Conflict of Laws and Diversity of Opinions—A View of The Nigerian Jurisdiction

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Introduction

At the core of Conflict of Laws or Private International Law (hereinafter PIL) is reconciling rules across jurisdictions for dispute settlement and the broader concerns of justice and public policy. PIL rules are used as a toolbox to assist litigants in resolving these problems that arise from complex litigations. This has immense significance regarding the security of contracts, enforcement of obligations, and overall predictability of solutions on these issues. Recent debates and academic discourse about the Nigerian Judiciary, its decisions, and opinions on PIL have inspired even more contemplation on the institution's place, expertise, and contribution to the evolution of PIL rules and practices in the region.[1] In this intervention, I situate these discussions in the larger structure of the judicature in Nigeria, the institution and system rather than individual opinions and expertise, and draw some lessons that should mediate academic, judicial, and legislative deliberations on this topic. I conclude that a scholarly engagement with the issues should be more robust than looking for limited answers that conform with precedents elsewhere—especially where these precedents do not help to address the contextual challenges. Equally, one should be mindful of the danger of incoherent transplants of norms and potential poor transplant effects. It is essential to stay focused on institutional capacities,

expertise and competence and how to enhance them—instead of individualized expertise, which, though important, are weak foundations for enduring legal evolution and a reliable PIL regime.

I.The Supreme Court of Nigeria and the Judicature

The Nigerian Supreme Court is necessary for the legal system's stability, coherence, and sustainable evolution.[2] On the other hand, the Court of Appeal and the High Courts (High Courts of States and the Federal Capital Territory, and the Federal High Courts) have a vertical relationship with the Supreme Court. Except where matters can commence directly at the Supreme Court, these lower courts serve as clearing houses for disputes on most commercial subjects within the country. This means that the Court of Appeal intervenes in many respects, and often, these matters do not go beyond the Court of Appeal. These courts also have several divisions across the country, and their jurisdictions and general adjudicatory competencies are recognized in the Constitution or as stipulated in their establishment laws. For instance, the Court of Appeal established by *section 237* of the Constitution of the Federal Republic of Nigeria 1999 (as amended) has 20 Judicial Divisions spread across the six geopolitical zones of the country.[3]

Therefore, with 36 states and a Federal Capital Territory, Abuja, Nigeria has a complex judicature with subsystems designed to serve the needs of communities and regions, which are often peculiar to the regions. Indeed, there are many jurisdictions within Nigeria, although the country is also a jurisdiction. The complexity is also illustrated by the embeddedness of Sharia law, and customary law, in private law in different parts of the country. For example, a court may be called upon to interpret contracts and commercial transactions on religious and customary interests. These must be situated in the broader contexts of the legal systems and the specific dispute.[4] In that regard, although the Supreme Court is one institution, cases are heard and determined by different judges and judicial panels that are usually constituted to hear appeals and original disputes before the court.[5] Foreign investors who may not have a sense of the complex system may become excited by the so-called "expertise in conflict of laws," which has

recently formed part of the debate about PIL in Nigeria and the African region.

The case-by-case (ad-hoc) constitution of judicial panels to hear and determine causes before the Supreme Court has significant ramifications for appreciating the different workings of the institution and how to render justice to parties, even in problematic PIL circumstances. The rotation, in terms of panel constitution, increases the individual and collective mastery of all matters that come before the court for adjudication—including commercial transactions, which have broad ramifications for PIL. It also eliminates the possibility of predicting which justices may sit on a matter before each panel is constituted. This can potentially insulate the court as an institution from compromise by targeting specific justices ahead of time. The fundamental nature of this approach—rotation of judges and constituting different panels for different cases—is even more perceptive when situated within the larger problem of corruption within the Nigerian judiciary.[6] The daily debate about corruption in the Nigerian judiciary makes it imperative that the public should not predict which judges would sit on a matter because of their "expertise" as this would serve the institution better and contribute to the ongoing efforts to curb corruption within the judiciary.[7] Individual efforts can then augment this institutional capacity and competence.

The above structure and approaches to judicial deliberations mean that there is a strong institutional capacity and competence regarding subjects upon which the Supreme Court is seized by law, practice, and tradition to adjudicate. This capacity pervades the entire judicature through such capillaries as precedents, rules of courts, practice directions, law reports, and memories accumulated over time that provide valuable guidance for judicial deliberations and determination of questions before the court, albeit PIL questions. Justices are also trained across different (sub)areas of law and often have significant statutorily required practice experience in various contexts within the jurisdiction before assuming judicial offices. In essence, the weight of the expertise lies more on the experience accumulated both as individuals and, more importantly, as custodians of the institutional capacity of the Supreme Court.

