

**THE HISTORY AND SOURCES OF CONFLICT OF LAWS IN NIGERIA,
WITH COMPARISONS TO CANADA.**

By Remigius Nnamdi Nwabueze

Submitted to the Faculty of Graduate Studies
in Partial Fulfillment of the
Requirements for the degree of

MASTER OF LAWS

Faculty of Law
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Remigius Nnamdi Nwabueze

**A Thesis/Practicum submitted to the Faculty of Graduate Studies of The University of
Manitoba in partial fulfillment of the requirements of the degree**

of

Master of Laws

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DEDICATION

TO:

**Mr. James C. Ezike
Professor DeLloyd J. Guth
Dr. Joseph Nnyamah**

These gentlemen were the beacons in my intellectual journey through the dark tunnel that lead to light.

PREFACE

I had often wondered how, about five hundred or more years ago, cases with foreign elements were resolved in the geographical territory that is now known as Nigeria. My curiosity invited me to this intellectual pursuit with its unanticipated profound and challenging dimensions. From Nigeria I had to grapple equally with a comparable legal situation in Canada, and to proffer explanations for both colonial and post-colonial legal regimes. Mine has been only a flirtation with Canadian legal history!

This work has shown some eclecticism, borrowing from history, jurisprudence, constitutional law, and conflict of laws. Professor D. J. Guth ensured that I did not get stuck in the quagmire of historical materials or confused in their exposition. Chapter 1 introduces the reader to conflict of laws by giving its definition and principal characteristics. Chapter 2 explains the historical context for the evolution of conflict of laws in Nigeria. Chapters 3, 4, and 5 treat the various sources of conflict of laws in Nigeria and Canada. Chapter 6 focuses on the special problems of conflict of laws in Nigeria engendered by its pluralistic legal system. Each chapter tries to state what seems to be the legal position and then makes suggestions on what the legal position ought to be.

I have benefited immensely from my friendship with Ms. Taiwo Okunnu, Mr. Okechukwu Ekuma, Mr Kingsley and Mrs. Mercy Lughas, and Professor Sylvanus Ehikioya. As usual, I remain grateful to my father, brothers and sisters in Nigeria whose love and encouragement ensured that I concentrated on this work. I acknowledge the unfailing help I received from the staff of the E. K. Williams Law Library, Faculty of Law, University of Manitoba. I am grateful to the Faculty of Law,

University of Manitoba for their sundry assistance in my doctoral application, and for granting me a fellowship that made my graduate study at the University of Manitoba a possibility. I am grateful to Professors Cameron Harvey (Manitoba) and Joost Blom (British Columbia) for their helpful comments and suggestions.

Lastly, I feel very sorry and apologise for the unreasonable way I treated my supervisor and mentor, Professor D. J. Guth. I cultivated the bad habit of turning every meeting with him, whether in his house, office, or restaurant, into a seminar on the historical perspective of conflict of laws. But he encouraged and seemed to enjoy every bit of it. This work is dedicated to him and two other gentlemen who have greatly influenced my life: Mr. James C. Ezike and Dr. Joseph Nnyamah.

R. NNAMDI NWABUEZE.
WINNIPEG, MANITOBA
CANADA
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CHAPTER ONE

MEANING AND CHARACTERISTICS OF CONFLICT OF LAWS.

1.1 DEFINITION AND SCOPE OF CONFLICT OF LAWS.

Conflict of laws means that part of the domestic law¹ of each country which deals with cases that contain a foreign element.² There are three elements in the above definition: domestic law, country³, and foreign element.⁴

Since conflict of laws has its own rules and principles, it is as much a department of the law as, for instance, the law of contract, tort, corporate law, or environmental law. But it differs from the foregoing legal categories in that they are substantive in character while conflict of laws is rather selective and procedural. A substantive law creates and defines the rights and duties of the parties. Procedural law establishes the means by which those rights and duties are proved and regulates the proceedings for finding that right at every

¹ This means the local body of law or legal system of any country. Conflict of laws is said to be domestic in character because it is the prerogative of each legal system to determine its conflict of laws rules and these may vary from one legal system to another.

² Halsbury's Laws of England (Conflict of Laws), 4th ed., para. 601; Halsbury's Laws of Australia, Volume 4, para. 85-1.

³ This is a territory or area with a single legal system. It is usually a state or province in a federal system.

⁴ It is one element, at least, in a conflict of laws case which occurs outside the territory of the legal system whose court is exercising jurisdiction in the case. 'Territory' means a sovereign country and in the case of federal countries, it means each province or state. The foreign element may be one of the parties whose residence or domicile is in some territory other than the territorial jurisdiction of the court involved, or it may be the location of the subject matter of the dispute, *i.e.*, where the contract was made, to be performed, or breached, where the tort occurred, where the land or chattel is situated; or it may be that a court in another territory might have jurisdiction to try the case, or it may be the law governing the substantive issues, *i.e.*, the court that will be asked to apply foreign law. Where there are two courts within the territory of a single legal system but exercising different jurisdictions, an element which occurs outside the jurisdiction of one of the courts but within the territory of same legal system is not a foreign element. This is because no other system of law has been called into question; the same legal system will be applied by the two courts above, though exercising different jurisdictions. It is a foreign element that gives conflict of laws its distinctive character because it brings into question the application of another system of law. Without at least a single foreign element, a case would not qualify as a conflict of laws case.

stage.⁵ For instance, the law of tort defines a civil wrong and stipulates its correlative right to remedy in damages. Conflict of laws does not perform a similar function; it rather stipulates or selects the legal system whose law of tort ought to define a particular civil wrong and its correlative right, or the court to try the case. Just as one can, for instance, talk of a tortious act or a contractual right, there is no such thing as a conflict of laws right or duty.

Though conflict of laws has its own rules, which we examine below, those rules merely select the applicable legal system and do not create or define any substantive right. Consequently, conflict of laws is just a method or technique of legal analysis.⁶ On this perspective, conflict of laws is analogous to comparative law but differs from it in having its own rules, which is not characteristic of comparative law.⁷

1.2 NOMENCLATURE.

Conflict of laws is known by other names which are often used interchangeably. A glance at any collection of conflict of laws books will reveal that the most common names are conflict of laws and private international law. None of these two names is entirely without criticism. The name conflict of laws may falsely suggest that two systems of laws are in conflict and all the court does is to settle the clash. But conflict of laws connotes no such thing. When conflict of laws selects a particular law among potentially applicable laws to govern a dispute, it does not mean that those laws are competing for application or

⁵ T.E. Holland, *The Elements of Jurisprudence* (Oxford: at The Clarendon Press, 1900, 9th ed.), p. 84.

⁶ J. -G. Castel, "Conflict of Laws – Some Differences Between the Systems Found in the United States and Canada," (1962) 11 *American Journal of Comparative Law*, 315 at 322.

are in a state of conflict. It is not infrequent that the potentially applicable laws contain similar provisions and would have produced the same result. When a Manitoba court is confronted with a choice among the laws of Saskatchewan, Ontario and Quebec, it tries to ascertain the law which, in accordance with its conflict rules, will do justice in the matter. It does not necessarily mean that the three laws are in conflict. The court may well find the applicable law to be Ontario law, *i.e.*, not Manitoba law. If conflict of laws were to mean the settlement of clashing or conflicting legal systems, then every court would be biased in favour of its legal system and would settle the conflict accordingly. The name 'conflict of laws' has been adopted in this meaning by such popular writers as Dicey and Morris⁸, Nygh⁹, Castel¹⁰, and Rabel.¹¹

Similarly, the name private international law may be misunderstood. A person who does not appreciate the difference between public and private international laws may likely think that private international law is just an aspect of public international law. This usage is not least likely to confuse the discerning reader who appreciates that public international law only deals with the relationship among sovereign states and is, at least in theory, the same everywhere; while private international law rules are not the same everywhere and deal primarily with the relationships between persons. The name 'private international law' tries to emphasise the international character of the facts of a conflict case which may have contacts with the legal systems of two or more sovereign states. The

⁷ Alan Watson, Legal Transplants: An Approach to Comparative Law (Athens: The University of Georgia Press, 1993, 2nd ed.), pp. 1-6.

⁸ Dicey & Morris: The Conflict of Laws (London: Sweet & Maxwell, 1993, 12th ed., vols. 1 and 2 by L. Collins, *et al*).

⁹ P. E. Nygh, Conflict of Laws in Australia (Sydney: Butterworths, 1984).

¹⁰ J. -G. Castel, Conflict of Laws (Toronto: Butterworths, 1984, 5th ed.).

name private international law has been used by some popular writers on the subject like Story¹², Cheshire and North¹³, Westlake¹⁴, and Wolff.¹⁵

Some writers have equally used other names like polarized law¹⁶, inter-municipal law¹⁷, trans-municipal law¹⁸, and trans-national law.¹⁹ While the same subject is treated under all of these names, which are interchangeable, this thesis will adopt the name of conflict of laws for our project.

1.3 SCOPE OF CONFLICT OF LAWS.

Conflict of laws performs three major functions. First, where a case contains a foreign element it is the conflict of laws rules that determine whether the court asked to exercise jurisdiction in the case actually has jurisdiction. The conflict of laws rules of every legal system contain elaborate rules for determining the question of jurisdiction in a conflict of laws case. Assume that a Nigerian domiciled in a state in Nigeria and a Canadian domiciled in Manitoba entered into a contract in Winnipeg to be performed in Nigeria, and a question arose in a Manitoba court as to the rights of the parties under the contract. A court in Manitoba will apply the province's conflict of laws rules to determine whether

¹¹ E. Rabel, The Conflict of Laws: A Comparative Study (Ann Arbor: The University of Michigan Press, 1950, 2nd ed.).

¹² J. Story, Commentaries on the Conflict of Laws (Boston: Hilliard, Gray, and Co., 1834), p. 9.

¹³ Cheshire & North: Private International Law (London: Butterworths, 1992, 12th ed. by P. M. North and J. J. Fawcett).

¹⁴ J. Westlake: Private International Law (London: Sweet & Maxwell, 1925, 7th ed. by N. Bentwich).

¹⁵ M. Wolff, Private International Law (London: Oxford University Press, 1945).

¹⁶ T. Baty, Polarized Law (London: Stevens and Haynes, 1914), p. vi

¹⁷ F. Harrison, Jurisprudence and the Conflict of Laws (Oxford: At The Clarendon Press, 1919), pp. 130-131

¹⁸ G. Ökcün, Trans-municipal Law (Ankara: University of Ankara, 1968), p. 12.

¹⁹ P. C. Jessup, Trans-national Law (Yale University Press, 1956), p. 2.

jurisdiction lies in that court or in a court in Nigeria. If it decides that it has jurisdiction, then it will proceed to the next stage of a conflict of laws case; otherwise it will strike out the action for want of jurisdiction. Second, conflict of laws determines which of the potentially applicable legal systems will provide the rule for the decision. In other words, it selects the applicable law. This is a fundamental and common function of conflict of laws. This is technically called 'choice of law,' which we shall explain in detail later.

Once the legal system providing the rule of decision has been chosen by the application of choice of law rules, then conflict of laws will have finished its function. It withdraws for the chosen legal system to determine the substantive rights of the parties. Using our above example: where a Manitoba court, after assuming jurisdiction, decides by the application of its conflict of law rules that the contractual rights or liabilities of the parties will be determined according to a Nigerian state law, then the conflict rules of Manitoba would have finished their functions and will leave the matter to be decided in Manitoba according to the Nigerian state law. The Manitoba court would then ask for the proof of the Nigerian law on the point and apply it. Third, sometimes conflict of laws performs a third function, *i.e.*, it determines the circumstances and conditions for the recognition and enforcement of a foreign judgment. Assuming the Manitoba court gave judgment in favour of one of the parties who seeks enforcement against the judgment-debtor's property in Ghana, *i.e.*, another country. From the point of view of Ghana, that Manitoba judgment is a foreign judgment. A Ghanaian court asked to enforce it would

have to apply its local conflict of law rules to determine whether that judgment could be recognised and enforced in Ghana.²⁰

1.4 CHOICE OF LAW.

Choice of law is the second stage in the conflict of law process. It is the technique by which the applicable law in a case with a foreign element is chosen. But choice of law, as known to conflict of laws, should not be confused with whatever choice of law may exist in another discipline. A distinguishing feature is that for choice of law to arise the case itself must be a conflict of laws case, *i.e.*, it must possess a foreign element as defined above. Here is a classic choice of law situation:

Defendant and W. were validly married in Hungary, their domicile of origin. They left Hungary with the intention of going to Israel to make their permanent home. While en route, in Italy, they were divorced by a *gett* which, although recognised as a valid divorce in Israel, was not recognised by either Hungarian or Italian law as a valid dissolution of marriage. Eventually defendant and W. reached Israel where they acquired a domicile and where they had the status of single persons. While still domiciled in Israel, defendant went to Ontario on a visit where she married the plaintiff, who was domiciled in Ontario. Subsequently, in Ontario, the plaintiff sought a declaration of nullity on the ground that

²⁰ Similarly, in *Mohamed v. Knott* (1969) 1 Law Reports Queen's Bench, p. 1, an English Court recognised a valid customary law marriage, though not valid under English law, between a thirteen year old Nigerian girl and a Nigerian man twice her age, both domiciled in Nigeria but were in England at the time of the suit, as conferring the status of a 'wife' on the girl and therefore removed her from the ambit of the *Children and Young Persons Act 1963, c. 37*, of England.

defendant's marriage with W., who was still living in Israel, had not been dissolved by a divorce recognised by Ontario law.²¹

On the facts of the above case, it is purely a conflict of laws case for the Ontario court. There were so many foreign elements: the defendant and W. married in their domicile of origin in Hungary, the divorce by *gett* in Italy, the recognition of the *gett* in Israel, and the subsequent domicile in Israel. The facts of the case touched on four countries or different jurisdictions. The Ontario court having assumed jurisdiction, on the basis that the plaintiff and the defendant, by marriage to the plaintiff, were domiciled in Ontario, the next important question became which law would determine the validity of the divorce by *gett*, since the nullity of marriage sought by the plaintiff depended on the validity of the *gett*. The above question typically lies within the province of choice of law. The Ontario court would in the instant case apply that part of its conflict of laws known as choice of law to select the legal system that would determine the validity of the divorce by *gett*.²²

It is possible to have a case without a foreign element but which nevertheless involves some choice of courts or of law. Such a case may, literally speaking, present a choice of law situation, but strictly it does not qualify as a choice of law in conflict of laws, because of the absence of foreign element. Take another instance: the common law of England for centuries did not recognise legitimisation of a child by subsequent marriage of its parents, but ecclesiastical law did. Now a question arose as to the legitimisation of a child born to English parents who subsequently got married in England. We know that the decision

²¹ The facts are taken from the Canadian case of *Schwebel v. Ungar* (1964) 42 Dominion Law Reports (2d), 622.

²² In the above case it was held that Israeli law governed the validity of the divorce by *gett*, since it was the law of the defendant's domicile at the time of her marriage to the plaintiff, and that by that law the divorce by *gett* was valid.

would vary depending on whether the matter was taken before a common law or an ecclesiastical court, or whether the common law or ecclesiastical law was applied.

Whatever choice such a case might involve, it is not a choice of law known to conflict of laws because it had no foreign element. All the facts occurred in England. We can complicate the facts and say that the child was born in The Netherlands to English parents who subsequently got married there and that Dutch law recognises legitimation by subsequent marriage. These new facts would give the case the colour of conflict of laws. Foreign elements have emerged: birth and subsequent marriage in The Netherlands. The question of whether legitimation should be according to English law or Dutch law becomes a perfect question of choice of law.²³ Likewise in a purely local case involving a juvenile, the choice between the application of juvenile law and the ordinary law does not raise a question of choice of law, because there is no foreign element.

It is mainly because of this choice of law function that the entire subject could be classified as procedural law as distinct from substantive law.²⁴ Procedural law, as stated above,²⁵ does not decide the right of the parties but regulates the proceedings for finding that right at every stage. Substantive law, however, defines the rights of the parties.

Conflict of laws is selective in nature. It is a technique. It does not concern itself with the

²³ Similar facts and question occurred in: *In re Goodman's Trust* (1881) 17 Law Reports Chancery Division, p. 266.

²⁴ F. K. Juenger submitted: "For centuries jurists have drawn a line to separate choice of law, on the one hand, from jurisdiction and the recognition of foreign judgments on the other. The choice of the applicable law is regarded as a "substantive" matter, whereas jurisdiction and recognition are considered to be "procedural." Functionally, however, the three topics are intertwined": Choice of Law and Multistate Justice (The Netherlands: Martinus Nijhoff Publishers, 1993), p. 3. This bifurcation of conflict of laws into substantive and procedural aspects does not exist. Choice of law function cannot correctly be described as a substantive matter. Upon the selection of the applicable law, choice of law function is virtually exhausted and the definition of the relevant rights are left to the chosen law. Since choice of law merely selects the applicable law and does not define or create any right by itself, it is patently wrong to describe it as substantive in character.

²⁵ Page 1.

substantive rights of the litigants. Once it selects the applicable law, it withdraws for that substantive law to decide the rights of the parties. I cannot imagine any conflict of laws rule that directly decides the substantive rights of parties in a case. It is true that conflict of laws rules help the courts in their quest for justice, but they do so mainly by ensuring that the appropriate substantive law is chosen. When a conflict of laws rule, for instance the proper law doctrine in contract, seeks to give effect to the intentions of the parties, it does so by selecting the substantive law of a state that would actualise the parties' intentions. The conflict of laws rule does not by itself give effect to those intentions but helps in the process of effectuating them.

SOME EXAMPLES OF CHOICE OF LAW RULES IN ACTION:

(a) Law of domicile or *lex domicilii*: this is a choice of law rule which determines the applicable law on the basis of the domicile of one or both parties to a case. Common law domicile means a person's permanent home, *i.e.*, where a person has actually taken up residence with the intention of living there for an indefinite time. For instance, the Ontario court in our earlier example was asked to declare the marriage between the plaintiff and defendant a nullity on the ground of the defendant's incapacity to marry, due to her earlier subsisting marriage which was allegedly not dissolved by the *gett*. The court could, and it did, refer the matter of capacity to marry to the law of the defendant's domicile at the time of her marriage to the plaintiff, *i.e.*, Israeli law. Therefore, the *lex domicilii* was employed as the choice of law rule which selected Israeli law as providing the rule of decision. However, domicile is not always easy to ascertain. We have already noted that it is

composed of two elements: residence and intention to reside indefinitely. A person's intention to reside in a place indefinitely may require all manner of evidence for proof.

Let us assume that a Nigerian took up residence in Manitoba where he got a lucrative job. While in Manitoba he has not made up his mind as to whether he would return to Nigeria. He has lived in Manitoba for twenty years but still maintains contact with friends and family in Nigeria. He never visits Nigeria again. If he dies in Manitoba, where shall we locate his domicile? Can we presume his intention to reside indefinitely in Manitoba from his long period of stay there? Assuming further that he told some people that he would not go back to Nigeria again, would that expressed intention be decisive?²⁶ Consequently, in ascertaining a person's domicile, the court looks at all the circumstances of the case and every piece of available evidence which can establish the fact and intention of domicile.

(b) The national law or *lex patriae*: this is a choice of law rule based on the nationality of a litigant. For instance, the court could in a conflict of law case hold that a particular issue would be decided by the national law of a party. In that case, where the national law of the party is different from the law of his domicile, the national law prevails. But it is not always easy to ascertain what is a person's national law. For instance, when a court refers a particular issue to the national law of a Nigerian or Canadian person, the reference becomes difficult to interpret because in these two countries we have not a single but two

²⁶ The Privy Council has held that a person's declaration as to his domicile is not conclusive and that the court would weigh it against other pieces of available evidence: *Casdagli v. Casdagli* (1919) Law Reports Appeal Cases, 145 at 173: "Intention may be (and in most cases is) gathered from what a person does, not merely from what he says," Lord Dunedin. In Manitoba, however, the issue of domicile would be determined under *The Domicile and Habitual Residence Act, R.S.M., c. D-96*, which creates a statutory law of domicile slightly different from the common law rules on the matter. For instance, Section 3 abolished the common rules on the domicile of a married woman, and the common law rules on the revival of the domicile of origin.

systems of law: the federal law and the state or provincial law. As citizens of these countries are each subject to the simultaneous application of both systems of law, which of the systems constitute the national law? Or are both systems the national law? In that case, what if the two systems have conflicting provisions on the particular matter? In the type of situations above, a further supplementary rule is required to make the reference identify the national law more accurately.

It is for each legal system to devise its supplementary rule. Again, the national law becomes almost meaningless in the case of persons with multiple nationalities. An instance is Nigeria where its constitution allows multiple nationality to Nigerian citizens by birth.²⁷ Where a Nigerian citizen by birth emigrates to Canada where he also acquires the Canadian citizenship, which of these two countries signifies his nationality? Having become a national of two countries, where shall we locate his national law? Obviously, in this type of situation, each legal system needs a supplementary rule to identify specifically the national law of a person with dual nationality. For instance, it may be provided that this person is a national of the particular country where he is actually domiciled; or one of the countries where he is habitually resident; or the country where he carries on his business. Another problem with identifying the national law is where a person is stateless. For instance, a person may leave state A for state B in such circumstances that he has lost his nationality of state A but without acquiring the nationality of state B. He has therefore become stateless and a reference to his national law may become meaningless. Again, a legal system may solve this problem by providing that the national law of a stateless person is the law of his domicile or habitual residence.

²⁷ Section 28 (1) of the 1999 *Nigerian Constitution* (Lagos: Federal Government Printers).

In this reality, the courts in Canada and Nigeria use domicile, not nationality, as a connecting factor for determining the governing substantive law.

(c) The *lex loci contractus* marks the choice of law rule for where a contract was concluded or made to govern most matters arising from the contract.²⁸ But the greatest difficulty with this rule is ascertaining the place of contract. Where a contract was concluded inside an international flight from Canada to Nigeria, or inside a ship in the middle of an ocean, where is the place of the contract? It is obvious that we may not get a unanimous opinion on that. To avoid this type of problem, parties to a contract may expressly or impliedly provide for a particular legal system as governing all disputes arising from the contract.²⁹ Otherwise, the court may, in ascertaining the place of the contract, subject it to a legal system well beyond the contemplation of the parties.

(d) A similar rule marks law of the place of performance of a contract or *lex loci solutionis*. This rule selects the law of the place where the obligations under a contract are to be performed as the applicable law, especially in some questions of illegality of performance. But then there is the similar problem of ascertainment of the place of performance of the contractual obligations. That place may be fortuitous. Where is the place of performance of a contract if performed on an international highway during the course of a journey by road from Manitoba to New York, or inside an international flight

²⁸ *Robinson v. Bland* (1760) 97 English Reports, p. 717 at 718 (judgment delivered on 22 May 1760 by Lord Mansfield); *Holman v. Johnson* (1775) 98 English Reports, p. 1120 at 1121 (judgment delivered on 5 July 1775 by Lord Mansfield). However, Canada and Nigeria now use the proper law of contract as a connecting factor to the applicable law.

²⁹ *Vita Food Products Inc. v. Unus Shipping Co.* (1939) Law Reports Appeal Cases, p. 277; *R v. International Trustee* (1937) Law Reports Appeal Cases, p. 500: "The legal principles which are to guide an English Court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive. If no intention be expressed the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances,]" by Lord Atkin.

from Toronto to Paris? Because opinions may vary on these problems, the court may ultimately identify a place of performance which may be different from the place contemplated by one or both of the parties. Therefore, parties to a contract usually make detailed provisions as to the applicable law, including the law governing performance.

(e) Law of the place where a tort is committed or *lex loci delicti*: this choice of law rule in tort selects the law of the place of the tort as the applicable law defining the liabilities arising from a tortious conduct. The preference for the law of the place of tort could be explained on the ground that every legal system or government has a right or interest in ensuring that persons and property within its territory are protected against wrongful, injurious or tortious acts. However, the place of tort may not be easy to identify. If while on the Nigerian side of her border with Ghana I set a fire which crosses the borderline and causes damage in Ghana, where is the place of tort? Is it in Nigeria where the act that caused the damage was done or in Ghana where the resultant damage occurred?³⁰ An aircraft as a result of negligent repair in Canada crashes in the course of its flight from Canada to Holland and severely injures the survivors: where is the place of the tort? Is it in Canada, where the negligent act took place, or in whatever place it is ascertained to have crashed?³¹ Again, a company in Nigeria produces cement which is distributed all

³⁰ In *George Monro Ltd. v. American Cyanamid and Chemical Corporation* (1944) Law Reports King's Bench, p. 432 at 440, Goddard L.J. observed: "It may be that in some cases an act which would be regarded as tortious in England would not be regarded as tortious in America, and *vice versa*. Therefore, it would be a very strong thing for an English court to exercise jurisdiction over an American in respect of an act committed by him in America, although some damage might be alleged to be suffered in England, when the act in America might not be considered by the courts of that country to be tortious at all."

³¹ In *Kilberg v. Northeast Airlines* (1961) 172 Northeastern Reporter (2d) 526 at 527-528, Chief Judge Desmond of the New York Court of Appeals observed: "Modern conditions make it unjust and anomalous to subject the travelling citizen of this State to the varying laws of other States through and over which they move.... His plane may meet with disaster in a State he never intended to cross but into which the plane has flown because of a bad weather or other unexpected developments, or an airplane's catastrophic descent may begin in one State and end in another. The place of injury becomes entirely fortuitous. Our courts should if possible provide protection for our own State's people against unfair and anachronistic treatment

over the world. The company imports the raw materials for the cement from Liberia. The cement is bought by a Canadian company that retails it. A Canadian buys the cement and the house with which it was built collapses as a result of defect in the raw material with which the cement was produced.

In the above scenario, where is the place of tort? Is it in Liberia where the raw materials were bought or in Nigeria where the raw materials were used to produce the cement or in Canada where the defective cement was distributed?

There are three approaches to solving the question of place of tort:

1. It could be taken to be the place where the act that caused the harm took place.

The problem with this approach is that the defendant might have acted in several places in which case it will be difficult to determine the place he acted.

2. The second is to regard the place of tort as the place where the injury was suffered.

Again, the injury could be distributed in more states than one, making it difficult to determine the state of injury.

3. Lastly, the place of tort could be taken to be one of the places in which any of the facts of the case occurred and whose law is more favourable to the plaintiff.³²

of the lawsuits which result from these disasters. There is available, we find, a way of accomplishing this conformably to our State's public policy and without doing violence to the accepted pattern of conflict of law rules."

³² In England, it seems the approach to the ascertainment of the place of a multi-jurisdictional tort is to apply what is called the 'substance' test. This was the test suggested by Lord Pearson when he delivered the judgment of the Privy Council in *Distillers Co. (Biochemicals) Ltd. v. Thompson* (1971) Law Reports Appeal Cases, 458 at 468: "The right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question, where in substance did this cause of action arise?" It was applied by the Court of Appeal in *Castree v. E. R. Squibb & Sons Ltd.* (1980) 1 Weekly Law Reports, 1248 at 1252; and more recently in *Metall & Rohstoff v. Donaldson Inc.* (1990) 1 Law Reports Queen's Bench, 391 at 446, where Slade L.J. observed: "In our judgment, in double locality cases our courts should first consider whether, by reference exclusively to English law, it can properly be said that a tort has been committed within the jurisdiction of our courts. In answering this question, they should apply the now well familiar "substance" test previously applied in such cases as *Distillers Co. (Biochemicals) Ltd. v. Thompson* (1971) A.C. 458, *Castree v. E.R. Squibb & Sons Ltd.* (1980) 1 W.L.R. 1248 and *Cordoba Shipping Co. Ltd. v.*

The Supreme Court of Canada in *Moran v. Pyle National (Canada) Ltd.*³³ had to grapple with the problem of the ascertainment of the place of tort, especially in a product liability tort. The plaintiff brought in Saskatchewan an action for the wrongful death of her husband. The defendant was an Ontario corporation and the claim was for negligence in the manufacture of a light bulb. The plaintiff sought leave to serve the writ out of Saskatchewan, as was required by Saskatchewan rules, and relied on the ground that the tort had been committed in Saskatchewan. The Saskatchewan courts had refused leave, holding that no tort (the tort consisting in the alleged negligent manufacture in Ontario) had been committed in the province. The Supreme Court, in a judgment by Dickson J., reversed the decision of the Saskatchewan Court of Appeal. The Supreme Court laid down the test of real and substantial connection as the criterion of the place of tort, *i.e.*, where damage was suffered by the plaintiff in a state where the defendant foresaw or was deemed to have foreseen that his negligently manufactured goods would, through the normal channels of trade, be distributed. Dickson J., observed:

Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the place of harm theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence. In the *Distillers' case* [*Distillers Co. (Bio-Chemicals) Ltd. v. Thompson*, (1971) 1 All E.R. 694] and again in the *Cordova case* [*Cordova Land Co. Ltd v. Victor Bros. Inc.* (1966) 1 W.L.R. 793] a real and substantial connection test was hinted at. Cheshire, [Private International Law, 8th ed., p. 281], has suggested a test very similar to this; the author says that it would not be inappropriate to regard a tort as having occurred in a country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties. Applying this test to a case of careless manufacture, the following rules can be formulated:

National State Bank, Elizabeth, New Jersey (1984) 2 Lloyd's Rep. 91. If on the application of this test, they find that the tort was in substance committed in this country, they can thenceforth wholly disregard the rule in *Boys v. Chaplin* (1971) A.C. 356; the fact that some of the relevant events occurred abroad will thenceforth have no bearing on the defendant's liability in tort. On the other hand, if they find that the tort was in substance committed in some foreign country, they should apply the rule and impose liability in tort under English law, only if both (a) the relevant events would have given rise to liability in tort in English law if they had all taken place in England, and (b) the alleged tort would be actionable in the country where it was committed."

³³ (1975) 1 Canada Supreme Court Reports, 393, (1973) Dominion Law Reports (3d) 239.

where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. This rule recognizes the important interest a state has in injuries suffered by person within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce.

Because of the questions necessitated by the sometimes fortuitous character of the place of tort, some legal systems, *e.g.*, some states in America and, to some extent, England, have adopted another choice of law rule to govern the place of tort: the proper law of tort. This is the legal system that has the greatest connection or relationship with the parties and the conduct occasioning harm.

(f) Law of the place where a thing is situated or *the lex situs* is the choice of law rule that selects the law applicable to immovable property. Where land or immovable property is the subject matter of a conflict of laws case, most legal systems, *e.g.*, Nigeria, Canada, and England, usually provide that the applicable law shall be the law of the place where the land or the immovable property is situated.³⁴ The *lex situs* rule seems to be in accord with common sense, because an opposite rule could produce strange results and hinder the enforcement of judgments. For instance, let us assume that a Manitoba court exercised jurisdiction in a conflict of laws case concerning land in Nigeria. The court made a declaration granting absolute title to one of the parties in the case. The law of the place in Nigeria where the land is situated does not recognise individual ownership of land which

³⁴ *Re Zilberman's Estate; Chochinov v. Davis, Davis and Davis* (1980) 4 Manitoba Law Reports (2d) 325 at 331.

is vested in the government. Since the Manitoba court's judgment is in direct conflict with the law of the place where the land is situated, its enforcement in Nigeria may meet with serious difficulties and non-recognition.

(g) Law of the *forum* or *lex fori* means the legal system of the country whose court is exercising jurisdiction in a conflict of laws case. For instance, matters of procedure are always governed by the *lex fori*. But when is a matter one of procedural or substantive law? This is called the problem of characterisation in conflict of laws.³⁵ Does one characterise a statute of limitation as one of procedure to be governed by the *lex fori*, or of a substantive matter which may be governed by a foreign law? Most common law systems characterise a statute of limitation as procedural in nature, while most continental civilian systems characterise it as substantive.³⁶ A court not minded to apply a foreign law, *i.e.*, eager to apply the *lex fori*, could hide under characterisation theory, by which the particular issue could be classified as procedural. A court is more able to do this because, under conflict of laws, it is within the jurisdiction of each legal system through its courts to characterise or classify a particular rule of law, even if it is a foreign law. For instance, it is within the competence of a Nigerian court to characterise the Canadian statute of limitation. Even though the particular statute may be regarded as substantive in Canada, a Nigerian court may characterise it as procedural so as to obviate its application in Nigeria, because matters of procedure are governed there by the *lex fori*.

³⁵ G. E. Lorenzen, "The Qualification, Classification, or Characterization Problem in the Conflict of Laws," (1941) 50 Yale Law Journal 743.

³⁶ *Tolofson v. Jensen* (1994) 120 Dominion Law Reports (4th) 289 at 319: "The common law traditionally considered statutes of limitation as procedural, as contrasted with the position in most civil law countries where it has traditionally been regarded as substantive. The common law doctrine is usually attributed to the 17th century Dutch theorist Ulrich Huber....I must confess to finding this continental approach persuasive. The reasons that formed the basis of the old common law rule seem to me to be out of place in the modern context," La Forest, J (SCC).

(h) Law of the place where a marriage is celebrated or the *lex loci celebrationis* selects the law that governs the formal validity of a marriage. For instance, a Nigerian boy and girl under twenty-one years travel to Canada where they get married in accordance with Canadian law. The celebration of the marriage is valid under Canadian law but invalid under the Nigerian law, because of the absence of their parents at the marriage ceremony. Where a question arises as to the formal validity of this marriage, it will be referred to the Canadian law as the *lex loci celebrationis*; and since it is formally valid under that law it is formally valid everywhere. Thus in *Dalrymple v. Dalrymple*, a wife brought an action for restitution of conjugal rights against the husband. The main issue in the case was the validity of their Scottish marriage *per verba de praesenti* and without religious ceremony.³⁷ The wife was a Scot while the husband was an English man; but at the relevant time, *i.e.*, the time of the marriage, he was quartered with his regiment in Scotland. When the question of the formal validity of that Scottish marriage arose in an English court, Sir William Scott observed:

Being entertained in an English court, 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. Having furnished this principle, the law of England withdraws altogether and leaves the legal question to the exclusive judgment of the law of Scotland.³⁸

It should be noted that choice of law rules, some of which we have noted above, identify the governing *connecting factor*, *i.e.*, the incident, factor, or rule connecting the particular issue in court with the substantive law to be applied.

³⁷ This type of marriage is not valid under the common law but valid by ecclesiastical law.

³⁸ (1811) 161 English Reports, 665 at 667.

1.5 AMERICAN REVOLUTION

The theoretical approach by American writers to the whole question of conflict of laws and connecting factors has been revolutionary. The American approach, otherwise called American Revolution, is so complex and varied that it cannot be adequately discussed in a work of this nature. Some of the American writers who have treated the subject theoretically include D. F. Cavers,³⁹ B. Currie,⁴⁰ J. H. Beale,⁴¹ A. A. Ehrenzweig,⁴² L. M. Reese,⁴³ E. G. Lorenzen,⁴⁴ and H. E. Yntema.⁴⁵

Cavers started the break with traditional methods in conflict of laws. The traditional approach is based on single contact connecting factors like, *lex situs*,⁴⁶ *lex loci delicti*,⁴⁷ and *lex loci contractus*.⁴⁸ He derided these choice of law rules or connecting factors for being, in his opinion, "jurisdiction-selecting."⁴⁹ He believed that when a court is faced with a conflict of laws case, it is "not idly choosing a law; it is determining a controversy. How can it choose wisely without considering how the choice will affect that controversy?"⁵⁰ He submitted that the court has a duty to look into the content of the laws potentially applicable and apply the law that will meet the justice of the case.

Currie's approach which he called, "governmental interest" analysis is slightly different from Cavers'. He was dissatisfied with the traditional approach which, he alleged, does not take account of the forum government's interest. He believed that the courts have a heavy duty to promote the

³⁹ D. F. Cavers, "A Critique of the Choice-of-Law Problem," (1933) 47 Harv. L. Rev., 173.

⁴⁰ B. Currie, Selected Essays on the Conflict of Laws (Duke University Press, 1963).

⁴¹ J. H. Beale, A Treatise on the Conflict of Laws (New York: Baker, Voorhis, 1935).

⁴² A. A. Ehrenzweig, Private International Law (New York: Oceana Publications, 1967).

⁴³ E. E. Cheatham & L. M. Reese, "Choice of the Applicable Law," (1952) 52 Columbia L. Rev. 959.

⁴⁴ E. G. Lorenzen, "Territoriality, Public Policy and the Conflict of Laws," (1924) 33 Yale L.J. 736.

⁴⁵ H. E. Yntema, "The Hornbook Method and the Conflict of Laws," (1928) 37 Yale L.J. 468.

⁴⁶ Law of the place where a thing is situated.

⁴⁷ Law of the place where a wrong or tort is committed.

⁴⁸ Law of the place where a contract was made.

⁴⁹ Cavers, *supra*, note 39, p.173 at 194.

⁵⁰ *Ibid.*, p.189

forum's interests. Thus, "assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy."⁵¹

Currie opined that when a court is confronted with a case possessing a foreign element, it should look into the laws potentially applicable to discover the governmental policies expressed in them. Then, the court would apply the law of the state whose government has the greatest interest in the application or enforcement of its policy.⁵² The relevant policies and governmental interests can be discovered by the ordinary processes of construction and interpretation. According to him, a true conflict only arises when more than one state can legitimately assert such an interest. He thought that foreign law ought to be preferred to local law only when the forum has no interest in the application of the policy behind its own law. "The traditional system of conflict of laws," Currie observed, "counsels the courts to sacrifice the interests of their own states mechanically and heedlessly, without consideration of the policies and interests involved."⁵³ Currie's theory shows undisguised preference for the *lex fori* (local law) in the resolution of cases with foreign element. He observed:

....The sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law. In this way it can be sure at least that it is consistently advancing the policy of its own state. It should apply its own law....simply because a court should never apply any other law except when there is a good reason for doing so."⁵⁴

Another American approach, espoused by Yntema and Reese, is that which totally rejects the necessity or desirability of choice of law rules. It is called "choice-influencing considerations." The exponents of this approach suggest that instead of having choice of law rules that would

⁵¹ Currie, *supra*, note 40, p. 182.

⁵² This approach was adopted by the Court of Appeals of New York in *Babcock v. Jackson* 191 N.E. 2d 279 at 283, where Fuld, J. observed: "Justice, fairness and "the best practical result"....may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or parties, has the greatest concern with the specific issue raised in the litigation. The merit of such a rule is that "it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual context" and thereby allows the forum to apply "the policy of the jurisdiction 'most intimately concerned with the outcome of [the] particular litigation'."

automatically choose the applicable law, the judges should be given some guidance by spelling out for them the considerations they could legitimately draw upon in making a selection among conflicting laws.⁵⁵ This approach gives a lot of judicial discretion to the judges in conflict of laws cases.

Generally, the American revolutionary approach is a rejection of the classical method of the common law which is still applicable in Nigeria and , to some extent, England and Canada.

1.6 INTERSTATE AND INTERNATIONAL CONFLICT OF LAWS SITUATIONS.

A peculiar characteristic of conflict of laws for some countries like Nigeria, Canada, and the United States of America is that it has both interstate and international dimensions. An interstate, or in Canada interprovincial, conflict situation poses a question of choice of law between the legal systems of two states or among three or more states. In such situations the facts of the case ordinarily have contacts with more states than one within a single political territory, *i.e.*, a state as defined in both the political and international law senses. Example: A was a passenger in a car driven by B and was injured in an automobile accident in Abia State of Nigeria as a result of B's negligent driving of the car. A and B were residents of Imo State of Nigeria where B's car was insured and registered. C, another car owner involved in the accident, was a resident of Rivers State of Nigeria where his car was registered and insured. The laws of these three states have conflicting provisions in respect of the issues arising from the accident. A brought an

⁵³ Currie, *supra*, note 40, p. 278.

⁵⁴ *Ibid.*, p.119.

action in Imo State High Court against B and C, claiming damages in respect of the injuries he sustained in the accident. The question that naturally arises is, which of the three states' laws will provide the rule of decision? It should be observed that all the facts of our hypothetical case occurred in the Nigerian federal state, as a sovereign country, though in different countries in the conflict of laws sense. The Imo State High Court will be faced with the question of the application of sister states' laws, *i.e.*, Abia or Rivers States? There is no question of the application of the law of another country, *e.g.*, Canada or Ghana.

This type of conflict is identified as an interstate conflict of laws. It is prevalent in countries that operate a federal system of government where we have legally independent units within a single political territory. Unitary systems, like England, do not have interstate conflict situations, because there is only a single system of law uniformly applicable throughout the territory. On the other hand, the international conflict of laws dimension is the common situation where the facts of a case have contacts with two or more countries in the political sense, *i.e.*, a court in Nigeria faced with the application of English or Austrian Laws. Generally, the above conflict of laws rules we have discussed are designed for the international conflict of laws situations. But they also apply to interstate situations with modifications and adaptations depending on the particular legal system and the need to achieve justice in a case.⁵⁶

⁵⁵ Such considerations include: predictability of results; maintenance of interstate and international order; the relevant policies of the forum; the protection of justified expectations; application of the better rule of law.

