Private International Law in Africa: Comparative Lessons

By:

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About a decade ago, Oppong lamented on the “stagnation” in the development of private international law in Africa.[1]That position is no longer as true as it was then - there is progress. Though the African private international law community is small, the scholarship can no longer be described as minimal.[2] There is a growing interest in the study of private international law in Africa. Why is the recent interest in the study of private international law [in Africa] important to Africa? What lessons can be learnt from other non-African jurisdictions on the study of private international law?

With increased international business transactions and trade with Africa, private international law is a subject that deserves a special place in the continent. Where disputes arise between international business persons connected with Africa, issues such as what court should have jurisdiction, what law should apply, and whether a foreign judgment can be recognised and enforced are keys aspects of private international law. Thus, private

international law is indispensable in regulating international commercial transactions.

Currently, there is no such thing as an “African private international law” or “African Union private international law” that is akin to, for example, “EU private international law”. It could, however, be argued that there is such a thing as “private international law in Africa”. The current private international law in Africa is complicated as a consequence of a history of foreign rule, and the fact that Africa has diverse legal traditions (common law, Roman-Dutch law, civil law, customary law and religious law). Many countries in Africa still hang on to what they inherited during the period of colonialism. As colonialism breeds dependence, there has not been sufficient conscious intellectual effort to generate a private international law system that responds to the socio-economic, cultural, and political interests of countries in Africa.

Drawing from comparative experiences, it is opined that a systematic academic study of private international law might create the required strong political will and institutional support (which is absent at the moment) that is necessary to give private international law its true place in Africa.

There has always been private international law in Africa from time immemorial. Africans, like any other persons, migrated from one territory to another (especially within Africa), where the clash of socio-cultural, political, and economic interests among persons in Africa gave rise to private international law problems as we know them today. Some of these disputes between private parties of different nation states may have likely been resolved through war or diplomacy.

The systematic study of private international law as we know it today has largely been academically developed by the Member States of the European Union (EU) and the United States of America (“USA”). The period of industrialisation in the 19th century, and the rise of capitalism gave birth to a variety of solutions that could respond to globalisation. Indeed, the firm entrenchment of the principle of party autonomy in international dispute settlement in the 20th century was a way of securing the interest of the international merchant who does their business in many jurisdictions. The

privatisation of international law dispute settlement is what gave birth to the name *private* international law.

In the international scene, the study of private international law is currently dominated by two major powers: the EU and the US, but the EU wields more influence internationally. The EU operates an integrated private international law system with its judicial capital in Luxembourg. The EU can be described as a super-power of private international law in the world, with The Hague as its intellectual capital. Many of the ideas in the Hague instruments (a very important international instrument on private international law) were originally inspired by the thinking of European continental scholars. As a result of colonisation, many countries around the world currently apply the private international law methodology of some Member States of the EU. The common law methodology is applied by many Commonwealth countries that were formerly colonised by the United Kingdom; the civil law methodology is applied by many countries (especially in French-speaking parts of Africa) that were formerly colonised by France and Belgium; and the Roman-Dutch law methodology is applied by many countries that were formerly colonised by Netherlands.

Asia appears to have learnt from the EU and USA experience. Since 2015 till date, private international academics from Asia and other regions around the world have held many conferences and meetings with the purpose of drawing up the principles of private international law on civil and commercial matters, known as “Asian Principles of Private International Law”). The purpose of the principles is to serve as a non-binding model that legislators and judges (or decision makers) in the Asian region can use in supplementing or reforming their private international law rules.

It is important to stress that it is the systematic study of private international law by scholars over the years in the US and Member States in the EU and Asia that created the required political will and institutional support to give private international law it’s proper place in these countries. In Africa, such systematic study becomes especially important in an environment of growing international transactions both personal and commercial. This is what propels the study of private international. It is seldom an abstract academic endeavour given the

nature and objectives of the subject.

Oppong – a leading authority on the subject of private international law in Africa - has rightly submitted in some of his works that private international law can play a significant role in Africa in addressing issues such as: “regional economic integration, the promotion of international trade and investment, immigration, globalisation and legal pluralism.” A systematic study of private international law in Africa will address these some of these challenges that are significant to Africa. Indeed, a solid private international law system in African States can create competition among countries on how to attract litigation and arbitration. This in turn can lead to economic development and the strengthening of the legal systems of such African countries.

What should private international law in Africa look like in the future? Is it possible to have a future “African Union private international law” comparable to that of the European Union? Should it operate in an intra-African way to the exclusion of international goals such as conflicts between non-African countries, and the joint membership or ratification of international instruments such as The Hague Conventions? Should it take into account internal conflicts in individual African states, where different applicable customary or religious laws may clash with an enabling statute or the constitution, or different applicable religious or customary laws may clash in cross-border transactions? In the alternative, should it focus primarily on diverse solutions among countries in Africa, and promote international commercial goals, with less attention placed on African integration?

These questions are not easy to answer. It is opined that private international law in Africa deserves to be systematically studied, and solutions advanced on how the current framework of private international law in Africa can be improved. If such study is devoted to this topic, the required political will and institutional support can be created to give [private international law] proper significance in Africa.

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[1]RF Oppong, “Private International Law in Africa: The Past, Present and Future” (2007) 55 *American Journal of Comparative Law* 677; RF Oppong

“Private International Law Scholarship in Africa (1884–2009) – A Selected Bibliography” (2010) 58 *American Journal of Comparative Law* 319.

[2]For recent monographs on the subject see generally CSA Okoli and RF Oppong, *Private International Law in Nigeria* (Hart, 2020- forthcoming); P Okoli, *Promoting Foreign Judgments; Lessons in Legal Convergence from South Africa and Nigeria* (Wolters Kluwer, Alphen aan den Rijn, 2020)*;* AJ Moran and AJ Kennedy, *Commercial Litigation in Anglophone Africa: The law relating to civil jurisdiction, enforcement of foreign judgments, and interim remedies* (Juta, Cape Town, 2018); RF Oppong, *Private International Law in Ghana* (Wolters Kluwer Online, Alphen aan den Rijn, 2017); M Rossouw, *The Harmonisation of Rules on the Recognition and Enforcment of Foreign Judgments in Southern African Customs Union* (Pretoria University Law Press, Pretoria, 2016); E Schoeman *et. al.*, *Private International Law in South Africa* (Wolters Kluwer Online, Alphen aan den Rijn, 2014); RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge University Press, Cambridge, 2013); C Forsyth, *Private International Law – the Modern Roman Dutch Law including the Jurisdiction of the High Courts* (5thedition, Juta, Landsowne, 2012).

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