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Former British Colonies: The Constructive Role of African Courts in the Development of Private International Law

PONTIAN OKOLI

Dr Pontian Okoli, PhD and LLM from the University of Dundee (Scotland), is a lecturer in Private International Law and Commercial Law at the University of Stirling (Scotland). He is a Barrister and Solicitor, his practice being mainly focused on international commercial/corporate dealings and investment risks. He has also published in several areas of law, including a special focus on Private International Law, International Commercial Law, and how access to justice concerns such areas.

@ pontian.okoli@stir.ac.uk

0000-0003-2704-4161

ABSTRACT

Significant strides have been made in efforts to facilitate the resolution of international disputes in Africa. However, cross-border issues that concern private litigants have remained challenging. One major reason is the legal history of relevant countries which often makes it difficult to contextualize legal principles inherited before independence. It is sometimes unclear how African courts determine the current law and how their discretionary powers should be used. This challenge is complicated where scholars focus on what they consider that the law ought to be without first accepting what the law is. Any sustainable growth of private international law requires a systematic approach to legal developments. Using the main comparators of South Africa and Nigeria, this article examines the connections between legal traditions and the legal methods that are required to ensure that there is a sustainable development of private international law in Africa. The core enquiry is set on a tripartite structure. Law in context, fidelity to context and functionalist approaches are essential elements that should drive the resolution of disputes in private international law matters. A dominant theme is how the recognition and enforcement of foreign judgments should be examined through appropriate interpretational mechanisms.

KEYWORDS

Comparative Law; Legal Context; Common Law; Judicial Discretion; Foreign Judgments

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INTRODUCTION

Generally, national laws cannot be divorced from the history and legal development of jurisdictions within which such laws exist.[1] Laws are in many cases not purely autochthonous,[2] and private international law cannot be divorced from relevant interactions with public international law.[3] In this regard, a distinction between imperialism and colonialism has its merits because both concepts have shaped African legal developments in different ways.[4] Imperialism may be understood in an industrial and capitalist context, while colonialism may be expressed in a more political sense. In the nineteenth century context of international law in Africa, it was persuasively argued that British protectorates did not distinguish between imperialism and colonialism even though both were different.[5] The British focused on "stability, tax revenue, and the flow in inter-colonial and transitional commerce" but adopted a more flexible approach in matters of culture and religion.[6]

[1] Knop, Michaels and Riles argued that "many conflicts problems are, in one way or another, a product of histories or present-day forms of colonization". *See* Karen Knop et al., *Transdisciplinary Conflict of Laws Foreword*, Law & Contemp. Probs., 2008, at 1, 12. (discussing the importance of colonial laws on conflicts problems).

[2] *See* Friedrich K. Juenger, *American and European Conflicts Law*, 30 Am. J. Comp. L. 117 (1982), (arguing that U.S. conflict of laws developed into "an indigenous crop of conflicts law and literature").

[3] Knop et al, *supra* note 1, at 12. María Julia Ochoa Jiménez, *Conflict of Laws and the Return of Indigenous Peoples' Cultural Property: A Latin American Perspective,* 26 Int'l. J. Cult Prop. 437, 438 (2019).

[4] Especially by European countries which colonized about ninety percent of Africa. Ethiopia successfully resisted colonialism, although occupied by Italy for half a decade. Free blacks in the U.S. were resettled in Liberia. *10 Countries Who Were Never Colonized by Europeans*, World Atlas, https://www.worldatlas.com/articles/10-countries-who-were-never-colonized-by-europeans.html (last visited Sept. 7 2021); Founding of Liberia, 1847, Office of The Historian (U.S. Department of State) https://history.state.gov/milestones/1830-1860/liberia (last visited Sept. 7, 2021).

[5] *See* James Thuo Gathii, *Imperialism, Colonialism and International Law,* 54 Buffalo L. Rev. 1013, 1014 (2007).

[6] *See* John R. Schmidhauser, *Legal Imperialism: Its Enduring Impact on Colonial and Post-Colonial Judicial Systems,* 13 Int'l. Pol. Sci. Rev. 321, 323 (1992) (discussing how the British adopted different approaches depending on the end sought).

Imperialism and colonialism have had distinct influences on legal developments in Africa. For example, the Portuguese engaged in international commerce in parts of Africa long before the British and French, who were the predominant colonial powers in Africa.[7] While the former decided to focus on international commerce,[8] the latter went a step further to make political decisions in favor of their colonial conquests. However, even in the Portuguese context, the colonialists were involved in military campaigns usually only to promote their commercial interests in West Africa.[9] It may be suggested that in the context of national laws in Africa, colonialism usually involved some form of imperialism while imperialism did not necessarily lead to colonialism.[10] Thus, Portuguese law is not a part of Nigerian jurisprudence despite Portuguese commercial activities. By contrast, the English common law was introduced and gained traction in Nigeria and South Africa (the latter to a limited extent) because of the colonial approaches adopted in both countries.[11] This illustrative context is important because the development of transplanted law is interwoven with the need for its establishment and the functions that it serves.[12] Conscious decisions have been pivotal in shaping the legal development in former colonies. Legal history, development and conscious decisions extend to private international law, including the recognition and enforcement of foreign judgments, which have gained renewed attention partly due to the Hague Judgments Convention.[13]

Considering legal traditions, the central question is what legal methods are required to ensure that there is a sustainable development of private international law in Africa. This question is significant because it is foundational and there is no clarity on how legal development should take place in an area of law that has practical implications. The nature of private international law suggests that comparison during legal development is often inevitable - a point more self-evident in the alternative term

[7] *See The Portuguese had already traversed West Africa in the fifteenth century. See* J. Okoro Ijoma, *Portuguese Activities in West Africa before 1600 The Consequences,*11 TRANSAFRICAN J. HIST. 136 (1982).

[8] Also inspired by "the crusading spirit and the scientific enquiry" *see id.* For an insight into "the days of the Lagos market in the fifteenth century", see Eduardo Moreira, *Portuguese Colonial Policy,* 17 J. INT'L. AFR. INST. 181, 185 (1947), (describing trade in the Lagos area at the time).

[9] For example, the Portuguese helped the Oba of Benin to "ward off a strong threat" through supply of firearms and direct involvement. *See* Ijoma, *supra* note 7, at 145.

[10] Unlike the West African context, the Portuguese adopted a colonial power status in areas that include today's Mozambique and Angola. *See* Moreira, *supra* note 8, at 185.

[11] *E.g.* British conquest in South Africa. *See* BEAT LENEL,THE HISTORY OF SOUTH AFRICAN LAW AND ITS ROMAN DUTCH ROOTS 10 (2002).

[12] *See* Mathias Reimann, *Comparative Law and Neighbouring Disciplines, in* THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 13, 23-24 (Mauro Bussani & Ugo Mattei eds., 2012).

[13] Hague Conference on Private International Law, Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019, https://www.hcch.net/en/instruments/conventions/full-text/?cid=137.

"conflict of laws".[14] Legal development has necessitated the evolution of laws generally, but this is particularly so for private international law in Africa because of colonial influences. This evolution has presented some challenges and contradictions in some former British colonies including Southern and West Africa. With a primary focus on South Africa and Nigeria, this article articulates such challenges and contradictions in two main categories: "the paradox of legal existence" and "the paradox of legal interpretation". A major argument is that there are two emergent schools of thought concerning both categories of paradoxes. First, with respect to the existence of law, legal commentary and even case law suggest that there is some conflict between the evidence of absence and the absence of evidence.[15] In other words, whether laws cease to exist merely because scholars or even courts do not mention them. Second, with respect to legal interpretation, there are significant concerns as to how relevant private international rules should be interpreted. For example, it is sometimes unclear what approach to legal interpretation should be applied.

Nigeria and South Africa are important jurisdictions for several reasons, including economic and political ones. For the purposes of this article, South Africa is also strategic because it has inspired calls for the "common law" to promote the development of private international law.[16] The recognition and enforcement of foreign judgments constitute a paradigm in this regard. Conventional wisdom suggests that a comparative approach is essential in private international law matters. For example, the laws of a Commonwealth African country may be compared with the English common law, considering former British colonialism. Also, the laws of such a country may be compared with those of other African countries or other parts of the Commonwealth. However, comparative approaches that do not factor in the contexts in which the relevant laws exist have created a gap from which significant challenges in dealing with the paradoxes of legal existence and legal interpretation follow. Not only is there considerable legal uncertainty, but there is also a questionable approach to sustainable legal developments, especially since scholars at times have different views on what the law is. It is a significant concern that scholars are sometimes divided as to what the law

[14] *See* Arthur Taylor von Mehren, *The Contribution of Comparative Law to the Theory and Practice of Private International Law*, 26 Am. J. Compar. L. 32, 33 (1978).

[15] Various fields have contained examples of the evidence of absence/absence of evidence dichotomy over centuries. But the presumption of innocence in law is a classic exception to the requirement of evidence. For a multi-disciplinary context, *see* Efraim Wallach, *Inference from Absence: The Case of Archaeology*, Palgrave Commc'n, 2019, at 1.

[16] *See* Muyiwa Adigun, *Enforcing ECOWAS Judgments in Nigeria through the Common Law Rule on the Enforcement of Foreign Judgments,* 15 J. Priv. Int'l L. 130, 161 (2019); *see also* Richard Frimpong Oppong, *The High Court of Ghana Declines to Enforce an ECOWAS Court Judgment,* 25 Afr. J. Int'l Compar. L. 127, 132 (2017).

is rather than what it should be. There are also implications for other African countries, especially former British colonies.

This article examines such paradoxes by using the recognition of foreign judgments as the main subject. This subject also highlights a major question: the extent to which an aspect of private international law (for example, foreign judgments) can be interpreted as inextricably connected with the law. Comparative insights may be sought but, generally, private international law is a part of domestic law and national approaches thereto may differ.[17] Colonial legal history and the peculiar challenges or experiences of countries require a contextual approach which is often missing in practice.[18] Thus, an overarching argument in this paper is that a tripartite contextual approach is necessary. First, a "law in context" approach requires an examination of the "special problems a legal order faces at a given time in its history".[19] Second, a "fidelity to context" approach requires "the analysis of particular institutions and social spheres" *vis-à-vis* the appropriateness of rules and procedures.[20] "Legal rules and judgments" also require adaptation to ensure "effectiveness, fairness as well as efficiency".[21] Third, a functionalist approach considers how "functions can serve as an interpretive cross-systemic perspective" in understanding different laws and in developing knowledge of legal rules and institutions.[22] To ensure legal comparison that is underpinned by a contextual approach, African courts should first determine and accept the current law as the law. This approach is critical to ensuring legal comparison that factors in contextual differences. Second, there should be a clear understanding of the courts' discretionary powers to amend the law. Third, courts need to decide how they want to use such powers. In all cases, there are several layers of context to be considered as African countries continue the journey of legal development in a sustainable manner.

[17] The Hague Conference is mandated to "work for the progressive unification of the rules of private international law". *See* Statute of the Hague Conference on Private International Law art 1, *adopted Oct. 31, 1951* (entered into force July 15, 1955). Many African countries are not members of the Hague Conference including Nigeria. South Africa is a member.