⁵⁶ As P. E. Nygh, submitted: "Does there exist a special law of intra-Australian conflicts as distinct from international conflicts? Judicial opinion, so far, has steadfastly denied the existence of a law of intra-

The concept of internal conflict of laws is analogous to the interstate situation we have described above. But internal conflict of laws is peculiar in that it is solely concerned within the legal system of a country, in the conflict of laws sense. Internal conflict situations arise because of the different aspects of a local legal system. Example: Imo State laws comprise the Ibo customary law, the received English law, and the state's local legislation. Assume: H and W, an Ibo man and woman respectively, were subject to Ibo customary law but married in Imo State according to Christian rites under the state's received English law. H died intestate and a question arose in Imo State High Court as to the law that would govern the succession to his estate. Is it the Ibo customary law, received English law or the state's legislation? It should be observed that the facts of this hypothetical case do not involve any contact with another state in Nigeria or another country, *e.g.*, England. It is a straight question of choice among the different aspects of the Imo state laws. Legal systems that have internal conflict problems usually make legislation or evolve rules that take care of such problems. In the Nigerian case of *Cole v. Cole*, where a similar problem arose, Griffith, J., observed:

The position of a man and a woman who marry according to Christian rites is entirely different. Christian marriage imposes on the husband duties and obligations not recognised by native law.... In fact, a Christian marriage clothes the parties to such marriage and their offspring with a status unknown to native law.⁵⁷

Australian conflicts. As Windeyer J said in *Pedersen v. Young* (1964) 110 CLR 162 at 170: "The states are separate countries in private international law, and are to be so regarded in relation to one another." This statement certainly reflects the basic attitude of Australian courts. Generally speaking, they have applied to intra-Australian conflicts the same rules as are applicable to international conflicts. There was certainly no suggestion on the part of any of the justices of the High Court in Anderson's case that the conflict of laws between New South Wales and the Australian Capital Territory should be resolved by rules in any way different from those which are normally applied to resolve conflicts in international situations.... It is therefore true to say that, generally speaking, an Australian court will apply the same rules to an intra-Australian conflict as to an international conflict unless directed to do otherwise by the Australian Constitution, a federal or state statute or a territorial ordinance": Conflict of Laws in Australia (Sydney: Butterworths, 1984; 4th ed.), p. 6.

⁵⁷ (1898) 1 Nigerian Law Reports, 15 at 22.

The learned judge then applied the received English law.

However, the Privy Council on an appeal from Ghana reached a different conclusion in *Coleman v. Shang*,⁵⁸ which posed the question of internal conflict of laws. There the deceased, Stephen Coleman, an Osu man, first married a woman called Adeline Johnson and had three children by her, all of whom survived him. Later he married the appellant's mother, Wilhelmina, under the Marriage Ordinance and had five children by her, of whom the appellant was the sole survivor. Wilhelmina died in 1940. During the lifetime of Wilhelmina the deceased lived and cohabited with the respondent, Shang, and had ten children by her. After the death of Wilhelmina the deceased married the respondent in accordance with customary law. The issue in the case was whether the appellant or the respondent was the proper person entitled to the grant of letters of administration of the estate of the deceased? If English law was applicable, it would be the appellant; but if customary law applied then it would be the respondent. On the appellant's submission that the deceased's Christian marriage displaced the application of customary law, the Privy Council observed:

The first submission of counsel for the appellant was to the effect that on the proper construction of the Ordinance the only persons entitled to any portion of the two-thirds share of the personal estate of a deceased person dying intestate are his widow whom he had married under the Ordinance or the issue of such marriage, and any persons claiming under a marriage contracted by any native customary law are relegated to such share of the remaining one-third as they can establish under that law. This is the construction which appears to have been put upon the section in some decisions of the courts in Ghana from time to time and would seem to have been adopted by the trial judge.... Their Lordships are unable to accept this construction....⁵⁹

The Privy Council in granting joint letters of administration to the appellant and respondent opined:

⁵⁸ (1961) Law Reports Appeal Cases, p. 481.

⁵⁹ *Ibid.*, p. 490

Nonetheless, having regard to the attitude of the courts of this country to the status of parties validly married by the laws of the country of the domicile...their Lordships are of opinion that in dealing with personal property in Ghana of an intestate domiciled in Ghana, and validly married in that country in accordance with its laws, the courts of Ghana are not precluded from making a grant of letters of administration to a lady who was validly married to the intestate at his death by reason only of the use of the words "widow" and "wife" in the singular in the Act of Henry 8 and the Statute of Distribution. Apart from the Interpretation Ordinance their Lordships would hold that in the application of those statutes to Ghana the courts of that country would be entitled to apply the words "wife" and "widow" to all persons regarded as lawful wives or widows according to the law of Ghana.⁶⁰

Because an internal conflict of laws situation does not usually have any contact with the legal system of another country, at least in the political sense, it is doubtful whether it could be treated as a conflict of laws topic in the strict sense of the term, *i.e.*, as defined above (p. 1). Much as internal conflict of laws situations, as shown above, involve a question of choice of law in the literal sense of the term, the absence of a foreign element makes conflict of laws an inappropriate designation for internal conflict situations.

Conclusion:

Having noted the meaning and essential characteristics of conflict of laws, we shall now proceed to discuss the evolution of the subject in Nigeria.

⁶⁰ *Ibid.*, p. 494. Lord Tucker.

CHAPTER TWO

HISTORICAL CONTEXTS FOR THE EVOLUTION OF CONFLICT OF LAWS IN NIGERIA.

2.1 INTRODUCTION

Knowledge of the history of conflict of laws in Nigeria, the ideas behind its development, and the numerous problems that beset the application of its principles, is in itself the history of the socio-economic structure of the society, between feudalism and capitalism. Conflict of laws often found more fertile soil for germination in societies with capitalist tendencies, like the Italian city-states of the fourteenth and fifteenth centuries. Its historical context identifies the themes that matter in the development of laws in Nigeria.

In Egypt, Rome and the Greek city-states, their citizens had dealings, contacts and commercial intercourse with foreigners which ought to have raised the question of conflict of laws in disputes arising from such intermingling and transactions. The Egyptians traded with the Greeks; the Romans traded with most parts of their world, *e.g.*, the Carthaginians and Europeans; and the Greek city-states traded among themselves and with their neighbours. What was the law applied by the courts of each of these ancient peoples in the settlement of disputes which had foreign elements? It does not seem that clear choice of law rules as known today and described in the previous chapter were developed and applied by the courts of these ancient states. But it appears that disputes which arose from intercourse with foreigners were settled in a

peculiar manner by means of treaties and bilateral agreements¹ under which the application of the local legal system was extended to foreigners. For instance, under the bilateral agreement between Rome and Carthage, law applicable to Roman citizens alone, *jus civile*, was extended to Carthaginians. In addition, Rome appointed a special magistrate, the *praetor peregrinus*, to adjudicate disputes between Romans and foreigners or between a foreigner and another in Rome. However, the *praetor peregrinus* did not settle such disputes on the basis of rules analogous to contemporary choice of law rules in conflict of laws, but relied on general notions of fairness and justice. The body of law emanating from the *praetor peregrinus*' decisions formed the part of Roman law known as *jus gentium*.

But it was in the Italian city-states in the Middle Ages that a scientific approach was adopted towards the solution of disputes arising from transactions and intercourse with foreigners. They had separate courts, laws and magistrates for that purpose. The city-states were legally and politically independent and had huge trading transactions and intercourse among themselves. A citizen of Bologna would conclude a contract in Padua with a citizen of Modena to be performed in Florence. Such transactions had contacts with four city-states whose laws were not necessarily identical in respect of issues arising from the contract. The question became: what law was applicable to such disputes? The Roman jurists of this period, the glossators, of which Accursius is an example, tried to answer such questions by means of glosses on the *Justinian Code*. However, this approach was fictitious because that Code did not have choice of law rules as identified earlier.²

¹ Rudolph Sohm, *The Institutes: History And System of Roman Private Law* (London: at The Clarendon Press, 1940), 65-66; P. Vinogradoff, *The Collected Papers of Paul Vinogradoff*, vol. ii, *Jurisprudence* (Oxford: at The Clarendon Press, 1928), 260-261.

² A celebrated seventeenth century writer stated: "1. It often happens that transactions entered into in one place have force and effect in the territories of a different state, or have to be adjudicated upon in

The post-glossators, *e.g.*, Bartolus, approached the question of applicable law engendered by intercourse with foreigners from the perspective of statutory doctrine. A statute was used by the post-glossators to refer to all laws of a city, whether they emanated from custom, legislative enactment, or executive acts.³ Under statutory doctrine, a statute was real if things were mentioned first, and personal if persons were mentioned first.⁴ Real statutes applied to all things within the territory of the sovereign who enacted it and had no force outside the territory of that enacting sovereign. Personal statutes followed a person everywhere and had force within and outside the territory of the enacting sovereign. By this analysis a court in Modena, for instance, could apply the personal statute of Padua but not its real statute. It was often a matter of great controversy whether a statute was real or personal. Is a statute on conveyance of land to minors real because it mentions land, or personal because it mentions persons?

This statutory doctrine approach continued in France in the sixteenth century. France equally had the problem of conflict of laws arising from its diversity of regional laws, *i.e.*, *coutume*, mainly written, varied from province to province and had to apply to inter-provincial trade. The foremost exponents of the statutory doctrine in France were Charles Dumoulin (1500-1566), who established the principle that the law mutually intended by the parties, or presumed to have been intended by them,

another place. Moreover, it is well known that the laws of every nation differ in many respects, for since the breaking up of the provinces of the Roman Empire, Christendom has been divided into almost innumerable nations, not subject to one another and not sharing the same system of government. It is not surprising that there is nothing on the subject in Roman law, for since the sovereignty of Rome extended to all parts of the world and was regulated by a uniform law it could hardly give rise to a conflict of different laws": Ulrich Huber (1636-94) De Conflictu Legum Diversarum in Diversis Imperiis: Praelectiones, vol. ii, book 1. Tit. iii: Leipzig, 1707 (a translation of it is appended to D. J. Llewelyn Davies' article: "The Influence of Huber's *De Conflictu Legum* on English Private International Law," (1937) 18 *British Year Book of International Law*, pp. 64 -78.

³ A. K. Kuhn: Comparative Commentaries on Private International Law (New York: The Macmillan Company, 1937), p. 4.

should apply to disputes arising from their contract; and D'Argentre (1519-1590), who added a third class of statute: mixed statutes, *i.e.*, statutes that mentioned both persons and things. He considered mixed statutes to be in the nature of real statutes which did not have extra-territorial application.

This statutory doctrine adopted in the Italian city-states, France, Germany, and later in America by Samuel Livermore, bears close resemblance to modern choice of law rules. Choice of law rules, *e.g.*, *lex domicilii*, *lex contractus*, and *lex loci delicti*, ensure that in certain circumstances the court of a country could apply foreign law as providing the rule of decision. Likewise, the statutory doctrine gave extra-territorial effect to foreign law where such law was personal, as defined above. In the same way that a modern court can hold that legitimation is governed by *lex domicilii*, and therefore apply foreign law if it is the law of domicile, a court in Padua would apply the statute of Modena if it dealt with the legitimation of Modena citizens, *i.e.*, was a personal statute and gave effect to it.

However, the Dutch theorists in the seventeenth century, notably Paul Voet (1619-77), Ulrich Huber (1636-1694) and Johannes Voet (1647-1714), did not base the solution for conflict of law problems on the statutory doctrine. They resorted to the comity doctrine as the basis of their solution to disputes arising from international transactions or intercourse. The Netherlands, like France, was divided into independent provinces with their own separate legal systems. Intercourse among these provinces and between them and other countries ensured the emergence of conflict problems. The Dutch jurists tried to respond to such problems on the basis of the comity doctrine under which foreign law was applied by reason of the comity or

⁴ Bartolus on the Conflict of Laws, ed. and trans. by J. H. Beale (Cambridge: Harvard University Press, 1914), pp. 45-46.

friendly relations existing between nations.⁵ The implication seems to be that a Dutch province applied a foreign law, *e.g.* English law, not on the basis of lucid choice of law rules but solely on the ground of whether or not friendly relations existed between it and England. What happened when, for instance, the relationship between it and England became frosty? Would English law then be inapplicable? However, we know today that courts give recognition to foreign law in order to obviate the injustice that would arise by doing the contrary. When courts apply foreign law, it is not out of any courtesy or respect to the foreign country. For instance, when a court holds that a marriage celebrated in a foreign country would be determined, as to its formal validity, by the foreign law, it so held not because of any friendly relationship or respect for that foreign country but because of the injustice that might have arisen if the local law was applied to determine the validity of that marriage. It could be that under the local law the marriage is formally invalid, though formally valid by the foreign law under which it was celebrated; with the result that the children of the marriage might be legitimate, *i.e.*, by virtue of valid celebration of the parent's marriage, under the foreign law but illegitimate under a local law which had no connection with the celebration of the marriage in a foreign country.

The point is that in The Netherlands the comity doctrine was employed in a way similar to the modern function of choice of law rules, *i.e.*, used as the basis for the application of a foreign law to a case having a foreign element.

⁵ "For the purpose of unfolding the difficulty of this particularly intricate subject we shall formulate three maxims, which being accepted, as undoubtedly it appears they should be, seem to clear the way for us for the solution of the remaining questions.

2. They are these:

1. The laws of every sovereign authority have force within the boundaries of its state, and bind all subject to it, but not beyond.

2. Those are held to be subject to a sovereign authority who are found within its boundaries whether they be there permanently or temporarily.

It was in England and America in the nineteenth and twentieth centuries that choice of law rules as we know them today were developed for conflict of laws. Instead of approaching the question of conflict of laws from the perspectives of the statutory and comity doctrines, the judges in these countries applied judicially developed rules of selection, *i.e.*, choice of law rules, to such questions. For instance, in *Holman v. Johnson*, Lord Mansfield observed: "There can be no doubt, but that every action tried here must be tried by the law of England; but the law of England says, that in a variety of circumstances with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern."⁶ Thus, *lex loci contractus* as a choice of law rule was recognised and applied in that case. Some of the jurists responsible for the formation of conflict of laws rules both in England and America, include J. Story,⁷ C. Kent,⁸ A. V. Dicey,⁹ G. Cheshire,¹⁰ J. Westlake,¹¹ and F. Harrison.¹²

2. 2 PRE-COLONIAL NIGERIA

Where then is Nigeria in this configuration of conflict of laws history? As an independent nation on 1st October 1960, Nigeria gained its sovereignty from British colonial rule.¹³ In 1914, the northern and southern parts of the country, hitherto separately administered by British colonial government, were amalgamated by Sir Frederick Lugard. Before colonialism the amalgamated territories consisted of

3. Those who exercise sovereign authority so act from comity that the laws of each nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the power or rights of another state or its subjects." Huber, *supra* note 2.

⁶ (1775) 98 English Reports, 1120 at 1121 (delivered on July 5, 1775).

⁷ *Commentaries on the Conflict of Laws* (Boston: Hilliard, Gray, & Co., 1834).

⁸ *Commentaries on American Law* (Boston: Little, Brown, & Co., 1873).

⁹ *The Conflict of Laws* (London: Sweet & Maxwell, 1993, 12th ed., by L. Collins, *et al*).

¹⁰ *Private International Law* (London: Butterworths, 1992, 12th ed., by P.M. North and J.J. Fawcett).

¹¹ *Private International Law* (London: Sweet & Maxwell, 1925, 7th ed., by N. Bentwich).

¹² *Jurisprudence and Conflict of Laws* (Oxford: at The Clarendon Press, 1919).

¹³ *Nigeria Independence Act, 1960*, 8 & 9 Elizabeth II, c. 55.

politically and legally independent tribes. Earlier, about 1898, Flora Shaw, who later became Lady Lugard, had suggested in an article for *The Times* that the several British protectorates on the Niger be known collectively as Nigeria.¹⁴

Long before the emergence of the British colonialists on the territory now known as Nigeria, and the subsequent colonisation of the people thereof, the geographical area now called Nigeria had been the abode of strong and independent kingdoms. As Crowder put it:

Within its frontiers were the great kingdom of Kanem-Borno, with a known history of more than a thousand years; the Sokoto Caliphate which for nearly a hundred years before its conquest by Britain had ruled most of the savannah of northern Nigeria; the kingdom of Ife and Benin, whose art had become recognised as amongst the most accomplished in the world; the Yoruba Empire of Oyo, which had once been the most powerful of the states of the Guinea Coast; and the city-states of the Niger Delta, which had grown partly in response to European demands for slaves and later palm oil; the largely politically decentralised Igbo-speaking peoples of the south-east, who had produced the famous Igbo-Ukwu bronzes and terracottas; and the small tribes of the Plateau, some of whom are descendants of the people who created the famous Nok terracottas.¹⁵

In Nigeria, the history of the legal science known as conflict of laws has been largely neglected by the few Nigerian jurisprudential writers on the subject.¹⁶ Their discussion of the subject starts from the date when English law was received into Nigeria¹⁷, *i.e.* 1863 for Lagos and 1900 for the rest of the country. No serious inquiry has been made on the position before the reception statutes. Nigerian writers seem to content themselves with an *a priori* conclusion that the Nigerian pre-colonial legal regime did not have conflict of laws rules¹⁸ and, by extension, such problems. It seems therefore a Sisyphean task for the legal historian to attempt a construction or exposition of conflict of laws in pre-colonial Nigeria.

¹⁴ A.H.M. Kirk-Greene, "Who Coined the Name Nigeria?" *West Africa*, 22 December 1956, quoted in M. Crowder, *The Story of Nigeria* (London: Faber and Faber, 1962), p. 11.

¹⁵ Crowder, *supra* note 14, p. 11.

¹⁶ For instance: A. O. Agbede, *Themes on Conflict of Laws* (Ibadan: Shaneson Ltd., 1989); A. Yakubu, *Harmonisation of Laws in Africa* (Ikeja: Malthouse Press Ltd., 1999).

¹⁷ A.E.W. Park, *The Sources of Nigerian Law* (London: Sweet & Maxwell, 1963), pp. 16-20.

¹⁸ Agbede, *supra* note 16, p. 28; Yakubu, *supra* note 16, p. 25.

Our initial survey of the general history of conflict of laws teaches us that two factors must be simultaneously present before any issue of conflict of laws can arise: social and economic interaction by people of different sovereign states, and a diversity of legal regimes. The whole history of conflict of laws is intertwined with these factors. Until people begin to cross their national, state, local, or tribal boundaries and intermingle with one another, there can be no foreign element in disputes. As Merrill noted:

The introduction of steam power for purposes of locomotion by sea as well as by land, and the employment of telegraph wires and submarine cables, have led to a marvellous increase in travel and commercial intercourse, and to corresponding increase and complexity in the relations existing between numerous individuals, and the governments and laws of states other than their own. The vast immigration from almost all parts of Europe to America, with a view to permanent settlement and naturalization, the establishment by thousands of individuals of their residences in foreign countries without any transfer of allegiance, and the extra-territorial operations of numerous corporations, have given rise to many interesting and important questions growing out of the conflict of laws.¹⁹

The *ius gentium* in ancient Rome was the product of transnational movements. Such movements, and the subsequent intermixture between people of different legal backgrounds, gave birth to conflict of laws in the Italian city-states of the fourteenth century and later in France, The Netherlands, Germany, England and the United States and Canada. According to the recent authors of Cheshire and North: “The *raison d’etre* of private international law is the existence in the world of a number of separate municipal systems of law – a number of separate legal units that differ greatly from each other in the rules by which they regulate the various legal relations arising in daily life.”²⁰ Pavel Kalenský echoed the same sentiment:

It is generally known that most textbooks and systems raise as the conditions of the origin and existence of private international law on the one hand the fact that there exist in the world parallel to each other many sovereign states with different legal systems and, on the other hand, that the citizens of these states, who are non-sovereign subjects, *i.e.*, natural and legal persons,

¹⁹ A. B. George Merrill, Studies in Comparative Jurisprudence and the Conflict of Laws (Boston: Little, Brown, and Co., 1886), p. 1.

²⁰ Cheshire and North, Private International Law (London: Butterworths, 1992, 12th ed., by P.M. North and J. J. Fawcett), p. 3.

establish contacts and relations of civil law (or family law), labour law or procedural character. Of course, it should be seen that the two aforesaid preconditions are far from being static and that in the past decades they have undergone a very dynamic development²¹

Many questions arise in the application of the above principles to the Nigerian situation:

- (1) Were there contacts and dealings between the various independent primordial and pre-colonial Nigerian tribes?
- (2) Were those tribes regulated by different and divergent legal rules or customary laws?
- (3) If the answer to both of the above is yes, then how was the ensuing conflict of laws resolved?

Here, we shall explore possible answers to the above questions.

Within the northern part of Nigeria, there had flourished the Kanem-Bornu Empire, Sokoto Caliphate, and the Hausa states of Gobir, Katsina, Rano. Daura, Kano, Zaria, Kebbi, Zamfara, Nupe, and Gwari. There were intermingling, communication and contacts among these groups. There was from earliest times intensified commercial intercourse amongst these northern Nigerian kingdoms and states, and between them and the outside world, especially Algeria and Morocco, through the Sahara desert. The corollary was the introduction of Islam in the northern part of Nigeria in about the eleventh century. According to Crowder:

West Africans participated eagerly in the growing trans-Saharan trade, which brought them much needed salt from the desert, as well as clothes, weapons, horses and beads. The new states of the Western and Central Sudan also traded among themselves. Kano cloth, for instance, was to become much prized throughout the Western and Central Sudan. One of the most extraordinary achievements of these empires, from the accounts of Arab travellers, was their maintenance of security of trading conditions over vast areas of West Africa.

²¹ Pavel Kalenský, Trends of Private International Law (The Hague: Martinus Nijhoff, 1971), p. 28.

Probably the most important results of the Sahara trade were the penetration of the Sudan by Islam and the introduction of writing.²²

The introduction of Islam in the northern part of Nigeria meant the regime of Islamic law²³, as both are axiomatically inseparable. Even today, Islamic law is the personal law of Moslems in the northern part of Nigeria.²⁴ The common application of Islamic law in northern Nigeria left no room for choice of law problems. The legal system was a monistic one, analogous to the unitary legal system in England which, in the formative stage of conflict of laws, frustrated its growth and development in that country.

Even before the introduction of Islam in northern Nigeria about 1080 A.D.,²⁵ trading contacts had existed amongst the various tribes in the northern part of Nigeria, and among them and the outside world. The trade was by means of barter. At this pre-Islamic period, one would expect that the commercial intercourse amongst these northern Nigeria tribes and the outside world must have engendered some conflict of laws problems. However, that was not to be. The economic system of exchange, *i.e.*, barter, left little room for substantial disputes requiring choice of law considerations.

There were also trading contacts between the tribes in the northern region of Nigeria and the kingdoms of the forest in the southern part of Nigeria, especially the Yoruba kingdom. According to a leading authority on Yoruba history:

Light and civilisation with the Yorubas came from the north with which they have always retained connection through the Arabs and Fulanis. The centre of life and activity, of large populations and industry was therefore in the interior, whilst the coast tribes were scanty in

²² Crowder, *supra* note 14, p. 25.

²³ A.O., Ikelegbe, ed., *Politics and Government: An Introductory and Comparative Perspective* (Benin: Uri Publishing Ltd., 1995), p. 164.

²⁴ *Usman v. Umaru* (1992) 7 Nigerian Weekly Law Reports (Part 254), 377.

²⁵ That was the year a Kanem king, Mai Hume, converted to the Islamic faith. Islam was introduced into the neighbouring Hausa states in the fourteenth century.

number, ignorant and degraded not only from their distance from the centre of light, but also through their demoralizing intercourse with Europeans, and the transactions connected with the oversea slave trade²⁶

Crowder made the same point when he said that, "...Indeed there is strong reason to suppose that from an early stage Hausa and Yoruba traded with each other."²⁷ Again, the trade was by barter. As argued below, the barter system did not yield disputes that warranted the application of conflict of laws rules.

Thus far, the indigenous legal system, *i.e.*, customary laws of these tribes and kingdoms, had no occasion to ponder conflict problems. Economic activities carried on by a system of barter where, presumably, the goods were exchanged on the boundary lines, could hardly have given rise to substantial disputes in the area of conflict of laws. As Diamond noted, "barter presupposes something of an objective standard of values, a preliminary stipulation as to the form which the return is to take, and an instantaneous return."²⁸ The inability of this medium of exchange to raise disputes which would have necessitated a discussion of choice of law in pre-colonial Nigeria is evidenced by Diamond's postulation:

To sum up, the only commercial transactions of importance, except among tribes who possess currency, are ready barter and credit barter, and among the few tribes who use currency, cash sale and loan of money are added. There is little else. Of these transactions, ready barter and cash sale produce little litigation.²⁹

Thus in the northern part of Nigeria the barter system and the subsequent unitary legal system resulting from the introduction of Islam hindered growth and development for rules of conflict of laws.

However, this conclusion presupposes that the barter transaction went on smoothly and successfully. The parties involved in the exchange were mutually

²⁶ Rev. Samuel Johnson, The History of the Yorubas (Lagos: CSS Bookshops Ltd., 1921), p. 40.

²⁷ Crowder, supra note 14, p. 43.

²⁸ A.S. Diamond, Primitive Law (London: Watts & Co., 1935), p. 393

²⁹ *Ibid.*, pp. 400-401.

satisfied with their bargains and no objections were raised by any of them after the barter transaction. For instance, a Kano man in pre-colonial Nigeria subject to Islamic law as his customary law exchanged his horse for the gold of a Gao man in Western Sudan who was subject to Gao customary law. The Kano man was happy with the gold and the Gao man was happy with his horse. No dispute arose and therefore no question of whether Islamic law or Gao customary law was applicable to that transaction arises. But if we complicate these facts, then a lot of difficulties interpose. Assume that the Kano man subsequently discovered that the gold he received in exchange for his horse was not genuine. He felt cheated and wanted his horse back. His Islamic law, in furtherance of our assumption, allowed him to get back his horse in the circumstances. On the other hand, the Gao man was not inclined to return the horse and relied on his customary law which, for instance, provided that after an exchange of the goods in a barter transaction, the parties were automatically discharged from any liabilities arising from the contract, and goods already exchanged could not be returned.

The above facts face two conflicting systems of law, *i.e.*, Islamic law and Gao customary law. Also, the parties involved in the case were subject to these two divergent legal systems. Whether the action was brought in Kano or Gao, there would be the question: which of the two systems of customary law would provide the rule of decision? And if the barter transaction had taken place in a third tribal territory, *e.g.*, the Yoruba Kingdom of Oyo, the complexity would double because the question would be whether it is the Yoruba customary law, Gao customary law, or Islamic law that should govern the case? There is no doubt that the type of barter

we are analysing is of a litigable nature and could raise questions within the province of conflict of laws, *i.e.*, the question of choice of law.

It is not clear how these pre-colonial tribes and kingdoms resolved the type of questions raised by the above hypothetical case. In other words, there seems to be no evidence that specific choice of law rules, or other ascertainable rules of selection of the applicable law, were applied. We think that the absence of this evidence suggests that barter transactions giving rise to litigable disputes must have been few in those pre-colonial times. This can only be explained on the basis that the actual exchange in a barter transaction must have been preceded by long and detailed negotiations between the parties, during which they tried to ascertain the quality of their individual goods, terms of exchange and allowances for unexpected or latent defects. This level of circumspection and wisdom on the part of the traders is expected, knowing that one or both of the traders involved in the barter transaction might have come from a long distance that involved travel for weeks or months. For instance, it was likely that the man from Gao, present day Ghana in West Africa, must have travelled for several weeks or months on the back of a camel, the only means of transportation then, across the Sahara desert before getting to Kano in the present day Nigeria. It is therefore not unexpected that such a man would try to obtain the most favourable bargain and take care of the minutest aspect of the contract, especially with respect to latent defects in the articles of exchange. For instance, if he reasoned that the horse might have a latent disease, and that returning it after the barter exchange might be legally and practically impossible because of the distance involved, he might decide only to accept the horse in exchange for an inferior merchandise in his store instead of his gold, and then take the horse as he

found it. The Kano man would likely operate on the same reasoning. He knew that his customer came from Gao, a far away land and that getting back his exchanged horse, if things went wrong, might be practically impossible in the circumstances. He would then take care to bargain in such a way that, if the gold turned out to be fake, he would not lose completely. For instance, he could subject the gold to the strictest examination and could even hire local experts to examine it for him. If he had doubts he could refuse to accept the gold in exchange. But if he decided to take the risk, then he could accept the gold only in exchange for an inferior article of his, other than his horse, and then live with the consequences of his bargain.

The above type of circumspection naturally would leave little room for litigable disputes arising from barter. But where this level of prudence was not exercised then the scenario changes and the problem of the applicable system of law comes to the fore. We have already said that there seems to be no evidence that any rules of selection of the applicable law were applied by these tribes. But we can speculate that such disputes might have been settled on the basis of the local law, *i.e.*, the *lex fori*. In other words, the court where the action was brought would apply the customary law of the tribe to which that court belonged. This hypothesis is based on the fact that in pre-colonial times, the legal systems of the above tribes were elementary. The means of communication and travel were at the rudimentary stage, mainly by horses and camels. In fact, camel was metaphorically called 'the ship of the desert.' The judicial system was also basic. Some like the Hausas and Yorubas had something like formal courts, while the Ibos lacked any formal court structure and disputes were settled democratically. These early legal systems, without law reporting, juristic writing, publication and distribution of legal commentaries,

coupled with the difficulties in communication and travel, must have inhibited cross-fertilisation of legal ideas and were unlikely to have generated adequate knowledge of legal systems obtainable in other tribes. Proof of other tribal or customary laws must have been difficult, if not impossible, in the circumstances. Even in modern times, judges do not envy legal situations requiring proof of a foreign law.³⁰ One can then guess how absurd it must have been to expect a court of one tribe to establish by proof the customary law of another tribe, probably in a far away land. Consequently, one would imagine that the courts of each tribe applied its tribal or customary law to disputes between a member of its tribe and a foreigner or between one foreigner and another. That was the law with which it was most familiar. Therefore, if such a primitive court ever assumed jurisdiction in the matter, it would apply its tribal law. On this postulation, one could generally say that litigable disputes arising from barter transactions in the pre-colonial period must have been rare and settled on the basis of the *lex fori* or the local law of the tribe in which the action was brought.

The Ibos in the eastern part of Nigeria also had contacts with their neighbours in the Middle Belt and the various city-states of the Niger Delta. These contacts were mainly by way of trade carried on by barter. According to Dr. Osmund Anigbo:

The Hausa\Yoruba traders can be regarded as the oldest settlers in the Ibagwa community (Ibo tribe). Oral tradition traces the permanent settlement to the history of a long war fought between Ibagwa Aka on the one hand and a combined force of Obukpa, Iheakpu Awka and Itchi on the other. The Hausa and Yoruba tribes had been frequenting the Nkwo

³⁰ In a situation that required an English judge to establish what was the law of Spain on a particular point, the judge lamented: "It would be difficult to imagine a harder task than that which faces me, namely, of expounding for the first time either to this country or to Spain the relevant law of Spain as it would be expounded by the Supreme Court of Spain, which up to the present time has made no pronouncement on the subject, and having to base that exposition on evidence which satisfies me that on this subject there exists a profound cleavage of legal opinion in Spain and two conflicting decisions of courts of inferior jurisdiction," Wynn-Parry J: Re Duke of Wellington (1947) Law Reports Chancery Division, 506 at 515.

market, bringing with them horses, dried fish and talismen. The market offered palm oil in exchange.³¹

On the relationship between the Ibos and the city-states of the Niger Delta in the south southern part of Nigeria, Obaro Ikime stated: “The mode of life of the Itsekiri people (one of the tribes on the Niger Delta) has been determined by their environment. The Itsekiri are primarily fishermen and, like their Ijo neighbours, are known as suppliers of fish and ‘crayfish’ to the peoples of the hinterland (*i.e.*, the Ibos).”³² And Crowder added that, “the Ijo traded with the peoples of the hinterland, who were mainly Igbo and Ibibio....The Ijo exported dried fish and salt, which they panned in the salt water creeks, to the peoples of the hinterland, in exchange for vegetables and tools, particularly those made of iron.”³³ As we have already noted, this type of trading contact based on the barter system could not, generally speaking, generate conflict of laws problems. But this is subject to the misgivings expressed on the litigable aspects of barter based on the hypothetical case above. Generalising on the socialisation pattern in pre-colonial Nigeria, Dr. Eteng opined: “Periodic markets, themselves symbolizing the underdevelopment of the pre-colonial distributive and exchange systems, provided occasions for barter and information and diplomatic exchanges among contiguous communities.”³⁴

We can now posit that for problems of conflict of laws to arise from inter-tribal or trans-boundary contacts, such contacts must be of such quality and intensity as to affect personal or family status or profoundly entail commercial contracts of a

³¹ Osmund Anigbo, Commensality and Human Relationship Among the Igbo: An Ethnographic Study of Ibagwa Aka, Igboeze L.G.A. Anambra State Nigeria (Nsukka: University of Nigeria Press, 1987), p. 47.

³² Obaro Ikime, Merchant Prince of the Niger Delta (London: Heinemann Educational Books Ltd., 1968), pp. I-2.

³³ Crowder, supra note 14, p. 60.

litigable nature. These factors were seemingly absent in the tribal contacts we have so far examined. Kalenský rightly points out:

....in order for private international law to progress further, it was necessary for the initial, sporadic contacts between non-sovereign subjects subordinated to the laws of different states and juridically exceeding the boundaries of a single jurisdiction to grow to a certain level both quantitatively and as regards the general and essential character of such contacts for the life of society³⁵

Obviously, this required a level of contact lacking in pre-colonial Nigerian societies. Because the prevailing economic system of barter entailed an instantaneous exchange and gave little room for disputes, there was no question, for instance, of a contract concluded in the Yoruba kingdom between Hausa and Yoruba merchants being litigated in the local courts of Kanem-Bornu or Benin Kingdom. However, this is only in respect of simple barter transactions that were concluded successfully without disputes thereafter.

Though we have reasoned above that most barter transactions in the pre-colonial period must have belonged to this class, *i.e.*, raising non-litigable disputes, it is entirely possible that some barter transactions might have given rise to litigable disputes. In that case the analysis above on the suggested method of solution is also germane here. There is no authoritative evidence that at this period people from one tribe domiciled or permanently resided in another tribe, *e.g.*, a Yoruba man, in the thirteenth century or earlier, taking up permanent residence in the Ibo area. The insularity of the Nigerian pre-colonial tribal societies, the difficulties in communication and travel, and the differences in language, manners, culture, and political organisations must have made inter-tribal residence or settlement unattractive. As such, intercourse among pre-colonial Nigerian tribes must have

³⁴ I.A. Eteng, "Changing Patterns of Socialization and their Impact on National Development," in E. C. Amucheazi, ed., Readings in Social Sciences: Issues in National Development (Enugu: Fourth Dimension Publishing Co. Ltd., 1980), p. 348.

been superficial and transitory. Concomitantly, the local jurists of these tribes never had the opportunity to ponder over the application of their local or customary laws to foreigners. Equally untested was the resourcefulness of Nigerian customary laws in resolving cases with foreign elements. However, one writer has confidently asserted the contrary, *i.e.*, that Nigeria's customary law has rules of conflict of laws:

The problem of choice of law arises in court where citizens have relations or transactions with foreigners. It also arises where this arises extra-territorially. The solution is often found in established rules of conflict of laws or what is sometimes called private international law. There is even here a greater problem of this kind because customary laws mainly vary from place to place and as between families or kindred. There are however areas of common ground. Nonetheless it cannot be suggested that customary law is devoid or [*sic*] rules for solving issues of conflict of laws³⁶

This is quintessential *a priori* reasoning. Suffice it to say that the analysis thus far challenges Onyechi's postulation. But he might well be right with respect to some barter transactions that could actually give rise to disputes, as shown in the above hypothetical case of a barter exchange between a Kano man and Gao man.

However, Onyechi did not tell us how customary law resolved such disputes with multi-tribal contacts. What were those customary law "rules for solving issues of conflict of laws?" Is there any evidence of them? These points were not addressed by him but, as already examined in detail, insofar as litigable disputes arose from barter transactions, it seems that such disputes were settled by the customary law on the basis of *lex fori*. It is for the reasons canvassed above that we agree with P.C. Lloyd's conclusion:

With each Yoruba group claiming that its own customary law differs from that of its neighbours there seems to be scope for conflicts of laws. In fact such conflict does not seem to have arisen. This is partly because the alleged differences in law between the traditional kingdoms refer often to variant customs and not to any differences in the basic legal system. Land cases are always heard by the court within whose area of jurisdiction the land is situated and they are judged according to the local law. It is conceivable, though I recollect no case,

³⁵ Kalenský, *supra* note 21, p. 29.

³⁶ J. N. M. Onyechi, "A Problem of Assimilation or Dominance," in T.O. Elias, S.N. Nwabara, et al., eds., *African Indigenous Laws* (Proceedings of Workshop held at Nsukka, Nigeria, 7 – 9 August 1974; Nsukka: University of Nigeria Press, 1974), p.292.

that a stranger might claim that in his home town a grant of land similar to that he gained in his new settlement would confer greater rights; but the rights granted to a stranger are those usual in the grantor's town, and the stranger well knows this. Cases involving the divorce or inheritance laws are almost invariably taken by strangers to their home towns for settlement.³⁷

It remains to add that the legal situation did not change even with exploration of the River Niger and the emergence of the British merchants on the coast of Nigeria about the sixteenth century, which led to trading relationship between members of the coastal tribes of Nigeria and the British traders. This relationship ultimately resulted in the political subjugation of the Nigerian people.

2.3 CHRONICLE EVIDENCE FOR COMMERCE AND CONFLICTS

During the era of slave trade which reached its peak about the seventeenth and early nineteenth centuries, and its Victorian replacement with legitimate trade, the British merchants maintained the economic system of trade by barter. The implication of this system for conflict of laws in Nigeria has already been noted, and justifies the lengthy quotation of James Barbot, describing the operation of the barter system between the British merchants and Nigerian coastal middlemen:

The king had on an old fashion'd scarlet coat, laced with gold and silver. very rusty, and a fine hat on his head, but bare-footed; all his attendants showing great respect to him and, since our coming hither. none of the natives have dared to come aboard of us, or sell the least thing, till the king had adjusted trade with us.

We had again a long discussion with the king and Pepprel his brother, concerning the rates of our goods and his customs. This Pepprel, being a sharp blade, and a mighty talking Black, perpetually making objections against something or other, and teasing us for this or that Dassy, or present, as well as for drams, etc., it were to be wish'd that such a one as he were out of the way, to facilitate trade....

Thus, with much patience, all our matters were adjusted indifferently, after their way, who are not very scrupulous to find excuses or objections, for not keeping literally to any verbal contract: for they have not the art of reading and writing, and therefore we are forced to stand to their agreement, which often is no longer than they think fit to hold it themselves.... We adjusted with them the reduction of our merchandize into bars of iron, as the standard coin, viz: one bunch of beads, one bar.... The price of provisions and woods was also regulated.

³⁷ P. C. Lloyd, Yoruba Land Law (London: Oxford University Press, 1962, for the Nigerian Institute of Social and Economic Research, Ibadan, Nigeria), p. 26.

Sixty king's yams, one bar; one hundred and sixty slave's yams, one bar; for fifty thousand yams to be delivered to us. A butt of water, two rings. For the length of wood, seven bars, which is dear; but they were to deliver it ready cut into our boat. For a goat, one bar. A cow, ten or eight bars, according to its bigness. A hog, two bars. A calf, eight bars. A jar of palm oil, one bar and a quarter.³⁸

The last clause of the first paragraph above, "or sell the least thing, till the king had adjusted trade with us," is explained by the detailed examples which show that Barbot was not referring to conflict between the customary laws of the Nigerian tribes on the coast and English law. Barbot was just describing the nature of the barter transaction between the English merchants and Africans, which a further passage from him will illustrate.

Barbot's account herein generally shows that the trading system, if it was limited to the type of instantaneous exchange implied in the passage, was immune to commercial disputes of any litigable nature. This is evident from the fact that actual exchange in the barter transaction referred to by Barbot was preceded by days of negotiations during which every aspect and detail of the contract were mutually agreed by the parties. Barbot recounted:

On the twenty fifth in the morning, we saluted the Black King of Great Bandy, with seven guns; and soon after fired as many for captain Edwards, when he got aboard, to give us the most necessary advice concerning the trade we designed to drive there. At ten he returned ashore, being again saluted with seven guns; we went ashore also to compliment the King, and make him overtures of trade, but he gave us to understand, he expected one bar of iron for each slave more than Edwards had paid for his; and also objected much against our bafons, tankards, yellow beads, and some other merchandise, as of little or no demand there at that time.

The twenty sixth, we had a conference with the King and principal natives of the country, about trade, which lasted from three a-clock till night, without any result, they insisting to have thirteen bars of iron for a male, and ten for a female; objecting that they were now scarce, because of the many ships that had exported vast quantities of late. The King treated us at supper, and we took leave of him.

The twenty seventh the King sent for a barrel of brandy of thirty five gallons, at two bars of iron per gallon; at ten we went ashore, and renewed the treaty with the Blacks, but concluded nothing at all, they being full of same mind as before.

³⁸ James Barbot, An Abstract of a Voyage to New Calabar River or Rio Real in the year 1699, translated and published in Churchill: A Collection of Voyages and Travels, 3rd ed., 1744 – 1746. (London: Printed by Assignment from Messrs. Churchill *et al.*), pp. 459-460.

The twenty eight, we sent our pinnace up the river to Dony, for provisions and refreshments; that village being about twenty-five miles from Bandy. Transacted nothing with Blacks of Bandy all this day.

The twenty ninth, had three jars of palm-oil, and being foul weather, did not go ashore.

