The American and European Revolutions on Choice of Law in Tort with Foreign Element: Case Studies for the Practice of Conflict of Laws in Nigeria

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Abstract

The Revolutions across America and Europe on tort choice of law in conflict of law situations are quite remarkable. They remind us of the progressing voyage of modern societies, legal systems inclusive, in meeting the demands and peculiarities of changing times. In particular, they also speak volume of the pace with which the western bloc is advancing in the practice of conflict of laws. Using the Revolutions as case studies, this paper reveals that the Nigerian experience cannot be said to be at par as it concerns the development of Private International Law. This is reflected in the current position on tort choice of law which favours the common law principle of double actionability. Undeniably, we are miles apart from the current position in America and Europe where conflict rules on tort choice of law have evolved immensely. While conceding that there exists a Nigerian voice on tort choice of law evidenced in Benson v. Ashiru as proof that the problematic of conflict practice is not absolute; the paper diagnoses some factors possibly among others militating against the thriving of conflict practice in Nigeria and, by way of conclusion, articulates a way forward.

Keywords: Conflict of laws, tort, revolution, lex fori, lex loci delicti, choice of law
1.0 Introduction

Like many areas of law, Private International Law, also called Conflict of laws, which is generally concerned with civil cases having a foreign element (Fawcett J, Carruthers J & North P. 2008), is evolving to meet the dynamics of modern times. Rigid traditional approaches are giving way for more flexible modern approaches. In line with one of the three major areas covered by the subject, the choice of applicable law with respect to torts has experienced revolutionary trends in the United States (US) and across Europe. In contrast however, the Nigerian position has been inundated by this current trend. This challenge is not unconnected with the slow pace at which conflict of law practice thrives in the country.

Using the American Revolution and the Revolution across Europe on choice of law in tort conflict as case studies, this paper examines the Nigerian perspective. After the introduction, the paper is divided into five sections and a conclusion. The first and second sections deal with the traditional and the modern approaches to choice of law in tort conflict respectively. This is vital because the revolutionary trend in most jurisdictions is basically an adaptation of one, two or more of these approaches. The third section deals with the American Revolution - the theoretical underpinnings, the watershed case of Babcock v Jackson and subsequent decisive cases, the position of the US Supreme Court, the recent approaches adopted by American states and the revolutionary move under the Alien Tort Claims Act of 1789. The fourth section deals with the Revolution across Europe. The fifth section considers the Nigerian experience on tort choice of law. As noted earlier, conflict of law practice in the country is at a slow pace compared to what obtains in Europe and the US and there are possible factors responsible for this, three (3) of which are discussed. The current position on choice of law in tort conflict from the decision in Benson v. Ashiru is also discussed. Further, there is an emerging trend in the Nigerian jurisprudence which tends to sacrifice conflict of law elements on the altar of jurisdiction. The paper will discuss this trend. In conclusion, a way forward is proffered.

2.0 Traditional Approaches

The traditional choice of law methods were more rigid and based on a specific locality or jurisdiction, hence they are called jurisdiction-based rules (Reed, 2001: 870). The two main traditional tort choice of law approach are the *lex fori* and the *lex loci delicti*. The common law approach is a combinative adaptation of these two.

The law of the forum (*lex fori*) theory holds that the applicable law in a tortuous relationship with a foreign element should be no other but the law of the forum court. Its adherents argue that liability for tort is closely affiliated to the fundamental public policy of the forum such that its law should reign supreme (Reed, 2001: 870). Drawing similarity to criminal law, to which certain torts have an affinity, *lex fori* proponents argue that since foreign law
scarcely applied to criminal law, it should also not apply to tort. However, these rationales have been criticized on several grounds. First, there is a distinction between criminal and tort law as each has fundamentally different objectives. Again, the lex fori theory is said to be unduly “facilitative of egregious forum shopping” (Reed, 2001: 871). Most jurisdictions have abandoned the approach because it operates unjustly.

The lex loci delicti theory is the application of the law of the place where the tort was committed. It was the prevailing doctrine on the continent of Western Europe with slight modifications prior to the coming of the Rome II Regulation. It was also the applicable rule in the United States before and during the first part of the twentieth century. Proponents of the lex loci delicti theory stress that it avoids unnecessary forum shopping and leads to certain, uniform, and predictable results (Freund, 1968). However, the theory has faced criticisms among which is the difficulty in arriving at the locus of more complicated tortuous instances as against road accident scenarios around which much analysis on locus is focused (Reed, 2001:873-874).

The common law rule on tort choice of law which developed in England is dualistic. First, where a tort is found to have been committed in England, the common law rule is to the effect that the English courts always apply English law (lex fori). This is the case irrespective of how limited the parties’ connection is with England. However where the tort occurs abroad, the traditional English common law principle is based on the decision in Phillips v. Eyre. This case formed the general rule of double actionability under both the lex fori and the lex loci delicti theories. Lord Justice Willes outlined the procedure plaintiffs needed to satisfy to bring an action in England for a foreign tort:

“As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England . . . Secondly, the act must not have been justifiable by the law of the place where it was done.”

Hence, in an action on a foreign tort, the applicable law would be determined according to the above formula. The House of Lords in Boys v. Chaplin confirmed the decision in Phillips v. Eyre and further laid an exception to this general rule which has a tint of the most significant connection theory (Reed, 2001:910-912).

