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Re - Examining the Theory of Savigny, the Theory of Acquired Rights and the Local Law Theory under Private International Law

CHIGOZIE NWAGBARA, LL.M
LAW AUTHOR & LECTURER, FACULTY OF LAW,
NIGERIA POLICE ACADEMY, WUDIL, KANO STATE, NIGERIA
E-MAIL: hichibaby@yahoo.com

ABSTRACT
This paper critically examines the theories of ***Savigny***, ***The Acquired Rights Theory*** and the ***Local Law Theory***. In the Introductory part, I discussed the Statute Theory which existed before that of Von Savigny. Most of the theories discussed here emphasize ***territoriality*** as a key factor on which most Judges should base their decisions on any Matter or Cause brought before them. This paper discussed Von Savigny's theory in full details, and makes us to know that Savigny's theory is still practicable, workable, and cannot be done away with.
The Local Law Theory also has judicial precedents as one of its key factors, and we cannot rule out the importance of precedents which help us to predict the outcome of most Cases even before they have been heard, tried and determined by the Courts. Those theories make it clear for us to understand that no Court of Law sitting in the Forum should be a slave to laws of other countries, and that those seeking to enforce foreign laws in another country should know that those laws or Rights can only be enforced if it is in consonance with those of the law of the Forum, or may be enforced where there is a lacuna in the law of the Forum over such Matter (and it will not do injustice to the citizens of the Forum when they are faced with the same problems). In effect, this paper discusses the usefulness of all the theories discussed, and why none of them can be done away with for any reason. It tells us that those theories are still applicable and very workable in the Courts of Law, as they each have one, two or more key features that prove their relevance in Law and in Fact till date.
Keywords: Theory of Acquired Rights, Savigny's Theory, Statute Theory, Local Law Theory, Private International Law, Territorial Law, Sovereign, Ulric Huber, Walter Wheeler Cook, Von Savigny, Cheshire, North & Fawcett

INTRODUCTION

Private International Law as found in England is a substantive part of English law, and was until the last two to three decades almost entirely the result of judicial decisions; though it is now the case that a considerable part of this field of law has been embodied in legislation[1]. Its growth has also been influenced to a reasonable extent by the writings of Jurists in other countries[2], and mostly by doctrines that have found acceptance globally.

Historically, when English traders began to extend their commercial activities beyond the seas, it was inevitable that they will suffer occasionally from the inability to obtain redress in respect of transactions effected abroad. A remedy ultimately became available to them in the Court of Admiralty, which extended its jurisdiction to foreign Causes as early as the middle of the fourteenth century. By the middle of the sixteenth century, it was competent to try disputes arising out of mercantile dealings abroad[3]. Then, there was no question of choice of law, for the court dispensed the general law maritime or, in cases of purely commercial matters, the general law merchant[4].

By the end of the 16th century, the Common Law had begun to compete for this jurisdiction. The technical difficulty that formerly stood their way had disappeared, for the Jury relied no longer on its knowledge, but on the testimony of witnesses. Trying cases connected solely with a foreign country was facilitated by the new division of actions into *local* and *transitory*. In transitory actions, i.e where the Cause of action might have arisen anywhere, there was no necessity to summon the jury from one particular neighbourhood. The plaintiff could sue

[1] Cheshire, North & Fawcett Private International Law (14th Edition, Oxford University Press) 2008 @ p. 19
[2] Cheshire & North's Private International Law (10th Edition, Butterworths) 1979 @ p. 15
[3] Cheshire, North & Fawcett supra @ p. 2o; *Sack on 'Conflict of Laws in the history of English Law : A century of progress* (1835 – 1935) Volume III p.353-355
[4] Sack @ p. 355

the defendant where he was to be found, and could lay the venue (i.e, the place from which the jury was summoned) where he liked[1].

