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THE CHARACTERIZATION OF CONFLICT RULES

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Introduction to the Concept of Organization or Classification

Should one day the Supreme Court declare that "bright law students" will be exempted from the bar examination the important question comes up: who will determine who these "bright law students" are? Should it be the Supreme Court itself, the Department of Education, the various schools and universities involved, the various professors? The process of determining who these students are is called classification or characterization.

In the same way, in the subject of Private International Law, the problem may crop up. While, for instance, it is almost universally admitted that the validity of a marriage depends upon whether or not there has been compliance with the law of the place where it was performed, the following questions may be asked: firstly, by whose law should we judge whether or not a certain factual situation is indeed a marriage? secondly, assuming that everybody agrees on the fact that there indeed has been a marriage, where exactly is the "place where it was performed" if say the marriage took place at the border of two states, with the man on one side, and the woman, on the other? Which law shall we consider in determining this point: the law of the State where the man was, or the law of the State where the woman was, or should we apply our own internal law as the yardstick? Then, again suppose we have a rule that we recognize all valid foreign marriages except "incestuous ones": whose definition of "incestuous" marriages shall we use — ours, or the definition in the place where the marriage was contracted? The answers to all these are given by what we refer to as characterization or classification or qualification in Private International Law.

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Characterization Defined

Characterization as used in our subject is simply the process of determining under what category a certain set of facts fall. Falconbridge defines it as the "process of deciding whether or not the facts relate to the kind of question specified in a conflicts rule."[1] Dean Salonga on the other hand aptly refers to it in this manner:

> "Characterization is the process of assignning a disputed question into its correct legal category. The problem is crucial inasmuch as the law of the forum may have a different characterization from that of the law of the place where the act or transaction has its closest connection."[2]

Characterization was first discussed by Franz Kahn in 1891; then by Bartin who referred to it as the "doctrine of qualification". Falconbridge admits that its synonyms are classification and qualifications, but in view of the many legal meanings of these two terms, he candidly professes an affection for the term "characterization". According to Falconbridge, "one of the notably controversial features of the discussion of characterization relates to the problem of whether the characterization should be based on the concepts of the law of the forum or upon the concepts of the proper foreign law, or upon concepts derived from the study of comparative law.[3]

The ultimate purpose, of course, of characterization is to enable the forum to select the proper law.

Stages of Characterization

Falconbridge suggests three important steps in characterization:[4]

(1) Characterization of the Question
(2) Selection of the Proper Law
(3) Application of the Proper Law

On the other hand, Dean Salonga breaks down the problem of characterization into three stages, namely:

(1) The Characterization of the Factual Situation
(2) The Characterization of the Point of Contact or the Connecting Factor
(3) The Characterization of the Problem as Procedural or as Substantive[5]

[1] ESSAYS ON THE CONFLICT OF LAWS, 50.
[2] PRIVATE INTERNATIONAL LAW, 94-5.
[3] *Op. cit. supra* note 1, at 58.
[4] *Ibid., op. cit. supra* note 1.
[5] *Op. cit. supra* note 2, at 95-102.

On my part, I believe that the following should be the steps taken in the application of the proper foreign law:

(1) The determination firstly of the facts involved
(2) The characterization of the factual situation
(3) The determination of the conflicts rule which is to be applied
(4) The characterization of the point of contact or the connecting factor
(5) The characterization of the problem as procedural or substantive
(6) The pleading and proving of the proper foreign law
(7) The application of the proper foreign law to the problem

It will be noticed, however, that in this enumeration only steps (2), (3), (4), and (5) concern themselves with characterization proper.

First Step — The Determination of the Facts Involved

In every case, the law that will be applied will have to depend upon the facts involved. Thus, the facts have to be ascertained. If for instance it is clearly determined that no foreign element is involved, no problem in Private International Law arises. To determine what the facts are the forum has to be guided necessarily (but only, preliminarily) by its own rules of pleading and proof. We of course cannot as yet make use of any foreign criterion or rule: we do not even know at this stage what the problem is all about.

Second Step — The Characterization of the Factual Situation

After we have preliminarily uncovered the facts in the situation presented, we are now faced with the duty of determining whether the problem before us is one say of succession or of conjugal marital rights; one of tort or of contract. This process is called the characterization of the factual situation. We may define the process as *the assigning of the proven facts into their particular category*, that is, do the facts constitute a problem of succession or a problem of marital property rights? Do they constitute a problem in torts or a problem in contracts?