[18] For insights into the approach, see O. Kahn-Freund et al, *Reflections on Public Policy in the English Conflict of Laws,* 39 Transactions Grotius Soc'y 39, 48 (1953); Walter Wheeler Cook, The Logical and Legal Bases of the Conflict of Laws 457-58 (1942); Ronald J. Daniels et al., *The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies,* 59 Am. J. Compar. L. 111, 115 (2011); Mark van Hoecke and Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards A New Model for Comparative Law*, *in* Legal Theory and the Legal Academy 495, 496-7 (1998).

[19] Philip Selznick, *Law in Context Revisited*, 30 J. L. Soc'y 177, 180 (2003).

[20] *Id.* at 181.

[21] *Id.*

[22] *See* Ralf Michaels, *Explanation and Interpretation in Functionalist Comparative Law - a Response to Julie de Conick*, 74 Rabel J. Compar. Int'l Priv. L. 351, 357 (2010).

Drawing on these major thematic aspects, this article concludes that sustainability in this regard requires African courts to take control of legal developments in a deliberate manner. The foundational task is to consider what laws exist.

1. THE PARADOX OF LEGAL EXISTENCE

It may appear basic to find out what laws apply, but this inquiry can be complex especially in a private international law context.[23] It is not always easy to draw a neat distinction between what the law is and how it is interpreted. This is also because judicial interpretation of the law represents the law in many cases. The difficulty in determining legal existence will be mainly illustrated through two jurisdictional bases for the recognition and enforcement of foreign judgments: domicile and mere presence.

Traditionally, persons are domiciled where they have their "permanent home",[24] although important modifications were introduced as the traditional meaning could affect those who have never been in a forum.[25] Mere presence implies that defendants may be served with court documents such as a writif they are physically present in the foreign jurisdiction.[26] Unlike other jurisdictional bases such as submission and residence, domicile and mere presence have proven to be divisive among courts and scholars. For example, it was argued that "under the current common law regime in Nigeria, South Africa, and many other African countries, only presence, residence and submission qualify as indirect bases of jurisdiction – no other basis of jurisdiction utilized by the foreign court, including service out of the jurisdiction, matters".[27] This argument means that domicile is not a ground of indirect jurisdiction in South Africa, but the case law clearly points to the contrary. In *Government of the Republic of Zimbabwe v Fick* [hereinafter *Fick*],[28] the South African Constitutional Court (the highest appellate court) observed that:

> The principles recognised by our law with reference to the jurisdiction of foreign courts for the enforcement of judgments sounding in money are: 1. at the time of the commencement of the proceedings the defendant [. . .] must have been domiciled or

[23] Larry Kramer, *More Notes on Methods and Objectives in the Conflict of Laws,* 24 Cornell Int'l L. J. 245, 247 (1991).
[24] *See* Whicker v. Hume (1858) 7 H.L.C. 124 (H.L.).
[25] Civil Jurisdiction and Judgments Act 1982 § 41(2)-(6) (UK.), considering the EU Brussels regime.
[26] Also called causal, temporary, or transient presence.
[27] Richard Frimpong Oppong, *The Dawn of the Free and Fair Movement of Foreign Judgments in Africa?* 16 J. Priv. Int'l L. 575, 580 (2020).
[28] *Government of the Republic of Zimbabwe v. Fick* 2013 (5) S.A. (C.C.) at 325 (S. Afr.).

> resident within the State in which the foreign court exercised jurisdiction; or 2. The defendant must have submitted to the jurisdiction of the foreign court.[29]

Some other authors have, however, conceded that domicile is a ground of indirect jurisdiction even though they have also argued that domicile should be rejected.[30] There is merit in this approach of first accepting what the law is. This is also a good example of the tensions that sometimes exist between what the law is and perceptions of what the law ought to be. Relevant legal developments in South Africa have inspired considerable literature on how the common law can be used to further the recognition and enforcement of foreign judgments.[31] However, as this article will argue, *Fick* itself illustrates the contradictions that can emerge if the current law is glossed over or omitted. It is a different matter altogether what judges may want to do regarding the laws that exist considering any powers that they may have to exercise discretion.

There is a question as to why there may be a difference of opinion regarding what the law is. This is a crucial issue because the contestations should be more about how the law is applied or what the law ought to be. One major reason for this complex reality is the making of legal comparisons without contextualization. For example, it may be considered that South Africa and Nigeria are members of the Commonwealth, and therefore they should take similar or even the same positions on the same issues.[32] This is not necessarily the reality, as this article argues, and it is critical to examine when such laws may differ. There are two major justifications for examining the common law. First, both South African and Nigerian private international law regimes include the common law. Second, both regimes do not apply the common law in the same way.

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[29] *Id.* para. 38. *See also Purser v. Sales* 2001) (3) S.A. 445 (S.C.A) paras 8-13 (S. Afr.); for a confirmation of the legal position: *Cf. Maschinen Frommer v. Trisave Engineering & Machinery Supplies (Pty) Ltd.* 2003 (6) S.A. at 69 (C.P.D.) at 73 (S. Afr.) the argument that the latter is of no help because jurisdiction was not before the court. *See* Andrew Moran & Anthony Kennedy, *When Considering Whether to Recognize and Enforce a Foreign Money Judgment, Why Should the Domestic Court Accord the Foreign Court International Jurisdiction on the Basis that the Judgment Debtor Was Domiciled There? An Analysis of the Approach Taken by Courts in the Republic of South Africa*, 16 J. Priv. Int'l L. 549, 556 (2020).

[30] *See* Moran and Kennedy *id.* at 549.

[31] *See* Adigun; Oppong, *supra* note, at 16.

[32] *E.g.*, South Africa joined in 1931 and Nigeria in 1960 – both upon removing the vestiges of British rule: *Member Countries*, The Commonwealth, https://thecommonwealth.org/member-countries (last visited Sept. 18, 2021).

1.1. WHAT COMMON LAW?

The English common law "was essentially autochthonous, based on known rule and familiar practice. It owed very little to Roman law".[33] A distinctive feature of the English common law is that "it is to be found not in codes, treatises, statutes or learned compilations but in the decisions of the judges on the particular facts of particular cases argued before them, and in the body of precedent built up over the years".[34] The generic reference to "the common law" outside the judicial context of England has increasingly led to the assumption that any reference to "the common law" is the English common law. There may be a different understanding with respect to the "common law" and "English common law especially where the later had limited influence[35] and some former British colonies.[36] There has also been an emergent understanding of how the "common law" may evolve in uniquely local contexts.[37] The different evolutions of the common law were not unique to Africa. In the United States [hereinafter U.S.], there was no "federal common law".[38] States were to apply the common law as "altered, interpreted, or preserved by the state courts".[39] This does not mean that patterns did not emerge, but such patterns were preceded by an adaptation of the common law to particular contexts.[40] Thus, it is a question of fact whether the development of the common law in former colonies can or should be uniform.

The possibility of developing "a Nigerian common law" was considered shortly after Nigeria attained independence.[41] This was so considering that Nigeria received the English common law in force in England with a cut-off date of the 1st of January 1900.[42] This substantive reception of English law is objective. In other words, as will be demonstrated shortly, the reception of the English common law is determined by set

[33] Raoul C. van Caenegem, The Birth of the English Common Law 91 (2nd ed. 1988). This law is "so different" from the "common learned law of the European universities" *See id.* at 88.
[34] Thomas Bingham, *The future of the Common Law*, 18 Civ. Just. Q. 203, 208 (1999). *See also* Robert L.A. Goff, *The Future of Common Law*, 46 Int'l. Compar. L. Q. 745, 748 (1997).
[35] *See, e.g.*, Scotland. Smith argued that "one result of the consequent hostility [there were intermittent wars over centuries] between the two countries was a certain revulsion in Scotland against English methods, including those of English law". Thomas B. Smith, *English Influences on the Law of Scotland*, 3 Am. J. Compar. L. 522, 523 (1954).
[36] Such as South Africa which is a mixed jurisdiction.
[37] For a detailed analysis of case law on the need for a "Malaysian common law" *see, e.g.*, Tun A.H. Mohamad & Adnan Trakic, *The Reception of English Law in Malaysia and Development of the Malaysian Common Law*, 44 Common L. World Rev. 123 (2015).
[38] Morris L. Cohen, *The Common Law in the American Legal System: The Challenge of Conceptual Research*, 81 Law Libr. J. 13, 22 (1989).
[39] *Id.*
[40] *See* Lauren Benton & Kathryn Walker, *Law for the Empire: The Common Law in Colonial America and the Problem of Legal Diversity*, 89 Chicago-Kent L. Rev. 937 (2014).
[41] For a detailed analysis of this issue, see A. N. Allot, *The Common Law of Nigeria*, Int'l. Compar. L. Q. (1965).
[42] *See id.* at 38.

legal parameters. The need for a contextual approach to the English common law is illustrated by the evolution of the law in two West African countries that had similar colonial experiences, but significantly different approaches on approaching the English common law. On the one hand, after the attainment of independence, the Ghanaian legislator stated that "in deciding upon the existence or content of a rule of common law [. . .] the Court may have regard to any exposition of that rule by a court exercising jurisdiction in any country".[43] On the other hand, the Nigerian legislator stated that subject to Nigerian federal law and competence, "the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st of January 1900" shall apply in Nigeria.[44] This legal provision is consistent with a legal analysis provided just after Nigeria attained independence.[45] The different legislative approaches to the English common law by the two countries, Nigeria and Ghana, having very similar colonial experiences is a cautionary tale for a non-contextual approach to comparative analysis.

Unlike the Nigerian context, the South African common law has been long established. The British maintained the Roman-Dutch law as the common law of the Cape Colony.[46] This was later extended to the whole of the British Dominion which would become South Africa. The English common law complemented the Roman-Dutch law.[47] The South African common law encompasses South African judicial decisions but is also shaped by treatises of Roman-Dutch jurists as well as commentaries on Roman law.[48] This context is important because it will be demonstrated how, unlike Nigeria, the South African courts historically have not only had a more limited scope to apply the English common law but also had a wider berth to develop the South African common law. It is necessary to consider whether there is any scope for an automatic application of the English common law.

[43] Ghanaian Interpretation Act (1960) § 17(4). This was passed into law in 1960 but remained in the law after several amendments over decades. In a 2009 version of the Act, there were detailed provisions on how to deal with statutes of general application including "requisite alteration, modification or adaptation so as to make that statute or instrument applicable to the circumstances". *See* § 11(2) of the 2009 version.

[44] *See* Nigerian Interpretation Act § 32(1). *Cf.* §32(3) of the Nigerian Interpretation Act that any such alteration should not affect the substance.

[45] *See* Allot, *supra* note 41, at 37-88.

[46] *See* Lenel, *supra* note 11, at 9.

[47] *See* Elspeth Reid, *Mixed but not Codified: The Case of Scotland*, *in* The Scope and the Structure of Civile Codes 343 (Julio César Rivera ed., 2013).

[48] Customary law featured much later (centuries after the establishment of the Cape colony) and even then was subject to Roman-Dutch law and did not apply to foreign judgments. *See* Lenel, *supra* note 11; *see also* Joan Church et al., Human Rights from a Comparative and International Law Perspective 58 (2007).

