RENVOI TECHNIQUES AS INSTRUMENTS AGAINST JURISDICTION ISSUES: A COMPARATIVE STUDY BETWEEN PORTUGUESE AND BRAZILIAN LEGISLATIONS

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https://doi.org//10.62140/MDFS2772024

Summary: 1. Introduction: The conflict of laws *per si* and jurisdiction problems; 2. *Renvoi*; 3. Portuguese legislation; 4. Brazilian legislation and its challenges; 5. Conclusion.

Abstract: This paper explores the efficacy of the *renvoi* technique in Private International Law (PIL), emphasizing its potential to achieve legal uniformity and certainty across jurisdictions. It examines the plurality of conflictual regulation techniques within PIL, highlighting the need for coherent integration of choice-of-law, choice-of-court, and recognition of foreign judgments. To do so, this paper contrasts the Portuguese legal system, which effectively employs *renvoi*, with the Brazilian one under the LINDB (Lei de Introdução do Direito Brasileiro, freely translated to "Introduction to Brazilian Law Act"), which resists this technique, resulting in inconsistent legal outcomes. It will explore jurisdiction issues as well, to see how legal systems can better address the complexities of transnational cases, ensuring justice and predictability in legal proceedings.

Keywords: Private International Law; *renvoi*; jurisdiction; Portugal; Brazil; comparative civil law.

1. INTRODUCTION: THE CONFLICT OF LAWS PER SI AND JURISDICTION PROBLEMS

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When determining the applicable law in litigation involving transnational issues, legal doctrine offers various techniques. Among these, choice of law rules have emerged as the most prominent method in civil law countries, giving rise to significant conflict of law issues.

In contrast, common law countries often resist this approach, as exemplified by the American Restatements and influential legal scholars like Joseph Story, David Cavers, and Brainerd Currie, each one having relevant theories regarding the relevant connecting factor of the conflict law.

Focusing on the European perspective, the choice of law method is a standard model in various legal systems, and it prioritizes certainty, foreseeability, and international harmony of solutions. Recently, this approach has become more flexible, incorporating "escape valves" such as the public policy clause and the best interest of the child criteria.

When this process indicates the application of foreign law, generally European countries' jurisdictions tend to shift the examination then to the choice-of-law rules of the relevant foreign country. However, complications arise when this foreign legal system does not endorse its own application, emerging the need of a phenomenon known as *renvoi*, largely accepted in European legislations. Although choice of law issues are distinct from jurisdictional issues, they intersect when some countries recognize and apply *renvoi* techniques, while others do not, creating a complex gray area in terms of jurisdiction and forum shopping matters.

This paper's analysis will be done with a comparative approach, focusing on Brazilian and Portuguese legislation. By examining these legal systems, the aim is to provide a comprehensive understanding of how *renvoi* operates and its implications for Private International Law.

2. RENVOI

Renvoi is a doctrine in private international law used to determine which law should be applied when a choice of law rule points to a foreign jurisdiction. Essentially, it is a technique for resolving issues arising from the bilateral nature of conflict rules and the differences in connecting factors between the legal systems involved in a case. It has mainly emerged from famous cases like the Forgo case (1882) and Collier v. Rivaz (1841).

Renvoi is particularly used when there is a discrepancy between the connecting factors used by the forum's conflict laws and those of the foreign law to which it points, not limiting it to direct/

material reference, but actually diving into the foreign law's PIL. This technique aims to correct inadequate outcomes produced by the straightforward application of conflict rules, facilitating a more harmonious recognition of legal situations across different jurisdictions. Its adoption is also advantageous when it comes to facilitate the *exequatur* in the State of the appointed law by the *lex fori*.

Some authors, however, claim this harmony only exists when the foreign legal system points to substantive or material norms as applicable. If it also considers the foreign PIL, each legal system will decide based on its *lex fori* when accepting *renvoi* from the other, leading to disharmony between the two legal systems. This argument, however, does not take into consideration the multiplicity of possible *renvoi* techniques.