The thirtieth, being ashore, had a new conference which produced nothing; and then Pepprell, the King's brother, made us a discourse, as from the King, importing, He was sorry we would not accept of his proposals; that it was not his fault, he having a great esteem and regard for the Whites, who had enriched him by trade. That what he so earnestly insisted on thirteen bars for male, and ten for female slaves, came from the country people holding up the price of slaves at their inland markets, seeing so many large ships resort to Bandy for them; but to moderate matters, and encourage trading with us, he would be content with thirteen bars for males. and nine bars and two brass rings for females. Upon which we offered thirteen bars for men, and nine for women, and proportionably for boys and girls, according to their ages; after this we parted, without concluding anything farther.

On the first day of July, the King sent for us to come ashore, we staid there till four in the afternoon, and concluded the trade on the terms offered them the day before; the King promising to come the next day aboard to regulate it, and be paid his duties.³⁹

The above apparently shows that Barbot was describing the trading conditions of barter between the European merchants and African traders. That transaction carried with it the potentiality of conflict of laws problems because the two groups, *i.e.*, Europeans and Africans, were subject to at least two different systems of law. There is no doubt that disputes arising from such transactions would have raised the question of choice of law, *i.e.*, is it the African system of law or the system to which the European merchants were subject that would provide the rule of decision? But it seems that the occurrence of the above type of problem or dispute was mitigated by the detailed and lengthy negotiations that preceded the actual barter exchange. With the type of transaction described by Barbot, in which the parties mutually came to satisfactory terms before the actual exchange, disputes which would have necessitated conflict of laws problems were practically avoided. If the entire barter transactions on the Nigerian coast were carried on solely on the basis of Barbot's description, *i.e.*, mutually accepted negotiated terms followed by instantaneous exchange of goods, one would have been tempted to conclude that conflict problems

did not arise. However, things did not remain entirely as Barbot described. He gave another side of the barter transaction, *i.e.*, credit barter, which was full of potentialities for conflict of laws problems.

According to Barbot, the European merchants gave credits in the form of goods to the African Kings and merchants. The Africans paid back the credit with slaves and other commodities needed by the Europeans. The credit system existed probably to facilitate trade and ensure that the European merchants spent less time on the African coast; with the credits the Africans would keep the slaves and other goods ready before the Europeans made a return trip. Barbot described the credit system:

We also advanced to the King, by way of loan, the value of a hundred and fifty bars of iron, in sundry goods; and to his principal men, others, as much again, each in proportion of his quality and ability.

To captain forty, eighty bars. To another, forty. To others, twenty each.

This we did, in order to repair forthwith to the inland markets, to buy yams for greater expedition; they employing usually nine to ten days in each journey up the country, in their long canoes up the river.⁴⁰

The questions then become: did the Africans pay back the credits or fulfil their own obligations under the credit barter? If not, how did the European merchants react or enforce payments? If so, did the method of enforcement generate disputes? How were those disputes settled? Which legal system was applied to the settlement of such disputes? Barbot's account did not answer most of the above questions, but he described the method of repayment:

It is customary here for the King of Bandy to treat the officers of every trading ship, at their first coming, and the officers return the treat to the King, some days before they have their compliment of slaves and yams aboard. Accordingly, on the twelfth of August, we treated the King, and his principal officers, with a goat, a hog, and a barrel of punch; and that is an advertisement to the Blacks ashore, to pay in to us what they owe us, or to furnish with all speed, what slaves and yams they have contracted to supply us with, else the King compels them to it. At that time also such of the natives as have received from us a present, use to

³⁹ *Ibid.*, p. 459.

⁴⁰ *Ibid.*, p. 460.

present us, each with a boy or girl-slave in requittal. According to this custom we treated the Blacks ashore on the fifteenth of August, and invited the Portuguese master to it, as also the Black ladies; the King lending us his musick, to the noise of which we had a long diversion of dances and sports of both sexes, some not unpleasing to behold....

On the twenty second, we let fly our colours, and fired a gun, for a signal to the Blacks, of our being near ready to sail, and to hasten aboard with the rest of the slaves, and quantity of yams contracted for.⁴¹

Barbot has just described the custom by which the Africans paid back their loans or discharged their own obligations under the credit barter transaction. According to him, the African King ensured that the African merchants paid back their loans and in fact enforced repayment in that he, “compels them to it.” That is clear.

But what of the loan given to the African King himself? How was repayment by the King enforced and by whom? Where the African King refused to pay back his loan and a dispute naturally resulted, what law was applied to the resolution of that dispute? Barbot did not give any clue to the answers for the above questions. His silence on the point may well mean that the African King himself was not found wanting in repaying his own loan. Otherwise, he would have recorded such an important event which would have had the effect of disrupting trade and adversely affecting the relationship between the European and African merchants. But one thing seems to be clear: disputes which resulted or would have resulted from such credit transactions involving people from different legal and political backgrounds obviously belonged to the field of conflict of laws. As we shall see later, the frequency of similar disputes in the nineteenth century led to establishment of a special type of court called ‘the court of equity,’ not in any way connoting the Chancery Court in England which developed its principles of equity.

⁴¹ *Ibid.*, p. 463.

Again, during this era, the British merchants merely conducted their transactions on the Nigerian coast without any settlement or intention to settle in the Nigerian territory. This is particularly true in the early periods of their presence in Nigeria, *i.e.*, about the fifteenth and sixteenth centuries. The African land, its peoples and cultures were strange to them and malaria resulting from mosquito bites ensured a very high mortality rate on the part of the foreigners. This was such a serious impediment to settlement that most parts of West Africa, including Nigeria, were euphemistically called the ‘White man’s grave.’ It was not until the British merchants started residing in Nigeria on a more permanent basis, probably following the discovery of a malaria prophylactic, *i.e.*, chloroquine, in the early nineteenth century, that serious and full disputes of a conflict of laws nature began to arise.

Trade disputes between Nigerian merchants and British traders led to the latter’s call to their home government for help and protection. The British government reacted by appointing a first British Consul, John Beecroft to Nigeria in 1849. He was himself a British merchant and already familiar with the trade and politics of the Niger Delta.⁴² The consul’s primary duty was to protect the lives and property of the British traders.⁴³ We shall presently discuss how the conflicts between the British and Nigerian merchants were settled.

Having described, as the primary evidence allows, the extent and effect of social and economic interaction in Nigeria to the period of the arrival of European traders, mainly British, the next step is to establish the existence of the diversity of tribal or customary laws in pre-colonial Nigeria.

⁴² Ikime, *supra* note 32, p. 14.

⁴³ *Ibid.*

2.4 CUSTOMARY LAW AND SYSTEMS

There is no doubt that each of the various pre-colonial Nigerian tribes had, and still has, its own tribal, native, or customary law which exclusively applied to it, and was different in some ways from the customary legal system applicable in another tribe. Even today one speaks of Yoruba customary law, Ibo customary law, and Islamic law that is applicable in the northern part of Nigeria. According to Justice A.G. Karibi-Whyte, “the various customary laws are indigenous to the ethnic groups and were formulated by them to meet the different social challenges in their development over the ages. Islamic law does not enjoy the same natal origin, and like English law is exotic.”⁴⁴ Similarly, Mr. Justice Dan Ibekwe (as he then was) stated extra-judicially:

In the beginning, the various communities which made up what is today known as Nigeria were developing in their own simple ways. It is however, correct to say that, those communities were not integrated as is the case now. In the process of time, each community had evolved into an organized society. Each had its customary law and, in many cases, there were sanctions behind such law⁴⁵

Since different social, political and even religious structures obtained in these tribes, the customary laws emanating therefrom were bound to diverge. As Yntema put it:

In early times, when the legal order was intimately connected with actual or supposed kinship groups and was part of the peculiar religious and social structure of the particular community, law was inalienably personal. It was inconceivable, for example, that the *ius civile*, the common law of the Roman citizenry, should be available to a *peregrine* in Rome or, *vice versa*, that an Athenian in Attica should claim the protection of some barbarian custom. This identification of local law with the interests of the social group has by no means disappeared⁴⁶

⁴⁴ A. G. Karibi-Whyte: The Relevance of the Judiciary in the Polity – In Historical Perspective (Lagos: Nigerian Institute of Advanced Legal Studies, 1987), p. 31.

⁴⁵ D. O. Ibekwe, “Conflict of Cultures and our Customary Law,” in T.O. Elias, S.N. Nwabara, et al., eds., African Indigenous Laws (Nsukka: University of Nigeria Press, 1974; proceedings of workshop held in Nsukka, Nigeria, 7 – 9 August 1974), p. 297.

⁴⁶ H. E. Yntema, “The Historic Bases of Private International Law,” (1953) 2 American Journal of Comparative Law, 297 at 297-8.

Similarly, Ezra Zubrow opined that: “This universality of legal systems is probably matched only by their diversity. They range from systems based on kinship to property, from secular to religious principles, and from consensual to dictatorial impositions. Different societies have differing mixes at various times.”⁴⁷ Finally on this point, Professor Nwabueze has stated: “It should be explained that customary law is not a single body of law throughout the country. Far from that being the case, customary law is as various as the number of independent communities comprised in Nigeria.”⁴⁸

It should be emphasised that the existence of a multiplicity of tribal or customary laws in pre-colonial Nigeria and the exclusive application in a tribe of its customary law, did not generate legal pluralism. Legal pluralism implies the simultaneous existence and interaction of two or more different systems of law, one of which is superior to the others.⁴⁹ In pre-colonial Nigeria where the customary law of a tribe was the only applicable law, the question of interaction with or subservience to any other law did not naturally arise.

Although the pre-colonial Nigerian societies had their different customary laws, *i.e.*, existence of legal diversity, the emergence of conflict problems of choice of law depended on the view one takes of the apparently superficial social and economic interaction, and the impact of the barter based economic system. In other words, if one takes the view that the barter system actually led to disputes, then that is a

⁴⁷ Ezra Zubrow, “The Impact of Folk Law on the Development of the Early State,” (Ottawa: Indian and Northern Affairs: being a paper delivered during the symposia on folk law and legal pluralism, X1th International Congress of Anthropological and Ethnological sciences, Vancouver, Canada, August 19 – 23, 1983), p. 334.

⁴⁸ B. O. Nwabueze, *Machinery of Justice in Nigeria* (London: Butterworths African Law Series No. 8, 1963), p. 3.

⁴⁹ M. Hooker, *Legal Pluralism* (Oxford: Clarendon Press, 1975), p. 6.

strong argument for the existence of conflict of laws problems at that period; but a contrary view of barter may mean that conflict of laws problems did not exist. We have already examined both perspectives. However, whatever dispute arose, between individuals from different tribes or between natives and European traders, it was settled in a clearly identifiable pattern and without reference to any judicial process.⁵⁰

This naturally takes us to the last question: what was the mode of resolution of disputes, if any, arising from inter-tribal contacts? The first approach will be to tackle the mode of dispute resolution before the advent of Europeans. Thereafter, we shall examine the style of dispute resolution in the colonial era.

The argument here on dispute resolution in pre-colonial Nigeria is without prejudice to the earlier suggestion that the *lex fori* was likely applied to disputes of a conflict of laws nature. The following is in the nature of an alternative argument. In pre-colonial Nigeria, disputes that resulted from the superficial inter-tribal contacts were not referred to any adjudicatory body. This might have been due to the ethnic and tribal nature of the different customary laws. During this period, violence was usually and freely resorted to in the settlement of such disputes. Few references will suffice. Professor Obaro Ikime stated:

The development of the palm oil trade had another effect on Itsekiri – Urhobo relations. Although through the system of pledges and ‘diplomatic marriages’ it was often possible to maintain friendly relations between the middlemen and the producers, disputes between the Urhobo and the Itsekiri were not always resolved peacefully. Sometimes the Itsekiri traders, offended by the non-fulfilment of promises made by their Urhobo customers sent their slaves, usually described as their ‘boys’ to raid the villages of the offenders concerned; the idea was that slaves taken during such a raid would, by working for the Itsekiri, eventually make good the loss sustained by the non-fulfilment of the obligations previously agreed on. Once under way such raids tended to become indiscriminate, since the ‘boys’ did not always confine their

⁵⁰ For traditional judicial process: E.K. Quashigah, “Reflections on the Judicial Process in Traditional Africa,” (1989 – 1990) 4 *Nigerian Juridical Review*, 1.

depredations to specific individuals or villages. This practice usually referred to as 'chopping' was to be frowned upon by the British administration in the years after 1891.⁵¹

Violence and self-help as dispute resolution methods were characteristic of 'primitive' law. They were equally employed by the Greeks, as Vinogradoff noted:

As frequently happens in ancient law, distress was used as a means of obtaining justice by self-help. Another feature of the procedure was that distress or reprisals are not necessarily directed against one's opponent, but might be levelled against relatives of his or even against his countrymen at large. Such cases were considered as a justified taking of hostages.⁵²

And Gluckman added that: "In polysegmentary societies there may be no authoritative means of settling disputes between opposed segments and hence there is resort to vengeance or self-help."⁵³

The advent of colonialism at least initially did not alter the above mode of dispute resolution. The Europeans naturally refused to submit to legal regulation by customary law, which was considered alien. However, Nwabueze submitted: "At first these foreign traders resorted to the traditional tribunals for the settlement of their disputes with the natives."⁵⁴ No authority was cited for this proposition. What he said could have been true of Canada but definitely not Nigeria. The Canadian position has been stated by Bradford W. Morse: "There is in fact a wealth of information indicating that early travellers, traders and colonists willingly chose to accept local Indian law as governing their affairs in the Canadian Prairies."⁵⁵ Certainly this was not the position in Nigeria because the prevailing barter system

⁵¹ Ikime, *supra* note 32, p. 7.

⁵² P. Vinogradoff, *The Collected Papers of Paul Vinogradoff*, vol. 11, *Jurisprudence* (Oxford: at The Clarendon Press, 1928), p. 260

⁵³ M. Gluckman, *Ideas and Procedures in African Customary Law* (Oxford: University Press, 1969), p. 69.

⁵⁴ Nwabueze, *supra* note 48, p. 46.

⁵⁵ B. W. Morse, "Indigenous Law and State Legal Systems: Conflict and Compatibility," Commission on Folk Law and Legal Pluralism (Ottawa: Indian and Northern Affairs: Papers of the Symposia on Folk Law and Legal Pluralism, XIth International Congress of Anthropological and Ethnological Sciences, Vancouver, Canada, August 19 – 23, 1983), p. 384.

entailed instantaneous⁵⁶ return which, generally speaking, hardly generated litigable dispute.

Again, this point is substantiated by the account of James Barbot:⁵⁷ “they (Africans) have not the art of reading and writing, and therefore we are forced to stand to their agreement, which often is no longer than they think fit to hold it themselves.” Thus, with this unequal bargaining power, the question of resort, by the European traders, to the customary laws or traditional tribunals did not arise and could not have arisen. Professor Crowder clearly made the same point:

The palm-oil traders were as rough a lot as the old slave traders, and well deserved their title ‘palm oil Ruffians.’ The African chiefs could not actually bring these traders before their own courts, so they resorted to the expedient of imposing collective punishment on the European community through the banning of trade. This was fairly effective, since conditions on the coast were such that most traders were very anxious to get back to Europe as quickly as possible, and could stomach no delays. The ban on trade was always absolute because of the strict control African chiefs exercised over their subjects. There was no ‘scabbing’ on the African part, to use a modern trade-union term. On the other hand, the Europeans found it difficult to combine effectively, since whenever a European community stuck out for lower prices, there was usually one of their number willing to trade at the African’s price⁵⁸

The imperative of some form of adjudicatory body to resolve disputes between African and European traders did not arise until the latter began to settle on a more permanent basis in the larger territory that became Nigeria. Consequent upon this settlement, disputes between Nigerian and British merchants increased. These disputes were clearly of the nature of conflict of laws since they naturally involved the question of which legal system, *i.e.*, English or customary law, was applicable? Since the British merchants were reluctant to employ the traditional process of dispute resolution, they appealed to their home government for help. This, as we have already noted, led to the appointment of the first consul, *i.e.*, John Beecroft,

⁵⁶ Diamond, *supra* note 28, p. 393.

⁵⁷ *Supra* note 38, pp. 459 – 460.

⁵⁸ Crowder, *supra* note 14, p. 123.

whose primary responsibility was the protection of the lives and property of British traders in the Niger Delta.

The various consuls did not apply any judicial form of inquiry or technical rules of justice: rather, they resorted to intimidation and violence against the Nigerian traders whenever there was a dispute between them and their British counterparts. The *modus operandi* of the British consul was graphically captured in the account of Ikime:

But while he (*i.e.*, John Beecroft) was actually in the district, the people of the town of Bobi, led by their chief Tsanomi, attacked and looted Horsfall's factory. The cause of the attack is not known but, judging from subsequent incidents, it is unlikely that it was undertaken out of sheer desire for loot. Beecroft was filled with great indignation. In a note to the naval authorities, he requested that a gunboat be sent to the Benin River to mete out condign punishment: 'the sooner a man of war arrives the more pleasing it will be for me, for these scoundrels must be well chastised with powder and shot.' This was characteristic. Beecroft was determined to leave no doubts as to the power and authority which the consul could bring to bear on these perennial disputes between white traders and the delta peoples. The gunboat requested did arrive, and Beecroft proceeded to bombard and burn down Bobi, thereby establishing the pattern of Afro-British relations in this as in other parts of the delta: whenever a dispute arose between British traders and the delta middlemen, the latter had almost invariably to face punishment irrespective of the rights and wrongs of the case.⁵⁹

No doubt, dispute settlement based on gunboat diplomacy hindered trade, and even social intercourse between Africans and Europeans. Both parties set out to find a formula for the resolution of such disputes with traces of foreign elements. This resulted in establishment of a 'Court of Equity' in 1854, for the adjudication of disputes between Africans and Europeans. It was composed of African middlemen and European supercargoes, *i.e.*, the foreign traders as they were known, and presided over by the latter in monthly rotation. It's judgment was confirmed by the African king.⁶⁰ The court of equity was described by Dr. Baikie, who explored the River Niger up to Lokoja in Nigeria:

⁵⁹ Ikime, *supra* note 32, pp. 15-16.

⁶⁰ Crowder, *supra* note 14, p. 123.

A commercial or mercantile association was, by the exertions of captain Witt and others formed, the members being the chief white and black traders in the place, and the chair is occupied by the white supercargoes in monthly rotation. All disputes are brought before this court, the merits of the opponents are determined, and with the consent of the king, fines are levied on defaulters. If any one refuses to submit to the decision of the court or ignores its jurisdiction, he is tabooed, and no one trades with him. The natives stand in awe of it, and readily pay their debts when threatened with it⁶¹

Disputes before the court of equity obviously had a foreign element and were most likely to have involved the question of choice of law, *i.e.*, was it English law or African customary law that would provide the rule of decision? However, the court of equity did not decide disputes before it, based on any ascertainable pattern or system of law. Rather, it based its decisions on general notions of justice.⁶²

The emergence of these courts of equity in various parts of Nigeria after 1854, though it entertained problems in the nature of conflict of laws, did not lead to the introduction of a full system of conflict of laws or its rules in Nigeria. This is because the court of equity did not decide disputes before it on the basis of choice of law. *i.e.* which of the potentially applicable laws would provide the rule of decision? It is historically in the nature of pure equity, as employed in the English court of Chancery, that the judge's 'conscience' ruled according to reason and fairness.

On 30 July 1861, King Dosunmu of Lagos ceded Lagos to Acting Consul, McKoskry, in return for a yearly payment of one thousand and thirty pounds sterling. Consequently, a governor was appointed for the newly acquired colony of Lagos in the person of Henry Stanhope Freeman. This appointment marked the beginning of a permanent British colonial administration in Nigeria. Obviously, an administration of this nature required a complete legal system for effective

⁶¹ Baikie: Narrative of an Exploring Voyage up the Rivers Kwora and Binne in 1854, p. 356, quoted in Nwabueze, supra note 48, pp. 51-52.

⁶² A. O. Obilade, The Nigerian Legal System (London: Sweet & Maxwell, 1979), p. 18.

operation. This led to the introduction of English law in the colony of Lagos in 1863,⁶³ subsequently extended to the rest of the country.⁶⁴ By the Supreme Court Ordinance of 1863⁶⁵, the first Supreme Court was established for the colony of Lagos. The above Ordinance was subsequently repealed and replaced with the Supreme Court Ordinance of 1876.⁶⁶ This statute received into the colony of Lagos the common law of England, the doctrines of equity, and statutes of general application in force in England on 24 July 1874.

In 1900, both northern and southern Nigeria were declared British protectorates and a Supreme Court was established for each.⁶⁷ The common law of England, doctrines of equity and statutes of general application in force in England on 1 January 1900 were received into each protectorate. The reception of English law was continued and confirmed by many statutes passed after Nigeria's independence⁶⁸

Thus, the reception of English law into the colony of Lagos in 1863 and the rest of the country in 1900 marked the introduction in Nigeria of complete and mature rules of conflict of laws derived from England.

⁶³ *Ordinance No. 3 of 1863.*

⁶⁴ A. N. Allott, "The Common Law of Nigeria" in *Nigerian Law: Some Recent Developments* (London: British Institute of International and Comparative Law, 1965; a report of a discussion conference held from 13 March to 16 March 1964, under the auspices of the British Institute of International and Comparative Law, at St. Catherine's, Cumberland Lodge, Windsor Great Park), p. 31.

⁶⁵ No. 11 of 1863.

⁶⁶ No. 4 of 1876.

⁶⁷ *Supreme Court Proclamation* No. 6 of 1900 (for Southern Nigeria), and *Protectorates Courts Proclamation* No. 4 of 1900 (for Northern Nigeria).

⁶⁸ *Nigerian Tobacco Co. Ltd. v. Alloysius Olumba Agunanne* (1995) 5 Nigerian Weekly Law Reports (Part 397), p. 541 at pp. 580-581: decision of Supreme Court of Nigeria.

Conclusion.

This legal historical reconstruction has concentrated on the state of conflict of laws in Nigeria from the pre-colonial period to establishment of full British administration in Nigeria in 1863. The existence of conflict of laws during this period can be mirrored from the barter economic system and was conditioned by it. There were two arguments on the impact of barter: first, that barter was preceded by such circumspection, prudence and detailed negotiation that disputes of a conflict of laws nature which might have arisen were practically averted; and second, that the barter system, especially the credit barter, actually resulted, or were likely to have resulted, in disputes which belonged to conflict of laws. Disputes which came before the court of equity in the nineteenth century were clearly of conflict of laws nature. To the extent that conflict of laws problems existed during the period under review, there was no clear evidence of the rules which were adopted in the resolution thereof. Apart from the traditional settlement by war, reprisals, gunboat diplomacy, and reference to the court of equity, which did not apply any systematic body of principles or rules, disputes of a conflict of laws nature were likely settled by application of the *lex fori*, because of the peculiar difficulty of proving foreign law during that period. We conclude that a full system of conflict of laws, as we know it today, was introduced into Nigeria in 1863.

In the next chapters, we shall discuss the state or sources of conflict of laws in Nigeria in the colonial period from 1863 to Nigeria's independence in 1960, and from that date to the present period. The primary evidence for conflict of laws in Nigeria during the colonial period, which are still valid sources today, were the reception of English common law, doctrines of equity, and statutes of general application.

CHAPTER THREE

ENGLISH LAW AS A SOURCE OF CONFLICT OF LAWS IN NIGERIA AND CANADA.

3.1 INTRODUCTION

In the following chapters we shall discuss the sources of conflict of laws in Nigeria in the colonial and post-colonial periods. As such, it becomes imperative to clarify what we mean by sources of conflict of laws. The term 'sources of law' could be used in many senses and in different ways. It may refer to all those quarters or materials from which we obtain knowledge of the law, *e.g.*, religious practices, customs, books, treatises, statutes, law reports, and expert opinions. It may also be used to indicate the mode or process through which a rule of law comes into force, *e.g.*, whether the law was enacted by the legislature, or emanated from usage, or is a regulation made pursuant to a statutory power. The term could also be employed to show the authority for a rule of law, *i.e.*, the person, institution or sovereign that has given that rule its authoritative character. Consequently, sources of law could come under two major categories: material or historical, and legal or formal sources.¹

Material or historical sources of law will cover all those sources from which one obtains knowledge of the law. The first sense in which we understand sources of law above can come under this category. Here we are not so much concerned with the legal validity of a rule as with getting information that will advance our knowledge of that rule. Material or historical sources serve mainly intellectual purposes. We refer to

¹ T. E. Holland, The Elements of Jurisprudence (Oxford: at The Clarendon Press, 1900, 9th ed.), p. 52; C. K. Allen, Law in the Making (Oxford: at The Clarendon Press, 1951), p. 1.

them not in justification of a legal act or otherwise, but to show the origin or the basis of a legal prescription. Material or historical sources usually answer the question: why is a legal norm in its present form? For us to understand why the offence of bigamy is practically not prosecuted or enforced in Nigeria, we have to wade into the customary, religious and matrimonial practices of the peoples who are essentially polygamous. This exercise does not attenuate the offence of bigamy but explains the liberal attitude of the state towards practitioners.

However, legal or formal sources of law refer to a the authority for a rule. This covers the second and third senses in which the term was used above. The question here is usually one of legal validity of a rule: what is the source of authority of that rule? Does the rule emanate from a sovereign or state, backed by sanction? Is it of such a positive nature that the courts will enforce it? Legal or formal sources provide justification or excuse for an act or conduct. The formal or legal source of our civil and criminal law is the will of the Nigerian State backed by sanctions which Nigerian courts enforce. On this reasoning, whatever rules are enforced by the courts constitute formal or legal sources of law. In Nigeria, the most important formal or legal source of law is the 1999 Nigerian Constitution.

However, Austin, in his analytical positivism, limited the sources of law to only the formal source. Accordingly, he said:

The expression *fontes juris*, or sources of law, is of course metaphorical, and is used in two meanings. In one of its senses, the source of a law is its direct or immediate author. Now the immediate author may either be the sovereign (who is the ultimate author of all law) or a person or body legislating in subordination to the sovereign. In the latter case it is an improper use of the metaphor to describe the immediate author as the *source*. Individuals or bodies legislating in subordination to the sovereign, are more properly *reservoirs* fed from the source of all law, the Supreme Legislature, and again emitting the borrowed waters which they receive from that fountain of law. For convenience, however, I adopt the expression source of law as meaning the authors from whom it emanates immediately.² [Emphasis supplied by author]

² J. Austin, Lectures on Jurisprudence or The Philosophy of Positive Law (London: John Murray, Albemarle Street, 1904, Students Edition, Lecture xxviii), p. 254.

Because we are looking at all the materials in Nigeria from which knowledge of the conflict of law rules can be obtained, we therefore adopt the broader classification of sources of law as both historical/material and formal/legal sources.

3.2 RECEPTION OF ENGLISH LAW.

The source of conflict of laws during the colonial period was English law which was received into the country. Reception of law is an immemorial legal phenomenon by which foreign law is introduced to a local legal system.³ It connotes the transmigration or transplantation of a particular legal system.⁴ In this case, it meant the transmigration of English law to the Nigerian legal system. This is by no means peculiar to Nigeria. In the Middle Ages, many countries in the continent of Europe received Roman law into their various legal systems. Probably the Law of Twelve Tables (*circa* 451 B. C. E.), which is the earliest example of legal codification in the Roman law, was inspired or based on the laws of Solon of the ancient Greeks.⁵ The provinces of Canada and many states of America received English law at early stages of their development.

Reception of foreign law into a local legal system usually leads to two consequences: legal pluralism and legal acculturation.⁶ Legal pluralism is the corollary of a practice adopted by the British colonial administration in Nigeria by recognising and allowing the continued operation of the indigenous customary law, alongside the

³ A. E. W. Park, *The Sources of Nigerian Law* (London: Sweet & Maxwell, 1963), p. 15.

⁴ Lord Denning called it legal 'transplant' in *Nyali Ltd. v. Attorney-General*, (1955) 1 All England Law Reports 646 at 653; Alan Watson equally uses the phrase "Legal Transplants," which he defined as, 'the moving of a rule or a system of law from one country to another or from one people to another'; *Legal Transplants: An Approach to Comparative Law* (Athens: University of Georgia Press, 1993, 2nd ed.), p. 21.

⁵ Watson, *supra* note 4, p. 25.

⁶ The discussion of these concepts is based on an assumption of a colonial situation in which the country that received foreign law is or was subject to colonial rule.

received English law.⁷ As Lord Wright said in *Oke Lanipekun Laoye & ors. v. Amao Ojetunde*⁸:

The policy of the British Government in this and other respects is to use for purposes of the administration of the country the native laws and customs in so far as possible and in so far as they have not been varied or suspended by statutes or ordinances.... The courts which have been established by the British Government have the duty of enforcing these native laws and customs, so far as they are not barbarous, as part of the law of the land.⁹

Therefore, as a legal phenomenon, legal pluralism means the simultaneous operation of two or more legal systems in the same territory in which the local system is subservient to the foreign one.¹⁰ This has led to the problem of internal conflict of laws in Nigeria. For instance, a court in Nigeria may be called upon to decide which of the several systems of law applicable in the country will provide the rule of decision in a particular case, *i.e.*, is it the received English law, customary law or local legislation? Many states in Nigeria have legislation dealing with this type of internal conflict of laws on the basis of the law binding between the parties.¹¹ Consequently,

⁷ In recognition of the pre-existing system of the administration of justice, the *Native Courts Proclamation* 1900, No. 9 of 1900, established Native or Customary Courts to administer customary law in cases involving natives of Nigeria: B. O. Nwabueze, *Machinery of Justice in Nigeria* (Butterworths: African Law Series No. 8, 1963), pp. 70 – 77; A. O. Obilade, *The Nigerian Legal System* (London: Sweet & Maxwell, 1979), pp. 22 – 29.

⁸ (1944) Law Reports Appeal Cases, 170 at 172-173.

⁹ I. Schapera similarly opined that: “The general policy of the Administration has been to preserve the tribal authority of the chiefs and the laws and customs of the people, ‘subject to the due exercise of the power and jurisdiction of the crown, and subject to the requirements of peace, order, and good government.’ Consequently, apart from certain changes regarded as essential, there was as little interference as possible with the traditional forms of government and jurisdiction”: *A Handbook of Tswana Law and Custom* (London: Frank Cass & Co. Ltd., 1938), pp. 41-42.

¹⁰ M. Hooker, *Legal Pluralism* (Oxford: at The Clarendon Press, 1975), p. 6; Ezra Zubrow, “The Impact of Folk Law on the Development of the Early State,” *Commission on Folk Law and Legal Pluralism* (Ottawa: Indian and Northern Affairs: Papers of the Symposia on Folk Law and Legal Pluralism, 11th International Congress of Anthropological and Ethnological sciences, Vancouver, Canada, August 19 – 23, 1983), p. 335; Russell Smandych and Rick Linden rightly stated: “.... ‘classical legal pluralism’ have typically been concerned with describing and explaining how new (usually European) legal systems and laws brought by colonizers are superimposed on indigenous customary laws and pre-existing methods of dispute-settlement and social control”: Russell Smandych and Rick Linden, “Co-existing Forms of Aboriginal and Private Justice: An Historical Study of the Canadian West,” in Kayleen M. Hazlehurst, ed., *Legal Pluralism and the Colonial Legacy* (England: Avebury, Ashgate Publishing Ltd., 1995), p. 4.

¹¹ For instance, section 20(3) *Customary Courts Law of Lagos State*, Cap. 33, 1973, which we shall discuss in detail in the next chapter.

*Osuagwu v. Soldier*¹², held that Ibo customary law, and not Islamic law, applied in a civil case between two Ibos resident in Kaduna State, where Islamic law applies to the predominant Moslem population of that state. Thus in Nigeria, legal pluralism and the consequent internal conflict of laws rules have been historically conditioned. They have their special advantages in a multi-tribal country like Nigeria. For instance, legal pluralism and the internal conflict of laws rules fashioned upon it ensure the security of transactions and that legitimate expectations of the parties are met, on the ground that an Ibo can hardly reside or transact business in northern Nigeria where Islamic law, alien to him, obtains. But he does so in the hope and belief that Islamic law does not necessarily apply to him unless he consents to its application.

Recent attempts of some states¹³ in northern Nigeria to reverse this historical fact of legal pluralism to monism has affected the peace and unity of the country. It illustrates the wisdom of making legislation reflect historical experience. Northern Nigeria, inhabited mainly by Moslems, has started discussions in their legislatures with a view to introducing strict Sharia or Islamic law. When this proposed legislation takes effect, Sharia will become compulsorily applicable and enforced by the courts on all persons within those states, irrespective of their non-Moslem religion or customary law or the received English law, none of which will be applicable. The effect will be that, in most matters of civil and criminal law, Sharia or Islamic law, which is strictly meant for Moslems, will apply universally, regardless of religion or tribe. Where an Ibo in Zamfara State commits a crime, he will be charged under the religious Sharia law instead of the Penal Code based on the received law. It is not that the received English law is preferable to the Sharia but that the law of a religion to which he is not

¹² (1959) Nigerian Law Reports 39.

an adherent is applied to him. Is it not an indirect and compulsory conversion to the Islamic faith? Does it not intrude on his right to freedom of thought, conscience and religion under Section 38 of the 1999 Nigerian Constitution?¹⁴ Again, the proposed legislation will produce the result that a civil suit in a Zamfara State court between two Ibo residents will be decided in accordance with Islamic law. Thus, the court will determine the parties' rights by a law to which both are strangers!

The problem is brought into sharper focus when we assume that the two Ibos are husband and wife, married under Ibo customary law and seeking dissolution of their marriage in a Zamfara court. Does the application of Sharia to such a divorce suit meet the ordinary expectation of the parties to be regulated by their own Ibo customary law? Would it not be an affront to their sense of justice and bring law into disrepute? Could they have contemplated that coming to reside in Zamfara State would 'convert' them to Moslems overnight? Does such legislation promote national unity, social integration and justice as declared in the Fundamental Objectives and Directive Principles of State Policy under chapter two of the 1999 Nigerian Constitution? Also, will such legislation not impinge on the right to peaceful assembly and association and the right to freedom of movement, which allows every Nigerian to reside in any part of Nigeria, respectively guaranteed under sections 40 and 41 of the 1999 Nigerian Constitution?

¹³ *E.g.*, Zamfara, Kaduna, Niger and Sokoto States: The Globe and Mail (Canadian), Thursday, 24 February 2000, p. A13.

¹⁴ The section currently provides: "38(1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance
(2) No person attending any place of education shall be required to receive religious instruction or take part in or attend any religious ceremony or observance if such instruction, ceremony or observance relates to a religion other than his own, or a religion not approved by his parent or guardian
(3) No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination."

It will be interesting to see how the Nigerian courts will constitutionally characterise this proposed legislation. Clearly, it has a destructive potential for the present practice where conflicting claims are decided by application of internal conflict rules, which allow the application to a party of the system of law to which he is subject and which meet legitimate expectations of the parties. Expectedly, this proposed legislation, even before becoming fully operational, has produced some violent demonstrations and riots by non-Moslem Nigerians resident in the northern states. More than one thousand people have so far been killed in such riots¹⁵ which threaten the stability of the country.

On the other hand legal acculturation is the second result of reception of law, manifested in most Canadian provinces. It emerges from the non-recognition of the existing local legal system or the total assimilation of the local system into the foreign legal system. As such, there is an exclusive application of the received foreign law. Legal acculturation and pluralism have been distinguished by a French anthropologist.¹⁶ However, P.G. Sack seems to prefer the term legal unification to legal acculturation. He has vividly demonstrated that legal pluralism or unification is a matter of ideological orientation.¹⁷

¹⁵ "Dozens killed in religious riots in Nigeria: March by Christians opposed to introduction of Islamic law sparks clashes in Kaduna" The Globe and Mail (Canadian), Wednesday, 23 February 2000, page A9.

¹⁶ Norbert Rouland, Legal Anthropology (London: The Athlone Press, 1994, translated from French by Philippe G. Planel), p. 292 : "The acceptance of a foreign system by an indigenous system can lead to coexistence between the two systems. Often the indigenous communities continue to follow their own law, the received law only being applied by the state institutions of that society. However, a more thoroughgoing process of legal acculturation may result. Either it is unilateral (only one of the legal systems is modified, or even eliminated) or it is reciprocal (each of the systems is modified through contact)."¹⁶

¹⁷ P. G. Sack, "Legal Pluralism: Introductory Comments," in P. Sack, E. Minchin, eds., Legal Pluralism (1986), p. 1, quoted in G. R. Woodman and A. O. Obilade, eds., African Law and Legal Theory (New York University Press, 1995), p. 54: "Legal pluralism is more than the acceptance of a plurality of laws; it sees this plurality as a positive force to be utilised....rather than eliminated. Legal pluralism thus involves an ideological commitment. However, this commitment takes the form of an opposition to monism, dualism and any other form of dogmatism instead of prescribing a certain, positive course of action. Moreover, the refusal to treat the plurality of law as a positive force also implies an ideological

As in Nigeria, any British subjects upon settlement in what became the province of Manitoba, Canada, after 1870, continued to be subject to the application of English law which, under English colonial constitutional doctrine, followed them there. However, the local law, if any, existing before the settlement was not recognised. The concomitant legal acculturation has been lucidly described by Havemann¹⁸ But the question is: why was it legal pluralism in Nigeria and legal acculturation in Canada, when both countries were subjected to the same overlord? Why the differing discriminatory practices? What informed the non-recognition of the local rules by the British administrators in Canada? Is there any discernible pattern or principle in this differential colonial treatment of the indigenous legal systems? Was it based on racial hatred or just an arbitrary action? Or were the local inhabitants to be blamed for their action or inaction in that regard? The answers may not be found with certitude, but examining the British colonial policy and practice may give an insight to some of these problems.

stance. It means...that the plurality of law must be temporarily tolerated as a necessary evil: it forces us to adopt a series of essentially undesirable compromises, it prevents us from fully implementing other, positive goals which demand that this plurality be overcome. In short, the counterpart of legal pluralism is an ideology which aims at a global unification of law and which deserves the ugly label 'legal unification'."

¹⁸ Paul Havemann, "The Indigenization of Social Control in Canada," Commission on Folk Law and Legal Pluralism, *etc.*, *supra* note 10, p. 353, : "The Canadian state has never tolerated autonomy for indigenous people whether it was in terms of plurality within the legal system, other spheres of social control, or political action. Stark illustrations of this are offered in the Canadian Government's unwillingness to accommodate the Metis Nation under Louis Riel in the 19th century or grant any significant measures of sovereignty to Indian people in the second half of the twentieth century. To find indigenous people with any form of formal legal autonomy in North America, the irony is that one has to look to the U.S.A. There, Indian Tribal Courts and Codes of law exist, while in Canada they do not. Indeed, little or no 'customary' law has been received into Canadian law, let alone survived in a

3.3 MODE OF RECEPTION

The method of reception of English law in a particular territory depended on the manner of its acquisition by the British government.¹⁹ A territory could be acquired by settlement, conquest, cession, annexation, or treaty, *i.e.*, treaty of protection. These have been classified into two broad categories, *viz.*, settled and conquered territories. Apart from acquisition by settlement, all other methods come under the category of conquered territory. Under English colonial constitutional practice, a settled colony was deemed largely uninhabited and politically unorganised at the time of first arrival by British subjects. Such settlers were seen to have brought English law with them. By contrast, conquered colonies were deemed, before settlement, to have had some form of legal and political system. Presently, we shall pursue this distinction.

But first, what is the legal signification of a colony? Territories acquired by the British government were designated as colonies. Etymologically, the word derives from a latin word, *coloni*, meaning Roman citizens who settled outside Rome and became farmers or *colonia*, the land itself upon which the settlement was made.

Statutorily, it was defined in section 18(3) of the *Interpretation Act*, 1889²⁰:

The expression *colony* shall mean any part of Her Majesty's dominions exclusive of the British Islands, and of British India, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one colony.

coherent form, though a little customary usage has." *Manitoba Supplementary Provisions Act*, R.S.C. c. 124.

¹⁹ J. E. Cote, "The Reception of English Law," (1977) 15 *Alberta Law Rev.*, p. 29; A. G. Karibi-Whyte, The Relevance of the Judiciary in the Polity- In Historical Perspective (Lagos: Nigerian Institute of Advanced Legal Studies, 1987), p. 12.

²⁰ 52 & 53 Victoria, c. 63. This seems to be the earliest *Interpretation Act* on the matter: Halsbury's Statutes of England (London: Butterworths & Co., 1930, 1st ed., Vol. 18), p. 992.

Sir Kenneth Roberts-Wray²¹ has criticised this statutory definition for including territories which, etymologically speaking, are not colonies.²² However, he added that "it is difficult to find an alternative definition."²³ What amounts to *British Settlement* has also been defined in section 6 of the *Interpretation Act* of 1889²⁴ (U.K.):

any British possession which has not been acquired by cession or conquest, and is not for the time being within the jurisdiction of the legislature (constituted otherwise than by virtue of that Act or the Acts thereby repealed) of any British possession.

C.J. Tarring, relying on Lord Mansfield's decision in *Campbell v. Hall*²⁵, submitted that, "British subjects cannot take possession in their own right of a foreign country. No colony can be settled without authority from the crown."²⁶ But Roberts-Wray disagreed with this legal proposition:

Read literally, this cannot be good law. It is inconsistent with the authorities quoted above; it is not true as a statement of fact; and unauthorised settlement constitutes no civil wrong or criminal offence known to the law. Lord Mansfield admitted that the point was not material to the question being argued.... It is more probable, however, that he meant only that settlers could not add to the Sovereign's dominion without the authority of the crown.²⁷

This debate need not detain us. But the definition of settled colony adumbrated above, by any meaning of English constitutional law, has been swimming from the beginning in a legal fiction's sea!