In sum, one challenge with the common law approach is its rigidity and possibility to work injustice or inadequate compensation to victims of torts. In a case where damage would have been rewarding to a victim of tort by the law of England but is justifiable by the law of the place where the tort occurred, the common law rule of double-actionability will deprive the victim of tort from benefitting from the court in England as the matter will not actionable. Except where the exception laid in Boys v Chaplain is applied to favour the law of England as the law of the place with the most significant relationship to the tortuous facts.
3.0 Modern Approaches

They are called modern approaches because they mainly evolved to provide solutions to the rigidity of the traditional and jurisdiction-based choice of law rules. They include the proper law of torts, Caver’s principles of preference, Currie’s Interest Analysis, Leflar’s Better Law approach, Beale’s Vested Rights theory and the Comparative Impairment theory. The list in open ended as newer approaches are emerging.\textsuperscript{11}

The proper law theory of tort is described as, ‘the law which has the most significant connection with the chain of facts and circumstances in the particular case in question’ (Mayss, 1999:135). The vested rights theory as explained by Joseph Beale is more of a territorial or jurisdiction based theory. Its crux is that the right a forum court seeks to enforce is not necessarily the forum law or the law of the place where the tort occurred but the right arising from the law of the place where the tort was committed (Reed, 2001: 872). Under his principles of preference theory, Professor Cavers proposed five “principles of preference” for tort conflicts and two principles for contract conflicts. His principles on tort choice of law generally leaned in favour of the preferred place where the tort victim will be most compensated and which will serve as sufficient deterrent to a tortfeasor (Reed, 2001: 895).

Currie’s governmental interest analysis theory is one that analyses the competing interests of states to which the parties to a tortuous relationship belong. It posits that the applicable law with respect to a tortuous transaction should be the law of the state whose interest would be most affected if not applied. In view of this, it postulates the true and false conflict situations as well as the “un-provided case” (Reed, 2001:884).\textsuperscript{12} The comparative impairment theory, advanced by Baxter, is an off-shoot of Currie’s government interest analysis. Its main thrust however is that unlike the forum preference in a true conflict situation as posited by Currie, the courts can reach satisfactory outcomes through the extrapolation of conflicting interests (Reed, 2001: 895). Under the Leflar’s better law theory, Professor Leflar recommended five choice-influencing considerations courts should use when resolving choice of law issues. The fifth consideration focuses on the “better rule of law.” Leflar argues that courts have almost always tacitly considered whether one of the competing laws is “anachronistic, behind the times” such that they could reasonably and candidly acknowledge that they prefer to apply the more “realistic practical modern” law to achieve justice in the individual case (Leflar, et al 1986: 282).

Conclusively on this, it is instructive to note that Currie’s interest analysis theory, as well as most modern approaches highlighted earlier, was pivotal to the American Revolution and the revolutionary trend across Europe on choice of law. It is to these we now turn.
4.0 The American Revolution

4.1 The Revolution and Theoretical Underpinnings

Simply put, the American Revolution is a departure of most American states from the traditional, rigid and jurisdiction based choice of law theories or approaches to the much more flexible and pliant modern approaches or a mixture of both. This, over the years, has by-passed the rigidity in choice of law approach while sometimes wallowing in a greater degree of uncertainty and unpredictability, all in an attempt to arrive at the justice and fair result that each case deserves.

Before the early part of the 20th century, the general tort choice of law rule was that the law of the place where the tort was committed (the lex loci delicti commissi) was applicable throughout the United States. Some other states preferred to adopt the jurisdiction based rule of lex fori, or an approach that incorporates aspects of both perspectives. By the early part of the 20th century, the lex loci delicti choice of law principle was also adopted in the First Restatement in 1934 and all courts in the United States purported to follow it for several generations (Posnak, 1988: 682). The First Restatement provided for each area of substantive law. In tort, the critical determinant was the place of injury. Joseph Beale, the reporter of the Restatement, canvassed the vested rights theory in support of the lex loci delicti choice of law principle, although this attracted much criticisms (Reed, 2001: 880).

The main theoretical undertone that sparked off the Revolution appeared to have come in the 1950s largely as a result of Professor Brainerd Currie’s writings which promoted the government interest analysis theory (Reed, 2001: 885). For Currie, he believes that when choosing between competing laws, courts should account for the legal policies and the relevant factual scenario. This theory, although has its criticisms, paved way for a novel reasoning which the New York court followed in the landmark case of Babcock v. Jackson.

4.2 The landmark case of Babcock v. Jackson and subsequent decisive cases

Government interest analysis obtained judicial recognition and an important foothold in the New York Court of Appeals landmark decision in Babcock v. Jackson (Reed, 2001: 885). The case represented a break from tradition and, as such, is probably the most important choice of law decision an American court has rendered (Reed, 2001:886). Hence it is usually regarded as the focal point of the American Revolution.

