Nature and Scope of Conflict of Law: Internal and International Conflict in Perspective

Fasilat Olalere (Ph.D)
Elizade University, Ondo State
Nigeria

Abstract
This paper examined the conceptual nature and scope of conflict of law. The concept is explored from the internal and international perspective of conflict of law. The crux of conflict of law as a specific area of law is to determine the applicable laws or jurisdiction to determine various kind of cases. This could occur at the municipal or international level, which is referred to as internal and international conflict of law. With respect to the internal conflict of law, the discuss is limited to the Nigerian perspective. This paper finds that, the objective of conflict of law is to protect the legitimate expectation of persons who relocated from their country of origin to other country or expand their going concerns beyond their State borders. Private international law which forms the corpus juris for international conflict of law situation is largely municipal in nature. As such, its content varies from one jurisdiction to the other. Attempts at uniform rules of private international law rules have proved abortive as its enforceability thereof still remains a challenge. The reason for this challenge is that private international law conventions are more concerned about the method to be used in putting the rules to effect.

Introduction

The world is fast becoming a global village. The advancement in technology, transportation, telecommunication, internet etc. makes it easy for people to interact from different parts of the world. There is also a greater height of interdependence between various countries of the world as no nation is an island on its own. This has made it possible for people to move from one part of the country to another for the purpose of social, commercial, economic and cultural exchange. It is common to find people of foreign origin in one's country. So many companies, for instance, are of multinational origin. Certain products are made in different countries. A Chinese company may be involved in the production of the component of a phone, while an American company may be in charge of the assemblage of the phone. The phone battery and other accessories may be produced by a Japanese company, while a Norwegian company has the patent right to the operating system of the phone. These series of transactions have brought several entities from different jurisdiction with totally different legal system together in order to attain commercial objectives.

There is every tendency that clash of interest, personality or infraction of rights in the course of social interactions between persons. This realisation obviates the need for law in the society to intervene as an instrument of social control. The essence of law in this regard is to balance conflicting rights between persons with conflicting claims and interest. Where the persons with conflicting claims are of different origin or where the transaction that gave rise to their interaction is multijurisdictional, it gives rise to another situation of clash between these conflicting legal systems. The pertinent issue then becomes the determination of the appropriate legal system or rules of law to apply in the applicable situation or the manner of giving effect of judicial determination of one jurisdiction in another jurisdiction. Conflict of law situation may "sprung like a mine in a plain common law action, in an administrative

proceedings in equity or in a divorce case, or a bankruptcy case, or a matter of criminal procedure, the most trivial action of debt, the most complex case of equity claims may be suddenly interrupted by the appearance of a knot to be united only by private international law".[1]

Apart from a situation where the transaction involves people or object of foreign origin, even when the persons or object of interaction are of the same nationality, conflict of law situation may also arise. Internal conflict may also arise as a result of countries which have a pluralistic body of laws reflecting the pluralistic nature of their society. In such situation, conflict may arise as to which of the different body of laws to apply in the various situation that may arise. These are the main thrust of conflict of laws.

Conflict of laws have attracted various perceptions, either rightly or wrongly conceived. Most students of law perceive it as a no-go-area when it comes to choosing an elective law course. This is due to its least interesting feature as a course that is reflects almost every subdivision of private law. Thus, greater rigors has to be put in place to grapple with the complexities and wide knowledge or expertise that is require to fully understand the conflict of law problems that usually arises from various transactions. No wonder it had been referred to as "one of the most baffling subjects of legal science".[2] In the words of Baty, "there is a swamp and range in it which is almost lyric in its completeness. It is the fugal music of law".[3] The awe that accompanies conflict of law situations is not peculiar to law students. Even a foremost American judge, had noted that "the average judge, when confronted by a problem in the conflict of laws, feels almost completely lost, and like a drowning man, will grasp at a straw".[4]

The foregoing, notwithstanding, the relevance of conflict of laws as a subject of law cannot be overstated due to the need to attain the goal of universal justice and delivering equity to various persons across the world, irrespective of their belief, race or colour. This point was well made by Lord Nicholas of Birkenhead when he observed that: "Conflict of laws jurisprudence is concerned essentially with the just disposal of proceedings having a foreign element. The jurisprudence is founded on the recognition that in proceedings having connections with more than one country an issue brought before a court in one country may be more appropriately decided by reference to the laws of another country even though those laws are different from the law of the former court".[5] In essence, this paper seeks to examine the nature and scope of conflict of law both at the internal and international level of interactions of different persons and systems.

Conceptualising Conflict of Laws

Conflict of laws is that area of law that primarily deals with specific duties and rights of individuals with which the state is not immediately and directly concerned. For example, the law of contract, for assertion of private law rights, Wardsworth *IBC v Winder*[6] can be called to aid. Conflict of laws, otherwise known as private international law, has been described by Agbede as physics of the law because it is concerned with the application of the law in space and time. It is that part of Private Law of a country which deals with cases having a foreign

Dr Fasilat Olalere. Lecturer, Elizade University, Ilara-Mokin, Ondo State.