How can one contend, for instance, that as late as the seventeenth century, specifically 1670, part of Rupert's land, now Manitoba, was uninhabited or was found

²¹ Sir, Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966), pp. 40-41: "The definition was never altogether appropriate. If it had been given its correct etymological meaning it would not perhaps have acquired its unpopularity. 'Colony' is, of course, apt to describe either a number of people who have gone abroad and settled in a new country or the country which they inhabit (if it is not part of a foreign state); but not territories, such as those in West Africa, where Europeans have for many years gone as missionaries, traders and administrators but rarely to make permanent homes."

²² As he explained in note 21.

²³ Roberts-Wray, *supra* note 21, p. 41.

²⁴ *Supra*, note 20.

²⁵ (1774) 1 Cowp. 204 in 98 English Reports 1045

²⁶ C.J. Tarring, *Law Relating to the Colonies* (London: Stevens & Haynes, 1893, 2nd ed.), p. 35.

²⁷ Roberts-Wray, *supra* note 21, pp. 100-101.

out by British settlers, *i.e.*, the Hudson's Bay Company, who that year were given a charter by their government? What of the Aboriginal inhabitants? Is this an implicit way of asserting a docility in the Aboriginal population? Of course, if the British settlers had been seriously confronted or attacked, as in Nigeria, they would have readily recognised the prior habitation of Rupert's Land by the Aborigines. Conquered colony, on the other hand, is a broad designation that includes territories acquired by various means other than settlement. This category embraces territories acquired by cession, annexation, treaty, and conquest.

The above distinction between settled and conquered colonies is of the utmost constitutional and legal importance, especially for Nigeria and Canada. This distinction explains the discriminatory practice of the British colonial government in recognising the indigenous laws in some of its colonies, *e.g.*, Nigeria and New Zealand, and refusing the same recognition in others, *e.g.*, Canada and Australia. The distinction in the mode of colonial acquisition, and the discrimination in the recognition of indigenous laws, have been emphasised by some English constitutional writers²⁸ and judges. Thus, the rule was that, since settled colonies had no population, otherwise presumed in law to be uninhabited, the settlers took with them all the immunities, privileges and laws of England.²⁹ English law became the presumed legal system of the colony. The question of existing indigenous law did not arise: if there was no previous population known to English law, no previous law could have existed, because law cannot thrive in a vacuum.

²⁸ Tarring, *supra* note 26. p. 4 , : "Colonies are formed either by settlement of an unoccupied or barbarous country, or by conquest or cession from other nations. These different modes of acquisition give rise to corresponding differences in the laws to which a colony becomes subject on its foundation." [Emphasis added.]

²⁹ "The settlers who established settled colonies took with them all the rights of British subjects, particularly the right to be granted representative government in the shape of a bicameral legislature

The legal position has been fully stated by Lord Blackburn in the case of *The Lauderdale Peerage*³⁰:

When the province of New York was founded by the English settlers who went out there, those English settlers carried with them all the immunities and privileges and laws of England. The Englishmen in a province which had been so settled were as free Englishmen, with as much privilege, as those that remained in England. It is true that it is only the law of England as it was at that time that such settlers carry with them; subsequent legislation in England altering the law does not affect their rights unless it is expressly made to extend the province or the colony.³¹

The headnote of *Blankard v. Galdy*³², delivered by Holt, C.J., lent the issue greater perspicuity: “Where an uninhabited country is found out and planted by English subjects, all laws in force here are immediately in force there; but in the case of an inhabited country conquered, not till declared so by the conqueror.” English law enhanced itself both ways!

As already noted, conquered territories retained application of their indigenous laws until changed by the conqueror, *i.e.*, the colonial master. The logic behind this seemed to be that such conquered territories were already inhabited prior to the conquest and had a functional legal system. Is this not a modest, if not subtle, concession to the strength and resistance of the indigenous people in the conquered territories? In some places, like most parts of Canada where the colonial master seemed to have encountered no resistance from the indigenous population, it was convenient for the British government to hold that the area was uninhabited and thus

with a nominated upper house and an elected lower house, on the model of British Parliament”: M. Wight, *British Colonial Constitutions 1947* (Oxford: at The Clarendon Press, 1952), p. 5.

³⁰ (1884 - 85) Law Reports 10 Appeal Cases 692 at 744-745

³¹ E. C. S. Wade and G. G. Phillips similarly stated: “When settlers annexed for the Crown territory which had no civilised system of law, the law of the colony was the common law of England and, in so far as it was applicable, the statute law existing at the time of the settlement. The crown could grant institutions, but could not take away rights; it had no powers of legislation; nor could it impose a tax. It followed that in such colonies changes in the constitution, like all changes of law, could only be effected by Acts of the United Kingdom Parliament”: *Constitutional Law* (London: Longmans, Green & Co. Ltd., 1960, 6th ed.), p. 390.

³² (1795) 91 English Reports 356.

to be declared a settled colony with all its legal consequences, *i.e.*, the erection and exclusive application of English laws.

The legal position of the conquered territories was set out by Lord Mansfield in *Campbell v. Hall*³³:

I will state the propositions at large, and the first is this:

A country conquered by the British arms becomes a dominion of the king in the right of his crown; and, therefore, necessarily subject to the legislature, the Parliament of Great Britain. The 2d is, that the conquered inhabitants once received under the king's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.

The 3d, that the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.

The 4th, that the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of a decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives.

The 5th, that the laws of a conquered country continue in force until they are altered by the conqueror: the absurd exception as to pagans mentioned in Calvin's case, shews the universality and antiquity of the maxim. For that distinction could not exist before the christian era; and in all probability arose from the mad enthusiasm of the Croisades. In the present case the capitulation expressly provides and agrees that they shall continue to be governed by their own laws, until His Majesty's further pleasure be known.

The 6th, and last propositions is, that if the king (and when I say the king, I always mean the king without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles....³⁴

The rule: that indigenous law remained in operation in conquered territories until changed by the colonial government, did not extend to indigenous constitutional law.

The constitutional aspect of the indigenous law ceased to exist from the moment of conquest or cession.³⁵ Thus, the native inhabitants could not resist the enforcement of English law on the ground that it did not derive from their customary law. Finally, the

³³ (1774) 98 English Reports 1045.

³⁴ *Ibid.*, pp. 1047-1048.

³⁵ Hood Phillips rightly commented: "The laws of the conquered colony, other than constitutional law, so far as they are consonant with our principles of right and justice, continue to exist unless and until altered by the conqueror. Hence Roman-Dutch law obtains in Ceylon, and old French law in Mauritius and the Seychelles, while there are traces of Turkish law in Cyprus and of Spanish law in Trinidad and Tobago. If there are no laws, those entrusted with the management of the colony must govern in accordance with right and justice": D. H. J. Chalmers and Hood Phillips: *Constitutional Law* (London: Sweet & Maxwell, 1946), pp. 534-535. And according to Tarring, "laws contrary to the fundamental principles of the British constitution cease at the moment of conquest": Tarring, *supra* note 26, p. 23.

above exploration of the legal distinction between settled and conquered colonies is summarised in the observations of the Master in the case of *Freeman v. Fairlie*.³⁶

Apart from Lagos which was acquired by cession following a conquest³⁷, other parts of Nigeria were mainly acquired by various treaties of protection concluded at different times between each of the native rulers and the representatives of the crown on behalf of the British government³⁸. Nigeria as a whole comes under the conquered colony category.

The situation in Canada was different. The west-central part of Canada was the subject of a royal Charter granted in 1670 by the British monarch, Charles II, to the Hudson Bay Company. The company was authorised under its charter to make laws for the administration and good government of the territory granted to it. Such laws were to be in accord with the laws of England. Pursuant to its charter, the company established trading posts in various parts of the territory for the execution of its fur trade. The above has led to the conclusion that the whole of western Canada, including

³⁶ (1828) 18 English Reports 117 at 128: "I apprehend the true general distinction to be in effect, between countries in which there are not, and countries in which there are, at the time of their acquisition, any existing civil institutions and laws, it being, in the first of those cases, matter of necessity that the British settlers should use their native laws, as having no others to resort to; whereas, in the other case, there is an established *lex loci*, which it might be highly inconvenient all at once to abrogate; and, therefore, it remains till changed by the deliberate wisdom of the new legislative power. In the former case, also, there are not, but in the latter case there are, new subjects to be governed, ignorant of the English laws, and unprepared, perhaps, in civil and political character, to receive them. The reason why the rules are laid in books of authority, with reference to the distinction between new-discovered countries, on the one hand, and ceded or conquered countries, on the other, may be found, I conceive, in the fact, that this distinction had always, or almost always, practically corresponded with that, between the absence and the existence of a *lex loci*, by which the British settlers might, without inconvenience, for a time, be governed; for the powers from whom we had wrested colonies by conquest, or had obtained them by cession, had ordinarily, if not always, been civilized and christian states, whose institutions, therefore, were not wholly dissimilar to our own."

³⁷ "Thus, on 30th July 1861, Dosunmu ceded Lagos to Acting Consul McKoskry in return for a pension of £1,030 a year. The handing-over ceremony was concluded by the singing of the British National Anthem by three hundred local schoolchildren, conducted by two missionaries. A Governor of the colony of Lagos, Henry Stanhope Freeman, was appointed and there began a new era in the history of British relations with that part of the coast, an era which inaugurated the new territory of Nigeria": Michael Crowder, *The Story of Nigeria* (London: Faber and Faber, 1962), p. 136

³⁸ Sir Udo Udoma, *History and the Law of the Constitution of Nigeria* (Lagos: Malthouse Press Ltd., 1994), pp. 1-46.

present day Manitoba, was a settled colony.³⁹ As we have already noted, this characterisation carries the assumption that the present Manitoba was, in the seventeenth century, uninhabited and politically unorganised! However, this assumption has been doubted by recent sociological studies. Russell Smandych and Rick Linden firmly stated:

The arrival of the Hudson's Bay Company in western Canada also marked the beginning of European economic and cultural intrusion into a territory that had for many centuries been populated by aboriginal people who had their own complex set of cultural and social institutions, including customary laws and traditional methods of dispute resolution and social control.⁴⁰ [Emphasis added.]

If the above is accepted, Manitoba would be more appropriately regarded as a conquered territory rather than a settled one. One is only left to wonder why the British colonial government, against the trend of authorities and historical fact of an immemorial Aboriginal population in Canada decided to treat that colonial territory as a settled colony.

Apart from the mode of acquisition, the clearest form of reception of English law in any territory is by legislation. In the previous chapter, we noted how English law was for the first time statutorily introduced to the colony of Lagos in 1863 and the rest of the country in 1900. A more recent statute, which adopted the formula of reception in the much earlier statutes, is Section 45 of the *Interpretation Act*⁴¹:

45(1) Subject to the provisions of this section and except in so far as other provision is made by any federal law, 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 day of January, 1900, shall be in force and, insofar as they relate to any matter within the exclusive legislative competence of the federal legislature, shall be in force elsewhere in the federation.
(2) Such imperial laws shall be in force so far only as the limits of the local jurisdiction and local circumstances shall permit and subject to any federal law.

³⁹ Cote, *supra* note 19, p. 89.

⁴⁰ Hazlehurst, ed., *supra* note 10, pp. 1-2.

⁴¹ *Interpretation Act*, Cap. 89, Laws of Nigeria, 1958.

Similar formulations can be found in the statute books of former British dependencies.

For instance, a Manitoba statute provides:

S.4 Subject to the provisions of this Act, the laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the fifteenth day of July, one thousand eight hundred and seventy, were from the said day and are in force in the Province, in so far as applicable to the Province, and in so far as the said laws have not been or are not hereafter repealed, altered, varied, modified or effected by any Act of the Parliament of Great Britain applicable to the Province, or of the Parliament of Canada.⁴²

The Nigerian statute specified parts of the English law received: common law of England, doctrines of equity and statutes of general application. The Manitoba legislation, on the other hand, adopted a monolithic reception formula: ‘the laws of England.’ Since the common law, doctrines of equity and statutes of general application in England received into Nigeria are all parts of the laws of England,⁴³ which were received into Manitoba, there is no substantial difference in the nature or quantum of English law received into both Nigeria and Manitoba. We shall now consider important matters arising from the above reception statutes.

3.4 PARTS OF ENGLISH LAW RECEIVED

A. Common Law and Equity.

Common law and equity refer to those principles of law developed in England by the original courts of common law: Common Pleas, Queen’s Bench, Exchequer, and the equity court of Chancery.⁴⁴ Common law has, in English legal parlance, many different denotations. At its broadest it can mean the Anglo-American system of jurisprudence. More narrowly, it means the unenacted, non-statutory portion of the

⁴² *Manitoba Supplementary Provisions Act*, R.S.C. 1927, c. 124, s. 4.

⁴³ It has been held that, “‘English law’ includes any relevant statute law. Otherwise one would expect to find the standard phrase ‘the common law of England and the doctrines of equity’”: Briggs, J.A., in *Hassanali R. Dedhar v. Special Commissioner, etc., of Lands* (1957) East Africa Protectorate Law Reports, p. 104 (C.A.).

⁴⁴ A. Allott, “Reception of the Common Law in the Commonwealth – Some Problems of the Resulting Pluralism,” (Lagos: Academy Press: Proceedings and Papers of the Sixth Commonwealth Law Conference held in Lagos, Nigeria between 17th – 23rd August, 1980), p. 162.

general law of England. And, more narrowly still, it means that part of the unenacted laws of England which is not equity.⁴⁵ Because equity was not expressly included in the Manitoba statute, *i.e.*, *Manitoba Supplementary Provisions Act, R.S.C., c. 124, s. 4* there was doubt as to whether it was implied in the received laws of England.⁴⁶

The express reception of equity in Nigeria saves it from the above debate.

The received common law rules form the bulk of Nigerian rules on conflict of laws. A few examples will suffice. Domicile is a concept used to determine a person's personal law, *i.e.*, the law that furnishes the rule of decision in most matters of his status and family relations. The meaning of domicile is therefore of the utmost importance. It is the relationship which exists between a person and a particular locality. It is therefore the law of that locality that applies when a question of his status arises for determination. Domicile of choice was defined in *Moorhouse v.*

*Lord*⁴⁷:

The present intention of making a place a person's permanent home exists only where he has no other idea than to continue there without looking forward to any event, certain or uncertain, which might induce him to change his residence. If he has in his contemplation some event upon the happening of which his residence will cease, it is not correct to call this event a present intention of making it a permanent home. It is rather a present intention of making it a temporary home, though for a period indefinite and contingent.⁴⁸

This definition has been adopted by the Nigerian courts, apparently relying on the reception statute. In the case of *Fonseca v. Passmen*, Thomas, J., held: "To establish a

⁴⁵ A. Allott, "The Common Law of Nigeria," in *Nigerian Law: Some Recent Developments* (London: British Institute of International and Comparative Law, 1965: A Report of a Discussion Conference held between March 13 and 16, 1964, under the auspices of the British Institute of International and Comparative Law, at St. Catherine's, Cumberland Lodge, Windsor Great Park), p.34.

⁴⁶ Cote submitted: "For want of express grant of equitable jurisdiction, the local courts seem to have taken this (*i.e.*, 'laws of England') to refer only to the rules of the courts of law, but not those of equity.... This would be nothing more than an antiquarian curiosity now were it not the fact that the late Dr. Falconbridge... has suggested that similar rules apply everywhere, apparently even in settled colonies. He contends that a general reception of English law did not include equity, and that it would be introduced only by a statute which either established a court of equity or (like the English Judicature Acts) gave the powers of courts of equity to the ordinary courts.... The simple answer to this seems to be that Dr. Falconbridge's theory is wrong, and equity is an integral part of English law. In other words, the common-law rule of reception covers equity too, and statutes on reception should (whenever possible) be interpreted in the same way": Cote, *supra* note 19, pp. 57-58.

domicile in Nigeria the mere *factum* of residence here is not sufficient.... There must be unequivocal evidence of *animus manendi* or intention to remain permanently."⁴⁹

Similarly, Coker, J., held in *Udom v. Udom*:

The subject must not only change his residence to that of a new domicile, but also must have settled or resided in the new territory *cum animo manendi*. The residence in the new territory must be with the intention of remaining there permanently. The *animus* is the fixed and settled intention permanently to reside. The *factum* is the actual residence.⁵⁰

Another area in which the Nigerian courts have received the English common law rules is on the law relating to the dependent domicile of a married woman. At common law, the domicile of a man is communicated to the wife immediately upon marriage. The common law position, which was statutorily changed in England in 1973⁵¹, and in most Canadian provinces, was lucidly stated by the recent authors of Cheshire and North⁵²:

Until 1974, the rule was that the domicile of a husband was communicated to his wife immediately on marriage and it was necessarily and inevitably retained by her for the duration of the marriage. This rule was much criticised as "the last barbarous relic of a wife's servitude" and was abolished by section 1 of the Domicile and Matrimonial Proceedings Act, 1973. The domicile of a married woman as at any time on or after 1st January 1974 shall, instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile.

However, the common law rule on the matter still applies in Nigeria. Consequently, De Lestang, C.J., held in *Machi v. Machi*⁵³ that, "it is trite law that the domicile of the wife follows that of the husband and.... [that] the wife cannot have a domicile

⁴⁷ (1863) 10 House of Lords Cases 272.

⁴⁸ *Per* Lord Cranworth at pp. 285-286.

⁴⁹ (1958) Western Region of Nigeria Law Reports 41 at 42.

⁵⁰ (1962) Lagos Law Reports, p. 112 at 117; *Adeyemi v. Adeyemi* (1962) Lagos Law Reports, p. 70 at 72.

⁵¹ *Domicile and Matrimonial Proceedings Act, 1973, c. 45* (U.K.). This statute is not applicable in Nigeria because under Nigeria's reception statute, only English statutes which existed and were in force in England on 1st January 1900, were received.

⁵² Cheshire and North, *Private International Law* (London: Butterworths, 1992, 12th ed.), p. 163; *Halsbury's Statutes of England and Wales* (London: Butterworths, 2000, 4th ed., Vol. 27), pp. 576, 716.

⁵³ (1960) Lagos Law Reports 103 at 104.

different from that of the husband while the marriage lasts.” In *Adeyemi v. Adeyemi*⁵⁴, Onyeama, J. (as he then was), held that, “the domicile of a married woman is that of her husband while the marriage subsists and indeed a divorced woman retains her former husband’s domicile until she changes it.”

In the area of tort, Nigerian courts have equally received the common law conflict of laws rules. The common law position was stated by Willes, J., in the case of *Phillips v. Eyre*⁵⁵:

As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England...[and]secondly, the act must not have been justifiable by the law of the place where it was done.

In *Benson v. Ashiru*⁵⁶, the Nigerian Supreme Court relied on *Phillips v. Eyre, supra*, and held:

After considering this and other authorities cited to us we are satisfied on the following points: The rules of the common law of England on questions of private international law apply in the High Court of Lagos. Under these rules, an action in tort will lie in Lagos for a wrong alleged to have been committed in another part of Nigeria if two conditions are fulfilled: first, the wrong must be of such a character that it would have been actionable if it had been committed in Lagos; and secondly, it must not have been justifiable by the law of the part of Nigeria where it was done: *Phillips v. Eyre*. These conditions are fulfilled in the present case. 57

Examples of adherence by Nigerian courts to common law rules can therefore be multiplied indefinitely. It serves to demonstrate the importance of the reception statute that brought English law into Nigeria. Therefore, an ascertainment of the scope of English law received into Nigeria is a prerequisite to any determination of the extent and quantum of English conflict of laws rules received into Nigeria.

⁵⁴ (1962) Lagos Law Reports 70 at 70

⁵⁵ (1870) Law Reports 6 Queen's Bench 1 at 28-29.

⁵⁶ (1967) Nigerian Monthly Law Reports 363

⁵⁷ *Ibid.*, p. 365, per Brett, J.S.C; for similar decisions: *Amanambu v. Okafor* (1966) 1 All Nigeria Law Reports 205; *Ubanwa & others v. Afocha & University of Nigeria* (1974) 4 East Central State of Nigeria Law Reports 308.

Scope of Received Common Law.

Here the question is: does the cut-off date of January 1st 1900, apply to common law and equity as well as statutes? One answer to the above question will delineate the scope of English law received into Nigeria. Manitoba in Canada is saved the agony of the following debate by its monolithic reception of the 'laws of England' on the fifteenth day of July 1870, *i.e.*, by its, *i.e.*, *Manitoba Supplementary Provisions Act, R.S.C. 1927, c. 124, s. 4*, simply receiving 'the laws of England' on that cut-off date without specifying its aspects, *e.g.*, common law, equity, and statutes. Therefore, it is apparent from a literal reading of the Manitoba reception statute that the cut-off date of 15 July 1870 applies to all parts of English law it received which constitute 'the laws of England.' What was received into Manitoba is not current English law but that law as it stood on the 15 July 1870. For instance, rules of common law and equity that evolved in England after 15 July 1870 ought not to be applicable in Manitoba because they would be outside the Manitoba cut-off date.

In Nigeria, there is no doubt that the limiting or cut-off date of January 1st, 1900 applies to the English statutes of general application⁵⁸; but the question is whether it equally applies to common law and equity? Allott and Park had a celebrated debate on this issue. While Allott argued that the limiting date also applied to common law and equity, thereby discountenancing the application of changes in English common law after 1900 Park, on the other hand, contended that it is the current common law and equity that was received into Nigeria. Allott's argument was based on the historical rule of construction and comparative analysis. He contended that, in the light of the history of the reception statutes and the comparative judicial decisions on them, it must have been the legislative intention that only common law and equity as it stood

in 1900 was received.⁵⁹ Allott's position seems to be supported by the Nigerian case of *Solomon v. African Steamship Co.*⁶⁰, where Petrides, J., held:

the statutes of limitation...were statutes of general application in force in England on January 1, 1900, and they in common with other statutes of general application which were in force on that date, are together with the common law and the doctrines of equity which were in force in England on the same date, in force within the jurisdiction of this court.⁶¹

Park's position finds anchorage in the literal rule of construction and the practice of courts. Accordingly, he submitted:

Dr. Allott's arguments, upon close examination do not hold good. And his position is not in accordance with the actual practice of the courts....In deciding issues on points of common law and equity they base themselves on English cases without making any attempt to discriminate between those decided before and after 1900.⁶²

This view is supported by *United Africa Co. Ltd. v. Saka Owoade*⁶³, where the Judicial Committee of the Privy Council, on appeal from Nigeria, applied the common law rule enunciated only in 1912 in *Lloyd v. Grace, Smith & Co.*⁶⁴

Though Cote professed to take a middle position, regarding Canada, he seems actually to support Park's contention.⁶⁵

⁵⁸ Park, *supra* note 3, p. 20; A. Allott, *New Essays in African Law* (London: Butterworths, 1970), p. 60.

⁵⁹ He said: "But in interpreting any statute, it is reasonable and indeed necessary to have regard to the general state of the law and the general opinion thereon immediately prior to the passing of the statute, to the meanings habitually attributed to the terms used therein, to the constitutional practice of the time, and to the way in which the statute has been consistently interpreted by the judges. It is also necessary to examine the history of provisions of this type in our colonial law, and the way in which legislatures and judges in other colonial territories – in Africa and elsewhere – have viewed the matter. It is this historical and comparative approach I respectfully suggest has been somewhat under-emphasised in the recent criticisms to which I refer": Allott, *supra* note 45, p. 38.

⁶⁰ (1928) 9 Nigerian Law Reports 99

⁶¹ Other cases to the same effect are: *Ibingira v. Uganda* (1967) Eastern Africa Law Reports 445 at 450; *Barclays Bank D.C.O. v. Gulu Millers, Ltd.* (1959) Eastern Africa Law Reports 540 at 548; *Re An Application by Jiwa* (1977) Eastern Africa Law Reports 749 at 751; *Besson v. Easaji Allibhoy* (1906) 2 East Africa Protectorate Law Reports 8; *Catteral v. Catteral* (1847) 1 Robertson, English Ecclesiastical Reports 581.

⁶² Park, *supra* note 3, p. 22.

⁶³ (1955) Law Reports Appeal Cases 130.

⁶⁴ (1912) Law Reports Appeal Cases, p. 716, where the House of Lords held, reversing the Court of Appeal, that an employer was vicariously liable for the torts of his employee committed in the course of his employment, even when the tort was committed solely for the employee's benefit.

⁶⁵ He opined: "Therefore, the best answer is the middle view. Admittedly the common law develops, but it is its living growing body which was transplanted to the various commonwealth territories, and not a petrified version of it. As one Canadian judge said, "I do not agree that the common law is any more static in British Columbia than in England." (*R v. Carriere* (1955) 17 Western Weekly Reports (New Series) 317 at 322) The American view is patently the same. Therefore, one should even look

Park's position makes the most legal sense because any attempt to limit the applicable common law to its state in 1900 would be unduly restrictive and inconsistent with the dynamism of law in society. A contention that only common law as it stood in 1900 is applicable would warrant the application of old rules to modern conditions which were not within the contemplation of those rules. It would likely impede legal development in Nigeria by its being shut out of recent modifications and refinements of old common law rules in England and elsewhere. A recent example of such changes in the common law is the House of Lords decision in *Boys v. Chaplin*⁶⁶; the House of Lords modified the common law rule posited in *Phillips v. Eyre*⁶⁷, by introducing the element of "flexibility." The facts were : Both parties were British servicemen stationed temporarily in Malta. The plaintiff was injured in a road accident by the admitted negligence of the defendant. Both parties were off duty at the time. Under Maltese law the plaintiff was given a right of action to recover pecuniary loss, but no right to compensation for pain and suffering and the plaintiff would be able to recover only £53 special damages. Under English law the damages would be £2,000. By a strict application of the old common law rule in *Phillips v. Eyre*, the damages will be assessed according to Maltese law, which was less favourable to the plaintiff. But the House of Lords modified the rule in *Phillips v. Eyre* by introducing the element of flexibility, which enabled it to determine damages according to English law. Lord Hodson held that English law was applicable on the basis of a flexible interpretation of *Phillips v. Eyre*, justified on grounds of public policy and in line with the American Restatement on Conflict of Laws.⁶⁸ Lord Wilberforce held that *Phillips*

askance at any interpretation of a local statute introducing English law which would impose a cut-off date on the common law": Cote, *supra* note 19, p. 57.

⁶⁶ (1971) Law Reports Appeal Cases 356.

⁶⁷ (1870) Law Reports 6 Queens Bench 1.

⁶⁸ *Supra* note 66, pp. 377-380.

v. Eyre must be, “made flexible enough to take account of the varying interests and considerations of policy which may arise when one or more foreign elements are present.”⁶⁹

Now, if Allott’s position were to be the law, a Nigerian court would be required to exclude the concept of flexibility⁷⁰ introduced by *Boys v. Chaplin*, in its application of the common law rule in *Phillips v. Eyre*. This concept enabled the plaintiff who suffered legal injury in *Boys v. Chaplin* to be adequately compensated. But Park’s view will give Nigerian judges the desired latitude to apply the modified rule in *Boys v. Chaplin*, on the basis that only current common law was received. This, flexibility, will enable them to provide justice in individual cases.

The foregoing debate was judicially confirmed in the recent Nigerian Supreme Court case of *Nigerian Tobacco Co. Ltd. v. Agunanne*.⁷¹ One of the issues raised in the lead judgment of Kutigi, J.S.C., was whether the common law doctrine of common employment abolished in England in 1948⁷² was still part of the common law received into northern Nigeria by Section 28 of its *High Court Law, 1955*,⁷³ which provides:

28. Subject to the provisions of any written law and in particular of this section and of sections 26, 33, and 35 of this law –
(a) the common law;
(b) the doctrine of equity; and,
(c) the statutes of general application which were in force in England on the 1st day of January, 1900
shall, insofar as they relate to any matter with respect to which the legislature of Northern Nigeria is for the time being competent to make laws, be in force within the jurisdiction of the court.

⁶⁹ *Supra* note 66, p. 391

⁷⁰ This is because the concept was only introduced in 1971 by the case of *Boys v. Chaplin, supra*, long after the limiting date of 1900.

⁷¹ (1995) 5 Nigerian Weekly Law Reports (Part 397) 541.

⁷² *Law Reform (Personal Injuries) Act 1948*, 11 & 12 George VI, c. 41.

⁷³ *High Court Law Cap. 49, Laws of Northern Nigeria, 1963*, vol. 11.

A priori, Kutigi, J.S.C., in the lead judgment, opined:

“First, it is doubtless that the year 1900 in section 28(c) above is only applicable to statutes of general application. The common law and doctrines of equity in Section 28(a) & (b) could only respectively mean the current common law and current doctrines of equity.”⁷⁴

Consequently, his Lordship held:

So clearly in whichever way one looks at it the common law of England adopted under section 28(a) of the High Court Law above did not and could not have included the doctrine of common employment which had been abolished in England in 1948. Consequently therefore [sic] when the cause of action, the accident herein, occurred on 5th April, 1976, the defence of common employment was no longer available because it had been abolished in England as long ago as 1948 even before the High Court Law of Northern Nigeria was enacted in 1955. The learned trial judge was manifestly in error when he held as he did above that the doctrine was yet to be abolished in Northern states and therefore applicable by virtue of section 28 of the High Court Law of Northern Nigeria, 1955 above.⁷⁵

Three other members of the court: Uwais,⁷⁶ Wali,⁷⁷ and Mohammed,⁷⁸ J.J.S.C., agreed with the views expressed in the lead judgment.

But in a scholarly dissenting judgment, Ogundare, J.S.C., made a disquisition on the reception of English law into Northern Nigeria since 1900. He came to the conclusion that Section 28 of the Northern Nigeria High Court Law merely replaced the earlier statutes which, according to him, clearly received English common law as at 1900 into Northern Nigeria. His Lordship therefore concluded:

It was this provision that section 28 of the High Court Law of Northern, 1955, now cap. 49 laws of Northern Nigeria 1963, re-enacted. From the above historical analysis the conclusion is that the received law of England in Northern Nigeria since 1900 is the common law, the doctrines of equity and the statutes of general application that were in force in England in 1990 [sic]. By virtue of section 14 (b) Interpretation Ordinance cap. 89 laws of the federation of Nigeria and Lagos, 1958 and Interpretation Law of Northern Nigeria (Cap. 52 laws of Northern Nigeria, 1963) the repeal of the various Supreme Court Ordinance would not affect the application in Northern Nigeria of the common law of England as at 1900 when the first proclamation was made unless by local legislation, changes had been made thereto. The common law of England in 1990 [sic] remains applicable in Northern Nigeria until such time when local legislation is enacted to abolish it as was the case in England in 1948 with the promulgation of the Law Reform Personal Injuries Act of that year. As this doctrine of common law is part of the common law received in Northern Nigeria before he [sic] enactment in England of the 1948 Act it remains in force in that part of the country. The 1948 Act though

⁷⁴ *Supra* note 71, p. 569.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, p. 575.

⁷⁷ *Ibid.*, p. 576.

⁷⁸ *Ibid.*, p. 584

of general application but not being in force in England on 1 st January, 1900 could not, and did not, affect the continued operation in Northern Nigeria of the doctrine of common employment. 79

One sympathises with this erudite argument, but for reasons already stated, the majority view in the above case which upheld the reception of current common law into Nigeria remains more persuasive.

B. Statutes of General Application

Under section 45 of the *Interpretation Act*⁸⁰, the last part of English law received into Nigeria is the “statutes of general application” in force in England on the 1st day of January 1900. It is not practically feasible in this thesis to list all pre-1900 English statutes which may have a bearing on conflict of laws, especially when no single statute deals exclusively with this subject and since conflict of laws is only a technique and covers every field of law.⁸¹ Most statutes, like those on wills, matrimonial causes and divorce, tort, and contract, usually embody provisions touching on conflict of laws. Therefore, our approach is to discuss the rules that determine the applicability of any pre-1900 English statute. If a pre-1900 English statute satisfied the test as a statute of general application, it did not matter that it was repealed in England after 1900. That repeal will not affect its operation in Nigeria or any former British colony, *e.g.*, Canada and Australia. *Chief Young Dede v. African Association Ltd.*⁸² held that, once an Act was in force in England at the relevant date, *i.e.*, 1 January 1900, the fact that

⁷⁹ *Ibid.*, p. 581.

⁸⁰ *Supra* note 41.

⁸¹ “It will be observed also that it (*i.e.*, conflict of laws) forms in no sense a separate branch of decisions....It starts up unexpectedly in any court, and in the midst of any process. It may be sprung like a mine in a plain common law action, in an administrative proceeding in equity, or in a divorce case, or a bankruptcy case, in a shipping case, or a matter of criminal procedure. It makes itself heard in every existing court of justice, whether superior or inferior, civil or criminal, and it may intrude, quite unlooked for, into the midst of any part of the jurisdiction, whether substantive, or simple procedure. The most trivial action of debt, the most complex case of equitable claims, may be suddenly interrupted by the appearance of a knot to be untied only by Private International law” – F. Harrison, *Jurisprudence and the Conflict of Laws* (Oxford: at The Clarendon Press, 1919), pp. 101-102.

⁸² (1910) 1 Nigerian Law Reports 131 at 132-133.

it has, subsequent to that date, been amended or repealed does not affect its application in the receiving country. The Canadian case of *R v. Roblin*⁸³, held that *26 George II, c.33* was in force in Upper Canada and that it was irrelevant that it had been repealed after 1792 in England by *3 George IV, c. 75*.

What then does a statute mean? In its general acceptance, the word means an act of parliament or legislature taken as a whole.⁸⁴ However, a statute for the purpose of reception enactments can mean just a particular section thereof. Thus, it was held in *R v. Coker*⁸⁵ that while most of the *Libel Act, 1843*, no longer formed part of the Nigerian law, having been incorporated into the *Criminal Code*, that was not so for one section, *i.e.*, section 6, which did remain in force.

Again, when is a statute one “of general application in England”? To pass the test, must it be applicable throughout the United Kingdom? Ordinarily, this last question would have been unnecessary in view of the express provision for “application in England.” But some decisions which insist on such statute’s application throughout the United Kingdom make the inquiry relevant. In *Re Sholu*⁸⁶, Webber, J., held that the *Land Transfer Act of 1897* was not of general application merely because it was not in force in Scotland and Ireland. However, Macleod, J., in the Gold Coast⁸⁷ case of *Des Bordes v. Des Bordes and Mensah*,⁸⁸ disagreed with this view. The judge, lamented the ambiguity of the phrase ‘statutes of general application,’ and declared:

Now, what is meant by ‘statutes of general application’? That expression cannot mean statutes which apply to the whole United Kingdom, for this court constantly enforces the provisions of statutes which do not apply to Scotland; neither can that expression mean those statutes which are printed under the designation ‘Public General Statutes,’ for statutes which apply to Scotland alone are among the ‘Public General Statutes;’ neither does that expression include

⁸³ (1862) 21 Upper Canada Queen's Bench Reports 352 at 354-55.

⁸⁴ *Jowitt's Dictionary of English Law* (London: Sweet & Maxwell, 1977, vol. 2, 2nd ed.), p. 1695.

⁸⁵ (1927) 8 Nigerian Law Reports, p. 7.

⁸⁶ (1932) 11 Nigerian Law Reports, p. 37.

⁸⁷ Now Ghana, in West Africa.

⁸⁸ (1884) Cases Reported in Sarbah, Fanti Customary Laws (Sar. F.C.L.), p. 267 at 269

those statutes which apply to the whole of England, for the Full Court (sitting in Lagos) has decided that the *Bankruptcy Acts* of England are not operative here.

The *Marriage Acts* of England are of general application when compared with some statutes and of particular application when compared with other statutes; and I am afraid I must designate those words 'statutes of general application' as a slovenly expression, made use of by the legislature of this colony to save itself the trouble of explicitly declaring what the actual law of the colony shall be.

However, as regards application throughout the United Kingdom, the West African Court of Appeal, the highest appellate court within Nigeria then, gave the final word and overruled *Re Sholu*⁸⁹. in the case of *Young v. Abina*.⁹⁰ where the court observed that the *Land Transfer Act, 1897*, applied to all estates of persons dying in England after 1 January 1898. Consequently, it held that, "it is difficult to see how a statute could be of more general application.... The words 'of general application' are used with reference to the matter of the statutes and not only geographically. Also it seems to us that under Section 14, England is the test of geographical generality."

Must a pre-1900 English statute be generally applicable in all the former English colonies before it is admitted in Nigeria as a statute of general application? This position would require evidence of the legal position in all former British colonies. This evidence may be difficult to get, in terms of proof of such foreign law, and will lead to a vicious circle as each of the former colonies will be waiting for what the others will do. This test of general application was suggested to Osborne, C.J., at first instance in *Att.-Gen. v. John Holt & Co.*⁹¹ He rejected the suggestion on the ground that it would make the question depend upon evidence that was not available to the court. However, he attempted to frame a comprehensive test for determining what amounts to a statute of general application:

No definition has been attempted of what is a statute of general application...and each case has to be decided on the merits of the particular statute sought to be enforced. Two preliminary questions can, however, be put by way of a rough, but not infallible test, viz. : (1) by what courts is the statute applied in England? and [sic] (2) to what classes of the community in

⁸⁹ (1932)11 Nigerian Law Reports 37.

⁹⁰ (1940) 6 West African Court of Appeal Judgment 180.

⁹¹ (1910) 2 Nigerian Law Reports 1.

England does it apply? If, on January 1, 1900, an Act of Parliament were applied by all civil or criminal courts, as the case may be, to all classes of the community, there is a strong likelihood that it is in force within the jurisdiction. If, on the other hand, it were applied only by certain courts (e.g., a statute regulating procedure), or only to certain classes of the community (e.g., an Act regulating a particular trade), the probability is that it would not be held to be locally applicable.⁹²

Osborne's double test of applicability is obviously restrictive. It does seem that few statutes will pass that test. It is not often that a statute deals with 'all classes of the community,' or becomes applicable in 'all civil or criminal' courts. Osborne's tests are equally not in accord with judicial practice. Few decisions will suffice to establish this.

In *Adam v. Duke*⁹³, it was held that Section 50 of *the Chancery Procedure Act, 1852*, was in force within the jurisdiction. This was despite the fact that the Act applied only to the court of Chancery in England, and not to "all civil or criminal courts."

In *Ribeiro v. Chachin*,⁹⁴ the West African Court of Appeal held that Sections 210-212 of the *Common Law Procedure Act, 1852* applied in the territory of Nigeria as a statute of general application. This was notwithstanding that the Act itself applied only to the common law courts in England. Similarly, the West African Court of Appeal in *Inspector-General of Police v. Kamara*,⁹⁵ held that the *Summary Jurisdiction Act, 1848*, which in England governed only magistrate courts, was a statute of general application. These cases which treated Acts applicable only to particular English courts as statutes of general application seriously weaken Osborne's first test. His second test has also not been free from judicial departure.

⁹² *Ibid.*, p. 21.

⁹³ (1927) 8 Nigerian LawReports 88.

⁹⁴ (1954) 14 West African Court of Appeal Judgment 476.

⁹⁵ (1934) 2 West African Court of Appeal Judgment 185.

In *Labinjoh v. Abake*,⁹⁶ the court held that the *Infants Relief Act, 1874* applied in Nigeria as a statute of general application. This is notwithstanding that the Act applied only to a particular class of the community, *i.e.*, persons under twenty-one years of age.

It is also true that some cases have followed Osborne's tests. In *Lawal v. Younam*,⁹⁷ the Supreme Court of Nigeria held that the *Fatal Accidents Act, 1846*⁹⁸ and the *Fatal Accidents Act, 1864*⁹⁹ both of which applied to all classes of the community in England, were statutes of general application. Also in *Braithwaite v. Folarin*,¹⁰⁰ the West African Court of Appeal held that *The Fraudulent Conveyances Act, 1571*¹⁰¹ was a statute of general application because, "...the statute in question is in our view a statute of general application, applying as it does quite generally to ordinary affairs and dealings of men without any qualification or speciality restricting its application."

The result of all these decisions is that there is no agreement on what constitutes a 'statute of general application.' The cases cited above show that each statute was treated on its own basis, which took into consideration the circumstances of the particular case and the demands of justice. Any attempt to state a rigid and inflexible rule will likely work hardship on litigants because that will not allow the particular circumstances of each case to determine the designation of a statute as one of general application.

⁹⁶ (1924) 5 Nigerian Law Reports 33.

⁹⁷ (1961) 1 All Nigerian Law Reports 245.

⁹⁸ 9 & 10 Victoria, c. 93.

⁹⁹ 27 & 28 Victoria, c. 95

¹⁰⁰ (1938) 4 West African Court of Appeal Judgment 76.

CONCLUSION:

This chapter has examined the phenomenon of reception of law as a source of conflict of laws in Nigeria, mainly in the colonial period. The reception of English law led to legal pluralism in Nigeria and legal acculturation in Canada. Attempts to eliminate legal pluralism statutorily in northern Nigeria led to chaos.¹⁰² The different modes of British acquisition of the territories of Nigeria and Canada were the basis for the discrimination in recognising indigenous laws in Nigeria and not recognising them in Canada.

The statutes receiving English law into Nigeria and Manitoba indicated that the quantum of English conflict of laws rules applicable in Nigeria depended, and still depends, on the interpretation placed on the reception statute. An interpretation that favours the reception of current English common law and equity remains the majority view in Nigeria. Whether a received English statute is of general application should depend on the facts of each case and the demands of justice.