In England, the growth of the British empire inevitably led to increased links between British subjects owing obedience to a variety of laws, and consequently to an increase in the number of disputes that required (if justice were to be done) a reference to something more than the Common Law of England. The first step was taken in the case of *Robinson v. Bland*[2] in 1760 where the plaintiff had lent 300 pounds to **X** in Paris, which **X** immediately lost to the plaintiff by gaming, together with an additional 372 pounds. **X** gave the plaintiff a Bill of exchange payable in England for the whole amount. It was found that in France, *money lost at play between gentlemen may be recovered as a debt of honour before the Marshals of France who can enforce obedience to their sentences by imprisonment*[3]. After the death of **X,** the plaintiff brought assumpsit against his Administrator on three counts: on the bill of exchange, for money lent and for money had and received. It was held that the bill of exchange was void, and that no action lay for the recovery of the money won at play. The plaintiff however, was held entitled to recover on the loan. According to Lord Mansfield in this case[4], *the general rule established ex comitate et jure gentium, is that the place where the contract is made, and not where the action is brought is to be considered in expounding and enforcing the contract*. But this rule admits of an exception when the parties at the time of making the contract had a view to a different kingdom[5]. Other principles suggested or established in the eighteenth century were that the law of the place of celebration governs the formal validity of marriage[6], that movables are subject to the law of the domicile of the owner for the purpose of succession[7] and bankruptcy distribution[8], and that actions relating to foreign immovables are not sustainable in England[9].

It was not until nearly the close of the century that a clear acknowledgment was made of the duty of English Courts to give effect to foreign Laws. *Lord Mansfield* once again said *every action here must be tried by the law of England, but the Law of England says that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern*[10].

According to Cheshire, North Fawcett Private International Law[11], the 18th century which extended to the middle of the 19th century represents the embryonic period of Private International Law. Thus, although Rules to govern contracts, torts and legitimation were laid down in 1865, 1869 and 1881 respectively, such matters as capacity to marry, choice of law in nullity and legitimacy are still unsettled. The formative period is not yet at an end[12].

PRE - SAVIGNY PERIOD

Just immediately before the theory of Savigny existed the *Statute Theory*[13] by Ulric Huber who laid down the following three maxims, from which he considered a sufficiently comprehensive system for the reconciliation of conflicting laws could be evolved. These are:

a. The laws of a State have absolute force within, but only within the territorial limits of its sovereignty;
b. All persons who, whether permanently or temporarily are found within the territory of a Sovereign are deemed to be his subjects, and as such are bound by his laws.
c. By reason of Comity, however, every Sovereign admits that a law which has already operated in the country of its origin shall retain its force everywhere, provided that this will not prejudice the subjects of the Sovereign by whom its recognition is sought.

According to Cheshire & North's Private International Law, the Statute Theory lacks a scientific basis, and affords no solid ground upon which a sound and logical system can be erected[1]. Whatever be

[1] Cheshire, North & Fawcett @ p. 21
[2] (1760) 1 Wm Bl 234; 2 Burr 1077
[3] Wilmot J. described it as *this wild, illegal, fantastical Court of Honour;* 2 Burr @p. 1038
[4] *Robinson v. Bland* (1760) 1 Wm Bl 234; 2 Burr 1077
[5] *Robinson v. Bland* supra @ 258 – 259; *Cheshire, North & Fawcett* @ p. 22
[6] *Scrimshire v. Scrimshire* (1752) 2 Hag Con 395
[7] *Pipon v. Pipon* (1744) Amb 25
[8] *Solomons v. Ross* (1764) 1 Hy Bl 131
[9] *Shelling v. Farmer* (1725) 1 Stra 646
[10] *Holman v. Johnson* (1775) 1 Cowp 341. Lord Stowell spoke to the same effect in *Dalrymple v. Dalrymple* (1811) 2 Hag Con 54; *Cheshire, North & Fawcett* @ p. 23
[11] @ p. 23
[12] See *Fentima – Prescriptive Formality & Normative Relativity in Modern Legal Systems* (1994) pp 443 et seq; *Cheshire, North & Fawcett* @ p. 23
[13] By *Ulric Huber. Huber deserves particular notice if only for the influence that he exercised upon the development of Private International Law, both in England and in North America*. See also *Cheshire & North's Private International Law* (10th Edition, Butterworths), 1979 @ p. 22

the case, I agree with the first maxim that says that the laws of a State have absolute force within, but only within the territorial limits of its Sovereignty because we cannot go to State **A** or country **A** and apply the Law of State **B** or country **B** there. That can only be possible if the laws tally on the same subject. Where the law of State **B** differs from that of State **A** or country **A**, we must confine our selves to the law of country **A,** or we go back to country **B**. No person should use his own laws to govern other persons in their own territories because such cannot be acceptable. But then, whenever people come into a country, it is very correct to say that the laws of that State shall have absolute force within its territorial limits. For if it has no force within its boundaries, where else shall it have any force?[2]