[1]F Harrison, *On Jurisprudence and the Conflict of Laws* (Clarendon Press, 1919) 101.

[2]J Cardozo, *Paradoxes of Legal Science*, (Columbia University Press, 1928) 67.

[3]T Baty, *Polarized Law (With an English Translation of the Hague Conventions on Private International Law)*, (Fred B. Rothman & Co 1914) 5.

[4]Statement of Cardozo J. as cited in W Cook, *Logical and Legal Bases of the Conflicy of Laws*, (Harvard University Press 1942) 152.

[5]*Kuwait Airways Corporation v. Iraqi Airways Company & Ors.* [2002] UKHL 19

[6](1985) AC 461.

element.[7] From the viewpoint of English law, foreign element means contact with some system of law other than English law.[8]

Conflict of law may arise in the application of personal laws. According to the Black's Law Dictionary, conflict of personal laws is "a difference of laws between a jurisdiction's general laws and the laws of a racial or religious group, such as a conflict between federal law and American Indian tribal law".[9] It went on to define personal law as "the law that governs a person's family matters, usually regardless of where the person goes. In common law systems, personal law refers to the law of the person's domicile. In civil-law systems, it refers to the law of the individual's nationality (and so is sometimes called *lex patriae*)".[10]

On the part of Graveson, he maintained that conflict of laws or private international law is that branch of law which deals with cases in which some relevant fact has a connection with another system of law on either territorial or personal grounds, and may, on that account, raise a question as to the application of one's own or the appropriate alternative usually foreign law to the determination of the issue, or as to the exercise of jurisdiction by one's own or foreign courts.[11]

From the perspective of marriage, conflict of laws is concerned with the provision of solutions to the three basic issues that usually arise under this area of Private International Law. They are: What law determines the nature of a marriage? Is the nature of a marriage to be determined in the light of the facts existing at its inception or at the time when its nature is questioned in legal proceedings? What recognition will be extended by an English Court to a marriage that is found to be actually or potentially polygamous? The resolution of these question would ultimately affect the position in England on the status of children of a polygamous marriage and Succession by widows of a potentially.[12]

According to Clarkson and Hill, "the part of English law called the conflict of laws or private international law deals with cases before the English court which have connections with foreign countries". [13] Stating further, the authors noted that: "the foreign elements in the case may be events which have taken place in a foreign country or countries, or they may be the foreign domicile, residence or place of business of the parties".[14] Lending his voice to what constitutes "foreign element", McLean stated that it simply means a contact with some system of law other than that of the "forum", that is the country whose courts are seized of the case. Such foreign elements in the facts of a case are quite commonplace: a contract was made with foreign company or was to be performed in a foreign country, or a tort was committed there, or property was situated there, or one of the parties is not English.[15] We may substitute the expression "one of the parties in not English" with "one of the parties is closely related to another country apart from the forum by virtue of nationality, domicile or residence."[16]

Holland is noted to have taken a more critical stance in definition of conflict of law. He questioned the adequacy or otherwise of the choice of terminology used to describe the subject matter. He views the term conflict of law as not being all encompassing enough to cover the scope of the subject. He however, yielded to it due to lack of better expression. In

[7]IO Agbede, *Conflict of Laws in Nigeria*, (Lagos, Shaneson C.I. Ltd, 2001).
[8]JHC Morris, *The Conflict of Laws*, 2nd ed., (London: Stevens, 1980).
[9]BA Garner, *Black's Law Dictionary* 9th ed. (Minnesota: West Group, 201) 341.
[10]Ibid. 1259.
[11]RH Graveson, *Conflict of Laws: Private International Law*, 7th ed. (Sweet & Maxwell, 1974).
[12]C Nwagbara, 'Recognition of Polygamous Marriages under the English Law', (2014) 2 (2) Global Journal of Politics and Law Research 52, 52.
[13]CMV Clarkson & J Hill, *The Conflict of Laws*, 3rd ed., (Oxford University Press) 1.
[14]*ibid*.
[15]D McClean, in JHC Morris, *The Conflict of Laws*, 5th ed. (Sweet & Maxwell, 2000) 2.
[16]*ibid*.

his words, "The phrase (conflict of laws) although inadequate because it does not cover questions as to jurisdiction, or as to the execution of foreign judgments, is better than any other".[17]

Justification for the Application of Conflict of Law

Ordinarily courts are established to interpret and uphold the laws of their various countries. However, there are circumstances that would warrant it to prefer the laws of other countries to theirs. There are various justifications that would make the courts depart from the legal rules of its country in favour of those of another system. These factors include the following

(i) To fulfil the reasonable and legitimate expectation of parties to the transaction or dispute in question. According to Jambholkar, "the existence of private international law is justified because it implements the reasonable and legitimate expectations of the parties to a transaction or an occurrence".[18]

(ii) To avert instance of severe injustice that may arise. Chandrachud, J, of the Indian Supreme Court noted in *Satya v. Teja Singh*[19] that: "the Indian conflict of laws may require that the law of a foreign country ought to be applied in a given situation for deciding a case which contains a foreign element. Such recognition is accorded not as an act of courtesy but on considerations of justice".

