

# THE ROLE OF A JUDGE IN CONFLICT OF LAWS

BY  
KERA, FARIDA AISHA\*

## 1.1 Introduction

Conflict of laws is that part of the law which comes into operation whenever an issue before the court contains foreign element<sup>1</sup>. It is its function to ascertain which potentially applicable law must be chosen for determination of the issue.

According to Leflar<sup>2</sup>:

*Any case which Involves facts occurring in more than one state or Nation, so that In deciding the case it is necessary to make a choice between the laws of two different states or countries<sup>3</sup>, is a conflict of laws case. So in any case in which the facts have occurred in one state and suit is brought in another state, so that the forum must decide between its own law and the law of the place where the events occurred before it can determine the rights of the patties. Such "choice of law" problem comprises most of the conflict of laws.*

Contravening the above summary of the scope of conflict of laws by Leflar, it can be rightly observed that conflict of laws occurs at two levels.

The first one is international conflict of laws situation, this is where the law of one country is competing with the law of another country to govern an issue before the court, while the second one is the internal conflict of law, here the clash is between two or more different laws within a country.

Although, customary courts are established essentially to administer customary laws, it is not uncommon for one law or system of law to clash

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\* LLB (Hons). LL.M, B.L. Lecturer, Department of Private Law, Faculty of Law, A.B.U, Zaria.

<sup>1</sup> Foreign element simply mean contact between different legal systems

<sup>2</sup> Leflar, R.A. – The Law of Conflict of Laws, the New Bobbs-Merrill Company, Inc., New York, 1969, p. 1.

<sup>3</sup> Underlined – mine for emphasis only.

with another and the customary court judge is faced with the challenge of choosing the appropriate legal system applicable to the dispute at hand.

This paper will be more concerned with the second type i.e. Internal conflict of laws.

In Nigeria, there are so many factors responsible for conflict of law situation. These include:

- (a) Federal form of government, with its separate federal and state laws.
- (b) Dual System of Court and multiplicity of laws, Nigeria operates an integrated legal system, which is made up of a plurality of laws, or different system of laws, such as Customary Law, English law, Sharia and Statute law, thereby leading to conflict of laws.
- (c) Multi ethnic, multi lingual and multi cultural country: each of these groups has customs which may be similar but not exactly the same. In the case of *Olowu v Olowu*<sup>4</sup>, the Supreme Court held that although Nigeria is one country, its multi ethnic, multi lingual and multi customary law system makes the problem of conflict of laws unavoidable. In this case *Oputa J.S.C.* examining the problem of internal conflict of laws in Nigeria said that:

Nigeria being one nation, one country, will it not be a contradiction in terms to talk of conflict of laws in the same country? Our former National Anthem supplied the answer where it reads; though tribes and tongue may differ, in brotherhood we stand, Nigerians all. There are different tribes and tongue in Nigeria, different customary laws dealing with devolution of Property, on Intestacy, where there is a clash between two or three of these different customary laws and the court has to choose which one should apply, we have an issue of conflict of laws<sup>5</sup>.

The import of this dictum is to buttress the fact that conflict of laws is in existence within our system and where it occurs all that is necessary is how to determine which of the legal system is applicable to resolve the conflict, thereby achieving the cause of justice.

Aside from these two reasons for the existence of conflict of laws situation mentioned above other reasons include where parties to a transaction rely on different systems of law, there is often an issue of

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<sup>4</sup> (1983) 3 NWLR. Pt 13, P. 372. sc

<sup>5</sup> Ibid at P9 402

conflict of laws to be determined especially where it is an arguable point of law as to which system should regulate the transaction<sup>6</sup>.

So also where parties who have been involved in a transaction governed by one system of law, go into another transaction governed by a different system of law, this will create a problem of conflict of laws<sup>7</sup>.

Judges play fundamental and crucial role in the development of jurisprudence in general and particularly in conflicts of laws where they are faced with different laws competing to govern a matter before them. Therefore the role judges play in conflict of laws cannot be over emphasized. The scope of the role they play depends on the nature, structure and foundation of the legal system which determine the character of the judge in the exercise of his challenging statutory and constitutional functions<sup>8</sup>.

Finally, a relevant law maker may act ultra vires and enact a law which is beyond his powers, thereby bringing such ultra vires law into conflict with a superior law<sup>9</sup>.

