WITHIN AND WITHOUT: THE RELEVANCE AND POTENCY OF THE LAW BEYOND OUR FRONTIERS

AN INAUGURAL LECTURE, 2006

by

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UNIVERSITY OF IBADAN

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The Vice-Chancellor, Deputy Vice-Chancellor(Administration), Deputy Vice-Chancellor (Academic), Registrar, Librarian, Provost of the College of Medicine, Dean of the Faculty of Law, Dean of the Postgraduate School, Deans of other Faculties and of Students, Distinguished Guests, Ladies and Gentlemen.

In the University setting an inaugural lecture is delivered by a Professor for the purpose of telling the whole world what it is that one has contributed by way of research or advancement of knowledge. One thing that distinguishes human beings from other creatures is our ability (as human beings) to advance beyond our yesterday and today. Indeed, we have the ability to project into the future. An academic environment provides the needed forum for research and advancement of knowledge. An inaugural lecture is therefore not just a ritual but an endeavour to be treated with the seriousness it deserves.

In choosing the topic of this inaugural lecture, I took into consideration the fact that my teaching experience, publications and research endeavours have been in the areas of Commercial Law, Property Law, Private and Public Law, Municipal Systems of Law and International Law both Private and Public although I obtained my Ph.D in Private International Law. I have seen the law from within and without. Based on this, it is the purport of this inaugural lecture to discuss how the law works within the municipal system and having regard to the convergence of laws, co-operation and international intercourse, both social and commercial, between persons of various nationalities as well as co-operation between nations it is necessary to discuss the relevance and efficacy or potency of the law or various laws beyond the frontiers of each nation or the international dimension of law.

The first point that needs to be noted is the necessity for law. Law can be defined as a rule of social conduct or a system by which inter-personal and organizational relationships are regulated or enforced. Law has come to be recognized as a viable method by which peace and harmony can be ensured in a world with conflicting interests and because, in most cases, there are insufficient means of satisfying multifarious needs. One development that has come to be accepted is the grouping of

various geographical locations into states or nations. This may have happened by reason of historical consanguinity, colonialism, conquest or agreement. What is beyond doubt is the fact that the world has come to be known through the nation states. No nation is without law. Additionally, no nation is an island as to conclude that only laws promulgated within its borders will be relevant and efficacious. Thus, this inaugural lecture is about the nature, relevance and application of the municipal law within the country of its enactment or promulgation and the relevance of operation and efficacy of the law, enacted, promulgated or decided outside the frontiers of a municipal system but to be given necessary effect within the municipal system.

Municipal Law

Municipal law is the law enacted, promulgated or decided within a state. It may be a law made in a sub-division of the nation state as in the case of a law made by a state government, a local government or any other legal sub-division that has the power to make laws or due regulations. It may also be a law made by the central government of a nation. One feature of a municipal law is that it is a law made within a sovereign state. The sovereignty which a free state possesses clothes that sovereign state with the requisite power to make laws for the sovereign state. For the purpose of governance within a nation state, many forms of government have come to be recognized. Such forms of government include monarchical system and democratic government. Some forms of government have become outdated. Such forms of government include, oligarchy and facism. Military rule which is constitutionally an aberration was a form of government that many African nations had to contend with given the various internal problems. It is gratifying to note that many African nations are now referred to as emerging democracies. Democratic rule is therefore the basic form of government that is globally accepted. Democracy is a form of government that is made up of the representatives of the

people in composition[1]. In most of the civilised nations of the world, a democratic government may be given orientation or direction through the adoption of a constitution or a central constitution and sub-national constitutions[2] or a central constitution embodying the requirements of the sub-divisions within the corporate state[3]. A country may also be governed by an unwritten constitution in the form of conventions which have become trite given the requirements or needs of that society[4]. Other laws are also made by the competent legislative body or bodies and through delegated legislation, for the day to day running of the government. All these laws add up to make the municipal law.

A peculiar feature of municipal law is that as long as the law is valid and still in operation, it has the consequential effect of being very potent in existence and in application to the relevant state in the regulation of affairs or issues. Since such laws normally wear the garment of their legislative authority, their infraction is usually met with appropriate legal sanctions. And since it is accepted that each sovereign state possesses the requisite legal power to legislate and regulate issues, state of affairs and governance within that state, there ought not to be a problem with respect to the potency or efficacy of such laws. However, the history of some of the countries of the world is such that they were colonized in the past and had to make use of the laws made for them by their colonial masters. Thus, this discourse that has as its focus, the law within and without, must, in the process of discussing the law, even within, look or consider what obtained during the colonial era. The objective is not to consider the history of such laws ***per se***, but to consider the operation of such transplanted laws in the context of their operation within the municipal system.

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[1] See Yakubu J. Ademola, ***Democracy, Good Governance and the Phenomenon of Democracy in Nigeria***, 2004/2005, Numbers 16 & 17 ***Annals of the Social Science Academy of Nigeria,*** pp. 53 - 86

[2] See the American Central Constitution and the constitutions of the states that make up the United States of America and the 1960 Constitution of Nigeria.

[3] See the 1963, 1979 and 1999 Constitutions of Nigeria

[4] See the United Kingdom's democratic system

Municipal Law during the Colonial Period: The Position of Some Common Law Jurisdictions with particular Reference to Nigeria

Most African states were tribal groups before the advent of the Europeans on the various African soil. The various tribal groups were simple men and women of valour whose ways of life were regulated by various customs and values. The natural endowment of instinct and intelligence enabled them to stay together in peace and harmony under accepted leaders and kings and in accordance with the rules of conduct which were acceptable to them. The advent of the Europeans on the various African soils and the subjugation of the indigenous people led to the introduction of their various legal systems. Such Europeans included the British, Germans, French, Portuguese and Italians[5].