(iii) Comity or reciprocity has been canvassed as a rational at some quarters.[20] This could be applicable in the instance of enforcement of foreign judgement or accordance of diplomatic immunity to envoys. Although, reciprocity has not swayed most common law countries towards upholding foreign laws. They would rather chance on it to effect their domestic law reforms and bringing their law "into accordance with well-settled rules of international law".[21]

(iv) certain rules of the Civil Procedure in England (r 60) was enacted to bring English practice 'In *Laker Airways* litigation, British Airways and British Caledonian Airways obtained injunctions in English courts restraining the liquidator of Laker Airways from commencing anti-trust proceedings against them in the United States. The United States Court enjoined other airways from taking similar steps in the English courts to frustrate the anti-trust proceedings in the United States. In the final stage of these contest, the House of Lords discharged the English injunction. Lord Scarman perceived the action to be a disguised interference with the process of justice in foreign courts. In another case, *Credit Suisse Fides Trust SA v. Cuoghi*,[22] Millet LJ held that it was becoming largely acceptable for mareva injunction to be upheld by courts of various countries as a form of expressing reciprocal regard for each other's territorial integrity of each other's jurisdiction.[23]

(v) To Satisfy Treaty Obligations– the application of foreign laws by a municipal court may be necessitated by public international law. Most countries enter treaty obligations with one another to enable their national courts to apply foreign laws in their respective countries.[24]

---

[17]TE Holland, *The Element of Jurisprudence*, 13th ed, (Oxford: Clarendon Press, 1924) 421.
[18]L Jambholkar, 'Conflict of Laws', Fifty Years of the Supreme Court 650, 652.
[19]AIR 1975 SC 105.
[20] See the decision of the Indian Supreme Court in *Viswanathan v. Abdul Wajid* AIR 1963 SC 1, 14-15.
[21] Coleridge CJ, in the case of *Rahimtoola v. Nizam of Hyderabad* [1957] 3 All ER 441.
[22][1998] QBB 818, 827 (CA).
[23]BJ Mwimali, 'Conflict of Laws', Session 1, 2-3. <https://www.academia.edu/29243066/Conflict_of_Laws_Notes.pdf> (accessed April 16, 2021).
[24]*ibid*.

Scope of Conflict of Law

The purpose of conflict rules is to safeguard the reasonable expectation of persons who move from one country another or including when they expand their lawful concerns beyond their State borders. For instance, a person must not be made to go through the traumatic situation of realising that he was never married or his children has suddenly turn bastards by virtue of his relocation to another jurisdiction which laws does not recognise the form of marriage he had procured in his previous jurisdiction of domicile. Also, in order to promote international social, cultural and economic transactions party must be assured of the availability to accessible tribunals or courts to determine conflict of interest arising thereto. If those transactions confer rights on parties, they should be available remedies for them on instances where those rights are breached. In view of these, Graveson suggests the direction Conflict of Laws should take as a subject matter. He said that, "for the purpose of this subject, law cannot be treated as divided into a number of well-defined and water-tight compartments, for the conflict of laws in a cross-section of almost the whole law, and different systems divide themselves in different ways".[25]

On what occasion can it then be said that a conflict has occurred between laws? In answering this question, O'Brien stated that a true conflict occurs where one is caught in the situation of making a choice between the applicable laws of two or more legal systems, any of which could have been applicable in the instance. The choice of which of them to apply would lead to entirely different consequences. In the case where the competing legal systems have similar rules on the subject matter, the conflict exercise may still be embarked on, even though nothing will turn on it. However, the choice of law rules which any country chooses to apply, may have the consequence of creating a problem which has no real existence in the laws of any country.[26]

Conflict of law seeks to resolve three basic issues:

i. Which court has jurisdiction over a cause of action?

There are instances where different courts equally have jurisdiction to preside and determine the rights of parties in the case. For instance, where the parties are citizens or domiciled in different jurisdictions. Or where the subject matter of the dispute was performed in a jurisdiction different from where parties are domiciled.

ii. Which choice of law is applicable?

Choice of law is the second stage in the conflict of law process. It is the technique by which the applicable law in a case with a foreign element is chosen. But choice of law, as known to conflict of laws, should not be confused with whatever choice of law may exist in another discipline. A distinguishing feature is that for choice of law to arise the case itself must be a conflict of laws case, which must possess a foreign element.[27]

iii. How is foreign judgement to be enforced?