The next chapter examines the source of conflict of laws in Nigeria from the country's independence in 1960 to the present: these are mainly statutes passed by the Nigerian legislature, the judicial decisions of Nigerian courts, juristic writings, and public international law. The above will supplement the received English law as we have now defined it.

¹⁰¹ 13 Elizabeth 1, c. 5.

¹⁰² This writer does not know whether the proposed legislation was eventually passed into law.

CHAPTER FOUR

PUBLIC INTERNATIONAL LAW, CASE LAW AND LEGISLATION AS SOURCES OF CONFLICT OF LAWS IN NIGERIA AND CANADA.

4.1 PUBLIC INTERNATIONAL LAW.

In 1960 Nigeria became an independent and sovereign state and also a member of the international community regulated by public international law. It has continued to be an important source of conflict of laws both for Nigeria and other members of the international community.

Public international law has made its impact on conflict of laws through the medium of international agreements and treaties, such as the *Rome Convention of 1980*, which dealt with conflict of laws rules relating to contractual obligations, and the *Brussels Convention of 1968*, which provided for free circulation of judgments throughout the signatory states, thereby encouraging international business and intercourse in and among those states. Nigeria and Canada have not signed the above Conventions.

However, Canada is a signatory to the *1980 Hague Convention on the Civil Aspects of International Child Abduction* which has been implemented in Manitoba by *The Child Custody Enforcement Act, R.S.M. 1987, c. C - 360*. This Convention seeks to protect children internationally against wrongful removal from or retention in a contracting state and to ensure that rights of custody and of access under the law of

one contracting state are respectively respected in the other contracting states.¹

The main aim of such international treaties has been to harmonise the conflict of laws rules of member states on the various issues dealt with by such treaties. This is intended to promote the uniformity of decisions and discourage forum shopping.² Since Nigeria is a federation, like Canada, with a clear distribution of legislative competence between the constituent states and the federation³, how far can any international treaty, of which Nigeria is a signatory, be implemented in Nigeria? Does an international treaty, touching on conflict of laws, become automatically as applicable in Nigeria as in the U.S.A? Where the subject matter of the treaty is, by the 1999 Nigerian Constitution, within the legislative competence of the state, is the federal government of Nigeria competent to negotiate and sign such a treaty? Happily, these questions have been fully answered by the 1999 Nigerian Constitution. No treaty becomes applicable in Nigeria except it has been enacted into law by the federal legislative body, *i.e.*, the National Assembly of Nigeria. Again, the federal government has the constitutional competence to negotiate and sign a treaty dealing with a matter within the legislative competence of a state government. Thus, Section 12 of the 1999 Nigerian Constitution provides:

- 12(1) No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.
- (2) The National Assembly may make laws for the federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.
- (3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.

¹ The Convention was interpreted by the Supreme Court of Canada in *Thomson v. Thomson* (1994) 3 Supreme Court Reports 551. Nigeria is not a signatory to this Convention: P. R. Beaumont and P. E. McEleavy, The Hague Convention on International Child Abduction (London: Oxford University Press, 1999), pp. 289 – 297.

The legal position in Canada was summarised by W. R. Lederman:

First, if the subject matter of a treaty is something that falls exclusively or concurrently within federal jurisdiction...there is no problem. The national Parliament then has full treaty-implementing power, and, indeed, is not confined to legislation strictly relevant to the treaty terms. The federal defence power and trade and commerce power are obviously of great importance here, to take but two examples. Secondly, if the subject matter of the treaty is something that falls exclusively within provincial jurisdiction in the absence of a treaty, then the creation of a treaty obligation on that subject likely would invest the matter with a federal aspect under the federal general power concurrent with the original provincial aspect. In this event, the national Parliament would acquire relevant treaty-performing power, but power that could only be used to the extent specifically necessary to implement treaty terms. Other aspects of the matter would remain exclusively within provincial jurisdiction. In other words, in this situation, the extent of the federal treaty-performing power would be strictly limited by the scope of the treaty terms. Finally, if the subject-matter of the treaty is something that falls exclusively within provincial jurisdiction in the absence of a treaty and, moreover, is something quite fundamental for provincial autonomy, then the conditions for invoking the federal general power are not met and, in Lord Atkin's phrase, legislative powers remain distributed. In this event – but only in this event – it would be essential to be assured of the necessary provincial legislation before making a treaty on such a subject matter.⁴

4.2 CASE LAW AND JURISTIC WRITINGS.

Judicial decisions and juristic writings are important current sources of conflict of laws in Nigeria. In eighteenth century England, these sources were responsible for the evolution of the subject and have continued to play a radical role in its further development. Judicial decisions are for England what juristic writings are for civil law jurisdictions in the Continent. The hierarchy of authorities in a conflict adjudication has been judicially stated by Sir William Scott in *Dalrymple v. Dalrymple*⁵:

The authorities to which I shall have occasion to refer are of three classes; first the opinions of learned Professors given in the present or similar cases; secondly, the opinions of eminent writers as delivered in books of great legal credit and weight and, thirdly, the certified adjudication of the tribunals of Scotland upon these subjects. I need not say that the last class stands highest in point of authority.⁶

² On the basis that since the same rules will be obtainable in those states, the same decision will likely result irrespective of the particular state where the action is commenced.

³ Section 4 of the 1999 Constitution of Nigeria (Lagos: Federal Government Printer).

⁴ W. R. Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981), p. 358.

⁵ (1811) 161 English Reports 665.

⁶ *Ibid.*, p. 675.

Similarly, the late J.H.C. Morris observed:

It is a unique feature of the conflict of laws, as compared with other branches of English law, that jurists have exerted a considerable influence on the decisions of the courts. The most influential foreign jurists have been Ulrich Huber (1636-1694), who was successively a Professor of law and a judge in Friesland; Joseph Story (1779-1845), who was simultaneously a justice of the Supreme Court of the United States and a Professor of law at the Harvard Law School, and the nineteenth-century German jurist Friedrich Carl von Savigny....Each of these well-known books has passed through many editions and each is frequently cited by the courts.⁷

In Nigeria, however, these sources are not used as creatively as in other jurisdictions, like Canada and the U.S.A. Books of authority are rarely cited and the old English decisions are mechanically applied under the reception clause, even when such decisions have been overtaken by statutes or later decisions in England. For instance, in *Benson v. Ashiru*⁸, the Supreme Court of Nigeria was presented with an opportunity to restate English conflict of laws rules in the light of the Nigerian Constitution. Unfortunately, this opportunity was not utilised and the court, with respect, merely stated:

The rules of the common law of England on questions of private international law apply in the High Court of Lagos. Under these rules an action of tort will lie in Lagos for a wrong alleged to have been committed in another part of Nigeria if two conditions are fulfilled: first, the wrong must be of such a character that it would have been actionable if it had been committed in Lagos; and secondly it must not have been justifiable by the law of the part of Nigeria where it was done: *Phillips v. Eyre*.⁹

Thus, the English rule in *Phillips v. Eyre* was applied without the slightest discussion of its fitness for Nigeria's circumstances. The Supreme Court did not ask itself whether the above rule which is forum centered, *i.e.*, encourages the application of a forum law at the expense of another state's law, is compatible with the integrating character of the Nigerian Constitution, which encourages the application and recognition of one state's law in another. The few conflict of laws cases in Nigeria, as

⁷ J. H. C. Morris, *The Conflict of Laws* (London: Stevens & Sons, 1980), p. 8.

⁸ (1967) Nigerian Monthly Law Reports 363.

⁹ *Ibid.*, p. 365.

in the above, have neglected the fact that Nigeria operates with a written constitution. No judicial attempt has been made to articulate conflict decisions against the background of that written constitution.

English conflict of laws rules, which Nigerian courts slavishly follow, may not be sound in their application to federal constitutional situations which draw a clear distinction between interstate and international conflict situations.¹⁰ As Lorenzen said: “Characteristic of the American conflict of laws is that it is applicable both between the different states of this country and between this country and foreign countries; that is, it has both an interstate and an international aspect.”¹¹ This is apt for Nigeria. But the English decisions followed as binding on Nigerian courts do not, because of the English unitary legal system, make any distinction between interstate and international conflict of law situations.

Canada, like Nigeria, formerly under British rule, has taken a new approach which Nigeria could emulate. Canada soon realised that because of its federal constitutional structure, which is different from the English unitary system, it has to expound its own conflict of laws rules based on provisions of its constitution. This judicial activism has produced some notable conflict of law decisions in Canada.

In *Churchill Falls Corp. Ltd., et al. v. Attorney-General of Newfoundland et al.*,¹² the Legislature of Newfoundland enacted the *Upper Churchill Water Rights Reversion Act, 1980 (Nfld.), c. 40* (*Reversion Act*). Section 3 provided that its purpose “...is to provide for the reversion to the province of unencumbered ownership and control in

¹⁰ A. A. Ehrenzweig, “Interstate and International Conflicts Law: A Plea For Segregation,” (1957) 14 *Minnesota Law Review*, pp. 717-729; Ross, “Has the Conflict of Laws Become a Branch of Constitutional Law?” (1931) 15 *Minnesota Law Review*, 161; E. G. Lorenzen, “Developments in the Conflict of Laws, 1902-1942,” (1942) 40 *Michigan Law Review*, 781.

¹¹ E. G. Lorenzen, *Selected Articles on the Conflict of Laws* (New Haven: Yale University Press, 1947), p. 203.

¹² (1984) 8 *Dominion Law Reports* (4th)1.

relation to certain water within the province.” The *Reversion Act* repealed the *Churchill Falls (Labrador) Corporation (Lease) Act, 1961 (Nfld.), No. 51*, including a statutory lease between the province and Churchill Falls (Labrador) Corporation Limited, a Dominion Company, whereby the company had acquired the exclusive right to use certain waters of the Upper Churchill River for the purpose of generating hydro-electric power. The *Reversion Act* expropriated the fixed assets of the company used in the generation of electric power, while expressly precluding the company asserting any claim either for compensation additional to that provided by the legislation for the loss of its property or damages for breach of any of its leases. On a reference to the Newfoundland Court of Appeal, the *Reversion Act* was held *intra vires*. On appeal by the company to the Supreme Court of Canada, the appeal was allowed and the *Reversion Act* declared *ultra vires*. Part of the argument before the Supreme Court, against the constitutional validity of the *Reversion Act*, was that it interfered with civil rights existing outside the Province of Newfoundland, *i.e.*, rights acquired by Hydro-Quebec under the power contract between it and the appellant. It also contended that, while all that would be taken under the Act was physically situated within the Province of Newfoundland, the effect of the Act would be to destroy lawfully acquired civil rights outside the province.¹³

If these facts had occurred in Nigeria, then by English rules of conflict of laws which Nigeria follows, Quebec, taking it to be equivalent to a state in Nigeria, would be regarded as a foreign country, Hydro-Quebec regarded as a foreign company, and the rights acquired by it under the power contract regarded as a foreign acquired right. The result would be that such a right would suffer the usual fate of all foreign acquired rights under the ordinary rules of conflict of laws, *i.e.*, lack of readiness to give it

¹³ *Ibid.*, p. 26.

recognition, requirement of proof of foreign law as a fact, and the exclusionary rule of public policy of the forum, which militates against enforcement of a foreign law or right.

But the Supreme Court of Canada showed its preparedness, in accordance with the federal constitutional structure of Canada, to give effect to extra-provincial rights and thereby encouraged inter-provincial intercourse and business. McIntyre, J., observed:

Where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment *ultra vires*. Where, however, the pith and substance of the provincial enactment is the derogation from or elimination of extra-provincial rights then, even if it is cloaked in the proper constitutional form, it will be *ultra vires*. A colourable attempt to preserve the appearance of constitutionality in order to conceal an unconstitutional objective will not save the legislation.¹⁴

Applying these principles to the facts of this case, he opined: “All of this, in my opinion, points to one conclusion: the *Reversion Act* is a colourable attempt to interfere with the power contract and thus to derogate from the rights of Hydro-Quebec to receive an agreed amount of power at an agreed price.”¹⁵

Through application of the principles of conflict of laws, Justice McIntyre localised the rights of Hydro-Quebec in Quebec and therefore held the *Reversion Act*, which violated such rights acquired in a sister province, unconstitutional:

A finding that the Reversion Act is aimed at the rights of Hydro-Quebec under the power contract would render the Act *ultra vires* only if the rights so attacked are situate in Quebec beyond the jurisdiction of the legislature of Newfoundland....The fact, of course, is that Hydro-Quebec has the right under the power contract to receive delivery in Quebec of hydro-electric power and thereafter to dispose of it for use in Quebec or elsewhere as it may choose. If these facts are not sufficient for the purpose of the constitutional characterization of the Reversion Act, it may be noted in any event that ordinarily the rule is that rights under contracts are situate in the province or country where the action may be brought ¹⁶....[i]t will be recalled that the power contract provided that the courts of Quebec would have jurisdiction to adjudicate disputes arising under it and it is, therefore, the province of Quebec where enforcement of the contract may be ordered and where the intangible rights arising under the contract are situate. ¹⁷

¹⁴ *Ibid.*, p. 30.

¹⁵ *Ibid.*, p. 31.

¹⁶ His Lordship then referred to : J. Castel, *Canadian Conflict of Laws*, vol. 2, p. 347 (the particular edition was not mentioned), and Dicey & Morris, *The Conflict of Laws*, Vol. 2, 10th ed., p. 533.

¹⁷ *Supra* note 12, p. 32.

Thus, rights acquired in a sister province were readily recognised without traditionally treating them as rights acquired in a foreign country. No doubt, if Quebec had been another country, *e.g.*, England, the Supreme Court of Canada would have been forum centered and upheld the Newfoundland reversion statute.

Perhaps more revealing, in terms of the exposition of the rules of conflict of laws against the background of a federal constitution, is the judgment of La Forest, J. in the Canadian Supreme Court case of *De Savoye v. Morguard Investments Ltd. et al.*¹⁸

The facts: The respondents took mortgages on lands in Alberta in 1978. The appellant then resided in Alberta and was guarantor under the mortgages. Later he took title and assumed the responsibilities of mortgagor. Then he moved to British Columbia. When the mortgages fell into arrears, the respondents brought action in Alberta for foreclosure and served the appellant in accordance with the Alberta rules for service *ex juris*. The appellant did not appear or defend the action. Nor was he contractually bound to attorn to the jurisdiction of the Alberta court. Subsequently, the properties were sold pursuant to court order and judgments entered against the appellant for the deficiencies. The respondents then commenced separate actions in British Columbia to enforce the Alberta deficiency judgments. They obtained judgments and those judgments were upheld on appeal. Their further appeal was dismissed.

Again, how on the same facts would a Nigerian court, following English rules on conflict of laws, likely treat a judgment of a sister state's court? Neglecting Nigeria's federal constitutional structure, it would treat the judgment of a sister state court as foreign. It would then apply the relevant English common law rule, which does not

discriminate between the judgment of a sister state and another country, as firmly

stated by Buckley, L.J., in *Emanuel v. Symon*¹⁹:

In actions *in personam* there are five cases in which the courts of this country will enforce a foreign judgment: (1) where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained. 20

Adumbrating the erstwhile Canadian legal position on the matter, very much like the present Nigerian practice, La Forest, J., stated:

In Canada, the courts have until recent years unanimously accepted the authority of *Emanuel v. Symon* in dealing with the recognition of foreign judgments.... This was, of course, inevitable so far as foreign judgments were concerned until 1949 when appeals to the Privy Council were abolished. But, the approach was not confined to foreign judgments. It was extended to judgments of other provinces, which for the purposes of the rules of private international law are considered "Foreign" countries.... Essentially, then, recognition by the courts of one province of a personal judgment against a defendant given in another province is dependent on the defendant's presence at the time of the action in the province where the judgment was given, unless the defendant in some way submits to the jurisdiction of the court giving the judgment. 21

¹⁸ (1991) 76 Dominion Law Reports (4th) 256.

¹⁹ (1908) Law Reports 1 King's Bench 302 at 309.

²⁰ An attempt to extend these categories by the principle stated by Hodson, L.J., in *Travers v. Holley* (1951) 2 All England Law Reports 794 at 800: "...where it is found that the municipal law is not peculiar to the forum of one country, but corresponds with the law of a second country, such municipal law cannot be said to trench on the interests of that other country. I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which *mutatis mutandis* they claim for themselves," was firmly rejected, with respect to judgments *in personam*, in *Re Trepca Mines Ltd.* (1960) 1 Weekly Law Reports 1273; *Schemmer v. Property Resources Ltd.* (1975) Law Reports Chancery Division 273. This rejection of extension was made despite Lord Denning's support for the extension of the principle in *Travers v. Holley* to an *in personam* judgment: *Re Dulles' Settlement Trusts* (1951) 2 All England Law Reports 69 at 72-3.

It should be noted, however, that in Nigeria interstate enforcement of a judgment is by means of registration of the judgment in the state where it is sought to be enforced, as provided under sections 104 to 112 of the Sheriffs and Civil Process Act, Cap. 189. Nevertheless, it seems that the rule in *Emmanuel v. Symon*, could still be employed to defeat the enforcement of such registered judgments. Commenting on a similar British Columbia statute, *i.e.*, *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, La Forest, J., in the case under review, observed at pages 279-280:

"There is a short answer to this argument. The *Reciprocal Enforcement of Judgments Acts* in the various provinces were never intended to alter the rules of private international law. They simply provide for the registration of judgments as a more convenient procedure than was formerly available, *i.e.*, by bringing an action to enforce a judgment given in another province.... This is in fact made clear by s. 40 of the British Columbia Act which provides that nothing in the Act deprives a judgment creditor from bringing an action for enforcement of a judgment. There is nothing, then, to prevent a plaintiff from bringing such an action and thereby taking advantage of the rules of private international law as they may evolve over time." In America and Australia, interstate enforcement of judgments is done under the 'full faith and credit' clause of their constitutions: under which it is obligatory for a state to recognise a valid judgment of a sister state.

²¹ *Supra* note 18, p. 265.

His Lordship lamented this state of the law because it did not accommodate Canada's federal constitutional structure. He suggested that conflict of laws rules on the recognition of foreign judgments *in personam* should be interpreted and applied in the light of Canada's federal constitution:

...there is really no comparison between the interprovincial relationships of today and those obtaining between foreign countries in the 19th century. Indeed, in my view, there never was and the courts made a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister provinces....In any event, the English rules seem to me to fly in the face of the obvious intention of the constitution to create a single country. This presupposes a basic goal of stability and unity where many aspects of life are not confined to one jurisdiction. A common citizenship ensured the mobility of Canadians across provincial lines....These arrangements themselves speak to the strong need for the enforcement throughout the country of judgments given in one province....[i]n my view, the application of the underlying principles of comity and private international law must be adopted to the situations where they are applied, and that in a federation this implies a fuller and more generous acceptance of the judgments of the courts of other constituent units of the federation. In short, the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the constitution. 22

In enunciating the above principles, La Forest ended up, wittingly or unwittingly, establishing a new category for the recognition of foreign judgments, especially in an interstate or interprovincial situation:

I add that recognition in other provinces should be dependent on the fact that the court giving judgment "properly" or "appropriately" exercised jurisdiction. It may meet the demands of order and fairness to recognise a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject matter of the action. But it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit. 23

²² *Ibid.*, pp. 271-72

²³ *Ibid.*, p. 274. It should be noted that in formulating this proposition for the recognition of judgments based on the test of "greatest or at least significant contacts," better known in contractual conflict of law rules as the 'most significant relationship,' Justice La Forest was confessedly inspired by the House of Lords decision in *Indyka v. Indyka* (1969) Law Reports 1 Appeal Cases 33, where the House of Lords was faced with recognition of a divorce decree granted by a court where the petitioner-wife was not domiciled, but merely resident at the time of the action. Under the traditional rules, such a decree would not have been recognised. But Lord Wilberforce, at p. 105, formulated a proposition which is now recognised as a new category for recognition of foreign divorce decrees: "In my opinion, it would be in accordance with the developments that I have mentioned and with the trend of legislation – mainly our own but also that of other countries with similar social systems – to recognise divorces given to wives by the courts of their residence wherever a real and substantial connection is shown between the petitioner and the country, or territory, exercising jurisdiction." Therefore, the Canadian case under review should be seen as an extension of the principles in *Indyka v. Indyka*, a case involving matrimonial status, to an action *in personam*.

The next case is *Williams v. Canada*.²⁴ This demanded an adroit adaption of conflict of laws rules to the Canadian situation, in order to locate the *situs* of intangible property for the purposes of exemption under Canada's *Indian Act*. The headnote reads: The appellant was a member of an Indian reserve. He received regular unemployment insurance benefits from the federal government because he had performed work on the reserve for an employer located on the reserve. In addition, the appellant received enhanced unemployment insurance benefits paid in respect of a job creation project administered on the reserve by the band. The appellant received a notice of tax assessment which included in his income both the regular and the enhanced unemployment insurance benefits. The appellant contested the assessment but his objection was overruled by the Minister. On appeal to the Federal Court, Trial Division, it was held that both the regular and enhanced unemployment insurance benefits were exempt from taxation. The Federal Court of Appeal set aside the judgment, in part holding that only the enhanced portion of the benefits were exempt. The appellant appealed again. At issue was the question whether the enhanced benefits were personal property situated on a reserve, and therefore exempt from taxation under the *Indian Act*, R.S.C. 1970, c. 1-6. The Supreme Court of Canada allowed the appeal.

At the crux of this case was the determination of the *situs* of the appellant's unemployment insurance benefits. If located on the Indian reserve, then they were exempted from taxation; otherwise, tax was payable. Under English conflict rules, which Nigeria follows, the *situs* of intangible property of this kind is determined by

²⁴ (1992) 90 Dominion Law Reports (4th) 129.

the place of residence of the debtor. This was equally the rule urged upon Gonthier, J., in the above case. But he observed:

The only justification given in these cases for locating the *situs* of a debt at the residence of the debtor is that this is the rule applied in the conflict of laws. The rationale for this rule in the conflict of laws is that it is at the residence of the debtor that the debt may normally be enforced. Cheshire and North, *Private International Law*, 11th ed. (London: Butterworths, 1987), quote Atkin, L.J. to this effect in *New York Life Ins. Co. v. Public Trustee (1924) 2 Ch. 101 (C.A.)* at p. 119 :

'...the reason why the residence of the debtor was adopted as that which determined where the debt was situate was because it was in that place where the debtor was that the creditor could, in fact, enforce payment of the debt.' Dicey and Morris adopt the same explanation in *The Conflict of Laws*, 11th ed. (London: Stevens & Sons, 1987), vol. 2, at p. 908, as does Castel in *Canadian Conflict of Laws*, 2nd ed. (Toronto: Butterworths, 1986), at p. 401. This may be reasonable for the general purposes of conflict of laws. However, one must inquire as to its utility for the purposes underlying the exemption from taxation in the Indian Act.²⁵

Convinced and quite conscious of the fact that he was dealing with a local statute, and that an indiscriminate and uncritical application of conflict of law rules might defeat the forum's legislative intentions, Gonthier, J., directed himself:

In resolving this question, it is readily apparent that to simply adopt general conflicts principles in the present context would be entirely out of keeping with the scheme and purposes of the Indian Act and Income Tax Act. The purposes of the conflict of laws have little or nothing in common with the purposes underlying the Indian Act....The test for *situs* under the Indian Act must be constructed according to its purposes, not the purposes of the conflict of laws. Therefore, the position that residence of the debtor exclusively determines the *situs* of benefits such as those paid in this case must be closely re-examined in light of the purposes of the Indian Act. ²⁶

He therefore formulated a new test for *situs* that would be apt for Canada's peculiar situation:

There are a number of potentially relevant connecting factors in determining the location of the receipt of unemployment insurance benefits. The following have been suggested: the residence of the debtor, the residence of the person receiving the benefits, the place the benefits are paid, and the location of the employment income which gave rise to the qualification for the benefits.²⁷

Thus, instead of the English single contact connecting factor, *i.e.*, residence of the debtor, the case was decided on the basis of a multi-contacts connecting factor.

²⁵ *Ibid.*, pp. 137-138.

²⁶ *Ibid.*, p. 138.

The next case is *Hunt v. T & N PLC*.²⁸ Here, the Supreme Court of Canada was concerned with the constitutional characterisation of a Quebec blocking statute that intruded on the principles of conflict of laws in a federation, as enunciated in *Morguard's case, supra*. Again, the executioner, as it were, of this blocking statute was La Forest, J., who restated the principles of *Morguard's case*.

The appellant brought action for damages in British Columbia against the respondent Quebec companies, alleging that exposure to asbestos produced and distributed by the respondents caused the appellant to develop cancer. When the appellant served demands for the discovery of documents, the respondents refused to produce those documents, relying on ss. 2 and 4 of the *Business Concerns Records Act, R.S.Q., c.D-12*. Section 2 of the Act precludes, with certain exceptions, a person, pursuant to a requirement of, *inter alia*, a judicial authority outside Quebec, from removing any business documents, or résumé or digest of any document, relating to any business concern from any place in Quebec to a place outside Quebec. Section 4 then provides that the Attorney-General, or any person interested in the concern, may apply to a Quebec court in the judicial district where the concern is located for an order requiring a person to furnish an undertaking or security to ensure that a document mentioned in S. 2 shall not be removed from Quebec pursuant to a judicial or other requirement. The trial judge dismissed applications for orders to compel discovery. An appeal to the British Columbia Court of Appeal was dismissed. The Supreme Court of Canada held that the appeal should be allowed and the respondents should produce the required documents for inspection.

²⁷ *Ibid.*, p. 140.

²⁸ (1994) 109 Dominion Law Reports (4th) 16.

La Forest, J., stated the essence of conflict of laws generally and particularly in a federation: “This appeal raises issues that lie at the confluence of private international law and constitutional law.”²⁹ Again, by the general English principles of conflict of laws and the operation of its doctrine of comity, which requires friendly treatment of and respect for foreign laws, the Quebec statute involved would have been upheld because Quebec, by the same reasoning, would be regarded as a foreign country. La Forest, J., was not overwhelmed by this bondage to traditional rules that had evolved in a different cultural and legal milieu:

This argument (*i.e.*, that Quebec by the doctrine of comity is entitled to respect for its statute) is understandable in terms of traditional approaches to private international law as it operates between foreign states. It is well established that judgments and orders of a state must be recognized and enforced in order to have effect in a foreign jurisdiction. But the traditional conflict rules, which were designed for an anarchic world that emphasized forum independence, must be assessed in light of the principles of our constitutional law mentioned above....[T]he courts must consider appropriate policy in relation to recognition and enforcement of judgments issued in other provinces in light of the legal interdependence under the scheme of confederation established in 1867. ³⁰

After analysing and affirming the principles he had previously propounded in *Morguard's* case, La Forest continued:

I now turn to the issue whether the impugned statute is consistent with the principles I have just set forth. I say at the outset that I do not think it is. A province undoubtedly has an interest in protecting the property of its residents within the province, but it cannot do so by unconstitutional means. Here the means chosen are intended to unconditionally refuse recognition to orders and thereby impede litigation not only in foreign countries but in other provinces....So it can scarcely be said that the Act respects the principles of order and fairness which must, under the *Morguard* principle, inform the procedures required for litigation having extra-provincial effects. ³¹

On the undesirable effects of a blocking statute, particularly its effects on interprovincial co-operation within a federation, he said:

The whole purpose of a blocking statute is to impede successful litigation or prosecution in other jurisdictions by refusing recognition and compliance with orders issued there. Everybody realises that the whole point of blocking statutes is not to keep documents in the province, but

²⁹ *Ibid.*, p. 20

³⁰ *Ibid.*, p. 38.

³¹ *Ibid.*, p. 42-43.

rather to prevent compliance, and so the success of litigation outside the province that that province finds objectionable. This is no doubt part of sovereign right, but it certainly runs counter to comity. In the political realm it leads to strict retaliatory laws and power struggles. And it discourages international commerce and efficient allocation and conduct of litigation. It has similar effects on the interprovincial level, effects that offend against the basic structure of the Canadian federation.³²

Thus, the blocking statute which, under the traditional comity doctrine of the conflict of laws would have been upheld, was considered unconstitutional because it impeded litigation in a sister state. This demonstrates the disadvantage of the cut-and-paste approach to traditional conflict of laws rules which Nigeria follows at present.

Finally, we examine *Tolofson v. Jensen*.³³ Here, the Supreme Court of Canada exploited the long awaited opportunity of recasting the choice of law rule in foreign torts. The traditional choice of law rule in tort³⁴ has been the formulation of Willes, J. in *Phillips v. Eyre*³⁵:

As a general rule, in order to found a suit in England, for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England....[and] secondly, the act must not have been justifiable by the law of the place where it was done.

This rule was subjected to considerable refinement in *Tolofson v. Jensen, supra*. Two appeals were heard together. In the first case the plaintiff, a passenger in a car driven by his father, was injured in an automobile accident in Saskatchewan. The plaintiff and his father were residents of British Columbia and the father's car was registered and insured there. The plaintiff brought an action in British Columbia against his father and against the driver of another car involved in the accident. This driver was a resident of Saskatchewan and his vehicle was registered and insured there. At the time of the accident by Saskatchewan law the limitation period had

³² *Ibid.*, p. 43.

³³ (1995) 120 Dominion Law Reports (4th) 289.

³⁴ *I.e.*, the law that should govern in tort cases involving the interests of more than one jurisdiction; followed in Nigeria, Canada and most other Commonwealth countries.

expired and a gratuitous passenger in an action against a driver had to prove willful or wanton misconduct. In the second case the plaintiffs, residents of Ontario, were passengers in a car owned and driven by the first defendant, also a resident of Ontario. The plaintiffs were injured when the car was involved in a collision in Quebec with a car driven by the second defendant, a resident of Quebec. The plaintiffs brought an action in Ontario against both defendants, and the first defendant cross-claimed against the second defendant under the *Negligence Act, R.S.O. 1990, c. N1*. The plaintiffs' action against the second defendant was later discontinued. By S. 4 of the *Quebec Automobile Insurance Act, S.Q. 1977, c. 68*, no action lies for injuries caused by an automobile accident. The British Columbia and Ontario courts held that British Columbia and Ontario law respectively were applicable.

The Supreme Court of Canada held, allowing both appeals, that the applicable law in cases of actions within Canada in respect of wrongs committed in Canada was the law of the place of the wrong. This rule was clear, certain and predictable. It conformed to ordinary expectations, discouraged forum shopping and conformed to requirements of the Canadian constitution. Accordingly, the applicable law was that of Saskatchewan and Quebec, respectively.

After an elaborate and exhaustive review of the authorities, La Forest, J. who delivered the lead judgment of the court, affirmed the rule in *Phillips v. Eyre*, and justified its operation in Canada on the principle of territoriality:

From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, *i.e.*, the *lex loci delicti*.... That being so it seems to me, barring some recognised exception, to which possibility I will turn later, that as Willes, J., pointed out in *Phillips v. Eyre, supra*, at p. 28, "civil liability arising out of a wrong derives its birth from the law of the place [where it occurred], and its character is

³⁵ (1870) Law Reports 6 Queen's Bench 1 at 28. This case was followed in Nigeria, without discussion of Nigeria's peculiar situation, in *Benson v. Ashiru* (1976) Nigerian Monthly Law Reports 363.

determined by that law.” In short, the wrong is governed by that law. It is in that law that we must seek its defining character; it is that law, too, that defines its legal consequences. ³⁶

Then he carefully considered whether the Canadian federal constitution warranted an exception to the above rule, as obtainable in America and England. He remarked that an exception to the strict rule, “could encourage frivolous cross-claims and joinders of third parties,”³⁷ and would add, “an element of uncertainty, and leaves the door open to a resourceful lawyer to attempt to change the application of the law...”³⁸ La Forest then stated:

The nature of our constitutional arrangements – a single country with different provinces exercising territorial legislative jurisdiction – would seem to me to support a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout the country. This militates strongly in favour of the *lex loci delicti* rule. In this respect, given the mobility of Canadians and the many common features in the law of the various provinces, as well as the essentially unitary nature of Canada’s court system, I do not see the necessity of an invariable rule that the matter also be actionable in the province of the forum. That seems to me to be a factor to be considered in determining whether there is real and substantial connection to the forum to warrant its exercise of jurisdiction.³⁹

However, Major, J., in his concurring judgment, cautioned that: “I doubt the need in disposing of these appeals to establish an absolute rule admitting of no exceptions.”⁴⁰

The above Canadian cases on conflict of laws constitute signposts for change, judicial rethinking and re-orientation, for a developing but similar legal system like

³⁶ (1995) 120 Dominion Law Reports (4th), 289 at 305.

³⁷ *Ibid.*, p. 313.

³⁸ *Ibid.*

³⁹ *Ibid.*, p. 315.

⁴⁰ *Ibid.*, p. 326; a similar position in America, *i.e.*, which admits of exception, has been stated by Lorenzen: “Although the courts will as a general rule look to the *lex loci* to determine claims for damages arising out of torts, they will decline to do so under exceptional circumstances, namely, if to do so would violate the public policy of the forum. This exception to the rule prevails everywhere. It is a device which is used by the courts as an escape from the rigid operation of general rules which under particular circumstances lead to results which are shocking to the court. The public policy doctrine is retained even between the individual states of the United States....” *Supra* note 11, p. 374; a similar exception has recently been engrafted in the English rule by the decision of the House of Lords in *Chaplin v. Boys* (1969) 3 Weekly Law Reports 322; R. H. Graveson, “Towards a Modern Applicable Law in Tort,” (1969) 85 Law Quarterly Review, p. 505. The same judicial activism was reflected in the older case of *Weir v. Lohr and Allstate Ins. Co. of Canada* (1967) 65 Dominion Law Reports 717, where it was held *obiter* that though a Canadian court will not enforce a foreign revenue law or

that of Nigeria. The decisions have manifested a consummate exploitation of the peculiar opportunity offered to judges in the field of conflict of laws to dictate the direction of its development. The Canadian judges have shown creativity and resourcefulness. They did not slavishly adhere to English conflict rules or apply English precedents. They were well aware of their judicial oath to uphold the Canadian federal constitution, whose principles dictated and impelled a recasting of the English conflict rules to meet the imperatives of the Canadian constitutional order. In each case where traditional conflict of law rules were sought to be applied, the considerations were: how did the particular rule affect the operation and spirit of the Canadian Constitution? What were the requirements of Canada's peculiar social, cultural and political conditions? Nigeria's conflict of law decisions, very few indeed, are yet to meet similar demands of legal acculturation and adaptation.

4.3 NIGERIAN LEGISLATION

Nigeria since independence in 1960 has been actively legislating both at the federal and state levels. Statutes which contain provisions touching on conflict of laws constitute an important source of conflict of laws. It would be exceptional anywhere to have a single enactment devoted entirely to conflict of laws.⁴¹ This is mainly due to the fact that conflict of laws generally is not a department of law, like the law of contract or property or tort; but its *raison d'etre* and principles traverse all these departments of the law. It is those statutes dealing with such specific legal subjects that reveal the conflict provisions designed for each one of them. The courts have a

judgment, a court of a province will be more willing to enforce the revenue law or judgment of another province.

⁴¹ J. McLeod, The Conflict of Laws (Toronto: Carswell Legal Publication, 1983), p. 14; J. Castel, Conflict of Laws (Toronto: Butterworths, 1984, 5th ed.), p. 1-4.

duty, in accordance with the rules of statutory interpretation and the general principles of conflict of laws, to apply such provisions.

Under Section 4 of the 1999 Constitution of Nigeria, the federal government has exclusive legislative competence over all matters in the exclusive legislative list set out in Part One of the Second Schedule of the constitution, *i.e.*, sixty-eight items. The federal government also has legislative competence over those matters in the concurrent legislative list, contained in the first column of Part Two of the Second Schedule to the constitution. Similarly, each state government has legislative competence, under Section 4 (7) of the 1999 Constitution, over all matters not included in the exclusive legislative list and over all matters contained in the concurrent legislative list as set out in the second column of Part Two of the Second Schedule to the constitution. In other words, the states have residual legislative power.

From the perspective of conflict of laws, the implication in the above constitutional provision is that both the federal and state governments have the legislative competence to enact conflict of laws rules and principles in their separate spheres of legislative activity.

In the internal conflict of laws situation, discussed in Chapter One, and as far as the courts are concerned, the most important local conflict of laws legislation is that directing the courts as to which of the several systems of law in a state or country is to be applied in cases before them. For the High Court, this legislation is Section 26 of the *High Court Law*⁴² which provides:

26(1) The High Court shall observe and enforce the observance of customary law which is applicable and is not repugnant to natural justice, equity, and good conscience, nor incompatible either directly or by implication with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of customary law.

⁴² *High Court Law*, Cap. 60, Laws of Lagos State, 1994; other states of the federation have similar legislation.

(2) Customary law shall be deemed applicable in causes and matters where the parties thereto are natives and also in causes and matters between natives and non-natives where it may appear to the court that substantial injustice would be done to either party by a strict adherence to any rules of law which would otherwise be applicable.

(3) No party shall be entitled to claim the benefit of any customary law, if it shall appear either from express contract or from the nature of the transactions out of which any suit or questions may have arisen, that such party agreed that his obligations in connection with such transactions should be exclusively regulated otherwise than by customary law or that such transactions are transactions unknown to customary law.

The specific issue of customary law will be addressed in detail in the next chapter.

This section establishes the principles governing choices among customary law, received English law and local legislation. The most important basis for choice of customary law is the parties' origin, *i.e.*, are the parties Nigerian natives? Generally, where both parties are natives of Nigeria, customary law applies. But problems still arise where such parties are subject to different systems of customary law. In such a case the court will, in the light of the transaction between the parties, apply the ordinary rules of construction and the general principles of conflict of laws to ascertain which customary law will govern the case. English law will apply by virtue of the agreement of parties or on account of the strange nature of the transaction to customary law. However, customary law or received English law applies in so far as there is no overriding or inconsistent local legislation.

At the customary court level, the equivalent legislation is Section 20 of the *Customary Courts Law*⁴³:

20(3) (a) Subject to the provisions of sub-section (1) and (2) of this section: in civil causes or matters where

(i) both parties are not natives of the area of jurisdiction of the court; or

(ii) the transaction the subject of the cause or matter was not entered into in the area of the jurisdiction of the court; or

(iii) one of the parties is not a native of the area of jurisdiction of the court and the parties agreed or may be presumed to have agreed that their obligation should be regulated, wholly or partly, by the customary law applying to that party, the appropriate customary law shall be the customary law binding between the parties

(b) in all other civil causes and matters the appropriate customary law shall be the law of the area of jurisdiction of the court.⁴⁴

⁴³ Cap. 33, *Laws of Lagos State*, 1973.

⁴⁴ There are similar provisions in the Customary Courts Law of other states of the federation.

In any case before the customary court where each of the parties, as well as the court, is subject to a different system of customary law, which of these systems of customary law will provide the rule of decision? This is the question that the above legislation tries to answer. In Nigeria, such questions have become prevalent because of the blurring of ethnic and tribal boundaries engendered by tribal intermixture.⁴⁵ However, the above legislation poses some interpretational problems which make it difficult to apply.

Section 20 above establishes two choice of law rules:⁴⁶

- (a) the customary law binding between the parties; and
- (b) the law, *i.e.*, customary law, of the area of jurisdiction of the court.

What then is the customary law binding between the parties? In cases of contract or where the parties come from the same tribe, it should be the law under which they contracted.⁴⁷ Where the parties come from the same tribe, it should be the tribal or customary law to which both are subject. This was the decision reached by the court in *Osuagwu v. Soldier*,⁴⁸ a case between two Ibos residing in Kaduna, outside their tribe. The plaintiff claimed the value of a box of clothing which, he alleged, he had entrusted to the defendant for safe-keeping. The court of first instance, *i.e.*, Alkali's court at Kaduna where Islamic law was the law of the court, awarded damages to the plaintiff. The defendant appealed on the ground that Islamic law should not have been applied, and the High Court accepted that submission. Brown, C.J., observed:

⁴⁵ "...[t]he next question to answer is which customary law applies. This question is necessitated by the fact that every territorial area has its own customary law and every individual has customary law personal to himself which he carries about wherever he goes": A. N. Allott, ed., Judicial and Legal Systems in Africa (London: Butterworths, 1970), p. 90.

⁴⁶ Rules that select the applicable law.

⁴⁷ Cheshire and North: Private International Law (London: Butterworths, 1992, 12th ed.), Ch. 18.

⁴⁸ (1959) Nigerian Law Reports, p. 39.

We suggest that where the law of the court is the law prevailing in the area but a different law binds the parties, as where two Ibos appear as parties in the Moslem Court in an area where Moslem law prevails, the native court will in the interest of justice be reluctant to administer the law prevailing in the area, and if it tries the case at all it will – in the interest of justice – choose to administer the law which is binding between the parties.⁴⁹

But in non-contractual cases or where the parties are not subject to the same system of customary law, ascertaining the law binding between them becomes a daunting task. For instance, where each of the parties in a non-contractual case, as well as the court, is subject to a different system of customary law, which of these systems of customary law is binding between the parties? Again, in a divorce suit where the customary court, the husband and the wife are each subject to a customary law which, presumably, would decide the case differently from the others, whose customary law will provide the rule of decision? Or bind the parties? Is it the customary law to which the court is subject or the husband's customary law, or the wife's customary law? The above statute does not provide answers for these questions. Therefore, in such circumstances a court may fall back on the general rules of private international law or conflict of laws⁵⁰ which have developed solutions for similar problems, though in the context of conflict between the laws of two or more sovereigns. For instance, in a divorce case where the parties and the customary court are each subject to a different customary law, the customary court could hold that the law binding between the parties is the law of their matrimonial domicile, *i.e.*, where the parties established their permanent home immediately after marriage, or failing that, the law of their intended matrimonial home, *i.e.*, where the parties at the time of the marriage intended to establish their permanent home.