With respect to Nigeria, its subjugation by the British was in phases. The British traded with the coastal areas thereby making interaction with the coastal people possible. The trading areas included Lagos, Benin, Bonny, Brass, New Calabar (now Degema and old Calabar). Consults were appointed by the British for the purpose of regulating trade between the British and the indigenous merchants. The first consul was appointed in 1849. This led to the establishment of consular courts whose jurisdiction extended to the then Dahomey now Republic of Benin and the Cameroons[6]. The cession of Lagos to the British by King Dosumu (Docemo) in 1861 led to the recognition of the authority of the British over Lagos. Lagos became a British colony. English law was established in Lagos with effect from March 4, 1863. The Supreme Court of the Colony, the first of its type was established by virtue of the Supreme Court Ordinance No 11 of 1863.[7] The court was conferred with civil and criminal

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[5] See Asiwaju A.I. ***Partitioned Africans, Ethnic Relations Across Africa's International Boundaries 1884 – 1984,*** *C Hurst & Co. London & University of Lagos Press 1984.*

[6] Obilade A.O, ***The Nigerian Legal System***, Sweet & Maxwell, Second Impression 1981, pg. 18

[7] ***Ibid***. See also Dupont J. ***The Common Law Abroad, Constitutional and Legal Legacy of the British Empire***, Fred B. Rothman Publications, Littleton, Colorado 2001 pp. 912 – 932. See also Chief Akinjide Richard, **Good Governance, Oil and Gas, And National Development**, Anniversary Lecture delivered on Tuesday, January 31, 2006 at the 30th Anniversary of Ondo State, Akure, Nigeria, series 24.

jurisdictions. In 1866, the British placed under one government, then known as the Government of the West Africa, the settlements which consisted of Lagos, the Gold Coast, Sierra Leone and Gambia[8]. Appeals from the Supreme Court of each of these settlements lay to the Judicial Committee of the Privy Council. Although the early Gold Coast Colony consisted of the settlements of Lagos and Gold Coast as established in 1874[9], the Supreme Court of Lagos was established in 1876 as a Supreme Court of Lagos and other neighbouring territories. It was a Court of Record by virtue of the Supreme Court Ordinance No 4 of 1876. Like other Supreme Courts of the other establishments, it had jurisdiction and powers similar to that of Her Majesty's High Court of Justice in England. It had jurisdiction in the Colony of Lagos and other neighbouring territories under the British rule. A common feature of the British system in establishing the Supreme Court of each of these territories was the empowerment of the Supreme Court to administer the common law, the doctrines of equity and statutes of general application in force in England as at July 24, 1874[10]. In relation to customary law, the Ordinance provided that nothing should deprive any person of the benefit of any law or custom existing within the jurisdiction on the condition that such law or custom was not repugnant to natural justice, equity and good conscience

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[8] The consequences of this development were: (a) the court of Civil and Criminal Justice was established to replace the Supreme Court, (b) The West Africa Court of Appeal made up of the judges from the Supreme Court of Sierra Leone became an appellate court with respect to appeals from the Court of Civil and Criminal Justice in Lagos, (c) other courts were established for Lagos (d) trial by jury, a method by which justices who were lay people determined issues of fact. See Obilade A.O., ***op.cit*** pg. 19.

[9] Under this arrangement, the West Africa Court of Appeal was no longer an appellate court with respect to appeals from the early Gold Coast Colony made up of the settlements of Lagos and Gold Coast.

[10] The Supreme Court was composed of three arms: the Full Court which was a Court of Appeal, the Divisional Courts which had appellate and original jurisdiction and the District Commissioner's Courts. Appeals lay to the divisional courts from the decisions of the Direct Commissioner's Courts. The Full Court was conferred with jurisdiction to hear appeals from the divisional courts. See Obilade *op.cit* pg. 19

nor incompartible with any local statutory provision[11]. A new Supreme Court Ordinance similar to that of 1876 was established for the colony of Lagos in 1886. This Ordinance was the basis of the authority of the British. This territory became known as the colony and protectorate of Lagos. It should be pointed out that the colony and protectorate of Lagos was established in 1886. The said colony and protectorate was made up of Lagos and its environs[12]. The Oil Rivers Protectorate was established in 1885 but it became effective from 1891. It was made up of Benin, Brass, Bonny, Old Calabar, New Calabar and Opobo. This area was at first administered by Consuls by virtue of the Order in Council of 1872[13]. By virtue of the Order in Council 1899, a Consul-General was appointed for this area. Consular courts determined disputes in this area. The decisions of the consular courts were subject to appeal to the Supreme Court of the colony of Lagos. In 1899, the Niger Coast Protectorate and the territories of the Royal Niger Company South of Idah became amalgamated by virtue of the Southern Nigeria Order in Council 1899 and thus became known as the "Protectorate of Southern Nigeria with effect from January 1900". By virtue of the Supreme Court Proclamation No 6 of 1900, the High Commissioner established a Supreme Court for the Southern Protectorate. The jurisdiction of this court was akin to that of the Supreme Court established by the Supreme Court

[11] The indigenous laws were relevant for the following reasons (a) the indigenous laws were firmly established prior to the advent of the Europeans, (b) these indigenous laws regulated individual or personal issues as well as the general administration and systems of governance of these various communities, (c) the indirect rule system established by the British in the governance of her colonies made the various customary law rules relevant and indispensable except where they were in conflict with the general law or where they were repugnant to natural justice, equity and good conscience.

[12] British influence became expanded to other parts of modern Nigeria through the activities of the United Africa Company which was formed by Sir George Goldie. By the year 1886, the United Africa Company had amalgamated British trading interests on the lower Niger and had bought out French competitors. In 1886, the United Africa Company became known as the Royal Niger Company. Through the influence and support of the British Foreign Office, it had control over the lower Niger Basin. See Dupont J. ***op.cit*** pg. 913.

[13] Treaties were the preferred system of governance, although force was used in a number of instances. See Dupont J. ***The Common Law Abroad.***

Ordinance 1876 except with respect to the English Statutes which were applicable to Nigeria. Instead of the 24 July 1874 limitation date, 1 January 1900 became the limitation date and has remained so in all parts of Nigeria except the old Western Region and the states carved out of this region.