Examples:

(1) A California wife dies. Her California husband claims the entire conjugal property as his alleging that under California law on *marital property*, the entire conjugal property is his and that this is so not because of succession, but because of accretion. Under our own law, this is clearly a problem, not of accretion, but of succession. *Issue*: Whose characterization of the factual situation shall apply — California or Philippine law? This is a problem in characterization of the factual situation.

(2) Under Art. 71 of the Civil Code if a marriage celebrated abroad is valid in the place of celebration, the same will also be valid in the Philippines, EXCEPT if the marriage be bigamous, or polygamous, or incestuous. Now then, in our country a marriage between *first cousins* is *incestuous*. Suppose in the foreign country where the marriage took place, the same marriage is *not incestuous*, whose definition or classification or characterization of "incestuous marriage" should we follow: the characterization in the Philippines, or the characterization in the foreign country? This again is example of a problem in characterization of the factual situation.

Suggested Solution:

(1) In the *absence* of an express conflicts rule on the matter, it is suggested that the characterization of the *forum* should be adhered to, unless there would result a clear case of injustice. Hence, in the first example given, the Supreme Court of the Philippines (without however discussing the question of characterization) apparently considered the problem, not one of accretion to conjugal property, but as one involving succession, inasmuch as the conjugal properties referred to were lands located in the Philippines.[6] Parenthetically, it should be observed that inasmuch as the case was held to be one of succession, inheritance taxes could properly be collected. Obviously, the Court must have been swayed by the financial benefit that would accrue to our government, if it would consider, as it really considered, the matter as one involving succession.

As Dean Salonga brilliantly points out:

"IT WOULD HAVE SERVED the cause of clarity better if the Supreme Court had answered squarely this simple question: do the facts involve a problem of succession or a problem of marital property relationship? However wobbly the decision may be, the case seems to indicate that the standard of characterization should be that of the *lex fori*. It may be that in view of the tax aspects of the case, the court was swayed by the demands of expediency, and neglected to discuss satisfactorily the problem of characterization. It would undoubtedly strengthen the Supreme Court decision to note that under any view, in matters affecting lands, the characterization of the *lex situs* is decisive." [7]

(2) If we have an express conflicts rule on the matter of characterization, there is no question that we have to abide by such characterization. Thus, in the second example given (concerning the *incestuous* marriage), Art. 71 of our Civil Code specifically provides:

"All marriages performed outside the Philippines in accordance with the laws in force in the country, where they were performed, and valid there as such, shall also be valid in this country, except bigamous, polygamous, or incestuous marriages, *as determined by Philippine law.*"

The phrase "as determined by Philippine law" simply indicates that the characterization or definition of "incestuous, etc." marriage shall be

[6] See Gibbs v. Government, 59 Phil. 293.

[7] *Op. cit. supra* note 2, at 97, citing a reference to LORENZEN, SELECTED ESSAYS, 135.

that made by Philippine law. It is therefore clear that the marriage abroad of the two Filipino first cousins, even if valid where celebrated, shall be considered VOID in our country, because under our characterization, a marriage between *first cousins* is INCESTUOUS.[8]

Third Step — The Determination of the Conflicts Rule Which is to be Applied

After having properly classified the factual situation into its legal category, the next question that will be asked is: what conflicts rule must we follow — the conflicts rule that we have on the matter, or some foreign conflicts rule? The question has been made necessary in view of the existence in the world today not only of conflicting internal laws, and conflicting internal judgments, but also of *conflicting conflicts rules*. However, there can be little debate on this matter: it is clear that *our* own conflicts rule, that is, the conflicts rule of the forum, should indubitably apply. There are two good reasons for this: firstly, this is precisely the *purpose* of a conflicts rule; secondly, at this stage, we still have to definitely ascertain the precise foreign country that has the closest or the most intimate connection with the facts that have been brought out.

Fourth Step — The Characterization of the Point of Contact or the Connecting Factor

On the assumption that we have determined the proper conflicts rule which we are going to follow, a new problem confronts us: whose characterization of the point of contact should be adhered to?

Examples:

(1) X dies in the Philippines, with personal and real properties situated here. Under Art. 16, par. 2 of the Civil Code, the successional rights to his estate shall be governed by his *national* law. During his lifetime, X had become naturalized Filipino citizen, but inasmuch as he had failed to comply with certain requisites of Chinese law (he was a Chinese, when he sought Philippine naturalization) China up to the time of his death still considered him a Chinese national. Now then, under Art. 16, par 2, the point of contact is his NATIONALITY. The trouble is — what was his nationality at the time of his death? Applying Chinese characterization, he was a Chinese; applying our characterization, he was already a Filipino. Whose characterization must we follow? This is an example of a problem of characterization in the point of contact.

