

BOOK REVIEW

THE FOUNDATION OF CHOICE OF LAW: CHOICE AND EQUALITY

BY SAGI PEARI

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I INTRODUCTION

Choice of law, jurisdiction, and the enforcement of foreign judgments are typically identified as the three components of private international law.¹ Dr Sagi Peari's excellent text, *The Foundation of Choice of Law: Choice and Equality*,² addresses the first of these. Peari's text proposes a novel theoretical underpinning for choice of law which he calls the Choice Equality Foundation, or 'CEF'. CEF's own foundations lie in the historical choice of law writings of Friedrich Carl von Savigny, as well as the legal philosophy of Immanuel Kant. Considering both of these sources together allows Peari to undertake a 'careful

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¹ Lord Lawrence Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) 4 [1-003].

² Sagi Peari, *The Foundation of Choice of Law: Choice and Equality* (Oxford University Press, 2018).

evaluation, qualification, and extension of the various stages of Savigny's argument to choice of law'.³

Though primarily a theoretical work, Peari's text has very real practical implications. Theory matters a lot in the law — in general, and in the choice of law context. Consider the following two observations of leading private international law thinkers, the first made in the context of US interstate torts, and the second in the context of international commercial arbitration:

The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.⁴

These questions [that is, questions concerning the identification of the governing substantive law] may sound academic and may seem to be of interest for professors only, but as a practitioner I can say that they are not. They are questions of crucial practical significance because, depending on their answer, they may sometimes directly determine the outcome of a case. And because this is so, these questions need to be examined and handled very carefully.⁵

Indeed, the sixth and final chapter of Peari's text is devoted to CEF's practical implications.⁶ Before addressing that theory-practice link, however, this review will provide a summary of Peari's work, identify two particularly interesting aspects of his argument, and note some stylistic points setting his book refreshingly apart from much scholarly legal writing.

II PEARI'S CHOICE EQUALITY FOUNDATION ('CEF')

Private international law, including its choice of law rules, is inherently domestic, with the rules of private international law varying between jurisdictions just as they do in any other area of private law.⁷ Nevertheless, Peari's CEF seeks to establish a theoretically sound, internally consistent, and principled model of choice of law that transcends national boundaries. The

³ Ibid 30.

⁴ William Prosser, 'Interstate Publication' (1953) 51(7) *Michigan Law Review* 959, 971.

⁵ Marc Blessing, 'Choice of Substantive Law in International Arbitration' (1997) 14(2) *Journal of International Arbitration* 39, 49.

⁶ Peari (n 2) 235–93.

⁷ Peter Stone, *The Conflict of Laws* (Longman, 1995) 2.

choice of law process is often conceptualised as having two stages — an initial enquiry into whether parties in a particular legal relationship have made a choice of law, and (if not) then the determination of the applicable law by the relevant court.⁸ Sometimes the literature describes three stages — express choice by the parties, implied choice by the parties, and then the decision-maker's own analysis.⁹ Peari's CEF is built upon what he describes as two pillars — a choice pillar and an equality pillar. The traditional processes described above actually reside entirely within the first pillar. The equality pillar then sets out exceptions to the application of this otherwise identified law. That those exceptions are set out in their own pillar, with their theoretical and normative bases being examined in significant detail, is an important contribution of this work to the field, given the tendency of contemporary choice of law literature to gloss over them.

Peari's choice pillar incorporates, at its core, the idea of 'juridical relational choice'.¹⁰ This concept is given effect by invoking the party autonomy principle, whereby parties are empowered to choose the law governing their relationship,¹¹ and also a process of constructive inference in cases where no choice is made.¹² The constructive inference process involves application of the most significant relationship principle,¹³ a concept that the common law would refer to as the closest connection test.¹⁴ Unlike the closest connection test at common law, however, Peari's CEF couples its consideration of 'juridical indicators' (the connections that a case has to particular jurisdictions)¹⁵ with 'juridical presumptions' (the use of a particular connecting factor as a starting point).¹⁶ As summarised by the helpful diagram provided by Peari in Appendix B of his book,¹⁷ when applying the choice pillar we start with the parties' express or implied choice. If there is none, we then look for the law having the most significant relationship with the case, starting from certain presumptions (for example, the presumption that the place of performance will be particularly

⁸ See, eg, *Akai Pty Ltd v The People's Insurance Company Ltd* (1996) 188 CLR 418, 442.

⁹ See, eg, Hong-lin Yu, 'Choice of Laws for Arbitrators: Two Steps or Three?' (2001) 4(5) *International Arbitration Law Review* 152, 154.