Sometimes, for example as in the case of the Court of Appeal, the different judicial divisions may reach different opinions on subjects ranging from marriage to child custody, service of processes, and enforcement of awards and judgments. This aligns with the general notion that courts of equal standing (coordinate jurisdiction) may depart from the opinion of their peers. Equally, state court

systems have their respective rules of procedure, which have ramifications for the outcomes of dispute settlements in the states. The differences in the rules of courts further consolidate the necessity for a diverse knowledge base, a broad experience portfolio, and a flexible approach because of the complexity of the Nigerian legal system, the complicated court structure, and the breadth of judicial constitution. These factors also advance the argument that case-by-case issues that may need to be resolved by the courts are best dealt with not only by an independent knowledge base, but also drawing from the collective knowledge reservoir and diversity that the justices of the Supreme Court bring to the court to address issues as may be appropriate.[8] Thus, the differences, approaches, plurality of views, conflicts of opinions, and diversity of questions are not unusual, considering the vastness of the jurisdiction and the interaction of different aspects of law and society.

The horizontal relationship between the courts of a particular subsystem, such as the Appeal Court divisions, does not mean there is chaos in the system or that they must depend on individual expertise to reconcile the PIL questions. Instead, it is an invitation to look to the institutional frameworks fashioned over time to manage disputes and achieve justice in cases. The wisdom of these institutional designs is more enduring because individual judges and their brilliance cannot sustain the long-term needs of any legal system. Thus, bright stars that stud the Nigerian Supreme Court's history (such as Chukwudifu Oputa, Kayode Eso, Muhammed Bello, Ignatius Pats-Acholonu, Akinola Aguda, Udo Udoma, and many others), while invaluable for the growth and evolution of the system, must be seen as part of the overall institutional structure for sustainable dispute resolution—especially on PIL—in the Nigerian legal system.

Arguably, it is potentially counterproductive to focus solely on individual judicial PIL expertise in trying to resolve PIL questions in Nigeria. This is so because it would be considerably difficult to find evidence of a fundamental miscarriage of justice merely because a preponderance of individual expertise is lacking. Furthermore, the U.S.—a bit similar to Nigeria in terms of federalism—does not do that either. In *J. McIntyre Machinery Ltd. v. Nicastro*, although there is no evidence of individualized PIL expertise of the judges, the U.S. Supreme Court resolved the issue regarding the rules and standards for determining jurisdiction over an absent party in a fair, just and reasonable manner.[9] The court came to a reasonable and just answer despite arriving at the majority judgment from a

plurality of views. It is, therefore, the collective quality of judicial deliberations and opinions that is the distinctive standard for measuring the capacity and competence of a court on matters of PIL. There are other examples of this display of institutional capacity and competence in the U.S. Supreme Court in cases such as *The Bremen v. Zapata Off-Shore Co.,**[10]* where Petitioner Unterweser agreed to tow respondent's drilling rig from Louisiana to Italy, with a forum-selection clause stipulating that any disputes would be litigated in the High Court of Justice in London. When the rig was damaged, the respondent instructed Unterweser to tow the rig to Tampa. Subsequently, the respondent filed a lawsuit in admiralty against petitioners in Tampa. Unterweser invoked the forum clause and initiated a lawsuit in the English court, which asserted its jurisdiction under the contractual forum provision. It was held that forum selection in the contract was binding unless the respondent could discharge the heavy burden of showing that its enforcement is unreasonable, unfair, or unjust.[11]

In *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC,* Raiders, a Pennsylvania company insured a yacht for up to $550,000 with Great Lakes, a UK-based company.[12] In 2019, the yacht ran aground in Florida. Raiders submitted a claim to Great Lakes for the loss of the vessel, but Great Lakes rejected it, citing Raiders' failure to recertify or inspect the yacht's fire-extinguishing equipment on time. Great Lakes sought a declaratory judgment to void the policy. The district court dismissed Raiders' counterclaims, applying New York law per the policy's choice-of-law provision. Raiders argued that this provision was unenforceable under *The Bremen v. Zapata Off-Shore Co.**[13]* The U.S. Supreme Court disagreed, holding that choice of law provisions are enforceable unless under some narrow exception that is not applicable in the circumstance. There is therefore great wisdom in attributing competence, expertise and capacity to the institution instead of individuals.