(2) Aboard a ship of Philippine registry, anchored at a pier in Country X, two Filipinos were married. Art. 71 provides that the validity of the marriage depends generally on the observance of the *lex loci celebrationis* (the law of the place of celebration). The question however is: where

[8] Art. 81, par. 3, NEW CIVIL CODE.

is the *locus celebrationis* (place of performance or celebration) — is it the Philippines, because the ship is of Philippine registry, or is it Country X, because it was certainly performed within the territorial boundaries of said Country? This again is an example of a problem involving the characterization of the point of contact.

Suggested Solution:

In case of doubt, the characterization of the forum must certainly prevail. This seems to be the prevailing weight of authority.[9] Hence, in the first example, X should be considered a Filipino. This also accords with the time-honored principle that nationality is a matter exclusively determinable by the country concerned. As it happens in this case, the forum considers him its own citizen. In the second example, the marriage should be considered to have been performed in the Philippines.

To the general rule that the characterization of the forum determines the point of contact, we must give at least two exceptions:

(1) If the problem deals with real or personal property, it is virtually futile to speak of characterization, particularly if the question deals with the validity of their disposition or alienation, or the capacity of the contracting parties. Insofar as Philippine Private International Law is concerned, it is the *lex situs* that will govern. If the property is situated at the boundary of two states, the law that should apply in case of conflict (as when, applying the law of the first state, the contract will be considered *valid;* but, applying the law of the second state, the contract will be deemed *void*) is the law that will *uphold* the efficacy of the transaction, for it cannot be seriously contended that the parties did not intend to be bound by their agreement.

(2) If the forum is merely an incidental place of trial, the characterization of the forum has to give way to any *common characterization* that may exist in the foreign countries involved.

Example:

A enters into a contract with B, although at the time of agreement they are in different countries. Let us assume that under the law of the *two countries involved,* the *locus celebrationis* is State *X;* let us also assume, that under our own characterization, the *locus celebrationis* is State Y. If our forum has no substantial connection with the case (as when for instance, the parties are neither citizens nor residents of our country, and the transaction has no connection whatsoever with the Philippines), we may very well refuse to assume jurisdiction over the case on the ground of *forum non conveniens.* However, should we decide to consider the case on the merits, we should cast aside our own characterization; instead, we should consider State X as the *true locus celebrationis.* After all this is the common characterization of the two countries essentially involved.[10] If, on

[9] LORENZEN, SELECTED ESSAYS, 135.
[10] See *ibid.*

the other hand, there is no common characterization, I believe that we may avail ourselves of the characterization that will uphold the efficacy of the contract. If this may be attained by making use of our own characterization, hy all means, we must do so.

FIFTH STEP — THE CHARACTERIZATION OF THE PROBLEM AS SUBSTANTIVE OR PROCEDURAL

The Basis of the Problem:

At the outset it must be stated that the problem of characterization of the matter as one pertaining to "substantive law" or "procedural law" is not met in ALL kinds of conflicts cases; the question is relevant only in some of them. Secondly, the problem itself does not seem so important inasmuch as the distinction between what is "substantive" and what is "procedural" treads dangerously on a very thin line: in many instances a denial of certain remedial processes often results in the negation of substantial justice; and all too often what may appear to be "substantial rights" are really nothing but "procedural processes" thickly disguised.

There is no question that *procedural matters* are governed by the law of the forum. Therefore, such matter as service of process, joinder or splitting of a cause of action, periods within which to appeal, requisites for the perfection of an appeal, and so forth are governed by the *lex fori.* All States regard them as purely procedural questions. However, in matters like the Statute of Frauds, and periods of prescription, some States view them as appertaining to "Substantive Law"; others treat them as part of "Procedural Law", and still others just cannot seem to make up their minds on the subject. Now then, if the forum considers them *substantive,* and the foreign State designated in the forum's conflicts rule chooses to view them as *procedural* (or *vice versa*) whose characterization shall prevail? It is obvious that an arbitrary selection one way or the other may prove unjust.

Suggested Solution:

It would seem that the modern trend today would be to consider the *prescriptive period or the Statute of Frauds that the parties had in mind at the time the transaction took place.* For instance, if Englishmen in England undertook a contract, all of the elements of which are in England, it is obvious that they intended *English law* to completely govern their actuations; it is also evident that they intended the English law on prescription and the English *Statute of Frauds* to control their rights and obligations. This, in nutshell form, is what is referred to as the *"totality approach"* of Prof. Rabel. According to this eminent authority, we have to:

(1) first get the *law intended* by the parties to govern the contract;

(2) then, proceed to apply that intended law in its "TOTALITY" including its periods of prescription and its Statute of Frauds.