The plaintiff was a passenger in the defendant’s car who suffered severe injuries in a car accident in Ontario. Both the plaintiff and the defendant were New York residents, and the...
motor vehicle was registered and garaged there. Under Ontario law (the *lex loci delicti*), a guest statute would have prevented recovery entirely. Conversely, New York law (the *lex fori*) allowed recovery upon a showing of ordinary negligence. After affirming the *lex loci delicti* as the prevailing rule in the United State at that time, the New York court laid a novel exception. The exception was where another state had a more significant interest in either the event or the parties that warranted the application of that state’s laws. Hence, upon this exception the court applied the law of New York being the state of more significant interest as regards the parties.

Since Babcock’s case, several courts had attempted to shift from the rigid *lex loci delicti* rule to a more flexible approach suitable on a case-by-case basis. Another decisive case was *Neumeir v. Kuehner*. In this case, the defendant was a New York resident, the claimant was from Ontario, and the accident occurred in Ontario. Since Babcock, Ontario had modified- but not repealed- its guest-host statute. After laying down some decisional rules for choice of law in such tortuous instances, the court determined that in guest-host cases, the *lex loci delicti* should govern, unless the parties have a common domicile in a state other than the site of the accident. In these exceptional cases, the law of the common domicile would apply. Instructively, this decision does not appear contradictory to the decision in Babcock, especially considering the fact that Ontario (where the accident occurred) had modified their guest-host statute to reasonably allow for compensation on loss. Hence it was fair to rely on the *lex loci delicti*.

The key point in the two decisions is that in contrast to the rigid jurisdiction based rule of *lex loci delicti*, the court could now be flexible with the general rule of *lex loci delicti* to arrive at a fair decision. This flexible approach became the attitude of most courts in America afterwards although it began to result in some uncertainties as was the case in *Schultz v. Boy Scouts of America, Inc.*

### 4.3 Recent Choice of Law Approaches (Post-Revolution)

The post-revolution choice-of-law approaches among American states were more of the Second Restatement of the Conflict of Laws, Leflar’s choice influencing considerations and the comparative impairment approach. Of course, leaflets of the government interest analysis approach still underpinned decisions of court and in other instances, a combination of two or more of these approaches. In two jurisdictions, attempts have been successful at codifying choice of law principles to attain some level of uniformity and ease of application. They are the Louisiana and Oregon’s codifications of 1991 and 2010 respectively.

The Second Restatement basically formulated rules along the proper law of tort i.e. the most significant connection principles and no fewer than twenty-one (21) states are listed as subscribing to it (Symeonides 2000: 144). Five states are known to have adopted Leflar’s “Better law” approach. For Baxter’s comparative impairment approach, the Supreme Court of California has endorsed it.
4.4 The United State Supreme Court and the Revolution

The United States Supreme Court often does not enter into the arena of choice of law reform. However, the present position on tort choice of law to which the apex court adheres was laid down in *Allstate Insurance Co. v. Hague.* The court’s plural opinion was in favour of the interest analysis approach of Currie, although it disregarded some state court endorsements of Currie’s ideological perspective that mostly supported forum preference. The Court determined that a state must have a significant contact or an aggregation of contacts that create a state interest before the presiding court can apply that state’s substantive law in a consistent and equitable way that agrees with constitutional ideals.

4.5 Revolutionary Move under the Alien Tort Claims Act Of 1789

The US has a unique law on torts known as the Alien Tort Claims Act (ATCA), also referred to as the Alien Tort Statute (ATS) of 1789. The Act provides that U.S. district courts “shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Hence, there are three requirements under the Act: (1) the claim must be made by an alien (2) for a tort, and (3) the tort must be in violation of the law of nations or a treaty of the United States.

One issue that has sparked a move synonymous with a revolution under the Act is the issue of “[w]hether and under what circumstances the Alien Tort Statute…, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.” It was a question on the extraterritoriality of torts or simply put, a question bordering on the place of tort taking place outside the US. Prior to the recent decision of the apex court in *Kiobel v. Royal Dutch Petroleum,* it was the usual practice that the federal courts could entertain a cause of action that arose outside the United States.

However, in 2013, the US Supreme Court took a radical turn in *Kiobel v. Royal Dutch Petroleum.* A group of Nigerian citizens, on behalf of the Ogoni people of Nigeria, asserted claims for damages against Shell Petroleum Development Company of Nigeria, Ltd (SPDC) and its parent entities claiming that these corporations had aided and abetted human rights abuses by the Nigerian government in connection with the government’s suppression of protests against SPDC’s activities in Nigeria. After giving parties the opportunity to debrief it on the question of extraterritoriality of torts, the apex court by a 9-0 decision held that the ATCA did not apply to conduct in foreign countries based on the “presumption against extraterritoriality.”

Much beyond the scope of this paper can be said about the decision of the US Supreme Court but the revolutionary move undertaken by the apex court is remarkable. Although compared to the general tort choice of law revolution explicated earlier, it would appear that this
is a stark contrast in that it moves from the flexible to the rigid. Thus, taken this decision as precedent, tort claims arising outside the United States, which erstwhile succeeded may now scarcely be entertained by the US federal courts under ATCA.\textsuperscript{31}

\subsection*{5.0 Revolution across Europe\textsuperscript{32}}

Before the coming into force of the Rome II Regulation of 2007, the prevailing method in most European countries was to apply a \textit{lex loci delicti} test, or a closely amended variant of that approach (Morse, 1984). In France, Belgium, Denmark, Germany and Canada, courts applied modified forms of the \textit{lex loci delicti} theory (Reed 2001: 920). Australia still maintained the common law double actionability rule\textsuperscript{33} in \textit{Phillips v. Eyre} while England had abolished the rule by enacting the Private International Law (Miscellaneous Provisions) Act of 1995 which limited the common law position to the tort of defamation. Some countries in Europe had further adopted specific provisions to meet the difficulties that certain torts present (Reed 2001: 921).