Huber's second maxim which says that *all persons who whether permanently or temporarily are found within the territory of a Sovereign are deemed to be his subjects, and as such are bound by his laws* is equally correct[3] because before any person or citizen of a country enters into another country for temporary reasons (e.g to work with a work permit) or permanently (for a change of nationality to the country entered), he should be cognisant of the laws of that country (e.g the Constitution) and know whether he may fit in, and adapt properly to the customs and laws of that country without having any problems. Where a person is in a country temporarily, the person should ensure that the law that accords him his rights at his workplace will not in any way conflict with the law of the country where he is sent to work temporarily. If any such conflict should arise, the law of the country where he is temporarily transferred or posted to work supercedes that of his workplace or Head Office.

With respect to the third theory, I disagree with the Clause or Proviso which says *"…. Provided that this will not prejudice the subjects of the sovereign by whom its recognition is sought"*. The reason is not far - fetched, and as mentioned earlier, we cannot give any condition to another country we enter into, by asking them to make their laws to suit us, if ordinarily it will not make us comfortable. Any person that seeks the recognition of a foreign law should expect a positive or negative outcome. For example, a law that perfectly suits **Y** in his own country, may make him uncomfortable if **Y** seeks to apply and enforce it in another country. Therefore, it is best to get adapted to the laws of any country a person seeks to enter (whether temporarily or permanently)[4] .

THE THEORY OF SAVIGNY

The great German Jurist, Savigny, made a decisive break with all former approaches to the subject in his book on *Conflict of Laws* published in 1849[5], in which he maintained that it was possible to construct a system of Private International Law common to all civilized nations, a theory that has been revived in more recent years by an eminent American Jurist[6]. He dismissed the Statute Theory as being both incomplete and ambiguous, even though I disagree with him for reasons I have given earlier on my acceptance of the first two maxims of the Statute Theory.

Savigny advocated a more scientific method by saying that the problem is not to classify laws according to their object, but to discover for every legal relation that local law to which in its proper nature it belongs. Each legal relation has its natural seat in a particular local law, and it is that law which must be applied when it differs from the law of the Forum[7]. According to him, the principal determinants of this natural seat are:

1. The domicile of a person affected by the legal relation
2. The place where a thing, which is the object of a legal relation is situated
3. The place where a juridical act is done
4. The place where a Tribunal sits.

For every legal relation, there must be a contract between at least two parties, the two parties may agree to a law that will govern their contractual relationship. But where that law will do injustice to the main party that ought be benefit more from the contract, recourse must be had to what is just and proper in the eyes of the law. Looking at Savigny's principal determinants, all the factors given by Savigny are relevant factors that should govern any legal relation.

In the case of the domicile of a person affected by the legal relation, we should rather insist on the domicile of the parties to the contract, where the contract took place, where the breach was committed and where

[1] 10th Edition, Butterworths, 1979 @ p. 23
[2] In my opinion
[3] In my view
[4] In my opinion
[5] This was the final volume of his ***System of Modern Roman Law***. It was translated into English by William Guthrie in 1869; Cheshire & North's Private International Law (10th Edition) @ p. 23
[6] *Jessup, Transnational Law* (1956)
[7] *Cheshire & North's Private International Law* @ p. 24

the court (for settlement of the dispute) sits. If the subject of the dispute is a land, the lex situs governs the contract (even if it differs from the domicile of either party or both parties). The Law Court entertaining the Matter should equally be within the lex situs (location of land or property). However, the domicile of the party or parties may not really be of any importance if it differs from the place where the contract was entered into or even where the subject of the contract is located. The only exception to the domicile not being useful is where the law of the domicile or nationality of the parties or that of the most interested party does not allow him to purchase any property in a particular location. Then, if the particular party enters into any transaction in the forbidden location, the law of the domicile of the affected party nullifies the transaction, and no recourse will be had to the lex situs.