⁴⁹ Similar decisions were reached in the cases of *Ghamson v. Wobill* (1947) 12 West African Court of Appeal Judgment 181; *Tapa v. Kuku* (1945) 18 Nigerian Law Reports 5.

⁵⁰ This approach was discouraged by A. Allott, *New Essays in African Law* (London: Butterworths, 1970), pp. 115-116.

The second choice of law formula, 'the law of the area of jurisdiction of the court,' meaning the court's law, is by no means free from interpretational difficulties. This second choice of law rule is applicable in situations not falling within Section 20(3)(a) above. How do we ascertain the court's law? What are the connecting factors? Are those factors tribal, geographical or subjective? Where the court exercises jurisdiction in an area with a heterogeneous and miscible population of the Ibos, Hausas and Yorubas, with a different customary law applying to each tribe, which customary law is the court's law? Is it the Ibo, Hausa, or Yoruba customary law? Or is the court going to adopt the customary law with which it is most familiar? Further still, would the judges subjectively decide the matter? In *R v. Ilorin Native Court ex p. Aremu*⁵¹, a similar expression, 'law prevailing in the area of jurisdiction of the court,' called for interpretation. The judge, in rejecting the submission that there could be more than one system of customary law prevailing in a particular area, held that "prevailing" meant "predominant." Therefore, the prevailing customary law is the predominant customary law. But the question still remains: how to decide predominance? What are the connecting factors? This case does not, therefore, seem to answer the many questions posed above and there are not other reported cases in this regard.

In the application of the above choice of law formulation, the court should consider all circumstances of the case, e.g., the subject matter of the case, the parties and the customary law to which they are subject, the place where the act or transaction took place, and the customary law that provides the best remedy, before designating the court's law.

However, the problems of interpretation and application of the choice of law provisions in the above statute may not be as difficult as we have portrayed them. The

⁵¹ (1950) 20 Nigerian Law Report 144.

reason is that in practice, customary court judges do not worry about the niceties involved in the statutory choice of law rule. They simply concern themselves with reaching a just result and decision in each case before them. Accordingly, they apply any rule or principle that will effectuate this objective. In other words, the above choice of law provision is rarely invoked. As Elias observed: “But in Native or Local Courts, whether ‘pure’ or ‘mixed,’ the observable tendency appears to be that the judges apply a kind of *jus naturale* which achieves a more or less ‘just’ solution to the conflicting claims of the litigants.”⁵² Similarly, Professor Agbede⁵³ stated:

The existence of the statutory choice of law rules appears to be practically unknown to most of the customary court judges.... In a questionnaire sent to customary court’s judges (with legal education) in the erstwhile Western states only one referred to the statutory provisions as the basis for his answers. And in some cases, his answers were not in conformity with the statutory rules. In practice, the customary courts have managed to gloss over choice of law problems or resolve them in whichever way they please.⁵⁴

CONCLUSION:

The sources of conflict of laws in the post-colonial period which, together with the received English law previously discussed, constitute the present sources of conflict of laws in Nigeria. Emphasis is on the importance of judicial decisions as a source of rules for conflict of laws and this suggests that Nigerian judges should emulate the creativity shown by their Canadian counterparts. There is a need to adapt general conflict of laws principles to a particular legal environment, especially the need to give those principles a constitutional orientation. Local statutes often give directions as to the applicable law in an internal situation, but difficulties in interpretation and

⁵² T. O. Elias, *British Colonial Law* (London: Stevens & Sons Ltd., 1962), p. 213.

⁵³ I. O. Agbede, *Legal Pluralism* (Ibadan: Shaneson C.I. Ltd., 1991), p. 193.

⁵⁴ Our practical experience in a divorce suit before a customary court in Lagos State, where the parties as well as the court were subject to different systems of customary law, lends credence to this opinion: *Okoye v. Okoye* (unreported suit no: LMLG/053/ 97, Yaba Grade A Customary Court, Lagos. Judgment delivered on 2nd April 1998). In this case, despite the author’s submission on the applicable customary law and the statutory choice of law provision above, the Customary Court decided the matter on general grounds of fairness and justice without reference to my argument or the above statutory provision.

application of their choice of law provisions remain. The next chapter discusses the more profound problem of the ascertainment and exclusion of customary law in the Nigerian courts. This is not a problem for Canadian courts because of the general, traditional non-pleading and non-recognition of customary, *i.e.*, Aboriginal, laws

CHAPTER FIVE

NIGERIAN CUSTOMARY LAW AS A SOURCE OF CONFLICT OF LAWS

5.1 INTRODUCTION

Chapter Two identified the circumstances which surrounded the evolution of conflict of laws within the customary law system. This chapter will focus on the meaning, characteristics, proof, and exclusion of customary law.

5.2 MEANING OF CUSTOMARY LAW.

Customary law is capable of having different meanings to an anthropologist or sociologist, compared with a legal theorist.¹ To appreciate the meaning of customary

¹ For W. H. Rattigan, "customary law, or as it is called, *mores majorum* or *consuetudinarium* is composed of a large body of rules observed by communities, evidenced by long usages and founded on pre-existing rules sanctioned by the will of the community. It exists independently of a sovereign authority": Digest of Customary Law (Delhi: The University Book Agency, 1953, 13th ed.), p. 8: I. A. Schapera stated: "Tswana, like ourselves, have attained to a stage of legal development where certain rules of conduct can, in the last resort, be enforced by the material power of compulsion vested in the tribal courts. These courts can compel a man to carry out obligations he has neglected to fulfill, or to make restitution or pay compensation for damage he has done, or to suffer punishment for an offence he has committed. The rules of conduct distinguished from the rest by this ultimate sanction of judicial enforcement may for all practical purposes be regarded as the 'laws' of the Tswana:" A Handbook of Tswana Law and Custom (London: Frank Cass and Co. Ltd., 1938), p. 37. In *Kharizaidan v. Fatima Khalil Mohssen*, (1973) 11 Supreme Court of Nigeria Reports 1 at 2, the Supreme Court of Nigeria defined customary law as: "any systems of law not being the common law enacted by the competent legislature in Nigeria but which is enforceable and binding within Nigeria." We believe that this definition will include every rule of conduct that is enforceable whether through customary, social or judicial means. Recently, the same court, in *Bilewu Oyewumi v. Amos Owoade Oginesa* (1990) 3 Nigerian Weekly Law Reports (PT. 196) 182 at 207, gave a more detailed definition of customary law: "Customary law is the organic or living law of the indigenous people of Nigeria, regulating their lives and transactions. It is organic in that it is not static, is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is the mirror of the culture of the people. I would say that customary law goes further to impart justice to the lives of those subject to it." Similarly, the Nigerian Court of Appeal defined customary law as: "The unrecorded tradition and history of the people which has 'grown' with the 'growth' of the people to stability and eventually becomes an intrinsic part of their culture. It is a usage or practice of the people which by common adoption and acquiescence and by long and unvarying habit has become compulsory and has acquired the force of a law with respect to place or the subject matter to which it relates," *Aku v. Aneku* (1991) 8 Nigerian Weekly Law Reports (PT. 209) 280. However, John Austin described it thus: "At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the

law, one must differentiate between a custom and a customary law.² A custom is a rule of conduct. When such rule of conduct attains a binding or obligatory character it becomes a customary law. It is the assent of the community that gives a rule of conduct its obligatory nature. This means that such rule of conduct is supported by a sanction and is enforceable. Sanction under customary law does not take the nature of the sanctions of a modern state, with its full machinery for administration of justice. Customary sanction can take the form of ostracism, compensation, propitiation, restoration, or apology. It is this element of sanction that distinguishes a custom from customary law.³

courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects; but deriving the only force, which it can be said to possess, from the general disapprobation falling on those who transgress it." Lectures on Jurisprudence or The Philosophy of Positive Law (London: John Murray, Albemarle Street, 1885, vol. 1, 5th ed.), p.87.

² According to a South African writer: "Bantu law is often spoken of as Bantu custom. This is a common-law point of view, arising from the fact that Bantu law is unwritten, and since it was originally only ascertainable orally from the Bantu themselves, it was viewed by courts applying the common law as similar to trade custom. There is, however, a clear distinction between Bantu law and Bantu custom, although they are inextricably interwoven:" S. M. Seymour, Bantu Law in South Africa (Johannesburg: Juta & Co. Ltd., 1970), p. 13.

³ "The investigator must remember from the outset that there is a clear *distinction*...between *law* and *custom*. difficult though the operation often is. Where Native Court records exist, these might be consulted in cases of doubt or difficulty, always subject of course to a scrupulous observance of the law of averages. But where such records do not cover the points at issue, one useful but by no means conclusive test would be to ask whether the alleged practice is *law*, which the Native Courts would enforce, or *custom*, which they would not; perhaps it is better to say, whether the particular practice is recognised by the majority of the local community as binding on all and sundry, or whether it is merely conventional or permissive:" T. O. Elias, "The Problem of Reducing Customary Law to Writing," in A. K. R. Kiralfy, ed., British Legal Papers (London: Stevens & Sons, Ltd.; presented to the fifth International Congress of Comparative Law, Palace of Justice, Brussels, 4 th - 9 th August, 1958), p. 61. Dr. S.N.C. Obi was even more forthright: "What then is the point of departure between customary law and custom simpliciter? In our submission, this difference lies in what the traditional courts could or could not do where the party pronounced against refuses or merely fails to give effect to the court's decision, and does not seek to prove his case to a higher tribunal. If the court was satisfied that the party in the wrong was guilty of a breach of a legal right, then the judgment of the court will have to be executed in much the same way as a judicial decision is executed in the Western world. In such a case, either masquerades or young age-grade societies are employed by the court to act as bailiffs. If on the other hand, the action was founded on a breach of a mere custom, there is no right of enforcement. The court merely apportions blame and offers suggestions. But the party who has been wronged will have to be satisfied with whatever effect public opinion may have on the other party to the case:" The Ibo Law of Property (London: Butterworths, 1963), pp. 28-29.

A breach of custom does not occasion any injury to the infringer, because it is not backed by sanction; while a breach of customary law attracts the imposition of the appropriate traditional sanction. For instance, it is the custom of the Ibos of Nigeria that the father obtains a wife for the first son. Every father ordinarily would like to do that, but no father suffers any legal injury or sanction for failure to get a wife for his first son. Likewise, no son can successfully compel his father under such custom to get a wife for him. It is a mere custom, the breach of which does not attract any sanction. Two examples of custom are the requirements of Yoruba custom that a person genuflects when greeting an elderly person, and that one wears facial tribal marks.⁴ Breach of the above attracts no sanction at all. An infringer may be denounced for being rude or modern, but that is the end of the matter. However, a breach of a rule of customary law, *e.g.* adultery, attracts the full weight of customary sanctions: there will be propitiation followed by ostracism.

Therefore, customary law means those customs generally accepted by a particular community as binding, the breach of which is supported by customary sanction. This definition covers the distinction between custom and customary law based on the availability of sanction.⁵ It also emphasises the general acceptance of a rule of conduct or custom by a community which gives it its binding and enforceable character.

⁴ An analysis of the different Yoruba tribal marks is contained in: Samuel Johnson, The History of the Yorubas (Lagos: CSS Bookshop Ltd., 1921), pp. 104-109.

⁵ Schapera set out to define customary law anthropologically but ended up in a legal definition. He began with a distinction between custom and customary law. He seems to have concluded that sanction was attached to every rule of conduct whether such rule sounds in custom or customary law. Apparently convinced that sanction, in the circumstances, cannot be a basis for the distinction between custom and customary law, he sought the criterion for the distinction in judicial enforcement and thus defined customary law as supra note 1, pp. 35-38. But what happens to those rules of conduct that have not come before the courts for judicial enforcement? How do we determine whether they are mere customs

5.3 THE EVIDENTIARY PROBLEM OF CUSTOMARY LAW.

The foremost obstacle to any systematic discussion of customary law is its unwritten form. How do we capture its most authoritative statement? When we want to know the elements of a crime or the punishment for it, or the constitutional protection for a right, in Nigeria and Canada we consult the *Criminal Code* or the *Constitution Act*, respectively. But what do we do when, for instance, we want to know the customary law stipulation as to the legitimation of a child? What is the primary source for a foreign scholar who comes to Nigeria for research on its customary laws? These questions reveal how challenging the study of customary law is.

The truth is that customary law is not in any written form, like a code or constitution. It is imbedded in the mind and heart of every native whose customary law is at issue, perhaps genetically implanted. This makes a discussion of proof for customary law in a court very interesting. The ascertainment of customary law is, however, not as much of a problem for a native as for a foreigner. In Nigerian traditional society, the education of a child from birth includes special lectures on the procedural and substantive contents of customary law. Therefore, before the child becomes an adult, he already has a mastery of customary law. For instance, in Iboland, a child who attains the age of ten to twelve years is initiated into age-grade society and masquerade cults. These societies teach the child his civil rights and obligations and also the customs and customary laws of the tribe. This type of education is passed from generation to generation so that the natives of a tribe rarely have problems with

or customary law? It suffices to say that, sanction is the basis of distinction between custom and customary law.

knowledge of their customary law; neither is anybody expected to claim ignorance of the customary law.

However, the pre-colonial Nigerian tribes formerly subject to the sole regulation of their customary laws had their tribal boundaries opened to foreign intercourse and civilisation. The period of tribal insularity thereafter ended. Customary law is no longer the sole concern of natives, because foreigners who intermingle with them can be affected by customary law stipulations. So, such foreigners need to know the customary law provisions. For instance, a foreigner may have consensual sexual intercourse with a native girl of sixteen years, which is allowed under his legal system but criminalised by customary law which is unknown to him. The need, therefore, for a written or permanent record of customary law is obvious. Many suggestions have been put forward on how to solve this problem of unwritten customary law.

Various writers have suggested that customary law should be reduced to a code or put into a form of restatement, like the *American Restatement*, or that the various customary laws in the country should be ascertained and unified.⁶ Of interest are the recent efforts of the state governments of the former Anambra and Imo states⁷ of Nigeria which reduced their customary laws to: 'The Customary Law Manual.'⁸ In the style of a code, it states uniform principles or rules of customary law applicable in

⁶ William Twining, The Place of Customary Law in the National Legal Systems of East Africa (Being lectures delivered at the University of Chicago Law School in April – May 1963, and published by the law school, University of Chicago, 1963), pp. 32-53; E. Cotran, "The Place of Customary Law in East Africa," in East African Law Today (London: The British Institute of International and Comparative Law, 1966), p. 72; T. O. Elias, "Towards a Common Law in Nigeria," in T. O. Elias, ed., Law and Social Change in Nigeria (Lagos: University of Lagos and Evans Brothers Ltd., 1972), p. 254; N. Okoro, "Integration of the Customary and the General (English) Laws of Succession in Eastern Nigeria," in University of Ife (Faculty of Law), ed., Integration of Customary and Modern Legal Systems (A conference held at Ibadan, Nigeria, between 24 th – 29 th August, 1964, published by University of Ife, 1964), p. 242.

⁷ It is a notorious fact that due to recent state creations in Nigeria, the Abia, Ebonyi, and Enugu states were created out of the former Anambra and Imo states.

⁸ Prepared by Dr. S.N.C. Obi, former Commissioner for Law Revision, Anambra State, and printed in 1977 by the Government Printer, Enugu.

those states, with local variations where such exist. The ambition of this project is demonstrated in the foreward to the *Manual*: “it is an authentic statement of the customary laws of the East-Central state of Nigeria and I am confident that the handbook will be of great assistance not only to the legal profession but also to everyone interested in the society in which we live.”⁹ The problem with this effort is that it has the tendency to rigidify or fossilise customary law. A code, restatement, or manual, unless periodically reviewed, may enjoy such favour of citation by superior courts that their provisions are made inflexible and unquestioning statements of the customary law. Such a result may materially depart from the real evolutionary nature of customary law. Perhaps the best solution is to continue the present practice of proving customary law as a fact, by calling witnesses versed in customary law.

5.4 CHARACTERISTICS OF CUSTOMARY LAW.

A major feature of customary law is that it is unwritten. As we said above, its rules are well known by members of the community whose conduct it regulates. Justice Dan Ibekwe (as he then was) said extra-judicially:

Regrettably enough, our own customary law is unwritten. It was handed down the ages, from generation to generation. Like a creed, it seems to live in the minds of people. This explains why so little was really known at the beginning about the vast body of laws which had always governed the affairs of our ancestors from time immemorial. Much of what is known about such laws has been drawn either from judicial decisions or from the few publications on the subject.¹⁰

The result is that customary law remains largely uncertain for a lawyer who has to advise his client, based on a reasonably certain state of the law. But if customary law is reduced to a permanent form, then that will destroy its intrinsic character of being

⁹ Dr. Obumneme Onwuamaegbu, former Attorney-General of former East-Central state of Nigeria: S. N. C. Obi, The Customary Law Manual (Enugu: The Government Printer, 1977), p. xxxvi.

unwritten; and this will render it alien to some of the people whose law it is and whose conduct it is meant to regulate. Consider telling an eighty year old illiterate Ibo man that his customary law, the knowledge of which he believes to have gained from his ancestors, is to be ascertained from a customary law manual, restatement, or code! This information can give the old man cause for laughter. He would rather think that it is English law that is being talked about and not customary law, which he knows to be unwritten.

The point is that the anglicisation of customary law by its reduction to writing will render it strange to some of the people it is meant to regulate. Perhaps Nigeria's, and indeed Africa's, greatest contribution to the world's jurisprudence lies in the evolution, articulation and presentation of a unique customary law that is unwritten, yet indestructible and ineffaceable.¹¹ This is the challenge and genius of our customary law.

Another feature of customary law is that parties to a dispute subject to customary law are usually no strangers to each other. There is usually a tie, social, marital, or tribal, binding them.¹² For instance, land disputes are usually between people related by blood. This is in contradistinction to modern land adjudication which may be between parties who are strangers to each other and may even be of different

¹⁰ Ibekwe, D.O., "Conflict of Cultures and Our Customary Law," in T.O. Elias, S.N. Nwabara, *et al.*, eds., African Indigenous Laws (Proceedings of Workshop held at Nsukka, Nigeria, between 7-9 August, 1974, published by the University of Nigeria Press, 1974), p. 297.

¹¹ "But non-literacy did not prove fatal to the preservation of customary doctrine. Apart from the elders, who were deemed to be natural repositories of the law, there were traditional functionaries, well-versed in forensic science and learned in the law, who had special responsibilities in directing the proceedings in the courts and acted generally as legal experts. In Ashanti, for example, every chief had an *okyeeame* who was at once spokesman on affairs of state and "attorney-general" of the state. The institution of legal specialisation facilitated the process of transmitting the legal heritage from generation to generation by oral tradition." S.K.B. Asante: "A Hundred Years of a National Legal System in Ghana: A Review and Critique," (Lagos: Academy Press: Proceedings and Papers of the Sixth Commonwealth Law Conference, Lagos, Nigeria, 17th – 23rd August, 1980), p. 152.

¹² P. C. Lloyd, Yoruba Land Law (Ibadan: Published for the Nigerian Institute of Social and Economic Research, Ibadan, 1962), pp. 17-18.

nationalities. Apparently for this reason, disputes in an African setting are considered to disrupt the societal or family equilibrium. The main aim of the adjudicators will be to restore that equilibrium and this might only be achieved by not deciding strictly on the right of the parties. Legal rights are not emphasised as much as reconciliation. Thus, an African justice system is mainly reconciliatory.¹³ For instance, a man may have several pieces of land and his brothers have none. He might have allowed one of his brothers to occupy one of those pieces of land but without alienating it to him. This brother and his own family may be in occupation of this piece of land for a long time. When a dispute arises between the owner and the brother as to the ownership of this allotted piece of land, the customary court judges, while acknowledging the legal ownership of the land, may decide in favour of the brother. The basis may be that since the real owner has several other pieces of land, he should in the spirit of brotherhood and family cohesion allow the brother to own or settle on that single, gifted piece of land. The real owner will be persuaded to accept this decision. If customary law was in a permanent form, the court in the above hypothetical case would not be able to do what it considered to be equity. It would simply have declared ownership under customary law, written or unwritten, in favour of the owner.

Again, to qualify as customary law, even in medieval Europe, a norm must be generally accepted by the people subject to it.¹⁴ This position is clearly affirmed by the

¹³ "Igbo legal procedures aim essentially at readjusting social relations. Social justice is more important than the letter of the law.... The resolution of a case does not have to include a definitive victory for one of the parties involved. Judgment among the Igbo ideally involves a compromise and consensus. They insist that a good judgment 'cuts into the flesh as well as the bone' of the matter under dispute. This implies a 'hostile' compromise in which there is neither victor nor vanquished; a reconciliation to the benefit of – or a loss to both parties:" V. C. Uchendu, *The Igbo of Southeast Nigeria* (New York: Holt, Rinehart and Winston, 1965), p. 14.

¹⁴ Walter Ullmann, *Law and Politics in the Middle Ages* (New York: Cornell University Press, 1975), p. 193.

Privy Council in *Eshugbayi Eleko v. Government of Nigeria*,¹⁵ where Lord Atkin

stated:

Their Lordships entertain no doubt that the more barbarous customs of earlier days may under the influences of civilisation become milder without losing their essential character as custom. It would, however, appear to be necessary to show that in their milder form they are still recognised in the native community as custom, so as in the form to regulate the relations of the native community inter se....[I]t is the assent of the native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognised by the native community whose conduct it is supposed to regulate.

What is the proof that, when customary law is reduced to writing it will continue to be the customary law that is generally accepted by the members of the community whose lives it is meant to regulate? Would it not better represent what the compilers alleged or accepted to be the customary law? However, it is possible that all the members of a community may decide to ratify the text.

Customary law remains flexible, evolutionary, and capable of adaptation to changing circumstances. Gluckman stated:

The view that customary law was ancient and immutable, retaining its principles through long periods of time. its origins lost in the mists of antiquity, has been discarded. Not only are customary laws changing today but also they were subject to constant change in the pre-colonial past.¹⁶

In *Lewis v. Bankole*,¹⁷ Osborne, C.J., opined: "One of the most striking features of West African native custom....is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptation to altered circumstances without entirely losing its character." Some cases further illustrate the changeability or evolutionary nature of customary law. For instance, it was the original position in customary law that land was totally inalienable. It belonged to either a family or the community. But through the process of evolution the concept of

¹⁵ (1931) Law Reports Appeal Cases, 622 at 673.

¹⁶ M. Gluckman, *Ideas and Procedures in African Customary Law* (London: Oxford University Press, 1969), p. 9

inalienability of land was discarded in favour of transferability by way of sale. Thus, Webber, J. in *Barimah Balogun and Scottish Nigerian Mortgage and Trust Co. Ltd. v. Saka Chief Oshodi* stated:

It seems to me that native law existent during the last fifty years has recognised alienation of family land, even by a domestic, provided the permission of the family is obtained.... The chief characteristic of native law is its flexibility – one incident of land tenure after another disappears as the times change- but the most important incident of tenure which has crept in and become firmly established as a rule of native law is alienation of land.¹⁸

In the same vein, Graham Paul, C.J. opined in *Kadiri Balogun v. Tijani Balogun & Ors.*: “....as a matter of historical fact and of judicial decision, it is now too late in the day to say that under (Lagos) native law and custom family property is inalienable so as to give the grantee absolute ownership.”¹⁹

The adaptation of customary law to changing political, social and economic circumstances of the society was further evidenced in the case of *Ewa Ekeng v. Efana Ekeng Ita & Ors.*²⁰ The issue in that 1929 case was the determination of the rights of two rival claimants to the headship of the Ewa Ekeng House at Calabar, Nigeria. The defendant holder of the headship held it by virtue of election, *i.e.*, by voting at a family meeting. The plaintiff claimed the headship by right of primogeniture, as the eldest male member of the family. The plaintiff contended that any kind of popular election was contrary to customary law and therefore *ultra vires*. On this contention, Berkeley, J., commented:

Before the Government came to Calabar, and established law and order, it is certain that the headship of a house belonged as of right to the senior male member of that house. But he took it at his peril. If he failed to find support within the family only two courses were open to him. Either he went into exile or else he stayed and was put to death. In either case the succession to the vacancy devolved on the next senior male, if he chose to take it up. Human nature is much the same all over the world, and it is absolutely certain that there must have been occasions on which the next senior male, knowing that he had no chance of winning the support of the family, had sufficient intelligence to stand aside rather than risk such perilous promotion....[I]t

¹⁷ (1909) Nigerian Law Reports 100-101.

¹⁸ (1931)10 Nigerian Law Reports 36 at 51, 53-54.

¹⁹ (1943) 9 West African Court of Appeal Judgment 73 at 82.

²⁰ (1928) 9 Nigerian Law Reports 84.

is obvious that even before the advent of the Government, the theory of election, though in a very rudimentary form, was already inherent in the family system of the Efik people of Calabar. With the coming of the Government the rule of law was substituted for the rule of violence. It was no longer possible to put an unpopular head to death. Therefore an unpopular head, being no longer in fear of his life, was under no compulsion to seek security in exile. The family was saddled with the unpopular head and had no means of getting rid of him. The only remedy for such a state of affairs was to take steps to see that no man should become head of the house unless he had behind him the support of the family. No doubt in the majority of cases the senior man was sufficiently suitable, and became head without opposition. But when he was not suitable the family had no hesitation in selecting some other member in his stead. This was only common sense, and a natural adaptation of custom to make it conform to a change in condition.

The plaintiff is asking this court to put the clock back. He wishes to deprive the family of any choice in the matter of their head. He ignores the changed circumstances of the times and wishes to revert to a custom the safeguards and checks upon which can no longer be applied.

If in 1929, when this decision was given, the original customary law on the matter, *i.e.*, promotion to the headship of the family based on seniority, had been reduced to writing, the court would have just applied that custom and there would have been no room for the flexibility shown in this case. The decision would have been different and would not have reflected the new custom, *i.e.*, promotion based on election, which sought to make sure that a family was not saddled with an unpopular head. Reducing customary law to a permanent form, unless periodically reviewed, would destroy its characteristic of flexibility and adaptability to changing circumstances and needs of the society.

Finally, changes in the customary law evolve from usage and are not declared, as in Western legal systems where a statute could repeal or amend a law by making declarations to that effect. The explanation seems to be that most traditional societies, like the Ibos, did not have a legislature or sovereign who could declare such changes in the customary law. Once a new customary law has evolved and is generally accepted,²¹ it becomes binding on all the members of the community and any member who resists its application does so at the risk of customary sanctions.

5.5 PROOF OF CUSTOMARY LAW.

The *Evidence Act*²² has established two methods of proving customary law:

- (a) proving it as a fact; or,
- (b) by judicial notice.

Section 14(1) provides:

A custom²³ may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence. The burden of proving a custom shall lie upon the person alleging its existence.

This seems to be a legislative enactment of the rule enunciated by the Privy Council in

Angu v. Attah:

As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the courts, become so notorious that the courts will take judicial notice of them.²⁴

A. Proving Customary Law as a Fact.

Like questions of fact in any judicial inquiry, customary law may be proved by calling witnesses who are versed in the customary law sought to be established or denied. They become expert witnesses as far as that customary law is concerned and are usually chiefs or traditional rulers of the community whose customary law is at issue. By virtue of their customary offices or positions, it is their duty to know the customary law of their people. They may be called as witnesses by any or both of the parties in a case. The court is, however, not bound by such evidence. For instance, in *Ricardo v. Abal*,²⁵ the court commented: "Now both these witnesses were called by the plaintiff and knew, of course, what evidence they were expected to give." In

²¹ Lord Atkin, *supra* note, 15.

²² *Laws of the Federation of Nigeria*, 1990, Cap. 112, vol. VII.

²³ Section 2(1) of the same *Evidence Act* defines 'custom' as "a rule which, in a particular district has from long usage obtained the force of law."

²⁴ (1921) Privy Council Judgement (1874-1928) 43.

²⁵ (1926) 7 Nigerian Law Reports 58 at 59.

Nigeria, the use of an expert witness is the commonest means of establishing customary law.²⁶

The fact of customary law may also be proved by the use of authoritative textbooks.²⁷ *Larbi v. Cato*,²⁸ held that the author of such a textbook must be dead at the time the book is cited in court. But in *Amoo v. Adigun*,²⁹ the court relied on the book of a living person. Section 59 of the *Evidence Act*³⁰ deals with the admission of a textbook on customary law: “Any book or manuscript recognised by the natives as a legal authority is relevant and admissible as proof of native law and custom.” This was judicially interpreted in *Adedibu v. Adewoyin*,³¹ where the West African Court of appeal stated the two conditions that must be satisfied for the operation of the section: (a) the book or manuscript must form part of the evidence in the case; and, (b) it must be shown, as a fact, that such book or manuscript is recognised by members of the community concerned as a legal authority.

In this particular case, the litigants gave contradictory evidence on the applicable customary law to the headship of their family, *i.e.*, *Mogaji*. The judge refused to accept either side’s version but relied on H. L. Ward-Price’s book: *Memorandum of Land Tenure in the Yoruba Provinces* (Lagos: Printed by the government Printer, 1933). This book was neither tendered in evidence nor referred to by counsel for the parties; yet the declaration sought by the plaintiff was granted on the strength of it. On appeal, the West African Court of Appeal held that Ward Price’s book was wrongly relied on by the judge, because it was in breach of Section 59 of the *Evidence Act*.

²⁶ *Adeseye v. Taiwo* (1956) Federal Supreme Court Reports 84; *Andre v. Agbebi* (1931) 10 Nigerian Law Reports 79; *Owoo v. Owoo* (1946) 11 West African Court of Appeal Judgment 81

²⁷ A. E. E. Park, *The Sources of Nigerian Law* (London: Sweet & Maxwell, 1963), pp. 87-79; section 59 of Evidence Act, *supra* note 22.

²⁸ (1960) Ghana Law Reports 146 at 153.

²⁹ (1957) Western Region of Nigeria Law Reports 55.

³⁰ *Supra* note 22.

Another method of proof, which is not common in Nigeria, is the use of assessors who sit with the judge and advise him on customary law.³²

Proof of customary law as fact seems preferable to codification or other attempts to reduce customary law to a permanent form. This is the only approach that leaves customary law with its flexibility. Where there is a change in customary law or need to adjust it to changing circumstances, these can be established as a fact, at the same time leaving its unwritten nature unimpaired. When this method of proof is involved, textbooks or other written evidences of customary law take a secondary position. They are merely considered as part of the facts to be taken into consideration in ascertaining the particular customary law involved.

B. Judicial Notice of Customary Law .

A party who wishes the court to recognise and enforce a particular customary law may request it to take judicial notice, instead of proving it as a fact. Again, the *Evidence Act* has laid down the conditions which must be fulfilled before judicial notice is taken of a custom. Section 14(2) provides:

A custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.

The above section has been the subject of much judicial interpretation. The expression “same area” seems to connote a geographical location and to mean that a case establishing the customary law of area ‘A’ may not be the basis of judicial notice of the customary law of area ‘B’. Thus, in *Santos v. Ikosi Industries Ltd. & Anor.*,³³ it was held that judicial notice cannot be taken of native law and custom relating to ownership of ‘beach land’ of Calabar on the basis of judicial notice of Epe custom:

³¹ (1951) 13 West African Court of Appeal Judgment 191.

³² T. O. Elias, *The Judicial Process in Commonwealth Africa* (Ghana: University of Ghana, 1977), pp.18, 20; Park, *supra* note 27, pp. 89-90.

“since Epe and Calabar are widely separated in distance, one in the colony the other within the Eastern provinces of the protectorate; they are inhabited by people of different tribes with different languages and custom.” However, in *Taiwo v. Dosunmu and Another*,³⁴ Brett, J.S.C., observed:

We are of the view that in applying section 14(2) of the Evidence Act the courts must treat the reference to ‘the same area’ as meaning an area in which some grounds appear for supposing the custom to be uniform. On the material before us no grounds are disclosed for supposing that the customs of the Fanti or Ga of Ghana are the same as those of the Yoruba of Lagos in this matter. We are not saying that in ascertaining the customs of a particular area the decisions which establish the customs of neighbouring areas may not be helpful, but they cannot be conclusive. Coming to Nigerian decisions, in *Archibong v. Archibong*, Robinson, J., held that under the customary law of Calabar the representatives of a sub-branch of a family could sue the head of a house to which the family belonged for an account and for the sub-branch’s proper share of rents received. The trial judge in this case held that that distinction was distinguishable on the grounds that a specific act of delinquency had been proved.

Brett, J.S.C., concluded that there was no evidence that the customary law of Lagos was the same as that of Calabar on the question of the duty of the head of a house to render accounts. This case, therefore, seems to establish that “same area” means an area with uniform customary law and does not necessarily refer to geographical location as we observed above, *i.e.*, where the court that delivered the first precedent and the court being asked to take judicial notice of it are within the same geographical location.

The courts seem to proceed on the presumption that the uniform customary law applies in contiguous areas. Thus in *Salami v. Salami*,³⁵ it was held that,

in the absence of satisfactory evidence to the contrary, the court should hold that the customary rules regulating the distribution of an intestate’s estate in Abeokuta were not different from those which appear to be well settled by a line of cases in which the parties were Yorubas.

According to Section 14(2) of the *Evidence Act*, before judicial notice is taken of a custom, a court of superior or co-ordinate jurisdiction in the same area must have

³³ (1942) 8 West African Court of Appeal Judgment 28 at 36

³⁴ (1966) Nigerian Monthly Law Reports 94.

³⁵ (1957) Western Nigeria Law Reports 10.

acted upon it to an extent which justifies the conclusion that the people in that area accept the same as a correct statement of their customary law in the circumstances.

How many decisions on a particular custom would be sufficient to warrant the judicial notice of it? A similar requirement in *Angu v. Attah*³⁶ was that the custom must have become notorious by frequent proof. This phrase is absent in S.14(2) above. The courts have not been consistent in the application of the criterion of judicial notice in Section 14(2). *Larinde v. Afiko*³⁷ held that a single case was sufficient to justify judicial notice of a customary law. But *Olubanji v. Omokewu*,³⁸ held that a customary law can only be judicially noticed after it had been considered, accepted and applied in many decisions. Also in *Kareem v. Ogunde*,³⁹ it was held that the native law and custom whereby a Yoruba person's children are entitled to succeed to his property on his death intestate has been firmly established by numerous cases and does not have to be proved by evidence. In *Cole v. Akinyele*,⁴⁰ and *Alake v. Pratt*,⁴¹ three previous decisions on a customary law were held sufficient to warrant judicial notice of it. In *Onisiwo v. Fagbenro*,⁴² the court relied only on a single previous decision as a judicial notice of a customary law. However, in *Odunsi v. Ojora*,⁴³ two previous decisions were held insufficient to take judicial notice of a customary law.

This myriad of contradictory decisions does not permit an accurate prophecy of judicial notice of a particular customary law. The decisions seem to have been inspired by the peculiar facts and circumstances of each case. However, it seems that the recent

³⁶ *Supra* note 24.

³⁷ (1940) 6 West African Court of Appeal Judgment 108.

³⁸ (1992) 6 Nigerian Weekly Law Reports (PT. 250) 671.

³⁹ (1972) All Nigeria Law Reports 75

⁴⁰ (1960) Federal Supreme Court Reports 84.

⁴¹ (1955) 5 West African Court of Appeal Judgment 20.

⁴² (1954) 21 Nigerian Law Reports 3.

⁴³ (1969) 1 All Nigeria Law Reports 283.

trend is to insist on more than one previous decision before judicial notice can be taken of a particular customary law.⁴⁴

A major disadvantage of ascertaining customary law by means of judicial notice is its tendency to rigidify customary law and impair its characteristics of flexibility and adaptability. Take for instance a court in the year 2000 taking judicial notice of a customary law established in a case, or even cases, decided before 1930. This means that changes which have taken place in the intervening seventy years will be neglected! The court would have just applied the lawyer's customary law, *i.e.*, judicially noticed, but not the people's customary law which may have changed since 1930. Therefore, this method of ascertaining customary law shows that there could be a difference between the customary law applied by the court and the same customary law as known to the people who are subject to it.

Finally, on the whole question of proof of customary law, one common impression amongst African scholars is troubling. They view the requirement of proving customary law as a fact as assigning customary law an inferior status *vis-à-vis* the received English law. Dr. T.O. Elias' observation epitomises this common view, which has even been given statutory underpinning in Ghana:

Progressive opinion is that, despite all these modes of ascertaining customary law, it is no longer acceptable, whether as a rule of law or of practice, that customary law in independent African States should still be treated as a fact to be proved, like any other matter of fact or of foreign law, by calling evidence of it from these extraneous sources.... The right trail has fortunately been blazed by Ghana which in its *Courts Act, 1960*, provided that customary law should no longer be treated as a matter of fact, but as law; and that, if the judges who are to apply a particular rule of customary law feel any doubt, they are free to consult whatever sources, such as by empanelling a group of persons to inform themselves before applying the law.... This, it is submitted, is the right course for all independent Commonwealth African States to take.⁴⁵

⁴⁴ *Olubanji v. Omokewu*, *supra* note 38.

⁴⁵ T. O. Elias, *The Judicial Process in Commonwealth Africa* (Ghana: University of Ghana, 1977), pp. 27- 28; S.K.B. Asante, "A Hundred Years of a National Legal System in Ghana: A Review and Critique," (Proceedings and Papers of the sixth commonwealth law conference, Lagos, Nigeria, 17 th- 23rd August, 1980: Academy Press, Lagos), p. 154; Eugene Cotran, "The Place and Future of Customary Law in East Africa," in *East African Law Today* (London: The British Institute of International and Comparative Law, 1966), pp. 74, 76.

This pushes nationalism and patriotism to the extreme, to demand that customary law should be treated like the received English law as regards proof thereof.

The bitter truth is that customary law is largely unwritten. Without the present modes of proof, chaos and judicial rascality will be entrenched . Arbitrariness and legal uncertainty will be the rule. The Ghana statutory experiment does not lend itself to recommendation. Such a rule allows judges to apply what they think is the customary law, without reference to any primary source, and is an invitation to legal anarchy. In this situation, even a legal realist cannot predict the mind of the judge! Will the judge's view of customary law represent that customary law which, by definition, is known to all the members of a community and generally accepted by them? What if the judge is not a native or comes from a different customary law background? The severity of our objection is not mitigated by the Ghana provision allowing the judges, should they think fit, to have recourse to extra-judicial opinion on the customary law! What kind of procedure is this? Lawyers for the parties may not have the opportunity of cross-examining the source of this opinion that might determine the rights of their clients! Even then, is it an improvement or derogation from the original method, *i.e.*, proof as a fact, which allows such persons to give direct evidence of the customary law and be cross-examined?

5.6 EXCLUSION OF OTHERWISE APPLICABLE CUSTOMARY LAW.

What circumstances allow a customary law that would have provided the rule of decision to be excluded? These grounds are statutory. Section 26 of the *High Court Law*⁴⁶ provides:

26(1) The High Court shall observe and enforce the observance of customary law which is applicable and is not repugnant to natural justice, equity, and good conscience, nor incompatible either directly or by implication with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of customary law.

(3) No party shall be entitled to claim the benefit of any customary law, if it shall appear either from express contract or from the nature of the transactions out of which any suit or questions may have arisen, that such party agreed that his obligations in connection with such transactions should be exclusively regulated otherwise than by customary law or that such transactions are transactions unknown to customary law.

The above provision clearly stipulates three situations for non-application of customary law:

- a. repugnant to natural justice, equity, and good conscience;
- b. agreement by parties to exclude customary law; or,
- c. transactions unknown to customary law.

Repugnancy Doctrine: customs repugnant to natural justice, equity, and good conscience.

What does this phrase mean? It has rightly been called, “the trinity of legal virtues.”⁴⁷ It seems that what was intended is not an importation of the different, and often nebulous, meanings of the three constituent elements of that phrase, *i.e.*, natural law, equity, and good conscience. Otherwise, the application of customary law would be tested against the technical rules of natural justice and equity. Therefore, the phrase

⁴⁶ *High Court of Lagos State Law* Cap. 60, Laws of Lagos State, 1994.

⁴⁷ Jill Cottrell, “The Reception of English Law in the Commonwealth: The Need for Integration,” (Lagos: Academy Press, proceedings and papers of the sixth commonwealth law conference, Lagos, Nigeria, 17 th – 23 rd August, 1980), p. 187.

should be construed as a whole and should mean the universal principles of morality and fairness.⁴⁸

That phrase is really a cleansing and modernising provision, originally entrenched by the colonial government to divest customary law of its ostensibly ‘barbaric’ relics.

As Lord Wright declared in *Laoye v. Oyetunde*⁴⁹:

The policy of the British Government in this and other respects is to use for purposes of the administration of the country the native laws and customs in so far as possible and in so far as they have not been varied or suspended by statutes or ordinances....[s]o far as they are not barbarous.

