# A Review of the Conflicts Law Revolution in the USA As a part of historical sketch of the theories and methods of private international law

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## 1. Introduction

This article was originally prepared as a revised chapter of a famous treatise of private international law in Scotland, where the author stayed total three years as a graduate research student. In these years, I watched the rise of civil law tradition not only in Scotland but also in United Kingdome generally, which was caused by the arguments on unjust enrichment mainly lead by Peter Birks who had been a professor of Roman law in the University of Edinburgh before he held the chair in Oxford. Some judgments of House of Lords followed this academic movement. On the other hand, at that time, the divide of the theories and methods on private international law between USA and UK seemed to be almost impossible to overcome. Scotland has been proud of being one of the most important places for developing private international law. Therefore, if my memory is correct, the original author of the treatise was very much annoyed by the scornful criticism against his explanation of new methodologies developed in the USA by a famous professor who was evaluated highly as one of the 'avant-garde' in US movement. As a research assistant, the main mission given to me was to revise the part of introducing modern methodologies developed in the USA based on a substantive research.

This experience gave me a lot of new understandings and insights of private international law as well as the cultures of lawyers. Following are the original writing by the original author: 'Judges decide cases on the basis of certain assumptions, consciously or unconsciously held, and the fact that in any branch of the law the decisions exhibit some consistency will usually point to a sharing of the relevant assumptions. The judges may decline to describe these shared assumptions as a theory, but they have all the characteristics of one and inevitably influence the development of the law. A man can disdain theory only when he is quite convinced of the validity of his own assumptions. Such a man may possibly apply or even make law, but he can hardly understand it. An understanding of the law presupposes an understanding of the assumptions of lawyers.'[1]

1 A.E. Anton with P.A. Beaumont, Private International Law: A treatise from the standpoint of Scots Law, 2nd edn (Edinburgh: W. Green, 1990), 17.

I am not always sure what he meant by these sentences, because, in my understanding, the advocates of new theories in the USA vigorously pursued the very basic legitimacy of shared assumptions themselves. I think it is only the real lawyers who are allowed to embark on such bold experiments. However, I fully agree with him in the following paragraph.

'In private international law, theoretical questions emerge compulsively at its very threshold. Why should we depart from the rules of our own law and apply those of another system? How do we select the relevant foreign rules? The answers given to these questions at each stage in the history of the conflict of laws have been of considerable practical importance. Their terms have profoundly influenced both the method adopted to select foreign rules and the extent to which the selected foreign rules are allowed normal operation.'

I believe that this stays to be the sound starting point to think over why there have been so many different opinions appeared and are still appearing in this area of law[2], which is very clearly shown in the movement named 'Conflicts Law Revolution'.

This article is largely a review of the recent schools of private international law in the USA, even if I occasionally add some my own critical comments. The starting point is 'Policy Evaluation Method', which is represented by Brainerd Currie. For other older theories, please refer to the original explanation made by the prominent author[3]. Also, this review does not cover the very recent movement from the end of nineties. I am sure that the most important movement of private international law in these days are the creeping unification of private international law rules by the new regulations in European Union. However, these new phenomena should be treated in a different paper in the near future.

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2 I would like to suggest the reader some useful and credible references of the history of private international law generally. An excellent summary of the history and theory of private international law with an extensive bibliography can be found in G. Kegel, "Fundamental Approaches" (1986) Int. Enc. Comp. L., Private International Law, Vol. III, Chap. 3. Among the writings, the reader may wish to consult are the following: M. Gutzwiller, "Le developpement historique du droit international prive" (1929) IV Hague Recueil 289, which contains a helpful bibliography; F. Laurent, Droit civil international, Vol .I (1880), pp. 273-623; A. Laine, Introduction au droit international privé, Vol. I (1888) and Vol. II (1892); D. J. Llewelyn Davies, "The Influence of Huber's De Conflictu Legum on English Private International Law" (1937) 18 B.Y.B.I.L. 49; E. G. Lorenzen, "Huber's De Conflictu Legum" in Selected Articles on the Conflict of Laws (1947), pp. 136 et seq.; E. M. Meijers, "Histoire des principes fondamentaux du droit inter national privé" (1934) III Hague Recueil 547, which also contains a bibliography; K. H. Nadelmann, "Joseph Story's Contributions to American Conflicts of Law" (1961) 5 Am. J.L.H. 230; idem, "Some Historical Notes on the Doctrinal Sources of American Conflicts of Law," in lus et Lex: Festgabe fur Max Gutzwiller(1959), p.263; idem, "Wachter's Essay on the Collision of Private Laws of Different States" (1964) 13 Am. J.C.L. 414; idem, "Bicentennial Observations on the Second Edition of Joseph Story's Commentaries on the Conflict of Laws" (1980) 28 Am. J.C.L. 67, idem "Private International Law: Lord Fraser and the Savigny (Guthrie) and Bar (Gillespie) Editions" (1971) 20 I.C.L.Q. 213; some of these articles by Nadelmann are reprinted in Conflict of Laws: International and Interstate (1972); R. de Nova, "The First American Book on Conflict of Laws" (1964) 8 Am.J.L.H. 136; idem, Historical and Comparative Introduction to the Conflict of Laws (1966) II Hague Recueil 440; H. E. Yntema, "The Comity Doctrine," in Vom Deutschen Zum Europaischen Recht_Festschriftfur Hans Dolle (1963), p. 65; idem, "The Historic Basis of Private International Law" (1953) 2 Am.J.C.L.297.

## 2. Policy Evaluation Method[3]

### 2.1. Currie's governmental interest analysis and its later development

#### *2.1.1. Currie*

The most radical theory which still represents the Revolution was evolved by Currie.[4] Same as Cavers, his starting point was the strong dissatisfaction against the mechanical application of the rigid choice of law rules brought by the 1st Restatement. He described his impression on this:

'A choice-of-law rule is an empty and bloodless thing. Actually, instead of declaring an overriding public policy, it proclaims the state's indifference to the result of the litigation. Let there be a domestic case of tort or contract and the law of the state points to the *result* which alone can advance the social and economic policy embodied in that law. Let a conventionally suitable foreign factor be injected and the state immediately loses interest.'[5]

Currie, therefore, completely rejected the traditional method of private international law and, instead, he tried to find out the policy of the rules of substantive law of the various states concerned and give effect to the governmental interests in them[6]; his method is usually called 'governmental interest analysis.' Currie's method can be divided into two stages. In the first stage, his work was said to be based on 'the "Experimental Model" of the Short-Sighted Selfish State rationally pursuing its Own Interest, Subject to Constitutional Constraints.'[7]

At this stage Currie obliged himself to play the role of trailblazer. For

3 Major writings about this method include B. Currie, Selected Essays on the Conflict of Laws (Durham: Duke University Press, 1963); A.A. Ehrenzweig, "A Counter-Revolution in Conflicts Law? From Beale to Cavers" (1966) 80 Harv L.R. 337; A.A. Ehrenzweig, "The Lex Fori-Basic Rule in the Conflict of Law" (1960) 58 Michigan L.R. 637; A.A. Ehrenzweig, A Treatiso on the Conflict of Laws (St Paul, Minn.: West Publishing Co., 1962); A. von Mehrenand D. Trautman, The Law of Multistate Problems: Cases and Materials on Conflict of Laws (*Boston: Little Brown & Co., 1965); A. von Mehren*, "Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology" (1974-75) 88 Harv L.R 347; A. von Mehren, "Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common and Civil Law Systems" (2002) 295 Hague Recueil 9-432; F. Juenger, Choice of Law and Multistate Justice (Dordrecht/Boston/London: M. Nijhoff publ., 1993); and S. Symeonides, "The American Choice-of-Law Revolution in the Courts: Today and Tomorrow (2002) 298 Hague Recueil 9-448. As a critical review of these methods from the viewpoint of traditional method, see Gerhard Kegel, "The Crisis of Conflict of Laws" (1964) 112 Hague Recueil 91-268, and "Fundamental Approaches" (1986), pp.37-72. For an American critique, see H.L. Kom, "The Choice-of-Law Revolution: A Critique" (1983) 83 Col. L.R. 772; Peter Hay, "Flexibility versus Predictability and Uniformity in Choice of Law: Reflections on Current European and United States Conflicts Law" (1991) 226 Hague Recueil 281-412; L. Brilmayer, Conflict of Laws, 2nd edn (New York: Aspen Publishers, 1995); and L. Brilmayer, "The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules" (1995) 252 Hague Recuei 19- 112.

4 Alfred Hill states: ' The revolution in choice of law was inaugurated, and indeed accomplished, largely by the writings of one man, the late Brainerd Currie, in a feat without parallel in the history of the common law.' (Hill, 'The Judicial Function in Choice of Law' 85 Columbia L Rev 1587-1588 (1985))
As a comprehensive review of his achievement, see H H Kay, 'A Defence of Currie's Governmental Interest Analysis' Hague Recueil III 9-204 (1989).

5 Currie, Selected Essays 52.

6 Selected Essays ch1 s25.

7 Kay 48; also see Currie, Selected Essays 52-53.

that purpose he seemed to make his theory very sharp-pointed.

He summed up his method on several occasions. The following is one from his article published in1959.[8]

' 1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.

2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitime basis for the assertion of an interest in the application of the policy. This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal dpmestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.

3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.

4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.

5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its country policy, and a fortiori, it should apply the law of the forum if the foreign state has no such interest.'

For Currie, the governmental interest cannot be decided by the legislature of one state; the legislature only decides governmental policy. A governmental interest is beyond the control of a state; for admitting it, 'the concurrent existence of an appropriate relationship between the state having the policy and the transaction, the parties, or the litigation' is required.[9]

Currie admitted that a choice of law rule also expresses a policy, but for him it is not the same as 'the social and economic policies which are normally developed by a state in the pursuit of its governmental interests and the interest of its people.'[10] It is a 'rather general and diffident policy' which 'imposes a degree of restraint upon its sovereignty and upon the

8 'Notes on Methods and Objectives in the Conflict of Laws' Selected Essays183-184; originally in Duke LJ 171 [1958].

9 Currie, Selected Essays 621; Concerning Currie's distinction between 'governmental policy ' and 'governmental interest,' see Kay, supra note 3, 50-58.

10 Id., 52.

pursuit of its selfish interest' for the sake of achieving the uniformity of dispute resolution.[11] He pointed out the paradox: the priority is given to that kind of policy at the expenses of 'specific, carefully formulated social and economic policies.'[12] So, he proposed to return to the interpretation of each substantive rule from the sociological viewpoint same as the interpretation of the substantive law: he insists that we should determine the governmental policy and then whether the relation of the forum to the case is to provide a justified interest in the application of that policy.

