
THEORIES OF PRIVATE INTERNATIONAL LAW AND THEIR APPLICATION

Shubhangi Gandhi, Rajiv Gandhi National University of Law

1. INTRODUCTION

India has always been a state consisting many a different culture, beliefs and set of notions. In such a diverse state, conflicts are bound to arise between various parties. During the colonial rule therefore, disputes often arose between the British laws and the private laws of the citizens. Such was so because the British India was divided between a British India and many other princely states. This meant that there were various separate legal structures throughout the land up until independence. In British India's judicial system, the judgment pronounced by the courts of princely states was considered as international judgments. During the British time, therefore, there was an inter-state conflict of laws.¹ Apart from such conflicts, the trade during the colonial era was not restricted only within the state borders. The merchants would go across borders in order to expand markets and trade. Conflicts during such cross-border transactions would make them subject to the laws of various states.

In order to solve such jurisdictional issues, 'Private International Law' was introduced, also known as 'Conflict of Laws'. The term was coined by Ulrich Huber in his book- "*De Conflictu Legum Diversarum in Diversis Imperiis*" in 1689.

By definition:

Legislation which addresses ties between private entities generally involved in cross-border transactions is known as Private International Law. Private International Law sets procedural rules relating to the substantive law applicable to the relationship between the parties. It includes the proper venue for resolving their conflicts and the effect that a foreign judgment is to be issued. It is primarily based on national or local legislation. Private International Law

¹ Ayush Verma, *Public International Law v. Private International Law*, IPLEADRERS (Aug 26,2020), <https://blog.ipleaders.in/public-international-law-v-private-international-law/>.

*focuses primarily on individual-to-individual or business-to-business ties.*²

In simple words, private international law or conflict of laws is that branch of legal service which comes into play when two or more legal structures mismatch over a particular topic. It basically debates over a. jurisdiction b. foreign judgements and c. choice of law.

While the disputes dealt with under this particular service of law can be of international nature, the law applied is still domestic. Such is so because of the underlying difference between private international law and public international law (commonly known as simply international law).

The underlying difference is that unlike international law, conflict of laws does not deal with disputes between states but the disputes between individuals of a particular state with relations to more than one jurisdiction. It is used to manage the internal affairs of a nation. For example, an Indian woman and a Chinese man get married. If they ever want a divorce, private international law would be applied to determine whether they shall go to Chinese court or Indian family court in order to get it. Similarly, laws of private international law may apply in cases of contracts, child-parent relationships etc.

Private international law has a dualistic character, balancing international consensus with domestic recognition and implementation, as well as balancing sovereign actions with those of the private sector.³

2. THEORIES & THEIR APPLICATION

There are 5 major theories of Private International Law. These theories are namely- Statute Theory, International Theory, Territorial Theory, Local Law Theory and Theory of Justice. Each of these theories are explained further along with their practical application.

2.1 STATUTE THEORY

The statute theory can be said to be the oldest theories of Private International law. It was originated in 13th century Italy by Bartolus. He is often denoted as the father of this theory. He had developed the statute theory in order to resolve conflicts between the city states and their laws with the Italian law at the time.

² *Id.*

³ *Id.*

The statutes were divided into 2 heads depending upon the object of law, these were namely- *Statuta Personalia* and *Statuta Realia*.

- a. Statutes concerning persons (*Statuta Personalia*)- It dealt with people and applied to persons domiciled within a territory. The statutes of that particular territory applied to such domiciled persons even when they went to other territories.
- b. Statutes concerning things (*Statuta Realia*)- It dealt with things and was mainly territorial in nature.
- c. Mixed Statutes (*Statuta Mixta*)- Bartolus however, created a third subhead for the statutes. This dealt with acts rather than persons or things. For example, formations of contracts or agreements would fall under this sub-head. These applied to all acts done in the territory enacting such statutes, even when litigation with respect to such acts was done in another jurisdiction.

2.1.1 APPLICATION OF BARTOLUS' STATUTE THEORY

While in theory, the said statute theory seems simple and straightforward. However, when practically applying the theory, it showcases various practical problems that do not appear in theory. For instance, in a case where a person A might want to transfer his property to his son B. In such a scenario, it becomes tough to deduce whether it shall fall under personalia or realia. As it involves persons and their personal transaction it is very well fit to fall under the statutes dealing with people. However, it also subjects a land to be transferred thus it makes it eligible to fall under statutes concerning things.