We have seen that internal conflict of law is unavoidable in Nigeria in view of our peculiar circumstances, our focus now will be to evaluate conflict of law situation which usually come up for determination by courts in Nigeria. However, we shall first of all look at the various matters that will require attention of the judge and the role he will play when a court is seized with a suit that contains foreign element. The paper shall therefore focus its lens on the following:

1. Sequence of events in conflict of laws situation.
2. Conflict situation.
3. How to resolve the conflict situation.
4. Conclusion

## **1.2 Sequence of Events In Conflict Situation**

When a case contains foreign element, certain issues will as a matter of necessity become of importance to the court as a result of which it becomes duty bound to give its consideration, if the ends of justice must be achieved. The following are some of the issues in the order in which they come.

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<sup>6</sup> Koney v Union Trading Co. Ltd (1934) 2 W.A.C.A., 198

<sup>7</sup> Ibid

<sup>8</sup> See 6, Constitution of the Federal Republic of Nigeria.

<sup>9</sup> Council of University of Ibadan v Ademolekun (1967). All N.L.R. 225

### **1.2.1 Jurisdiction**

The first and most important issue to be determined in addressing a case containing foreign element whether internal conflict or international is the question as to jurisdiction of the court. This is because the court obviously will not even properly be seized of the power to get into the substantive action if it lacks jurisdiction.

The word jurisdiction can be used in different context and to mean so many things, hence the difficulty to give it a precise meaning. Therefore it is often used in contextual terms that is to say its meaning depends upon the circumstances in which it is used.

The term jurisdiction is defined for the purposes of conflict of laws as the power of a state to create or affect legal interest which will be recognized as valid in other states. This definition though valid for inter state situations is inadequate for international problems, since authority does not exist beyond the treaty states. Also in domestic and municipal law, jurisdiction (section 16) constitution of the Federal Republic of Nigeria, 1999 is often defined in relation to extra territorial or intra-territorial power of a court, while extra territorial is defined as the extend of the land mass which the power of a court covers for the purposes of receiving, hearing and determining a case, extraterritorial jurisdiction is defined in terms of the competence of a court to apply a substantive law. Simply put in this context jurisdiction can be defined as the power of the court to accept, hear and determine a case before it.

It has been posited that the jurisdiction of the court in this instance must be available to the plaintiff and must be exercisable over both the defendant and the subject matter. Also important is the general rule that an action cannot lie against a defendant except he is present in the forum personally unless he voluntarily submits himself to the jurisdiction of the court. The test of jurisdiction is very important because it is not in all cases that the jurisdiction of the court will be available to the plaintiff.

Where the parties are foreign sovereigns or diplomats such as ambassadors and their staff are immune from the jurisdiction of the courts of a place where they are resident. So also a judge will disregard a claim in certain cases such as trespass to land because such issues are within the jurisdiction of the court of the place where the land is situated i.e. the situs Rule.

### **1.2.2 Classification of the Cause of Action**

This is done by determining the nature of the question that requires decisions by way of compartmentalization of the matter before the court into their respective legal categories. The idea is that unless this is done, it will be almost impossible to apply the rule for the choice of law with a view to ascertaining the *lex cause* (the applicable law). By virtue of this therefore, unless the judge seized of a case with a foreign element has determined the particular category into which the matter before him falls, he can do little or nothing because he will not know what rule for the choice of law to apply.

### **1.2.3 Selection of the Lex Causae (The Applicable Law)**

Matters of conflict of law are hinged purely on the choice of an applicable law. Once a matter has been classified, then the next step is to select the appropriate law. Selection is normally based on connecting factors. The connecting factors here normally vary with the circumstances of each case. It could be in the form of domicile in some instances, the situation of the immovable by virtue of which the facts in issues relates to a different legal system. The process of selection can be illustrated as follows: In a case involving succession to landed property, where there is a dispute as in which customary law will apply, the applicable law is the deceased personal law, i.e. the customary law that was binding on him during his life time and in the absence of personal law applying, the law of the place where property is situated, i.e. the *lex situs*. In this illustration the connecting factors for selecting the applicable law is the personal law i.e. *lex domicile* or the *lex situs* that is the law of the place where the property is situated.