Currie tried to destroy the system of choice of law because, he believed, the system itself was at fault,[13] but 'without entertaining vain hopes that a new "system" will arise to take its place.'[14] He suggests only going back to the original problems of conflicting interests and to the 'hard task of dealing with them realistically by ordinary judicial methods, such as construction and interpretation, and by neglected political methods.'[15] Perhaps for Currie, a choice of law rule cannot be an object of interpretation in the ordinary sense, but already a decision by a strange political position which treats the policy of substantive rules 'blindly and badly'[16] and leads us into troublesome problems such as 'renvoi' created by the position itself. To determine governmental policy, the court can use the construction and interpretation which are essentially the same as those in a pure domestic case.[17]

Though Currie summed up his theory on several occasions, the last summary by himself can be found in his comment on the seminal judgment of Babcock v Jackson. He suggested it 'as a substitute for' all the part of the Second Restatement dealing with choice of law.[18]

' §1. When a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies. In making these determinations the court should employ the ordinary processes of construction and interpretation.

' § 2. If the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state.

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11 Id., 53.
12 Id., 53.
13 Id., 185.
14 Id., 185.
15 Id., 185.
16 Id., 185.
17 Id., 367.
18 This is found in his comment on the seminal case of Babcock v Jackson. (63 Col L R 1212, 1241-43 (1963) (Essay 183-184)

§ 3. If the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict.

§ 4. If, upon reconsideration, the court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply the law of the forum.

§ 5. If the forum is disinterested, but an unavoidable conflict exists between the laws of the two other states, and the court cannot with justice decline to adjudicate the case, it should apply the law of the forum -- until someone comes along with a better idea.

§ 6. The conflict of interest between states will result in different dispositions of the same problem, depending on where the action is brought. If with respect to a particular problem this appears seriously to infringe a strong national interest in uniformity of decision, the court should not attempt to improvise a solution sacrificing the legitimate interest of its own state, but should leave to Congress, exercising its powers under the full faith and credit clause, the determination of which interest shall be required to yield.'[19]

There seems to be a stereotyped image of Currie's doctrine that it is seeking vainly the 'governmental interest' in substantive rules of private law which does not exsist[20] and therefore it is almost always leading to the application of the lex fori. Currie's defence was that:

'I have been told that I give insufficient recognition to governmental policies other than those that are expressed in specific statutes and rules: the policy of promoting a general legal order, that of fostering amicable relations with other states, that of vindicating reasonable expectations, and so on. If this is so, it is not, I hope, because of a provincial lack of appreciation of the worth of those ideals, but because of a felt necessity to emphasize the obstacles that the present system interposes to any intelligent approach to the problem. Let us first clear away the apparatus that creates false problems and obscures the nature of the real ones. Only then can we effectively set about ameliorating the ills that arise from a diversity of laws by bringing to bear all the resources of jurisprudence, politics, and humanism-each in its appropriate way.'[21]

His 'felt necessity' to stress the defects under the situation of the First Restatement might sometimes have made his doctrine too straightforward

19 63 Cal L R 1212, 1242-43 [1963] §3 and §4 were added at his later stage and threfore give some moderate character to his doctrine at the cost of sharpness. See Brilmayer 69; Ehrenzweig Hague Recueil

20 Kegel, fundamental approach p. 32: Rabel I p. 103 pointed out that the private law is usually neutral. Therefore 'the answer is not in them.'

21 Currie, Selected Essays 186-187.

and, as a result, somewhat vulnerable. However his actual influence on the practice and also some theoretical contribution are clearly undeniable.[22]

His theory was based on the idea that 'some typical choice-of-law problems fall into two classes: (a) false problem (false conflict) and (b) problems that are insoluble by any conceivable conflict-of-law method.' (true conflict).[22] If only one of two related states has a legitimate interest, there will be no problem: the law of the state which has the interest will be applied. If both states have a legitimate interest, there is a real problem which cannot be solved rationally by any choice-of-law method; the effort of making universal choice-of-law rules is required.[23] The discovery of this distinction is evaluated as one of the main achievement of the Conflicts Law Revolution.

Currie's doctrine is also featured by its scepticism against the ability of the court of a state to act neutrally for the resolution of multistate cases. Therefore if his method cannot solve the problem effectively, he always suggests the application of the law of the forum. For him, therefore, the ideal solution of the conflicts law should be given by the 'Congress' or supranational body;[24] though in this respect he did not try to make any concrete suggestion.

From his position towards the true conflicts, it is clear that his doctrine was not proposed as an overall method to solve every question in conflict of laws. Concerning the case which a state having no interest or a "disinterested third state" must handle, he accepted that his method did not provide a solution.[25] He said: 'When a problem cannot be solved with the resources at hand it is sheer quackery to pretend a solution.'[26] He suggested to resort to other ways, 'preserving the basic method for its value in solving within its competence.'[27] Therefore, by nature, Currie's method is intended to be useful only for limited situations.[28]

22 Id., 189.

23 Id., 189-190.

24 Currie said: 'We would be better off without choice-of-law rules. We would be better off if Congress were to give some attention to problems of private law, and were to legislate concerning the choice between conflicting state interests in some of the specific areas in which the need for solutions is serious. In the meantime, we would be better off if we would admit the teaching of sociological jurisprudence into the conceptualistic precincts of conflict of laws. ' (Crre,Selected Essay 183-184)

25 Id., 606. He, however, suggeted the use of the doctrine of 'forum non convenience' to dismiss this kind of case.(607) But it is fair to understand this as an incidental opinion which has no relation to the method of govermental interest analysis.

26 Id., 607. Currie sometimes misunderstood as an exclusivist of the method and said to had some resemblance to Beal.(Leflar, Choice-Influencing Considerations in Conflicts law 41 NYU L R 267, 269-270 (1966) However this seems to be wrong. Currie said: 'What American conflict-of-laws theory needs most at this stage is a real joinder of issues by the proponents of the new methodologies. One who presume to offer a new technology in circumstances such as these should feel an obligation to evaluate carefully the efforts of others to the same end, and to work as harmoniously as possible toward a definition of differences, a reduction of misunderstanding, and the widest possible consensus.' (Currie, The Disinterested Third State 755.

27 Id., 607.

28 As to the case where only the laws expressing no governmental interest are concerned, he surprisingly suggested: 'All that required, then is a way of determining, simply and certainly, what law will be applied, so that transactions can be planned and litigation undertaken with some confidence as to the outcome--and , in addition, assurance that the decision will not vary according to the forum.'(Id., 609) Here he intended to promote predictability, certainty and the uniform resolution in this kind of situation. However it is nontheless clear that he made little of the traditional method. As a solution, he suggested that 'the ideal choice-of-law rule for such cases would be that the governing law shall be that of the state first in alphabetical order.' (609)

Currie's doctrine has been criticised very severely by foreign as well as American writers.[29] However it is not deniable that his doctrine, at least partially, hit the mark. The legislation motivated by social policies has been increasing in these days and the traditional approach might be becoming inadequate to treat them properly. We can easily find the similar ideas in the French doctrine of the "loi de police".[30] Also article 7 of the 'EC Convention on the Law Applicable to Contractual Obligations (1980)' is founded on basically the same as Currie's, though here it is adopted only as a supplementary for the traditional method of private international law.

### *2.1.2. Comparative Impairment*

Later, concerning the method of solving 'true conflicts', his doctrine was developed further by his supporters.[31] In the case of true conflicts, for which Currie suggested to apply the forum law because of no rational way to solve it, they suggested the solution based on that 'interest analysis' itself: the court should determine which state's policies would be more impaired if its law were not to be applied. This method is called "Comparative Impairment". The California Supreme Court adopted this method in *Bernhard v Harrah's Club*.[32] In this case, two California residents had driven form their home to Nevada, where they rested at Harrah's Club and drunk too much alcoholic beverages to drive safely. Driving in this condition in California, the car collided head-on with a motorcycle operated by the plaintiff, a California resident. He claimed damages to the Club. In the Supreme Court of California, Justice Sullivan treated the choice of law problem according to the method of interest analysis and found that both California and Nevada had different policies concerning the imposition of civil liability on tavern keepers for damage to others by their intoxicated patrons. Both states also appeared to have interests for applying its law. California law would allow recovery of damages by a Californian injured in California. On the other hand, Nevada law would not impose civil liability on the tavern keeper. Therefore, there was a true conflict. Justice Sullivan concluded that California's interests would be more impaired if Nevada law were applied. The method of Comparative Impairment is said to be

29 Kegel in his general course of the Hague Academy in 1964, mainly criticised the theories of Currie, Ehrenzweig, and the movement of substantivism including 'New Law Mercahnt', as the attackers on the traditional method. (Kegel, Supra note 2, 263) The foresight of Kegel was correct. All the three methods are still more or less influential even today; Fawcett 'Is American Governmental Interest Analysis The Solution to English Tort Choice of Law Problems?' 31 ICLQ 150 (1982): Brilmayer, Interest Analysis and the Myth of Legislative Intent, 78 Michigan L R 392 (1980); Hill,

30 Concerning 'loi de police', they are discussiong the solution about the situation where the 'conflict' of the lois de police in plural countries occurs and the discussion there reminds us the precise reappearance of the true/fault conflict. and even the argument of comparative impairment.

31 Baxter, Choice of Law and the Federal System, 16 Stan LR 1, 18 (1963): H H Kay 'The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience' 68 Cal LR 577, 617 (1980); This method was placed as a development of Currie's approach:Hay and Ellis 387, Brilmayer 69, Kay above 580 etc. (See, Supra note 3)

32 Bernhard v Harrah's Club, 16 Cal 3d at 319-21.

adopted by the courts of California for resolving true conflicts cases[33] and the codification of private international law in Luisana was based on this method.[34]

### *2.1.3. Kramer*

The followers of Currie are said to be not many but they are still trying ambitously to construct a new system based on Currie's basic idea.[35] Among them, Kramer's effort to evolve a comprehensive theory of choice of law process based on Currie's governmental interest analysis deserves special attention.

Kramer evaluates that, in spite of Curie's many erroneous assumptions, his 'basic insight about the applicability of standard methods of statutory interpretation was sound.'[36] Kramer also shares Currie's strong complain against the completely distinguished legal treatment between the pure domestic cases and the multistate cases. His analyses shows that the choice of law problems can occur even in domestic cases and that will be solved by a two step approach which is also applicable for multistate cases too. In other words, Kramer denies the distinction of domestic cases and multistate cases for the purpose of solving the choice of law problems.