With respect to the northern part of what is now known as Nigeria, some British firms traded along the banks of the River Niger. This led to a coalition which received a Royal charter at first called 'The National African Company'. In 1886 the company was re-named the "Royal Niger Company". One consequence of this was the power granted to the company to administer justice in its area of operation. The charter of the company was revoked in 1899. Consequent upon the revocation of the Charter of the Royal Niger Company by the British in 1899, the Northern Nigeria Order in Council was established in 1899 with effect from 1 January, 1900. This gave birth to the Protectorate of Northern Nigeria. The Protectorate of Northern Nigeria was made up of the territories controlled by the Royal Niger Company north of Ida. Like in the South, the British established a High Commission for the purpose of administering this area. The High Commissioner issued the Protectorate Courts Proclamation 1900 which led to the establishment of a Supreme Court, Provincial Courts and Cantonment Courts. The Supreme Court that was established had power to hear and determine civil and criminal cases. The court had power to administer the common law of England, the doctrines of equity and the statutes of general application which were in force in England on 1 January 1900. It also had power to administer customary law. Native Courts were also established by the Native Courts Proclamation 1900.

The Colony and Protectorate of Southern Nigeria and the Protectorate of Northern Nigeria were amalgamated in 1914. This development gave birth to modern Nigeria. The Supreme Court Ordinance No 6 of 1914 was issued with jurisdiction of the Supreme Court of the erstwhile sub-divisions of the amalgamated Nigerian state. This court was empowered to observe and enforce the rules of common law, doctrines of equity and statutes of general application which were in force in

England on 1 January, 1900. Other courts established included the Provincial Courts and Native Courts.

The Supreme Court that was put in place by the British administered justice in accordance with the common law of England, the doctrines of equity and the statutes of general application as provided by the relevant enabling laws. Appeals lay to the Privy Council until 1930 when the West African Court of Appeal (WACA) became seised of jurisdiction to hear appeals. The West African Court of Appeal had been established by the West African Court of Appeal Order in Council 1928. This order was extended to Nigeria by the West African Court of Appeal Ordinance No 47 1933[14]. This development became imperative because of the dearth of personnel and the need for uniformity of the system of administration of justice in the territories administered by the British. The Supreme Court created by the British at this time although headed by a Chief Justice, had a jurisdiction similar to the High Court. Appeals from the decisions of the West African Court of Appeal were to the Judicial Committee of the Privy Council. The West African (Appeal to Privy Council) Order in Council is relevant in this regard[15]. Magistrate's courts with summary jurisdiction on civil and criminal matters were also in existence as well as native courts[16]. Some amendments were made to the judicial system in 1943[17]. It was however in 1954 by virtue of the Nigeria (Constitution) Order in Council 1954 that radical reforms were carried out. This was the year Nigeria became a federal state and a federal constitution was put in place with effect from October 1, 1954. Three regions – the Eastern, the Northern and Western

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[14] See Obilade A.O., ***op. cit*** pp 25 – 32, Dupont J. *op.cit* pp. 916 - 917

[15] This law provided the enabling authority for appeals from the West African Court of Appeal to the Privy Council.

[16] Legal Practitioners were allowed to appear in the High Court and the Magistrates' Courts.

[17] See for example, the Native Courts (Colony) Ordinance No 7 of 1943 which amended in part the Native Courts (Colony) Ordinance 1933, the Magistrates' Courts Ordinance No 43 of 1943, the Supreme Court Ordinance No 33 of 1943, the West African Court of Appeal Ordinance No 30 of 1943 which amended the West African Court Ordinance of 1933 and the Children and Young Persons Ordinance No 41 of 1943. see Obilade A.O. ***op.cit*** pg. 32, Dupont J. ***op. cit*** pg. 916 – 919.

Regions were created with a Federal territory situated in Lagos. This constitution established the Federal Supreme Court for the whole of Nigeria as an appellate court[18]. A High Court was also established for each Region and the territory of Lagos. Magistrate's courts were also established in each jurisdiction. While the Eastern and Western Regions statutorily established "Customary Courts", the Northern Region statutorily established 'Native Courts'. Appeals to the West African Court of Appeal were abolished following the establishment of the Federal Supreme Court which took its place as an intermediate appellate court. Appeals from the Federal Supreme Court lay to the Judicial Committee of the Privy Council. On October 1, 1963, a Republican constitution came into operation. Each region – the Northern, Western and Eastern Region of Nigeria had its own constitution. Appeals to the Judicial Committee of the Privy Council were abolished. The Federal Supreme Court was abolished and in its place, a Supreme Court of Nigeria was established as the highest court for Nigeria – with the Chief Justice of Nigeria as the head of the court[19]. The above could be described as the historical development of the court system in Nigeria[20].

The Extinct Colonial Common Law Courts and Effect on the Nigerian Legal System

On account of colonization and uniformity of the laws put in place by the British in the four West African countries, it was

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[18] Obilade discussing the hierarchical structure of the Courts at this time stated thus: "The Federal Supreme Court had original jurisdiction in (a) disputes between the Regions, (b) disputes between a Region and the Federal Government, (c) cases arising from treaties involving foreign representatives in Nigeria and (d) cases relating to the validity of a law made by the Federal Government. Appeals lay to the court from the High Court of Lagos. Appeals from the decisions of the Federal Supreme Court lay to the Judicial Committee of the Privy Council, the West African Court of Appeal having ceased to be in the hierarchy of the courts under the Constitution. See Obilade A.O., ***op.cit*** pg. 34.

[19] Section 120 of the 1963 Constitution provided that "without prejudice to the provisions of section 101 of this Constitution no appeal shall lie to any other body or person from any determination of the Supreme Court".

[20] See also Yakubu J.A., "Colonialism, Customary Law and the Post-Colonial State in Africa: The Case of Nigeria", ***Africa Development (Afrique et Development)*** (2005) Vol. xxx, No 4 pp 201 – 220.

easy for the British to establish the West African Court of Appeal to hear appeals from the four West African countries. It was also easy for the Privy Council to hear appeals from the various intermediate courts in the commonwealth countries. Later, these commonwealth countries became independent. The consequence was an interplay of decisions reached by the courts which were purely Nigerian courts and courts which were outside Nigeria but with power to hear appeals from cases emanating from Nigeria. Thus, it was a case of an interplay of justice dispensation by the courts *within* and *without*, but under the umbrella, supervision and authority of the British legal system. The power of these courts situated within and without the geographical expression called Nigeria before independence was not in doubt as they were under the authority and dictation of the British – the colonial overlord. The question that needs be asked in this regard relates to the potency of the decisions of these courts, post independence.

