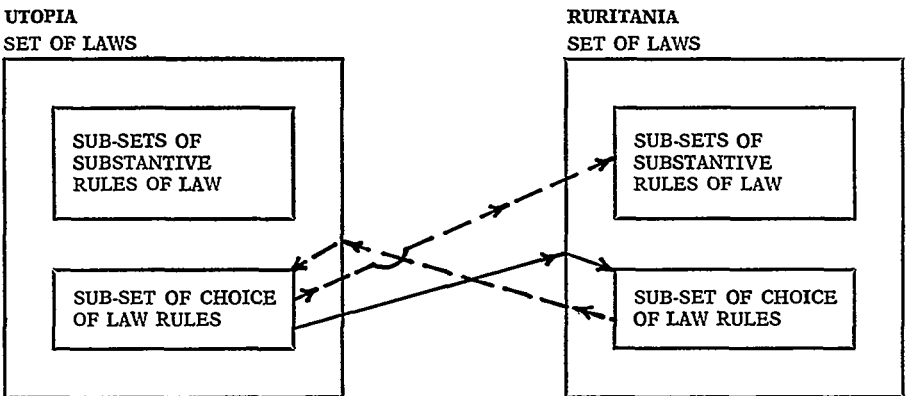


FIG. 3A. "Total Renvoi" (Renvoi accepted by the Foreign Court).  
——— Initial Reference to Foreign Court.  
- - - Renvoi Accepted.

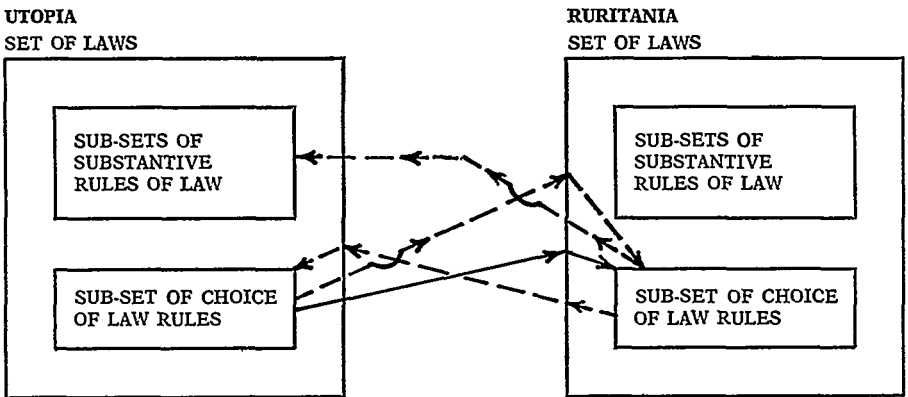


FIG. 3B. "Total Renvoi" (Renvoi rejected by the Foreign Court).  
——— Initial Reference to Foreign Court.  
- - - Renvoi Rejected.

tania. If the choice of law rules of both countries refer to the *lex situs*, then the substantive law of Ruritania would be applied.

It is, however, possible that the choice of law rules of Ruritania will refer to the "law" of Utopia. The court of Utopia may then consider this as a reference back to its substantive law, and will proceed to apply the *lex fori*.<sup>9</sup> This case, as shown in Fig. 2B, may be illustrated by the type of case where it arises most often, namely those cases involving personal law. For example, X, a citizen of Utopia, may be domiciled in Ruritania. If the choice of law rules of Utopia would look to the *lex domicilii* on the facts before it, this (on our assumption) would be considered to be a reference to the whole of the law of Ruritania. However, if Ruritanian choice of law rules would look to the *lex patriae* in such cases, then there would be a reference back to Utopian law. At this point the court of Utopia decides to terminate the potential game of "international ping-pong" and applies the substantive *lex fori*. There is thus what has been termed a partial *renvoi*, or single remission back to Utopian law.

Although the *lex fori* is ultimately applied, it is only because, in theory, Utopia allows the Ruritanian choice of law rules to make the final choice of which country's substantive laws are to be the *lex causae*. Implicit in this decision of the Utopian court to apply the *lex fori* may be the view that a court of Ruritania, if faced with the same case, would have looked directly to the substantive laws of Utopia. If so, this should be contrasted with the apparent willingness of the Utopian court to apply Ruritanian choice of law rules. Alternatively, the ultimate application of substantive Utopian law may stem from a policy decision to avoid another reference to Utopian choice of law rules and the consequent logical dilemmas of a *circulus inextricabilis*. Finally, the policy basis for this decision may rest, at least in part, on the court's predilection towards applying the substantive *lex fori*.