There will be situations in which parties to foreign proceedings may want the effect of any judgment to be recognised in another country. A successful plaintiff before a foreign court may wish to have his judgment recognised in England so that he can enforce it against the defendant's assets in England.[28] Buckley L.J. stated the common law instance where foreign judgment can be recognised or enforced in the case of *Emanuel v Symon*.[29] He mentioned the basis of nationality, submission to the foreign court's jurisdiction and residence within the

[25]RH Graveson, *Conflict of Laws: Private International Law*, 7th ed. (Sweet & Maxwell, 1974).
[26]J O'Brien, *Conflict of Laws* 2nd ed. (London: Cavendish Publishing Ltd, 1999) 28.
[27]RN Nwabueze, The History and Sources of Conflict of Laws in Nigeria, with Comparisons to Canada. (LL.M Thesis, University of Manitoba, 2000) 6.
[28]O'Brien, *supra*. note 25.
[29][1908] 1 KB 302.

jurisdiction of the foreign court. In essence, the foreign court must have been conferred with the powers to determine the case by virtue of the defendant's residence within the jurisdiction or having submitted himself to its jurisdiction.[30]

It should be noted that conflict of the appropriate laws to apply do not only occur between two or more different countries or legal systems. Conflict may also arise as to which of the applicable laws to apply in a particular system. This is what is referred to as internal conflict. This often happens in countries which have pluralistic or double decker systems. Nigeria is one instance. When issues like that occur, the arbiter is to determine which of the internal systems or law is best suitable to the issue in contention. This brings us to the next issue for discussion- internal conflict.

Internal Conflict of Law

From the English law perspective, there are three major sources of internal conflict of laws. These include statutes, court decisions and opinion of jurists.[31] The Nigerian case presents a more complicated situation due to multifarious legal system. According to Agbede's classification, sources of conflict of laws in Nigeria includes: Customary/Islamic Law; English Law; Decogians of courts outside Nigeria; Nigerian statutory enactments; decisions of Nigerian courts/case laws; public international law, international treaties and conventions; bilateral treaties and agreements; opinion of eminent scholars.[32] He went on to state that, the classification were overlapping, as it was only made for the purpose of convenience. However, for the purpose of this work, internal conflict shall be wholly discussed from the Nigerian perspective. Also, it shall be addressed from the headings of Received English law, Nigerian legislations, Case Law and Public international law.

(a) Received English Law

It should be noted that the receipt of English law in Nigeria did not introduce the first instance of conflict of law in Nigeria. Conflict of law situation predates the colonial incursion into the affairs of the geographical enclave that later became Nigeria. The advent of the English styled justice delivery system which was an offshoot of colonialism in Nigeria, a pluralistic legal system derived from the pluralistic societies with their various customary law practices still prevailed.[33] The Sharia law system existed in the north, while the diverse customary practices of the various ethinic groups in the south and some parts of the north were still in force.

Nigeria was a former colony of Britain. Under the colonial leadership, the English Law was received into Nigeria by virtue of Ordinance 3 of 1863. The English Law that was received into Nigeria includes: Common law rules, doctrines of equity and Statute of General Application (SOGA) The SOGA are laws that are generally applicable throughout England as at January 1, 1900. *In Solomon v. African Steamship Co*[34] the court held that the rules of English common law received into Nigeria were those in force in 1900. The provisions of Ordinance 3 of 1863 are recaptured in Section 32 (1) Interpretation Act, which went further to encompass the requirement that they have to fall under subject matters within the legislative powers of the National Assembly.

[30]G Tovey, 'Conflict of Laws Lecture Notes', (2006). <https://www.scribd.com/document/85619353/ConflictsTopic1-1ScopeNature.pdf> (accessed April 24, 2021).
[31]AV Dicey & JHC Morris, *The Conflict of Law*, 10th ed. vol. 1 (Stevens, 1980) 7.
[32]Agbede, *supra*. note 7.
[33]AO Yekini, 'Recent Development in Inter-State Conflict of Laws in Nigeria'. (2012) 6 (2) The Journal of Jurisprudence and Contemporary Issues 168, 169.
[34](1967) NMLR 363.

In other for this to have equal application to states, the laws establishing the High Court of various states of the federation also incorporated English common law, doctrines of equity and SOGA into their various legal system.[35] In the case of States which formed part of the old Western Region,[36] vide Section 3 of the Law of England (Application) Law, only English common law and doctrines of equity were received into the states.[37] This law was inherited by the various states that broke out of the Western region.[38] For states which have such provisions in their laws, the Received English Law also applies on matters within the legislative competence of State Houses of Assembly.[39]

In view of the foregoing, can it be said that the reception of English law in Nigeria carries the collateral implication of also making the English conflict of law rules applicable in Nigeria? Agbede is of the view that the consequence of this receiving English law into Nigeria is that it also transplants the body of private international law rules into Nigeria. In the case of *Adegbola v. Folaranmi*,[40] the deceased, who was a native of Oyo, had performed customary marriage and was subsequently enslave in the West Indies where he performed Christian marriage with another woman. He later came back to Lagos with his West Indies wife where he built a house and they both lived in it until when he died. The West Indies wife continued to living in that house until she died. She devised the property by Will to the defendant. The plaintiff, being the child of the customary marriage claimed entitlement to the property in accordance with native law. The defendant argued English law of intestate succession applied given the fact of the deceased Christian marriage, thereby making the defendant entitled to the property as the product of the Christian marriage. Surprisingly, the court was persuaded by the submission of the defendant. In similar fashion, in the case of *Gooding v. Martin*,[41] the deceased had first contracted a Christian marriage during the course of which the plaintiff was born. After the death of the first wife the deceased married under the native law, the defendants were the children of the marriage. In a case stated, the West Africa Court of Appeal (WACA) was asked to decide whether the defendants were to have any share in the deceased estate. The court held that the defendants had no such claim.