On the first day of October 1960, Nigeria became a sovereign state with all the incidents relevant to the fact of sovereignty. Prior to independence, the general law was the English law. After independence, the Interpretation Act[21] and the High Court Law of each of the regions[22] imported the common law, the doctrines of equity and the statutes of general application in force in England as at 1st January 1900. These laws continued to be regarded as part of the general law. One thing about common law is that it is basically the type of law created by the courts. Therefore, without necessarily embarking on the jurisprudential disputation as to whether judges do make laws, it could be said that by their decisions, they do make laws[23]. The idea of judicial precedent is very prevalent under the

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[21] See Section 28 of the Interpretation Act 1964 (No 1 of 1964). Now see the Interpretation Act, Cap. 192, Laws of the Federation of Nigeria, 1990 Provisions).

[22] See Sections 28, 29 and 35 of the Laws of Northern Nigeria Cap. 49 1959, section 15 of the Eastern Nigeria Laws Cap. 61 1963 and section 3 Western Region of Nigeria Laws Cap. 44, 1959.

[23] See Park A.W, ***The Sources of Nigerian Law,*** Sweet & Maxwell, London 1963, Law in Africa Series Number 8 pp. 5 - 8

common law system[24]. For the purpose of achieving coherent laws and uniformity of decisions especially where the principles are the same or could be analogically applied, it is felt that a hierarchy of courts should be put in place such that where a decision has been reached on an issue, it should stand and indeed in respect of courts that are hierarchically linked, decisions of higher courts should bind the lower ones. The decisions of the highest court should bind those below it[25] while decisions of courts of co-ordinate jurisdiction should bind in certain cases or be persuasively applied[26] or should not be binding at all, especially in criminal cases[27], for the purpose of ensuring that in criminal cases, previous errors are not perpetuated. This is the principle of law inherited or bought and cherished by the adherents of the common law system which became the dominant legal system in Nigeria, like the other commonwealth countries[28]. Therefore, it came to be considered the relevance of the decisions of the courts which existed within the country before and after independence and, those outside the country that existed, but later became extinct up to 1963 when

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[24] J.L. Monrose ***Precedent in English Law and other Essays,*** Irish University Press, Shannon, Ireland (1968)

[25] See ***Ngwo v Monye*** (1970) 1 All NLR 91 at 100. The Supreme Court was held to be Supreme in name and authority. See also ***Bucknor – Maclean & anor v Inlaks Ltd*** (1980) 8 – 11 SC. 1 at pp. 23 – 25; ***Bronik Motors Ltd & anor v Wema Bank Ltd*** (1983) NSCC 226, ***Abdulkarim v Incar Nig. Ltd*** (1992) 7 SCNJ 366, ***Nofiu Surakatu v Nigeria Housing Development Society Ltd*** (1981) 4 SC 26, ***Raji Oduola & ors v Gbadebo Coker & ors*** (1981) 5 SC 197

[26] See ***Young v Bristol Acroplance Co.*** (1944) K.B. 712, ***Osumanu v Kofi Amadu*** 12 WACA 437, ***Usman v Umaru*** (1992) 7 SCNJ 388.

[27] See ***R v Taylor (1950)*** 2 K.B. 368, ***Ganiyu Adisa Motayo v COP*** 13 WACA 114

[28] See ***Abdulkarim v Incar*** (Nig) Ltd (1992) 7 SCNJ 366, ***Dr Olu Onagoruwa v The State*** (1992) 5 NWLR (pt. 244) 713, ***Osho v Foreign Finance Corporation*** (1991) 4 NWLR (Pt 184) 157 at 188, ***Yusufu v Egbe*** (1987) 2 NWLR (Pt. 80) 109 at 122, ***Madike v S.G.P.*** (1992) 3 NWLR (Pt. 227) 70 at 197, ***Williams v Daily Times*** (1990) 1 NWLR 21 at 37, ***Ebite v Obiki*** (1992) 5 NWLR (Pt. 243), ***Nwosu v the State*** (1990) 7 NWLR (Pt. 162) 322.

appeals to the Privy Council got abolished. By virtue of the doctrine of judicial precedent the relevance of the decisions of the common law courts situated outside Nigeria but which had authority to decide cases emanating from Nigeria on appeal had to be determined. It became the rule that since the Privy Council was the highest court for Nigeria till its abolition, its decisions should be regarded as the decisions of today's Supreme Court[29]. The West African Court of Appeal was an intermediate court between the old Supreme Court and the High Courts in Nigeria and the Privy Council. Its decisions became decisions of today's Court of Appeal which is an intermediate court in the appellate system of the courts of record. This is also the position with respect to the decisions of the Federal Supreme Court on account of the same argument[30]. This fact is also true with respect to the decisions of the Western State Court of Appeal in the States carved out of the former Western Region[31]. Thus the decisions of these courts especially the West African Court of Appeal and the Privy Council which existed outside Nigeria are as potent as the decisions of present-day Supreme Court or the Court of Appeal respectively (Table 1).