By entering into force of the EU Regulation no. 864/2007 (The Rome II Regulation) in 2009, autonomous provisions of the law of torts in the member states, except Denmark, ceased to apply. The regulation became the main source of European international private law by entering into force of the Treaty of Amsterdam of 1\textsuperscript{st} May 1999\textsuperscript{34}. When determining the applicable law for tortuous liability, Article 4 of the Regulation stipulated a general rule and exception. The general rule confired the application of \textit{lex loci delicti commissi}, but in order to avoid unnecessary rigidity peculiar to the traditional approaches, two (2) exceptions- indicative of the common domicile exception under \textit{Boys v. Chaplin} and the most significant connection test under the proper law theory- were allowed. Again, the regulation stipulated the application of the law of the country in which direct damage occurred (in cases where the place the tort occurred and the place the damage or injury occurred are different) as a way to balance the interests of both the injurer and the injured.

Conclusively, it is noteworthy that this current position in Europe is reminiscent of the flexibility in choice of law approach engendered by the American Revolution discussed earlier. The place the tort occurred, significant connection test, interests of the parties, common domicile are all indicative and decisive factors present in both the Rome II regulation for Europe and the various choice of law approaches for the American states. However, as seen earlier, the American courts arguably appear to be more radical in their choice of law approach.

\subsection*{6.0 The Nigerian Experience}

This paper is basically about considering the practice of conflict of laws in the Nigerian context, with particular emphasis on tort choice of law, in the light of the American Revolution and the Revolutions across Europe which have been discussed in the foregoing. In this part, we
shall examine some factors militating against the speedy growth of conflict practice in Nigeria. Then, a peep into the Nigerian position on tort choice of law will follow.

6.1 Factors inhibiting the growth of conflict of laws practice in Nigeria

The practice of conflict of laws has not thrived considerably in the Nigerian jurisprudence in comparison to what obtains in the US and across Europe. The resultant effect is that concerned stakeholders such as the academia and the courts are left with scanty precedents on the Nigerian position to rely on. For the most part, reference is usually made to the received English common law system or matters are treated in other areas of law with sheer silence on conflict of law issues arising from the given facts. This is not to say that the Nigerian system is not a comfortable ground for conflict of laws practice (Omoruyi 2005: 157-158). A consideration of three (3) factors which can be attributed to the slow pace of conflict practice in the country will ensue.

6.1.1 The federal structure and the courts

The Nigerian jurisprudence is structured along federalism. The component states have their distinct laws on specific subjects to the extent that the federal constitution permits and for the purpose of conflict of laws, these component states are regarded as countries (Agbede 1989: 5). Ideally, the existence of a federal structure should aid the practice of conflict of laws given that federalism grants a level of autonomy to component states to evolve their laws on specific subject matters. However, these states have restricted autonomy especially with respect to the judiciary which is one vital organ for the thriving of conflict practice. Under Chapter 7 of the 1999 constitution, as amended, no state court has a final or absolute jurisdiction on any matter, as an opportunity to appeal still lies generally to the Court of Appeal and Supreme Court, both of which serve the entire states of the federation. Hence, state courts do not have the ultimate say as it concerns evolving a set of precedents which defines its body of laws on a particular subject-matter. This is in stark contrast to the American system where each state has a Supreme Court to which a final appeal for a matter decided by the state’s lower courts lies. A matter only goes to the Federal Supreme Court in the US when a federal question is to be decided or where a matter started at a district court which spearheads the federal court structure.

This is one reason why the study of conflicts perhaps thrives best under the American system. Take, for instance, the landmark case of Babcock v. Jackson which is widely considered as the focal point of the American Revolution, was decided finally by the New York Court of Appeal which is the highest court in the US state of New York. Subsequently, several decisions emerged by the courts of different states which have given substantial voice to choice of law revolution in tort in the US. Hence, state courts in US can handle both “intra” and “inter” US conflict issues and come up with decisions that embody their peculiar conflict laws with or without legislations. It is hardly conceivable that this will be the case in Nigeria given the restricted autonomy to state courts under the extant federal structure. Agbede has noted a similar
problem under the regional arrangements of Nigeria’s 1st and 2nd Republic. Said he, “For now it seems likely that the Federal Appellate courts… will prevent the development of a diversity of state case-laws.” (Agbede 1989:4) However, this can be remedied by the evolution of state legislations to that effect as exemplified by some states in the US. Also, nothing prevents lawyers from raising conflict of law issues at state or appellate courts when the need arises.

6.1.2 Legislative intervention

For jurisdictions like the UK that also do not have the peculiarities of the US court systems, they make up with a legislation that fully embodies conflict principles garnered over the years with modifications. The Private International Law (Miscellaneous Provisions) Act 1995 is the main legislation dealing with conflict issues especially as it regards choice of law. In the US, states like Louisiana and Oregon have codified their conflict of laws rules. In some other jurisdictions, specific legislations on other issues have conflict of laws colourations. Same cannot be said of Nigeria and this greatly inhibits the level of awareness of conflict issues especially in the judicial arm which primarily ought to interpret legislations.