Further criticism avoids *renvoi* because the foreign PIL deems its internal law incompetent can lead to a vicious circle (*circulus inextricabilis*), where neither jurisdiction considers its law applicable, leading to a potential deadlock. Some authors also claim it is often difficult to interpret foreign PIL, as it is broadly studied in each legal system.

Proponents of *renvoi*, on the other hand, argue that it is impractical to separate a foreign jurisdiction's domestic law from its PIL rules, as they are intrinsically connected. When the forum's PIL points to a foreign law, it should consider the foreign law in its entirety, including its PIL rules. This does not relinquish sovereignty, as accepting the foreign PIL rule aligns with the forum's conflict rule. *Renvoi* helps ensure that the law most closely connected to the legal situation is applied, adhering to the Principle of Proximity, which is gaining prominence in modern private international law.

Considering both positive and negative positions about *Renvoi*, there are two main theories that the countries' legislations may apply. The first is condemning *renvoi* (doctrine of direct reference, or *Sachnormverweisung*), pointing exclusively to the material foreign law, or understanding it as favorable (doctrine of *renvoi* or total reference theory, or *Gesamtverweisung*), referring to the PIL of the foreign legal system. Fact is: with many legal systems adopting different approaches towards *renvoi*, depending on the jurisdiction, different outcomes may emerge from the same case - but different courts. The absence of standardized jurisdiction rules across legal systems (with some exceptions, such as specific Hague Conventions or European Regulations) often leads to forum shopping, where lawyers seek jurisdictions most favorable to their interests.

A practical example of the aforementioned situation is, hypothetically, the succession of a French man that lived in Brazil most of their life, bought multiple houses there, then moves to Portugal at the end of his life and passes away; according to Portuguese Civil Code, article 62 and 31, the connecting factor would be the nationality of the deceased, consequently considering the French law applicable. French jurisprudence accepts a similar *renvoi* model to the Portuguese one regarding remission and transmission, and considers applicable in those cases the *lex rei sitae*. Therefore, both French and Portuguese courts would apply the Brazilian law. If the succession were to be in Brazilian Courts, however, in this case, Brazilian law would consider the Portuguese law competent as it was the last domicile of the deceased (article 10 LINDB). The Brazilian court would not assert its applicability solely on the basis of non-recognition of *renvoi*.

In conclusion, despite *renvoi's* drawbacks like redundancy and intricacy, its merits—fostering judicial concord, honoring foreign legal intentions, and guaranteeing the application of the most fitting law—are significant in resolving transnational legal disputes.

3. PORTUGUESE LEGISLATION

Portugal is a rare exception of the polarity of the positions towards *renvoi*. It adopts an intermediate position, accepting *renvoi* as an useful technique, but not as a general guiding principle. It is used as complementary proceeding to correct the normal fluidity of the conflict of laws.

The Portuguese Civil Code was considerably developed for its time (1966) and although it uses *renvoi* techniques such as remission and transmission, this use is moderate and has limits towards *renvoi* use. We shall analyze 3 of its articles.

Firstly, the article 18, about remission or *renvoi au premier degré*, the article instructs the applicator to apply Portuguese law when the PIL of the country designated by the previous conflict law. This, combined with the general principle of direct/material reference postulated in article 16 "A reference to conflict rules to any foreign law determines only, in the absence of a contrary provision, the application of the internal law of that law", avoiding *circulus inextricabilis*. However, it shows a restriction when it comes to personal status matters. In these cases, "Portuguese law is only applicable if the interested party has their habitual residence in Portuguese territory or if the law of the country of this residence also considers Portuguese domestic law competent", limiting *renvoi*.

Secondly, article 17 shows the transmission cases, or *renvoi au second degré*, states that if the law designated by the Portuguese conflict of laws rules refers to another legislation which considers itself competent to regulate the case, then the internal law of that legislation should be applied, also avoiding *renvoi ad infinitum*. However, transmission ceases if the law designated by the Portuguese conflict of laws is referencing nationality and the person concerned habitually resides in Portuguese territory or in a country whose conflict of laws rules consider the internal law of the state of their nationality competent. Lastly, only the cases of guardianship and curatorship, property relations between spouses, parental authority, relations between adopter and adoptee, and succession upon death may be transmitted only if the national law indicated by the conflict of laws refers back to the law of the location of the immovable property and this law considers itself competent, pointing out another restriction.