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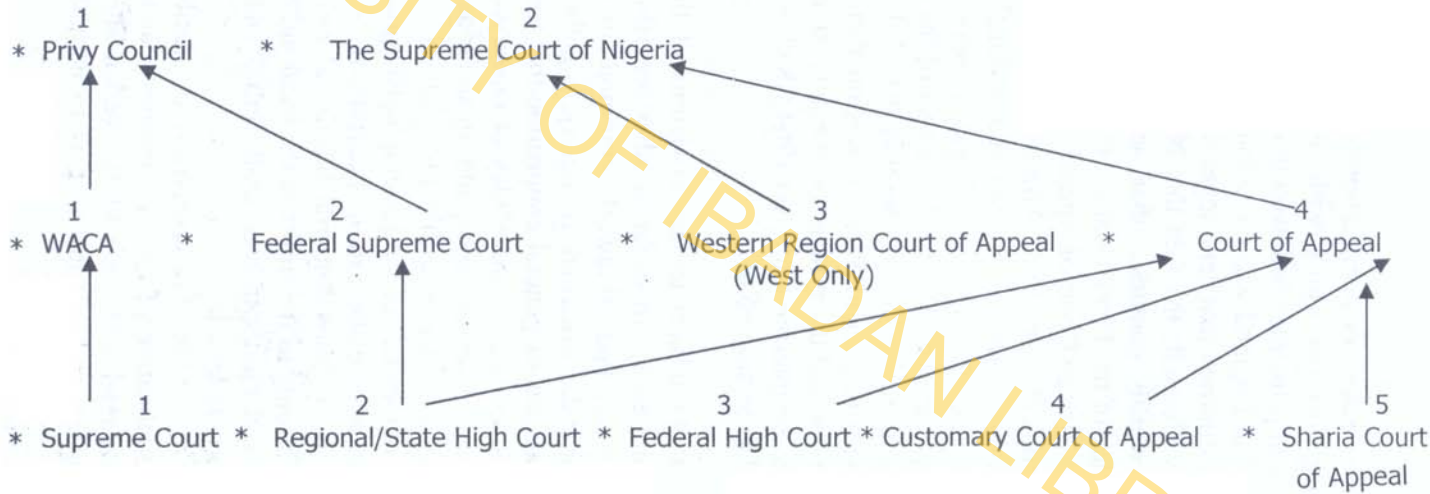
[29] See ***Johnson v Lawanson*** (1972) 2 U.I.L.R. 24

[30] See ***Maizabo v Sokoto Native Authority*** (1957) 2 FSC 13

[31] One other issue that must be noted is the practice in the northern part of Nigeria where a High Court when sitting on appeals may be presided over by two or more judges. The question is whether the decisions of the High Court in this regard should be equated with the decisions of the West African Court of Appeal or the Federal Supreme Court which were intermediate courts at the time of their existence. Whatever may be the argument in this regard, the High Court of the Northern Nigeria when sitting as an appellate court is bound by the decisions of the West African Court of Appeal and the Federal Supreme Court. See ***Jalo Tsamiya v Bauchi Native Authority*** (1957) NRNLR, 76 at 82 – 83, ***Fagoji v Jano Native Authority*** 14 WACA 587

TABLE I

HIERARCHICAL STRUCTURE OF THE EXTINCT COURTS AND CURRENT NIGERIAN COURTS OF RECORD AND THEIR HIERARCHICAL RELATIONSHIP



Other reasons or justification for this conclusion include the following: (a) uniformity with respect to the common legal system and principles followed in reaching these decisions; (b) the fact that England was the colonial overlord of the four West African countries that sent appeals to WACA and in respect of the Privy Council, the fact that Nigeria was a member of the commonwealth countries that sent appeals to the Judicial Committee of the Privy Council, (c) the fact that with respect to the West African Court of Appeal, the justices of this court were drawn from the four West African countries. So much was the common law system engrained and so much were the statutes regulating essential issues in England cherished that they were made applicable to Nigeria. In respect of the statutes of general application, the limitation date was the 1st day of January 1900 except with respect to Western Region that imported only the common law and the principles of equity. In line with the above intention, the interpretation Act 1964 which was a federal statute provided in section 45 thus:

> 45(1) subject to the provisions of this section, and except in so far as other provisions 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 in Lagos, and in so far 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.
>
> (3) For the purposes of facilitating the application of the said Imperial laws they shall be read with such formal verbal alterations not affecting the substance as to names, localities,

courts, officers, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances.

This legislation has survived till today as could be seen in the current Interpretation Act[32] and its tenor could be gleaned from the High Court Laws of each of the states in Nigeria[33].

Many landmark decisions were reached by these extinct common law courts which are still potent till today[34]. They are thus being referred to with reverence. For example, the Supreme Court of Nigeria in deciding the case of *Alhaji Saibu Yekini Otun & Ors v Sindiku Ashimi Otun*[35] referred to and with approval the decision in *Lewis v Bankole*[36] and held thus: "the law as stated by the leading authorities on the matter, particularly by *Lewis v Bankole* 1 NLR 81 at page 102 is that

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[32] See section 32 of the Interpretation Act, Cap. 192, Laws of the Federation of Nigeria, 1990. The word "Lagos" in the 1964 Act has been deleted from the provisions of Interpretation Act, Cap. 92, Laws of the Federation of Nigeria, 1990.

[33] See for example section 14, Laws of Oyo State of Nigeria Cap. 55 2000. This section provides thus: "Subject to the express provisions of any law, in every cause or matter commenced in the High Court, Law and equity shall be administered by the High Court concurrently and in the same manner as they are administered by Her majesty's High Court of Justice in England.

[34] Such landmark decisions include ***Amodu v Tijani*** (1921) 2 AC 399, ***Alagba v R.*** (1950) NLR 128, ***Bamgbose v Daniel*** (1955) AC 107, ***Dawodu v Danmole*** (1962) 1 WLR 1053, ***Eshugbayi Eleko v Government of Nigeria*** (1931) AC 662, ***Wallace Johnson v R*** (1940) AC 231, ***Alake v Awawu*** (1932) 11 NLR 39, ***Awo v Cookey Gam*** (1913) 2 NLR 100, ***Labinjoh v Abake*** (1924) 5 NLR 33, ***Buraimoh v Bamgboye*** (1940) 15 NLR 139, ***Nelson v Nelson*** (1951) 13 WACA 248, ***Ogbuagu v Police*** (1953) 20 NLR 139, ***Owonyin v Omotosho*** (1961) 1 AII NLR 304, ***R v Edgal*** (1938) 4 WACA 133, ***Smith v Smith*** (1924) 5 NLR 105, ***Attorney General v John Holt & Co*** (1910) 2 NLR 1, ***R v Ebok*** (1950) 19 NLR 84, ***Akanni v R*** (1951) WRNLR 153, ***Okoni v R*** (1938) 4 WACA 19, ***Ogunbambi v Abowaba*** (1951) 13 WACA 222, ***R v Omoni*** 12 WACA 511, ***R v Udo Eka Ebong*** (1947) 12 WACA, 139, ***R v Itule*** (1961) AIINLR 462, ***Kodilinye v Odu*** (1935) 2 WACA 3361.