1.2. THRESHOLD FOR AUTOMATIC APPLICATION OF THE ENGLISH COMMON LAW

Legal history suggests that the need for a contextual application of the English common law is sometimes glossed over. Even when appeals still lay to the Privy Council in certain jurisdictions, the Privy Council could decide that a jurisdiction was entitled to a legal development different to that of the English common law. In *Australian Consolidated Press Limited v. Uren* [hereinafter *Uren*],[49] the Australian High Court had to determine whether the law with respect to libel developed in Australian law should be changed considering *Rookes v. Barnard*.[50] The House of Lords was more concerned about whether such law had developed "by processes of faulty reasoning" or "founded upon misconceptions".[51] Otherwise, as the Privy Council observed, the focus should be on whether the policy of the relevant law "calls for decision and where its policy in a particular country is fashioned so largely by judicial opinion".[52] The Privy Council concluded that the Australian High Court could not be faulted in its view that a change in approach was desirable. *Uren* is not a conflicts case but had clear implications for the development of the English common law in former colonies. This liberal approach was taken when the Privy Council had force in a former colony, to say nothing of when that appellate power and default uniformity had ceased.[53] In the absence of the Privy Council having powers in any former colony, as this article will argue, it is difficult to accept any premise that the current English common law should automatically apply to such a former colony.[54] The roles of private and public international law are complementary but should not be conflated.

The relationship between comparative law and private international law is "much more complicated" than that between comparative law and public international law.[55] It is critical to understand and develop rules of private international law within appropriate contexts.[56] This deliberate approach requires an acknowledgment of existing laws, not an obfuscation or rationalization. The trouble with not acknowledging existing rules of private international law is that mere disapplication of laws does not necessarily help to develop the jurisprudence. However, laws that are acknowledged but

[49] *See Australian Consolidated Press Ltd. v. Uren* (1969) 1 A.C. 590 (P.C.) (appeal taken from Australia).
[50] *See Rookes v. Barnard* [1964] (H.L.), [1964]A.C. 1129.
[51] Australian Consolidated Press Ltd. v. Uren (1969) 1 A.C. 590 (P.C.) (appeal taken from Australia).
[52] *Id.*
[53] Australia stopped appeals to the Privy Council only in 1986, decades after Nigeria had done so.
[54] Exceptions include the U.K.'s overseas territories etc. *See* THE PRIVY COUNCIL OFFICES, https://privycouncil.independent.gov.uk/privy-council/committees/ (last visited Sept. 10 2021).
[55] *See* George A. Bermann et al., *Comparative Law: Problems and Prospects*, 26 AM. UNIV. INT'L. L. REV. 935 (2011).
[56] Writing in the context of "choosing" laws, Symeonides argued that an "intelligent choice" was predicated on knowledge. See the arguments of Symeonides in response to George Berman et al. at 263.

consciously disapplied do potentially help to develop the jurisprudence where legal guidance or jurisprudence is lacking or scanty. If modern rules of private international law should be interpreted within appropriate contexts,[57] then it is also necessary to first understand other rules of private international law in their (English) common law context where applicable.

The experiences of the European Union [hereinafter E.U.] and the U.S. illustrate deliberate approaches to private international legal development. While the E.U. and U.S. approaches to aspects of private international law may be considered "revolutions",[58] the reality is that both approaches represent the aspirations of certain developing countries. Regional integration in the case of the E.U. and the assertiveness of considering policy interests in the case of the U.S. are instructive,[59] especially as the latter engaged the common law in a deliberate manner.[60] While the term "conflicts revolution" is often used to describe choice of law aspects, it is also used to "capture the jurisdictional elements as well"[61] and foreign judgments to a more limited extent.[62] An appropriate approach to interpreting rules of private international law is essential.

2. THE PARADOX OF LEGAL INTERPRETATION

The English common law was transplanted to relevant colonies, including Nigeria and South Africa. As a transplant, the English common law can and should be adapted where necessary to ensure that the law meets the individual needs of post-colonial States.[63] Otherwise, such States will be default receptacles for rules which may not necessarily

[57] For the argument that E.U. rules of private international law must be understood in the context of European integration, *see, e.g.*, Lydia Lundstedt & Erik Sinander, *Enhancing Critical Thinking in Private International Law,* 54 Law Tchr. 400 (2020).

[58] Mills largely focused on the choice of law aspect, but also considered how it related to other aspects of private international law such as jurisdiction. *See* Alex Mills, *The Identities of Private International Law: Lessons from the U.S. and E.U. Revolutions*, 23 Duke J. Comp. Int. Law 445, 445-446 (2013). For "a determined effort to build a new common law system of jurisdiction in the "proper forum", *see* Albert A. Ehrenzweig, *A Counter: Revolution in Conflicts Law? From Beale to Cavers*, 80(2) Harvard Law Rev. 377, 400 (1966).

[59] Mills argued that "identifying and pursuing state policy interests" could be associated with "the U.S. choice of law revolution". *See Mills*, at 465.

[60] Mills for example argued that "The U.S. rightfully rejected the artifice of vested rights which had become foundational to common law private international law in favor of policy-oriented approaches" even though American legal realism may have pushed things "too far". *See id.* at 447-48.

[61] Jesse M. Cross, *Rethinking the Conflicts Revolution in Personal Jurisdiction*, 105 Minn. L. Rev. 679 (2020).

[62] *See* Celia W. Fassberg, *Realism and Revolution in the Conflict of Laws: In with a Bang and Out with a Whimper*, 163 U. Pa. L. 1919, 1921 (2015).

[63] *See* Luis F. Del Duca and Alain A Levasseur, *Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System*, 58 Am. J. Int. L. 1 (2010); *see also Joost Blom, Canadian Private International Law: An English System Transplanted into a Federal State*, 39 Neth. Int. L. Rev. 155 (1992).

promote solutions to conflicts issues. For example, some colonies had "very divergent streams of common law transplantation and evolution".[64] Such nuances and complexities are important because private international law is a part of national law even though private international law is a technical area.

This law may be found in judicial precedents, statutes developed by the national legislator, or treaties incorporated into domestic law.[65] In South Africa and Nigeria, judges play a vital role in the development of private international law including common-law approaches to varying degrees. One aspect of private international law cannot be entirely separated from other aspects *vis-à-vis* the legal system within which the courts interpret and apply laws in general. In Nigeria for example, as this article will demonstrate, certain foundational statutory structures concern private international law in general, especially the framework for applying the English common law where relevant. Legal interpretation should be considered in relevant contexts (including South African and Nigerian), of which a fundamental one is jurisdictional.

2.1. A NIGERIAN PERSPECTIVE

There are two major questions with respect to the English common law. First, whether Nigeria is anchored to a default application of the English common law. This This question is partly justified because the Nigerian law is clear about the cut-off date for the application of the English common law.[66] In practical terms, there is no conflict between this legal position and the need for Nigerian law to be adapted to factor in modern needs. The argument that "as a matter of practice" Nigerian courts apply "the Common Law which is currently in force at a particular time in England"[67] cannot be accepted without contextualization. To sustain this logic, it was further argued that the Nigerian courts "determine what constitutes the current Common Law of England at a particular time".[68] It is potentially contradictory for Nigerian courts to subjectively ascertain the current position of the English common law, which is itself an objective matter. Arguably, as the

[64] Sandra Fullerton Joireman, *The Evolution of the Common Law: Legal Development in Kenya and India*", 44 Commonw. Comp. Politics 190 (2006). Comparing Kenya and India, Joireman argued that India had established common law courts more than a century before Kenya. This afforded the former an opportunity to adapt the common law to its context 199-200. Bennett argued that the common law was invariably applied where State interests were affected. *See* T.W. Bennett, *Conflict of Laws – the Application of Customary Law and the Common Law in Zimbabwe*, 30 Int. Comp. Law Q. 59 (1981).

[65] On the incorporation of such international rules "in domestic law", *see, e.g.*, the Private International Law (Implementation of Agreements) Bill 2020-21 (HL) cl. 2 enacted on 14 December 2020: (UK) https://publications.parliament.uk/pa/ld5801/ldselect/ldconst/55/5503.htm (last visited Sept. 17, 2021).

[66] *See* Nigerian Interpretation Act, *supra* note 43; *see also* Allot, *supra* note, at 41.

[67] Adigun, *supra* note 16, at 156.

[68] *Id.*

next question will demonstrate, it is more accurate to state that the Nigerian courts in practice interpret relevant Nigeria High Court laws including relevant references to the English common law.[69] The second question is whether the application of the English common law should automatically change because the law has changed. This will lead to major inconsistencies and undermine systematic legal development. The influence of relevant statutes that regulate the operation of Nigerian state courts illustrates the need to understand possible complexities in navigating the English common law. For example, the Lagos High Court is empowered to apply "law and equity [. . .] concurrently and in the same manner as they are administered by the High Court of Justice in England" subject to any contrary enactment in Nigeria.[70] This is the premise upon which an important case illustrative of this point was decided. The case is *Benson v. Ashiru*.[71] In 1967, well after Nigeria had become independent and a republic, Justice of the Supreme Court Brett observed that "[t]he rules of the common law of England on questions of private international law apply in the High Court of Lagos".[72] The case concerned defamation. In applying the English common law, this case has provided an important basis to amplify relevant provisions of the Lago State High Court Law. In *Zabusky v. Israeli Aircraft Industries*, the Court of Appeal considered Sections 10 and 11(1)(a) of the High Court Law to have "concurrent jurisdiction with Her Majesty's High Court of Justice".[73]

While this approach may have seemed expedient at the time, it creates the real potential for both legal uncertainty, contradictions, and inefficiency. This approach creates legal uncertainty because, by way of illustration, the Nigerian appellate courts can apply the current English common law in January and the law in England is then amended in June. The issue here is that a Nigerian appellate decision in January will remain binding on the lower courts due to *stare decisis*. Lower courts can only decide cases on similar facts but based on the English common law position. To decide differently based on the English common law position in June, lower courts must then wait for the Nigerian appellate courts to change the law to the English common law position in June. Distinguishing cases is a valid strategy in litigation. However, the art of distinguishing can be a double-edged sword as it can be easily politicized. More so, the absence of specific evidence concerning existing law does not necessarily mean that such certain laws do not exist. Thus, any recourse to a default application of the English common law should be scrutinized in specific legal contexts. This complex situation contrasts with the South African approach in terms of developing the common law.

[69] Each of the thirty-six federating states (including the Federal Territory) in Nigeria has a High Court.
[70] *See* § 10 Lagos State High Court Law (1955) Cap. (80) § 10 (Nigeria), https://laws.lawnigeria.com/2018/09/10/lagos-state-high-court-law/ (last visited Jul 10, 2022). *Cf.* § 8 on general jurisdiction.
[71] *See Benson v. Ashiru* [1967] NSCC (SC) 198 (Nigeria).
[72] *Id.* at 201.
[73] *Zabusky v. Israeli Aircraft Industries* [2006] LPELR-11597 (CA) (Nigeria).