Therefore, of all Savigny's determinants, the most important factors are the second to four determinants. Generally, his theory attempts to decide each case according to the legal system to which it seems most naturally to belong[1]. Hence, we cannot do away with Savigny's Theory[2].

THE THEORY OF ACQUIRED RIGHTS

The theory of *Vested or Acquired Rights* originated with the Dutch Jurist, Huber, because it is based on the principle of territoriality. But it has been elaborated earlier this century by Common Lawyers like Dicey[3] in England and Beale in the USA. It says that a Judge cannot directly recognize or sanction foreign laws nor can he directly enforce foreign judgments, for it is his own territorial law which must exclusively govern all cases that require his decision.

According to *Cheshire, North & Fawcett*[4], the administration of Private International Law, however, raises no exception to the principle of territoriality, for what the Judge does is to protect rights that have already been acquired by a claimant under a foreign law or a foreign judgment. Extra – territorial effect is thus given, not to the foreign law itself, but merely to the rights that it has created.

This theory has been supported by the judgment of Sir William Scott in *Dalrymple v. Dalrymple*[5] where the issue arose as to whether Miss Gordon was the wife of Mr. Dalrymple. Sir William Scott said *the Cause being entertained in an English Court, it must be adjudicated according to the principles of English Law applicable to such a case. But the only principle applicable to such a case by the law of England is that the validity of Miss Gordon's Marriage Rights must be tried by reference to the law of the country where if they exist at all, they had their origin.*[6]

This theory of Acquired Rights receives insignificant support at the present day, and it has been seriously criticized[7]. It is my own opinion as stated earlier that this theory based upon the principle of territoriality is correct because we cannot respect rights acquired by any person under a foreign law and enforce same rights in another territory without those rights being enforced tallying with the laws of the territory where they are being sought to be enforced. Therefore, if we go by Sir William Scott's judgment in *Dalrymple v. Dalrymple* that: **"……** *the only principle applicable to such a case by the law of England is that the validity of Miss Gordon's Rights must be tried by reference to the law of the country where if the exist at all, they had their origin,* I will say that it is contrary to what the theory of Acquired Rights says. The theory does not give room for us to try any case by reference to the law of the country where the rights existed or originated. The theory strictly says that a judge cannot directly recognize or sanction foreign laws, nor can he directly enforce foreign judgments, for it is his own territorial law which must exclusively govern all cases that require his decision. So why should he in this case have to refer to the law of the country where the rights existed? The only reason why he should ever do so is only if the law of the place where such rights originated is exactly the same law applicable in his country, and if the facts and subject matter of the case are similar or the same[8]. I am very much in support of this theory.

This particular theory of territoriality seems like that which does not support the existence of Private International Law. Yet, that is not true because many countries have diverse laws governing various Issues, but still, so many laws on the same subject tally with those of England. For example, we must realize that Great Britain colonized many countries of the world in the past, and those former British colonies still have many laws

[1] Cheshire & North's supra @ p. 24
[2] As I observed that *Cheshire, North & Fawcett (14th Edition, Oxford University Press)* wrote nothing on Savigny's theory
[3] Cheshire, North & Fawcett Private International Law (14th Edition) @ p. 24; *Nadelmann, Conflict of Laws : International & Interstate* pp. 14-18
[4] 14th Edition, 2008 @p. 24
[5] (1811) 2 Hag Con 54
[6] Ibid @ 58
[7] *Arminjon* (1933) 1 Hague Recueil 1-105; *Cook Logical and legal basis of the conflict of laws, passim; Carswell* (1959) 8 ICLQ 268; *Kahn – Freund* (1974) III Racueil 157, 464-465
[8] In my humble view

imported from England which they apply in their country. An example of such countries is Nigeria where we still practise the English law which is one of the major sources of Nigerian Laws.