But then, what is the touchstone of natural justice, equity, and good conscience? Is it the British or African standard? G. F. A. Sawyerr⁵⁰ submitted: “The result of this attitude was that “British” was substituted for “natural” justice and the touchstone of the fitness of local laws for application to local peoples was the British standard of justice.” In support of this view is the case of *Hakam Bibi v. Mohammed*,⁵¹ which held that, “it is a matter of common sense that there cannot be in one colony at one and the same time two conflicting concepts of natural justice, public order or morality. If there is conflict then it is the concepts of the Suzerain Power which will prevail.” But Park⁵² disagrees: “It can therefore be stated with confidence that inconsistency with the principles of English law is not the standard applied in determining whether a particular rule is repugnant to natural justice, equity and good conscience.”⁵³ It is difficult to share Park’s confidence. The preponderance of judicial authority, and utterances of judges, mainly foreign, who were confronted with the application of the

⁴⁸ G. F. A. Sawyerr, “Internal Conflict of Laws in East Africa,” in G. F. A. Sawyerr, ed., East African Law and Social Change (Kenya: East African Publishing House, 1967), 134; Park, supra note 27, p. 70.

⁴⁹ (1944) Law Reports Appeal Cases 170 at 172-173.

⁵⁰ Supra note 48, p. 135.

⁵¹ (1955) 28 Kenya Law Reports 91 at 112.

⁵² Park, supra note 27, p. 70.

repugnancy doctrine clearly show that it was English justice and social values that were used as the criteria for 'natural justice, equity, and good conscience.'

The bigotry which smothered the application of this phrase was eloquently declared and manifested in the 1917 case of *R. v. Amkeyo*.⁵⁴ There, Hamilton, C.J., in considering whether the incidents of a Christian marriage were applicable to a customary marriage,⁵⁵ declared in most unenviable terms:

In my opinion, the use of the word "marriage" to describe the relationship entered into by an African native with a woman of his tribe according to tribal custom is a misnomer which has led in the past to a considerable confusion of ideas. I know of no word that correctly describes it; "wife-purchase" is not altogether satisfactory, but it comes much nearer to the idea than that of "marriage" as generally understood among civilised peoples.

The elements of a so-called marriage by native custom differ so materially from the ordinarily accepted idea of what constitutes a civilised form of marriage that it is difficult to compare the two.

In the first place the woman is not a free contracting agent but is regarded rather in the nature of a chattel, for the purchase of which a bargain is entered into between the intending husband and the father or nearest male relatives of the woman. In the second place there is no limit to the number of women that may be so purchased by one man, and finally the man retains a disposing power over the woman he has purchased.

Women so obtained by a native man are commonly spoken of, for want of a more precise term as "wives" and as "married women," but having regard to the vital difference in the relationship of the parties to a union by native custom, from that of the parties to a legal marriage, I do not think that it can be said that the native custom approximates in any way to the legal idea of marriage.

About forty-five years later, the above *dictum* was approved by Sir Ronald Sinclair in the case of *Abdul Rahman Bin Mohamed and Another v. R.*⁵⁶:

....the marriage appears to have all the elements of "wife purchase," the description given to an African customary marriage in *Amkeyo's* case. There was no religious ceremony or indeed any ceremony at all. The first appellant merely paid Shs. 200 for her which money was paid through her father to her former husband to release her. Either party could buy his or her release at any time.

No doubt, customary marriage in the above cases was assessed against the background of Christian marriage under English law. Accordingly, whether a customary union is entitled to the description of a marriage depends on its

⁵³ He is supported by, *Rufai v. Igbirra Native Authority* (1957) Northern Region of Nigeria Law Reports 178, where it was held that a customary rule which deprived the appellant of a legal right which he would have had under English common law was not for that reason contrary to natural justice.

⁵⁴ (1917) 7 East Africa Protectorate Law Reports 14.

⁵⁵ A polygamous or potentially polygamous marriage.

approximation or conformity with a Christian or foreign judge's idea of marriage.

Does the payment of bride wealth really convert an African marriage ceremony to a wife-purchase? Does it not signify the love and commitment of the husband just like the marriage vow, or even pre-nuptial contract, in an English marriage ceremony?

Does the participation of the families of the bride and bridegroom not signify the bond the union creates and the seriousness it imports? Is there evidence that a husband or wife of an African marriage is less loving or devoted to his or her partner than the spouse of Christian marriage? Therefore, to describe an African marriage ceremony as a "wife-purchase" is not only an abuse of language but smacks of the provincialism and bigotry, worse still ignorance, roundly condemned by Cardozo, J. in *Loucks et al. v. Standard Oil of New York*⁵⁷:

Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right. A right of action is property. If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise[than] at home[New York State].

In the same vein, James, L.J. in *In Re Goodman's Trust*⁵⁸ condemned a veiled contempt for the application of foreign law:

And why should we on principle think it right to lay down a rule leading to such results? I protest that I can see no principle, no reason, no ground for this, except an insular vanity, inducing us to think that our law is so good and so right, and every other system of law is naught, that we should reject every recognition of it as an unclean thing.⁵⁹

The point being made is that, in striking down customary law under the triple formula (natural justice, equity, and good conscience), an English sense of justice was used as the standard and the judges, especially the colonial judges, proceeded from a

⁵⁶ (1963) East Africa Law Reports 188 at 192-193.

⁵⁷ (1918) 120 North Eastern Reporter (N.Y.) 198 at 201.

⁵⁸ (1881) 17 Law Reports Chancery Division 266.

⁵⁹ *Ibid.*, p. 298.

Western superiority complex and self-proclaimed cleansing mission.⁶⁰ The proclivity to reject customary law, on the basis of the above mental attitude, for being contrary to natural justice, equity, and good conscience was fostered by the elliptical nature of the triple formula which deprived it of any objective criterion and analysis.⁶¹

For instance, many people are likely to differ on what amounts to good conscience. The result has been a huge field of judicial discretion in which the judge's idea of civilisation becomes the litmus test by which a customary law must adjudged valid and acceptable. As G. F. A. Sawyerr noted, "no matter how well-established a custom was, its application in any particular case depended on the discretion of the judge before whom the issue arose."⁶²

However, with the independence of Nigeria in 1960 and the appointment of more indigenous judges, a more Nigerian sense of justice and values have come to be the standard of natural justice, equity and good conscience. Thus in *Ejiamike v. Ejiamike*,⁶³ the plaintiff was the Okpala (head) of his father's household at Onitsha and the defendants were members of the household. The plaintiff's case was that the defendants who were jointly managing the property of their late father, in disregard of his right as the Okpala, were letting out some of the houses to tenants and collecting rents therefrom. The plaintiff tendered evidence and called many witnesses to establish his right to manage the said property as the Okpala according to Onitsha custom. The defendants did not cross-examine the witnesses nor object to the

⁶⁰ As the judge said in *Ashogbon v. Oduntan* (1935) 12 Nigerian Law Reports 7 at 10: "I regard this court in its equity jurisdiction as in some measure by virtue of the jurisdiction sections of the Supreme Court Ordinance "the keeper of the conscience" of native communities in regard to the absolute enforcement of alleged native customs."

⁶¹ T. O. Elias said: "It must nevertheless be said that in so many of the cases decide on this principle, no consistent principle is discernible and that some of the decisions are hard to justify. This is probably an area in which the court has not made a very notable contribution." The Judicial Process in Commonwealth Africa (Ghana: University of Ghana, 1977), p. 53.

⁶² Sawyerr, supra note 48, p. 134.

⁶³ (1972) East Central State of Nigeria Law Reports, p. 130.

customary law relied on. They claimed that the customary law relied on by the plaintiff was repugnant to natural justice, equity, and good conscience. The judge held that this was not sufficient for the defendants, because they had to show how it was so repugnant:

Is there a universal standard of natural justice, equity and good conscience? Or should the test be subjective and related to the conscience and moral susceptibilities of a given community at a given period of development? It is my view that in this case the onus is on the defendants to establish that the custom relied on by the plaintiff was repugnant to good conscience of the average Onitsha man in 1972.

What of the cases where the repugnancy doctrine has been successfully applied?

In *Eder v. Essien*,⁶⁴ the plaintiff had paid the dowry for a woman and married her. She later left him and entered into a new marriage with another man, by whom she subsequently had two children. The plaintiff then alleged that, under a rule of native law and custom, he was entitled to the custody of these children, since his dowry had not been repaid to him. It was held that such a rule of customary law was repugnant to natural justice, equity, and good conscience. In *Mariyamo v. Sadiku Ejo*⁶⁵, the court held that a custom which entitled a man to a child born by his former wife ten months after the marriage was repugnant to natural justice, equity, and good conscience.

In *Okonkwo v. Okagbue*,⁶⁶ one Nnayelugo Nnebue Okonkwo of Ogbotu village died in 1931 and was survived by five sons. The plaintiff was one of the five sons. Okonkwo also left behind two sisters who were the 1st and 2nd defendants. Though married, both were childless and claimed to have separated from their respective husbands and returned to the family home at Ogbotu village. About 1961, thirty years after the death of Okonkwo, the 1st and 2nd defendants, acting under Onitsha customary law, married the 3rd defendant for their deceased brother Okonkwo, with

⁶⁴ (1932) 11 Nigeria Law Reports 47.

⁶⁵ (1961) Northern Region of Nigeria Law Reports 81.

consent of the elders of Ogbotu village and the Okonkwo family, as well as its head. Since that said marriage the 3rd defendant had given birth to six sons, who answered Okonkwo's name. The plaintiff and his own brothers refused to acknowledge the 3rd defendant's children as their brother. The plaintiff acting on behalf of himself and his brothers brought a representative action against the defendants claiming (a) a declaration that, by Onitsha native law and custom, the 1st and 2nd defendants by themselves cannot marry the 3rd defendant for their late brother, Okonkwo, and that the alleged marriage was null and void; (b) that the 3rd defendant was not the wife of the late Okonkwo; (c) an order of court that all the children of the 3rd defendant were not the issues of late Okonkwo; and, (d) a declaration that the children of the 3rd defendant could not inherit both the real and personal property of late Okonkwo.

Both the High Court and the Court of Appeal held that the alleged Onitsha customary law, which allowed marriage to a deceased person was valid in view of the consents of the family and the village before the marriage. On appeal the Supreme Court held that the Onitsha native law and custom applicable to the marriage between the 3rd defendant and the late Okonkwo was not only repugnant to natural justice, equity and good conscience but also contrary to public policy. The purported marriage was declared null and void. The Supreme Court observed:

A conduct that might be acceptable a hundred years ago may be heresy these days and *vice versa*. The notion of public policy ought to reflect the change. That a local custom is contrary to public policy and repugnant to natural justice, equity and good conscience necessarily involves a value judgment by the court. But this must objectively relate to contemporary mores, aspirations, expectations and sensitivities of the people of this country and to consensus values in the civilised international community which we share. We must not forget that we are a part of that community and cannot isolate ourselves from its values. Full cognisance ought to be taken of the current social conditions, experiences and perceptions of the people. After all, custom is not static.

⁶⁶ (1994) 9 Nigerian Weekly Law Reports (Part 368) 301.

Agreement by parties to exclude customary law.

Where customary law would have been applicable but the parties agreed, expressly or impliedly, that the transaction would be regulated by another system of law, the court will give effect to their intention. In *Griffin v. Talabi*,⁶⁷ a native took from Chief Oloto, in connection with a sale of land, a document couched in English law form. It was in fact a receipt which had the effect of alienating the land under English law. It was subsequently contended that since both parties were natives, customary law should apply. If customary law had applied, the sale transaction in the English form would have been held unknown to customary law and therefore set aside.

The West African Court of Appeal rejected this contention as both parties were aware, at the outset, that English law was to govern the transaction. Also in *Okolie v. Ibo*,⁶⁸ there was a dispute between two Ibos residing in Jos regarding the supply of fuel. One of them was a transporter and the other operated a filling station. It was held that the nature of their respective occupations, the transaction between them and the commodity in which they dealt indicated that neither Islamic law, applicable in Jos, nor Ibo customary law should apply. The parties were therefore held to have intended the application of English law.

Transactions unknown to customary law.

We shall illustrate the operation of this category with conflict between customary and English laws of succession. The question here was whether a native who went through a Christian marriage ceremony, *i.e.*, monogamous marriage, and died intestate had by that uncustomary marriage excluded the application of the customary law of succession to his estate? In other words, is a Christian marriage a transaction unknown

⁶⁷ (1948) 12 West African Court of Appeal Judgment 371.

⁶⁸ (1958) Northern Region of Nigeria Law Reports 89.

to customary law? The importance of these questions, and the answers thereto, can only be fully appreciated when one understands the differences between customary and English laws of succession. Ten of them exist:⁶⁹

1. Under customary law, a wife has no succession rights beyond that of actual abode in her late husband's house; but English law gives her well defined succession rights.
2. The succession rights of daughters under English law are much ampler, and better defined, than under Ibo customary law.
3. Under customary law, the children and wife of a deceased, in matrilineal societies, have no rights of succession to the deceased's estate; but English law gives them full rights of succession.
4. Under Boki (in eastern Nigeria) customary law, only the father, eldest brother or uncle of the deceased, to the exclusion of the children and wife, have rights of succession; but with application of the English law of succession, the children and wife of the deceased would be entitled to succession rights.
5. Among the Kalabari and Nembe (in south-eastern Nigeria), children of an *igwa* marriage belong to and have succession rights in their mother's family; but the application of the English law of succession entitles such children to succession rights in their father's estate.
6. Under customary law, a husband's succession rights to the wife's estate are inferior to and subjected to the succession rights of the children; however, English law gives a husband defined rights in his wife's estate.

⁶⁹ Dr. Nwakanma Okoro, "Integration of the Customary and the General (English) Laws of Succession in Eastern Nigeria," University of Ife, Faculty of Law, ed., Integration of Customary and Modern Legal Systems (A conference held at Ibadan, Nigeria, 24 th – 29 th August, 1964, published by the University of Ife), pp. 248-251; Obi, S.N.C., supra note 3, pp. 221-222.

7. Customary law of succession recognises group succession under which children of a deceased become entitled to undivided shares in his real property; such property becomes family property; and the practical effect of the English rule of primogeniture is a virtual destruction of the concept of family property.
8. While succession under English law is beneficial and not onerous, it is both under customary law. A successor under English law succeeds only to assets; but under customary law, he succeeds to both assets and liabilities of the deceased, for instance, he could be liable for the deceased's personal debts.
9. While the Crown has a right of succession under English law, e.g., *bona vacantia* and right of *escheat*, no such rights are recognised under customary law.
10. Customary law recognises oral death-bed declarations, *i.e.*, a nuncupative will, by which a man may distribute his assets; however, English law does not recognise this method of testate distribution except by way of *donatio mortis causa*.

These differences show the importance and implication of a determination of the question: which law of succession, English or customary, governs the estate of a Nigerian native who went through a Christian form of marriage and died intestate?

A decision that it is English law totally obviates the application of customary law, with all its consequences as evidenced in the ten differences highlighted above. The Nigerian courts have grappled with this problem over the years. The decisions show a cleavage of approaches. One view maintains that, since the incidents of a Christian marriage are unknown to customary law, it is the English law of succession that applies to the estate of persons who married thereunder and died intestate. In other words, a Christian marriage transaction is unknown to customary law, the application of which should therefore be excluded. The contrary view rejects any notion that Christian marriage has such a talismanic and automatic effect on the law of

succession. It holds that the applicable law depends on the facts and circumstances of each case. We shall now look at some of the cases on the topic, starting with those that support the first view.

*Cole v. Cole*⁷⁰ seems to be the first case. There the deceased, John William Cole, had contracted a Christian marriage in Sierra Leone in 1874. He died intestate in Lagos and was survived by his wife, a brother, and a lunatic son. The brother sought a declaration that he was the customary heir of the deceased and as such should succeed to the property and be declared trustee for the son. The widow, however, claimed that since the deceased had contracted a Christian marriage, the English law of intestate succession, not the customary law, should govern, and that the son was therefore the lawful heir. The lower court gave judgment for the brother, but on appeal the Full Court, formerly the Supreme Court, held that English law should govern succession to the deceased's estate. Brandford Griffith, J., elaborated:

Let us compare the position of the parties respectively in native and Christian marriages.... By native law a man can marry as many wives as he can afford to pay for. The wife does not take the husband's name, nor do the husband and wife become one person, but the wife remains a member of her family and often continues to live in her own house apart from the husband. The wife's property remains her own. By strict native law when a man dies his eldest brother on his mother's side takes his widow as his wife – that is the native method of providing for the widow. It is a consequence of the loose tie of the native marriage that by strict native law a man's eldest brother on his mother's side inherits. The brother is part of the man's family. The wife and her children are part of the wife's family.

The position of a man and a woman who marry according to Christian rites is entirely different. Christian marriage imposes on the husband duties and obligations not recognised by native law. The wife throws in her lot with the husband. She enters his family, her property becomes his. In fact, a Christian marriage clothes the parties to such marriage and their offspring with a status unknown to native law.

In such circumstances can it be contended that the question of inheritance to the deceased in the present case should be decided in accordance with the principles of native law and custom? I think not.⁷¹

The learned judge therefore held English law to be applicable by virtue of the Christian marriage, without factually ascertaining the life-style of the deceased, Cole,

⁷⁰ (1898) 1 Nigerian Law Reports, p. 15.

during his life time. Did the deceased live and conduct himself like a monogamously married Englishman? Could the deceased, a Nigerian native married in 1874, according to the report, be said to have been aware of and intended the application to his estate of the English law of intestate succession? Was it not obvious injustice to apply to a man's estate a law with which he, the deceased, had no connection other than regulating the celebration of his marriage?

The above questions depict the gaps in the *ratio* of *Cole v. Cole*. The case was nevertheless followed by many other cases. In *Coker v. Coker*⁷², Brookes, J., restated the rule in *Cole*'s case. The headnote of this case states: "...the intestate estate of a native who contracts a Christian or civil marriage is removed from the operation of native law of succession and brought under the common law of England." In *Adegbola v. Folaranmi*⁷³, the deceased, a native of Oyo (western Nigeria), had contracted a customary marriage in his youth, and the plaintiff was the only child of that union. Thereafter, the deceased was taken as a slave to the West Indies, where, during a stay of forty years, he converted to Christianity and married a woman in the Roman Catholic faith. Returning with his second wife to Nigeria, he purchased land, built a house, and took up residence in Lagos. In 1900, he died intestate. His wife by the Christian marriage continued to occupy the house and property until her own death in 1918. She left a will devising the Lagos property to the defendant. The plaintiff sought recovery of the house, claiming that since she was the deceased's only child she was entitled to the property according to native law and custom. The defendant, however, contended that since the deceased had contracted a Christian marriage, the English law of intestate succession should govern; therefore, since the plaintiff was not the issue of

⁷¹ *Ibid.*, p. 22.

⁷² (1943) 17 Nigerian Law Reports 55.

a Christian marriage, she had no right to share in the estate. The court, relying on *Cole's* case gave judgment for the defendant.

An automatic application of the principle in *Cole's* case is manifest in *Gooding v. Martins*⁷⁴. Here the deceased had first contracted a Christian marriage under which the plaintiff was born. After the death of his first wife, he married under native law and custom. The defendants were the children of the customary marriage. The issue before the court was whether the defendants were to have any share in the deceased's estate. Again, the court relied on *Cole's* case, that the defendants had no claim to their father's estate.⁷⁵

However, the contrary view looks at the facts and circumstances of each case and is equally supported by a good number of cases. In *Asiata v. Goncallo*,⁷⁶ decided just two years after *Cole's* case, the deceased, a Yoruba, had been seized as a slave in his youth and taken to Brazil where he married the same woman twice: first according to Islamic rites and then according to Christian rites. During his stay in Brazil, two daughters were born. When he returned to Nigeria with his wife, he married a second woman under Islamic law. Upon the deceased's death intestate, the plaintiff, the only child of the second marriage, brought an action claiming a share of the estate. The Divisional Court applied English law and rejected the claim on the ground that the plaintiff was illegitimate. The Full Court, however, held that the second marriage was valid and applied Islamic law, thereby giving the plaintiff a share of the estate.

⁷³ (1921) 3 Nigerian Law Reports 89.

⁷⁴ (1942) 8 West African Court of Appeal Judgment 108.

⁷⁵ The same result was reached in, *The Administrator-General v. Onwo Egbuna* (1945) 18 Nigerian Law Reports 1; and *Hastrup v. Coker* (1927) 8 Nigerian Law Reports 68 at 71, where Petrides, J. held, "I have no hesitation in deciding that it is not in fact necessary to prove that the deceased was a professing Christian when he married, as the law will presume that the parties, by going through a marriage according to Christian rites, intended to be bound by its consequences unless there was evidence to the contrary, of which there was none."

⁷⁶ (1900) 1 Nigerian Law Reports, p. 41.

However, the above conclusion was not easy to reach. The judges in that case were confronted with the obstructive precedent of *Cole*'s case. As it were, frantic efforts were made to distinguish *Cole*. Speed, A.C.J., opined: "I do not admit that the parties in this case contracted a Christian marriage at all. They were Mohammedans and they merely for local reasons went through the marriage ceremony in Christian form."⁷⁷ Justice Speed's unwillingness to admit the existence of the Christian marriage did not derogate from the legal existence of that marriage. If there was no Christian marriage why was the reference to *Cole* necessary? Justice Speed's line of distinction was tenuous indeed. In fact, in the same case, Griffith, J., stated: "there can be no doubt that the Christian marriage was legal."⁷⁸ He, however, stated that the distinction lay in the fact that while *Cole* dealt with the application of intestacy law, *Asiata* was concerned with the validity of the second customary marriage. This is an obvious avoidance of *Cole*'s case. for the issue of the validity of the second customary marriage was only incidental to the main issue which was the application of the intestacy law. However, Griffith, J., adopted the right approach by considering the peculiar facts and circumstances of the case before him, *i.e.*, the deceased's manner of life. He observed:

But it may fairly be argued that assuming the marriage to be legal, still it would be contrary to justice that, Selia (the first wife) having impliedly contracted by her Christian marriage for monogamy, her offspring should suffer by breach of that contract by their father. But the contract which a Christian marriage would ordinarily imply was clearly not implied in the present case as Selia not only went through a Mohammedan ceremony of marriage but does not appear to have raised the slightest objection to her husband's subsequent marriages and wives.⁷⁹

Therefore, the court without expressly overruling *Cole* set up an approach and solution manifestly distinct from and contrary to *Cole*'s.

⁷⁷ *Ibid.*, p. 44.

⁷⁸ *Ibid.*, p. 43.

⁷⁹ *Ibid.*

The approach in *Asiata* was followed by *Smith v. Smith*⁸⁰ There, the deceased contracted a Christian marriage in Sierra Leone in 1876. He later purchased a property and took up residence in Lagos. After his death intestate, his widow and children continued to occupy the deceased's property. Later, the daughters, basing their claim on customary law, brought an action for partition. The defendant, the deceased's eldest male child, opposed the action on the ground that he was the deceased's heir at law and was therefore solely entitled to the property. He relied upon *Cole v. Cole* and argued that since his parents had contracted a Christian marriage, English law must govern intestate succession. In giving judgment for the plaintiffs and rejecting the defendant's contention, Van Der Meulen, J., expatiated:

Counsel appearing for the defendant has based his claim solely upon the decision in the case of *Cole v. Cole* and has contended that the effect of that decision is to lay it down as a binding rule that when parties have been married according to the rites of the Church of England their property must devolve according to the English law and not according to native law and custom.

I have very carefully perused that decision and I am unable to find that any such general rule is laid down thereby; I do not consider that the case goes further than to decide that in such cases it might be inequitable for the native law and custom as to succession to property to be applied. It would be quite incorrect to say that all the persons who embrace the Christian faith, or who are married in accordance with its tenets, have in other respects attained that state of culture and development as to make it just or reasonable to suppose that their whole lives should be regulated in accordance with English laws and standards. Any such general proposition would in my opinion be no less unjust in its operation and effects than the converse proposition – with which I think the court must have been concerned in the case of *Cole v. Cole* that because a man is a native the devolution of his property must be regulated in accordance with native law and custom, irrespective of his education and general position in life.⁸¹

The completeness of the above needs no gloss save to say that, instead of an automatic application of English law where a native went through a Christian form of marriage, each case depends on its peculiar facts, circumstances, manner of life of the deceased, and the need to achieve a just result.

⁸⁰ (1924) 5 Nigerian Law Reports 105.

⁸¹ *Ibid.*, p. 107.

Again, in *Onwudinjoh v. Onwudinjoh*,⁸² there was evidence of a Christian marriage between the deceased and a woman called Agnes, but only a customary relationship between him and another woman called Chinelo; the question arose as to the rights of their children to the deceased's estate. Sir Louis Mbanefo, C.J., stated:

Were I to follow the long line of cases based upon the decision in *Cole v. Cole*, there would be little difficulty. The Full Court in *Cole's case* laid down the proposition that a Christian marriage, to quote the words of Sir Brandford Griffith, 'clothes the parties to such marriage and their offspring with a status unknown to native law.' Native law and custom does not then apply to such marriages, and succession to the parties to such marriages is therefore to be governed by English law. That resumé of the decision erred on the side of simplicity, but the propositions stated I think are propositions which had been repeatedly extracted from the case and followed by the courts in this country.

In *Ajayi v. White*,⁸³ the deceased had been the widow of Reverend James White, whom she had married according to the provisions of the *Marriage Ordinance*. She had several children, of whom one was the defendant in the case. Her other children married under native law and custom. The plaintiffs were the deceased's grandchildren by those customary marriages. Upon the deceased's death intestate, the plaintiffs brought an action for partition of the property in their grandmother's estate, basing their claim upon customary law and invoked the application of *Smith's case*. The court dismissed the defendant's contention that, because of the Christian marriage, English law must be applied to the estate. It was held that while a Christian marriage was strong evidence that succession should be regulated by English law, it was not conclusive of the question. It merely created a rebuttable presumption. Accordingly, Baker, A.C.J., held: "The original owner was no doubt the wife of an educated man but it is very doubtful whether she was literate or knew anything about

⁸² (1957) Eastern Region of Nigeria Law Reports 1.

⁸³ (1946) 18 Nigerian Law Reports 41.

the English law of succession; if she had done so it is more than likely that she would have left a will.”⁸⁴

So, why was *Cole v. Cole* not expressly overruled in *Asiata*'s line of cases? The reason is that, on its facts, *Cole*'s case was, and still is, a just decision. A contrary view in that case would have had the unsavoury effect of disinheriting a man's son in favour of a third party, *i.e.*, the man's brother. That was why *Asiata*'s line of cases limited *Cole*'s case to its peculiar facts. There is no doubt that *Asiata*'s line of cases is much preferable to the suggested mechanical approach in *Cole*'s case, *i.e.*, an unquestioning application of English law just because of the presence of a Christian marriage. *Asiata*'s approach admirably seeks to apply the law of succession that is best in accord with the presumed intention of the deceased. To the extent that *Cole v. Cole* laid down a general proposition, it is unlikely that Nigerian courts will follow it in future, more so as it inexorably impinges on the customary law of succession. Therefore, following *Asiata*'s line of cases, whether a Christian marriage amounts to a transaction unknown to customary law depends on the circumstances of each case and the deceased's manner of life and habits.

CONCLUSION:

The meaning of customary law emphasises the difference between a custom and customary law. The characteristics of customary law and the evidentiary problem of customary law were analysed to suggest that the best way of ascertaining customary law in court is by proving it as a fact. This method of proof allows customary law to

⁸⁴ *Ibid.*, p. 44.

retain its pristine characteristics, alongside the three criteria by which an otherwise applicable customary law will be excluded.

CHAPTER SIX

THE PROBLEM OF CONFLICT OF LAWS IN NIGERIA: PERSONAL LAW IN A LEGALLY PLURALISTIC SYSTEM.

6.1 INTRODUCTION:

If the infusion of needless confusion and uncertainty in the area of family relations is to be avoided, then it is of utmost importance that the law defining and regulating these relations should be the same wherever the issue arises. It does not augur well for societal equilibrium and comity of nations that a person's status, for instance, as a legitimate child, a married or single person, an adult or a minor, changes with his or her relocation to another legal territory. The inconvenience of such a situation was vividly described by James, L.J., in *In re Goodman's Trust*¹:

But would it not be shocking if such a man, seeking a home in this country with his family of legitimated children, should find that the English hospitality was as bad as the worst form of the persecution from which he had escaped, by destroying his family ties, by declaring that the relation of father and child no longer existed, that his rights and duties and powers as a father had ceased, that the child of his parental affection and fond pride whom he had taught to love, honour, and obey him, for whom he had toiled and saved, was to be thenceforth, in contemplation of the law of his new country, a fatherless bastard?.... Can it be possible that a Dutch father, stepping on board a steamer at Rotterdam with his dear and lawful child, should on his arrival at the port of London find that the child had become a stranger in blood and in law, a bastard, *filius nullius*?²

In mitigation of the above circumstances, most legal systems have accepted the concept of personal law as the sole determinant of a person's status and family relations.³ It is this personal law that applies to a person, wherever he may be, in determining his family relations.

¹ (1881) 17 Law Reports Chancery Division 266.

² *Ibid.*, pp. 297-298.

³ In *Le Mesurier v. Le Mesurier* (1895) Law Reports Appeal Cases 517 at 540-1, Lord Watson observed: "according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage....[I]t is the strong inclination of my own opinion

But what does personal law mean and how is it determined? Is there any universally acceptable test. In other words, can the test used to determine the personal law of an Englishman domiciled in England, and a Canadian domiciled in Manitoba, be equally used to determine the personal laws of a Nigerian, Chinese, or Hindu Indian, domiciled in Lagos, China and India, respectively? What is the impact of legal pluralism on the criterion for the determination of personal law?

Legal pluralism means the simultaneous operation of more than one system of law in a given legal territory. In Nigeria, it is understood in the context of the received English law and the local customary law. It has an historical origin and derives from the parallel legal structure established by the erstwhile British colonial government, whereby different courts were established separately to administer customary and English laws. The courts that administered English law exercised jurisdiction over English subjects and other foreigners; and the customary law courts exercised jurisdiction over Nigerian natives. Notwithstanding post-independence attempts at legal unification, legal pluralism still exists, though in attenuated form.⁴ Legal pluralism in Nigeria poses this question: which system of law constitutes a Nigerian's personal law? Is it the received English law or customary law?

Graveson, in a searching and critical discussion, analysed a similar problem in what he called a non-unified system, which he defined as "a single national state which possesses more than one legal system, or what Professor Cavers called the Plurilegic

that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another."

⁴ The High Court which in the colonial period administered only English law now equally administers customary law: Section 26(1) *High Court Law*, Cap. 60, *Laws of Lagos State*, 1994.

state.”⁵ There is no doubt he had legal pluralism in mind. However, he concentrated on the American and English types of legal pluralism which, in the case of America, is a corollary of its federal constitutional structure and composite legal system. Any discussion of personal law must concentrate on those non-unified systems which have an interplay of customary or religious laws with the general law, as in Nigeria or India.

6.2 MEANING AND PROVINCE OF PERSONAL LAW.

What then is personal law? It is the law of that territory or tribe or race with which a person is permanently connected and which determines his status or family relations.⁶ That law follows him wherever he goes. The concept of personal law is ancient and intrinsically a creation of historical conditions. In the Roman Empire, the insularity of the *jus civile*, which applied only to Roman citizens, was meant to be short-lived, because it could not withstand the inexorable intercourse between Romans and foreigners. This led to the appointment of the *praetor peregrinus* to administer some system of law, other than the *jus civile*, in cases between foreigners and Romans and between foreigners. Thus, the principle of personal law was not applied.

The end of the Roman Empire created a dilemma by the co-existence of the Roman law and barbarian tribal laws. Which law, for instance, applied to a dispute between a Roman and a Frank? Was it the Roman law or Salic law? The logical solution adopted in the circumstances was to allow each person, Roman or barbarian, the application of

⁵ R. H. Graveson, Comparative Conflict of Laws (Amsterdam: North-Holland Publishing Co., 1977, vol. 1), p. 305.

⁶ E. Rabel, The Conflict of Laws: A Comparative Study (Ann Arbor: The University of Michigan Press, 1950, 2nd ed., vol. 1), p. 109; Arthur Nussbaum defined personal law as, “the system determining the status and other lasting relations of a person,” Principles of Private International Law (London: Oxford University Press, 1943), p. 140.

his personal law.⁷ Personal law declined with the emergence of feudalism about the eleventh century, which allowed the unmitigated application of the territorial law which did not countenance the prospect of personality in a law which did not respect geographical limitations. But the principle of personality was to emerge again in the wake of the colonial expansionist policy of some Western countries, especially Britain. This, as already noted, conditioned legal pluralism and the personality of law in Nigeria.

The province or scope of personal law is as wide as the importance of its ascertainment for any individual. Personal law covers most matters of status which may vary from country to country. Some of the situations subjected to personal law can be gleaned from the Agreement of 11 July 1928 between the United States and Persia⁸:

Whereas Persian nationals in the United States of America enjoy most-favored-nation treatment in the matter of personal status,...non-Moslem nationals of the United States in Persia shall be subject to their national laws in the said matter of personal status, that is, with regard to all questions concerning marriage and conjugal community rights, divorce, judicial separation, dowry, paternity, affiliation, adoption, capacity of persons, majority, guardianship, trusteeship, and interdiction; in regard to movable property, the right of succession by will or *ab intestato*, distribution and settlement; and, in general, family law.

Having ascertained the meaning and scope of personal law, what factors locate and fix a person's personal law, especially in a Nigerian type legal system?

⁷ According to S. L. Guterman, "Both in France and Italy as well as in Spain, where the process of fusion was accelerated, foundations were thus laid for a dual stream of legal activity and an intermingling of legal institutions and ideas on terms of equality. Without these conditions it would have been impossible for the developments that we associate with the personality of law to have taken place. The Germanic people settled in the midst of a larger Roman population and faced with a superior system of jurisprudence had little alternative but to recognize existing legal conditions. This did not mean that the invaders were prepared to accept the Roman law for themselves, for potent influences originating in racial and tribal memories perpetuated differences between the races that long survived the invasions": "The Principle of the Personality of Law in the Early Middle Ages: A Chapter in the Evolution of Western Legal Institutions and Ideas," (1966) 21 U. Miami L. Rev. 259, at pp. 468-269.

6.3 DETERMINANTS OF PERSONAL LAW

6.3.1 DOMICILE

Domicile and nationality have been the traditional determinants of personal law in most Western countries. Formerly, domicile was the sole test until Mancini's famous lecture at the University of Turin in 1851, in which he espoused the principle of nationality as the criterion of personal law.⁹ Canada, America, England and most common law countries continue with the principle of domicile as a test of personal law, while civil law countries, like France, Italy, Belgium, and The Netherlands continue with the principle of nationality. Since domicile and nationality play such a fundamental role in the life of every individual, it becomes essential that their meaning and ascertainment should not be left to arbitrary legal standards. Lord Watson, delivering the judgment of the Privy Council in *Abd-ul-Messih v. Farra*¹⁰ opined:

It is a settled rule of English law that civil status, with its attendants and disabilities depends, not upon nationality but upon domicil alone; and, consequently, that the law of the testator's domicil must govern in all questions arising as to his testacy or intestacy, or as to the rights of persons who claim his succession *ab intestato*.¹¹

Therefore, domicile is the correlation between a person and a particular territory.

As Lord Westbury classically stated in *Bell v. Kennedy*¹²:

Residence and domicile are two perfectly distinct things. It is necessary in the determination of the law that the idea of domicile should exist, and that the fact of domicile should be ascertained, in order to determine which of two municipal laws may be invoked for the purpose of regulating the rights of parties. We know very well that succession and distribution depend upon the law of the domicil. Domicil therefore is an idea of law. It is the relation which the law creates between an individual and a particular locality or country.

⁸ United States Department of States: Executive Agreement Series No. 20 (Washington: United States Government Printing Office, 1929 - 46).

⁹ Dicey & Morris, The Conflict of Laws (London: Sweet & Maxwell, 1993, 12th ed., vol. 1), p. 164; Rabel, supra note 6, p. 121.

¹⁰ (1888) 13 Law Reports Appeal Cases 431.

¹¹ *Ibid.*, p. 437.

¹² (1868) Law Reports 1 Scotch & Divorce Appeals 320.

To constitute common law domicile, a person must be physically resident in a particular territory with the intention of making there his or her permanent home, or at least to live there indefinitely. The two factors of residence and intention are indispensable companions of domicile. Lord Lindley in *Winans v. Attorney-General*¹³ observed:

Further, I take it to be clearly settled that no person who is *sui juris* can change his domicile without a physical change of place, coupled with an intention to adopt the place to which he goes as his home or fixed abode or permanent residence, whichever expression may be preferred. If a change of residence is proved, the intention necessary to establish a change of domicile is an intention to adopt the second residence as home, or, in other words, an intention to remain without any intention of further change except possibly for a temporary purpose.¹⁴

Therefore, mere residence, however long, cannot create a domicile as the two concepts are not synonymous.¹⁵

Again, where the two factors of residence and the relevant intention are present, domicile emerges and no further factors or tests are generally required; this is the position in most Western legal systems. In other words, where a person has established his or her permanent home in a place, it is not necessary for the acquisition of domicile that he or she must adopt the manner of life and habits of the people of the new territory.

In *Casdagli v. Casdagli*,¹⁶ part of the argument before the House of Lords was that, before a British subject could acquire a domicile of choice in an Eastern country, apart from satisfying the two requirements already discussed, he or she must adopt the manner of life of the people in the new territory and identify himself or herself with their customs. Lord Atkinson, denouncing such extraneous requirements, observed:

The voluntary residence there (*i.e.*, in an Eastern country), the intention to make a home there, are apparently not enough. The British subject must adopt the manner of life there, make

¹³ (1904) Law Reports Appeal Cases 287 at 299.

¹⁴ Also, Lord Cranworth in *Moorhouse v. Lord* (1863) 10 House of Lords Cases 272 at 285-286.

¹⁵ Lord Carson in *Gout v. Cimitian* (1922) 1 Law Reports Appeal Cases 103 at 110.

¹⁶ (1919) Law Reports Appeal Cases 145.

himself a member of the civil society of that country. He must identify himself with its customs, he must merge in the general life of the inhabitants; but upon what rational principle? These are conditions which could not be fulfilled by a Hindu Brahman, faithful to his religion and bound by all the rigid rules of his caste, coming to reside in London. And compliance with them would not be possible in British India, where the population is not homogeneous but composed of different races living side by side, mingling little together and professing different religions, observing different customs, obeying different laws. For instance, is the English resident in India to obey the laws binding on a Hindu and regulating the enjoyment and descent of his property or the laws touching these matters observed by the Mahometans?... How is it possible for a British subject "to adopt the manner of life of a population" where caste holds the majority of that population in its iron and unchanging grasp?¹⁷

Again, because of the importance of actual residence as a constituent of domicile, residence cannot be inferred. For instance, residence in Nigeria by a Canadian, as a member of British society in Nigeria, cannot raise the presumption of residence in England and, *a fortiori*, cannot give rise to an English domicile. The concept of domicile without residence does not exist. That point was settled by Lord Watson in *Abd-ul-Messih v. Farra*¹⁸: "The idea of a domicil, independent of locality, and arising simply from membership of a privileged society, is not reconcilable with any of the numerous definitions of domicil to be found in the books."¹⁹

The common law constituents of domicile make it very difficult to establish a change of domicile in most cases. The requirement of intention often requires evidence of a person's personal life, habits and motives which are difficult to establish. Consequently, most federal systems like Canada and U.S have relaxed the common requirements for the establishment of domicile, especially for the purposes of interprovincial or interstate conflict of laws. For instance, because of the great mobility of the American and Canadian population, minimal evidence is required to establish change of domicile from one province or state to another. However, Nigeria,

¹⁷ *Ibid.*, p. 179.

¹⁸ *Supra* note 10, p. 439.

¹⁹ The same view was held by Chitty, J., in *Re Tootal's Trust*, 23 Law Reports Chancery Division 532.

despite its federal constitution, still follows the strict common law conception of domicile.

Finally, domicile locates a person in a legal territory and jurisdiction, *i.e.*, a place subject to a unitary system of law. It is such a place that constitutes a country in the contemplation of conflict of laws. Consequently, in a federation like Nigeria, each of the constituent states is a country and can constitute a person's domicile. As the authors of the *Halsbury's Laws of Australia* stated:

A law area is a territory which has a unitary system of law. A unitary system of law is a system in which the substantive rule or rules applicable to determine the lawfulness and the legal consequences or attributes of conduct, property or status at a particular time in a particular part of the national territory will be the same regardless of where in the territory questions concerning those matters or their consequences may arise.²⁰

However, Graveson cautioned:

...the traditional view of domicile as having reference to the territory over which a single system of law operates is inconsistent with the situation in non-unified states such as federations. It ignores the fact that the states of a federation are subject to two concurrent legal systems, those of the state and those of the federation. The inhabitant of such a state is thus subject to two systems of law, and it is misleading and inaccurate to describe him as subject to only one.²¹

We do not agree with Graveson that the application of the traditional view of domicile in federations creates any inconsistency. When a citizen in a federation is said to be domiciled in a particular state in that federation and therefore subject to that state's law as the law of his domicile, it does not mean that the federal law is thereby excluded or that the citizen is subject to two systems of law in that state. The state's legal system to which that citizen is subject also includes all the federal laws applicable to that state, which thereby become part of the single body of the state's law. To that extent you can say that a state in a federation is subject only to one system

²⁰ Vol. 4, para. 85-10, p. 155, 035.

²¹ Graveson, supra note 5, p. 345.

of law which applies to its citizen. So, the location of domicile in a state of a federation does not carry the implication that the federal law is thereby excluded.