Bartolus, to tackle such a problem, made a distinction between the two based on the grammatical construct of the statute. If the language of the statute mentions the person first it shall be considered to fall under personalia, and if it mentions the thing first then it falls under realia.

2.1.2 CRITICISM OF STATUTE THEORY

As law evolved, during 17th century, the Dutch jurist Ulric Huber laid down 3 maxims for the statute theory. He considered that a comprehensive system for resolving conflicts in laws could be made from these maxims.

These maxims were:

a. The laws of a State have absolute force within, but only within the territorial limits of its sovereignty

b. All persons who, whether permanently or temporarily are found within the territory of a Sovereign are deemed to be his subjects, and as such are bound by his laws.

c. By reason of Comity, however, every Sovereign admits that a law which has already operated in the country of its origin shall retain its force everywhere, provided that this will not prejudice the subjects of the Sovereign by whom its recognition is sought.⁴

While the first two maxims can be agreed with that any law of the land is the absolute force and persons are to comply with these laws. But the last maxim faced criticism from various scholars and jurists from around the globe. According to Cheshire & North's Private International Law, the Statute Theory lacks a scientific basis, and affords no solid ground upon which a sound and logical system can be erected.

The third maxim is debated on the fact that one can not expect every country's law to suit him or his means. While in some countries gay marriage is legal while in some others it is not. Therefore, the third maxim becomes illogical and impractical.

2.2 INTERNATIONAL THEORY

This theory is also known by the name of its founder Von Savigny. The German jurist completely rejected the statute theory propounded earlier in his book on Conflict of Laws published in 1849. He termed the statute theory to be incomplete and ambiguous.

Savigny advocated a more scientific method by saying that the problem is not to classify laws according to their object, but to discover for every legal relation that local law to which in its proper nature it belongs. Each legal relation has its natural seat in a particular local law, and it is that law which must be applied when it differs from the law of the Forum.⁵

Here the seat is the place where the thing is situated or in case of a person, where he is domiciled.

The most outstanding merit of this particular theory is that it tries to decide on each conflict on

⁴ Chigozie Nwagbara, *Re - Examining the Theory of Savigny, the Theory of Acquired Rights and the Local Law Theory under Private International Law*, 27 JLPJ 12, 13-14 (2014).

⁵ Cheshire & North's *Private International Law* @ p. 24.

the basis of its circumstances and most relevant set of laws. It supports the application of laws of that legal system to which the parties/ things concerned naturally belong to.

2.2.1 APPLICATION OF INTERNATIONAL THEORY

To determine the natural seat Savigny has explained four principal determinants. These are:

- 1. The domicile of a person affected by the legal relation*
- 2. The place where a thing, which is the object of a legal relation is situated*
- 3. The place where a juridical act is done*
- 4. The place where a Tribunal sits.⁶*

It is natural that for every legal relationship there has to exist some form of contractual arrangement between the parties involved. Thus, in case the law ought to do injustice to either party involved in such an arrangement, a legal recourse has to be sought.

In the case of the domicile of a person affected by the legal relation, we should rather insist on the domicile of the parties to the contract, where the contract took place, where the breach was committed and where the court (for settlement of the dispute) sits. If the subject of the dispute is a land, the *lex situs* governs the contract (even if it differs from the domicile of either party or both parties).

2.2.2 CRITICISM OF INTERNATIONAL THEORY

The international theory was not spared of criticism. The main basis for such criticism was the fact that Savigny assumed the laws of different lands to be uniform. Lack of such uniformity in practical world makes this theory less reliable. Such is so because the lack of such uniformity will render it difficult to determine the natural seat of the legal relationship. For example, in many countries a breach in marriage contracts is considered a tort, while in others it falls under contract law. In such situations it can become rather tough to establish the natural seat for the legal relationship persisting.

This theory also fails to recognise common law system and factors like religious diversity,

⁶ Chigozie Nwagbara, *Re - Examining the Theory of Savigny, the Theory of Acquired Rights and the Local Law Theory under Private International Law*, 27 JLPJ 12, 14-15 (2014).

ethnicities and customs which affect various laws of diverse lands. For example, India is a country rich in culture and ethnic values. Thus, such a diverse nature of the country affects its laws within territories as intricate as from village to village.