Legislative authority remains supreme in common law countries, and there is a "preference for procedural rather than substantive justice"[74] in restricting the exercise of judicial discretion. However, procedural and substantive aims are not always easily distinguishable, especially where the courts have been empowered to develop and articulate mechanisms that can promote substantive justice. An appropriate approach to developing private international law in African countries will ensure that there is coherence between substantive laws and procedural laws. In Nigeria for example, the same High Court Law that was interpreted by the Supreme Court to be the basis for applying substantive English common law was also the basis for making High Court Rules which are revised regularly. Private international law has been driven by the courts either actively or passively. For example, there has been no statutory intervention in the recognition and enforcement of foreign judgments for more than half a century.[75] This is essentially a common denominator between Nigeria and South Africa. This is so because even though South Africa enacted a statutory law in this regard, only a neighboring country has been a beneficiary of that extension.[76]

There are advantages for the common law to develop along similar lines in former colonies, especially in non-domestic matters such as trade. However, Nigerian High Court laws do not necessarily create the same opportunity for jurisprudential development. Although there are many similarities, there are also significant differences. Northern States are usually subject to Sharia law due to Islamic influence. Clearly, English law does not apply to cases governed by Islamic law.[77] Islamic practice also exists in Southern States even though such express provisions are not contained in relevant High Court laws. Even within Southern States, the High Court laws of Lagos State and Abia State differ in some significant respects.[78] For example, the latter provides that the High Court may be guided by "decisions and other pronouncements made by any superior court with regard to like provisions on matters in *"any common law country"*.[79] But the provision is instructive and consistent with the argument that "the law may be influenced from any one direction".[80] A more pressing reality is that the

[74] Kermit Roosevelt, *Legal Realism and the Conflict of Laws*, 163 U. Pa. L. Rev. 1939, 1938 (2015).
[75] *See* Reciprocal Enforcement of Judgements Ordinance (1922) Cap. (175) (Nigeria); Foreign Judgements (Reciprocal Enforcement) Act (1961)Cap. (F35) (Nigeria).
[76] Namibia. *See* R. Kelbrick, Civil Procedure in South Africa, para. 23 (3rd ed. 2015) (explaining the applicability of the South African Statute).
[77] *See* Kano High Court Law. Cap. (53) HCL § 58, (Nigeria).
[78] *See Supra* notes, at 69-73.
[79] Abia State High Court Law HCL § 15(1) (Nigeria). This is subject to other laws including the Interpretation Law which specifically mentions the English common law.
[80] Australian Consolidated Press Ltd. v. Uren (1969) 1 A.C. 590 (P.C.) (appeal taken from Austl.). For the argument that English law ought also to develop considering Commonwealth decisions, see David Jackson, *The Judicial Commonwealth,* 28 (2) The Cambridge Law Journal 257, 259 (1970).

express inclusion of "any common law country" in the Abia State High Court law, unlike the Lagos law that refers to the English common law, underscores interpretational challenges. The interpretation of specific High Court Rules of Lagos has been assumed to apply always and in all situations. This is one issue with ignoring the 1900 threshold specifically preserved by the Interpretation Act which is a federal statute.[81] Otherwise, foreign decisions including English case law are merely persuasive and can be used for "expanding the frontiers of Nigerian jurisprudence".[82] Such frontiers can be expanded if there is no established precedent in Nigeria.[83]

Ogun State of Nigeria offers another useful illustration. Although the Ogun High Court Law replicates many provisions of the Lagos High Court Law, it signals a clear intention to chart its own path where it considers necessary and without recourse to other High Court laws. Section 29 specifically provides for commercial transactions and it states that the Court shall not enforce obligations against Nigerians if such obligations arise from credit.[84] In this regard, the Court has discretion to determine that it was not "reasonably probable that the Nigerian was fully aware of the nature of the obligation and the consequence of failure to perform the same".[85] When compared with the Lagos High Court Law that specifically provides for enabling powers regarding foreign judgments, this provision may have relevance to such obligations that arise in private international law. This is especially so considering the express mention of Nigerians in the provision. There is a possible argument that private international law is protected from such intricate in-country differences, but not if there are cases that historically evolved based on the interpretation of certain High Court provisions of a state.[86] Apart from the fact that relevant private international law statutes such as those on foreign judgments are federal, there is no supporting jurisprudence to adopt an approach solely determined by provisions of each High Court Law. Yet, if rules of private international law have developed through an interpretation of such individual state laws, then it means that they can be distinguished if other High Court laws with different provisions are considered. Most importantly, there are inadequate legal and institutional frameworks for the sustainable development of private international law. The situation is significantly different in South Africa. Since the analysis concerning the English common law is also applicable to Nigeria, this will be done in the next Section.

[81] *See Supra* note 44.
[82] *In Re: Abdullahi* [2018] 14 NWLR (Pt 1639) 272 (CA), 290-292 (Nigeria). In this case, the Supreme Court was persuaded.
[83] *See Id*.
[84] "The Court shall not enforce against a Nigerian living in any area specified by the Order of the Executive Council [. . .]".
[85] *Id.*
[86] *E.g.*, *Benson v. Ashiru* [1967] NSCC (SC) 198 (Nigeria).

2.2. A SOUTH AFRICAN PERSPECTIVE

The unique constitutional support for an active development of the South African common law has created the basis to determine what law exists and how it should be interpreted by searching for evidence. This approach may be illustrated through South African case law on foreign judgments and how there is a real risk of "cherry-picking" in a way that undermines legal certainty. The question whether the mere presence of a judgment debtor in the foreign jurisdiction is a valid jurisdictional ground concerning foreign judgments illustrates the need for appropriate methodology in determining the existence and interpretation of relevant laws. The mere presence of a natural person is relevant under the English common law where the person was served with process in the foreign jurisdiction.[87] This has been so since the nineteenth century,[88] even though doctrine law has been criticized.[89] The position under the English common law has also been accepted although there may be debates regarding the extent to which such a person benefited from that country's laws.[90] Essentially, more recent cases have clarified and confirmed the position on mere presence as valid.[91] Of course, mere presence has been questioned "as a desirable basis of jurisdiction if the parties are strangers and the cause of action arose outside the country concerned".[92] The concern from the standpoint of *forum conveniens* is whether the foreign court was adequately equipped to deal with factual or legal issues.[93] Interestingly, the parties in *Richman v. Ben-Tovim* [hereinafter *Richman*] (where the South African Supreme Court of Appeal enforced a

[87] *See Buchanan v. Rucker*, [1808] 103 E.R. 546 at 547 (KB) – this case was cited by the Court of Appeal in *Pemberton v. Hughes*, [1899] 1Ch 781 (UK); *see also Singh v. Rajah* of Faridkote, (1894) A.C. 670 at 683-684 (India). Relevant cases after the turn of the nineteenth century include Emanuel v. Symon, [1908] 1 KB 302.

[88] *See* the appellate case of *Carrick v. Hancock*, 12 T.L.R. 59 (Q.B. 1895). For the argument that important *dicta* of the English Court of Appeal (including the fact that "mere casual presence" will suffice) were correct, *see* J.G. Collier, *Conflicts and Company Law Combine to Bar Enforcement of Asbestosis Damages*, 43(3) Cambridge University Press 416, (1990). For the point that *Carrick* was "the main authority for the principle that mere presence coupled with service of the claim form was sufficient to confer jurisdiction a foreign court". *See* Trevor C. Hartley, International Commercial Litigation: Text, Cases And Materials On Private International Law 439 (3rd ed. 2020).

[89] *See, e.g.*, Lord Collins, Dicey, Morris and Collins, *The Conflict of Laws*, para. 14-060 (15th ed. 2012).

[90] Fentiman relied on cases such as Buchanan, Singh and Rucker concerning the significance of mere presence under the English common law. This was so even though he noted that the explanation of such a defendant taking advantage of the foreign jurisdiction's laws was undermined by the fact that it applied to natural persons. *See* Richard Fentiman, International Commercial Litigation 624 (2nd ed. 2015).

[91] *See Adams v. Cape* has been "accepted as an accurate statement of the current position on common law" with respect to temporary presence even though the case concerned companies. *See also* Hartley, *supra* note 87, at 438. In confirming the position under the common law, the U.K. Supreme Court observed that *Adams v. Cape* and relevant authorities which it "re-states or re-interprets" remained the "leading decisions". *See Rubin v. Eurofinance SA*, [2012] UKSC para. 108. The English Court of Appeal had analyzed and endorsed *Singh v. Rajah of Faridkote* concerning mere presence in its judgment. *See Adams v. Cape*, [1990] Ch 433 at 457-458. The U.K. Supreme Court thus endorsed the jurisdictional principles, including that of presence, stated in Lord Collins, *supra* note 89, at para. 14R-054.

[92] Lord Collins, *supra* note 91, at para. 14-060.

[93] *See Id.*

foreign judgment based on mere presence) were not "strangers" and the cause of action arose in England.[94] The need for a contextual approach to the determination and interpretation of the law can be illustrated through the Constitutional Court case of *Fick*.[95]

In *Fick*, the Zimbabwean Government expropriated the respondents' farms. That Government denied the farmers compensation and access to court.[96] The South African Development Community [hereinafter S.A.D.C.] Tribunal resolved the matter in favour of the farmers, but the government refused to comply with the decision of the Tribunal which then awarded a costs order. Again, the Zimbabwean Government refused to comply with the order and the farmers then sought recognition and enforcement in South Africa including the attachment of the Zimbabwean Government's property.[97] The Court observed that "[T]he origin of the costs order was a dispute that implicates human rights and the rule of law, which are central to the [S.A.D.C.] Treaty and our Constitution. A [c]onstitutional matter does therefore arise here in relation to access to courts which is an element of the rule of law".[98] Important issues such as the immunity that Zimbabwe claimed were considered. As statutory law was too restrictive,[99] the Constitutional Court resorted to the common law.[100] The Court simply quoted the jurisdictional grounds previously listed by the Supreme Court of Appeal (in 2000 and 1994): the defendant must have been either domiciled or resident in the foreign jurisdiction, or submitted to the jurisdiction of the foreign court. The Court neither made any commentary on *Purser v. Sales*[101] (from which it quoted) nor *Richman*[102] – both Supreme Court of Appeal decisions on jurisdictional grounds.

In *Richman*,[103] the judgment debtor was served with a writ when he was temporarily in England. The central issue was whether, considering South African law, the English Court had validly exercised jurisdiction based on the physical presence of the judgment debtor.[104] The Supreme Court of Appeal then observed that "The South African conflict of law *rules relevant to the present action* are clear"[105] and relied on Pollak concerning the rules on the foreign court's "jurisdiction to entertain an action for a judgment sounding in money against a defendant *who is a natural person*".[106]

[94] *Id.*
[95] *See Government of the Republic of Zimbabwe v. Fick*, 2013 (5) S.A. (C.C.).
[96] *See Id.* para. 2.
[97] *See Id.* para. 3.
[98] *Id.* para. 21.
[99] *See Id.* para. 37.
[100] *See Id.* para. 38.
[101] *Supra* note 28.
[102] *Supra* note 28, at 283.
[103] *Id.*
[104] *Id.* para. 1.
[105] Quoting an earlier case: *Reiss Engineering Co Ltd. v. Insamcor (Pty) Ltd.*, [1983(1)] SA 1033 (W) at 103 (S. Afr.).
[106] *Richman, supra* note 94, paras. 7 and 9.

The Court listed physical presence, domicile, residence, and submission.[107] The Supreme Court of Appeal enforced the English judgment. It is necessary to restate that the judgment debtor in *Fick* was the Zimbabwean Government. Even so, whether a company can be resident without being present is a different matter altogether. Practical logic suggests otherwise, which is in part why the United Kingdom [hereinafter U.K.] Supreme Court preferred the term "presence" to "residence" in the context of the English common law.[108]

Despite its context, *Fick* inspired a new perspective on jurisdictional grounds and the recognition and enforcement of foreign judgments generally[109] but also seemed to cause a bit of uncertainty. For example, it was argued that physical presence was "a well-established ground of international jurisdiction"[110] in South Africa. However, it was also argued shortly after that "fortunately" *Fick* gave "no consideration to mere presence".[111] There is an argument that *Fick* has provided a list of indirect jurisdictional grounds and, therefore, since it omits mere presence, this ground should be deleted. In other words, the South African Constitutional Court "discarded" the jurisdictional ground of mere presence.[112] "Discard" in this context suggests that mere presence was rejected in *Fick*. There are two major issues with this argument. First, this approach may seem practical but it has the potential undermine a systematic development of the law. Second, the approach does not consider the jurisprudential context of the relevant cases. The Supreme Court of Appeal enforced the foreign judgment as a matter of obligation. This decision drew criticisms not because the judgment debtor was not indebted, but essentially because the jurisdictional ground was considered as exorbitant.[113] As earlier

[107] *Id*.