¹⁰ Peari (n 2) 81.

¹¹ Ibid 90–106.

¹² Ibid 106–23.

¹³ Ibid 109.

¹⁴ See, eg, *Bonython v Commonwealth* [1951] 1 AC 201, 219.

¹⁵ Peari (n 2) 112–20.

¹⁶ Ibid 120–3.

¹⁷ Ibid 301.

important in contract cases) and then weighing up all the connecting factors before coming to a conclusion.

Peari's equality pillar then sets out the circumstances in which the choice pillar's result is not the end of the matter. Pursuant to the equality pillar, a chosen law may be disregarded where: 1) it favours a barbarian regime's law (as these regimes are not true states according to CEF principles, meaning that their laws do not truly constitute laws);¹⁸ 2) where a chosen law involves innate inequality (that is, where the particular law discriminates on 'such inherent personality attributions as gender, ethnicity ...');¹⁹ and 3) where a chosen law offends the state equality principle.²⁰

In explaining CEF, Peari refers to an admirably wide range of choice of law, private international law, and philosophical/theoretical materials. It is particularly noteworthy that Peari cites numerous works by key authors currently only available online through the SSRN (Social Science Research Network) repository. His analysis thus incorporates the most up-to-date research and thinking of the leaders in these fields.

III TWO PARTICULARLY INTERESTING ASPECTS OF PEARI'S ARGUMENT

One particularly interesting aspect of Peari's analysis is its challenge to 'the borders of the traditional division between purely domestic and private international law cases'.²¹ Peari critiques the traditional 'cases having a foreign element' definition of when private international law applies.²² In doing so, he demonstrates that the choice of law question is always present in litigation, even if, 'in a purely domestic case ... we simply do not see it and take the application of domestic law for granted'.²³ This is in direct contrast to the traditional view, summarised in *Dicey, Morris and Collins on the Conflict of Laws*:

If an action is brought in an English court for damages for breach of a contract made in England between two Englishmen and to be performed in England, there is no foreign element, the case is not a case in the conflict of laws, and the English court will naturally apply English internal or domestic law. But

¹⁸ Ibid 128–33.

¹⁹ Ibid 136.

²⁰ Ibid 144–55.

²¹ Ibid 85.

²² Cf Collins (ed) (n 1) 3 [1-001].

²³ Peari (n 2) 86.

if the contract had been made in Switzerland between two Swiss and was to be performed in Switzerland, then the case would be (for an English court, but not for a Swiss court) a case in the conflict of laws, and the English court would apply Swiss law to most of the matters in dispute before it, just as a Swiss court would naturally apply Swiss law to all such matters. If we change the facts once more and assume that the contract was made in Switzerland between an Englishman and a Swiss but was to be performed in England, then the case is a case in the conflict of laws not only for an English court but also for a Swiss court and indeed for any court in the world in which the contract is litigated ...²⁴

Peari's own hypothetical demonstrates that even *Dicey, Morris and Collins'* first example involves at least implicit choice of law considerations:

Consider the following example: I go right now outside of my office, cross the street, and buy my wife a watch in the nearby watch store. Is this a choice-of-law case in the event of a legal dispute between myself and the store? Because of the presence of far more than a single foreign element in the factual matrix of the case, the answer to this question should be an absolute – ‘yes’. The possibility of classification of this case by the Ontario court as a ‘choice-of-law’ case, with the potential subsequent application of foreign law, follows from the facts that the owner of the store is a recent immigrant from South Africa, the salesman is from the United States, most of the watch parts were generated in Switzerland, and the watch itself was assembled in Slovakia. From this perspective, the classical choice-of-law methodology seems to fundamentally fail to cope with contemporary reality at the very outset of its analysis of the choice-of-law question.²⁵

Another particularly interesting aspect of Peari's analysis is its positioning of courts' own identification of the governing law as an aspect of party choice. This is again in contrast with the traditional view. According to the High Court of Australia, for example, where there is no party choice of law, ‘the law itself will select a proper law’.²⁶ As Peari explains, however, ‘the normative foundation of the choice-of-law question follows from the English title of the discipline itself — it is about *choice*’.²⁷

²⁴ Collins (ed) (n 1) 3–4 [1-002] (citation omitted).

²⁵ Peari (n 2) 87.

²⁶ *Akai Pty Ltd v The People's Insurance Company Ltd* (1996) 188 CLR 418, 442.

²⁷ Peari (n 2) 82 (emphasis in original).