For presenting the process of solving the choice of law problem, Kramer first takes an example of domestic situation: P alleges that he was injured by D when D was negligently driving a car through a yellow light. The collision occurred on the ramp onto a major expressway and a statute provides 'treble damages' for accidents on a highway. P claims damages under this statute. D responds that the statute does not apply to plaintiff's claim; he argues that P has a right only under the negligent law, if he ever has it at all.[37]

Kramer suggests two step process to solve the choice of law process. First, the court has to interpret each law from the viewpoint of 'its internal logic and purpose'.[38] This process is often enough to solve the question. The court might conclude that neither gives a right to P: the complaint will be dismissed. Alternatively, only one law will applies to P's claim. For example the highway statute's purpose is to encourage safe driving at high speed and is not concerned to accidents in the ramps: P could recover only the normal damages under the negligence law. The third possibilities is that both laws give P a right to recover damages but the lawmakers seems to leave P free to elect one of them; P will usually select to recover treble damages.[39] These

33 Symeonides, 'Choice of Law in the American Courts in 1995:A Year in Review' 44 AJCL 181, 201 footnote 125 (1996); Hay and Ellis, 'Bridging the Gap Between Rules and Approaches in Tort Choice of Law in the United States: A Survey of Current Case Law' 27 International Lawyer 369 (1993).
34 Hay and Ellis, 387.
35 Kay, Kramer, Hans Baade, Hancock, Weintraup, Sedler are the followers.
36 Kramer, Rethinking Choice of Law 90 Col L Rev 277, 279 (1990).
37 Id., 285
38 Id., 285.
39 Id., 285-286.

are the situations where only first step process is required.

But sometimes overlapping laws' purposes are inconsistent. For example, D is a police officer and there is a statute limiting damages to $10.000. In this case, P cannot claim treble damages if his damages are more than $3,334. In this kind of situations the court might resolve it by further interpretation of the laws. This is the second step of the process. The court usually try to reconcile conflicting laws by using a number of techniques such as re-examination of the legislative histories[40] or comparing which policy of the law would be more impaired if it were not applied.[41] However these methods have only 'limited utility'.[42] Most of the time, therefore, the court uses the 'canons of construction' which 'operate as default rules, directing the court's decision about which law should yield in the absence of a clear statement to the contrary.'[43] Kramer states that these cannons of construction 'reflect' judicial understandings of the most sensible way to accomplish the purposes of conflicting laws and bring harmony to the legal process' and despite the room of contradictions underlying them, 'some such set of rules and techniques is clearly necessary and appropriate to maintain a workable legal system by solving conflicts when they are arise.'[44]

The promotion to evolve the cannons for the multistate 'true conflicts' situations is the main idea of Kramer. He pointed out that 'the solution of the multistate cases does not change the essential nature of the interpretative problem.'[45] Same as in domestic cases, P must still base his right against D on a positive law. The difference is that only some of the facts are connected to other states and the court has to determine if it affects whether the laws at issue give a right.[46] Therefore his main thesis is that the domestic and multistate cases share the following feature: 'if the parties do raise a choice of law problem in a multistate cases, it can be resolved with basically the same two-step process'. If there is a true conflicts, the court must employ second-order rule of interpretation to select between these laws. The first step is the process for finding out the 'false conflict'; the court must find the prima facie applicability of the both laws relied on the parties. Here, Kramer also emphasise the large ability of the first step to solve the problem. There are three kind of cases equivalent to the domestic situations: (1) No law confers a right, (2) Only one law confers a right, (3) Both laws confers rights.

A example of (1) is as follows. A, a Washington resident, was injured in Washington by D, an Oregon resident. P, A's wife sued D for loss of

40 Id., 286.
41 Id., 287.
42 Id., 288.
43 Id., 288; for example, the rule that implied repeals are disfavoured. However this rule might be trumped by the rule that a specific statute is not controlled or nullified by a general one regardless of priority of the enactment.
44 Id., 289.
45 Id., 290.
46 Id., 290.

consortium in a Oregon court. Washington still followed the common law that a wife could not sue for loss of consortium. On the other hand, Oregon had abrogated this rule by statute. On these facts P had no right under either law. Oregon lawmakers are presumed to give rights only to wives who are from Oregon and to Wives who are married to someone injured in Oregon. Though interest analysts call this an "unprovided-for case" and 'has been a source of much grief for the supporters of interest analysis',[47] Kramer simply admits that P has no cause of action in this kind of situation and unless the Constitution provide some help the court has to dismiss the claim.[48]

As a example of (2), Kramer picks up the famous case of Babcock v Jackson. In this case, there was no true conflict of laws and only the New York law gave the right to the plaintiff. The New York law's purpose required its application because 'tort recovery rules serve both regulatory and protective purposes, New York is presumed to give a right to persons injured in New York and to persons from New York wherever injured.'[49] Therefore from his viewpoint, the element of common residence is only incidental, because the applicability of a New York law depends solely on the interpretation of its purpose.

Concerning (3), if plural laws in different legal systems give rights to the plaintiff and the purpose of each law is not inconsistent, such as above highway accident case, the plaintiff can select whichever law he prefers.

He generally emphasise the ability of the dispute resolution that the analysis of false conflict implies. As a second step which is for the purpose of resolving true conflict, Kramer suggests a quite innovative method. He, contrary to Currie, admits the 'inadequacy of forum law' as the consistent applicable law for the case of true conflict. He pointed out three reasons:

(1) States may share the "multistate policies" that may lead to the application of another state's law because, for example, comity towards other state may facilitate multistate activity and provide a legal regime whose enforcement is 'uniform and predictable; this effect might be more advantageous, even from the viewpoint of the interest of a state, than the effect of obstinate application of the forum law.[50]

(2) The consistent application of the forum law will encourage the forum shopping.[51]

(3) The application of the forum law is not necessary the best interests of the state 'even if those interests are defined narrowly in terms of the domestic policies underlying particular laws'.[52] In this situation, a state's

47 Id., 306- note 86.
48 Id., 307.
49 Id., 307.
50 Id., 313.
51 Id., 313-314.
52 Id., 314.

interest will be advanced only in true conflicts which are brought before the court of that state. 'But there is no guarantee that this will include even half the case'[53] of true conflicts which involve a law of that state. Therefore, even from 'a selfish and parochial point of view'[54], it may still the interest of a state to apply other states' laws in some true conflicts in its court in exchange of inviting reciprocal action that advances its policies in cases brought in other states.[55]

Kramer concludes that: 'Accordingly, unless a law clearly specifies that it applies without regard for any other state's law, it makes sense to assume that some true conflicts should be resolved by applying another state's law.'[56] Kramer further tries to make clear these assumptions.

First he picks up the idea of "Constructive Multistate Compact" and the principle of comparative impairment offered by Baxter.[57] However, he pointed out that the method of comparative impairment can not evaluate the difference of the intensity or comittness for a policy of a state, and therefore its role, though important, is limited. Therefore, as in the domestic choice of law cases the courts rely on the canons for construction, we have to develop 'Multistate Canons of Construction' as 'default rules, directing the court's decision about which law to apply absent a clear statement of actual intent'[58] by 'a constructive multistate agreement'[59] for which only the consideration of comparative impairment is not enough. Different from domestic canons, 'multistate canons' have to 'reflect the kind of compromise co-equal sovereigns'.[60] He claimed:

'At the very least, such canons should leave states better off that if they always applied forum law with respect to the three considerations discussed above: (1) the advancement of multistate policies, (2) the reduction of forum shopping, and (3) greater assurance that each state's law applied in the cases the state cares about most.'[61]

He respects rules, but still insists that, for resolving true conflicts, accommodation of conflicting policies and overlapping concerns are so varied as to be treated by a single theory.[62] Kramer suggests five canons which is not exclusive and only cover a fraction of the cases. (1) A comparative impairment canon[63], (2) A substance/procedure canon[64], (3) A canon for

53 Id., 314.
54 Id., 314.
55 Id., 314.
56 Id., 314.
57 Id., 315.
58 Id., 318.
59 Id., 318.
60 Id., 319.
61 Id., 319.
62 Id., 321.
63 If the inapplication of a law in true conflicts would render it practically ineffective, that law should be applied. (Id., 323)
64 The law reflecting the substantive policy should prevail in the true conflict between a substantive policy and a procedural policy, unless the forum's procedural interest is 'so strong that the forum should dismiss on the grounds of forum non convenience.' (Id., 324)

contract cases[65], (4) A canon for laws that are obsolete[66], (5) A canon for actual reliance interest[67].

Kramer's efforts made clear the common character of choice of law problems in domestic situations and multistate situations. The keen awareness of the power of sovereign in the law making and applying process is also the shared background with other American doctrines. However he tries to surmount this obstacle by indicating the possibility of the increase in the total advancement of the policies of each state; this logic is clearly inspired by the 'game theory'[68]. This is the core of his idea and therefore, he can be fairly prescribed as an idealist as well as a realist. But his theory, by adopting the concept of canon, is clearly approaching to the traditional method though the starting points are just the opposite: a state's policy and the purpose behind each concrete laws instead of a private legal relationship and the selection of a jurisdiction. In a sense, his theory is one of the complete system based on governmental interest analysis and now it might be possible to compare the traditional method with Kramer's well-organised method on the same ground. For example, in the Rome Convention, the bilateral choice-of-law rule is supplemented by the unilateral method which considers the application of special mandatory rule from the viewpoint of its 'nature', 'purpose' and 'the consequences of its application.'[69] This is an exceptional rule in the system of the Rome Convention, but the basic idea of this rule has strong similarity with the policy-evaluating method in America. Kramer's method is, in principle, starting from the interpretation of the purpose of particular law; however the last resort is the canon which is, in its reality, a bilateral rule of choice-of-law patterned according to the general assumption for promoting multistate policies which are generally beneficial for ever country. Reflecting strongly the political evaluation and not pretending to be value-neutral, the canons are still different from the ordinary bilateral rules of the traditional method. However the promotion of some substantive value judgment is, in some cases, already introduced in the bilateral rules in the traditional method. Therefore, here, the difference of both methods seems to be only a problem of the extent; both systems in anyway share the same methods for resolving the conflicts law problems. Therefore, the decisive standard for superiority is to be found in the practicability and the economy of each system in the present

65 True conflicts have to be solved according to the chosen law by the parties, or if no express choice, according to the law which validates the contract.
66 If one law is obsolete, the other law should be applied.
67 The law which the parties actually and reasonably relied on should prevail.(Id., 336)
68 Game theory, originally proposed as a theory of mathematics by Neuman in 1990s, is now noticed as a justification for promoting international cooperation by recent American conflicts law doctrines as well as those of other social scoences. See Brilmayer, Conflict of Laws 2nd ed 181-196; L Weinberg, Against Comity, 80 Geo L J 52 (1991).
69 Art.7

situation of the legal environment in the world. It is not deniable that the laws which have clear policies are increasing even in the area of private law. However, still most of the rules of private law do not have clear policy especially concerning their spatial scope of application. At the moment, still the development and adjustment based on the traditional method seems to be advantageous because of its practicability, economy and the strong empirical background. Therefore we still need not reverse the order of thinking.