We shall now quote him:

"The needs are simply and efficiently fulfilled by the application of the foreign law as it stands and in its *totality* . . . The question which state's law governs the case is answered by the choice of law; there is no reason why reference should not be made to this law as a whole instead of parts prematurely chosen . . . More precisely, the court has to decide the question exactly as a court sitting in the foreign court would do, if such court had jurisdiction, and had to apply its own domestic law."[11]

It will be noticed that Prof. Rabel did not exactly say that the forum must apply the law intended by the parties; he says, the forum *must apply the foreign law it has selected.* However, it is evident that the foreign law it selects must be the same law intended by the parties, otherwise we would unjustifiably deny the "rational expectations of the parties". It is evident too that the totality approach" must admit at least one exception, namely, if the subject matter concerns *property located in the Philippines,* our own law on prescription and our own Statute of Frauds must apply. This is the clear import of Art. 16, par. 1 of the Civil Code: "Real property as well as personal property is subject to the law of the country where it is situated."

By way of resume of our position on the subject, we hereby restate our suggested rule on the matter:

"The forum must apply the periods of prescription and the Statute of Frauds, which the parties evidently had in mind at the time they entered into the transaction; however when the subject matter deals with real or personal property located in the forum, the forum has no alternative except to apply its own periods of prescription and its own Statute of Frauds.

Example: A, an Englishman, borrowed a sum of money in England from B, another Englishman. The contract was evidenced by a written document, a promissory note. The contract subsequently matured. Six (6) years after maturity, suit was brought in the Philippines by B against A for the recovery of the amount borrowed. Let us assume that in England, the prescriptive period to sue on a written contract is four (4) years; in the Philippines, ten (10) years is the period of prescription.[12]

Issue: Has the cause of action prescribed? If we apply English law, there is no doubt that the action has already prescribed; if we apply Philippine law, we can still entertain the cause of action.

[11] RABEL, THE CONFLICT OF LAWS, 66-7, cited in Salonga, *op. cit. supra* note 2, at 101.

[12] Art. 1144 NEW CIVIL CODE.

Answer: Regardless of the Philippine or English characterization of prescription (as to whether it is substantive or procedural), the answer is: the action has already prescribed. English law was evidently intended by the parties to govern the case; therefore, we should apply the English law on prescription.[13]

The rule that we have just discussed is apparently the rule that we have in Sec. 48 of our own Code of Civil Procedure. This *section* has not yet been repealed: there is no contradictory legislation in our Civil Code or anywhere else in our laws. Said section says:

"*Sec. 48 If Barred at Place Where Cause of Action Arose, Barred Here.* — If, by the laws of the *state or country* where the cause of action arose, the action is barred, it is also barred in the Philippine Islands."

Unfortunately, in the case of *D'Almeida v. Hagedorn, L-10804, May* 22, 1957, the Supreme Court did not apply said Sec. 48. In said case, an action was brought in 1954 in the Philippines on two demand notes executed in 1942 and 1943 in Hongkong where both the debtor and the creditor were residing until the Philippines was liberated from the Japanese Occupation Forces. The Court, in applying the rule that the Moratorium Laws[14] suspended the running of the prescriptive period, ruled that prescription is governed by the *law of the forum;* it therefore concluded that the action had not yet prescribed. It would seem from this ruling that even if the cause of action accrued in Hongkong, and has already prescribed under Hongkong law, still the action has not yet prescribed under the law of the forum, that is, the law of the Philippines. Sec. 48 therefore of the Code of Civil Procedure was never taken into consideration. However, one important fact must be stated: in the D'Almeida Case, there was NO PROOF that the claim was barred under Hongkong law; it is well-settled that in the absence of proof of the proper foreign law, it is presumed to be the same as Philippine law.

Regarding Sec. 48 of the Code of Civil Procedure, a query may be asked: suppose the cause of action accrued in TWO OR MORE foreign States, the prescriptive law of which State must we consider? It is submitted that if the cause of action is divisible, that is, if one part of it accrued in State A (where the action has *prescribed*) and another part accrued in State B (where the action has *not yet prescribed*), we may still entertain in our jurisdiction that part which has *not yet prescribed.* On the other hand, if the cause of action be indivisible, we are not allowed to split it: in such a case, we shall have no alternative except to consider again the law intended by the parties (in its *totality,* including the periods

[13] If the suit had been for the recovery of a parcel of land in the Philippines, or for the recovery of an automobile situated here, there is no question that our own law on prescription must control (Art. 16, par. 1, New Civil Code).

[14] Exec. Orders Nos., 25 and 32; Rep. Act. 342.