Finally, article 19 also limits *renvoi* in order to prioritize the *favor negotii* principle, choosing not to apply articles 18 or 19 when, from their application, a contract becomes invalid or if it is not the applicable law chosen by the parties, applying article 16 in those cases.

It is imperative to acknowledge two final considerations. Firstly, the standard progression of *renvoi* may be disrupted not solely by the *favor negotii* principle but also due to *fraude à la loi* and the public policy and the emergent materialization of PIL, such as the best interest of the child criteria, now concerned with the tangible outcomes of legal application. Secondly, regarding jurisdictional matters within Europe, instruments like the Brussels I Regulation (1215/2012) provide guidance on jurisdictional issues, thereby mitigating such concerns within the European context. Outside the European context, the absence of uniform jurisdictional legislation coupled with disparate *renvoi* practices may precipitate forum shopping between nations.

4. BRAZILIAN LEGISLATION AND ITS CHALLENGES

Brazilian legislation, on the other hand, has an impediment in the application of *renvoi*: the article 16 of the LINDB, it excludes any *renvoi* to be made by the PIL of the foreign law, only allowing the direct reference doctrine.

Many attempts have been made to overcome this view, such as the "Anteprojeto da Lei Geral de Aplicação de Normas Jurídicas" (freely translated to Draft of the General Law on the Application of Legal Standards), by Haroldo Valladão, and the Project of Law nº 4905/1995, by Jacob Dolinger, Inocêncio Mártires Coelho, Rubens Limongi França and João Grandino Rodas.

All of them failed, and Brazil holds the anti-*renvoi* position. This stance is seen as outdated nationalism, overemphasizing the criteria used by national legislators in conflict of laws. Proponents of *renvoi* argue for applying foreign law in its entirety, accepting its conflict rules to achieve fairer outcomes. Conversely, the restriction to the material reference theory can lead to varied results across jurisdictions, making it an inefficient method for resolving multi-localized legal situations.

It could be posited that the endorsement of *renvoi* might precipitate a phenomenon akin to the "Brussels Effect." Anu Bradford's research into European market regulations and their impact on the Global South suggests that such regulations may constitute a form of neo-colonialism as they are just transposed to other legal systems without checking its adequacy to their own legal contexts. Consequently, Brazil's adoption of *renvoi* could be interpreted as conforming to the prevailing European legislative trends and patterns.

This applies mainly to business-related regulations. However, many studies have successfully proven that this is not the case: there is a true need to harmonize foreign decisions and decrease forum shopping. To do so, the adoption of *renvoi* should be cautious and pragmatic, always aiming for the most equitable results. Thus, it is argued that *renvoi*, especially considering the peculiarities of the Portuguese system in personal statute matters, is the best solution to mitigate the negative effects of conflicts in private international law systems. Therefore, there is an intrinsic need for a reform in the LINDB.

5. CONCLUSION

The *renvoi* technique, despite some resistance, is an effective tool in modern PIL for achieving legal uniformity and certainty. Ensuring coherence among choice-of-law, choice-of-court, and recognition of foreign judgments is crucial for consistent legal outcomes.

The Portuguese legal system carefully uses *renvoi* to address these conflicts, achieving greater harmony in judicial decisions. This approach contrasts with the Brazilian system, which, under the LINDB, does not currently accommodate *renvoi*, resulting in variable applicable laws depending on the forum. It is not a matter of legal superiority, neo-colonization, or merely transcribing European legislation; Brazilian incorporating *renvoi* would simply better align it with contemporary legal needs and international practices.

Adopting *renvoi* as a technique rather than a general principle can lead to uniform judgments and legal security, meeting the demands of an increasingly globalized world. Countries hesitant about *renvoi* should consider its careful application, when it has proven beneficial in harmonizing legal decisions, therefore successful in avoiding jurisdiction injustices.

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