[35] (2001) 7 SCNJ 344

[36] 1 NLR 81

the right to administer the family estate is vested in 'Dawodu' as the surviving eldest son of the founder of a family"[37].

Kalgo J.SC. rejecting an obiter dictum of the Supreme Court in *Adesanya v Otuewu*[38] a 1993 decision, held inter alia:

> ...I therefore find that what Nnaemeka – Agu JSC said on this issue in *Adesanya v Otuewu* case supra cannot be the correct application of the Yoruba native law and custom on the appointment of 'Dawodu' as in this case. In my respectful view therefore the failure by the Court of Appeal to consider the case of *Adesanya v Otuewu*, supra, has not prejudiced the appellants' appeal nor occasioned any miscarriage of justice. I am also satisfied that the decision in *Lewis v Bankole* supra, relied upon by the trial court and the Court of Appeal on the issue under consideration, is the well established and settled authority on it and was indeed followed by other decisions of this court such as *Olowu v Olowu* (1985) 3 NWLR (pt. 13) 372 at 387; *Adesanya v Taiwo* (1956) FSC 84; *Yusuf v Dada* (1990) 4 NWLR (pt. 146) 657, *Eyesin v Sanusi* (1984) SC 115 ...[39]

In *Lado v The State*[40], the Supreme Court in deciding this case on the issue of provocation referred to some extinct cases. Ejiwunmi J.SC. held inter alia:

> It is also my view that the definition of provocation given above, must be considered in the light of the particular facts and circumstances of the case under consideration. These include, among other things, the station in life of the

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[37] *Ibid* pg. 102
[38] (1993) 1 NWLR (Pt. 270) 414
[39] *Ibid*. pp. 356 - 357
[40] (1999) 6 SCNJ 1

person and the society in which he lives. See *R v Akpakpan* (1956) 1 FSC 1, *R v Adekanmi* (1944) 17 NLR 99. In *R v Igiri* (1948) 12 WACA 377 recognition was given to the primitive condition in which people lived in their own society to reduce the offence of murder to manslaughter[41].

Furthermore, in *Omini v The State*[42] the Supreme Court was faced with the determination of the interpretation of section 303 of the Criminal Code which provides thus:

> It is the duty of every person who, except in a case of necessity undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act, and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty.

In deciding this issue, in *Omini v. The State,* the Supreme Court relied on the WACA decision in *R v Akerele* and held, per Karibi-Whyte JSC, thus:

> A careful reading of the section clearly shows that the duty is applicable and restricted to persons administering surgical or medical treatment to persons, or persons performing any other lawful act which is or may be dangerous to human life or health. Such persons are required to have reasonable skill and to use reasonable care in exercising the skill. Criminal responsibility follows the failure to exercise

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[41] *Ibid.* pg. 15
[42] (1999) 9 SCNJ 1

reasonable care in the exercise of skill – See *R v Akerele* (1914) 7 WACA 66[43].

There are other cases in this regard[44].

What our discussion so far has revealed is that the current Nigerian legal system and indeed the Nigerian state came into existence through colonization. This development has had an enduring effect on the structure of laws, their potency and those with persuasive effect. It is therefore necessary in a discourse on the law within and without to consider the effect of this development on the Nigerian legal structure.

Effect of Colonial Legal Heritage

Extinct Courts

One effect which should be re-emphasized is the fact that the courts which the British put in place at diverse periods are no longer in existence but these courts gave decisions which are still relevant and of binding authority[45]. Some of the new courts put in place after colonialism bear the names of the extinct

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[43] *Ibid*. pg. 15

[44] The Supreme Court of Nigeria has been referring to the cases decided by these extinct courts in many other decisions. For example, in deciding ***Adeleke v Iyanda*** (2001) 6 SCNJ 101, the WACA decision on burden of proof in land matters in ***Kodinlinye v Mbanefu Odu*** (1935) 2 WACA 336 was referred to. In ***Akpan v The State*** (2001) 7 SCNJ 567, the decision of WACA on the issue of a confession in ***R v Udo Eka Ubong*** (1947) 12 WACA 139 was referred to. In ***Madjemu v The State*** (2001) 5 SCNJ 31, the decision of the Federal Supreme Court in ***Onakpoya v The Queen*** (1959) 4 FSC 150 and of WACA on the issue of mental disease or natural mental infirmity in ***R v Omoni*** (1949) 12 WACA 511 was referred to. The decision of WACA in ***R v Echem*** *supra* on the burden of proof where a defence of insanity is raised was also referred to. The decision of WACA in ***R v Philip Dim*** 14 WACA 154 was also referred to. Reference was also made in the case of ***Madjemu v The State*** to the following cases of the extinct courts: ***R v Ashigifuwo*** (1948) 12 WACA 389, (motive, in a defence of insanity), ***R v Onabanjo*** (1936) 3 WACA 43 (Confessional statement), ***R v Kassi*** (1939) 5 WACA 154 (Confessional statement), and ***R v Inyang*** (1946) 12 WACA 5 (motive in a murder charge). The case of ***Awo v Cookey Gam*** 3 NLR 100 was referred to in ***Adeleke v Iyanda*** (2001) 6 SCNJ 101 on the issue of standard of proof in a claim for declaration of title to land.

[45] See fn. 44

courts but with different togas of authority. Obi-Okoye[46] discussing the position of the Supreme Court, was apparently referring to the use of the name in the past and now when he said:

> The Supreme Court of Nigeria has had a very fascinating career, starting as it were, on a very low key, disappearing at various stages, and rising to become the highest court in the land.