In *Ghamson others v mobil*<sup>10</sup>, the plaintiff sued the defendant for recovery of possession of a house he had bought. The vendors claimed title through their mother who inherited the house from a woman who died at winneba, southern Ghana, a town where Efuru was the customary law. The defendant who was the head of the deceased woman's family claimed that Fanti customary law applied, the court held that ordinarily, Fanti customary law will not be applied between the parties. However, since the plaintiff's case depended, on the issue of succession to property of the deceased who was subject to Fanti law. It was the law that would be applied to the case to determine the right of the parties. This case can be contrasted

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<sup>10</sup> (1947) 2 WACC 181

with the case of *Ekem v Werba*<sup>11</sup>. In this case which was decided by the same court six months after *WCarthy J.* said that the facts of this case were different from that of *Ghamson v Mobil*<sup>12</sup> and held that the applicable law was the *lex situs* that is, the law of the place where the property was situated. In this case the deceased Johnson who was the owner of the property was a Nigerian, but evidence was not led to show what part of Nigeria he belonged, nor the nature of the law that applied to this case to determine the rights of the parties.

#### **1.2.4 Application of the Lex Causae**

The final step in the consecutive stages is to decide the dispute in accordance with the chosen law. This task is not always a simple one neither is it a straight forward one as it seems at first sight, because if for instance a foreign law represent *lex cause*, then the exact meaning to be given to the word law in the context becomes a subject of controversy since it could be referring to the internal laws of the forum or to the rules of private international laws. This usually brings about an enquiry into what is known as the doctrine of "*renvoi*". *Renvoi* or remission as it is sometimes called is to the effect that when a judge seised of a case in a country say Nigeria is referred by Nigerian rule for the choice of law of another country say Ghana, but the rules for the choice of law for Ghana refer such a case to the choice of law rules of Nigeria, then the judge in Nigeria must apply the internal law of Ghana<sup>13</sup>. However, the doctrine of *Renvoi* is not practiced by our courts where the *lex cause* is foreign to the custom of the Forum court. What the judge is expected to do is to adduce evidence from assessors or persons knowledgeable in the foreign custom to prove the existence of the customary law.

However, there is no serious problem when the rules applicable, apply to a purely domestic situation, but when the *lex causae* is a foreign law i.e a customary law different from that of the forum, the difficulty will then be as to the determination of the sense in which it must be understood.

### **1.3 The Conflict Situation**

Internal conflict of law problems arise in Nigeria whenever a court is faced with the problem of recognizing, applying or enforcing the law of

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<sup>11</sup> (1947) 2, WACA, 258

<sup>12</sup> *Supra*

<sup>13</sup> *Forgo's Case* (1883) 10 Clunet, 64.

another state or when it is required to exercise jurisdiction over persons or property located in another state.

The conflict of laws situation which usually come up for determination by court in Nigeria may be

- a. Between English law and customary law
- b. Between English law and Islamic law
- c. Between different systems of customary law.
- d. Between customary law and Islamic law
- e. Between Federal and State law or a Local Government bye-laws as the case may be, and
- f. Between the constitution and other laws

However, the doctrine of renvoi (remission) is not practiced by our courts, where the *lex causae* is foreign to the custom of the forum court, what the customary court judge is expected to do is to adduce evidence from assessors or persons knowledgeable in the foreign custom to prove the existence of the customary law.

### 1.3.1 When Does Customary Law Apply?

Customary law is the oldest source of Nigerian law, having existed in the various communities and tribes long before the Advent of the British into Nigeria. Customary law has no definite definition. However, Obaseki, J.S.C described customary law in the case of *Oyewumi Ajagunbade III v Ogunesan*<sup>14</sup> as:

*The organic or living law of an indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said custom is a mirror of the culture of the people, I would say that customary law goes further and impact justice in the lives of all those subject to it.*

Customary laws are recognize as binding on the day to day dealings of local communities to which they belong. There are many situations that call for special rules in determining when and where customary law is to be applied. Hence, once an established rule of customary law has

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<sup>14</sup> (1990) 3 NWLR, P. 182

attained validity, its application will depend on the applicable rule under the High court law. As a general rule when conflict occurs between English law and Customary law, customary law will apply in the following situations.

- i. Where a transaction is subject to customary law, the rules of customary law will apply between natives.