The courts in the above cases decided these issues in accordance with the English municipal law excluding its conflict of laws rules which would have referred the issues of legitimacy to the *lex domicili* of the father at the time of the child's birth. In effect, the issues had been decided as if the cases were before an English court where the parties were domiciled in England and not as the English court would decide them on the particular facts of these cases. In *Bamgbose v. Daniel*[42] the Judicial Committee of the Privy Council exposed the defects of the above approach and held that under English law, the legitimacy of a child was governed by the *lex domicilii* of the father. This later decision buttresses the point that the received English law includes its English conflict of laws rules.

[35]See for instance, Section 34 (2) High Court Law of the Northern States Cap. 49 Laws of Northern Nigeria 1963; Section 23 of the High Court of the Federal Capital Territory Act, Cap. 510, Laws of the Federation of Nigeria, 1990; Section 15 (1) High Court Law Cap. 61 Laws of Eastern Nigeria 1963; Section 16 High Court Law, Cap. 52 Laws of Lagos State 1973.

[36]This comprises of the present day Delta, Edo, Ekiti, Ogun, Ondo, Osun and Oyo States.

[37]Cap. 60 of Laws of Western Nigeria.

[38]See for instance, The Applicable Laws Miscellaneous Provisions) Law, Cap 10 Laws of Osun State of Nigeria 2001.

[39]For extensive discussion on this point, see the following: AEW Park, *Sources of Nigerian Law* (Sweet & Maxwell, 1963,) 19-24; AN Allot, 'The Common Law of Nigeria', (1965) 10 International & Comparative Law Quarterly 31-49; BO Nwabueze, *The Machinery of Justice in Nigeria* (Butterworths, 1963) 19-22.

[40](1921) 3 N.L.R 89.

[41](1942) 8 WACA 108.

[42](1955) A.C. 107.

b. Nigerian Legislation

Nigerian legislations which constitute of the Constitution and statutes enacted by the legislature is prominent source of law in Nigeria. Nigerian practices a federal system of government which comprises of the federal government and governments of the thirty-six states of the federation. Both tiers of government have legislative assemblies that enact laws applicable to both climes. However, these laws are subject to the overriding powers of the constitution such that whenever there is inconsistency either directly by necessary implication between these enactments and the constitution, they become null and void to the extent of their inconsistency.[43] Nigerian legislation incorporates Acts of the National Assembly, Laws of the State Houses of Assembly, Decrees and Edicts enacted by previous military administrations at the federal and state level respectively and delegated legislation enacted by an administrative body pursuant to an enabling law. These were incorporated as existing laws by the 1999 Constitution vide Section 315.

The Constitution has two list of subject matters on which the federal and state governments can exercise legislative competence. This is contained in the second schedule of the Constitution. Therein is provided exclusive and concurrent legislative list. Matters under the exclusive legislative list can only by exercised by the National Assembly; while matters under the Concurrent legislative list can be exercised by the federal and state legislative assembly concurrently. However, following the doctrine of covering the field, where the federal government have already exercised legislative powers on that matter, the field is said to have been effectively covered, such that any other law enacted by any state on that matter would be deemed to be in abeyance. In *AG Lagos State v. Eko Hotels Ltd & Anor*,[44] the Supreme Court referred to the state law as a mere supplussage. Where the state legislation contradicts the federal legislation, it would be null and void to the extent of its inconsistency. Eso, JSC fully explained this principle in *Attorney-General of Ogun State v. Aberuagba*[45] when he stated:

> the phrase 'covering the field' means precisely what it says. Where a matter legislated upon is in the concurrent list and the Federal Government has enacted a legislation in respect thereof, where the legislation enacted by the State is inconsistent with the legislation of the Federal Government it is indeed void and of no effect for inconsistency. Where, however, the legislation enacted by the State is the same as the one enacted by the Federal Government, where the two legislations are in pari material, I respectfully take the view that the State Legislation is in abeyance and becomes inoperative for the period the Federal Legislation is in force. I will not say it is void. If for any reason the Federal Legislation is repealed, it is my humble view that the State legislation, which is in abeyance, is revived and becomes operative until there is another Federal Legislation that covers the field.