2.3 TERRITORIAL THEORY OR THEORY OF ACQUIRED RIGHTS

The theory of Acquired Rights as called by many scholars or the Territorial theory, had laid its foundations when Dutch Jurist Huber propounded his theory back in 17th century as the theory bases itself on the concept of territoriality. However, it was developed later on by common lawyers like Dicey and Beale in England and USA respectively.

The theory in most simple words state that “courts of sovereign states do not apply foreign law but merely recognize the consequences of the operation of foreign law.” This means that courts of a country according to them, apply foreign law only to the extent to which they are permitted to do so by the sovereign.⁷

In effect it means that a judge cannot by his will apply any foreign law or judgement to any case he is deciding. He essentially has to use the law of his land to govern all the cases that require his decision.

2.3.1 APPLICATION OF TERRITORIAL THEORY

The theory of Acquired Rights or Territorial Theory tries to reconcile the territoriality of law and the need for private international law.

It has been applied in the case of *Dalrymple v. Dalrymple* by Sir William Scott.

In this case the question of conflict was whether or not Miss Gordon was the wife of Mr. Dalrymple. To tackle this issue Sir William had said that “*the cause is being entertained in an English Court, thus, it must be adjudicated according to the principles of English Law applicable to such a case. But the only principle applicable to such a case by the law of England is that the validity of Miss Gordon’s Marriage Rights must be tried by reference to the law of the country where if they exist at all, they had their origin.*”⁸

⁷ Chigozie Nwagbara, *Re - Examining the Theory of Savigny, the Theory of Acquired Rights and the Local Law Theory under Private International Law*, 27 JLPJ 12, 15-16 (2014).

⁸ *Id.*

Therefore, Sir William Scott had applied the theory of Acquired Rights to decide on this case.

However, going by this judgement it says- ... *Rights must be tried by reference to the law of the country where if they exist at all, they had their origin*, makes it contrary to what the acquired rights theory has to propound. According to this statement by the hon'ble Sir William, he was to take into consideration the foreign rights of Miss Gordon from where they originated. However, the theory in particular does not give any judge the room to look at any other law than the original law of the land.

The theory can be appreciated by the angle that no stranger is being allowed to come into your house to govern or dictate you. A tantamount can be drawn here with the example that a guest comes to your house and dictates you as to how to behave in your own house or to keep what things where. The theory stops any foreign laws (guest) to dictate you in your own territory (your house) as to how to behave or operate. It gives respect to countries where laws are being sought to be enforced, and it is indeed right for any Judge in such a country to exercise that, because it is the Judge's own country.

2.3.2 CRITICISM OF TERRITORIAL THEORY

This particular theory has been highly criticised by Dr Cheshire who called it to be 'unnecessary', 'untrue', and 'unhelpful'. It doesn't garner a lot of significant support in the present times either.

While the laws of diverse lands tend to differ from each other, it becomes rather impossible to tally the laws of different land with each other. In many cases, for example Nigeria, where British had ruled for ages, they still use the English laws thus making their legal system tally with that of the British. But such is not possible with every other nation.

The foreign judgements and their application are a part of legal system therefore it cannot be neglected.

The Territorial theory in essence nearly defeats the purpose of Private International Law as a subject area as if it were so possible to decide all cases with the use of only territorial law then such debate would not take place. But it is very well established that territorial law is not enough to resolve all conflicts of law.

2.3 LOCAL LAW THEORY

The Local Law theory was propounded by Walter Wheeler Cook and can be called as a developed version of the territorial theory.

Cook emphasised on the fact that governing rules should not be derived from logical reasoning of philosophers or jurists but by observing the previous decisions of the courts. He basically emphasised on the importance of precedents.

According to Cook, every court is to essentially formulate its own set of laws based on the previous judgements. However, unlike territorial theory, for reasons of social expediency and practical convenience, it takes into account the laws of the foreign country in question. The court creates its own local right, but fashions it as nearly as possible on the law of the country in which the decisive facts have occurred.⁹

He based his reasoning and theory on the fact that what Lawyers investigate in practice is how Judges have acted in the past, in order that it may be prophesied how they will probably act in future. To him, a statement of law is true, not because it conforms to an alleged inherent principle, but because it represents the past, and therefore the probable future judicial attitude.¹⁰

2.4.1 APPLICATION OF LOCAL LAW THEORY

While the local law theory is based on precedents majorly, it does not completely ignore foreign laws that can cause points of conflicts.