6.1.3 Conflict of law mastery by judges and lawyers

The history of conflict of laws is traceable to the contributions of the jurists and post-glossators of the Roman Empire around the 9th to 18th centuries, legal scholars of the 18th to 20th centuries even till date (North 1979: 15-37). The American Revolution discussed earlier had theoretical underpinnings from the contributions of such scholars as Cavers, Currie, Leflar, Baxter to mention a few. All these were skilled in conflict of laws and each made substantial contributions that were pivotal to the Revolution. On the other hand, there were judges who were apt to discuss the intricacies of conflict of laws issues, hence made substantial contributions in this field. In contrast, the Nigerian experience has not sailed that speedily.

To begin with, the subject of conflict of laws is not studied in all tertiary institutions that offer law as a course of study across the country. Even in schools where it is offered, it is but an elective course, hence not all law undergraduates are exposed to the subject. From this premise, it is reasonable to infer that quite a good number of lawyers are not exposed to this complex, yet interesting subject. Except such people are able to remedy the defect by further personal or postgraduate studies, we might expect no more than unsatisfactory judgments, arguments or opinions from lawyers or judges who encounter practical conflict of law issues. A quintessence is found in Amanambu v. Okafor, where the court and counsel were presented with a conflict of laws situation with regards to tort (road accident) choice of law. From the trial court to the Supreme Court, neither counsel on both sides raised the issue of applicable choice of law even though the laws of Northern and Eastern Nigeria could have been said to have competing interests. The matter was simply brought under the Fatal Accident Law of Eastern Nigeria without more. The Supreme Court on the other hand did not raise any such issue even by
way of obiter. It simply held its decision on two main grounds - that an action could not lie under the Fatal Accident Law of Eastern Nigeria in a case were the fatal accident and death occurred in Northern Nigeria and that the plaintiff in any case, failed to plead the laws of Eastern Nigeria on which it relied. It failed to discuss the rules upon which tort liability in private international law is based. In the words of Agbede, “it is doubtful whether the court was aware of the conflict problems involved” (Agbede 1989: 161)

Having highlighted the above problems, it must be noted that the Nigerian courts have made some remarkable inputs in conflict practice as it concerns the Nigerian perspective. As it concerns choice of law approach in tort conflicts, the cases of Ashiru v. Benson and Ubanwa & Ors v. Afocha & University of Nigeria are incisive.

6.2 The Nigerian position on tort choice of law

Nigeria favours of the common law approach as enunciated in Phillip v. Eyre. The first reason in support of this is the provision of section 32 of the Interpretation Act which allows for the reception of English law into our jurisprudence in areas where local legislations do not provide for. The other and more specific reason is the Supreme Court’s decision in Benson v. Ashiru.

Having failed a year earlier to discuss the applicable tort choice of law in Amanambu, the Supreme Court stepped out more emphatically in Benson v. Ashiru when a similar situation presented itself again. The plaintiff brought an action in the Lagos High Court under the Fatal Accident Act in respect of death which resulted from a road accident in the Western Region. Laying down the rule regarding appropriate choice of law in torts, the apex court stated emphatically:

“The rule[s] of the common law of England on questions of private international law apply in the High Court of Lagos. Under these rules, an action in tort will lie in Lagos for a wrong alleged to have been committed in another part of Nigeria if two conditions are fulfilled. First, the wrong must be of such a character that it would have been actionable if it had been committed in Lagos, and secondly, it must not have been justifiable by the law of the part of Nigeria where it was done: Phillip v. Eyre. These conditions are fulfilled in the present case.”

In Ubanwa & Ors v. Afocha and University of Nigeria, the Enugu High Court upheld the Supreme Court’s decision in Ashiru, although it also mentioned other authorities including the Amanambu’s case as having binding authority. While this has been criticized (Agbede 1989: 161), it does appear with little doubt that the present position in Nigeria is the application of the common law rule of double actionability in Phillip v. Eyre as laid down in Benson v. Ashiru (Omoruyi, 2005: 208)
However, as we have earlier seen, the revolutions that swept across the US and Europe have allowed for a paradigm shift from the traditional approaches to more flexible approaches that will meet the need of changing times. Specifically, England where the common law principle laid down in *Phillips v. Eyre* emanated has long left that train via the enactment of the Private International Law (Miscellaneous) Act of 1995. Even recently, the application of the Rome II Regulation holds across Europe, the UK inclusive. More unsatisfactory is how the common law principle might work injustice in modern tort situations. It is for this reason a radical shift for a more flexible approach within the Nigerian system has become necessary to meet up with the standards of contemporary societies.

