Zen and the art of zebra trading: Classification in conflict of laws

Kathleen Anne Bethune, LLB student, University of South Africa

Abstract | Umongo

Various solutions have been suggested to the problem of classification in conflict of laws. In this essay a Unisa student grapples with the enlightened lex fori and via media approaches. An extended metaphor is used to concretise the concepts. This is followed by a brief survey of cases and academic opinion. Finally Buddhist teachings on Enlightenment and the Middle Way provide refuge.

1 Introduction

The American Realist, Judge Hutchinson, said that he decided complex cases by ‘brooding over’ them, waiting for an ‘intuitive flash of understanding’ and not using ‘logomachy’.1 I have been brooding over the complexities of the competing approaches to classification for weeks now and I am afraid the jury is still out while I wait for the decisive flash.

But I remember that in the Zen tradition ‘Enlightenment’ is a process that also involves spontaneous flashes of insight called satori, the process facilitated by

dwelling on the incomprehensible in the form of riddles or koan which force the mind to go beyond logic.\(^2\) Perhaps the whole question of conflict of laws classification is in fact a koan with as little hope of a rational answer as ‘the sound of one hand clapping’.

That might be a mini satori in itself. In the absence of a big flash, I’ll share my broodings and some little flashes of understanding I have had along the way.

## 2 Dealing with diversity

Twining talks of ‘the law as a practical human activity’, which benefits from good ‘horse sense’.\(^3\) I’m rather inclined to the view that the law is an ass. Conflict of laws then conjures up the image of a multitude of beasts of varied (and often dubious) pedigree housed in the legal stables of the world. Perhaps it is not surprising that problems arise when we need them to pull together.

Speaking of pedigree and biodiversity, a zebra arrives at an Equestrian Society event one day\(^4\).

The official in charge flips though his folders. ‘Clearly, not a Falabella or a Shetland,’ he mutters, ‘so you’re not a miniature . . . but not a Lipiznaner or a Percheron either . . . so not a big breed . . . medium . . . ? Palomino . . . no . . . Arabian . . . no . . . Ah, donkey!’ He looks up at the zebra . . . ‘Perhaps not quite, but close enough!’ With a flurry of forms the zebra is duly designated ‘donkey’. This is the pure or strict lex fori categorisation of Kahn and Barkin as applied in *Ogden v Ogden*:\(^5\) rules of foreign law classified according to their best analogy in internal law.

If he had said: ‘A zebra, you say . . . we don’t have those . . . let’s see what our rule book says about other animals . . .’ he would have been using Kahn-Freund’s ‘enlightened’ lex fori because he distinguished between domestic law concepts (his breed register) and his conflict of law concepts (in the rule book).\(^7\)

On the other hand he could have said: ‘You may be an ‘unusual donkey’ . . . If you can show me what the Zoological Society says about you I’ll be able to decide whether to treat you as a donkey or whatever.’ This would have been a via media approach of first making a tentative classification using his own breed register and then considering ‘potentially applicable appropriate’ breeds ‘in their contexts’.\(^8\)

He may even have been faced with two rules:

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3 As referred to by van Blerk *op cit* (n 1) at 78.
4 This scenario was developed with my writer friend Gino Noli who is also a horse breeder. Originally, my story involved a cheetah at a dog show.
5 [1908] P 46.
7 *Op cit* (n 6) at 115.
8 Ibid.
1. Horses of uncertain breed must be dealt with according to the event organiser’s standards.
2. Animals for whom another society has registered specifications must be dealt with according to the standards of that society.

Then he would have to do a full Falconbridge⁹ analysis:

to determine whether
the concrete legal question [What to do with zebra?]
to which a given rule relates [Donkey/Zebra standards]
is subsumed under [Gosh!]
the abstract legal question specified [1. Horses of uncertain breed/
2. Animals registered somewhere else]
in a given conflict rule [Donkey/Zebra standards]
and consequently determine if
the rule of law [Donkey/Zebra standards]
is applicable in the factual situation.

While the ‘Zebra?’ question might fall within the ‘Strange horse?’ question of rule 1, a cosmopolitan view would alert the official to possible ‘Giraffe?’ or ‘Camel?’ questions that may crop up at some other stage and would not be fully within its ambit. However ‘Zebra?’ is completely covered by ‘Unknown animal, registered elsewhere?’ in rule 2. It follows that rule 1 must be rejected and rule 2 applied.

This all appears beautifully clear, until one realises that the two rules mentioned are in fact logically identical to one combined rule:

\[
\text{FOR ALL } A \quad (A = \text{animals not fitting into our registered breeds}) \\
\text{IF } C \quad (C = \text{complying with specifications of another society}) \\
\text{THEN 2} \quad (2 = \text{use that society’s standards}) \\
\text{ELSE 1} \quad (1 = \text{force into our system and judge by our standards}).
\]

Seen in this way, the official’s via media ponderings are now neatly ‘categorisable’ as ‘enlightened’ lex fori! The sentences explaining these approaches use different words, but don’t they amount to the same thing?