[108] *Rubin v. Eurofinance SA*, [2012] UKSC para. 89. Indeed, the S.A.D.C. Treaty referred to jurisdiction over disputes both between Member States and natural or legal persons. *See* Treaty of the Southern African Development Community art. 15(1), Oct. 21, 2015 [hereinafter S.A.D.C.]; *see also Government of the Republic of Zimbabwe v. Fick* 2013 (5) S.A. (C.C.).

[109] *See* Adigun; Oppong *supra* note 16.

[110] Zhu Weidong, *The Recognition and Enforcement of Commercial Judgments between China and South Africa: Comparison and Convergence*, 7 China Leg. Sci. 33, (2019).

[111] Zhu Weidong, *Enforcing Commercial Judgments between China and South Africa in the Context of BRICS and BRI*, 65 J. Afr. Law 1-13 (2020).

[112] Since it "exclusively referred to" the grounds stated in *Purser v. Sales*, (2001) (3) S.A. 445 (S.C.A). Saloni Khanderia, *The Hague Conference on Private Law's Proposed Draft Text on the Recognition and Enforcement of Foreign Judgments: Should South Africa Endorse It?*, 63 J. Afr. Law 413, 419 (2019). By contrast, although Xaba rejected the decision in Richman, the author conceded that the Constitutional Court's use of "the most relevant (grounds)" weakens the argument that court rejected mere presence. See GMN Xaba. *Presence as a Basis for the Recognition and Enforcement of Foreign Judgment Sounding in Money: The 'Real and Substantial Connection' Test Considered*, 36 Obiter 121, 125 (2015). See also Government of the Republic of Zimbabwe v. Fick, 2013 (5) S.A. (C.C.) para. 51 (S. Afr.).

[113] In rejecting the ground, Forsyth conceded that it promoted clarity and certainty. *See* C.F. Forsyth, The Mo Modern Roman-Dutch Law Including the Jurisdiction of The High Courts 90 (5th ed. 2012). *See also* Christian Schulze, *Conflict of Laws*, 1 Ann. Surv. S. Afr. Law 207, (2007); Moran and Kennedy *supra* note 29, at 573.

stated however, this article is not concerned with the merits, weaknesses, or viability of any jurisdictional ground.

A more poignant question is whether the ground is compatible with the South African common law. After all, the latter has also been influenced by the English common law which recognizes the jurisdictional ground. In *Fick*, the Constitutional Court in principle had the opportunity to overrule *Richman* but it did not do so. The Court endorsed the rationale of *Richman* on the need to secure the enforcement of obligations. However, the Court did not include presence as a jurisdictional ground. There are some possible reasons for this (in no order of importance). First, the Court took only what it needed from existing case law to decide the relevant issues. *Richman* was decided in the context of natural persons. The Zimbabwean Government is not a natural (or corporate person). Second, the Court did not want to overrule, perhaps for policy reasons. For example, that jurisdictional ground would usually be used as a last resort anyway. It would be pointless to serve a writ on a judgment debtor based on temporary presence if he resided within that foreign jurisdiction. Third, the Court may have considered it counterproductive to unduly curtail judicial flexibility to ensure that obligations are enforced. Fourth, the Court simply lacked the jurisdiction to overrule *Richman*. Generally, the jurisdiction of the Constitutional Court is restricted to constitutional matters, in which regard it has developed an impressive reputation.[114] Since 2013 the court has had expanded jurisdiction to hear appeals upon granting leave if "the matter raises an arguable point of law of general public importance" [115] which the court ought to consider. But this jurisdictional expansion was after *Fick*. *Fick* was decided on 27 June 2013 while the expansion of the court's jurisdiction took effect from 23 August 2013.[116] There is, therefore, merit in the view that mere presence remains a jurisdictional ground concerning foreign judgments in South Africa.[117]

In South Africa, the courts have a constitutional duty to develop the common law "in respect of both the civil and criminal law, whether or not the parties in any particular case request the court to develop the common law under [S]ection 39(2)".[118] As this is a solemn duty, the Constitutional Court has been deliberate, methodical, and thorough when it decides specifically to develop any aspect of the common law. There are examples in this regard including the development of the laws with respect to

[114] "Its reputation among constitutional courts in new democracies is second to none", *see* Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 Int. J. Const. Law 106, (2009).
[115] S. Afr. Const., 1996, § 167(3)(b)(ii). This provision was absent in § 167(3) of the original version.
[116] S. Afr. Const., Seventeenth Amendment Act of 2012.
[117] *See* Moran and Kennedy, *supra* note 29, at 573; Hartley, *supra* note 88, at 439.
[118] *Carmichele v. Minister of Safety and Security*, 2001 BCLR 995 (CC) para. 36 (S. Afr.). *See also* para. 66 of Government of the Republic of Zimbabwe v. Fick, 2013 (5) S.A. (C.C.).

family[119] and delict.[120] In the former case, the existing common law and the Marriage Act prevented same-sex couples from enjoying the same rights as heterosexual couples.[121] The Constitutional Court developed the common law to surmount the challenges which existing restrictions posed to such couples with respect to marriage. In the latter case, the question was whether the law of delict should be developed to afford the applicant the right to claim damages if the police or prosecutor were negligent.[122] The Constitutional Court decided that, considering the complexity of the case, the High Court should deal with the issue in a factual context.[123] In contract law, the majority of the Constitutional Court declined to develop the common law in such a manner that would impose a duty to negotiate in good faith.[124] But the reason was technical as the case to develop the common law was made for the first time in the Constitutional Court.[125] Otherwise, it was "necessary to infuse the law of contract with constitutional values, including values of ubuntu".[126] This view was considered in another split decision of the Court but the applicants could not justify how enforcing the terms which they sought to avoid violated public policy.[127]

In *Fick*, once again, the Constitutional Court expanded access to justice through a development of the existing law.[128] The purpose of expanding access to justice in *Fick* was to enforce the costs order: "[T]he right to an effective remedy or execution of a costs order is recognized as a crucial component of right of access to courts".[129] The Constitutional Court further stated that an "observance of right of access to courts would therefore be hollow if the courts order were not to be enforced".[130] The Constitutional Court neither expressed any view on mere presence as a jurisdictional ground nor disapproved of it. In fact, references to *Richman* were only in approval.[131] *Fick* ensured that judgment creditors reaped the fruits of their foreign judgment. In such novel cases, it is essential to develop

[119] *See, e.g.*, *Minister of Home Affairs v. Fourie*, 2006(1) SA 524 (CC) para. 114 (S. Afr.).
[120] *Carmichele v. Minister of Safety and Security*, 2001 BCLR 995 (CC) paras. 78-80 (S. Afr.).
[121] *See Minister of Home Affairs v. Fourie*, 2006(1) SA 524 (CC) paras. 114 and 118 (S. Afr.).
[122] *Carmichele v. Minister of Safety and Security*, 2001 BCLR 995 (CC) para. 78 (S. Afr.).
[123] *Id.* para. 82.
[124] *See Everfresh Market Virginia (Pty) Ltd. v. Shoprite Checkers (Pty) Ltd.*, 2012 (1) SA 256 (CC) (S. Afr.): no consensus.
[125] *Id.* paras. 65-67 and 74.
[126] *Id.* para. 71 (*obiter*) per Moseneke D.C.J. who also observed that the common law would have been developed if the case had been "properly pleaded".
[127] *See, e.g.*, *Beadica 231 CC v. Trustees of the Time Being for the Oregon Trust*, 2020 (5) SA 247 (CC) paras 43, 102, 205 and 207 (S. Afr.).
[128] Access to the courts is a prerequisite to access to justice. On access to the courts, see *Government of the Republic of Zimbabwe v. Fick*, 2013 (5) S.A. (C.C.) paras. 2, 21, 60, 61, 62, 64, 66, 68, 69, 70, 71 (S. Afr.). In *Minister of Home Affairs v. Fourie*, 2006(1) SA 524 (CC) there were several references to access in terms of courts and marriage e.g. paras. 39, 49, 111.
[129] *Government of the Republic of Zimbabwe v. Fick*, 2013 (5) S.A. (C.C.) para. 61 (S. Afr.).
[130] *Id.* para. 62.
[131] *Id.* para. 55.

the common law "beyond existing precedent".[132] In *Fick*, there was a need to develop the common law beyond existing precedent to include "the enforcement of judgments and orders of international courts or tribunals, based on international agreements that are binding on South Africa".[133] Otherwise the judgment creditors would not realize the fruits of their judgments.Mere presence poses some challenges that may overlap with domicile in terms of ascertaining the position of the law.

As earlier noted, scholars have differed on the existence of domicile as a ground of jurisdiction concerning foreign judgments.[134] The preferred approach is, as with mere presence, first to accept the current legal position. It is a different matter to argue, as some scholars have, that domicile should be rejected as a jurisdictional ground for foreign judgments in South Africa.[135] The latter approach of first accepting what the law is (not necessarily the merits of the argument itself), is critical to developing private international law in a sustainable manner. In Nigeria, the default application of the English common law has made it easier to disregard domicile. While it is unnecessary to revive the debate,[136] the point here is that principled rejection of any jurisdictional ground in Nigeria will first require an investigation into pre-1900 English case law.[137] If it is the role of the Nigerian courts to determine the English common law then they cannot avoid such investigations into past or current law. This article remains only interested in legal validity and interpretation, including the pitfalls of comparative analysis without appropriate contextual underpinning.

If "for the sake of argument" there is strict adherence to the analytical premise that the South African Constitutional Court has exclusively listed the grounds of indirect jurisdiction, then domicile is a ground and mere presence is probably not. However, this premise needs to be considered in the context of the jurisdictional scope of the South African appellate courts especially at the time of *Richman* and *Fick*. There are at least two possible ways of considering laws that have not been amended or removed. The first is that such laws remain valid, and anyone can use such laws as may be appropriate. Alternatively, the second is that even if such laws are valid, it is also necessary to see that they achieve substantive justice in a practical way that prevents parties from evading their legal obligations. Laws do not become invalid through lack of use or because the

[132] *Carmichele v. Minister of Safety and Security*, 2001 BCLR 995 (C.C.) para. 40 (S. Afr.).
[133] *Government of the Republic of Zimbabwe v. Fick*, 2013 (5) S.A. (C.C.) para. 43 (S. Afr.).
[134] *See* Oppong, *supra* note 27; Moran and Kennedy, *supra* note 29.
[135] *See* Moran and Kennedy, *supra* note 29, at 573.
[136] For the argument that jurisdictional grounds should be considered in terms of any functional substantive value in part or in entirety, *see* Pontian N. Okoli, Promoting Foreign Judgments: Lessons In Legal Convergence From South Africa And Nigeria 192-195 (2019).
[137] On faint dicta in this regard, *see* Lord Collins *supra* note 89, at para. 14-086. *See generally*, *Douglas v. Forrest,* [1828] 130 ER 933 (CP).

occasions have not arisen to use them. The role of the judge is critical and has a greater force in South Africa because the Constitution specifically mandates the judge to develop the South African common law. The courts have been very active in this area. The role of the judge is also important in Nigeria, but with less force than in South Africa. This is because, unlike South Africa, the Nigerian judge is largely circumscribed by statutory law. Thus, there is an even more pressing need in Nigeria to develop the English common law in a clearly deliberate manner. The Nigerian Constitution does not contain provisions that concern the common law, unlike the South African Constitution that contains specific provisions on the application and amendment of the English common law. In any case, the progressive South African experience in developing the common law that has inspired calls for such development needs to be placed in proper context.[138] The need to differentiate contexts should also be examined through the applicability of judicial discretion.