### 6.3 An Emerging Concern for the Nigerian Jurisprudence

There is a recent concern about the applicability of conflict of law rules in tort as it concerns the Nigerian jurisprudence. It is one of jurisdiction. The states that make up Nigeria have their High Court Rules that stipulate the issue of jurisdiction. In recent times, this has not aided the applicability of choice of law rules in tort conflict in Nigeria as such matters are basically addressed using the relevant provisions on jurisdiction found in the rules of court. The resultant effect is that conflict of law elements rather pass unnoticed and are treated as a matter of jurisdiction without more. In *Zabusky v. Israeli Aircraft Ind.*, the appellants sued the respondent for damages for alleged libelous words published by the respondent concerning the appellants. The defendant/respondent does not resides in/or carries on business in Nigeria while the alleged cause of action occurred outside the jurisdiction of the high court of Lagos State. The matter was instituted in the High Court of Lagos state under sections 10 and 11 of the High Court Law, Cap 60 Laws of Lagos State, 1994. The said provisions deal with the jurisdiction of the court. From the trial court to the court of appeal, no conflict of law issue was raised as regards the appropriateness or otherwise of applying either the *lex fori* which was the law of Lagos state or the *lex loci delicti* which was not the law of Lagos State. The court of appeal simply considered the above sections and the relevant section in the 1999 constitution on jurisdiction of state high courts and held in favour of the jurisdiction of the Lagos High Court.

Similarly in *Okeke v. Petmag*, the appellant’s driver was involved in an accident with the respondent’s car while driving the appellant’s vehicle. The respondent sued the appellant in the high court in Delta state. The accident occurred in Delta state while the appellant/defendant resided in Kaduna State although his address for service was in Delta state. On appeal, the court of appeal held that “the contention of the appellant that he resides in Kaduna while the address for service within jurisdiction is in Delta State and that there was a breakdown in communication cannot hold water.” In this case, no conflict of law question was raised to determine which law will determine the rights of the parties. Rather, what preoccupied the attention of the counsel and court was procedural matters of jurisdiction.
One major reason for this trend is the lack of separation of procedural law from substantive law by the courts when there is a set of facts with conflict of laws elements. Usually, in conflict of law situations, procedural matters are handled by the *lex fori* while substantive rights are handled by the *lex causae*, which in tort matters could be the *lex fori*, *lex domicile* or the *lex loci delicti* as exemplified by the revolutions across America and Europe. However, the Nigerian courts scarcely address distinctions of this ilk owing to some of the reasons which have been outlined above especially the level of awareness on conflict of laws among lawyers and judges. Hence, in the Nigerian context, the distinction between procedural and substantive matters where there is a conflict of laws element is largely non-existent with much emphasis on jurisdiction.

Also, the absence of favourable guest statute or any legislation on tort in different states of the country has contributed to this lapse. In *Babcock* case, New York had a favourable guest statute compared to Ontario. Hence, this influenced the New York Court towards applying New York law (*lex fori*). In *Neumeir’s* case, the court applied Ontario law mainly because as at the time, Ontario had a revised and better guest statute. In other jurisdiction across Europe, there are specific legislations governing tortuous relationship with foreign elements. This is a far cry from what obtains in the Nigerian jurisprudence as there is no guest statute or specific legislation on torts in any state or at the federal level which would have aided the courts and lawyers in considering conflict of law elements where there is commission of torts with foreign elements. Hence, after over forty-seven (47) years when the *Benson v Ashiru’s* case was last decided, nothing appears to have been heard from the courts on conflict of laws issues in torts with foreign elements.

7.0 Conclusion- Way Forward

Having highlighted the need for a radical shift in the Nigerian jurisprudence on tort choice of law, what then is the way forward? A possible solution in this regard cannot be unconnected with proffering a positive pathway through the factors militating against conflict practice in Nigeria. To this end, specific legislative intervention on Private International Law to fit our jurisprudence will suffice. When legislation is on board like it is in England and some other jurisdictions, the interest of the subject will be aroused within tertiary institutions and among legal practitioners as well. If need be, lawyers as well as judges can consult the books to acquaint themselves with conflict of law principles. More importantly, conflict of law issues arising out of contractual and tortuous transactions in our courts will no longer be swept underfoot as was the case in *Amananmbu* nor will they simply be treated simply as a question of jurisdiction as we have it in recent times.

Also, judicial activism in this regard will be most helpful. Our judges must be prepared to venture into analytical reasoning on conflict of law issues to aid reformatory moves like what obtained in the US’s cases of *Babcock v. Jackson* and *Kiobel v. Dutch Petroleum Company*.
among others. As Agbede has noted, it would have settled the air, if the Supreme Court in Ashiru had clarified its position in Amanambu when its attention was called to it (Agbede, 1989: 160-161). Such costly silence will not benefit a system like Nigeria where conflict of law issues is scarcely raised in our courts. Hence, we might have to wait for ages for clarity beyond what now is.
Endnotes