The Constitution went further to confer exclusive jurisdiction on specific matters to the Federal High Court. Even though the federal high court is located in all the States of the federation, it is regarded as having one jurisdiction. In other words, matters which can be determined exclusively by the Federal High Court can be brought before the federal High Court located in any state of the federation irrespective of certain factors such as where the act was performed or the place of residence of the parties. However, the Court is mindful of the convenience of the parties in circumstances like this. As such where a party raises an

[43]Section 1 (1) and (3) Constitution of the Federal Republic of Nigeria 1999 (as amended).
[44](2017) LPELR-43713(SC) 25-33, Paras. D-A, per Kekere-Ekun, JSC.
[45](1982) NSCC (Vol. 13) 1, 35, (1985) 1 NWLR (Pt. 3) 395.

objection of *forum non-convenience*, the court will transfer the case to any division of the federal High Court that is convenient for the parties. Similar situation applies to the matrimonial causes actions. Pursuant to Section 3 of the Matrimonial Causes Rules, a petitioner can commence matrimonial cause's action in the High Court of any state of the federation. However, the choice of state a party may commence such action is subject to the convenience of parties to the suit. The internal law of a state is the law applied to internal or local cases, cases with all their elements in the state.[46] If the state of domicile were truly a convenient forum, the petitioner would choose to sue there voluntarily. Rather, the domicile rule, which vests exclusive divorce jurisdiction in the domiciliary states, can cause inconvenience or inefficiency in a variety of factual settings.[47]

Conflict arises between applicable state laws and which state court can exercise jurisdiction over certain matters arising between those states. For instance, common law causes of action such as contract, tort and commercial transactions are ordinarily within the legislative and judicial competence of States' legislatures and judiciaries. Thus, certain conflict of law rules is applicable depending on the subject matter of contention between the parties. Generally, if it is land dispute between parties, the conflict of law principle of *lex situs* is applicable in determining the appropriate court to exercise jurisdiction over the matter. In this wise, the court of the state where the land is located would be the appropriate forum to exercise jurisdiction over the matter.

For contractual and tortious matters, the court is usually not persuaded by the state of residence of the parties; it is more concerned with the location where the contract was concluded. In *First Bank of Nigeria v Abraham*[48] the same court held that the proper forum to determine dispute arising from a loan agreement concluded in London is the relevant Court in London and not the Lagos State High Court, irrespective of the residence of the parties being Lagos. In *Ngige v. Capital Bancorp Ltd & Anor*,[49] the court stated that the Lagos State High Court lacks the jurisdiction to determine contractual matter that arose in Onitsha, Anambra State notwithstanding the fact that parties to the dispute were Lagos state residence. In *Nigerian Bottling Company v. Nwaneri*[50] the Court of Appeal held that a Lagos state High Court cannot entertain a claim on tort arising in Imo State even when both parties were Lagos residence.

(c) Nigerian Case Law

In order to appreciate the conflict of case laws, one has to understand the hierarchical structure of the Nigerian Courts. The Supreme Court, as the name implies, is the highest court of the land. This is followed by the Court of Appeal. The Federal High Court, High Courts of States, National Industrial Court, Customary Court of Appeal and Sharia Court of Appeal are contemporaries. The Magistrate Court, Area Courts, District Court, Customary Court and Sharia Court are all on the lowest rung of the ladder. The High Court and other courts within its category hear appeal arising from courts in the cadre of Magistrate Court, as the case may be. Decisions of court within the High Court cadre are appealable to the Court of Appeal; while the Supreme exercises appellate jurisdiction over matters arising from the decisions of the Court of Appeal.

[46]EE Cheatham, 'Internal Law Distinctions in the Conflict of Laws', (1936) 21 (4) Cornell Law Review 570, 571.
[47]R Wasserman, 'Divorce and Domicile: Time to Sever the Knot', (1997) 39 (1) William & Mary Law Review 1, 33.
[48](2003) 2 NWLR (Pt. 803) 31.
[49](1999) 7 NWLR (Pt. 609) 71.
[50](2000) 14 NWLR (Pt. 686) 30.

The hierarchical structure of the Courts in Nigeria determines the hierarchical order of judicial precedents in Nigeria. The Nigerian system adopts the common law approach of *stare decisis*. This is principle requires that lower courts are bound by the previous decisions of courts of higher hierarchy. Irrespective of its opinion as to whether the previous decision of a higher court was reached *per incuriam*, the lower court is bound to follow the decision of the lower court. Even though it is desirable for a court decide its case consistently with its previous holding on a subject matter, a court is not bound by its previous decision.[51] It is usually stated that where a lower court is faced with conflicting decisions of a higher could it can choose which of the decision to follow. However, this proposition does not currently find support in law, in view of latest Supreme Court decisions to the effect that where a lower court is faced with conflicting decisions of higher court, it is bound to follow the later decision as it must be regarded as the current position of the law.[52]

Apart from the decisions of the above mentioned courts the application of old rules to new situations or the evolution of new rules derived from legal principles to new combinations of circumstances embarked upon by Nigerian courts when foreign elements are involved in cases before them constitute a significant source of the conflict of laws in Nigeria. Nigerian courts often receive guidance from the decisions of foreign courts mainly of the common law family. When the rules formulated by these foreign courts are adopted by Nigerian courts such rules though of foreign origin become part of Nigerian case law. It is elementary knowledge that Nigerian courts are not bound by the decisions of foreign courts no matter how eminent. These decisions only constitute persuasive precedents.