It can not be denied that there are many overlapping laws if not having the exact same etymology, they are somewhere coherent in their understanding and application. For example, there is a Nigerian woman marrying an English man in England. Her marriage would still be valid in Nigeria for the reason that the concept of marriage laws has a similar nexus in both Nigeria and England.

Thus, in such cases the local law theory can be applied. There definitely lies no wisdom in any court overruling its own decision based on its local law due to some discrepancy with a foreign law. For any country, their law is the supreme guiding force, therefore the reliance on

⁹ *Cheshire, North & Fawcett* @ p. 26.

¹⁰ *Cheshire, North & Fawcett Private International Law* (14th Edition, Oxford University Press) 2008 @ p. 26.

precedents can be taken as a valid ground for delivering justice.

2.4.2 CRITICISM OF LOCAL LAW THEORY

According to Cheshire, North & Fawcett, *this local law theory affords no basis for the system of Private International Law. For to remind an English Judge about to try a case containing a foreign element, that whatever decision he gives, he must enforce only the law of the Forum is a technical quibble that explains nothing and solves nothing. It provides no guidance whatever as to the limits within which he must have regard to the foreign law.*¹¹

While precedents can be a good basis for deciding on conflicts however, they shall not be the only basis on which any future decisions shall be made. In case a precedent is obstructing justice and failing to achieve the full potential, then such precedent shall not be followed any longer. A court should also be ready to set aside a Precedent if it discovers in future that the precedent has led to miscarriage of justice.

As human beings evolve, the law also has to evolve. Therefore, basing any law solely on precedents can not be correct every time. A great example of such is the power of higher courts to overrule the earlier judgements of lower courts. In many instances we have seen courts overruling their previous judgements in the light of new facts and logical questions that arise with time on the previous judgements.

2.4 THEORY OF JUSTICE

The Theory of Justice was developed by Dr Graveson with the only basis of delivering true justice. Ideally Dr Graveson also believes that his theory is not a straight jacket rule for every case possible, but his main aim is to deliver pure justice keeping in mind precedents, having good conscience and equity.

In words of Graveson, *“one of English legislative and judicial justice, based on what English statutes say and what English judges do in cases to which the conflict of law applies. It is thus both pragmatic and ethical.”*

According to him private international law has a threefold premise, namely- sociological, ethical and legal. Sociologically, it calls for a need fair treatment of private transactions of

¹¹ Cheshire, North & Fawcett @ p. 27.

individuals internationally. Ethically, it speaks about the desire of English courts to do justice by looking at the training and traditions of jurors, judges and lawyers in their day to day delivering of justice. Lastly, legally, it rests on the terms of oaths of the judges.

As stated earlier, Graveson himself talks about his theory not being a perfect one. This is so because in many instances one cannot explain in terms of absolutes and empirically developed principles in this, as in other branches of law, may lead at times too hard individual cases. It brings one to an important conclusion as to no particular theory can properly answer the question of what are the theoretical basis of private international law. While some scholars base it on territory, the local law theory is an extended version of the same principle. The major issue here is that in cases of private international law one is bound to apply some or the other foreign law, but no one is willing to concede to such laws. Conceding to foreign laws and applying them while determining the conflicts only means that one sovereign is giving up his sovereignty in front of another sovereign.

While Cheshire and others point out that such a subordination of one's sovereignty does not occur by force but such a sovereign gives up his sovereignty by free will. However, in cases of private international law, one does not really have a choice. It is called as "private international law" because it involves the interests of more than one party which is in conflict. Thus, it is inevitable that some or the other foreign law is applied to resolve the cases of such conflict of interests.

3. CONCLUSION

Private International Law or Conflict of Laws, is a vast and ambiguous field of law, and essentially, there is no single theory that completely and effectively underpins the application of the law when there is a conflict with foreign law.

Conflict of Laws has become a veritable playpen for judicial policymakers. The courts are saddled with a cumbersome and unwieldy body of conflict laws that creates confusion, uncertainty and inconsistency as well as complication of the judicial task.

Nations in our contemporary world are so much interdependent that they have got to co-operate mutually. Then, it need not be said that the contact of people of the world with each other at the international level has grown so much that the wheel of the clock cannot be put back. In short, it is the international social need that has given birth to private international law and so

long as this need exists the private international law will stay whatever exercises may be made to find out its theoretical base.