Before leaving the event, the zebra comes across the prize stallion and asks, ‘What are you for?’ And the stallion answers, ‘Take off your pyjamas and I’ll show you!’

3 Case law

While it is tempting to scoff at academic pigeonholing of the courts’ classification in choice-of-law rules, a brief perusal of case law will bring home just how radically even nuanced shifts in perspective can alter outcomes and affect lives.

In *Ogden v Ogden* \(^{10}\) strict lex fori classification led to a woman being bound in a lifelong ‘limping’ marriage to a man whom the French courts had declared never to have married her.

In *Anderson v The Master* \(^{11}\) a widow is granted the opportunity to provide proof that she has a claim to part of her husband’s estate before it is wound up, because the court (without expressly saying so) followed a less mechanical approach which may be seen as ‘enlightened’ lex fori or indeed as via media.\(^{12}\)

*Pitluk v Gavendo* \(^{13}\) involved both matrimonial and successional matters. The will a woman had drawn up, prior to marriage, would be given effect or not, depending on whether her marriage had automatically revoked it under Rhodesian law. Classification as matrimonial would lead to one outcome and classification as

\(^{10}\) Supra (n 5).
\(^{11}\) 1949 (4) SA 660 (EDL).
\(^{12}\) Op cit (n 6) at 108.
\(^{13}\) 1955 (2) SA 537 (T).
successional to the opposite. As it happened the courts did classify it as matrimonial, using lex fori, but only after considering the Rhodesian rule of law ‘in the light of [the whole] factual complex’ rendering their approach ‘enlightened’.14

In *Re Maldanado's Estate*15 a dead Spaniard’s property would go into the coffers of Spain or of England, depending on how the classification was done. The court took the unusual step of classifying the rule in the context of Spanish law thus using the lex causae and not its own English law – making Spain the heir.16 In my opinion this must have been motivated by considerations of comity.

*Laurens NO v Van Höhne*17 also involved substantial amounts of money and the judge’s task was made all the more difficult by an intractable litigant. At least the prescription issue here did not involve a ‘gap’ as it did in *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd*.18 This case resulted in a company being able to reclaim thousands of pounds of debt because of the way the court classified the ‘rules of law’ in this tricky situation. The judge, to my mind convincingly, dismissed academic problems by using lex fori as the standard classification tool. Perhaps he agreed with Edwards who says that many ‘problems’ of conflict of laws are ‘in the minds of academic writers who, in their disputations, are at times inclined to stir up dust and then complain that they cannot see clearly’.19

We shall look now at some of these writers’ work in more detail.

## 4 Discussion

Like the American Realists, I hold a more than sneaking suspicion that unstated policy, not hallowed principles and doctrines, often influences matters.

In *Ogden* a supposedly gender neutral, but what we can safely assume to be conservative male court, was approached by a man seemingly bound in matrimony to an impulsive woman who had kept details of her (sexual) history from him. The court responded by releasing him from her, ostensibly using legal ‘reasoning’. Perhaps ‘it’ was relying on the mechanical nature of the strict lex fori approach to ‘conceal [“its”] choice from the reader of the judgment’ in the same way as Forsyth suggests apartheid Appellate Division judges did.20

I wonder whether there is perhaps a hint of the same accusation of hidden psychological choice when Forsyth says in his article about *Laconian* that ‘one senses that Booysen J was sympathetic towards *Laconian Maritime Enterprises*’.21

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14 Op cit (n 6) at 112.
16 Op cit (n 6) at 113.
17 1993 (2) SA 104 (W).
18 1986 (3) SA 509 (D & C).
20 Op cit (n 1) at 79.
21 CF Forsyth ‘Enforcement of arbitral awards, choice of law in contract, characterization and a new attitude to private international law’ 1987 *SALJ* 4 at 12.
The court had, rather creatively, ruled that the matter was not res judicata despite a very similar action having been dealt with in an Alabama court where it had failed because it was ‘time-barred’ under United States federal law. Later in the case New York law was rejected as the proper law to deal with substantive aspects of the case, thus once again protecting the company from the effect of prescription rules.

However, the prescription rules of the other countries involved still caused complications. The court decided that procedural matters were to be dealt with by the lex fori (South African law) and, after some pondering, that English law was the proper law and so it would be applied regarding substantive matters. This is where the problem arose. In South Africa, prescription under the new Act is regarded as substantive and England’s rules are procedural. So prescription rules should by strict logic thus not be applied at all. A German court once reacted to this ‘gap’ by upholding a claim that had in fact prescribed in both jurisdictions! Joining it in its ‘notoriety’ was not an attractive prospect for Booysen J. According to Forsyth none of the approaches to classification ‘however subtle and sophisticated provides an adequate solution’. Nevertheless he goes on to criticise the judge’s ‘refuge in the lex fori’, albeit ‘with some diffidence’.