The question is who is a native? A native for the purpose of being subject to native law where the transaction permits the application of customary law is defined broadly to include persons whose parent or (parents) was a member or (members) of a tribe (or tribes) indigenous to any part of Africa and the descendants of such persons. Section 34 (2) High Court law of Northern Nigeria as applicable in all the Northern State, provides for the application of custom based on the Nativity test.

*The general rule is that, if there is a native law and custom applicable to the matter in controversy, and if such law and custom is not repugnant to natural justice, equity and good conscience, ... and it shall not appear that it was intended by the parties that the obligation under the transaction should be regulated by English law, the matter in controversy shall be determined in accordance with such Native law and custom.*

The fact that a customary law is applicable to a transaction, reducing it into writing will not render the customary law inapplicable to the transaction.

- ii. Where a native and non native are involved in a transaction, and it appears that substantial injustice will be occasioned if customary was not applied, the court will proceed and apply customary law.

The broad effect of this provision is that it has created an exception to the general rule that transaction between Native and Non Native are not to be governed by customary law. This exception is limited only to transaction between Natives and Non Natives, where the transaction is subject to customary law, and both parties are natives, the court does not need to refer to substantial injustice rule before it can apply customary law. In *Osure V Anjonin, Baker*<sup>15</sup> A.J. stated that the

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<sup>15</sup> (1946) 18 NLR p.45

application of the statute of limitation, would occasion substantial injustice and went ahead to apply customary law.

- iii. Customary law also governs a transaction where law, such as a statute stipulates, that customary laws should be the applicable law.

Though customary laws are expressly subject to the provision of any relevant statute, it may in specific instances be recognized as an alternative thereby raising the only instance of conflict between a rule of customary law. An example of a statute stipulating customary law as the applicable law is section 3 (1) of Wills law cap 172, Bendel State law 1976 as applicable to Edo and Delta State, which provides that all properties may be disposed off by Will subject to customary law.

### **1.3.2 Different Systems of Customary Law**

Nigeria as we have pointed out earlier in this work is multi-ethnic and multicultural in nature, this creates avenue for conflict between two or more system of customary law and the court is therefore faced with the problem of determination of which customary law should apply.

The areas where these conflict present themselves is categorized into three:

- a. Succession
- b. Land matters
- c. Other civil matters

Let us briefly examined each of these areas.

#### **a. SUCCESSION:**

With regard to issues of succession, where there is a dispute as to which customary law will apply, the applicable law is the personal law of the deceased in unmixed land causes, while in mixed land causes in the North, the courts are enjoined in section 21 (2)(c) of the native courts law to apply the Native law and custom... which it appears to the court having regard to the nature of the transaction and the circumstances of the case, to regulate the obligation of the parties.

In the case of *Tapa v Kuka*<sup>16</sup> Nupe Muslim of Bida origin died Intestate leaving a house in Lagos. It was held that the personal law of the deceased was the Muslim law prevailing among the Nupe tribe and not the laws of Lagos State where the real estate was situated and that it should apply to the distribution of his estate.

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<sup>16</sup> (1945) 18 NLR 5

The question that arose is what is the Meaning of the phrase "personal law" according to Niki Tobi JSC Personal in the context of succession cases appears to mean the laws the deceased was normally subject to when he was alive.

However, in western Nigeria, Northern Nigeria and old Bendel State the law has shifted from *Tapa v Kuka*<sup>17</sup>. In this areas, a distinction has been made between succession in personal property and succession to immovable property, while the principle in *Tapa v Kuka*<sup>18</sup> govern succession to personal property, succession to immovable property is governed by the *lex situs*. See 20 (2) of the customary court law of Western Nigerian which qualifies the position by expressly providing that "in land matters the appropriate applicable law is the law of the place where the land is situated.

One major defect here is that current shift in the North from the principle in *Tapa v Kuka*<sup>19</sup> thereby making the *lex situs* predominant over the deceased personal law with regard to the distribution of his immovable property as noted above. There is no doubt that the legislative envisaged the application of the deceased's customary law in such matters but they did not succeed in making their intention clear. According to Yomi Olukolu<sup>20</sup>, the personal law of the deceased should govern the distribution. He further stated that; in a case like this only the court can flesh up the provision of his immovable property. As was the decision in *Tapa v Kuka*<sup>21</sup> and also *Ghamson v Mobil*<sup>22</sup> where the court held that customary laws of the deceased must govern the devolution of her immovable property and held further that the English rule of private International law on such matters should not apply.