(d) Public International Law

Nigeria's attainment of independence signals its ability to enter into international treaties with other countries, unlike it pre-independence position where the British crown usually entered into treaties on behalf of Nigeria. This is one of the means by which the country can exercise its sovereignty. Thus, treaties can be agreed with foreign countries on issues affecting Nigeria nationals or persons domiciled or resident in Nigeria. Private international law rules may gain admittance or application in Nigeria through the means of treaty which is ordinarily a public international instrument. However, such treaties have to pass the requirement of the constitution before it can be given a force of law in Nigeria. This condition is contained in Section 12 1999 Constitution (as amended) which provides that:

> **(1)** No treaty between the Federation and any other country shall have the force of law except to the extent to any such treaty has been enacted into law by the National Assembly.
>
> **(2)** The National Assembly may make laws for the Federation or any part thereof in respect to matter not included in the Exclusive Legislative List for the purpose of implementing a treaty
>
> **(3)** A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly of the Federation.

One instance where this provision has been put to use is in the case of African Charter on Human and Peoples Right (ACHPR). Nigeria is a signatory party and also ratified the Charter. The National Assembly went further to enact this treaty as an existing law in Nigeria. Consequently, the ACHPR is seen an Act of the National Assembly. In the case of

[51]See, *Young v. British Aeroplane Co.* (1944) KB 71.

[52]*Osakwe v. Federal College of Education, Asaba* (2010) SCNJ 529 at 546. Also see, the Court of Appeal restatement of this principle in the case of *CBN v. Zakari* (2018) LPELR-44751(CA).

Abacha v. Fawehimwi,[53] the court gave judicial clout to this process when it held that forms part of the body of laws enforceable in Nigeria.

International Conflict of Law

International conflict of law is otherwise known as private international law. It is consist of a corpus of legal rules utilised for resolution of disputes arising between private individuals who transcend international frontiers. Private international law is a field of law that deals with conflict of laws between multiple national jurisdictions. For instance, if a British citizen has a debt in Saudi Arabia and is later sued for it in a British court, the principles of private international law determines how the conflict of interests between laws in Britain and Saudi Arabia would be dealt with.[54] This is in contradistinction with public international law which generally confers international legal personality to states and international organisations. As such international courts adjudicate on disputes arising between entities that have are so conferred with international legal personality.[55] In the case of private international law, it is municipal courts that determine private international law disputes between parties. Where a matter arises between parties of diverse countries with distinct legal systems, resort is made to private international law rules is applied in determining the applicable substantive law and legal system in resolution of the matter arising between parties. Another difference between private international law and public international law is that foreign municipal law must be proved as a fact. This is not so with the law of nations or public international law because public international law is part of the law of the land.[56]

One should not be misled by the appellation private international law, as it is substantively a body of municipal law which is based on principles in resolving disputes of private international nature between parties. As noted earlier, private international law is largely municipal in nature, even though its rules are partly derived from international law principles.[57] It has been aptly noted that: "despite their intrinsic transnational nature, the resolution of conflicts of law issues has historically depended upon the disjointed efforts of individual national courts and legislatures".[58] Thus, Applicable rules in distinct cases differ from country to country. Thus, there are no uniform private international law rules in the international sphere unlike world, unlike its public international law counterpart. However there have efforts at various times to develop a uniform private international law regime across the world. The motive was to create a congruent system that would limit uncertain and adverse effect international legal disputes in order to promote international business and investment.

For a dispute to be regarded as an international conflict of law dispute there must be the presence of foreign element in the case. In the words of Parisi and O´Hara, this applies

[53](2000) 6 NWLR (Pt. 600) 228.

[54]MT Juma, 'Private International Law', (2018) 4. <https://www.scribd.com/.../INTRODUCTION_TO_PRIVATE_INTERNATIONAL_LAW_by_Morad_Tayeb_Juma.pdf> (accessed April 24, 2021).

[55]However, there is an exception to this general rule under international criminal law. For instance, the Rome Statute 1998 which created the International Criminal Court (ICC) conferred international legal personality on individuals. As such ICC can thereby exercise criminal jurisdiction over individuals.

[56]Juma, *supra*. note 54.

[57]R Michaels & J Pauwelyn, 'Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of Public International Law', (2012) 22 (3) Duke Journal of Comparative & International Law 349, 351.

[58]D Schmidtchen, R Kirstein & A Neunzig, 'Conflict of Law Rules and International Trade: A Transaction Costs Approach', Center for the Study of Law and Economics, Discussion Paper (2004) 1, 3.

"whenever a legal dispute involves parties, property or events that have a relevant connection with more than one legal system".[59] Under Indian jurisprudence, their Supreme Court noted that private international law is a branch of State civil law poise at effecting justice between disputing parties on transactions or personal status which contains foreign element. Thus, the rules of private international law of individual States, by that fact must differ.[60] Whereas, parties of similar nationality enter into a commercial transaction between themselves in the same country, which is also to be performed in that same country, dispute arising therefrom can be easily determined by a competent court of jurisdiction of that particular country in accordance with its domestic laws due to the lack of foreign element in the dispute. On the flip side, if the transaction between parties is to be determined by a court of another country, or where either parties are citizens or domicile in different countries, foreign element therein arises and the court adjudicating upon the matter be faced with the burden of determining the appropriate substantive private international rule to apply in the circumstances. Of course, the court would rely on its procedural rules to determine the dispute.