**2.2. Ehrenzweig**

Ehrenzweig, in his article named 'The Lex Fori-Basic Rule in the Conflict of Laws'[70] tried to show that a very clear fact had been distorted by the traditional doctrines of conflicts law. He points out the fact that a court usually applies its substantive law 'unless the parties' own choice or an important foreign fact, such as foreign domicile, a foreign situs, or a foreign conduct, appears to require application of another law.'[71] He says that this simple proposition i.e. 'the lex fori as the basic rule' will be agreed with by most Judges and lawyers in his country.[72] However, once one looks into the written things such as 'text books, class notes, the Restatement, and even much language of the courts'[73], one has the reverse impression: once the situations include foreign "contacts", a foreign law will be applied a priori, 'unless the court can be persuaded for special reasons to turn to its own law' or the forum law is chosen by the parties.: the lex fori as the exceptional rule.[74] He tries to prove the proposition of 'the lex fori as the basic rule' by the historical analysis of the conflicts law[75] and put off the distortions by the academic aberrations.[76] Ehrenzweig's thesis in this article can be summed up into four points.

First, American courts have nearly always given preference to their own law in both interstate and international conflicts cases and 'have applied foreign law only to situations where such preference was contrary to the intentions of the parties or would have caused hardship on their grounds.'[77]

Second, the treatment of lex fori as an exception from such a priori proposition is not based on "logical" postulates or practical exigencies but the heritage of academic aberrations in the history.[78]

Third, conscious recognition of the basic principle of the application of lex fori would centralise 'our effort on a search for a scheme of international

70 58 Michigan L R 637 (1960)
71 Id., 637.
72 Id., 637.
73 Id., 637. He called these written explanationas as 'official
74 Id., 637.
75 Id., 646-688.
76 Id., 644.
77 Ehrenzweig, supra note 3, 643-644.
78 Id., 644.

and interstate jurisdiction which would secure a lex fori properly applicable in view of a substantial contact of the court with parties or facts.'[79]

Fourth, '[o]nce the ascertainment of a convenient forum would thus have become the primary object of the law of conflict of laws, conflicts rules, insofar as they are not established by constitutional limitation, or international convention, would, upon a comparative analysis of forum and foreign policies,[80] come into play primarily in determining whether the defendant would be unfairly dealt with under the law of the forum, and where governmental interests otherwise require displacement of that law.'[81]

What he indicated in his first proposition seems to be a fair description of the present situation of the conflicts law in almost all Anglo-American legal systems.[82] He, however, felt the need to reiterate this fact several times in his life.[83] In his treatise on 'Private International Law',[84] he repeatedly pointed out: 'Unless application of a foreign rule is required by a settled (formulated or nonformulated) rule of choice, all choice of law should be based on a conscious interpretation de lege lata of that "domestic rule" which either party seek to displace. If that interpretation does not lead either to the dismissal of the suit or to the application of a foreign rule, the forum rule, in a proper forum, applies as the "basic," or as I now prefer to call it, the "residuary" rule, as a matter of "nonchoice"[cross references omitted]'.[85]

Ehrenzweig also stresses that two kinds of the academic works must be clearly distinguished: 'reformulation of existing law in terms of true rules replacing false doctrine, and the problem of *de lege ferenda.*[86] The theories of Currie, Cavers and Leflar are mainly concerned the latter, i.e. the purpose of stating 'desirable rules rather than to rationalise settled law.' Therefore, he clearly maintained: 'It is only areas outside settled law that such inquiries can have meaning, and it is only in such areas that a revolution can be said to have occurred.'[87] These areas are torts, contracts, and conveyances.[88] His above analysis about the application of the lex fori is mainly concerning the reformulation of existing law.[89]

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79 Id., 644.
80 Here we can already find the same idea of the later doctrine of comparative impairment.
81 Id., 645.
82 However it must his misunderstanding to apply this assumption to the private international law of Japan, where they believe that the court has to take the initiative in identifying and applying the foreign applicable law regardless of the plea and proof by the parties. (Ehrenzweig, Ikehara and Jensen, Bilateral Studies in Private International Law, No. 12, American-Japanese Private International Law (1964))
83 Id., 92-93; Hague Recueil 214-216.
84 Private International Law --A Comparative Treatise on American International conflicts law, Including the Law of Admiralty-- General Part (1937)
85 He also said 'any rule applied as a matter of "non choice" is a régle d'application immédiate' or 'räumlich bedingte Sachnorm'. (Id., 93)
86 Counter Revolution 380-381.
87 Id., 381.
88 Id., 381.
89 This was also repeated in 'Specific Principles of Private International law' Hague Recueil 1968-II 215-216:'What I have tried to show is not, as my critics are wont to assert, what court ought to do, but what they have always done.'

Therefore, for him, the total structure of the doctrine "followed largely scholastic tradition "did not reflect "living law".[90] Such techniques as characterisation, localisation, renvoi, and public policy were often used in distorted way for leading the application of the forum law.[91] For him, these are the techniques which is based on "superlaw"[92] fiction. Actually the law of the forum has been frequently applied only because they were "better rules."[93]

However, if his description about the preferred application of lex fori is correct, this might cause a serious problem 'by the danger of the plaintiff's temptation to "opt" or "shop" for a forum'.[94] Therefore, he felt strongly the necessity to reform the rule of jurisdiction. In the United States where personal jurisdiction is so wide as to permit any transient court to take the case and where courts will nearly always apply their own laws in very important areas such as divorce, adoption, workmen's compensation, and tort damages, the problem of forum shopping is especially acute.[95] Therefore, an improved law favouring a "proper forum," i.e., a court which can properly apply its own rule (as the "forum legis"), appears as the only, though admittedly imperfect remedy.'[96]

### 2.3. Comment

The illiberal attitude in the admission of foreign law is characteristic of the systems advocated by Currie. But it is fair to say that this is not necessary the intended result of the method of governmental interest analysis. As this method, in its original shape, has only very limited playground and the ability to solve the conflict of laws problem is quite small[97], Currie could not help permitting the application of the forum law as a residuary law in many kinds of situations.[98] Both Currie and Ehrenzweig have been often criticised as they emphasised lex fori too much. Currie's method, regardless of his intention, clearly leads to the extension of the application of the lex fori. Also, it is not deniable that Ehrenzweig emphasised his assumption too much. His criticism is sometimes too general to be fair especially concerning the criticism against the theoretical structure of the traditional method. For example, his complete rejection of 'Characterisation' as an independent process of applying private

90 Id., 645.
91 Treatiese113-177.
92 For Eherenzweig, "super law" seems to mean unrealistic ideology of universalism in conflicts law. (Hague Recueil, 231) His arguments as a whole can be described as a struggle for the realism against the unrealistic idealism which interrupt the achievement of justice in its reality.
93 Hague Recueil, 189-190.
94 Basic Rule 644-645.Hague Recueil 216;
95 Treatise 107-108.
96 Id., 107-108.
97 It can provide the criterion for the solution in the cases of false conflicts only.
98 However in the situations outside of his method, he never denied the possibility that someone would find a good ideea.

international law is clearly too much.

Stressing only bare substantive state interest in the conflict of laws are sometimes misleading. In a free society, the court's duty for selecting applicable law is not wholly or even primarily to give effect to State interests, but rather to balance those interests with such private interests: here, such interest as the State may have in giving effect to its legislative policies must be weighed against the need to give effect to the reasonable expectations of the parties. Hitherto our system of private international law has had no great difficulty in achieving this balance, because it has assumed that its own rules of private law are designed less to effectuate State policies than to provide a workable framework of rules within which the interests of private persons may be adjusted. The relative disinterest of the State has enabled the courts to make the warrantable assumption that their own system has no monopoly of legal truth and to adopt an attitude of qualified neutrality towards the substantive laws pressed upon its attention.

Their doctrines are, in some aspects, clearly erroneous. However, we should pay attention to the positive side of their opinions. Currie's somewhat incomplete and open-structured theory, together with his generous attitude to the new methodologies, has left the academics of the later generations the possibility to develop new doctrines further by using his basic idea of governmental interest analysis quite liberally. The theory of comparative impairment and Kramer's comprehensive analysis of the choice-of-law process for multistate problems are the salient fruits of this. Currie's basic insight of the governmental interest analysis seems to be the starting point of the new development of American doctrines.[99]

On the other hand Ehrenzweig clearly articulated the importance of the problem of jurisdiction as a main theme of the private international law which has to be explored further. This opinion has been widely supported in the world and the efforts has been continued. His approach, theoretically, has neither the intention nor the result of extending the application of lex fori beyound status quo; with the support of the proper jurisdictional rules, the application of lex fori deserves to be reevaluated as a practical and economical method.[100] The private international law system which requires a plea and proof for the application of a foreign law[101] is now becoming to be reassessed, from a practical viewpoint, by the writers of other legal systems.[102]

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99 Kramer, Posnak, Sedler, Weintraup.

100 In a sense, it casts the light on the traditional wisdom of the Anglo-American private international law.

101 This fact was probably the most important point to support Ehrenzweig's basic assumption. (Basic Rule 678): 'Notwothstanding any foreign laws allegedly "governing" the case, American courts have, in literally hundreds and perhaps thousands of decisions, applied their own law, in reliance on the often obviously unrealistic principle that the foreign law not properly pleaded or proved may be presumed to be identical with the law of the forum.'