Thus ‘[w]hat this requires is a careful evaluation of persons’ voluntary actions and juridical manifestation of these actions through the lens of judicial authority, which provides juridical meaning to those actions’.²⁸

To give some specific examples, in the contract law category of case, even if the parties do not themselves choose a governing law they have still *chosen* to shape their own circumstances and their contractual relationship in such a way as to have points of contact with particular legal systems.²⁹ Similarly, in the tort law context, Peari observes that ‘I make a *choice* to go to the bookstore. I *choose* to drive to Florida and my expectations are that in case of an accident there, the case will be adjudicated according to the laws of Florida’.³⁰ When ‘the law itself’ selects a governing law,³¹ it is doing so within a framework and a relationship shaped by the parties’ own choices. Peari thus ‘insists’ that choice of law ‘should not be supplanted by the court, or by the state, but by the parties themselves’.³²

IV MATTERS OF STYLE

Turning from matters of substance to style, Peari’s text stands out from most scholarly legal writing by its consistent use of the ‘I’ pronoun, evident as early as the book’s second sentence.³³ This approach is refreshing, and very engaging — especially for readers who have an interest in the field but who are not theory specialists. To adapt the words of Helen Sword, Peari reverses the ‘near erasure of human agency’³⁴ that sometimes characterises writing in our field.

Peari’s text also features another, unexpected, stylistic aspect — a friendly, even conversational, tone in his writing. Thus in Chapter 6, Peari poses a hypothetical scenario in which his neighbour ‘commit[s] a tort of trespass in my house’, adding the observation (easily read with a smile) that this ‘will never happen — I have such a wonderful neighbor’.³⁵ Also in Chapter 6, after presenting a hypothetical about a Joanna and Michael Smith (Canadian

²⁸ Ibid.

²⁹ Cf ibid 112–3.

³⁰ Ibid 180 (emphasis added).

³¹ Cf *Akai Pty Ltd v The People’s Insurance Company Ltd* (1996) 188 CLR 418, 442.

³² Peari (n 2) 198.

³³ Ibid xiii.

³⁴ Cf Helen Sword, *Stylish Academic Writing* (Harvard University Press, 2012) 6.

³⁵ Peari (n 2) 247.

residents ‘frequently depressed by the long Canadian winter’ and keen to take a holiday),³⁶ Peari clarifies that

[a]lthough I (presently) live in Toronto and I do suffer from the Canadian [w]inter, I would like to mention that the case is truly imaginary and does not relate in any way to me or my family or the (unpleasant) events which go on to occur for this couple. In other words, I am not ‘Michael’ and my wife is not ‘Joanna’.³⁷

We do not often see this kind of manifestation of a scholar’s own personality in published legal research.

Finally, it can be noted that Peari’s writing is clear about the limits of its claims. The reader is left with no question as to the lines between Peari’s central claims, additional (more tentative) observations, and matters beyond the scope of his work. For example, in Chapter 6’s discussion of the relationship between CEF, Savigny’s theory, and the American *Restatement (Second) of Conflict of Laws*,³⁸ Peari clarifies that ‘[a] full overview of the *Restatement*’s provisions in light of CEF and Savigny’s theory must be reserved for a much more ambitious project’.³⁹ Similarly, though CEF rejects choice of law rules favouring the application of local law (as noted in Part V of this review), Peari admits for practical reasons that even under CEF the forum’s law determines the classification of case types. In this regard, Peari explains that ‘the case for a complete elimination of *lex fori* must be postponed for another occasion’.⁴⁰ Peari furthermore describes his discussion of procedural rules as reflecting his ‘tentative understanding of the subject’.⁴¹ Incidentally, Peari’s text is principally concerned with choice of law in the state court context, though it does still occasionally refer to the arbitration field.⁴² Given CEF’s endorsement of a choice of law theory based on private relationships rather than notions of state sovereignty,⁴³ it would be interesting to consider its relevance (or

³⁶ Ibid 273.

³⁷ Ibid 273 n 205.

³⁸ American Law Institute, *Restatement (Second) of Conflict of Laws* (1971).

³⁹ Peari (n 2) 260 n 121. Similarly, Peari acknowledges that preparation of the *Restatement (Third) of Conflict of Laws* (a process into which CEF might usefully provide input) is in a ‘truly preliminary stage of its development’: at 257 n 96.

⁴⁰ Peari (n 2) 203. With reference to the second stylistic point mentioned in this Part, Peari’s personality shines through in his ultimate conclusion here that ‘[t]he winner cannot always have it all’: at 205.