The third alternative open to the court is to adopt a theory of "total *renvoi*", or as it has been more descriptively called, the "foreign court theory". According to this particular theory, a court in Utopia, when referred to the "law" of Ruritania will attempt to decide the case as it believes a court of Ruritania would decide it. This procedure can, in itself, lead to several alternatives. First, if the Utopian judge, wearing his Ruritanian robes, decides that Ruritania's choice of law rules would refer to Utopian law, and

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<sup>9</sup> See e.g., *Forgo's Case*, 10 Clunet (1883), 64; also discussed in Cheshire, *supra*, n. 3, p. 56.

Utopian "law" is substantive law only, the case would be decided by Utopian law, or what is really the *lex fori*. This leads to the same sequence as that illustrated in Fig. 2B.

However, according to a strict application of the total *renvoi* theory, the following chain of thought should occur. Since Utopia considers a reference to Ruritania "law" to be a reference to its whole set of laws, it is to be expected that a reference back by Ruritania law to Utopian "law" would similarly be a reference to the whole of Utopian law. If this is so, then there should be a second reference by Utopian choice of law rules back again to Ruritania law or, in other words, a total *renvoi*. If the Utopian judge thinks that Ruritania would accept this second remission and apply its own substantive law at this point, then the *lex causae* would be the substantive law of Ruritania.<sup>10</sup> On this analysis, it might also be said that "partial *renvoi*" is applied by the Ruritania court. This is illustrated in Fig. 3A. Alternatively, Ruritania choice of law rules might reject the *renvoi* doctrine and refuse this second remission, and the result will be an application of the original *lex fori*.<sup>11</sup> This is shown in Fig. 3B.

Unfortunately, this last analysis contains an inherent inconsistency. After the Utopian judge has donned his Ruritania robes, he finds that the Ruritania choice of law rules have directed him back to the "laws" of Utopia. If he were to behave in a consistent manner, he would quickly doff his assumed garb and examine Utopian choice of law rules. However, since he has already established that Utopian choice of law rules will only lead him back into Ruritania robes, he is faced with two alternatives. The first is to spend the balance of his judicial life changing hats on this *circulus inextricabilis*; a most undesirable solution. The second is to call a halt to his valet's activity and this game of "international ping-pong" and apply either Utopian or Ruritania law. In theory this choice depends on whether or not Ruritania accepts the *renvoi* doctrine. But if Ruritania rejects the *renvoi* doctrine and refuses the second remission, the Utopian judge is in the happy position of being able to apply his *lex fori*. In the few cases where this problem has arisen, the country in the role of Ruritania has rejected the *renvoi* and the other country has been able to apply its *lex fori*. However, if Ruritania does accept the *renvoi* doctrine, or second

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<sup>10</sup> See e.g., *In Re Annesley*, (1926) Ch. 692; *In Re Askew*, (1930) 2 Ch. 259.

<sup>11</sup> See e.g., *In Re Ross*, (1930) 1 Ch. 377.

remission, there is no logical justification for stopping the *circulus* at this point.<sup>12</sup>

### 3. A Critique of the Renvoi Doctrine

Despite what appear to be logical fallacies, this "foreign court" doctrine has attracted considerable support from British and American scholars.<sup>13</sup> A substantial volume of probing into its intricacies and ramifications has been undertaken by its proponents,<sup>14</sup> and opponents,<sup>15</sup> with the net result being an excessive devotion of academic attention to the doctrine of *renvoi*. It is submitted that preoccupation with the doctrine of *renvoi* has obscured the need for a reconsideration of the fundamental rules of choice of law. The balance of this paper will be devoted to further analysis of the weaknesses of the *renvoi* doctrine, and will conclude with an attempt towards a reformulation of choice of law principles.