102 Zweigert,'Some Reflections on the Sociological Dimensions of Private International Law or What is Justice in Conflict of Laws?' 44 University of Colorado Law Review 283, 292-294 (1973); Flsessner,Interressenjurisprudenz im Internationalen Privatrecht (1990); De Boer, 'Facultative Choice of Law : The Procedural Status of Choice-of-Law Rules and Foreign Law, Hague Recueil , Tome 257, 386-421 (1996)

### 3. Choice-Influencing Considerations

However, we can find a different trend in the American doctrines. As Leflar pointed out,[103] the 'process of identifying the choice-influencing factors and of attaching appropriate significance' has been tried by many writers as the basic choice-of-law analysis in America. In a notable article published in 1952,[104] a moderate thesis was advanced by Cheatham and Reese. They express no desire to abandon the traditional system of using choice of law rules to assist in the decision of cases with foreign elements, but they do emphasise that, in formulating such rules, courts should pay close attention to the policies which are relevant in this branch of the law. They tried to make complete catalogue of choice-influencing considerations and pointed out nine policy factors in the order of importance.

' (1) The needs of the interest and international systems;
(2) A court should apply its own local law unless there is good reason for not doing so;
(3) A court should seek to effectuate the purpose of its relevant local law rule in determining a question of choice of law;
(4) Certainty, predictability, uniformity of result;
(5) Protection of justified expectations;
(6) Application of the law of the state of dominant interest;
(7) Ease in determination of applicable law, convenience of the court;
(8) The fundamental policy underlying the broad local law field involved;
(9) Justice in the individual case.'[105]

Their propositions are moderate because the priority is on the necessity of interstate and international system.[106] But still they are the revolutionaries who stress the application of the forum law and respect the policy (purpose) of the 'local law' in the choice-of-law process.

Yntema, in his article in 1957[107], also listed seventeen policy considerations as examples:

'uniformity of legal consequences; minimisation of conflicts of laws; predictability of legal consequences; the reasonable expectations of the parties; uniformity of social and economic consequences; validation of

103 Leflar, Considerations 427. Leflar pointed out that Story, Wharton Minor and Beal already 181 E E Cheatham and W Reese (1952) 52 Col L R 959.
104 E. E. Cheathan and W. Reese (1952) 52 Col L R 959.
105 Id.
106 However, this seems to be largely a confirmation of the common sense in conflicts law. Concerning the interstate system they emphasise the importance of the role of the Supreme Court for guidance in cases of constitutional control of choice of law. This is alomost a common sense in the legal system of the United States and also easily accepted by other proponents of the revolutionary doctrines.(962-963) Concerning the international system, they propose the 'interests of international society and point out two concrete considerations: no discrimination against foreigners and the promotion of the smooth commercial intercourse.(962-964.) There is no mention about the unifromity of solution or the equal treatment of local law and foreign law.
107 Yntema, The Objectives of Private International Law 35 Can Bar Rev 721, 736 (1987).

transactions; relative significance of contacts; recognition for interests of other states; justice of the end results; respect for policies of domestic law; internal harmony of the substantive rules to be applied, location or nature of the transaction; private utility; homogeneity of national law; ultimate recourse to the lex fori.'[108]

Yntema's position is pluralistic, and therefore, difficult to understand the whole structure. He recognises that the lex fori is a residual law which he describes as 'a counsel of despair.'[109] However, he thinks that the essential policy considerations should be subsumed under two head of 'security' and 'comparative justice.'[110] Security is closely related to certainty.[111] According to his words, 'the first purpose of conflicts law, as of all law, is to introduce order, or at least that minimum which is necessary if basic human values are not to be unduly sacrificed or subjected to discrimination.'[112] On the other hand, comparative justice means 'consideration of the desirable result as indicated by comparative study' in the 'individual decision.'[113] His explanation of the relation of these two policies are somewhat sophisticated one. Sometimes comparative justice serves to 'complement the principle of security.'[114] As the policy of security requires to protect the reasonable expectation of parties, 'comparison of the substantive law doctrines' plays an important role for deciding what is reasonable in such expectations.[115] However, in other situations, the policy of comparative justice might correct improper results of 'artificial applications of stare decisis and like doctrines.'[116] Yntema maintains that 'the comparative justice of the newer and better law may outweigh considerations of security, and courts will find ways by appropriate construction to decide as seems to them right.' Here, he clearly suggests result-selecting approach. For him, techniques such as statutory interpretation or reference to the significance of connecting factors are 'tools that cut but cannot say when or why.'[117] He stresses that:

'It is most important to mark the distinction between such techniques and the policies of security and comparative justice, which we considered. Failure to do so too often has permitted belief that the solution to the very practical problems of conflicts law can be found in mere technique. This is the source of the mechanical jurisprudence that a recent critic has

108 Yntema, Id., 721, 735-36.
109 Id., 735.
110 Id., 735.
111 Id., 736.
112 Id., 736.
113 Id., 737.
114 Id., 737.
115 Id., 737-738.
116 Id., 737.
117 Id., 741.

pertinently described as the "illusory syntax" of conflicts law.'[118]

It is very difficult to search any defect in Yntema's theory, which is very profoundly considered and integrated almost every argument in recent doctrines. The theory, however, suggests very little concerning the practical and concrete process of realising these policies. This might be the reason why Yntema's theory, in spite of of its flawlessness, has rarely taken up in the recent arguments of conflicts law doctrines.

Cavers, thirty years after his epoch-making article, suggested the choice-influencing factors in the Cooley Lectures.[119] However, I have to skip this because the paper was not available at hand.

Also, Leflar, trying to reduce the policy factors in manageable number, summed up into five. He called them 'choice-of-law considerations' 'that have, expressly or impliedly, always underlain choice-of-law decisions, as others have from time to time identified them.'[120] They are:

' A. Predictability of results;
B. Maintenance of interstate and international order;
C. Simplification of the judicial task;
D. Advancement of the forum's governmental interests;
E. Application of the better rule of law.'[121]

No priority was intended from the order of listing. But he added that '[t]heir relative importance varies according to the area of the law involved'[122] and 'all should be considered regardless of area.'[123] Leflar, however, did not propose these as a rule but as 'a somewhat idealized description of the present system of choice-of-law decision designed to accept substantially what happens now, together with current trends, and to give the real reasons (which on the whole are good reasons) for the law as it currently operates.'[124]

In 1969, three years after Leflar proposed above choice-of-law considerations, the Restatement of the Law Second, Conflict of Law, as a result of the 18 years efforts, was completed and published two years later. Professor Reese was the reporter for it.[125] His influence on the Second Restatement is clear from the choice-of-law principles contained in § 6: subsection (2) of it which are derived from his 1952 article with Cheatham. In the absence of a statutory directive on choice-of-law, the factors relevant to the choice of the applicable rule of law include:

118 Id., 741.
119 These were published as The Choice-of Law Process (1965)
120 Leflar, (supra note 3) Considerations 282.
121 Id., 282.
122 Id., 282.
123 Id., 282.
124 Id., 327.
125 3 Vols. (1971). See Kegel, Fundamental Approaches, (supra note 3) at pp. 58-64.

'When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.'

These factors are not intended to be exclusive and the order does not suggest their relative importance.[126] As a result, the Second Restatement gives a large measure of latitude to courts in the United States. Reese is an advocate of choice of law rules. However, from the practical viewpoint, the attitude of Reese was not so different from other writers. As Ehrenzweig pointed out precisely[127], "Revolutionary" conflicts doctrines concerned 'only in areas outside settled law' such as torts or contracts and 'it is only in such areas that a revolution can be said to have occured.' Reese also admitted:

> 'Present experience, on the other hand, with respect to contracts and torts does not permit the formulation of definite rules with any reasonable assurance that these rules would give appropriate effect to what are here the most significant policies. Hence the more general and more flexible formulation of "state of most significant relationship" has been resorted to. Presumably more definite and precise rules can be stated after more experience has been accumulated. That will be the task of future Restatement.'[128]

As Reese himself pointed out, conflict of laws rules have been preserved by the American courts in all the fields of law apart from contract, tort and conveyances of interests in moveables.[129] In these areas, the rules should be more numerous and cover narrower areas than those prescribed in the First Restatement. He recognised that these rules will not always do justice in the individual case, but he was willing to pay this price in order to achieve the advantages of certainty and predictability and to avoid in litigation the expense of having to examine the underlying policies of the substantive laws of numerous potentially relevant States.[130]

However, the approach of the Second Restatement was clearly rejected

126 §6 Comment to Subsection (2): C.
127 See Ehrenzweig, Counter Revolution.
128 Reese 'Choice of Law and the Restatement Second' 425.
129 See "American Choice of Law" (1982) 30 Am.J.C.L. 135, 146. Even in those fields policy evaluation has not, by any means, been uniformly adopted in the American courts.
130 3 See (1972) 57 Cor.L.R. 315, 317-319 and 333-334.

by Currie[131], Cavers[132] and Ehrenzweig. Especially the idea of "neutral" forum which was advocated by Reese[133] was irreconcilable with their basic assumption of the forum law preference.[134]

Now, the approach of Second Restatement is the dominative conflicts law methodology adopted by the courts of a large number of the staes.[135] However, despite the 'rule' oriented attitude of Reese, it actually has introduced only 'approach' for the determination of the applicable law at least in the key areas of tort and contract.[136]

## 4. New Trend

The existing system assumes that the relevant interests "can be fully expressed in terms of the physical location of events, and further, that the intensity of the physical relationship precisely expresses the degree of community and individual concern."[137] These propositions are denied, and it is denied, too, that the search for the territorially dominant system is justified by jurisdictional effectiveness, because systems other than the one governing the territory where events occurred may be in a position to apply effective sanctions.[138] Instead, therefore, of applying the law of one State chosen by the arbitrary criterion of territorial connection, the court should seek to identify the "interested states" or the "concerned jurisdictions." Von Mehren and Trautman said:

"Actual concern exists when a jurisdiction, in view either of its thinking about the particular substantive issue raised or of its more general legal policies, such as concern for members of the community, can be taken to have expressed some interest in regulating an aspect of the multistate transaction in question."[139]

So, for them, the first step to the choice-of-law problem is to locate the "concerned jurisdictions."[140] They point out that: "In some cases it

131 Babcock comments; The Disinterested Third States 28 Law and Contemporary Problems 754, 755, 765-766 (1964).
132 Cavers, The Choice of Law Process (supra note 3), 123.
133 Reese, 'Conflict of Laws and the Restatement Second' Law and Contemporary problems 679 692-693 (1963). Discussion of Major Areas of Choice of Law, Hague Recueil 1964-I 315,329;
134 Ehrenzweig, A Counter-Revolution 377, 386.
135 According to the survey by Simeonides, 23 states courts adopted it concerning tort conflicts cases and 29 states courts concerning contracts conflicts cases in1995.(194,196)
136 Hay & Ellis 390; Ehrenzweig already pointed out :'that facile test could easily become a dangerous tool of unconsidered arbitrariness .' 1425 (1963).
137 Von Mehren and Trautman, Multistate Problems, above, p. 63.
138 Multistate Problems, (supra note 3) p. 64.
139 Id., 76. See also pp. 102-215.
140 von Mehren and Trautman, 76.

