Conflict Of Laws

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Part One

General Principles of Conflict of Laws

Chapter One
General Introduction On Conflicts

- 1.1. Naming
  - Various names have been suggested to refer to the subject but each are inadequate to describe it.
  - Such Names as:
    - Conflict of Law
    - Private International law
    - Law of Multistate Justice
    - International Property Law
    - Law of Comity
  - “Conflict of laws” and “Private International law” are commonly, and widely used
  - All are Inadequate and Misleading Names
    - Eg. The term “Conflict of laws” suggests the existence of equal status between the two laws and they are in competition. But in reality it is only with permission of the forum court that foreign laws will be applicable in a country and foreign law has no equality with forum law.

Naming Contd..

- The term “Private International law” also suggests the existence of certain Internationally accepted law applicable on the subject matter.
- But the truth is conflict of laws is essentially a national(Municipal) law having no international applicability except where it is permitted in special cases through treaty between countries. E.g. Harmonization attempt in EU private International Law.

1.2. Definition and Analysis of Conflict of laws

- Does not have a universally agreed up on definition
- Blacks law Dictionary defines:
  - " That branch of jurisprudence arising from *diversity of laws of nations* , state or jurisdictions, in their application to the rights and remedies that decides which law or system is to govern in case or settles the degree of force to be accorded to the laws of another jurisdiction…"
- Robert Allen Sedler Defines :
  - " that body of law that determines whether the forum will give effect to the laws of another state where the case that is adjudicated contains a *foreign element.*"

Analysis

- **The basic concepts in the above definitions are** :
  - Existence of diversity of laws of different nations
  - The existence of a case that contains a foreign element
  - The need for rule or body of law to determine the applicable law in such cases
  - **When does a case contains a foreign element?**
  - Three grounds:

    1. When the **events** giving rise to the litigation occurred partially or totally in foreign lands or;

    2. When the **Parties** to the dispute are domiciliary, nationals or residents of different states; or

    3. When the **property (subject matter of the dispute)** is **situated** outside the forum.

1.3. Nature , Scope and Subject matter of conflict of laws

A. Nature

- 1. Conflict of law rules **does not by themselves dispose** of a case with substantive remedy. They simply indicate the law through which final remedy could be obtained
- 2. Is not concerned with **public cases** like criminal, revenue, customs, constitutional and administrative cases. It deals with disputes of private nature.
- 3. It is **basically a national law** made by each country.
- 4. conflict problems arise at both the international (intra -state) and national level (interstate conflicts).e.g. in Federations

Conflict of laws(Private International Law) VS. Public International Law

- Common Grounds
  - Common Historical Origin
  - Exceptions to the normal application of law created by sovereign and diplomatic immunity
  - Displacement of the normal operation of rules of the conflicts when they threaten friendly international relations
- Differences
  - Conflict of laws is Part of domestic law of a country , It deals with private matters among private individuals
  - It has no uniformity or no consensus among states
  - Public international law governs states and international organizations in their mutual relations
  - Here there exist a certain degree of consensus on the rules an d principles.

Nature , scope ctd…

- **B. Scope**
- According to the traditional view, conflicts mainly deal with three major sub-divisions
- They are:
  - **Judicial jurisdiction**, (whether the forum court has the power to see and decide on the case);
  - **Choice of law**, (the law which related state governs the case) and;
  - **Recognition and enforcement** of foreign judgments and foreign arbitral awards. (How should we recognize a foreign judgment and ward; How to execute domestically.)

Nature and scope cntd…

- **Exceptions to scope**
  - In some civil law countries the subject often encompasses in addition to the above three:
    - The Law of Nationality and Citizenship
    - Some special rules pertaining to the position of aliens
    - International Legal Cooperation in civil matters

Scope of Conflict of laws Under Ethiopian System

- No separate conflict of law Proclamation
- Proclamation No. 25/1996 , dealing with Jurisdiction of federal courts and very vague choice of law rule;
- Art.11 (2) (a) and (c) of Proc. 25/1996 and the Civil Procedure Code of Ethiopia (esp. the former) deliberately or not implies that (recognition) and enforcement of foreign judgments is not part of conflicts discipline.
- Initial Draft Proclamation to Provide for Federal Rules of Private International Law prepared by the Justice and Legal System Research Institute considers the three elements as parts of the discipline.

1.4. Raison D'être of conflict of Laws(What is the purpose of its existence, Why do we need It?)

- Two important facts create obstacle to smooth operation of law in the international community and give rise to Conflict of laws Problems:
  - Different legal communities have different laws *(diversity factor)*
  - Legal transactions are some how connected with more than one legal system because of cross border commercial, family etc relations *(Integration factor)*
  - In addition the Notion of state sovereignty and impact on recognition of foreign judgments

Raison d'être Cotd..