The first salvo of attack on the use of the *renvoi* doctrine should be aimed at its basic assumptions. Traditionally, the *renvoi* doctrine has been relied upon to enable Utopian courts to recognize and enforce rights that have been acquired in Ruritania. Under this "vested rights" theory put forth by Professor Beale, "A right having been created by the appropriate law, the recognition of its existence should follow everywhere."<sup>16</sup> This theory has been widely criticized, most notably by Professor W.W. Cook. According to Professor Cook, a legal right is only the creature of the legal system that creates it. On this assumption, the right cannot exist outside the territory of the legal system that created it unless it has been re-created by foreign law.<sup>17</sup> Further, as Dean Falconbridge observed,

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<sup>12</sup> But cf. T.A. Cowan, in "Renvoi Does Not Involve a Logical Fallacy" in (1938-39) 87 *U. of Penn. L. Rev.* pp. 34-49 at p. 47 maintains that Ruritania "not only can, but must, stop at the second reference, although it need not do so before the point is reached". It is submitted that Cowan is considering the practical necessities involved in the application of the doctrine. This does not, however, rebut its theoretical short-comings.

<sup>13</sup> A.V. Dicey and Keith, *Conflict of Laws* (5th ed.), pp. 863 ff.; E.N. Griswold, "Renvoi Revisited" in (1937-38) 51 *Harvard L. Rev.*, pp. 1165-1208, at p. 1183.

<sup>14</sup> See e.g., Griswold, *op. cit.*, *supra* note 13.

<sup>15</sup> See e.g., E.G. Lorenzen, "The Renvoi Theory and the Application of Foreign Law", in 10 *Col. L. Rev.*, pp. 190-207.

<sup>16</sup> J.H. Beale, "Summary of the Conflict of Laws" in *Cases on Conflict of Laws*, Vol. III, p. 517, as quoted in J.H. Beale, *Treatise on the Conflict of Laws* (1935), Vol. 3, p. 1969, as quoted in W.R. Lederman, "Classification in Private International Law", 1951, 29 *Can. Bar Rev.* 168 at p. 179.

<sup>17</sup> Lederman, *supra* n. 16, p. 180.



...In the majority of cases, courts have not seriously attempted to apply in practice the theory of acquired rights to which they have sometimes paid lip service... Anglo-American courts have refused to adopt, or have ignored, the renvoi doctrine (implicit in the acquired rights theory)... Consequently the forum does not enquire how the foreign court would decide the specific case which is before the forum and does not know whether there is any foreign created right to be enforced. 'The forum thus enforces not a foreign right but a right created by its own law.'<sup>18</sup>

Even when a court does purport to apply the *renvoi* doctrine, as some English courts have,<sup>19</sup> it must rely on foreign experts for information as to what the foreign law is. This need for presentation of evidence of foreign law introduces into the court's procedure certain elements of awkwardness and inefficiency. There are also inherent dangers in the court's attempt to apply foreign law.<sup>20</sup> Since the judge is often forced to deal with alien concepts of law, it would seem that a certain degree of distortion is ordinarily unavoidable in the application of any foreign rule.<sup>21</sup> Thus it would appear that no *forum* can be relied upon to apply the substantive law of a foreign country in an entirely consistent manner. These problems are compounded when the court also seeks to understand and apply foreign choice of law rules. Again, quoting from Falconbridge,

...if the court is misinformed as to the foreign law or fails to interpret accurately the evidence of the foreign law, the supposed application of the doctrine of the total *renvoi* may lead to a grotesque result or a miscarriage of justice.<sup>22</sup>

Finally, the inherent complexities of the *renvoi* doctrine, and the evidentiary problems which it raises often enable judges to employ either foreign or domestic law according to their personal view as to which is the better rule of law. In the guise of "interpreting" foreign choice of law rules, the court is thereby able to introduce its own doctrines of public policy. According to Ehrenzweig,

...our best judges, when making use of the 'looseness in the joints of the [choice of law] apparatus' 'by employing manipulative techniques' or all purpose techniques such as the 'proper law,' often do so in order

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<sup>18</sup> Falconbridge, *supra* n. 2, pp. 24-25, quoted in part from W.W. Cook, *Logical and Legal Bases of the Conflict of Laws*, (1942), p. 21.

<sup>19</sup> See e.g., *In Re Ross*, (1930) 1 Ch. 377; *In Re Annesley*, (1926) Ch. 692; *In Re Askew*, (1930) 2 Ch. 259.