Adoption of English Legal System

The British introduced the English legal system as the judicial system in Nigeria following the establishment of her influence in the various areas now called Nigeria. By the various Supreme Court ordinances and other laws that followed, the common law, the doctrines of equity and the statutes of general application which ultimately became limited to those in existence as at the 1st day of January 1900 became part and parcel of the Nigerian laws. They were made applicable as they existed in England. In the interpretation of these English laws and statutes, separate hierarchical courts were created for the British colonies. The Judicial Committee of the Privy Council became the highest court for the commonwealth countries as they ultimately came to be known. The recurrent argument with respect to the importation of the English law and the adoption of the common law, the doctrines of equity and statutes of general application was whether the limitation date of 1st January 1900 should be limited to the statutes of general application or whether it should be extended to the common law and doctrines of equity[47]. It should be stated that it is clear that the limitation date applies to the statutes of general application. These statutes are therefore

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[46] Obi-Okoye A; ***The Development of Judicial Trial in Nigeria,*** Onitsha, Africana Fep. Publishers Ltd 1998 at pg. 75

[47] Note the argument between A.W. Park and Professor Allot in this regard. See A.W. Park in ***Sources of Nigerian Laws, supra.*** In his view, and rightly too, the limitation date does not apply to common law and doctrines of equity. Professor Allot in his book, ***New Essays in African Law*** pg. 68 held the view that the limitation date should be taken as relating to the common law, the doctrines of equity and statutes of general application. He relied on the decision in ***Solomon v African Steamship Co.*** 9 N.L.R 99

taken as statutes enacted for Nigeria[48]. With respect to the common law and doctrines of equity, the limitation date does not apply to them. It should however be stated that the current position is that the common law doctrines and equitable principles enunciated by the extinct courts in direct hierarchical relationship with Nigeria are those that are binding on the Nigerian courts depending on the hierarchical authority of the relevant court in the overall scheme of judicial categorization of those courts. The British could not have created a different hierarchy of courts for the commonwealth countries with the ultimate appellate court as the Judicial Committee of the Privy Council as opposed to the House of Lords for nothing if not for the purpose of determining the courts with hierarchical relationship in respect of courts of the commonwealth countries. It is beyond doubt that the decisions of the Privy Council are taken as decisions of today's Supreme Court. Therefore, in the determination of the potency or level of authority of a decision, regard must be paid to the court that gave the decision in the judicial hierarchy or system.

Further to the above, the other qualifications to the application of these laws should be noted. For example, the interpretation Act Cap. 192, Laws of the Federation of Nigeria 1990 provides that:

> (i) 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.
>
> (ii) for the purpose of facilitating the application of the said Imperial laws they shall be read with such formal verbal alterations not affecting the substance as to names, locations, courts, officers, persons, moneys, penalties, and otherwise as may be

[48] See for example, the ***Sale of Goods Act 1893,*** the ***Illiterate's Protection Act*** and the ***Statute of Frauds*** 1874

necessary to render the same applicable to the circumstances[49].

Further to the general importation of English laws as stated above, some post 1st January 1900 statutes were specifically imported into Nigeria. These statutes were on specific matters. For example, by virtue of section 4 of the State Courts (Federal Jurisdiction) Act, English statutes on divorce and matrimonial causes in force at the time, were applicable in Nigeria. The High Court Laws of various states except the Western State also imported these laws. The Eastern state limited the relevant date to 30th September 1960. It is gratifying to note however that Nigeria now has its own Matrimonial Causes Act[50] and Rules of Procedure[51]. Thus these English laws are no longer relevant in the determination of the laws having authority to determine matrimonial causes and the rules of procedure in this respect. The decisions reached by the Nigerian courts based on reliance on the English Matrimonial Causes Act have been preserved. The authority of these decisions where they are not inconsistent with the Nigerian Matrimonial Causes Act or overruled has been preserved. Section 113 of the Nigerian Matrimonial Causes Act put in place in 1970 provides thus:

> For the avoidance of doubt it is declared –
> (a) that a decree, judgment, order or sentence of the High Court of a state of the Federation given, made or pronounced before the commencement of this Act in the exercise of jurisdiction invested or conferred upon it in respect of matrimonial causes and in force immediately before the commencement of this Act shall, notwithstanding the repeal of any legislation under which the decree, judgment, order or sentence was given, made

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[49] See the High Court Laws of various states in this regard.
[50] See the ***Matrimonial Causes Act,*** Cap. 220, Laws of the Federation 1990.
[51] See the ***Matrimonial Causes Rules*** made in 1983

or pronounced, continue to have effect throughout the federation; and

(b) that the validity of a decree, judgment, order or sentence given, made or pronounced by a court of competent jurisdiction in the commonwealth (elsewhere than Nigeria) before the commencement of this Act by virtue of any enactment passed or made in respect of a marriage entered into during the war of 1939 – 45 and in force immediately before the commencement of this Act shall, if reciprocal arrangements are made for the recognition of the like decrees, judgments, orders or sentences given, made or pronounced in Nigeria in respect of any such marriage, be accorded in Nigeria the same recognition as if they were decrees, judgments, orders or sentences given, made or pronounced by a court of competent jurisdiction in Nigeria.

A Local Statute vis-a-vis A Statute of General Application

A local statute of valid authority overrides a statute of general application in terms of potency of authority and relevance. For example, the Interpretation Act in importing the statutes of general application qualifies them thus:

> 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[52].

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[52] This was and is still the position in the states of Nigeria with respect to the use of the statutes of general application. The position of the Western State and the states carved out of this state viz, Oyo, Ogun, Ondo, Edo, Delta, Osun and Ekiti States, should be noted. As far back as 1959, the application of the statutes of general application had been abolished in the Western State. By virtue of section 4 of the Law of England (Application) Law Cap. 60, the application of the statutes of general application was abolished. This law

Statutes of General Application and Local Circumstances

As stated above, a statute may qualify as a statute of general application but its importation for use as a Nigerian statute may not be suitable. The unsuitability may be as a result of its variance with local requirements and therefore it may be unsuitable for application in Nigeria. The law thus qualifies the application of the imperial laws in general, including the statutes of general application thus: "such imperial laws shall be in force so far only as the limits of the local jurisdiction and local circumstances shall permit". Thus, for example, a statute specifically made and meant for the church of England may not qualify for importation to Nigeria as a statute of general application.

What is and when is A Statute of General Application?

