

RENOI IN CONFLICT OF LAWS: A DOCTRINE OR PROBLEM?

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Abstract

In the growing era of globalization importance of uniformity in laws and rules has become a major concern for co-existence. The idea is that a state even though being sovereign wherein it is invested with authority to make laws should not affect the sovereignty of another state. The subject which deals with a country's law applicable in another country and jurisdiction is private international law or popularly called as conflict of laws. Under this wide umbrella of conflict of laws lies the Doctrine of *Renvoi* dealing with the applicability of foreign State's jurisdiction

Renvoi is derived from French word '*renvoyer*' and it means to send or refer back. Here, the courts according to the conflict of law rules of that particular country adjudicate on the point where the matter can be decided in foreign jurisdiction as well and hence matter is referred back. Here, it is important to notice and learn different aspects about the doctrine and understand how it is causing problems in resolving disputes by delay or any such reason on board. It is critical to understand whether *renvoi* is actually a doctrine or a problem in disguise for adjudication of disputes in private international law or conflict of laws. Therefore an attempt to analyze and comment upon the understanding of *renvoi* in private international law and to bring out a sense of awareness with regards to the subject is the aim of this article. This doctrine has far reaching impacts on various issues such as socio-legal problems with regard to marriage, succession laws etc., which all fall under the ambit of private international law.

Thus in light of the above stated context this paper aims to examine and understand the Doctrine of *Renvoi*, its applicability, its feasibility and its impacts.

Keywords: *Renvoi*, jurisdiction, justice, forum shopping, limping, private international law.

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Introduction

Justice delivery system and mechanisms have throughout the ages evolved as a tool to make justice and fairness prevail in the society. The pivotal object of any legal system across the globe is to provide justice equally and therefore no discrimination based on who comes before the court. If this object is to be accomplished then it becomes essential to develop principles of law in such a manner 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 and for any legal system or justice delivery mechanism it is necessary to follow a consistent and similar *modus operandi* so that justice can be met equally to all.

Usually the legal systems of all states are based revolving around principles of equality and non-discrimination and therefore there are not many obstacles in this aspect. However the problems become particularly acute in those cases which may require the application of rules of law that are foreign to the particular country's courts. In cases having elements that connect them with other jurisdictions, one of the questions that arise 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.

The recognition of the *Renvoi* theory implies that the rules of the conflict of laws are to be understood as incorporating not only the ordinary or internal law of the foreign state or country, but its rules of the conflict of laws as well. According to this theory *the law of a countr* means the whole of its law.¹

What is *Renvoi*? : Origin and history

The word '*renvoi*' is derived from the French word '*renvoyer*' which means to refer back.² This doctrine obtained a foothold in English law in 1841 *via* cases on the formal validity of wills.³ In that context, three factors favored its recognition.⁴ First, the English

¹ See

http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5565&context=fss_papers, last viewed on 08/07/2016.

² DAVID MCCLEAN, THE CONFLICT OF LAWS 531 (Sweet Maxwell Thomson Reuters 7th ed. 2009).

³ *Id.*

⁴ Conflict of Laws. *Renvoi*. Re Ross; Ross v. Waterfield, [1930] 1 Ch. 377; Author(s): M.H.; Source: The Cambridge Law Journal, Vol. 4, No. 2 (1931), pp. 209-210; Published by: Cambridge University Press on behalf of Editorial

conflict rule was that time unduly rigid. It insisted on the compliance with one form and one form only for wills, that of the testator's last domicile. Second, in neighboring European Countries (where people of English origin were likely to settle) there was one more flexible conflict rule, which allowed compliance with the forms prescribed by either the testator's personal law or the law of the place where the will is made. Third, there was a judicial bias in favor of upholding wills which admittedly expressed the last wishes of the testator and were defective only in point of form.