Thus, quality judicial deliberations and decisions reflect institutional competence. In the next section, I further the discussion on the issue of diversity, looking at subject matter diversity, diversity of views, and the place of stare decisis and precedents in light of the current debates about PIL and expertise in the Nigerian Supreme Court and its resonance for the legal system.

II. *Judex*, Expertise, and Diversity of Opinions

Quot homines tot sententiae—as there are peo, so are their opinions. A combination of factors including training, age, experience, temperament, and general background of judges affect their overarching nature and contributions to the making of legal institutions such as courts. These combinations of factors also influence the diversity of voices and views, opinions, individual competencies, and expertise. The ramification of these factors is even more vigorous and visible in PIL issues where there is a confluence of complex questions that could inspire diverse judicial decisions and plurality of opinions on controversies affecting commerce or other transnational/cross-border activities. Sometimes, this diversity can come as dissenting opinions. At other times, they may be reckoned with in the general *obiter* of superior courts such as the Supreme Court of Nigeria.

Regarding subject matter diversity, courts are usually confronted with different types of cases. These cross-cutting cases often mean that PIL rules must guide the courts in reaching a fair and reasonable dispute settlement. Equally, the rules to be applied may be implicated by background agreements or indemnities in bilateral and multilateral treaties, such as investment agreements, conventions, and soft law policies relevant to the dispute. Besides the subject matter diversity, which necessarily implicates PIL and opinion of courts, there is also procedural diversity, which affects the decisions of a court. In such situations, methods of service of processes, certification, and recognition of awards and judgments create a sort of complicated interaction between legislation and rules of court regarding how best to resolve disputes between litigants and in line with established precedents. In Nigeria's legal tradition, the rules of court support the rules of justice. Thus, the use of these tools can lead to different outcomes regarding diversity of procedure and diversity of opinion, and these have important implications for dispute settlement in PIL. For instance, a rule of court on limitation of time can influence the speed of hearing pretrial motions one way or another.

Yet, the dispute resolution system in Nigeria is not a rudderless ship. It has

anchorage on doctrines such as *stare decisis* and precedents. The primacy of precedents established by the Supreme Court provides the guardrails for making sense of the respective diversities within the legal system as it concerns PIL. *Stare decisis* and precedents ensure that the law remains strong, stable, reliable, and predictable without standing still. Overall, the stability, security, and predictability that come from this means that the broader answers to PIL questions lie in institutional and systemic resilience and capacities rather than individual efforts, expertise, or resilience. In light of all these, the doctrine of *stare decisis* and precedents further reinforce institutional competence and expertise. Individualized expertise can quickly become a weak point in the judicial institutional amour—especially if given undue prominence. For instance, judicial empaneling cannot wait for individualized expertise and competence.[14]

Equally, courts do not generally operate like that. Rather, courts must function with available human resources. Justice does not recline on individual expertise but on the entire institutional outlook of the courts. When citizens seek justice, they look up to the courts and not individual judges who may come and go at different intervals in the history of the court. Thus, even where divisions such as commercial divisions are established, the wisdom of such divisions is *functional*—to facilitate access to justice and enhance institutional competencies and efficiency for all manner of persons that appear before the court including corporate and other associated interests. Expertise in empaneling a tribunal is often a luxury preserved for arbitration tribunals or other alternative dispute resolution mechanisms. In those instances, parties can appoint their arbitrators or mediators based on their expertise. On the other hand, courts often have a set of judges already appointed by the appropriate authorities in the respective jurisdictions as at the time of commencement of actions.

Even then, expertise or expert views and opinions—whether in law or other spheres—are often subjects of evidence, and courts have procedural and institutional capacities to gain or leverage such expertise for fair and just settlement of disputes. When courts face certain difficulties, they can invite counsel to address the subject of controversy—usually through briefs. They can also invite *amicus* briefs or expert witnesses, such as professors of PIL, to testify on a matter in controversy with a view to answering critical questions for dispute resolution. These procedural safeguards reinforce the institutional competence and capacity and anticipate the limits of individual expertise. For example, *amici*

curiae (friends of the court) have since become an established tradition available to courts to assist them in understanding and applying rules, principles, doctrines, and laws that may have PIL significance.