1 The three main areas dealt with by conflict of laws are-(1) choice of law (2) jurisdiction and (3) recognition and enforcement of foreign judgment.
2 For instance, torts filed under the US Alien Tort Claims Act of 1789 which we shall discuss later are usually criminal in nature- torture and murder are examples. Again, for the offences of assault and burglary, there are correlative torts of trespass to person and property respectively. More examples abound.
3 Tort law operates as an instrument of distributive, not retributive (as the case with criminal law), justice, and embodies a compensatory loss-distribution structure. See generally Symeonides (2009). See also Reed (2001: 871).
4 In America, it is scarcely followed after the revolution. In Europe, save for Denmark, virtually all European countries now apply the Rome II Regulation on torts which lean more in favour of the *lex loci delicti* principle subject to some exceptions.
6 *Alabama Great Southern R.R. Co. v. Carroll* 11 So. 803 (Ala. 1893) (It involved the negligent conduct of a train worker in Alabama which caused injury to a fellow worker working on the same train shortly after it entered the neighboring state of Mississippi. The court applied the law of Mississippi were the tort occurred). For the early part of the 20th century, the American Law Institute’s Restatement (First) of Conflict of Laws of 1934 basically applied the theory although with a supportive reasoning of the vested rights theory proffered by the Restatement’s reporter, Joseph Beale.
7 *Szalatnay-Stacho v Fink* [1948] K.B. 1. An action for defamation committed in England and both parties were of Czech citizenship. The English Court of Appeal held that, as the documents containing the defamation had been published there, the tort was committed in England, and therefore, English law was the governing law. See also *Metall and Rohstoff AG v Donaldson Lufkin and Jenrette Inc* [1990] 1 Q.B. 391.
8 [1870] L.R. 6 Q.B. 1. (the Governor of Jamaica allegedly committed acts of assault and false imprisonment in Jamaican territory. No liability was imposed by the court in England, as a Jamaican Act of Indemnity retrospectively justified such conduct.)
9 *Id.* at 28-29. See *The Halley* [1868] 2 L.R. 193 (note that the first limb of the test, actionability as a tort under English law, was a result of the decision); cf *Patrick Grehan v. Medical Inc. and Valley Pines Assoc.* [1988] E.C.C. 6 (Ir.) (criticizing the dual actionability rule and suggesting it should not be followed); but see, *An Bord Trachtala v. Waterford Foods Pte* [1994] F.S.R. 316, 321-23 (Ir.).
11 For instance, statutory and codification mechanisms such as the Private International Law (Miscellaneous Provisions) Act of 1995 for England as well as the Louisiana and Oregon’s codes of 1991 and 2010 respectively for the US.
12 The true conflict situation arises where both states have an interest in the action while the false conflict situation arises where just a state of the two (2) states affected has an interest at stake with the action. Currie espoused further that in a false conflict situation, the law of the state that has interest will apply while in a true conflict situation, forum preference is desirable. Currie also looked at a third possible situation which he referred to as an “unprovided-for” case where neither of the states has interest in the applicable law.
See Alabama Great Southern R.R. Co. v. Carroll, supra, where the court opting for Mississippi law because that state was the place of injury, reasoned that “there can be no recovery in one state for injuries to the person sustained in another, unless the infliction of the injuries is actionable under the law of the state in which they were received.”

Even lately after the revolution, the courts do refer to these approaches. In Sutherland v. Kennington Truck Service, Ltd. 562 N.W.2d 466, 470 (Mich.1997), the Supreme Court of Michigan opined: “Only two distinct conflicts of law theories actually exist. One, followed by a distinct minority of states, mandates adherence to the lex loci delicti rule. The other, which bears different labels in different states, calls for courts to apply the law of the forum unless important policy considerations dictate otherwise.”

191 N.E.2d 279 (N.Y. 1963)

A guest statute is a law that set standards of care by the driver of a car to a non-paying passenger.

In 1964, the Oregon Supreme Court became the second state in the United States after the Babcock case to join the revolution in Lilienthal v. Kaufman 395 P.2d 543 (Or. 1964), although in the field of contract. The court abandoned the traditional choice-of-law rule of lex loci contractus and replaced it with the governmental interest analysis approach. Two weeks after Lilienthal, Pennsylvania became the third state to join the revolution in Griffith v. United Air Lines, Inc., 203 A. 2d 796 (Pa. 1964), a case involving a tort conflict.


480 N.E.2d 679 (N.Y. 1985). For a discussion on the uncertainties the Schultz’s case created, see (Reed, 2001: 888-889).

The codification was enacted into law by Acts 1991, No. 923, s 1, eff. Jan. 1, 1992, which added Book IV to the Louisiana Civil Code. For discussion of the tort provisions of this codification by its drafter, see (Symeonides 1992).

The Oregon’s choice of law codification for tort conflicts was enacted in 2009 by the 75th regular session of the Oregon Legislative Assembly and came into effect on January 1, 2010. It was the first of its kind in a common-law state of the United States but the second of its kind in the federation after the Louisiana code.


449 U.S. 302 (1981). At issue was the question whether Minnesota courts could apply a Minnesota insurance law to a claim based on a policy held by Hague, a Wisconsin resident, who was killed in Wisconsin by a Wisconsin uninsured motorist.

28 U.S.C. 1789

28 U.S.C. s 1350

In March 2012, the U.S. Supreme Court in Kiobel v. Royal Dutch Petroleum, No. 10–1491 (U.S. Apr. 17, 2013) directing the parties to re-brief and re-argue this broader question.

No. 10–1491 (U.S. Apr. 17, 2013)

Filiartiga v Peña-Irala 630 F.2d 876 (2d Cir. 1980) (cause of action arose in Paraguay concerning the torture and murder of the plaintiffs’ relation); Re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994) (class action initiated under ATCA on Ferdinand Marcos, former President of the Philippines for a cause of action- torture and murder- which arose in the Philippines was successful); Kadic v. Karadzic 70 F.3d 232 (2d Cir. 1995) (cause of action that arose in Bosnia from atrocities committed by the Bosnia-Serb military during the Bosnia civil war, was successful).