Forsyth’s main irritation is that Booysen J used the ‘enlightened’ approach without admitting to his own enlightenment!

I see the matter differently. Booysen J lays out what the theorists say very politely and then slips in an astounding solution in a few small phrases that seem to have been overlooked by Forsyth. He concludes his exposition stressing ‘that characterisation is but a tool in the process of reasoning . . .’ and a little later brilliantly explains that simple (not ‘rigid’) lex fori quickly finds analogies if they exist and, if the attempt turns out nothing, characterisation can be abandoned since it is ‘not a necessity but merely a tool to be used when available’. The Falconbridge analysis is shown up for the fluff that it is. The initial tentative classification (which is by lex fori) must be followed by an extensive enquiry that will give the court all the information it needs to move on with the case. The final little jump back may be a neat dance move, but what does it achieve apart from theoretical elegance? Booysen J gets on with just such an enquiry, being ‘enlightened’ enough to free himself of the mechanical application of Cheshire’s ‘consecutive stages’.

In Laurens Schulz J is gushing in his endorsement of the via media, assigning to it power even Falconbridge never envisaged. He will not start on the Middle Way only to fall back like Booysen J. Accepting his Path he will ‘follow it through wherever it leads’. Why? ‘We dare not let our law stand still’. Precedent can be abandoned because ‘our own South African private international law cannot be allowed to languish in a straightjacket’.

22 Op cit (n 21) at 13.
23 Supra (n 18) at 519 J.
24 My emphases. Supra (n 18) at 520 F.
25 Supra (n 18) at 520 F.
26 Ibid.
‘If one does not adopt this approach further evils may ensue’ [gosh, again].\(^{27}\) At least no one can accuse him of hiding psychological influences. Crucial points of the case are decided because of his trust of ‘this small old man [with his] clear voice’ and ‘a feeling of discomfort’ while adjectival issues were debated.\(^{28}\)

5 The problem remains

That’s been quite a lot of brooding . . . However, I haven’t even been able to brood on what really distinguishes ‘enlightened’ lex fori from via media.

It doesn’t help that writers can’t decide which has been applied unless the person doing the classification trumpets it out. Forsyth\(^ {29}\) only mentions that they both ‘envisage an informed review [. . .] of potentially applicable leges causa’ and a willingness to depart from the categories used in the lex fori’s internal law recognising ‘that characterisation is a fundamental problem’ without a mechanical solution. Prosser’s quagmires threaten to engulf me.\(^ {30}\)

6 Refuge in the Dharma

I sincerely hope that the piecemeal conflict rules and doctrines on how ‘best’ to apply them will eventually be swept away by the New Constitutional Order. In the meantime, what has helped is going back to the Buddhist source of the terminology itself. This reveals interesting similarities to the conflict of laws story.

Sidhartha Gautama (also called Buddha) had been born to a life of opulence and power. His life and concerns were completely confined by the walls of his palace until, as legend has it, on his first outing, he saw an old man, a sick man and a corpse. Nothing in the palace could answer the haunting questions this experience raised. He abandoned everything completely, going out into the very world that had scared him and vowing to return only when he had discovered a way out of the horrors of age, sickness and death.

For six years Gautama followed various austere mechanistic processes in his attempt to find his truth. The day he gave them up, he reached Enlightenment. That day a village girl, Sujata, offered him a bowl of milk when he was weak from fasting. The contrast between his own pitiful state and her glowing health shocked him. Neither luxury nor self-mortification had led to the happiness he saw in her. This realisation catapulted him towards Enlightenment. The Middle Way has been a central tenet of Buddhism ever since.

\(^{27}\) Supra (n 17) at 117C E.
\(^{28}\) Supra (n 17) at 120G H.
\(^{29}\) Forsyth op cit (n 21) at 11.
\(^{30}\) Prosser Selected Topics on the Law of Torts (1953) 89 stated: ‘Conflict of Laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorise about mysterious matters in a strange and incomprehensible jargon’.

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That night he sat down to meditate under a Bo tree. There he remembered the joy, contentment and inner calm he had felt sitting under a tree in a field one day as a child and he allowed himself to relive this experience. The meditations that flowed from this state finally made him understand the problems of life clearly and sense a way to solve them. He was finally liberated! This was Enlightenment – a full knowledge of things as they really are, but more of a way of seeing than the content of what is seen.

Gautama had no delusions of being Divine. He knew Enlightenment required great personal effort but he was filled with a desire to help people move towards it. His teachings simply guide (perhaps across ‘a dismal swamp, filled with quaking quagmires’) towards the solution he had found. To be on the Path, one must acknowledge the essentially unsatisfactory nature of life, dukkha and accept that indulgence in extremes restricts the opportunities for Enlightenment.\(^3\)

In Buddhist teaching it is easier to be Enlightened if one follows the Middle Way and the Enlightened walk the Middle Path to avoid being caught up in suffering. The two concepts although not identical are intricately entwined. Perhaps that is the satori I was waiting for. I leave it to the reader to ponder the parallels.

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