Consequently, there does not seem to be anything in law like a Nigerian, Canadian or United Kingdom or American domicile. A citizen of any of the above countries must be domiciled in a particular part of the territory.²² 'Nigerian domicile' is therefore a legal aberration. A federal or Nigerian domicile can only be created by legislation; for instance, Section 2(3) of the *Matrimonial Causes Act, Laws of Nigeria 1990*, which holds a person domiciled in any part of Nigeria to be domiciled in Nigeria for the sole purpose of exercising divorce jurisdiction. It is therefore surprising that some writers in Nigeria have continued the erroneous use of the phrase 'Nigerian domicile' or 'domiciled in Nigeria.' For instance, F.N. Ekwere, while discussing the doctrine of characterisation, submitted:

Under the Nigerian conflict of laws, domicile forms the basis for the ascertainment and application of personal law, while the continental countries use nationality. Domicil is also used in America to ascertain personal law but the meaning and rules of domicil differ in both countries. A problem might arise in a Nigerian court as to whether a Nigerian who was formerly domiciled there has lost his *Nigerians[sic] domicile* to that of say an *American domicile*.²³ [Italics added]

As already said, a Nigerian or American domicile makes no sense to a conflict of laws lawyer.

²² In *A. G. Alberta v. Cook* (1926) Law Reports Appeal Cases 444 at 450, the Privy Council on appeal from Canada stated: "...unity of law in respect of the matters which depend on domicil does not at present extend to the Dominion. The rights of the respective spouses in this litigation, therefore, cannot be dealt with on the footing that they have a common domicil in Canada, but must be determined upon the footing of the rights of the parties and the remedies available to them under the municipal laws of one or the other of the Provinces." For a similar conclusion: *Breavington v. Godleman and Ors.* (1989-90) 169 Commonwealth Law Reports 41 at 160.

²³ F. N. Ekwere, "Doctrine of Characterisation: Fact or Fiction," (1992/93) Nigerian Current Law Review 63 at 69. As the editors of Cheshire and North submitted: "In the case of a federation, where the legislative authority is distributed between the state and federal legislatures, this law district is generally represented by the particular state in which the propositus has established his home. A resident in the USA, for instance, is not normally domiciled in the USA as such, but in one of its States." Private International Law (London: Butterworths, 1992, 12th ed., by P.M.North and J.J. Fawcett).

6.3.2 NATIONALITY.

What about the principle of nationality? How do the two, domicile and nationality, fit into the Nigerian type legal system?

Nationality imports the reciprocal obligations of allegiance and protection. A person is the national of a country to whose sovereign he owes allegiance, in return for the protection which that sovereign accords him.²⁴ The allegiance here is a permanent one and distinct from the temporary allegiance which a visitor owes to a foreign sovereign in return for his protection during the period of his visit. It was Mancini who, in his famous Turin lecture in 1851, first postulated, or at least popularised, the notion that an individual's personal law should be determined by his political allegiance, *i.e.*, his nationality. Since nationality is mainly a question of birth (*natio*) in a particular country or descent from parents of a particular country, it is relatively easier to ascertain than domicile. But this does not, by any means, make it a better or preferable test to domicile. It has its own achilles heel. A reference to Nigerian law as a Nigerian's national law is meaningless. Is it the federal law, state law or customary law? Nigeria's constitution allows double nationality.²⁵ Where a Nigerian becomes a national of two countries, which of them qualifies as the country of nationality? The answers to these questions²⁶ are less urgent than the application of the criteria of domicile and nationality to the Nigerian situation.

The question becomes: can domicile, *a fortiori* nationality, be used to determine the personal law of a Nigerian subject or person domiciled in a state in Nigeria? When a court, *e.g.*, in Canada, is referred by its conflict of laws rule to the Nigerian law as

²⁴ *United States v. Wong Kim Ark*, (1898) 169 United States Supreme Court Reports 649.

²⁵ Section 28(1) of the 1999 *Constitution of Nigeria* (Lagos: Federal Government Press).

²⁶ See suggestions in that regard in Chapter One.

the law of the *propositus*'²⁷ domicile, is that reference complete or does it need qualification? And if so, what is the nature of the qualification? Is it the Islamic law, customary law, received English law, state legislation, or federal legislation, all of which are applicable in Nigeria, that is contained in the reference? The confusion is further confounded by the fact that Nigeria does not just have a single and uniform system of customary law but as many systems of customary law as its three hundred distinct tribes.²⁸ Probably the late John Westlake had the above problem in mind when he observed:

Domicile, being necessarily connected either with law or with jurisdiction or with both, must always be in a territory, though it need not be at any particular spot in the territory. If it be in India, where there are different communities or societies living under different laws, the domicile is not completely stated unless the statement of it includes that of the community or society to which the person belongs. Thus it may be described as the Indian domicile of a Hindu or Mussulman. Where a British subject is domiciled in an Eastern non-British country, then the description of such a domicile may be stated as Anglo-Egyptian, Anglo-Chinese, or as the case may be.²⁹

When a foreign court, by its own conflict of laws rules, is referred to the Nigerian law as the law of the domicile or nationality of the *propositus*, an additional connecting factor is required to consummate the reference and make it meaningful. In the Nigerian context, and similar systems like India and China, the additional connecting factors should be race, tribe or ethnicity, and religion, as determinants of personal law.

²⁷ The person from whom a line of descent is traced; used as an example of a proposed person.

²⁸ C. K. Meek, *Law and Custom in the Colonies* (London: Frank Cass & Co. Ltd., 1968), p. 145.

²⁹ John Westlake: *A Treatise on Private International Law* (London: Sweet & Maxwell, 1925, 7th ed., by Norman Bentwich), p. 343; however, Chitty, J., in *Tootal's Trust*, 23 Law Reports Chancery Division 532 at 542, declared that, "there is no such thing known to the law as an Anglo-Chinese domicil." Rabel similarly submitted: "Such diversity of personal law is a part of the substantive law of the country concerned. When a conflict rule refers to the "law" of such a country, either because it is the law of the domicil of an individual or because it is his national law, no uniform law being in force in any part of

6.4 Race, Tribe or Ethnic Group as Determinants of Personal Law.

When, therefore, Nigerian law is chosen as the law of domicile or nationality of the propositus, the judge is to further ascertain the tribe or ethnic group to which the propositus belongs. Nigeria has no less than three hundred tribes but the three major tribes are: Hausa/Fulani in the northern part of Nigeria, Ibo and Yoruba in the eastern and western parts of Nigeria, respectively. Also, the three major systems of customary law are Islamic law, Ibo customary law and Yoruba customary law in the northern, eastern and western parts of Nigeria, respectively. Ibo customary law, for instance, applies only to members of that ethnic group. A reference to the law of domicile of an Ibo man, who for instance is domiciled in Imo State of Nigeria, is therefore a reference to his customary law, because that is the law with which he is permanently connected. This should be the basic proposition which is derived from the analysis above. Even in Imo State, the received English law, the State's local legislation, and some federal laws are applicable as part of that State's laws, alongside its Ibo customary law. These need not worry us because once Ibo customary law is accepted as the personal law, then it could be modified or supplemented by the other aspects of the State's laws just mentioned, and as provided by the High Court Law. The Ibo customary law will therefore apply as the personal law³⁰ except where its application is repugnant to natural justice, equity, and good conscience or incompatible either directly or by implication with any law for the time being in force.³¹

Membership of an ethnic or tribal group, which entitles one to the application of its customary law, is not a matter of choice but of descent. It arises from one's birth to

the country, the reference can only be to the particular set of rules that governs the group of persons to which the individual belongs," *supra* note 6, p. 135.

³⁰ "African customary laws are in origin tribal laws, and a member of a tribe would take his tribal law around with him; the description of such tribal laws as "personal law" was therefore apt," A. Allott, *New Essays in African Law* (London: Butterworths, 1970), p. 112.

parents who are members of a particular ethnic group, or whose father at least is a member of that ethnic group. Membership attaches to a person from the moment of birth, just like the domicile of origin.³² Therefore, no one becomes, for instance, a member of the Ibo ethnic group by any voluntary act. No length of residence in an Ibo territory, *e.g.*, Imo State, by a foreigner can ripen into Ibo membership, even with the clearest intention to reside there permanently. The rule thus becomes, no birth no membership. And without membership Ibo customary law cannot attach as the personal law.³³ Consequently, a foreigner, *i.e.*, a non-Nigerian or a Nigerian from another ethnic group, cannot acquire the Ibo customary law as his personal law. On this contention, the Supreme Court of Nigeria erred in law when it held the contrary in *Olowu v. Olowu*.³⁴ We shall come back to this case.

6.5 Religion as the Determinant of Personal Law.

The religious factor as a criterion of personal law is important in the northern part of Nigeria where inhabitants are mainly Moslems and personal law depends on adherence to the Islamic faith. Unlike the ethnic or tribal factor, adherence to the Islamic faith does not usually depend on birth. It involves the voluntary submission and deliberate acts of acceptance. Therefore, reference to the personal law of a Nigerian Moslem domiciled, for instance in Kaduna State, means a reference to

³¹ Section 26 of the *Lagos State High Court Law*, Cap. 60, 1994.

³² With regards to the Frankish Empire established after the end of the Roman Empire, Professor Guterman observed: "The personal law was acquired principally through birth which also determined tribal or national membership. No one renounced this subjective right "without abandoning a little of himself". " Guterman, *supra* note 7, p. 296.

³³ Holland probably envisaged this situation when he stated: "There is a stage of civilisation at which law is addressed, not to the inhabitants of a country, but to the members of a tribe, or the followers of a religious system, irrespectively of the locality in which they may happen to be. This is the "personal" stage in the development of the law." T. E. Holland, *The Elements of Jurisprudence* (Oxford: at The Clarendon Press, 1900, 9th ed.), p. 389.

³⁴ (1985) 3 Nigerian Weekly Law Reports 378.

Islamic law. Apart from northern Nigeria's well-defined system of religious law, a system of religious law does not obtain in any other part of Nigeria.

Religion as a connecting factor to personal law may be illustrated with the case of *Parapano v. Happaz*,³⁵ related to the inheritance of one Peppo Happaz, who died on the 4th of June 1889. He had formally married his widow, after she bore four children for him, in accordance with the rights of the Latin church in Cyprus. The plaintiffs/respondents were collateral relatives of Peppo. They admitted that the widow was entitled to a one-third dower of the estate, but claimed the other two-thirds for themselves on the ground that the children were pre-nuptially illegitimate. The plaintiffs/respondents alleged that Mohammedan law did not recognise legitimation by subsequent marriage. Peppo was, and his relatives were, Christians and members of the Roman Catholic church. The defendants/appellants, Peppo's widow and children, claimed the whole estate. The District Court dismissed the suit. The Supreme Court on appeal decreed the plaintiffs' claim. On further appeal to the Judicial Committee of the Privy Council, Lord Hobhouse observed:

If legitimacy is proved, the right to succession follows. By what law, then, is the legitimacy of a Christian Ottoman subject in Cyprus to be ascertained?... Their Lordships will now assign their reasons for thinking that the Christian law applies.... When the Turks conquered Cyprus, that Island had been for nearly four centuries in the hands of adherents of the Latin church. The conquerors did not enforce all Mahomedan usages on their Christian subjects, but they allowed non-Mussulman sects to be governed by their own laws in diverse matters connected with religion and domestic life. Among such matters are marriage, divorce, alimony, and dower. Now, if the status of husband and wife among Christians is determined by reference to Christian law, it is not difficult to suppose that the status of their children as regards legitimacy may be determined by the same law.... The conclusion is that the succession in this case is governed by the canon law, under which the infant defendants are clearly legitimate.³⁶

³⁵ (1894) Law Reports Appeal Cases 165.

³⁶ *Ibid.*, pp. 169, 175.

6.6 Acquisition and Change of Personal Law in Nigeria: Case of a Foreigner.

In view of the composite legal structure in Nigeria, with the peculiar application of the systems of customary law and the insufficiency of the traditional concepts of domicile and nationality as touchstones of personal law in Nigeria, can a foreigner, *e.g.*, a Canadian citizen, attract Nigerian law as his personal law by his acquisition of a domicile of choice in Lagos State? If the answer is yes, then would he be subject to the application of Yoruba customary law which is in force in Lagos State?

Current law suggests that a foreigner resident in Lagos State who establishes his permanent home there acquires a domicile of choice. Generally, he becomes affixed with the laws of Lagos State as his personal law. However, because he is not a Yoruba man by birth, he does not become subject to Yoruba customary law which is part of the legal system in Lagos State. He would only be subject to the received English law, as applicable in Lagos State, laws made by the Lagos State legislature, and federal enactments as applicable to Lagos State.

In *Casdagli v. Casdagli*,³⁷ the respondent presented a petition for dissolution of her marriage with her husband, the appellant. The latter, a British subject born in England, prayed that the petition be dismissed on the ground that he was domiciled in Egypt, and that consequently the High Court in England had no jurisdiction to entertain a suit for dissolution of the marriage. The respondent answered that the appellant had never abandoned his English domicile. Her counsel submitted:

If a man carries with him into the country where he intends to reside part of the laws of his own country, and enjoys immunity from the laws of the new country, he cannot, by permanent residence, acquire a domicil of choice in that country. It follows that a British subject cannot acquire a domicil in Egypt so as to determine his domicil of origin.³⁸

Lord Finlay, in a lucid and scholarly ruling, rejected this argument:

³⁷ (1919) Law Reports Appeal Cases 145.

³⁸ *Ibid.*, p. 151.

The present case, therefore, depends upon the question whether the husband has an Egyptian or an English domicile. Upon the evidence, and according to the findings of the courts below, the husband has done everything possible to acquire an Egyptian domicile, and this he had acquired unless, as a matter of law, it be impossible for a British subject in his position to acquire such a domicile.³⁹

Further:

It has often been pointed out that there is a presumption against the acquisition by a British subject of a domicile in such countries as China and the Ottoman dominions, owing to the difference of law, usages, and manners. Before special provision was made in the case of foreigners resident in such countries for the application to their property of their own law of succession, for their trial on criminal charges by courts which will command their confidence, and for the settlement of disputes between them and others of the same nationality by such courts, the presumption against the acquisition of a domicile in such a country might be regarded as overwhelming unless under very special circumstances. But since special provision for the protection of foreigners in such countries has been made, the strength of the presumption against the acquisition of a domicile there is very diminished.⁴⁰

The situation in Lagos State is much more conducive to the acquisition of a domicile of choice by a foreigner than in Egypt, as portrayed in the facts of *Casdagli's* case. This is because, instead of special provision for the protection of foreigners, Lagos State has elaborate system of received English law in addition to state and federal enactments which reflect modern civilisation and can apply to foreigners without much difficulty. *Casdagli's* case also shows that a foreigner can acquire a domicile of choice in a state in Nigeria notwithstanding the prevalence of the customary law system from which he will be excluded.

Similarly, in *Rex v. Hammersmith Superintendent Registrar of Marriages, ex parte Mir-Anwaruddin*,⁴¹ Dr. Mir-Anwaruddin sought by means of a *mandamus* application to compel the superintendent registrar of marriages to issue him a certificate and licence to marry one Vyolet Louise. Dr Mir-Anwaruddin, a Mohammedan domiciled

³⁹ *Ibid.*, p. 156.

⁴⁰ *Ibid.*, pp. 156-157; similarly, in *Mather v. Cunningham*, 105 Maine 326; 74 Atlantic Rep. 809, the deceased had made his home and carried on his business at Shanghai, while his domicile of origin was Waldo County, Maine. The question for determination was whether an American can as a matter of law acquire a domicile in the province of Shanghai where, by treaty, American law was substituted for the Chinese local laws. It was held that the deceased, at the time of his death, had abandoned his domicile of origin in Waldo County, and had acquired a domicile of choice in Shanghai.

in India, was previously married to one Ruby Hudd, a domiciled Englishwoman, in accordance with Christian rites. Dr Mir-Anwaruddin, while in India, purportedly dissolved his previous marriage with Ruby Hudd by a writing of divorce in accordance with his religious personal law, Mohammedan law. Though the case turned on the recognition of that form of religious divorce, Viscount Reading, C.J., at the lower court, commented on the acquisition of Indian domicile by Ruby Hudd:

The law of his religion is the applicant's personal law; it is not the general law applicable to all who are domiciled in India. It is not a law peculiar to India, but to Mohammedans wherever they may be domiciled....An Englishwoman or a woman domiciled in England who marries in England a person domiciled in Scotland, Ireland, or India, or elsewhere out of the realm of England, acquires by the status of marriage the domicile of the husband and is subject to the law of that domicile, but she does not acquire his religion or become subject to the laws of his religion except in so far as they are the law of his domicile, and then to that extent only.⁴²

The proposition, that a foreigner can acquire a domicile in Lagos State and become subject to the general law in that state other than the Yoruba customary law as his personal law, is further supported by the case of *Savage v. Macfoy*.⁴³ Here, M. was born in Freetown, Sierra Leone and was not a Nigerian native. He purported to marry

⁴¹ (1917) 1 Law Reports King's Bench 634.

⁴² *Ibid.*, p. 643; the final decision in this case cannot pass without criticism. The decision, which was upheld by the Court of Appeal (Swinfen Eady, L.J., Bankes, L.J., and Lawrence, J.), was that the writing of divorce, though in accordance with Mohammedan law, was unknown to English law and could not therefore dissolve the English marriage; also that since it was not a decree proceeding from the court of domicile, *i.e.*, India, it was not recognisable in England and not effective to dissolve the previous marriage with Ruby Hudd. By this decision the court erroneously allowed English law, which was not Dr. Mir-Anwaruddin's personal law, to determine his status, *i.e.*, whether at the time of the application for second marriage, Dr. Mir-Anwaruddin was a married or single person. This was a question which ought fully to have been regulated by his religious personal law: Mohammedan law. And since the writing of divorce was done in accordance with that law it ought to have been recognised with the result that Dr. Mir-Anwaruddin ought to have been held a single person at the time of his application for a second marriage. Though Bankes, L.J., agreed with the final decision not to recognise the writing of divorce in that case, his approach in treating the matter as an evidential issue attracts less criticism. He held at page 661 that, "the appellant on August 27, 1915, claimed to dissolve it (*i.e.*, the first marriage) by a writing of divorce, and he claimed to dissolve it because he was a Mussulman, and he claimed that upon his marriage his wife acquired his status, and that therefore his law as a Mussulman applied to her, and that law included his right to put her away by a writing of divorce. Now, of course, that law, if it exists, must be proved by evidence, and the evidence which has been brought forward on affidavit, in my opinion, indicates something very different." However, this case was decided in 1917. It does not appear, for reasons already stated, that it will be followed in future cases. In fact, similar religious divorce was recognised by later cases: *Schwebel v. Unger* (1964) 42 Dominion Law Reports (2d) 622; *Har-Shefi v. Har-Shefi* (1953) 2 All England Law Reports 373.

⁴³ (1909) Renner's Reports (Ghana) 504.

S., a native of Nigeria, by customary law. S. sued for a declaration that she and her children by M. were entitled to M's intestate estate as against the brothers and sisters of M. The issue before the court was the validity of the union between M. and S.

Osborne, C.J., observed:

The mere fact of Macfoy having made Lagos his domicile of choice would not necessarily make him subject to or given the benefit of native law and custom, and his ordinary relations would be governed by English and not native law. I do not go so far as to say that the court ought not to apply native law in some transactions between Sierra Leone and colonial natives where injustice would be caused by strict adherence to English law, but I cannot hold that that applies to a contract of polygamous union when expressly repugnant to the English law. Marriage is something more than a mere contract, and creates a definite status. Unions involving polygamy are prohibited by English law on grounds of public policy, and though an exception is made by the local law in favour of polygamous unions where both parties are natives of the colony or protectorate, the application of that local law must be strictly confined to the persons for whom it was intended, and no effect will be given in this court, whatever views native tribunals may take in such matters, to a polygamous union which would not be recognised as valid by the laws of the domicile of origin of either party.

Thus, though M. was domiciled in Lagos, he was not subject to customary law and could not enjoy the benefits thereof, *i.e.*, customary marriage.

In *Brown v. Miller*,⁴⁴ the defendant was a West Indian resident in the Gold Coast (now Ghana) for the previous 62 years. She was a spinster and had acquired land from a native chief in Accra. She was sued in a Ga Native Tribunal regarding title to certain land. The tribunal assumed that she was a native and hence subject to the Ga law of property. She claimed that she was not a native under the *Native Jurisdiction Ordinance, 1883, S.2*, which defined it thus: "any person who is under Native Customary law or under any Ordinance a member of a Native community of the colony, Ashanti or the Northern Territories." In upholding her objection to the jurisdiction of the court, Crampton Smyly, C.J., observed:

...mere residence alone on the Gold Coast, even if prolonged, or even if she should purchase Accra land, does not make a stranger coming to the colony a Native so as to bring her within the jurisdiction of the Native Tribunals as established under the Native Jurisdiction Ordinance 1882[sic], as amended.⁴⁵

⁴⁴ (1921) Selected Judgments of the Full Court of the Gold Coast (Ghana) Colony (F. Ct. 20-21) 48.

⁴⁵ *Ibid.*, p. 49.

Wilkinson, J., in his own contribution opined:

If there were a Native customary law according to which strangers to this country (let alone to West Africa) could become for the purposes under reference members of a native community without any exercise of conscious volition on their part, and by mere length of residence or by mere holding of property, or merely by being domiciled here, or merely by marriage, I do not think that would be a law or custom which this court would be bound to enforce under section 19 of Ordinance No. 4 of 1876.⁴⁶

His Lordship then concluded:

In my view, before a stranger can for the purposes of section 2 of Ordinance No. 5 of 1883 be held to be a *native* it must be clearly shown that he has by definite and unmistakable signs and acts committed himself to the adoption of membership of the native community which claims him as one of its body.⁴⁷

To the extent that Wilkinson, J., purportedly held that a foreigner can attract the application of customary law to himself by his own voluntary acts or, as he put it, by "exercise of conscious volition," the learned judge was, with respect, wrong. As we have relentlessly maintained, customary law has a single touchstone and connecting factor, which is one's birth into a particular tribal group or one's membership of a particular religion.

However, where a foreigner, who has acquired a domicile of choice in a part of Nigeria, was previously subject to a religious law as his personal law, it seems that he will continue to be subject to that religious law as his personal law provided that a similar religious law obtains in that part of Nigeria where he is now domiciled. For instance, Mr. X, a Moslem originally domiciled in Saudi Arabia, acquires a domicile of choice in Kaduna State, *i.e.*, in Nigeria, where Moslem law obtains alongside the received English law. It seems that Mr. X will continue to be subject to Moslem law in Kaduna State since that religious law is apparently the same both in Saudi Arabia and Nigeria.

⁴⁶ *Ibid.*, p. 51.

⁴⁷ *Ibid.*

An illustration is the case of *Tan Ma Shawe Zin v. Khoo Soo Chong*⁴⁸: the plaintiff/respondent claimed that as nephew he was the sole heir to the estate of his uncle, Khoo Boon Tin, and his uncle's widow, Tan Ma Thin, both Chinese Buddhists who had been domiciled and died in Burma, on the ground that Chinese customary law governed inheritance and succession of Chinese Buddhists in Burma. The defendants/appellants were the sisters and brother of the widow Tan Ma Thin. The question in the appeal before the Privy Council was: what law applied by the High Court at Rangoon, should determine the person or persons entitled to succeed to the property in Burma of a Chinese Buddhist who was domiciled in Burma at the date of his death? The trial judge and, on appeal, the Divisional Bench, held that Chinese customary law governed the case and that the plaintiff was entitled to the inheritance. The Privy Council reversed the decisions of the lower courts.

Though this case largely turned on the construction of Section 13 of the *Burma Laws Act, 1898*, which provided for laws applicable to the various religious sects, *e.g.*, Buddhist law for Buddhists, Hindu law for Hindus, the conclusion reached by the Privy Council would still be the same by the application of our analysis above. Sir George Rankin, in delivering the judgment of the Privy Council, observed:

The matter must now be determined upon the words of s.13 as a question of construction. Their Lordships are in agreement with Page, C.J., that a Chinaman who is a Buddhist comes within the term "Buddhists" in cl. (a) of sub-s.1 of s.13, and cannot be excluded therefrom either on the ground that he is not a Burmese Buddhist or because the law which governs him in China is not a specifically Buddhist or even a religious law.... There would be little difficulty, were it shown that different schools of Buddhist law obtained in different places or among different peoples, in applying to Buddhist law the principle that in each case the appropriate school of law is that to which the propositus or the persons concerned owed allegiance. As regards Hindu law, indeed, this principle has never been in doubt.⁴⁹

⁴⁸ (1939) Law Reports Appeal Cases 527.

Later, His Lordship stated:

...it (*Burma Laws Act, 1898*) does not admit of being interpreted in such a sense that Buddhist law is only to be applied to Buddhists if it be the law prevailing in the country of their origin. The historical considerations to which their Lordships have alluded do not suggest that the intention of the sub-section is to prescribe for each Buddhist whatever law is found to govern him, but rather that all Buddhists shall be governed by a religious law which is deemed to be theirs as Buddhists.⁵⁰

Thus, the Privy Council applied to a Chinaman (foreigner) domiciled in Burma a religious law, *i. e.*, Buddhist law, to which he was subject as his personal law in China by virtue of his religion and which was also obtainable in Burma, his domicile of choice.

6.7 Acquisition and Change of Personal Law in Nigeria: Case of a Nigerian.

Here, we shall examine two situations: a Nigerian changing his personal law from a system of customary law to, for instance, Canadian, English or American law; and a Nigerian changing his personal law from one system of Nigerian customary law to another.

It is legally possible for a Nigerian to acquire a foreign law as his personal law in place of his customary law. All he needs to do is to acquire a domicile of choice in that foreign country, *i. e.*, making his permanent home there. Therefore, an Ibo man in Nigeria, subject to Ibo customary law, who comes to Manitoba in Canada and makes a permanent home there has acquired the laws of that province as his personal law.⁵¹

But when we come to a change of personal law from one Nigerian system of

⁴⁹ *Ibid.*, p. 537.

⁵⁰ *Ibid.*, p. 540.

⁵¹ Professor A. Allott submitted: "We are left with the case of the African who claims to be exempt generally from the customary law. He may become so exempt by change of domicile. Thus an African from, say, Ghana or Kenya who makes England his permanent home would lose his Ghanaian or Kenya domicile and acquire an English one. On a return visit to Ghana or Kenya respectively the rules of private international law would operate so as to make his personal law the law of England." *Supra* note 30, p. 193.

customary law to another, we are presented with an arduous legal scenario. Going in the teeth of the Supreme Court of Nigeria decision in *Olowu v. Olowu*,⁵² change of personal law from one system of Nigerian customary law to another seems beyond the realm of legal possibility. As explained above, the acquisition of customary personal law does not depend merely on domicile but on birth and religion. The concern here is acquisition of personal law that attaches through birth into an ethnic group, not personal law that attaches by using religion as a connecting factor. In other words, an Ibo Nigerian subject to Ibo customary law as his personal law can change it to Islamic law by joining the Islamic faith. That is not the concern here.

The question is: can an Ibo Nigerian, with Ibo customary law as his personal law acquire Yoruba customary law as his new personal law, by acculturation or by living permanently in Yorubaland, adopting the Yoruba manner of life and identifying with Yoruba customs? In *Olowu*'s case, the Supreme Court wrongly and without discussion of the conflict of laws questions involved, answered the above question in the affirmative.

In *Olowu v. Olowu*, the appellants were the children of one Adeyinka Ayinde Olowu whose intestate estate was the subject matter of the action. The deceased was a Yoruba of Ijesha origin. He lived from childhood to his death in Benin City, married Benin women and acquired substantial immovable property in Benin City. During his life he applied to the Oba of Benin to be "naturalised" a Benin indigene and the request was granted. The court found that it was by virtue of the "naturalisation" that he was able at that time to acquire immovables in Benin City. His entire estate, movable and immovable, was distributed in accordance with Benin customary rules of succession. The appellants, some of the deceased's children, were dissatisfied and

⁵² (1985) 3 Nigerian Weekly Law Reports 378.

thereupon brought an action giving rise to this case at the Benin High Court, contending that Yoruba customary law was the applicable law since their father was of Yoruba origin. The respondents, also children of the deceased, contended that Benin customary law was applicable because their father became a “naturalised” Benin indigene. The High Court found in favour of the respondents and the judgment was upheld by the Court of Appeal. The Supreme Court, in a unanimous judgment, upheld the decisions of the lower courts and dismissed the appeal.

If the Supreme Court had appreciated the analogous conflict of laws questions involved in the case, its decision might have been different. First, how have the courts treated the important question of burden of proof? The High Court held, and the Court of Appeal and the Supreme Court affirmed, that the deceased was originally a Yoruba man: “I have no hesitation in holding that the late A.A. Olowu is of Yoruba extraction – an Ijesha man.” This means that all the courts agreed that originally, at least, the deceased was subject to Yoruba customary law as his personal law, which was the law that attached to him from the moment of birth into a Yoruba family and ethnic group. In the language of English law, the deceased had a domicile of origin in Ijesha, *i.e.*, a Yoruba town, or was a national of Ijesha.⁵³

Consequently, in conflict of laws, it was the clear burden of the respondents, who contended that the deceased had abandoned his Ijesha nationality, domicile of origin or Ijesha customary law, to prove the same with convincing evidence. In this connection, Lord Lindley unequivocally stated in *Winans v. Attorney-General*⁵⁴:

⁵³ Similarly, in *In re Sapara* (1911) Renner’s Reports (Ghana) 605, Sapara’s father, an Ijeshaman, had been sold into slavery in Sierra Leone, where Sapara had been born. But Sapara had lived in Lagos for the greater part of his life. On these facts, the then Supreme Court of Southern Nigeria held: “But one’s place of birth may be a mere accident, and the fact that his father was an Ijesha, forcibly removed from his domicile of origin, is in my judgment sufficient to stamp Dr. Sapara with the nationality of an Ijesha,” p. 606.

⁵⁴ (1904) Law Reports Appeal Cases 287 at 299.

“...the burden of proof in all inquiries of this nature(*i.e.*, as to domicile) lies upon those who assert that a domicil of origin has been lost, and that some other domicil has been acquired.” But the Supreme Court of Nigeria placed this onus of proof on the appellants instead of the respondents, who contended in favour of Ijesha customary law. Coker, J.S.C. observed:

I have already considered and given reason why the burden of adducing evidence lay on the plaintiffs (*i.e.*, appellants) to prove why the purported distribution under Benin customary law should be nullified, and why the Yoruba customary law should be applied, particularly when the court found that the deceased at the time of his death was in the eye of the law a Benin indigene.

Thus, the court proceeded on the presumption that the deceased was already a “naturalised” Benin man and the burden of proving the contrary lay on the appellants. As *Winans*’ case shows, the only presumption which the law allows in the circumstances is that the deceased was an Ijesha man who continued to be subject to Ijesha customary law as the law of his birth or of his domicile of origin; and the burden of proof is on the person who asserts the contrary. So, on the burden of proof alone, the Supreme Court decision, with respect, is not justifiable.

Then, on the question whether a Nigerian can change his personal law attached by birth. to another system of customary law by his own voluntary acts, Bello, J.S.C., (as he then was), opined:

The word “naturalisation” which takes place when a person becomes the subject of a state to which he was before an alien, is a legal term with precise meaning. Its concept and content in domestic and international law have been well defined. To extend its scope so as to include a change of status which takes place under native law and custom, when a person becomes a member of a community to which he was before a stranger, may create confusion. I would prefer to describe a change of status under customary law as culturalization. I may add that culturalization with its resultant change of personal law may take place by assimilation or by choice. Strictly speaking, this case on appeal is not a case of a change of personal law by assimilation.⁵⁵

⁵⁵ *Supra* note 52, p. 389.

His Lordship then concluded: “The case in hand is concerned with culturalization by choice which axiomatically led to a change of personal law by choice.”⁵⁶

With respect, Justice Bello *a priori* held that change from one system of customary law to another is possible by the propositus’ voluntary acts. Unfortunately, this *a priori* approach did not give countenance to or afford any room for consideration of the question: Whether personal law derivable and actually derived from birth can be substituted with a similar personal law? A little consideration of this conflict of laws question involved would have revealed the dangers lurking on the path of his Lordship’s reasoning. The counsel that argued this case did not canvass the above point and therefore made the present Supreme Court decision inexorable. The central proposition we have aggressively maintained in this paper is that such a change of personal law is not possible. It attaches by birth, and birth alone. But even assuming what we cannot assume, that such a change of personal law is possible, a heavy burden of proof is on the person who alleges the change. In the present case, since the deceased was not born a Benin man, and it was not naturally possible for him to reverse his birth and ethnic identity: he could not have become a Benin man by choice so as to attract the application of Benin customary law to his intestate estate.

There was a mental deception that lurked in the word “naturalisation” referred to by Justice Bello. That is a familiar word in public international law and constitutional law. It is the means of acquisition of another state’s citizenship.⁵⁷ Though Bello, J.S.C., preferred “culturalisation” to “naturalisation,” he apparently regarded “culturalisation” as having the same effect as “naturalisation,” *i.e.*, change of nationality and therefore personal law. With this, there was no room left to consider

⁵⁶ *Ibid.*, p. 390.

whether change, in the first instance, was possible. It suffices to say that change of customary personal law, *i. e.*, birth law, is not possible even by the medium of “culturalisation.”⁵⁸

Uwais, J.S.C., as he then was, in his contribution adopted a misleading approach to the important but improperly framed question before the court.⁵⁹ In treating the question before the court as one of fact instead of law, he concluded:

On the evidence before it the High Court found that the deceased before his death changed his status from that of Yoruba to that of Benin. It followed therefore that the Benin customary law of inheritance would apply to the distribution of the estate since he died intestate. I think this finding of the trial court is unassailable.⁶⁰

This factual approach is simply wrong because the question of whether a birth law, *i.e.*, personal law, can be substituted for another birth law is clearly a question of law and not of fact. Either the law, forum’s law, allows it or not. If the law does not allow such replacement, that is the end of the matter. However, it is possible that the forum’s law may allow such a change and then state the conditions precedent to an effective change of birth law. It is only then that considerations of the facts will be necessary to ascertain whether the conditions have been met.⁶¹ What apparently happened in this

⁵⁷ Justice Gray in *United States v. Wong Kim Ark* (1898) 169 United States Supreme Court Reports 649.

⁵⁸ “The question of a free choice of law to which we now turn, for a long time aroused controversy. The right of an individual to change his birth law at will was suggested by Montesquieu, who made it the basis of an elaborate theory for the disappearance of the Roman law in northern France. According to Montesquieu, the reason the Roman law did not survive in the so-called country of customary law, or *pays de droit coutumier*, was that the Franks allowed the conquered population to embrace the Salic law. Furthermore, the Salic law offered an incentive to Romans to accept it because of the higher composition allowed to Franks. This free choice of law was based on a number of arguments which do not bear up well under examination.... In principle, a free choice of law was certainly not permitted. In practice, the free choice might be achieved in legitimate ways. In theory, the average person accepted his law with the same good grace with which he accepted membership in his national group or his church.” Guterman, *supra* note 7, pp. 303, 306.

⁵⁹ It seems that the court treated the question as being: whether the deceased had, as a fact, become a Benin man by acculturation rather than, whether the deceased, a Yoruba man by origin and tribe, can in law become a Benin man so as to be subject to Benin customary law?

⁶⁰ *Supra* note 52, p. 400.

⁶¹ For instance, the question whether the law allows change of domicile is a question of law, but satisfaction of conditions for the acquisition of a new domicile is a question of fact. It is now notorious that the law allows the acquisition of a new domicile of choice provided that the conditions of actual

case was that the court proceeded to determine whether the factual conditions for change of birth law had been met, without first determining the initial question of law involved: whether such change was legally feasible?

Much more interesting, in terms of understanding the misconception of conflict of law issues involved in this case, is the judgment of Oputa, J.S.C., (as he then was). The learned Justice of the Supreme Court decided to treat a fundamental question of conflict of laws, *i.e.*, status, as a question of estoppel:

I will go further and say that the appellants, the respondents and in fact all the eleven children of the late A.A. Olowu who are now his successors in title in respect of those properties are also estopped from denying that their late father acquired the status of a Benin man which status enabled him to acquire those properties. All the children of the late A.A Olowu are estopped from denying that their father though of Yoruba extraction lived and died a Benin man. They are required to abide by that assumption because it formed the conventional basis upon which the late Adeyinka Ayinde Olowu acquired his property in Benin.⁶²

But status is not a function of estoppel. Status cannot be acquired or lost by the operation of estoppel, which is yet to find a respectable place in the determination of a man's family relations. A man's status is a function of his domicile or nationality. These tests, as already noted, are consummated in Nigeria by the factors of religion, birth or ethnic group. As C. M. Schmitthoff observed: "...On principle, relationships of domestic status should be governed by the personal law of the *de cuius* which, in English and American law, is the law of the domicil."⁶³ Similarly, Brett, L.J., stated in *Niboyet v. Niboyet*⁶⁴:

The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of a community....As that relation and status are imposed by law, the only law which can impose or define such a relation or status so as to bind an individual, is the law to which such individual is subject.

residence and the relevant intention are satisfied. The question of the satisfaction of these conditions, according to Lord Finlay in *Casdagli v. Casdagli* (1919) Law Reports Appeal Cases 145 at 157, "is one to be tried on the ordinary principles applicable to such questions of fact."

⁶² *Supra* note 52, p. 405.

⁶³ C. M. Schmitthoff, *A Textbook of the English Conflict of Laws* (London: Isaac Pitman & Sons, Ltd., 1945), p. 271.

⁶⁴ (1878) Law Reports 4 Probate & Divorce Cases 1 at 11.

To inject the concept of estoppel, as done by Justice Oputa, into this relatively settled area of the law, *i.e.*, the ascertainment of status, is nothing but an invitation to confusion. Is a man estopped from challenging his status of a married man because he bought property on that understanding, filled and filed relevant forms on that basis, and got people to know and address him as a married man? Will the court not only concern itself with the sole legal issue of the validity of the man's marriage, by reference to the law of the place where it was celebrated, in case of formal validity, or by reference to the man's personal law, in case of intrinsic validity?

What has estoppel to do with the above questions? Is a person, on account of his conduct, estopped from contending that he is not illegitimate? Will the question of his legitimacy or illegitimacy not be referred to the personal law? As in this case, ought the questions of the deceased's status, *i.e.*, whether he was a Yoruba or Benin man, and therefore the personal law applicable to him, to have been determined by estoppel based on the facts of the case or by reference to the deceased's birth law and rules of conflict of laws of the forum? These rhetorical questions exemplify the inopportune use of estoppel in this case. There is no doubt that the Supreme Court of Nigeria will have a re-think when similar facts are presented to it again.

CONCLUSION:

Because conflict of laws ultimately rests on the locational identities of the parties, this chapter has examined the need for a single legal system that determines all questions relating to a person's status, wherever he or she may be. The answer is in the concept of personal law. The concepts of domicile and nationality as criteria of personal law suggest the need for qualification by the factors of tribe, ethnic group or religion, in their application in Nigeria. Personal law can be acquired and lost in

Nigeria, by both a Nigerian and a foreigner: a foreigner can acquire a domicile of choice in Nigeria without being subject to customary law; a Nigerian can acquire a domicile of choice outside Nigeria and thereby cease to be subject to customary law; and a Nigerian native, subject to a system of customary law in Nigeria, cannot by his voluntary acts or assimilation change it to another system of customary law in Nigeria.

SUGGESTION

There is no doubt that conflict of laws is still in its infancy in Nigeria. The legal historical reconstruction undertaken in the previous chapters shows that most of its common law principles and concepts are yet to be judicially tested in the Nigerian courts. This contrasts with the position in America and Canada where the traditional concepts of conflict of laws have been subjected to incisive judicial and scholarly criticism, which in most cases has led to abandonment of the classical English law approaches. Again, in these jurisdictions, statutes have been employed to change or clarify the law in most areas of conflict of laws.

Manitoba statutorily¹ dealt with the various problems emanating from the common law concept of domicile. In the United States, the cases show a marked departure from the common law concept of domicile, as in other areas of conflict of laws. For instance, the doctrine of revival of domicile of origin is not accepted in America.² Even in England, the confusing interpretations of the rule in *Phillips v. Eyre*³ in the case of *Chaplin v. Boys*⁴ attracted legislative intervention.⁵

The point is that legislative intervention, in most cases, is apt when it is preceded by enormous judicial activity and scholarly criticism in a particular area of law. It is then that the particular problem can be adequately covered by a statute enacted for that purpose. It is in this context that the above statutory interventions are germane. Consequently, it is suggested that Nigeria should not be in a hurry to follow the statutory examples in other jurisdictions. The ferment that led to the legislative intervention in other jurisdictions is yet to be manifest in Nigeria. By the time we

¹ *Domicile and Habitual Residence Act, R.S.M. 1987, c. D-96.*

² *Re Jones' Estate* (1921) 192 Iowa 78, 182 N.W. 227.

³ (1870) Law Reports 6 Queens Bench 1.

⁴ (1971) Law Reports Appeal Cases 356.

⁵ Sections 10, 11 and 12 of *Private International (Miscellaneous Provisions) Act, 1995, c. 42.*

experience abundant judicial activity in the area of conflict of laws in Nigeria, it might well turn out that the judicial and statutory solutions in other jurisdictions are completely inappropriate when applied to the Nigerian situation. This is not unexpected knowing that different jurisdictions have different problems. For instance, the presence of customary law in Nigeria may pose a conflict of laws problem of a nature not witnessed in other jurisdictions.

At this early period in the development of the subject in Nigeria, Nigerian judges, and not the legislature, should be allowed to deal with the emerging problems of application and adaptation of common law conflict of laws rules by a process of judicial interpretation. In this process, the Supreme Court of Canada can offer guidance.

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