The main purpose of the international private law provisions is to determine the cases in which the private law of the state where the action is pending or the private law of a foreign state[61] is to be applied.[62] Sanigay developed the connecting factors which must be identified in determining the dispute between parties in a conflict of law situation. This is also referred to as "connecting categories".[63] Sanigay's postulations formed a major foundation for modern international choice of law rules. This categorisation is private international law has become the magic wand to demystify any conflict of law challenge. The relevance of this categorisation is underscored by the fact that whenever a court is faced with the conflict of law dispute, it must first factor it into the appropriate compartment before determining the applicable law in the circumstance.[64] This is otherwise known as *lex causae*. There are variants of the *lex causae*, which are usually captured in Latin expression. There are as follows:

Lex domicile: This has to do with the domicile of parties whose law should determine their capacity, family affair and estate succession.

Lex situs: This involves the law of the place the legal transaction arose or the *res* is situate. It could either be movable or immovable property.[65]

Lex lociactus: This concerns the location of legal transactions which is to regulate the transactions.

Lex fan: This means the location of courts which procedural law is to applied in determine the right of parties in the dispute.

Lex fori: The law of the jurisdiction where the action is pending.

Lex patriae: law of the nationality.

Lex loci contractus: law of the place where a contract is made),

Lex loci solutionis: law of the place where a contract is to be performed or where a debt is to be paid.

Lex loci celebrationis: law of the place where a marriage is celebrated.

Lex loci actus: law of the place where a legal act takes place.

Lex loci deliciti: law of the place where a tort is committed.

---

[59]F Parisi, & EA O'Hara, *Conflict of law, The New Palmgrave Dictionary of Law and Economics*, vol. 1 (Palmgrave, 1998) 387.

[60]*Viswanathan v. Abdul Wajid* AIR 1963 SC 1, 14-15.

[61]The governing law is to be determined by applying choice of law or conflict of laws norms.

[62]V Orlov, 'Updated International Private Law of Russia', Athens Journal of Law (2017) 3 (2) 75, 76.

[63]V Allarousse, 'A Comparative Approach to the Conflict of Characterization in Private International Law', (1991) 23 (3/5) Case Western Reserve Journal of International Law 479, 479.

[64] Ibid.

[65]See the cases of Re Berchtold [1923] 1 Ch. 192; Re Hoyles [1911] 1 Ch. 179.

lex monetae: law of the country in whose currency a debt is expressed.

While the conflicts method secures a minimum of certainty, several drawbacks are apparent. Ordinarily, it presupposes a thorough familiarity with a number of legal systems both with regard to substantive law and conflict of law rules. Further, the conflict of law rules prevailing in various countries are not generally accepted and uniform provisions of public international law,10 but "national" rules which may differ from country to country. Thus, resort to choice of law is conducive to certainty only after the forum itself is known.[66]

The major challenge with private international conflict of law is the lack of uniformity and universal application of conflict of law rules. This has created a measure of uncertainty in international conflict of law. Even though concerted efforts have been made to develop uniform conflict of law rule with universal essence, international conflict of law has still remained largely municipal in nature. Parisi and O´Hara noted that "disagreement over the appropriate way to approach conflict of law issues as well as the inability of national legislators to endorse a singular solution to these many issues leaves the international community burdened with problematic coordination failures".[67] However, the European Union has been able to attain some level of uniformity of private international law within that region through the regional conventions. One instance is the Hague Convention on Exclusive Choice of Court Agreements 2005, Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, etc. But these conventions are yet to gain wide acceptance and enforceability by states.

Conclusion

This paper attempted an overview of the fundamental nature and concept of conflict of law. It also evaluates what conflict of laws entails. Conflict of law of examined from the municipal and international perspective. At the municipal level, particular attention is given to the Nigerian conflict of law rules on different frontiers such as: common law, legislative enactment, judicial precedent and public international law. Whereas, it was found that at the international level, private international law is largely municipal in nature and as such varies from one jurisdiction to the other. Efforts to unify private international law rules have not been successful in creating uniform rules or enforceability of those rules as opposed to municipal conflict of aw rules. This is because, the private international law conventions mainly contain provisions concerning the method to be followed by the contracting states in giving effect to the rules adopted therein. It is common to see certain provisions in those convention allowing state parties to incorporate the convention in a manner that is consistent with their national legislation or allowing them to limit the scope and area which those uniform rules can be applied.[68]

[66]AN Yiannopoulos, 'Conflict of Laws and Unification of Law by International Convention: The Experience of the Brussels Convention of 1924', (1961) 21 (3) Louisiana Law Review 553, 554.

[67]F Parisi, & EA O'Hara Conflict of law, *The New Palgrave Dictionary of Law and Economics* vol. 1 (Palmgrave, 1998) 387.

[68]Yiannopoulos, *supra*. note 66, 558.