While defining Private International Law, I want to say that Private International Law should be defined to include recognition of laws on subject matters that are the same with those of England and the countries where the laws bringing about the existence of rights being sought to be enforced in England emanated from. If we interpret Private International Law to mean the recognition of foreign judgments, it will be ambiguous, without us indicating whether such foreign laws, rights judgments being sought to be enforced tally with the laws of the country where they are being sought to be enforced on the same subject and issue. No country should force another to make its laws more inferior especially in the case of a foreign country coming to bend the rules and laws already existing in the country where it is seeking to have its own laws recognized.

It is tantamount to a Guest coming into your home to dictate to you, in order to get things done to suit him, even if doing those things for him will discomfort you in your own house. If we view the theory of territoriality from this angle, we will get to appreciate its value more. It gives respect to countries where laws are being sought to be enforced, and it is indeed right for any Judge in such a country to exercise that right – I mean it is a right, not a priviledge, because it is the Judge's own country! No stranger should dictate to any owner of a place!!![1]

THE LOCAL LAW THEORY

The Local Law Theory was expounded by Walter Wheeler Cook whose method was to derive the governing rules, not from the logical reasoning of Philosophers and Jurists, but by observing what the courts have actually done in dealing with cases involving Private International Law Issues. He stressed that what Lawyers investigate in practice is how Judges have acted in the past, in order that it may be prophesied how they will probably act in future. To him, a statement of law is *true*, not because it conforms to an alleged *inherent principle,* but because it represents the past, and therefore the probable future judicial attitude[2]. Here, the Court of the Forum recognizes and enforces a local right, i.e one created by its own law. This court applies its own rules to the total exclusion of all foreign rules. But since it is confronted with a foreign – element case, it does not necessarily apply the rule of the Forum that would govern an analogous case purely domestic in character. For reasons of social expediency and practical convenience, it takes into account the laws of the foreign country in question. It creates its own local right, but fashions it as nearly as possible on the law of the country in which the decisive facts have occurred[3].

According to Cheshire, North & Fawcett Private International Law, *this local law theory affords no basis for the system of Private International Law*[4]*. For to remind an English Judge about to try a case containing a foreign element, that whatever decision he gives, he must enforce only the law of the Forum is a technical quibble that explains nothing and solves nothing. It provides no guidance whatever as to the limits within which he must have regard to the foreign law*[5].

I must say that the local law theory is based more on judicial precedence in determining the outcome of a case, and even though the court applies its own rules to the total exclusion of all foreign rules, it is not bad altogether . To say that it affords no basis for the systematic development of International Law is not true[6] because there is no country that operates all its laws to the extent that not even some of those laws are in tandem with some laws of other countries. My own understanding of the existence of Private International Law extends to the fact that countries of the world certainly have existing laws that are basically the same with those of other countries on many subject Matters. It is enough to state that Private International Law exists if a Nigerian married under English law in Nigeria goes to England to live, and his marriage gets recognized there because both countries are using the Marriage Act (with most at least, if not all Sections) of it being the same.

My main objection to the Local Law Theory is that judicial precedence should be considered if it does not lead to miscarriage of justice once the facts of any case are brought before any Court of Law. Or else, it is right to judge a case based purely on the uncontroverted facts brought before the court. The court in this case should pass any Ruling based on merits of the facts, and ensure that substantial justice is achieved. A court should also be ready to set aside a Precedent if it discovers in future that the precedent has led to miscarriage of

[1] In my opinion
[2] *Cheshire, North & Fawcett Private International Law* (14th Edition, Oxford University Press) 2008 @ p. 26
[3] *Cheshire, North & Fawcett supra @ p. 26*
[4] *Cheshire, North & Fawcett supra @ p. 27; Yntema* (1953) 2 AJCL 297, 317
[5] *Cheshire, North & Fawcett @ p. 27*
[6] Cheshire, North & Fawcett supra @28

justice. Such decision can be overruled. Even the Highest Court in any country should be able to over rule itself on any Matter it has erroneously decided in the past.