- The legal systems being diverse and the unavoidability of commercial and other interaction among individuals across borders of states, in case of disputes individuals will and courts will be faced with questions of :
  - Which court , the local or the foreign court can see the case
  - If a certain court has assumed jurisdiction which law is it going to apply to remedy the dispute
  - Even if the plaintiff may obtain a judgment here can she obtain enforcement of the same in a foreign territory where the defendant has property etc
- These are the main problems private international law is meant to alleviate.

What would happen if there were no Conflict of law rules?

- International legal transactions would be greatly impeded Forum shopping would be rampant
  - Forum shopping is making use of jurisdictional options to affect the outcome of a lawsuit provided that all courts would always apply their own laws.
- Lex fori would always be applicable
- No one involved in multistate legal relationship would be sure of the out come of his action
- Prevention of Injustice to parties. Individuals could be gravely harmed for they may lose a right or status legally obtained in one state when they cross a border to another state
- Judgment creditors may be left without execution of their right obtained in one state against defendant in another state
- Business, and investment will be greatly hampered.

1.5. Interstate and International Conflict of laws

- Conflict of laws problem arises both on international level (among national states)(Intra-state) and between sister states of a federal or a decentralized system of governments(inter state conflict)
- For purpose of conflict of laws states of a federation are considered a separate legal entity and a distinct legal system
- Each of the sister state may have their own conflict of law rules
- Even if in most cases the nature of inter state and international conflicts of laws are the same, the inter state conflict is different because the federal constitution provides for certain rules that aim at homogeneity on certain issues and a constitutional guarantees so as to protect right of individuals, Unity of the federation and the sisterly relation of state governments.

1.6. Origin and development of Conflict of Laws In General

- The history of Conflict of Laws or Private International Law is history of Choice of law.
  - i.e., History of the theories of Choice of Law
- Problem of conflict of laws has a very ancient history from the time of ancient Egypt, Rome and Greek
- Various Methods were used to deal with the matter Like:
  - In Greek ,Special Courts for cases in which foreigners involved
  - In Rome Special Law, *Jus gentium i.e* "general principles of law common to all nations" was applied Instead of the *jus civile*.

Development ctd…

Middle Ages

- Conflict of laws as we know it emerged around 13th c In Italian City States
- Mgistur Aldricus (The Father of Conflict of Laws) Developed the first choice of law rule
- Suggested that " Court must apply the law with the significant contact with the case and the most effective and useful law"
- Critics: Vague

Development ctd..

The Statutory Theory

- Foreign defendant should be governed by his National or personal law wherever he may be
- Place of Cause of action immaterial personal law follows the person
- Critics: A person did not carry all of his national or personal law with him
- Classification of Statutes in to real and personal statutes
  - Real statutes do not have extra territorial applicability. E.g. Rules governing immovable are the laws of the citus.
  - Personal statutes follow the Person. E.g. Matters relating to status and movables governed by defendants national law.

Development ctd…

- Difficulty of Classification of statutes in to real and personal and the consequent development of third category “Mixed statutes” by d'Argentrè.
- Mixed statutes have same effect as Real statutes.

Development Ctd..

- 16th Century development and the French jurist Du Moulin's Party autonomy in contract cases.
  - contract should be governed by the law intended by the parties.
- 17th century Emergence of "Territoriality Theory" by Dutch Jurists along with the concept of sovereignty
  - Law should have force only within the territory of enacting sovereign foreign law applies only for purpose of comity.

Development ctd…

Modern Times

- Allocation Method (Traditional Choice of law Method)
  - in 1840's German Romanist, Karl von Savigny, who achieved the important shift of focus from classification of rules to 'consideration of legal relationships'
- The Governmental interest analysis theory
  - Developed by David Cavers, Brainerd Currie, Robert Leflar
  - "The Policy Underlying the rule of substantive law and the interest a state might have in its actual application determine the out come of the choice of law process."
  - Varieties :
    - Value Oriented Approach
    - Policy weighing Approach (Functional Analysis)
  - Widely accepted in USA
  - Suggested for Ethiopia by R. A. Sedler.

1.7. Development of Conflict of Laws in Ethiopia

- There is no separately enacted law of conflict of laws to guide judges in Ethiopia.
- A number of attempts have been made to draft the Private International law rules.
  - Renè David's draft during civil code codification
    - Rejected for no apparent reason
  - 1976 E.C. The Short-Term Law Revision Committee
    - Not adopted
  - R.A. Sedler's personal draft
    - No Action taken
  - The Federal Draft Conflict of law Rules by the Justice and legal Systems Research Institute
    - Not adopted

Development in Ethiopia Ctd..

- Despite no Proclamation Courts entertain Cases of conflict of laws
  - Ethiopian courts assume Judicial Jurisdiction if:
    - Defendant is Ethiopian national or domiciliary
    - Cause of action arise in Ethiopia.
  - Choice of law: Nationality and Domicile as connecting Factors
  - No Consistent trend followed by courts resulted in hampered of case law jurisprudence
  - The problem intensified by the Current Federal arrangement
    - Both Intera- state (International)and interstate (National) Conflict of laws arise in Ethiopia.