Therefore, it is proper and fair, that it should be the applicable law, for if the deceased were to give away her properties intervivors, that is, in her life time, she would most probably have done so according to his personal law. In many cases, the personal law of the deceased is the same law that is predominant in the locality.

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<sup>17</sup> Ibid

<sup>18</sup> Ibid

<sup>19</sup> Ibid

<sup>20</sup> Yomi Olukolu, Internal Conflict of Laws in Nigeria: A comparison of Choice of Law Rules for Determining Applicable Rules of Customary law. The Nigerian Journal of Contemporary Law. Vol. 18, No. 1, 2012, p. 238.

<sup>21</sup> Supra

<sup>22</sup> Supra

**b. LAND MATTERS:**

In cases concerning land, the attitude of the court is to apply the law prevailing in the area, where the land is located, even though different from the personal law of the parties involved, in other words in a conflict of law situation relating to land the *lex situs* (law of the place where property is situated) is the applicable law.

**c. OTHER CIVIL MATTERS**

In the States within the former Eastern Nigeria, the courts are required to administer the customary law prevailing in the area of jurisdiction of the court binding between the parties. This however is not explicit as it did not draw a line of demarcation as to cases between natives "who share the same customary law and cases between natives and non-natives.

The laws applicable to the states in the former western Nigeria are more explicit and comprehensive and can be summarized as follows, in civil causes or matters, other than land or succession cases, the applicable law is the law of the areas of jurisdiction of court. There are however three situations under which the Courts are enjoined to apply the law binding between the parties, viz:

- (a) Where both parties are not natives of the area of jurisdiction of the Court;
- (b) Where the transaction was not entered into within the area of jurisdiction of the Court.
- (c) Where one of the parties is a non native of the area of jurisdiction or the Court, and the parties agreed that the customary law applying to that party should regulate their obligations wholly or partly.

In respect of Lagos State, the provisions of Section 19 and 20 of the Customary Court Edict regarding internal conflict of laws are in *para materia* with the provisions of the laws of Western Nigeria and Bendel State.

In Northern Nigeria Civil Causes other than those concerning succession to land are divided into mixed and unmixed civil causes.

Unmixed civil causes governed by Section 20(1) (a) of the area Court law 1967 which requires the Court to choose between the native law and custom prevailing in the area and the native law and custom binding between the parties. Unmixed civil causes are those which the parties are subject to the same customary law. As regards mixed civil causes other than succession or land matters section 21 of the area Court law 1967 will apply,

the section defined a mixed civil cause to be a cause in which two or more of the parties are normally subject to different systems of customary law.

Here, where the personal law of the parties is the same, it (personal law) will be applicable even though different from the law of the locality. Where one of the parties is a native whereby his own personal law is the same with the local law, there may be a slight preference for the local law, but the court will no doubt look very closely into the statement and conduct of the parties, and will adopt any indication given by them as to which system may be assumed to govern their activities.

#### **1.4 Conclusion**

Drawing from our discourse thus far, one may safely assert that conflict of law principally, comes into operation when a matter before the court contains foreign element. It functions specifically in the area of dictating to the court a particular applicable law reference to which a solution to a legal dispute must be reached.

It has been shown that plurality of the laws as well as the multi-ethnic, multilingual, and multi-cultural nature of Nigeria makes conflict of laws situation unavoidable in our court. Therefore our legislative should endeavour to forge a system of choice of law rules than can be uniformly applied by the judge in a conflict of law in Nigeria.

They should also be able to codify customary laws for ease of reference by judges, this will go a long way in hastening judicial proceedings and if this is not done one of the basic purposes of choice of law rules, that the same determination shall be reached wherever and in whichever court, the issue is litigated shall be defeated.

Finally, a judge first seized of a matter containing foreign element, is required meticulously and consecutively to consider certain issues relating particularly to jurisdiction, classification, selection and applicable of the *lex causae*, if the ends of Justice must be achieved. This task is not always a simple one neither is it straight forward as it appears on the face of it, hence the need for the judges to commit themselves into continuous legal training to enhance their knowledge in this area of law.