The fountain-head of authority is *Collier v. Rivaz*⁵, where the court had to consider the formal validity of a will and six codicils made by a British subject who died domiciled in Belgium in the English sense, but not in the Belgian sense. Sir H. Jenner remarked that "the court sitting here to determine the issue at hand must consider itself sitting in Belgium under peculiar, circumstances of this case". He did not consider the English law and applied Belgian domestic law even though two codicils were made in Belgian form and four codicils in English. This showed that this doctrine was invoked as an escape device, in order to get round the rigidity of the English conflict rule.

The *Collier v. Rivaz* was later disapproved in *Bremer v. Freeman*⁶ where in the almost identical facts the Privy Council refused to admit to probate the will of a British subject who died domiciled in France in the English sense, but not in the French sense, on the ground that it was made in form acceptable in English but not in French Law. Until 1926 only single or partial *renvoi* was recognized, but in 1926 In *Re Annesley*⁷, Russell, J. introduced the doctrine of double or total *renvoi* and applied the same without citing specific authorities in that regard and applied French domestic Law as the law of the domicile on the ground that a French court would have done so by way of *renvoi* from English law.⁸

Committee of the Cambridge Law Journal; Stable URL: <http://www.jstor.org/stable/4502516> .Accessed: 11/07/2016 02:03.

⁵ (1841) 2 Curt. 855.

⁶ Conflict of Laws: Renvoi Doctrine; Source: Michigan Law Review, Vol. 29, No. 5 (Mar., 1931), pp. 627-628; Published by: The Michigan Law Review Association; Stable URL: <http://www.jstor.org/stable/1281473>. Accessed: 11/07/2016 02:00.

⁷ *Id.*

⁸ *Supra* note 1.

Exclusion of *renvoi*⁹

The Rome Convention excludes the application of *renvoi* in express terms. Article 15 provides that any reference to the applicable law of a country, specified by the provisions of the Convention, is taken to mean the application of domestic law of that country excluding its rules of private international law.¹⁰ Similarly, under the English common law rules, *renvoi* was expressly excluded by the judiciary.

In *Re United Railways of Havana and Regla Warehouse* (1960)¹¹, Lord Jenkins stated that the principle of *renvoi* found no place in the field of contract. In *Amit Rasheed Shipping Corporation v. Kuwait Insurance Company* (1984)¹², Lord Diplock elaborated on this issue and stated that the proper law of contract 'is the substantive law of the country which the parties have chosen as that by which their mutual legally enforceable rights are to be ascertained, but excluding any *renvoi*, whether of remission or transmission, that the courts of that country might themselves apply if the matter was before them.' He proceeded with an example and said that if 'a contract made in England were expressed to be governed by French law, the English court would apply French substantive law to it notwithstanding that a French court applying its own conflict rules might accept a *renvoi* to English law as the *lex locicontractus*¹³ if the matter were litigated before it'.

Renvoi: A problem¹⁴

The problem raised by what in conflict of laws is called *renvoi*, is simple: if the *lex fori*¹⁵ lays down that a particular issue should be decided by a foreign system of law as the *lex situs*¹⁶, or the law of the domicile of the person concerned, does it mean the domestic or internal rules of law of that system, or does it mean all the rules of law of that system including its conflict of laws rules?

If the reference to the law of a particular country means a reference to its entire set of rules including its conflict of laws rules, in some cases, where the conflict of laws rules of that

⁹ ABLA J MAYSS, PRINCIPLES OF CONFLICT OF LAWS 130-131 (Cavendish Publishing Limited 2nd ed. 1996).

¹⁰ *Supra* note 1.

¹¹ [1961] A.C. 1007.

¹² [1984] A.C. 50 at p. 61-62.

¹³ Law of the place where the contract is made.

¹⁴ Atul M. Setalvad, Setalvad's conflict of laws, 33-34 (Lexis Nexis 3rd ed. 2014).

¹⁵ The law of the forum.

¹⁶ Law of the place where the property is situated.

system are fundamentally different from those of the *lex fori*, the result can be strange.