will appear that only one jurisdiction is concerned, and that will be the end of the matter."[141] If there are several concerned jurisdictions, the next step is to 'construct for each such jurisdiction a rule regulating the issue that has arisen.'[142] The rule may be the jurisdiction's domestic rule, the domestic rule of another concerned jurisdiction, or 'a special rule, not used in domestic situations, developed for the multistate case.'[143] For the construction of the regulating rule, both of the relevant policies expressed by the domestic rule of each and of policies peculiar to multistate transactions separate from 'wholly domestic transactions' should be considered.[144] They think a large number of cases can be solved by these steps. For the cases remained unsolved (true conflict cases), they suggest that the contents of policies should be examined to see what material rule each would in fact apply to the issues which have arisen, whether by the application of its internal rules or through such other law as it would in fact apply to those issues. Very often, they indicate, it will be found that the same material rule would be applied by each concerned jurisdiction, and that rule should then be applied.[145] Where such uniformity does not exist, the authors would apply the law of the jurisdiction which clearly has a predominant concern.[146] The authors devote much thought to the identification of the jurisdiction with predominant concern and they stress that the mere fact that the forum itself has a legitimate concern should not necessarily lead to the application of the lex fori.[147] Von Mehren and Trautman conclude by saying: 'If the conflict cannot be resolved by locating a predominantly concerned jurisdiction, solution is sought in terms of the implicated domestic and multistate policies of the several concerned jurisdictions. Analysis will often reveal that, although a conflict exists, the claims of one jurisdiction are so clearly superior that its rule should be recognised.'[148] For small number of cases in which still an irreducible conflict exists because of no "predominately concerned jurisdiction", they suggest several methods including the evaluation of the 'relative strength of the several domestic policies and 'the consideration respecting the implication of multijurisdictional policies.'[149]

This brief summary does less than justice to an original and elegant system which is justified rationally and persuasively and documented with

141 Id., 105.
142 Id., 77.
143 As to (3) , von Mehren further evolved his theory in his later article. See below.
144 Id., 77.
145 Actually a 'false conflict.'
146 Id., 77, 314.
147 Id., 215 et seq. "A forum which is also a concerned jurisdiction may properly accord a decisive weight to its own law if analysis of the relative concerns of the several jurisdictions and of the strength of their policies leads to no resolution of the conflict" (at p. 407). In such a situation a neutral forum is encouraged to apply the most progressive rule of substantive law from amongst the concerned jurisdictions (see p. 408). Cf. Trautman (1977) 41 Law and Contemp. Probs. 105 and (1981) 32 Hastings L.J. 1612, esp. at pp. 1614-1615.
148 Multistate Problems, 77. See also 105.
149 Id., 376-408.

an impressive panoply of illustrative cases. Its authors recognise that their approach, when stated in abstract terms, may seem unduly complex. They meet this charge by saying that in many cases the relevant rule will be easily discovered, that their approach is no more complex than the existing system and that, with the passage of time, accumulated experience will resolve many of the problems of a functional approach.[150] Von Mehren and Trautman later betrayed their own concern with the problem of courts having to conduct a functional analysis of the laws of numerous "concerned jurisdictions."[151] Their method seems to be a mixture of the jurisdiction-selecting approach and the rule selecting approach: first, by using the general policy including its thinking about the large category of substantive law they try to find the concerned jurisdiction, and second they analyse the details of the rules in each jurisdiction. However if a specific rule should be referred to by the party for making the court apply it in a litigation, the actual process must be reverse: the court first check that the rule is belonging to the concerned jurisdiction and after that check its applicability to the case. This seems to be needlessly laborious. The court can just interpret the specific rule from the viewpoint of its purpose including the problem of spatial scope of its application.

The concern to 'a common multijurisdictional policy'[152] is one of the features of their doctrine. Von Mehren, after the publication of the Second Restatement, advanced this aspect further by proposing a unique method. He maintains that the conflicts rule has two objectives: (1) to provide a solution which "apt" to regulate the individual situation, and (2) to avoid forum shopping.[153] The traditional doctrines such as Beal or Savigny emphasise the latter objective. He stresses that the recent trends in American conflicts law thinking all focus on aptness of the 'results from a perception that the promotion of significant state and individual interests, in the particularised context of a single dispute.'[154] He points out that the Second Restatement also reflects the same preference and the 'decisional uniformity is not to be viewed as decisive.'[155]

As an 'innovative and most interesting efforts'[156] to achieve the both objectives, von Mehren puts forward the development of special multistate substantive rules for multistate problems. He points out three situations which require multistate substantive rules: (1) the court considers that both of two legal systems are concerned sufficiently enough to be given effect, (2) the multistate characteristics of them urge the considerations which have no

150 Multistate Problems, at pp. 77-78.
151 Trautman (1977) 41 Law and Contemp. Probs. 105, favoured the development of choice of law as an aspect of federal common law to eliminate many conflicts of law in interstate cases and Von Mehren (1975) 23 Am.J.C.L.751, favoured a compromise between the substantive laws of concerned jurisdictions.
152 Id., 395.
153 Id., 350.
154 Id., 354.
155 Id., 355.
156 Id., 356.

comparable significance in domestic setting, (3) the situation which involves true conflict, i.e. two or more legal orders have legitimate political interests to regulate the dispute, though both interests are mutually inconsistent. von Mehren pointed out the examples for each situation : (1) the German court, in a judgment of 1971, permitted a Spanish woman to use the maiden name after her marriage with a German. The applicable law is the German law, which, in the purely domestic situation, did not recognise the use of maiden name only for a married woman though the Spanish domestic law permitted it. (2) The French legislation of 1928 which made enforceable "gold clauses" in the contract for international payment , though they were unenforceable in the domestic situations, is the example for the second case.[157] (3) As a illustration, a dog owned by a resident in state A strays in state B and bites a resident there. The domestic law of B prescribes the strict liability of the dog's owner, but the domestic law of A prescribes that the owner is only liable when he knows the dog's propensity to bite which, in this case, the owner did not know. von Mehren suggests from the proposed position that P's recovery would be one-half of his actual damages.[158]

In the opinion of von Mehren, there is clearly an idea in common with 'better law' approach and the doctrine of 'lex mercatoria.' This means a sprout of new trends in the American conflicts law doctrines.

The 'lex mercatoria' approach is also strongly advocated by Juenger. Juenger pointed out many examples of European conflicts law developments which are analogues to the American movements. In a symposia concerning the methodology of private international law, he ironically maintains:

' Despite such striking parallels, the European panellists deny the Americanisation of their conflicts law. In this, I believe, they are correct, because when it comes to conflicts theories, we have not been particularly inventive. Samuel Livermre first American to write a conflicts treaties borrowed from the statutists. Story professed to follow Huber's teachings. Joseph Beal cribbed the vested rights theory from Dicey, who had apparently "imbibed [it] from Huber through Holland's *Jurisprudence*.. Our modern writers as well lack originality. Ehrenzweig's indebtedness to Waechter has been noted, and Leflar's discussion of result-selectivity recalls Aldricus. The author whose views are now most widely accepted by American judges and writers is the late Brainerd Currie. He was original only in the sense that he reinvented the wheel. If he had read Beal's translation of Bartolus he would have appreciated the venerable age of the idea that choice-of-law problems can be resolved by the 'ordinary process of

157 Id., 363.
158 Id., 366.

construction and interpretation [footnotes omitted] '[159]

Juenger, therefore, pointed out that, historically, conflicts law only has three methods: : (1) the attribution of a spatial reach to local rules; (2) the localisation of legal relationships; (3) the search for substantive solution. From his viewpoint, therefore, the American Revolution is nothing more than the repeating occurrence of the repulsion between these methods. This indication is probably correct. Form these three method, Juenger tries to find the future of private international law in the third one which is oldest and advocated by Aldrics.[160] His opinion is:

'The only choice-of-law approach still worth trying is one that looks to values that transcend state boundaries... Should such a method be adopted widely, it would yield greater predictability and uniformity than either unilateralism or multilateralism can possibly guarantee. If anything can discourage forum shopping, it is the expectation that multistate justice will be dispensed everywhere. If these objectives should prove to be unattainable, the substantive law approach at least produces better results in particular cases. It is also the only one to furnish a plausible reason for requiring judges to consider foreign law. Selective importation of superior foreign rules provides a powerful incentive to bring forum law up to the standards of international justice, thereby encouraging domestic reform... The time and money spent on researching and applying alien law would therefore not be wasted.'[161]

Juenger's opinion on the 'lex mercatoria approach' is in some respect more ambitious than its original shape which has evolved mainly in Europe. He stresses that the principle of party autonomy is a lex mercatoria created by the courts.[162] He admits that 'the lex mercatoria is a law made by an interest group for its own benefit.'[163] Therefore, it might work against the interest of outsiders such as consumers, who are also increasingly involved in the international transactions.[164] He points out that there is a need for 'some fundamental safeguards to protect the common interests of all.'[165] According to his opinion, Art. 7 (1) of the Rome Convention or art. 18 of the Swiss Private International Law Code at that time is the new devise to 'incorporate policies worthy of universal recognition.'[166] He concludes:

159 Juenger, American and European Conflicts Law, 30 AJCL 117, 118-119 (1982).
160 Id., 120.
161 Juenger, Hague Recueil 1985-IV, 321-322.
162 Juenger, 'Afterword: The Lex Mercatoria and the Conflict of Laws', in Lex Mercatoria and Arbitration (ed by T Carbonneau) 222 (1990). See also Juenger, Choice of Law and Multistate Justice 54-56, 213-220 (1993).
163 Id., 222.
164 Id., 222.
165 Id., 222.
166 Id., 223.