30 Supra note 72.
31 For instance, in same week *Kiobel* was decided, the Supreme Court issued a summary order in another large ATS case, *Rio Tinto plc v. Sarei*, No. 11-649 (April 2013), a claim for alleged corporate responsibility for human rights abuses in Bouganville, Papua New Guinea.

32 There are theoretical arguments peculiar to European scholars concerning the impact of the American Conflict Revolution across Europe. These arguments however were more of criticisms on the doctrinal writings of the American theorists. See generally (Vitta, 1982).


35 States are allowed to legislate only on matters on Part II of the Second Schedule to the extant 1999 Constitution of the Federal Republic of Nigeria, as amended. These matters also fall within the legislative competence of the Federal legislature.

36 Section 240 of the Constitution provides that the Court of Appeal has jurisdiction “to the exclusion of any other court of law in Nigeria” to hear and determine appeals from various courts at the state level. The import of this provision is that no state court has a final and appellate jurisdiction on a matter.

37 i.e. conflict issues arising within the US system.

38 i.e. conflict issues involving a jurisdiction outside the US system.

39 Same applies to jurisdictions like Japan (the *Horei*, Act on the Application of Laws (General), Law No. 10, 1898, as amended) and Turkey (Turkish Law on Private International Law and International Civil Procedure of 2007).

40 E.g. Section 2 of the Maylasian Arbitration Act of 2005 provide for the most significant connection test. The test is also adopted in China (General Principles of Civil Law of 1986; Maritime Law of 1992; and the General Contract Law of 1999)

41 Even if Part II of the Second Schedule to the 1999 Constitution does not expressly contain “private international law” as an item for legislation, it is possible to have conflict rules embedded into laws made on the items enlisted whether at the state or federal levels. However, our statutory laws do not provide for such conflict rules. The most we have in Nigeria is a handful of court decisions.

42 E.g Lord Wright’s comment in *Re International Trustee* (1937) A.C.277 at 289 (where he laid the criteria for parties’ intention as to the applicable law in contract as- legal, bona fide and conformity with public policy); Lord Denning’s comment in *Boissevain v. Weil* [1949] 1 K.B. 482, at pp. 490-491 (upholding the most significant connection theory); Lord Wilberforce’s decision in *Boys v. Chaplain*; Lord Slyn’s comment in *Red Sea Insurance v. Bouygues SA*. (clarifying Lord’s Wilberforce’ decision in *Boys v. Chaplain*). See also, the US Federal Supreme Court in action in *Allstate Insurance Co. v. Hague*, supra note 63. (where the judges of the US supreme court dealt extensively on the government interest analysis approach to tort choice of law)

43 Such tertiary schools as Benson Idahosa University, River State University of Science and Technology, University of Jos, and some others do not offer conflict of laws as a course as at the writing of this paper but have law faculties in place.

44 (1966) 1 All NLR 205.

45 The Laws of Eastern Nigeria could apply being the law of the parties’ common residence; the law to which the parties are mostly connected; or the law of the forum. The laws of Northern Nigeria could apply being the law where the tort occurred.

46 For instance, Oputa JSC’s words in *Sonnar Limited v. Norwind* [1987] 4 N.W.L.R (Pt 66), 520 on the choice of proper law of contract is remarkable. According to him, a choice of law to be effective, “must be real, genuine, bona
fide, legal and reasonable.” This goes beyond Lord Wright’s criteria of legality, bona fide and conformity with public policy in *Re International Trustees*, supra note 103.

47 Cap I 23 Laws of the Federation of Nigeria (LFN) 2004

48 (1967) NMLR 363


50 (1974) ECSLR 308

51 Although by virtue of the Act, the common law still applies to the tort of defamation.

52 For instance, in economic torts or torts involving cyber wrongs, it is sometimes difficult to envisage the *locus* where the tort actually occurred or where the injury took place. In such situation applying the common law rule of double actionability might not suffice easily. In any case, it was a rule that envisaged torts like road accident scenarios whose *locus* are easily deciphered from the onset. It didn’t have such wrongs as economic or cyber torts in contemplation. Hence, it is perhaps no surprise why England had to restrict it only to the traditional tort of defamation under Part II of the Private International Act of 1995.

53 Note that when we subscribe for a flexible approach, it does not mean that the traditional rigid approaches should be outrightly abandoned. For example, the recent decision of the US Supreme Court in *Kiobel v. Dutch Petroleum Company* discussed earlier is reminiscent of a move from the “flexible to the rigid” so as to, in the court’s opinion, avert “the danger of unwarranted judicial interference in the conduct of foreign policy…” Even if one may fault the judgment on several grounds, one cannot but admit that it is a novel ground upon which the US can build under the ATCA.

54 (2008) 2 NWLR (Pt. 1070) 109, C.A

55 (2005) NWLR (Pt.915) 245, C.A

56 *Per* Muntaka-Coomassie, JCA

57 See *British Linen Company v Drummond* (1830) 10 B & C 903; *Huber v Steiner* (1835) 2 Bing NC 202; *Boys v Chaplin* [1971] AC 356. See also O’Brien (1999: 113)
References