The individual expertise of judges will not provide answers to several PIL issues that arise in complex cross-jurisdictional disputes. Moreover, the expertise of individual judges from Nigeria is attested to in several jurisdictions as such judges have, at different times, dispensed justice in Gambian, Ugandan, and Namibian courts.[15] Therefore, the current fad of trying to prop up individual judges as PIL experts is mistaken—that expertise is better attributed to the institution, else scholars unwittingly set the judges up to fail and, in the process, diminish the established tradition of competence and expertise which the Nigerian judicature has managed to curate over time.

Conclusion

The judicature in Nigeria has often been a subject of intense scholarly deliberations. What has never been doubted is the expertise and competence of the courts in all matters within their assigned jurisdiction—both institutionally and in terms of the individuals who occupy the high judicial offices of the country. Individually, Nigerian judges serve with distinction and occupy high judicial offices even in countries such as the Gambia, Namibia, Botswana, Eswatini, and Uganda. These positions often require critical competence in the cross-border application of the law on matters relating to PIL. Therefore, there is no evidence to show that the expertise and capacities attributable to the judicature and its *judex* have been suspended at any time. Thus, the idea that "an expert in conflict of laws is now at the Supreme Court after a long time"[16] is potentially misleading—especially for persons, businesses, and investors who may not know the inner workings of complex legal systems such as Nigeria.

[1] Some of the interesting debates and discourse on the courts and PIL in Nigeria include, Folabi Kuti, SAN, *Critiquing the Critique: X-raying Dr. Okoli's restatement of the Court of Appeal's decision in TOF Energy Co. Ltd & Ors. v. Worldpay LLC & Another* (2022) LPELR -57462(CA) August 14, 2023, https://lawpavilion.com/blog/critiquing-the-critique-x-raying-dr-okolis-restatement-of-the-court-of-appeals-decision-in-tof-energy-co-ltd-ors-v-worldpay-llc-anor-2022-lpelr-574/>. Chukwuma Samuel Adesina Okoli, *A Critique of the Nigerian Court of Appeal's Recent Restatement of the Principles and Decisions on the Enforcement of Foreign Jurisdiction Clause in Nigeria*, November 8, 2022< https://lawpavilion.com/blog/a-critique-of-the-nigerian-court-of-appeals-recent-restatement-of-the-principles-and-decisions-on-the-enforcement-of-foreign-jurisdiction-clause-in-nigeria/> ; The Nigerian Court of Appeal declines to enforce a Commonwealth of Virginia (in USA) Choice of Court Agreement, March 10, 2021https://conflictoflaws.net/2021/the-nigerian-court-of-appeal-declines-to-enforce-a-commonwealth-of-virginia-in-usa-choice-of-court-agreement/. Anthony Kennedy, The Recognition and Enforcement of Foreign Judgements at Common Law in Nigeria, December 15, 2020 (on why the common law action should be revived) https://www.afronomicslaw.org/2020/12/15/the-recognition-and-enforcement-of-foreign-judgments-at-common-law-in-nigeria ;Richard Mike Mlambe, *Presence as a basis for International Jurisdiction of a Foreign Court Under Nigerian Private International Law,* December 16, 2020 https://conflictoflaws.net/2020/presence-as-a-basis-for-international-jurisdiction-of-a-foreign-court-under-nigerian-private-international-law/.

[2] *Section 230* of the Constitution of the Federal Republic of Nigeria 1999 (as amended) establishes the Supreme Court as the apex judicial institution in the country.

[3] Divisions of the Court of Appeal in Nigeria < https://www.courtofappeal.gov.ng/divisions> (last visited May 29, 2024). The Federal High Court of Nigeria has 35 Judicial Divisions < https://www.nextfhc.fhc.gov.ng/court/divisions>. (last visited May 29, 2024).

[4] Pontian Okoli, *Former British Colonies: The Constructive Role of African Courts in the Development of Private International Law,* 7 University of Bologna Law Review, 2, 126 (2022). https://bolognalawreview.unibo.it/article/view/15830

[5] Original disputes before the Supreme Court are often questions of controversy between the states as among themselves or between the states and the Federal Government of Nigeria. See *Section 232* of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

[6] Ameh Ejekwonyilo, *Corruption in Nigerian Judiciary is extensive—UNODC,* Premium Times March 1, 2024.

[7] Joseph Onyekwere, *ICPC Corruption Verdict Unsettles Judiciary*, The Guardian January 26, 2021; Punch: Editorial, *Uprooting Corrosive Corruption in the Judiciary*, August 24, 2023.