<sup>20</sup> See e.g., *In Re Duke of Wellington*, (1947) Ch. 506.

<sup>21</sup> A.A. Ehrenzweig, *Private International Law*, p. 173.

<sup>22</sup> Falconbridge, *supra* n. 2, p. 178.

to substitute a better foreign rule for much 'that is archaic and foolish' in their own law.<sup>23</sup>

On the other hand, the court may reject the foreign rule of law, and apply the *lex fori* because it feels that the latter is the better rule of law. One author claims that, "the search for the better rule of law may lead a court almost automatically to its own lawbooks."<sup>24</sup>

One American judge has confessed to this judicial sleight-of-hand and has said,

We prefer to apply the better rule of law in conflicts cases just as is done in non-conflicts cases, when the choice is open to us. If the law of some other state is outmoded, . . . we will try to see our way clear to apply our own law instead . . . Courts have always done this in conflicts cases, but have usually covered up what they have done by employing manipulative techniques such as characterization and *renvoi*.<sup>25</sup>

Thus it seems that the logical intricacies and the evidentiary problems which accompany the *renvoi* doctrine may in fact prove to be effective guises for judicial eclecticism and law reform. While judicial law-making may, in certain contexts, be a commendable activity toward the development of the *lex fori*, it is not altogether evident that a case should provide this opportunity merely because it raises foreign fact elements. Further, this type of judicial activity clearly detracts from the parties' expectations of certainty.

In summary then, it is apparent that the *renvoi* doctrine is subject to many weaknesses. It is built on the shaky foundation of purporting to recognize foreign acquired rights, it contains inherent logical fallacies, its application requires the inefficient and often misplaced reliance on expert testimony, and finally, the ultimate choice of the *lex causae* may reflect arbitrary judicial discretion rather than a rigorous and consistent application of the doctrine. In light of these criticisms, it is difficult to support utilization of the *renvoi* doctrine as a valid technique for the choice of the proper *lex causae*. It is almost devoid of the certainty and the predictability that are desirable in a court of law.

#### 4. *Towards a Reformulation of Choice of Law Principles*

As stated at the outset, the essential question in the choice of law problem is when, and to what extent, the *lex fori* should be

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<sup>23</sup> Ehrenzweig, *supra* n. 21, p. 100; See also R.A. Leflar' "Choice-Influencing Considerations in Conflicts Law" in (1966) 41 *N.Y.U. L. Rev.* 267 at p. 301.

<sup>24</sup> Leflar, *supra* n. 23, p. 298.

<sup>25</sup> *Clark v. Clark*, 222 A. 2d 205, 209 (N.H. 1966), per Kenison, C.J.

supplemented with or replaced by the substantive law of another country. There is no doubt that many cases do necessitate a reference to foreign law. However, what appears to be lacking are well-formulated principles for determining the nature and extent of this reference.

It is submitted that it is first necessary to have a well-defined, yet flexible set of choice of law rules. To this end, it should be fundamental that a court will apply the *lex fori* unless there are substantial reasons for not doing so. By employing the *lex fori*, the court avoids the practical difficulties and inefficiencies of hearing adequate proof of foreign law. It is able to apply a system of laws with which it is familiar, and is presumably better able to render just and consistent decisions.<sup>26</sup> If the court has predetermined that in certain fact situations it will deviate from the *lex fori*, then the parties can be assured that in those fact situations there will likely be a substantial measure of predictability and uniformity of result. Perhaps the best existing examples of such cases are the invariable references to the *lex situs* of immovables, or the *lex loci celebrationis* to determine the validity of marriages. In such cases, the *lex fori* can perhaps be characterized as inadequate or incomplete for the purposes of reaching a solution that is just to the parties.<sup>27</sup>

In many cases it is not possible to predetermine whether or not there should be a reference to foreign law. In these instances, a broad range of factors may be potentially relevant.<sup>28</sup> Most important among these is the need for justice in the individual case as reflected by the underlying policies of the court. On the other hand, if it is highly inconvenient to determine and apply the foreign law, a court should not hesitate to revert to the *lex fori*. Similarly, if a court is led to a foreign system of law that will produce a result that is repugnant to the ideas of the *forum*, the *lex fori* should be substituted.<sup>29</sup> However, it should be made clear that public policy is in fact being used. The enunciation of public policy as the basis for decisions will, in some cases, more clearly indicate the true rationale for the courts' choice of the better rule of law. This should yield benefits in predictability through the avoidance of misleading references to manipulative techniques such as *renvoi*.<sup>30</sup>

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<sup>26</sup> I.F.G. Baxter, *Essays on Private Law*, p. 29.