'The new law merchant has the distinct advantage of substituting for traditional choice-of-law approaches a selection process that is premised on quality rather than geography. There is no reason why noncommercial pursuits should not also benefit from this process.'[167]

However, it is too naive to emphasise only the 'superior quality' of lex mercatoria without due regard to the power of states in making and executing the law. It might be safe to say that the lex mercatoria can exist and develop under the generous ignorance of the sovereign powers. The neutrality of the lex mercatoria from any particular state is sometimes only convenient for dealing with the sensitive international problems which might involve conflicts of state policies, and therefore even politically promoted by the states in some areas. Same as the lex mercatoria, the traditional method such as Savigny's is very strong because of its neutrality at least in its appearance and therefore accepted by large number of states. It is true that in some areas the national laws are almost dysfunctional and the necessity of innovative method is very strong. However, it is impossible to say that both methods are the incompatible ones. Needless to say, the superior resolution for international private litigation should be promoted. However, for that purpose, the co-operation and concession of state policies are nevertheless indispensable in the present situation of the world. If the original figure of 'governmental interest approach' is, as Juenger points out,[168] the extreme position which has taken the 'positivistic notions about judicial sovereignty,' Juenger's lex mercatoria approach is an extreme reaction to that position. The reality should be found in the middle of these two extreme assumptions.

Hay also advocates these orientations. He asserts that the rejection of the 'ordering function of conflicts law' which is the feature of Currie-type interest analysis is not the tendency of the present American doctrines. Many writers such as Kay, Juenger, Brilmayer and Rosenberg 'have tried to merge the approaches, or to find an accommodation , all tilting toward the "better law"'.[169] The rigidity of rule is not derived from its value-neutrality but from its too sweeping character, also 'decisional patterns' may emerge and can furnish some predictability even in the approach-based systems. They 'have a degree of certainty, just as rule-based systems have a measure of flexibility.'[170] Hay remarks: 'The divergence in American and European approaches to conflicts law therefore is only marginally one of methodology.'[171]

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167 Id., 224.
168 Id., 222.
169 Hay (1991)Flessner 443.
170 Hay and Ellis (1993) 395.
171 Hay Hague Recueil 394. Lagarde permits the increasing flexibility in private international law is partially the influence of American revolution. 'Le proncipe de proximité', 25.

## 5. The Movement of New York Court

In the well-known decision of Babcock v Jackson in 1963, the New York Court of Appeal repudiated the traditional approach based on the vested right and adopted a new approach influenced by the interest analysis. The fact was simple. Miss Babcock and Mr and Mrs Jackson were New York residents. They left there for a week-end trip to Canada in Mr Jackson's Car. When Mr Jackson was driving in the Province of Ontario, he lost control of the car and bump into the stone wall adjacent to the highway and Miss Babcock was seriously injured. After returning to New York, she brought an action based on negligence against Mr Jackson. At the time of accident, Ontario had a so-called guest statute which prescribed a driver's immunity from liability for 'any loss or damages resulting from bodily injury or the death of a guest carried in the car.

In the judgment, Fuld J. discussed mainly two points: 'contacts' and 'interests.' Concerning contacts, '[t]he present action involves injuries sustained by a New York guest as the result of a New York host in the operation of an automobile, garaged, licensed, and undoubtedly insured in New York, in the course of a week-end journey which began and was to end there.' On the other hand, 'Ontario's sole relationship with the occurrence is the purely adventitious circumstances that the accident occured there.'[172] Concerning the policy, 'New York's policy of requireing a tort-feasor to compensate his guest for injuries caused by his negligence cannot be doubted.' In contrast, Ontario has no interest in rejecting 'a remedy to a New York guest against his New York host for injuries suffered in Ontario by reason of conduct which was tortious under Ontario law.' 'The object of Ontario's guest statute, it has been said, is "to prevent the fraudulent assertion of claims by passengers, in the collusion with the drivers, against insurance companies." (Survey of Canadian Legislation, 1 U. Toronto L. J. 358, 366) and, quite obviously, the fraudulent claims intended to be prevented by the statute are those asserted against Ontario defendants and their insurance carriers, not on New York defendants and their insurance carriers. Whether New York defendants and their insurers defrauded by a New York plaintiff is scarcely a valid legislative concern of Ontario simply because the accident occurred there, any more so than if the accident had happened in some other jurisdiction.'[173] Therefore, in this case, New York law is the only relevant law and the claim for damages by Miss Babcock was allowed.

It cannot be denied that this judgment was heavily influenced by the governmental interest analysis though it might not be the only

172 Id., 480.
173 Id., 483-484.

foundation.[174]

In Neumeier v Kuehner in 1972, however, the New York Court of Appeal had a chance to limit the scope of Babcock v Jackson. This is also a factually simple case. Kuehner, a resident of New York went to Ontario by his car and picked up his friend Neumeiyer who lived there. When they were going to another part of Ontario, a train hit their car as it crossed the railroad tracks in Ontario and both were killed. Neumayer's wife brought a wrongful death action against both Kuehner's estate and the railway company. Same as the case of Babcock v Jackson, the applicability of the Ontario guest statute was the central issue. The Chief Judge Fuld, in this jedgement, said:

'When, in Babcock v Jackson [reference omitted], we rejected the mechanical place of injury rule in personal injury cases because it failed to take account of underlying policy considerations, we were willing to sacrifice the certainty provided by the old rule for the more just, fair and practical result that may best be achieved by giving controlling effect to the law of the jurisdiction which has greater concern with, or interest in, the specific issue raised in the litigation.'[175] '[t]here is, however, no reason why choice-of -law rules, more narrow than those previously devised, should not be successfully developed, in order to assure a greater degree of predictability and uniformity, on the basis of our present knowledge and expererience.'[176]

As the sound principles for situations involving guest statutes in conflicts settings, three guidelines were proposed: (1) 'When the guest-passenger and th host-driver are domiciled in the same state, and the car is there registered,' the law of that state should be applied. (2) 'When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of th fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not-in the absence of special circumstances-be permitted to interpose the law of his state as a defence.'[177] (3) 'In other situations, when the passenger and the driver are domiciled in different states, the rule is necessary less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigants.'[178]

174 Concerning this point, see comments of the main figures of American conflicts law revolution (Cavers, Cheatham, Currie, Ehrenzweig, Leflar and Reese) in 'Comments on Babcock v Jackson, A Recent Development in Conflict of Laws' 63 Col L J 1212 (1963).
175 286 NE 2nd 454, 457.
176 Id., 457.
177 Id., 457-458.
178 Id., 373.

The Neumeier case came under the third rule and the court applied the law of the place of injury: Ontario guest statute was applied. Therefore this judgement did not overrule Babcock v Jackson which was under the rule (1). However the generality of the method of the Babcock case was denied.

However before the decision in Boy Scout of America, Inc. v Schultz, it is said that New York courts did not apply the Neumeier rules steadily.[179] In the Schltz case, the court made clear that the Neumeier rules should be applied to other cases than those concerning guest statutes. In this case, parents brought an action against the Boy Scouts which is a charitable youth organisation and other charitable corporation for the recovery of damages for personal injuries which they and their sons suffered because of the sexual abuse to the boys by an employee of the defendants' and for damages sustained by a wrongful death of none son's wrongful death after he committed suicide. The Boy Scout's national headquarter was located in New Jersey. The plaintiffs were also residents of New Jersey. The central issue in this litigation was the applicability of New Jersey charitable immunity statute which barred the plaintiffs' claim. In this judgment, Simons J held that there is not 'any logical basis for distinguishing guest statutes from other loss-distributing rules because they all share the charactaristic of being postevent remedial rules designed to allocate the burden of losses resulting from tortious conduct in which the jurisdiction of the parties' common domicile has a paramount interest.'[180] And 'if this were a straight Babcock fact pattern, rather than the reverse, we would have no reason to depart from the first Neumeier rule and would apply the law of the parties' common domicile.'[181]

After the Schltz case, many New York courts are said to accept Neumeir rules as the choice-of-law method in all tort cases concerning 'conflicting postoccurrence loss allocation rules.'[182]

## 6. The Political Right Based Approach

### 6.1. Brilmayer's Political Right Approach

Brilmayer constructs her basic concept of private international law on the basis of political rights.[183] The rights here are different from those of Beal's. Brilmayer criticised that Beal's rights are actually not right-based, because the rights themselves cannot supply the territorial rules; the choice of law rules based on territoriality were derived from the contradiction of the sovereignty of sates which were not themselves right-based.[184] Beal's

179 Hay and Ellis, (supre note 3) 375.
180 480 NE 2nd 679, 687 (NY 1985).
181 Id., 687.
182 Hay and Ellis, 377.
183 Brilmayer now seems to accept at least partially the justification of Interest Analysis Approach as means to

vested right approach was, therefore, only a consequential reasoning. She maintains that there is 'alternative concept of rights that does not require identification of the applicable substantive law'.[185] It is similar to 'common notions of individual fairness'.[186] In other words, it is the notion that 'states are limited in their pursuit of the common good at the expense of the individual.'[187] These are political rights 'because they concern the political relationship between the state and the individual.' On this concept of political rights, Brilmayer constructs her view of choice of law rights.

According to her, 'choice of law rights arise out of the fact that the state's legitimate authority is finite and that the state ought to recognise this.'[188] Principles of political fairness produce both positive claim of fair treatment and negative claims to be left alone. Brilmayer asserts that the choice of law rights in her sense is 'mostly' negative rights and these rights are possessed by individuals not against the opponents in the litigations but against the state directly.[189] This argument is related to the problem of state sovereignty because it concerns the claim of immunity from a state law. However, this does not involve an assertion that a sate 'transgresses against the sovereignty of some other state'; it does not concern the rights of other states.[190] The 'sovereign-related claim' is based on 'fairness to individuals' and not based on 'fairness to other states.'[191]

A political right based choice of law model needs the state's justification for coercing authority over an individual by the application of the state's law.[192] This naturally requires to identify 'the circumstances under which the state has, or lacks, an adequate justification for coercion.[193] However, Brilmayer only points out several 'most convincing solutions'[194]: ' Consent and Domicile,' 'Territoriality,' 'Mutuality.'

The political rights model focuses on the burden of a party which is the result of the application of a local law; on the other hand the interest analysis pays attention to the benefit produced by the application of a local law, i.e. how much the goal designed by the law is promoted.[195] Therefore those two approaches are 'mirror images' of each other.[196]

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maximise state policy objectives. See Brilmayer, Conflict of Laws 169-218 (1995). The remarkable thing is that the discussion of Brilmayer is becoming on the wavelength as Currie's though the conclusion seems to be different. Brilmayer takes the problems of Constitutional Limitation (127-166) and State Policy quite seriously as the basic discussion of private international law. These problems were clearly the basic concern of Currie's revolutionary theory.