I see no wisdom in any Court of Law ignoring its own law while faced with a foreign case with a foreign element, except of course, there is a lacuna in its own law on the same subject. In that case, it may decide to pass its judgement based on the foreign law being pleaded before it. In my own view, this foreign law should equally be tested in the country of the Forum and be seen to suit the citizens of the forum if they end up having to resolve a similar case with similar facts in their own Courts.

CONCLUSION

In conclusion, the Local Law Theory is interesting and should not be done away with. Being a theory that bases its judgments on its own Rules to the exclusion of other countries' Laws shows it recognizes the fact that no country should dictate for another country in terms of laws to be applied within its territories.

However, it is stated in *Cheshire, North & Fawcett*[1] that *if it is confronted with a foreign element case, it does not necessarily apply the Rule of the forum, …. for reasons of social expediency, and practical convenience, it takes into account the laws of the foreign country in question*. That is good, provided the laws of the foreign country being considered does not negatively affect the rights of the citizens of the Forum when applied to them in the forum, should they be faced with the same Facts.

Judicial precedent is a good development in law especially for the fact that it helps us to predict the outcome of a case, but it cannot be followed at all times, for socio – economic, political, IT Development and other factors can make a judgment out dated and archaic, in which case, a court has to rule according to the changes that have evolved over the years. So, a court in following judicial precedents must be current enough and go through the merits of the facts of each case and know when to over rule itself or a lower court.

The Local Law Theory is very much similar to the theory of Acquired Rights and the Statute Theory which are both based on territoriality. The only difference is that the Local Law theory emphasizes judicial precedents with cases involving Private International Law. The theory of Savigny is equally still very relevant because whether we accept that fact or not, cases of Private International Law border mainly on jurisdiction, and we must therefore accept at least three of his Factors which are as follows: the place where a thing is situated (if is a property- and a lot of private international law cases involve property, whether personal or family/marital property) ; (b) the place where a juridical act is done (this factor is very necessary for establishing evidence by the party seeking Relief from the court); (c) the place where a Tribunal or Court sits (is also a critical factor because it could be sitting in a place that lacks jurisdiction to entertain the suit). So, how do we do away with Von Savigny's Theory which is still very relevant in the modern day when Issues are brought for determination before the Courts? In every aspect of law, Savigny's Theory is relevant. We need it in the Law of Evidence, Contract, Torts, Family Law, Law of Property, Succession, Private International Law, Human Rights and every aspect of Law we can think of.

Every theory has proved to be relevant, even though each has its merits and demerits; for there is no perfect theory yet formulated in Private International Law. We can only be evolving and developing theories as years go by, but it is definitely not yet possible to get that single theory that will solve all problems involving Private International Law. Countries only develop over the years and with socio-economic, political changes and the introduction of improved modern technology, some laws or theories may be losing their validity and be of less significance in practice and in theory. Yet, none can be entirely useless. There must still be at least, a feature of every theory that makes it remain relevant in modern day.

I humbly recommend a combination of aspects of each of the theories discussed when we are dealing with issues of Private International Law[2].

Lastly, if the Local Law Theory affords no basis for the systematic development of Private International Law, just because it applies its own rules to the exclusion of all foreign Rules[3], then, we may as well do away with Private International Law and focus on Public International Law and Jurisprudence including other areas of Law because no Court sitting in its own country should for any reason adopt and apply the laws of another country if it is not going to do justice to its own citizens, or if it differs from its own Laws on the same subject as that will mean the Court does not respect the rights of the citizens of its country and the Independent nature of its country. The Statute Theory and Acquired Rights Theory equally emphasize territorial laws. Do we throw away all these theories? Private International Law Cases are private in nature, and so the litigants on such areas of law

[1] Private International Law (14th Edition, Oxford University Press) 2008 @ p. 26
[2] In my opinion
[3] As stated by *Cheshire, North & Fawcett (14th Edition) @ p. 27*

are very few in number compared to the entire populace of a city or any country. So, do we inconvenience majority of the citizens just to enforce the rights of a few Foreigners?[1]

** The Author, ***Barr. (Miss) Chigozie Ifeoma Nwagbara, LL.M*** is also a Solicitor & Advocate of the Supreme Court of Nigeria

[1] I may ask.

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