<sup>27</sup> *Ibid.*, pp. 32-33.

<sup>28</sup> See e.g., Leflar, *supra* n. 23, p. 279.

<sup>29</sup> Baxter, *supra* n. 26, p. 35.

<sup>30</sup> See also Ehrenzweig, *supra* n. 21, p. 173.

Next, it should be made clear that a reference to a foreign system of "law" is a reference to its rules of substantive law only. This may be supported by the argument that an initial reference to a foreign system of law should, in effect, be conclusive on the choice of law question. Following a policy decision to deviate from the normal procedure of applying the substantive *lex fori*, there should be a reference only to the foreign substantive law. If this view is not acceptable, and a further, or secondary, characterization according to foreign choice of law rules is deemed desirable, guidelines may still be established to avoid the problems of the *renvoi* doctrine. First, the circumstances under which secondary characterization may occur should be identified. Second, in those cases where there is a conflict of choice of law rules (as in our earlier domicile — nationality example), the *forum's* choice of law rule should be preferred, not through an application of the *renvoi*, but as a matter of policy.

Another mode of establishing a degree of certainty in the ultimate decision of the court is through the use of statutes. An example of this is the British statute commonly known as Lord Kingsdown's Act.<sup>31</sup> Although this statute permits the application of either *forum* or foreign law, it is helpful as an expression of *forum* policy. Unfortunately, in many instances when the legislatures have attempted to control the choice of law, the phraseology of the statute has been poor, and the statutes have led to confusion and distorting re-interpretation by the courts.<sup>32</sup> Further, as Leflar points out, "socio-economic standards can change faster than disinterested legislators can repeal old and 'minor' legislation."<sup>33</sup>

On a broader scope, codification at the international level may produce a degree of uniformity at both the national and international level. If we can assume that all legal systems are *prima facie* equally fair and reasonable, then international uniformity will not necessarily improve the law in any one country.<sup>34</sup> However, there may well be some positive value in creating uniformity at the international level with regard to matters such as title and status. It is certainly desirable that a potential series of actions to settle an estate be avoided, and that possible "limping" situations respecting

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<sup>31</sup> See Falconbridge, *supra* n. 2, p. 153; Baxter, *supra* n. 26, p. 33.

<sup>32</sup> Leflar, *supra* n. 23, pp. 273 ff. For a fuller discussion on the limitations of the use of legislation for determining choice of law, see also D.F. Cavers, *The Choice of Law Process*, cap. 9.

<sup>33</sup> Leflar, *supra* n. 23, p. 274.

<sup>34</sup> Baxter, *supra* n. 26, p. 45.

legitimacy or marital status be eliminated. Further, international uniformity will create some degree of predictability at the international level and will thereby help to curtail potential "forum-shopping".<sup>35</sup> While there may be no great need for uniform substantive laws, some international uniformity in choice of law rules should be encouraged. But the technique for achieving such uniformity should be through international conventions, and not through a supposed adherence to the *renvoi* doctrine. It is unfortunate that, largely through the unwillingness of many countries to compromise their traditional rules of choice of law, the various international conferences on private international law have met with little success.<sup>36</sup>

The development of a consistent and realistic approach to the choice of law problem is not a simple task. The *renvoi* doctrine has often been used in the past as a device for arriving at a choice of law for reasons of policy rather than logic. The courts should abandon this choice of law technique, and should attempt a reformulation of their conflict rules in the light of logic and socio-economic reality. Decisions based on public policy should have their *ratio decidendi* clearly enunciated. In this manner, valid choice-influencing considerations will not be obscured by the doctrine of *renvoi*.

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<sup>35</sup> Leflar, *supra* n. 23, pp. 282-3; R.P. Leflar "Conflicts Law: More on Choice-Influencing Considerations" in (1966) 54 *Calif. L. Rev.* 1584, at p. 1586.

<sup>36</sup> Graveson, *supra* n. 1, p. 25; Dicey, *supra* n. 6, p. 69.