The problem of *renvoi* cannot, however, arise if it is consciously decided to apply a foreign law in a given set of circumstances as that decision must mean the foreign domestic law. This is the situation in when, under an international convention, several countries have agreed that a particular kind of dispute between parties should be resolved by a specified legal system. Consequently, most frequently there are international conventions which adopt a uniform rule of conflict of laws expressly provide that the law chosen as applicable must mean the domestic law of that legal system. It should also be kept in mind that there are certain conventions such as the Rome Convention which excludes application of *renvoi* (Article 15).

Thus, it is somehow contrary to the object of Conflict of Laws or Private International Laws in place. The main objective of rendering justice is questioned when there is exercise of doctrine of partial (single) and total (double) *renvoi*. The difficulty in applying this doctrine is the unpredictability of the result.¹⁷

Solutions to *renvoi*¹⁸

In theory there are three solutions to decide whether a reference to determine what is meant when, under the *lex fori*, it is decided to apply a particular system of law to decide a particular issue.

To illustrate the three possible solutions it would be useful to take a common example:

A court in India is considering the question of succession to the moveables of an Indian national domiciled in Italy. The three possible solutions are:

- 1) The court could, in this case, where under its conflict of laws rules, it is required to apply Italian Law as the *lex domicile*¹⁹ of the *propositus*²⁰, take into consideration only the domestic or internal law of Italy without taking into consideration the Italian conflict of laws rules. Such a solution has the advantage of simplicity. Further, it accords with the presumed intention of the *propositus*, while being

¹⁷ Re Duke of Wellington, [1947] Ch. 506 at 515.

¹⁸ Atul M. Setalvad, *Supra* note 14 at pp. 34-35.

¹⁹ The law of the domicile by which the rights of persons are sometimes governed (as were as the person dies leaving personal property)

²⁰ The law applicable based on the descent.

an Indian, has chosen to live in Italy permanently and has acquired an Italian domicile. It is also logical as it involves the application of conflict of laws rules once, when the Italian rules are applied and Italian law chosen as the law of the domicile of the person. In some cases, however, this may not produce a very just result because had that very issue been decided by an Italian court, it may have applied Indian, not Italian, law to resolve it.²¹

- 2) The court could, in the same situation, ‘accept’ back the matter from Italy, but treat it as a reference to domestic rules of Indian law. This process has been described as ‘remission’ or single or partial *renvoi*.²² Such a solution does ensure that the decision would be the same as that which might have been reached by an Italian court and, in that sense, is just and proper; on the other hand, it amounts to the virtual abrogation of our rule that such issues should be resolved by the law of the person’s domicile. This solution has been although criticized as amounting to surrender to the rule of foreign law.
- 3) The third solution is to adopt what has been called ‘total *renvoi*’. Total *renvoi* has three stages: first, a reference, to the Italian law under our conflict of law rules as the *propositus* was domiciled in Italy; then, a reference to Indian Law because under Italian conflict of laws rules the proper law is the law of the nationality of a person; thirdly and finally, because the second stage involves a reference to all the rules of Indian law, including its conflict of laws rules, a reference back, once again, to Italian law. This process would be satisfactory if Italy ‘accepts’ the *renvoi*, and the result would also be just as the same conclusion would have been reached by an Italian court had the dispute been decided by it. The process would break down, however, if the third stage reference is to a system of law which like the Italian system before 1995 did not accept the *renvoi*.

As the English decisions are not satisfactory, there is considerable scope for Indian courts to lay down the correct law on the issue of *renvoi* generally. It appears that the rule as propounded in a leading English book set out under *Position of England* above is satisfactory as it gives full effect to our conflict of laws rules, and

²¹ CHESIRE & NORTH ON CONFLICT OF LAWS, 59 (OUP 14th ed. 2006).