3. THE IMPORTANCE OF JUDICIAL DISCRETION

There are two major aspects of the legal regime on the recognition and enforcement of foreign judgments in Nigeria and South Africa: statute and common law. The statutory regimes of Nigeria and South Africa are of contrasting importance. While in Nigeria, statutory law is by far the more important regime, in South Africa the common law is of very limited significance because of its scope.[139] The English common law on the recognition and enforcement of foreign judgments contains a rather narrow scope for discretion. In this regard, the English Court of Appeal observed that it was "a mistaken but nevertheless real concern" to state that common law rules for enforcing foreign judgments were "largely discretionary".[140] But some discretion exists. Any justice system that completely excludes any space for discretion will almost invariably lead to unfair or illogical results at some point.[141] Even under English common law, any exercise of discretion should factor in the need for different approaches to substantive and enforcement claims – the latter will not focus on the underlying cause of action.[142] To

[138] *Supra* note 16.

[139] *Supra* note 76.

[140] The Greer Committee thought this made foreign courts reluctant to recognize foreign judgments. *See* para. 36 of *Strategic Technologies Pte Ltd. v. Procurement Bureau of the Republic of China Ministry of National Defence*, [2020] EWC. Civ 1604 (CA).

[141] For the argument that, in principle, "submission should not provide an automatic ground for enforcement where the parties have explicitly agreed to resolve their dispute elsewhere" (although the courts are usually lenient), *see* Fentiman, *supra* note 90, at para 18.21.

[142] *See Lenkor Energy Trading DMCC v. Puri*, [2021] EWCA 770 para. 40 (CA). The Court of Appeal enforced the Dubai judgment.

exercise discretion properly, an element of fairness is essential, otherwise discretion will be abused. It may seem ironic that the statute on the same subject clearly provides for judicial discretion – more than the English common law which is essentially judge made. The exercise of discretion is a key and deliberate feature of the U.K. Act of 1920 of which the 1922 Nigerian Ordinance is essentially a rehash.[143] As case law clearly illustrates, the 1922 Ordinance has been the core of Nigerian jurisprudence on foreign judgments.[144] Under the Nigerian Ordinance, a court may enforce the foreign judgment if it is "just and convenient" to do so in all the circumstances of the case.[145]

Although the "just and convenient" ground has been described as "frighteningly wide" in Nigeria,[146] the concern exists because there has yet to be a clear articulation of how to exercise discretion on this ground. A careful navigation between this and public policy is also necessary and a purposeful sense of fairness is required to strike a balance.[147] In *Agbara v. Shell*, the defendant sought to set aside the registration of the Nigerian judgment. The English High Court observed that it was "necessary to have some understanding of Nigerian procedures in order to judge the extent to which Shell may have been unfairly treated".[148] The English High Court decided that there had been a "serious breach of natural justice" and set aside the registration of the Nigerian judgment.[149]

In South Africa, judicial discretion is an important element of developing the common law. Flexibility is required in developing the common law because the common law itself has evolved through organic growth as mandated by the South African Constitution. Nevertheless, the obligation to develop the common law is "not purely discretionary".[150] The exercise of this "general discretion" must be to promote the spirit and purpose of the Bill of Rights.[151] South Africa's neighbor, Swaziland, provides useful insights into the exercise of discretion, especially considering that both countries have a common Roman-Dutch law influence. Section 252(1) of the Constitution of Swaziland provides that the principles and rules of the Roman-Dutch Common Law that applied to Swaziland "*since* 22nd February 1907 are confirmed and shall be applied and enforced as

[143] The English Court of Appeal described discretion as a "critical difference" between the 1920 Act and the 1933 Act. The latter Act was intended to promote reciprocity. There is an equivalent of the 1933 Act in Nigeria, but it has not been extended to any country. *See* the Foreign Judgments (Reciprocal Enforcement) Act 1961.
[144] As case law referred to in this article shows.
[145] § 3(1) of the Nigerian Ordinance.
[146] *See* the dissenting opinion of Muhammad J.C.A. in *Shona-Jason Nigeria Ltd. v. Omega Air Ltd.*, [2006] 1NWLR (Pt 960) 1, 63 (CA) (Nigeria).
[147] *See also* Okoli, *supra* note, at 136, 227-228.
[148] *Agbara v Shell*, [2019] EWHC 3340 (Q.B.) para. 43 (Nigeria).
[149] *Id.* para. 45.
[150] *Carmichele v. Minister of Safety and Security*, 2001 BCLR 995 (CC) para. 39 (S. Afr.).
[151] S. Afr. Const. § 39(1).

the common law of Swaziland" subject to the Constitution or statutory law.[152] This constitutional empowerment has been important in the development of case law.

In *Mamba v. Mamba*,[153] the Swazi High Court had decided that foreign judgments obtained in the United States of America could not be enforced in Swaziland because it was not one of the Commonwealth countries listed in the relevant law on foreign judgments.[154] To disapprove of that judgment, the court in *Improchem Ltd. v. USA Distilleries* [hereinafter *Improchem*] had to first observe that it did "not see any inconsistency between the common law procedure and the statutory procedure for the recognition and enforcement of foreign judgments" in Swaziland.[155] In other words, both were different means to attaining the same end. The Swazi court observed that there was "no reason in logic or elsewhere" to deny enforcement merely because a country was not a part of the restricted list of countries.[156] There are two statements in *Improchem* that suggest the realization for African countries to take control of their laws on foreign judgments. First, the court was not persuaded that *mandament van reductie*[157] was a part of Swazi law.[158] "If it is a part of the law of South Africa, I think that this jurisdiction should be diffident towards it".[159] Second, in providing justifications that the legislator could not have intended the statutory regime to displace the common law, the court did not refer to South African law.[160] It rather applied itself to consider "this era of frenetic globalization, where goods are purchased online from anywhere in the world".[161] To decide otherwise would have impeded international commerce. There is, however, scope for arbitrariness where there is no principled approach to the exercise of discretion in promoting foreign judgments.

Fairness cannot be divorced from the recognition and enforcement of foreign judgments. In this context, it was argued that "[. . .] what must underlie a modern system of private international law are principles of order and fairness".[162] It was further argued that such considerations "compel more generous grounds for the enforcement of foreign judgments".[163] However, what amounts to fairness in the recognition and

[152] *See* The Constitution of the Kingdom of Swaziland Act 2005.
[153] *Mamba v. Mamba*, [2011] SZHC 43 (HC) (S. Afr.).
[154] *Id.*
[155] *Improchem (Pty) Ltd. v. USA Distilleries (Pty) Ltd.*, [2020] SZHC 23 (HC) para. 19 (Swz).
[156] *Id.*
[157] The respondent had argued for a reduction in capital, but the court considered that this would have required to reopen the merits of the case. *See id.* para. 22.
[158] *Id.*
[159] *Id.*
[160] *Id.* para. 10.2 (vi).
[161] *Id.* para. 22.
[162] Richard Frimpong Oppong, *Recognition and enforcement of foreign judgments in Ghana: A second look at a colonial inheritance*, 31 Commonw. Law Bull. 1, 24 (2005).
[163] *Id.*

enforcement of foreign judgments is debatable. A debt is an obligation and, to this extent, it has been persuasively argued that equity plays no role in "enforcement".[164] This argument is given impetus if recognition and enforcement are separated for the purposes of analytical discourse.[165] In reality, however, the court will not enforce a foreign judgment if it did not first recognize it. Thus, the English High Court has observed the need to consider "the question of whether it is just and convenient that the machinery of the High Court should be available for its enforcement."[166] The question of equity should not arise if a person is indebted and there is no dispute about the debt either by admission or because the courts have decided the dispute subject to any safeguards in the law. Thus, "actions for the enforcement of judgments are all but in name actions to enforce a debt".[167] Obligations should be enforced subject to applicable rules and a principled approach to the exercise of discretion where necessary.

As argued above, the Nigerian courts have since realized the discretionary function contained in the 1922 Ordinance.[168] Although there are different judicial views on its use, such views underscore the fact that judicial discretion is a matter of strategic importance. In *IFC v. DSNL*, the Nigerian Court of Appeal overturned the decision of the High Court because it decided that it was unjust or inconvenient to enforce, even though the High Court had observed that there was no violation of public policy. The Court of Appeal stated that this was a "contradiction in terms".[169] It is necessary to consider how English courts have dealt with discretion, which cannot be divorced from fairness.[170] Fairness should focus on producing results that are consistent with even initiating the dispute resolution process up to the outcome within legal limits. For example, "fairness to the defendant demands" that a claimant who applies to a tribunal must submit to its judgment.[171]

The evolution of commercial realities has compelled the need for flexibility.[172] The discretionary scope in the Administration of Justice Act 1920 [hereinafter A.J.A.] (*vis-à-vis* the 1922 Ordinance) is crucial. In several cases, the discretion in the A.J.A. has

[164] Hayk Kupelyants, *Recognition and enforcement of foreign judgments in the absence of the debtor and his assets within the jurisdiction: reversing the burden of proof*, 14 J. Priv. Int. Law 455, 474 (2018).
[165] Kupelyants first separated both for the purposes of contextual analytical discourse. *Id.*
[166] *Agbara v Shell* [2019] EWHC 3340 (Q.B.).
[167] Kupelyants, *supra* note 164, at 455, 474.
[168] *See, e.g.*, *supra* notes 145-146.
[169] *IFC v. DSNL Offshore Ltd.* [2008] 9NWLR (Pt 1093) 606, 637 (CA) (Nigeria).
[170] *See generally* Roger A. Shiner, Precedents, Discretion and Fairness 93-136, 93 (M.A. Stewart ed., 1983).
[171] *See* GFH Capital v Haigh [2020] EWHC 1269 (Comm) para. 51 (HC. *See also* Lord Collins, *supra* note 89, at para. 14-068.
[172] *E.g.*, "the 1920 and 1933 Acts gave little scope for the registration of foreign judgments against states". Per Lord Philips in *NML Capital Ltd. v. Republic of Argentina* [2011] UKSC 31 para 42 (SC). Lord Collins observed that "the English court had a discretion to exercise jurisdiction in an action on the New York judgment by virtue of C.P.R. 6.20(9) (now C.P.R. P.D. 6B para 3.1(10)). See *id.* para. 128.