184 Brilmayer 233.
185 Id., 233.
186 Id., 233.
187 Id., 233.
188 Id., 236.
189 Id., 237.
190 Id., 239.
191 Id., 239.
192 Id., 240.
193 Id., 240.
194 Id., 41.
195 Id., 244.
196 Id., 245.

Brilmayer, especially concerning 'Mutuality,' points out that the so-called jurisdiction-selecting rules generally satisfy this standard because these are not concerned with the content of the selected substantive rule 'in the sense of which party will benefit.'[197] The territorial rules based on the vested rights have the ability to satisfy mutuality while respecting political rights is seemed to be the distinguishing feature of the old-fashioned territorial rules because of the relative certainty of the location of a event in which the rights are vested. However at the moment the locations given by these rules are becoming more arbitrary and more likely to violate one party's rights because of the increasing difficulty of assignation of a location to an event in 'our modern conditions.'[198] and therefore 'Bealean rules are increasingly unlikely to satisfy both mutuality and negative [political] rights.'[199]

Savigny's approach 'based on the "seat of the relationship" of the parties' or 'centre of gravity' approach, which is also jurisdiction selective and therefore seemed to satisfy both mutuality and negative political rights, might not work well because 'the existence of some relatively direct prior dealings between the parties can no longer be taken for granted' in the present situation of the world.[200]

More interestingly, Brilmayer asserts that Currie's version of policy analysis was in its reality a Jurisdiction-selecting method. How can it be proved? The false conflict cases, as Ely pointed out,[201] involve 'situations where there is a common domicile or hail from states with identical laws on the issue in question.'[202] Therefore, these cause no unfairness because the burdened party also is a subject to his own state's law. Also, concerning the true conflict and unprovided-for cases, if Currie always suggests the application of the forum law, this is not because of its content and it is a kind of jurisdiction-selecting approach; therefore 'it is perfectly possible to apply local law even when the state has no "interest"'[203]; the probability of being benefited by the local law is the same as the probability of being burdened by it. The application of it does not depend on the result. So, Brilmayer concludes that Currie's policy analysis method 'passes the mutuality test but only by coincidence.'[204] In the false contract cases, Currie's method also satisfies the negative political rights because the burdened party is local.[205]

197 Id., 198.
198 Id., 258.
199 Id., 258.
200 Id., 259.
201 Ely, 'Choice of Law and the State's Interests in Protecting Its Own,' 23 Wm & Mary L Rev 173 (1981).
202 Id., 259.
203 Id., 261.
204 Id., 261.
205 Id., 261.

### 6.2. Critical Comments on Brilmayer's Argument

Brilmayer clearly articulated a crucially important viewpoint for making choice of law rules. The political rights aspect concerning choice of law rules should be always respected and promoted. Concerning this aspect, her contribution in the development of choice of law theory is significant and highly appreciated, even though it has been unconsciously taken into consideration in almost all methods of private international law.

The political rights aspect is nevertheless only one of the phases which any choice of law rule should esteem; it provides a vague guideline and seemed to suggests only the outer limit which should be kept. This is not an all mighty theory and Brilmayer seems to be ready to accept this because she alos argues extensively about the maximisation of state policy objectives as one of the most important problems for the future of choice of law.[206] Brilmayer, therefore, made clear the very plural character of private international law whether consciously or unconsciously. Her argument casts light on the public law aspect in choice of law and, in this respect, her argument has the same inspiration as Currie's, who clearly indicated the constitutional law aspect of choice of law.[207]

The most important question for making each conflicts rules still rests on the careful analysis of each legal situations which is occurring in the present world. The concrete suggestions for this is scarce in spite of its importance in the theoretical context.

## 7. Concluding Comment

The traditional method of private international law is one in which rules of choice of law point directly to a system which is to furnish the appropriate rules of decision and the latter are applied, in general, irrespective of their material content. The new techniques reverse this order of thought. The applicable system, if such an expression remains appropriate, is now indicated by a consideration of potentially relevant rules of decision. Their material content, usually irrelevant in the traditional system, now becomes of crucial importance. In extreme cases, the search for the appropriate legal system to govern a particular question becomes transformed into "a search for a just solution in the principal case,"[208] or

206 In her book above, she allocates the first chapter of Part III which is titled as 'The Future of Choice of Law,' the most important part of the book, to the problem of 'Maximizing State Policy Objectives' which is more or less based on or in line with the argument of the choice of law revolution; in the second chapter her original opinion of the 'Rights, Fairness, and Choice of Law' is discussed. The relationship between both chapters is not clear, but apparently these are compatible and therefore separate objectives both of which should be pursued for the future of choice of law.

207 Currie, Selected Essays, Chap 5, 6.

208 Cavers (1933) 47 Harv.L.R. 173, 193. Cavers later developed a less ad hoc approach with his principles of preference.

into a selection by the court of the better rule of substantive law.[209] Even in the less extreme forms of these techniques, the value judgment still plays an important role. The court is asked to appraise the interests of a State in the extension of its legislative policy to events with a foreign element. It is one thing, however, to identify the social interests which substantive rules of law seek to further in internal situations and quite another to project these interests into situations with a foreign element. In the ordinary case the legislature will not have thought about the latter, and the method proposed assumes that rules of law contain latent solutions to problems they were not designed to solve. Alternatively, or subsidiarily, the court is asked to weigh the competing interests of different states in the application to the problem of their respective legislative policies. These interests are not at all easily ascertained, clearly diverse and often imponderable. In either method, everything will depend upon the judge. A discretionary system of equity takes the place of a system of rules: we are back to the medieval beginnings of private international law.

The American exponents of policy-evaluation techniques speak with various voices upon some matters and with different emphases upon others. However, their main burden of complaint is that the rules in use in the United States patterned upon the first Restatement were too rigid, and applied concepts were artificial and tended to create false problems which distracted the court from the important underlying issues of policy. In consequence, it is argued, courts were compelled either to reach decisions repugnant to commonsense notions of justice or to utilise transparent devices to reach more satisfactory conclusions. "We should be better," Currie bluntly declared, "without choice of law rules."[210]

One of the major objections to all the American theories relying on policy or interest analysis is their impracticality. They require courts to consider the substantive law rules of foreign systems of law, possibly several, that might be concerned with the case. This is expensive and time consuming in that it requires those foreign laws to be proved in court.[211] The obtaining of such proof is not particularly demanding in inter-state conflicts in the United States[212] but it is demanding in the context of international conflicts. In addition, it is not enough to prove the substantive rule of foreign law; it is necessary to ascertain, if possible, the interest

209 See Leflar, American Conflicts Law (3rd ed., 1977) at 195 and Ehrenzweig, "Specific Principles of Private Transnational Law" (1968) II Hague Recueil 167, 212-213. Even von Mehren and Trautman advocated that a neutral forum should select the "more progressive" rule of substantive law when no concerned jurisdiction has a predominant concern that its rule of substantive law should apply: see The Law of Multistate Problems (1965) at p. 408.

210 Currie, Selected Essays, 183. Ehrenzweig, who placed emphasis upon the law of the forum, admitted that certain rules of choice will remain, including the rules which refer the validity of foreign marriages to the personal law or lex loci celebrationis and that of certain transactions regarding land to the lex situs: Treatise, above, p. 352. Ehrenzweig's emphasis on the lex fori is compensated, to some extent, by his desire that jurisdiction should be exercised by the proper forum (the forum conveniens), see Principles, above, pp. 216 217.

211 All this had to be done before any "false conflicts" can be found.

212 Where the substantive law of sister states is often similar and is easy to ascertain and prove.

of that foreign State in having its rule of law applied to the particular circumstances of the case.[213]

There is a perennial tension in the law between the need for legal certainty and the desire which all men share to secure justice in the individual case. But, a degree of certainty is of particular importance in cases with a foreign element.[214] It is true that in a few cases, such as actions for compensation for wrongful injuries, the dispute arises out of circumstances in which antecedent knowledge of the law would make no difference, but even here, after the injury has occurred, the ability to predict the approach which is likely to be taken by the courts may assist an injured party in obtaining a settlement without recourse to litigation. In other matters involving a foreign element, the knowledge which can only come from the existence of established rules is a necessary condition of rational choice in the arrangement of one's affairs. Without such rules, the task of the lawyer advising a client is difficult enough in any situation with foreign elements. Some degree of certainty, too, is necessary because, in Cavers's own words[215]: "Discretion is a safe tool only in the hands of the disinterested." And, even if every judge were perfectly impartial as to the treatment of persons from his own country and persons from others, it would still be a valid objection that, without established rules, any decision which rejected the pleas of a stranger would likely be construed as a biased one. Justice might well be done, but would the unsuccessful foreign litigant accept it?

The existing system in the United Kingdom does not entirely ignore State policies or the interests of the parties. It is traditional in the system, at crucial points in the development of the law, to refashion rules or to fashion new rules on the basis of a careful evaluation of the interests involved. The result of this evaluation, however, is expressed in the form of a bilateral choice of law rules. In other words, a bilateral rules is the patterned assumption resulting from the evaluation of the interests involved in each legal area which is usually represented by a legal relationship. Though it may have plasticity towards the circumference, it is clear enough at the centre to permit practitioners to apply them without excessive difficulty. Also, it is possible to secure the individual justice for an unusual case by prescribing an exceptional clause without unduly disturbing the predictability[216] or to set a smaller unit than a legal relationship for catching

213 The interests of a sister state legislature in the United States in enacting a particular rule of law is likely to be easier to ascertain than the interests of a foreign legislature in enacting a comparable rule. Also, the idea of State interests is hard to apply in the context of judge-made law.

214 See P. H. Neuhaus, "Legal certainty versus equity in the Conflict of Laws" (1963) 28 Law and Contemp. Probs. 795.

215 47 Harv. L. R. 173, 203. Cavers himself concedes that the argument for certainty is stronger in international conflicts than in inter-state conflicts.

216 For example, Contract (Applicable Law) Act 1990, art. 4 (5).

the subtle nuance of each case.[217] The description of the rules which define the limits of application of foreign law as "escape devices"[218] is merely tendentious. In particular, the role of public policy is a narrow one, although one which is essential in a system which is liberal in its admission of foreign law but scrupulous in its attempt to achieve justice in the individual case. On the basis of such rules, clients may be advised and business transacted. The existing system works reasonably well and its strength should not be under-estimated.

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217 For example, Private International Law (Miscellaneous Act) 1995 art. 9 (2) adopts 'issues' instead of a legal relationship as the scope of characterisation.
218 Cavers, above, 182-187; Currie, Selected Essays, p. 181; Ehrenzweig, Treatise, above, 325.