²² NYGH & DAVIES, CONFLICT OF LAWS IN AUSTRALIA, ¶15.3 (Sydney: Butterworths, Lexis 7th ed. 2002).

avoids the uncertainty and complications involved in adopting the doctrine of total *renvoi*.²³

***Renvoi* in various jurisdictions²⁴**

England: As far as the English Law is concerned, *renvoi* has never been applied in fields such as contracts and torts, and has been applied principally in matters pertaining to succession and legitimating.²⁵

Australia: Here, there is no application of *renvoi* in the field of contracts.²⁶

India: The position taken by the Supreme Court of India is that doctrine of *renvoi* is inapplicable to the area of contracts.²⁷

European Union: The application of *renvoi* is expressly excluded in contract cases under Article 15 of the European Commission Convention on the Law Applicable to Contractual Obligations (Rome 1980). It has also been rejected for contracts by most commonwealth countries.

United States: Most courts try to solve conflict of laws questions without invoking *renvoi*. In *Re Schneider's Estate*²⁸, is an example where *renvoi* is recognized as an option, in which the local court chose to apply the foreign country's laws to decide the dispute in the local court. This is most likely to happen in cases involving immovable property or domestic relationships.

Conclusion

A decision of the French Court of Cassation, known as the *Forgo* case²⁹, raised a problem of the most fundamental importance in the conflict of laws, to which Professor Labbe of the Ecole de Droit of Paris called first attention in an article which appeared in 1885.³⁰ This case was about the distribution of property to distant relatives when a person died intestate and conflict between

²³ ALBA J MAYSS, PRINCIPLES OF CONFLICT OF LAWS 170 (Cavendish Publishing Limited 2nd ed. 1996).

²⁴ Atul M. Setalvad, *Supra* note 14 at 35-42.

²⁵ *Supra* note 5.

²⁶ *Kay's Leasing Corpn. v. Fletcher*, [1064] 64 SR (NSW) 195.

²⁷ *Viswanathan (R) v. Rukn-ul-Mulk Syed Abdul Wajid*, A.I.R. 1963 S.C. 1.

²⁸ 96 N.Y.S. 2d 652 [1950].

²⁹ Cass. June 24, 1878, *Dalloz*, 1879, I, 56.

³⁰ "Renvoi" in the Conflict of Laws; Author(s): E.G.L.; Source: The Yale Law Journal Vol. 29, No. 2 (Dec. 1919), pp. 214-218; Published by: The Yale Law Journal Company, Inc. Stable URL: <http://www.jstor.org/stable/786110> Accessed: 11-07-2016 07:02.

French and English law which was settled *via* this doctrine and it said that this doctrine does not allow forum shopping and in a way paving swifter road to render justice which is sole object of conflict of laws. Later, in *Re Annesley*³¹ case where similar facts were weaved in order to deal with property of mother who died without leaving at least 1/3rd of her property to her children which was mandatory under her national law. She died in England and again the doctrine of *renvoi* was used to determine the consequences. Later in another landmark case *Macmillan Inx v. Bishopgate*³² said this doctrine involves the Judges in judicial mental gymnastics. Later in *Re Ross*³³ where there was a conflict between Italian and English law where the Italy courts sent back the matter to the English courts. Thus, one can safely arrive to a conclusion that although main objective of the conflict of laws is to render justice it ought to be fair enough hence applying the doctrine of *renvoi* it assists the process and although there might be certain problems *renvoi* is to be considered an efficient doctrine to solve private international law disputes.

However, it is apparent that the *renvoi* doctrine is not a very firmly built doctrine and has various loopholes. The doctrine is laid down on the premise that the rights of an individual must vest in him and therefore must be afforded to him by all the foreign courts. This doctrine is somewhat ridden with misconceptions. 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.

On a broader sense, international level codification may bring a degree of uniformity at both the national and international level. There was always a need for the codification of law at the international level so that there is harmony between National laws in international arena. For instance, if one can assume that all legal systems are *prima facie* equally fair and reasonable, then uniformity in laws international will not necessarily improve the law in any one country. However, there may well be some positive value in creating uniformity at the international level with regard

³¹ [1926] Ch. 692.

³² [1995] 1 W.L.R. 978, p. 1008.

³³ [1930] 1 Ch. 377.

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 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*. 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. 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*.