been used merely to extend the time within which a foreign judgment may be registered which has been anything from five months[173] to up to ten years.[174] But the English courts have also exercised discretion in other complex substantive issues. The English High Court judgment in *Ogelegbanwei v. Nigeria* [hereinafter *Ogelegbanwei*] is illustrative.[175] The Court did not just decide that it was "fair" to allow the claimants an extended time to apply for registration of the order.[176] The claimants were also deemed to have submitted the application under the right statute although they had already applied under the wrong one.[177] The Court further decided that it was just and convenient to enforce the Nigerian judgment against a Nigerian general who was believed to have assets in England.[178] There was therefore no question of state immunity.[179] In *LR Avionics Technologies Limited v. the Federal Republic of Nigeria*,[180] the English Court of Appeal decided that the defendants were immune with respect to the application for registration and enforcement of the Nigerian judgment.[181] Thus, discretion was exercised to enforce the foreign judgment.[182] The scope for discretion under the English common law may be narrow, but the practical role of courts would be undermined without such scope.[183] In *Rubin v. Eurofinance*,[184] the U.K. Supreme Court observed in a majority opinion that "the introduction of judge-made law extending the recognition and enforcement of foreign judgments would only be to the detriment of United Kingdom businesses without any corresponding benefits"?[185] Nevertheless, the court further added that there was unlikely to be "any serious injustice if this court declines to sanction a departure from the traditional rule".[186] Thus, recognition and enforcement should not be left to judicial discretion as a rule. What amounts to "serious injustice" is debatable. It is instructive that the court declined to postulate absolute rigidity. In any case, there was no reference to the A.J.A. which contains a significant scope for judicial discretion. This is consistent with the position that the A.J.A. must be

[173] *See Lavallin v Weller* [2019] 3672 (Q.B.) para. 13 (HC).
[174] *See generally Tenaga Nasional Berhad v. Fraser Nash Research Ltd.* [2018] EWHC 2970 (Q.B.). In deciding that it was just and convenient to enforce a ten year old foreign judgment, the court however order a stay as a "safeguard", just in case the Federal Court of Malaysia decided to entertain a further appeal. *See* paras 78-79.
[175] *See Ogelegbanwei v. Nigeria* [2016] EWHC 8 (Q.B.) para 12 (Nigeria).
[176] *Id.*
[177] *Id.*
[178] *Id.* para. 13.
[179] *Id.*
[180] *See, e.g.*, *Avionics Technologies Ltd. v. the Federal Republic of Nigeria* [2016] EWHC 1761 (CA) (Nigeria).
[181] *Id.* para. 27.
[182] This was done pursuant to § 9 of the 1922 Act.
[183] On the "unfettered discretion" with respect to granting a stay of judgment at common law, see para. 12 of *Leicester Circuits Ltd. v Coates Brothers Plc* [2002] EWCA Civ 474 (CA).
[184] *See, e.g.*, *Rubin v. Eurofinance SA* [2012] UKSC.
[185] *Id.* para. 130.
[186] *Id.* para. 131.

construed not only "on its own terms" but also considering the purpose of the legislation.[187]

There is no fixed standard for what would amount to a "judicial overreach for judges to incrementally develop the common law foreign judgment enforcement regime"[188] in any direction. What is more likely to amount to an overreach is if courts cannot consider the need to be flexible in trying to ensure that obligations are enforced. Rigid rules are likely to overreach because they "tend to produce arbitrariness or unfairness when applied to new or unanticipated problems".[189] A comparison to what happens in other jurisdictions would help, but it is for the judges involved to resolve disputes considering challenges that they face. Courts have a "general obligation" to develop the common law.[190] This is not "purely discretionary",[191] but it is not so even under the English common law in England or in Nigeria. The South African Constitution provides that "every court, tribunal or forum may develop the common law or customary law to promote the Bill of Rights".[192] The development of the common law is connected to general legal development in a jurisdiction. Judicial decisions to amend the common law can hardly be said to be unilateral. Legal exceptions have been developed because courts needed to deal with difficult issues in particular cases. Real concerns thus emerge if legal exceptions become general rules. Courts should adopt a common-sense approach to solve glaring problems that confront them. In South Africa, the common law must be developed within its own "paradigm",[193] even though it will favor international law such as treaties that it has ratified.[194] In Nigeria, as already explained, the English common law and certain statutes were incorporated into Nigerian law. Otherwise, it is etched in Nigerian jurisprudence that "foreign decisions are only of persuasive authority, and even then as long as the legislation in question is *in pari materia* with a Nigerian legislation".[195]

The development of the common law in African countries may be shaped by its own challenges or realities.[196] The need for fidelity to context is not merely a

[187] *Strategic Technologies Pte Ltd. v. Procurement Bureau of the Republic of China Ministry of National Defence* [2020] EWCA. Civ 1604 (CA) para. 47.
[188] Oppong, *supra* note 27, at 586.
[189] Cass R. Sunstein, "Two Conceptions of Procedural Fairness" 73 Soc. Res. 619 (2006).
[190] *See Carmichele v. Minister of Safety and Security* 2001 BCLR 995 (CC) para. 39 (S. Afr.).
[191] *Id.*
[192] S. Afr. Const., *supra* note 116, para. § 39 of the South African Constitution.
[193] *Carmichele v. Minister of Safety and Security* 2001 BCLR 995 (CC) para. 55 (S. Afr.).
[194] *See Government of the Republic of Zimbabwe v. Fick* 2013 (5) S.A. (C.C.) para. 66 (S. Afr.).
[195] *SIFAX Nigeria Ltd. v. MIGFO Nigeria Ltd.* [2018] 9 NWLR (Pt 1623) 138, 179 (SC) (Nigeria).
[196] For the argument that certain presumptions regarding statutory interpretation constitute "a departure from its common-law origins", see Marius van Staden, *A Comparative Analysis of Common-Law Presumptions of Statutory Interpretation*, 26 Stell. L. R. 550, 560 (2015).

sociological issue.[197] How certain rules are applied can depend on an "analysis of particular institutions". The analysis of "social spheres" is more common.[198] If a court seeks to develop the common law, then it should be because existing precedents do not help to deliver justice in particular cases. This is in part how the English common law itself developed. Indeed, "the life of the law has not been logic: it has been experience" which requires a consideration of prevalent, contextual, and institutional issues.[199] The law may also be developed to promote clarity. Otherwise, the court would have acted in vain as losing parties would very easily appeal and secure different outcomes. Common law rules should be applied not only considering the needs of society, but also considering the institutional capacities of the jurisdictions involved.

Litigation easily lasts many years in Nigeria and reversal of legal principles is relatively rare.[200] In the U.K., on the contrary, the U.K. Supreme Court has reviewed its own decisions up to twenty-five times in just over forty years.[201] One challenge of relying on an automatic change of the English common law is that English courts may not have had the chance to decide an issue. For example, the English Court of Appeal observed that the question of whether there could be a "registration of a judgment on a judgment" was one of which "the position at common law has never been decided".[202] Thus, African courts cannot escape the responsibility of developing national laws considering peculiar challenges. While it is desirable that similar provisions (through the influence of British colonial heritage for example) are interpreted in a similar manner, this approach may not always guarantee fairness or a sustainable growth of private international law. There is a real risk of contradictions, legal uncertainty, and unfairness where there are no systematic efforts to develop the law in a deliberate manner. This is where the South African courts and Nigerian courts have largely contrasted.

[197] But the "sociological circumstances" are also important as well as other factors" are important. *See Okon v. State* (1988) 1 NWLR (Pt 69) 172, 180 (SC) (Nigeria).
[198] Selznick, *supra* note 19, at 181.
[199] *See generally* Oliver Wendell Holmes, The Common Law (Little Brown and Company, 1st ed. 1881).
[200] This point will be expanded in the next Section.
[201] *See* Lord Hodge "The Scope of Judicial Law-Making in the Common Law". Max Planck Institute of Comparative and International Private Law Hamburg, Germany 28 October 2019. He observed that "In the 43 years between 1966 and 2009, the House of Lords used this power on about 25 occasions". *See* para. 30.
[202] *Strategic Technologies Pte Ltd. v. Procurement Bureau of the Republic of China Ministry of National Defence* [2020] EWCA. Civ 1604 (CA) paras. 1-2 and 67.

4. POTENTIAL FOR CONTRADICTIONS

Statutory reform and the development of the common law need not compete, which could undermine solutions to practical problems. Rather, they can be complementary. In Nigeria, for example, any clear statutory amendment of the English common law, where necessary, will immediately circumvent the challenges of *stare decisis*. A contradiction in rejecting statutory reform is that in Nigeria treaties take effect through legislative action. If Nigeria ratifies the Hague Judgments Convention (or any other treaty), it will be domesticated through a statute.[203] It then depends on how much scope the Nigerian legislator wants such a treaty to have, subject to the provisions of that treaty and the terms of ratification.[204] Even where a treaty does not specifically amend a certain regime, it may influence the interpretation of parts of that regime. For example, this could be to focus on substantive analysis rather than mere labelling.[205] For example, there was a pragmatic argument in the context of Scots private international law that "it may be logical for the Scottish courts to accept an indirect jurisdiction that is equivalent to the harmonized position of the domicile of a non-natural person under art. 60 of Brussels I".[206] That is, domicile at the statutory seat, central administration, or principal place of business.[207] If domicile is applied to non-natural persons, there would be a risk of that ground applying to individuals who were never in the forum.[208] A ratification of the Hague Judgments Convention can also lead to a more secure development of the English common law in Nigeria or the South African common law for two reasons. First, judges will be guided by explanatory reports which help to ensure a compliance with the intention of the legislator.[209] Second, there will be a more compelling justification to see how judges in other jurisdictions that have ratified the same treaty. To emphasize the development of the common law at the expense of statutory intervention would perpetuate these contradictions. Beyond treaties, the scope for contradictions is influenced by the legislative history of former colonies.

A statute may deliberately allow certain issues to be amenable to judicial development. In this context, the U.K. Supreme Court observed that the common law of

[203] *See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Ch. 10 LNF, 1990 (n.2 of 1983).*
[204] Application and effectiveness will also depend on how many countries ratify.
[205] *See* Okoli, *supra* note 136, at 216.
[206] Paul Beaumont & Peter McEleavy, Anton's Private International Law ¶ 9.26 (W. Green, 3rd ed. 2011).
[207] *Id.* For a similar argument in favor of domicile where a company is registered, see Lord Collins, *supra* note 89, paras. 30-002 and 30-003. *See also* Okoli, *supra* note 136, at 194.
[208] *See also* Okoli, *supra* note 136, at 193.
[209] *See generally* Paul Beaumont, *Hague Choice of Court Agreements Convention 2005: Background, negotiations, analysis and Current Status* 5 J. Priv. Int. Law 125 (2009) (discussing the importance of explanatory reports). It is also instructive that the Hague Judgments Convention "does not prevent the recognition or enforcement of judgments under national law". *See* Art 15 of the Convention *supra* note 13.

England and Wales can "keep pace with change" by factoring in international commercial practice.[210] The 1996 Arbitration Act is an example of a statute deliberately left incomplete to allow judges to develop the common law in areas that the law has not addressed.[211] This illustration is relevant to Nigeria because there has been no statutory intervention in foreign judgments in six decades. Similarly, there has been no such intervention in South Africa in four decades. Statutory intervention in the latter case is rather inconsequential because the South African Act has been extended only to Namibia, a neighboring country.[212] Despite the pivotal role of the English common law, the recognition and enforcement of foreign judgments-system has benefitted from statutory development.[213] Statutory intervention has also been used to address specific issues that have private international implications. For example, the U.S. Congress responded to the English common law position[214] concerning defamation on the Internet by enacting the Securing the Protection of our Endured and Established Constitutional Heritage [S.P.E.E.C.H.] Act 2010. The U.K. in response to the criticism of English libel law passed the Defamation Act which "contains a test reminiscent of *forum non conveniens*" only three years after the U.S. legislation.[215] The question of how or to what extent statutes may be amended *vis-à-vis* the common law also requires contextual consideration.