[8] Computation of time can be used to show some of the differences. For example, Order 48 rule (5) of the Rivers' State High Court Civil Procedure Rules 2019 provides that time will not run when the courts are under lock and key. This unique provision arises from the difficult Chief Judge succession experience in that state in the 2015/2016 legal year. In comparison, Lagos State High Court and the High Court of the Federal Capital Territory, Abuja, have no similar provision regarding when the court is under lock and key. See *Order 49 of the High Court of the Federal Capital Territory Abuja,* 2018; *Cf* Order 48 of the Lagos State High Court Civil Procedure Rules 2019. But to show flexibility of approaches, in responding to such a situation of courts being under "lock and key" as seen in the case of Rivers State, the Chief Judge of the High Court of the Federal Capital Territory, adopted a different approach by issuing a practice direction regarding computation of time to cover the period of industrial action by judicial workers. *[S]ee* High Court of the Federal Capital Territory, FCT Computation of Time and Exemption from payment of Default fees) Practice Direction No 1, 2021 (for the period April 6th, 2021 – June 14, 2021) < https://www.fcthighcourt.gov.ng/download/PRACTICE-AND-PROCEDURE/COMPUTATION-OF-TIME-AND-EXEMPTION-FROM-PAYMENT-OF-DEFAULT-FEES-PRACTICE-DIRECTION-NO.-1-2021-FOR-THE-PERIOD-APRIL-6TH-14TH-JUNE.pdf>. See also High Court of Delta State (Exemption of Payment of Default fees for filing of processes) Practice Direction (No 2) of 2021 for the Period of JUSUN Strike from April 6, 2021, to June 14, 2021. < https://thenigerialawyer.com/wp-content/uploads/2021/06/Practice-Direction_JUSUN-strike_cover-001-converted-delta.pdf>.

[9] 564 U.S. 873 (2011). Adam N. Steinman, *The Lay of the Land: Examining the*

Three Opinions in J. McIntyre Machinery, Ltd. V. Nicastro, 63 S. C. L. Rev. 481 (2011) https://scholarship.law.ua.edu/fac_articles/291/ ; Elisabeth A. Beal, *J. McIntyre Machinery Ltd v. Nicastro: The Stream of Commerce Theory of Personal Jurisdiction in A Globalized Economy*, 66 University of Miami Law Rev. 233 (2011). https://repository.law.miami.edu/umlr/vol66/iss1/9/

[10] *407 U.S. 1 (1972).* Ronald A. Brand*, M/S Bremen v. Zapata Off-Shore Company: US Common Law Affirmation of Party Autonomy,* The Common Law Jurisprudence of Conflict of Laws (2023) https://scholarship.law.pitt.edu/fac_book-chapters/50/ ; Harold G. Maier, *The Three Faces of Zapata: Maritime Law, Federal Common Law, Federal Courts Law*, 6 Vand. J. of Transnational Law 387 (1972-1973). https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=2618&context=vjtl ; K. M. Edwards, *Unterweser: Choice Not Chance in Forum Clauses,* 3 California Western International Law Journal 397 (1973).

[11] See also *Carnival Cruise Lines Incorporated v. Shute*, 499 US 585, 593-594 where the Court noted that the enforcement of forum selection clauses has the salutary effect of removing confusions and reducing the time and expense of pre-trial motions.

[12] *Great Lakes Insurance SE v. Raiders Retreat Realty Co.*, 601 U.S. (2024).

[13] Supra note 10.

[14] *Sonnar (Nig.) Ltd. & Anor. V. Partenreedri M. S. Nordwind Owners of the Ship M.V. Nordwind & Anor.* (1987) LLJR –SC. (courts can elicit expertise through evidence as in this case where the opinion of German lawyers as to the law in Germany was relevant in reaching a fair, just and reasonable decision. The courts also decide on what probative value to give the expert evidence considering the interest of justice).

[15] For instance, Hon. Justice Emmanuel Agim served in the Gambia and Swaziland (Eswatini) at the highest judicial levels in those countries < https://triplenet.com.ng/lawparliament/law_body.php?myId=2699&myView=259>. Justice Akinola Aguda was also the Chief Judge of the Supreme Court of Botswana. < https://www.news24.com/news24/renowned-african-jurist-dies-20010908>.

[16] *See* Chukwuma Okoli and Abubakri Yekini, *The Nigerian Supreme Court now has a Specialist in Conflict of Laws*, Conflict of Law.Net. January 7, 2024. https://conflictoflaws.net/2024/the-nigerian-supreme-court-now-has-a-specialist-in-conflict-of-laws/