⁴¹ Ibid 222 n 192.

⁴² See, eg, *ibid* xix.

⁴³ See, eg, *ibid* 33–6: with respect to Savigny’s writings.

otherwise) to the international commercial arbitration field, although this question is beyond the scope of Peari's analysis in this book.

V THE THEORY-PRACTICE LINK

Returning then to the link between theory and practice, an understanding of *why* the law is as it is helps the law adapt to new circumstances. This is the focus of Chapter 6, where Peari considers, amongst other things, the challenges posed to the choice of law field by the digital age. In particular, Peari addresses two issues — defamation, and online contracting — and demonstrates that the CEF vision of choice of law is capable of adaptation, without the need for wholesale revision.⁴⁴ As Peari points out, choice of law has already had to grapple with 'such inventions as letters of correspondence, telephones, cars, airplanes, and facsimiles'.⁴⁵ It is, however, interesting to note Peari's observation, in relation to online contracting, that uncertainty increases as a result of consumers frequently having less information about goods and the location of the businesses with which they deal.⁴⁶ This struck a chord with this reviewer, following a personal experience of buying goods online from a website appearing to be Australian, only to find, upon their arrival, that they had been dispatched from the UK.

In this way, Peari's CEF theory might be to choice of law what the High Court of Australia's decision in *Pavey & Matthews Pty Ltd v Paul*⁴⁷ was to Australia's law of restitution. In that case, the Court recognised that the principle of unjust enrichment (or restitution) was the basis for claims in *quantum meruit*, discarding earlier theories based on implied contracts.⁴⁸ In doing so, Deane J described unjust enrichment as:

a unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case ...⁴⁹

⁴⁴ Ibid 273–93.

⁴⁵ Ibid 282.

⁴⁶ Ibid 287.

⁴⁷ (1987) 162 CLR 221.

⁴⁸ Ibid 227–8 (Mason and Wilson JJ), 255–6 (Deane J).

⁴⁹ Ibid 256–7.

Peari similarly aims to provide a unifying choice of law theory that accommodates and explains many existing choice of law rules appearing in various jurisdictions around the world. CEF principles explain frequently-encountered real world choice of law concepts such as party autonomy, the most significant relationship/closest connection test, and the public policy exception to applying a chosen law.⁵⁰ In doing so, it ‘sheds light on these normative foundations, refines our thinking about their implementation, and suggests a way to cope with the advancing challenges of the digital age’.⁵¹

Nevertheless, while CEF is presented as an ideal, Peari also acknowledges that some of the world’s existing choice of law rules depart from CEF.⁵² Examples include rules favouring the application of local law (thus favouring local plaintiffs), choice of law rules in torts law that seek to distinguish between ‘conduct-regulating’ and ‘loss-allocating’ torts, and rules providing for the application of mandatory law.⁵³ This point again goes to the theory-practice link. Peari suggests that these rules, though in force and perfectly valid, are sub-optimal in their deviation from CEF; and that CEF’s choice pillar constitutes an ideal basis for their reform.⁵⁴

VI CONCLUSION

As the two quotations in this review’s introduction point out, choice of law rules are practically important, but have challenging theoretical underpinnings. Peari’s text can be commended for its effective synthesis of these sometimes ‘mysterious matters’ into a work which is well thought out, engaging, and rigorous, and which comprises anything but ‘strange and incomprehensible jargon’.⁵⁵

In this regard, the last word of this review might best be left to Peari himself. He concludes *The Foundation of Choice of Law: Choice and Equality* with the following remarks:

Buried under volumes of policy-based analysis, states’ interests, the comity doctrine of contemporary, and traditional choice-of-law scholarship, as well as wrongly associated with vested rights, distracted from its own internal

⁵⁰ Peari (n 2) 159. See also 177.

⁵¹ Ibid 159.

⁵² Ibid 159–60.

⁵³ Ibid 160, 214. See also 193, 199–200.

⁵⁴ Ibid 160, 215.

⁵⁵ Cf Prosser (n 4) 971.

coherency by Savigny's theory, and dismissed from the choice-of-law landscape by the legal realists' illusionary triumph over *any* rights-based conception of the subject, CEF is evident throughout the broad spectrum of choice-of-law rules, doctrines, and concepts of many legal systems. This is why CEF so matters for our thinking on the subject and understanding of the fundamental intuition of systems with respect to the nature of choice of law.⁵⁶

⁵⁶ Pari (n 2) 298 (emphasis in original).