A common denominator between the English common law in former colonies and many of their current statutes is that both legal regimes were essentially in place before such countries attained independence. Statutes were often enacted in a rubber-stamp manner, not because conscious efforts were made as to what might work. This was not by itself a problem at the time as the relationship with the outside world was often shaped through the lens of the colonialists. It is necessary to use examples of other areas of private international law to demonstrate that foreign judgments cannot be divorced from the jurisprudence of other such areas. Family law and human rights law reflect core policy issues that have implications for private international law. The South African Constitutional Court decided that "the common law offence of sodomy" was "inconsistent with the provisions of the 1996 Act and invalid".[216] One efficient way

[210] *Halliburton Company v Chubbs Bermuda Insurance Ltd.* [2018] UKSC 48, [162].
[211] *Id.* at [47].
[212] Kelbrick, *supra* note 76.
[213] See the introduction to the Civil Jurisdiction and Judgments Act 1982 (c. 27) (UK). This Act made "further provision about the jurisdiction of courts and tribunals in the United Kingdom and certain other territories and about the recognition and enforcement of foreign judgments given in the United Kingdom or elsewhere".
[214] This focused only on the material published in England, however minimal. *See, e.g.*, *King v Lewis* [2004] EWCA Civ 1329 (CA).
[215] *See* HARTLEY, *supra* note 88, at 376.
[216] *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999) 1 SA 6 para 106 (1.1) (S. Afr.).

of developing the common law is to ensure that there are no contradictions. For example, in amending[217] the common law to include gay rights the South African Constitutional Court also declared statutory law to be inconsistent with the provisions of the 1996 Act and invalid.[218] Yet, in this regard, a comparative analysis between South Africa and Nigeria without a contextual approach will lead to patent contradictions.

Nigerian law on same sex relationships contrasts with South African law. Nigerian law criminalized homosexual relationships for decades. However, the Nigerian legislator consolidated this position by specifically prohibiting marriage contracts or civil unions between people of the same sex.[219] Any person who administers the solemnization of such contracts or unions or even merely witnesses commits an offence.[220] Provisions of the Act have clear implications for public policy which is important in the recognition and enforcement of foreign judgments.[221] The Act specifically provides that any marriage or civil contract certificate "issued by a foreign country is void in Nigeria" and no "benefit" that accrues therefrom can be enforced in Nigeria.[222] This has implications for any attempt to enforce money orders that may result from such relationships in Nigeria. Thus, important arguments including "Nigerian courts should be free to enforce a wider range of foreign judgments such as an order for specific performance, injunctions and account"[223] also require a contextual approach which is the more complex part. For example, that argument was also extended to South Africa "subject to appropriate conditions"[224] but no condition was suggested. Even in the context of enforcing money orders arising from non-commercial transactions, a non-contextual comparison will be problematic because no benefit can derive from same sex marriages or unions. But it can even get more complicated in commercial matters because it is doubtful that the core northern states of Nigeria would enforce foreign judgments if such transactions concern alcohol.[225] To this extent, there is no federal public policy although the federal legislator has covered the field in the

[217] For the fine distinction that the Court exercised its powers under s 172(1)(a) rather than develop the common law, *see Minister of Home Affairs v. Fourie* 2006(1) SA 524 (CC) para. 121 (S. Afr.).

[218] *See* Section 20A of the Sexual Offences Act 1957, Section 1 of the Criminal Procedure Act 1977 and Security Officers Act 1987 (S. Afr.). *See* para. 2.1-3.2 and para. 4.1-4.2.

[219] The punishment is fourteen years imprisonment for such parties, *see* Same-Sex Marriage (Prohibition) Act 2013 Section 5(1) (Nigeria). Same sex marriage is also illegal in many parts of Africa. *Cf.* Monica Karheiti & Frans Viljoen, *An Argument for the Continued Validity of Woman-to-Woman Marriages in Post-2010 Kenya*, 63 J. Afr. L. 303 (2019) (discussing the constitutional validity of woman-to-woman marriage).

[220] 10 yrs. *See* Same-Sex Marriage (Prohibition) Act 2013 s 5(3) (Nigeria).

[221] The statutes on foreign judgments.

[222] *See* Sections 1 and 2(1) of the Same-Sex Marriage (Prohibition) Act 2013 (Nigeria).

[223] This argument was made in the context of law reform. Chukwuma Okoli & Richard Oppong, Private International Law in Nigeria 354 (2020).

[224] Oppong, *supra* note 27, at 582.

[225] Thus, Kano and Lagos courts may have contrasting positions on this point.

enforcement of foreign judgments[226] as federal statutory law exists on the subject.[227] Such complications serve as a reminder that the genius of English common law adaptability requires appropriate contextual and institutional mechanisms to thrive.

A contextual approach should consider institutional realities. Courts do not require formal evidence to take notice of "obvious realities" such as any "substantial extra burden of costs or delay".[228] In *Ogelegbanwei*, for example, the English court considered it an important argument that the Nigerian judgment debtors controlled "the apparatus of judgment execution" (including the Nigerian President and the Attorney General).[229] There is also the tyranny of judicial inefficiency. Several foreign judgments cases lasted about a decade in the courts. *Halaoui* lasted a decade after the judgment creditor applied to enforce an English judgment in a Nigerian High Court.[230] That case was decided in 2009, but there is no indication that much has changed in terms of judicial efficiency.[231] In February 2021, the Nigerian Supreme Court decided a matter concerning the oil and gas industry (a strategic part of the Nigerian economy) a decade after it commenced at the Federal High Court.[232] In South Africa, *Fick* took less than half a decade even though it had to go to the Constitutional Court.[233] Arbitration has become more attractive to stakeholders in the business sector and this trend is expected to continue as private international law cases generally remain exposed to the perennial challenges of inefficiency that the Nigerian courts face. Other mechanisms such as exclusive jurisdiction agreements may be considered.[234] The question of inefficiency has direct implications for sole reliance on the courts for the incremental development of the law. Sole reliance on such incremental development may be weakened by inadequate law reporting or access to law reports because access can also influence how law develops. Commenting on why Scottish references to English law was "relatively infrequent" between the sixteenth and eighteenth centuries, Smith argued that "English decisions were neither readily accessible nor comprehensible outside England".[235]

[226] The enforcement of foreign judgments is on the exclusive legislative list. *See* Item 57 of the Exclusive Legislative List; Part 1 of the Second Schedule. 1999 Constitution (as amended).
[227] *See* The 1922 Ordinance and 1961 Act.
[228] Nasser v. United Bank of Kuwait [2001] C.P. Rep. 105 para 64 (CA).
[229] *See Ogelegbanwei v. Nigeria* [2016] EWHC 8 (Q.B.) para 12 (Nigeria).
[230] In *VAB Petroleum v. Momah* [2013] 14 NWLR (Pt 1347) 284 (Nigeria), the first High Court ruling on the foreign judgment application was in 1993. The Supreme Court concluded the matter in 2013.
[231] *Id.*
[232] In a non-conflicts case. *See Statoil Nigeria Ltd. v. Inducon Nigeria Ltd.* [2021] 7 NWLR (Pt. 1774) 1 (SC) (Nigeria).
[233] *See Government of the Republic of Zimbabwe v. Fick* 2013 (5) S.A. (C.C.), at 24-29 (S. Afr.). Most matters end at the Supreme Court of Appeal anyway.
[234] The English CA decided, in the context of an exclusive jurisdiction agreement, that it had jurisdiction to grant a worldwide anti-enforcement injunction to refuse compliance with a foreign judgment. *See Bank St Petersburg OJSC v. Arkhangelsky* [2014] EWCA 593 para. 39 (CA).
[235] Smith, *supra* note 35, at 522-542.

The Scottish legal system was safeguarded eventually,[236] and continued efforts to forge its own path are instructive.[237]

A contextual approach to private international law is necessary; whether it is a "broader context" considering the "underlying aims and objectives" generally or more regional approaches.[238] While the exercise of discretion may have its grey areas and thus should attract caution, the exercise of discretion is inevitable where the law expressly allows it and rules are not mathematically clear. For example, in the era where the Internet continues to drive innovation at short notice, African judges need to deal with such matters quickly. Traditional rules remain inapplicable even where it is conceded that traditional rules of private international law can hardly be adapted to the Internet era.[239] To attain substantive justice, flexibility is required and flexibility cannot be divorced from the exercise of discretion. The notion that former colonies should change their laws merely because the English common law has changed needs contextualization. A principled contextual approach should underpin comparative analysis that is often inevitable in private international law issues.

CONCLUSION

Courts need to develop the law in a systematic manner. Considering the legal history of many former British colonies, the first step is to determine and accept the current legal position. The next step is to develop it systematically. Inconsistencies and contradictions should be tackled through a principled exploration of the discretionary space available to judges, which is a pivotal component of legal development in private international law. As more complex issues arise in private international law, especially those driven by technology and assertions of individual liberty, it is increasingly difficult to predict the specific challenges with which courts may be confronted. In Nigeria, there is a general default recourse to the English common law. Unlike Nigeria, South African courts have been more consistent in actively developing the South African common law.

African courts can benefit from a comparative approach to decide difficult cases. However, this should be done in a principled and purposive manner. Indeed, there is a

[236] The Treaty of Union ratified in 1707 would then help to guarantee the independence of the Scots legal system. *Id.*

[237] On Scotland's engagement with presence and residence, *see Zigal v. Buchanan* [2019] CSIH 16 paras 7-10 (Scot.). There were no references to English cases. *Cf. Service Temps Inc v. Macleod* [2013] CSOH 162 (Scot.).

[238] *See* Lundstedt & Sinander, *supra* note 57, at 404.

[239] *See* Oppong, *supra* note 27, at 580.

limit to comparison.[240] A contextual approach should be complementary. The English common law has been developed in the context of the English legal system, even if such law may have implications for other jurisdictions with which the English common law interacts. There is a growing realization that courts need to consider how they want to deal with various aspects of private international law. For example, the international rise of commercial courts can promote a contextual approach.[241] While what amounts to a commercial matter ought to be expanded to fit with the evolution of the times, such expansion should always be made considering the relevant contexts. Thus, commercial matters should be considered differently but always with the knowledge that such issues exist within certain contexts.

The role of African judges is at the center of building a resilient private international law framework. The discretion in discharging that role is not only inevitable, but also critical if a sustainable development of private international law is to be attained in Africa. The question is more about what should be done with the discretion and what policy should drive the adaptation of the English common law. The role of scholars is important but it should complement, and not displace, the role of courts in legal systems where judicial precedents are critical to legal developments. One reason for this is that courts, unlike scholars, are legally required to be objective since they have constitutional functions of interpreting statutes and resolving disputes. Other African countries can draw lessons from proffered solutions to the challenges that former British colonies face.

[240] *See* Moran and Kennedy, *supra* note 29, at 572.
[241] Standing International Forum of Commercial Courts, Second SIFoCC COVID-19 Memorandum 2021 (UK).