The issue of the determination of what a statute of general application is or when a statute can be said to be of general application after it must have passed the test of the limitation date of 1st January 1900 has not been without arguments. Whatever may be the arguments, the decision of Osborne CJ in *Attorney General v John Holt & Co*[53] though not infallible, provides a guide. He said:

> 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 (2) to what classes of the community in England does it apply? If, on January 1,1900, an Act of Parliament were applied by all civil and criminal courts, as the case may be, to all classes of the community, there is a strong likelihood that it is

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provides thus: "no Imperial Act hitherto in force within the Region shall have any force or effect therein".

[53] (1910) 2 NLR 1

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[54].

English Statutes passed in England and Applicable in Nigeria as a Colony of Britain

Apart from imported statutes, some statutes were passed in England and they were made directly applicable in and to Nigeria by reason of Nigeria being a colony of Britain. These statutes were passed in England and became applicable in and to Nigeria for this reason. At independence, some of these statutes continued to apply to and in Nigeria by virtue of the Nigeria (Constitution) Order in Council, 1960. However, these statutes have now either been re-enacted as local statutes or abrogated. Such statutes were the Arbitration Act 1911, the Carriage by Air Act 1932 which became applicable to and in Nigeria by virtue of the carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953.

Attainment of Independence and Adoption of English Constitutional Method and Legal Effect of this Adoption

The 1960 Constitution gave validity to the independence granted to Nigeria on the 1st day of October 1960. The 1960 Independence Constitution was based on the unwritten British constitutional system. It was felt that since the unwritten British values usually referred to as the unwritten constitution of Britain or the Westminster system of government[55] had worked in Britain to the admiration of the whole world, it might well be adopted in Nigeria despite her independence. Thus the 1960 constitution was modelled after the Westminster system. It was then thought that the jewel of cases and established practice

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[54] at pg. 21

[55] See Hood Phillips, ***Constitutional and Administrative Law,*** 6th Ed. Sweet & Maxwell, see also John Ademola Yakubu, ***Constitutional Law in Nigeria*** Demyaxs Law Books, 2003 especially chp. 3

which this system had produced should be regarded as of inestimable value. Subsequent events however proved otherwise. The case of *Adegbenro v Akintola*[56] could be used to explain this situation. The dispute between Chief Obafemi Awolowo, who was the leader of opposition in the House of Representatives and Chief S.L. Akintola, who was the Premier of the Western Region and Deputy leader of Action Group, to which both belonged proved intractable. A majority of the members of Action Group in the Western Region House of Assembly in support of their leader, Chief Obafemi Awolowo resolved and petitioned the Governor of the Region requesting that Chief S.L. Akintola, the Premier of the Region, be removed from his office of Premier as he no longer commanded the confidence of the majority of the members of the House of Assembly. They nominated Alhaji D.S. Adegbenro to take his place. The Governor, sir Adesoji Aderemi, consequently dismissed Chief S.L. Akintola, who refused to resign. The action of the governor was based on section 33(10) of the Western Region Constitution 1960, which provided thus:

> Subject to the provisions of subsection (8) and (9) of this section, the Ministers of the Government of the Region shall hold office during the Governors' pleasure: Provided that (a) the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly...[57]

The Premier – Chief S.L. Akintola, maintained that he could not be removed from office by the governor in exercise of the power conferred on him by section 33(10) of the 1960 Western Region Constitution in the absence of a prior resolution or decision of the Western Region House of Assembly. The governor claimed that Chief Akintola no longer enjoyed the support of the majority of the members of the House of Assembly. The

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[56] (1962) All NLR (pt. II) 462

[57] See Section 33 (10) of the Western Region Constitution 1960.

governor served Chief S.L. Akintola with notice purporting to remove him from office as the Premier and proceeded to swear in Alhaji D.S Adegbenro as the new Premier of the region. Chief S.L Akintola challenged his removal because it was not done on the floor of the House. The defendants filed a joint defence and counter-claim in which they sought declarations to the effect that the removal of the plaintiff from office and the appointment of the second defendant was valid. They also sought an injunction to restrain the plaintiff from purporting to act as Premier. Section 33 (10) of the Western Region Constitution 1960 derived its source from the British practice on the removal of the Prime Minister from office. The court had to consider the effect of section 33(10) of the Western Region Constitution 1960 vis-a-vis the English practice in this regard.

The Federal Supreme Court held that the House of Assembly was the appropriate place for the determination of the popularity of the Premier. The defendants not being satisfied with the decision of the Federal Supreme Court appealed to the Privy Council in London. The preliminary objection whether the appeal could lie to the Privy Council as of right was answered in the affirmative by the Federal Supreme Court. It held that its decision in a matter referred to it on the interpretation of a constitution was a "final decision" for the purposes of an appeal therefrom to Her Majesty in Council under the provisions of section 114 (10) (c) of the Constitution of the Federation 1960.

On the interpretation of section 33(10) of the Western Region Constitution, the Privy Council held as follows:

> (i) That where, under the written constitution of Western Nigeria, the power of the Governor to remove a Premier from office was expressly recognized and conditioned; and where the condition of constitutional action by the governor in this regard had been reduced to a formula of words for the purposes of the constitution, it was the construction of those words, and nothing else that must determine the issue whether the Governor had acted constitutionally or

not in the event of his removal as a Premier,

(ii) that any limitation of the constitutional powers of the Governor to remove a Premier must be found in the words in which the makers of the constitution had decided to record their description of his powers,

(iii) that by the words "it appears to him", employed in section 33 (10) of the Constitution of Western Nigeria the judgment as to the support enjoyed by a Premier was left to the Governor's own assessment, and there was no limitations as to the material on which he could base his judgment, or the contacts to which he may resort for the purpose,

(iv) that the Governor's power of removal was not limited in such precise terms as would confine his judgment to the actual proceedings of the House of Assembly,

(v) that there were no compulsive reasons to be found in the context of the constitution of Western Nigeria, or to be deduced from obvious general principles, that would impose on the Governor's power of removal of a Premier the limitation that he cannot constitutionally take account of anything in the matter of "support" except the record of votes actually given on the floor of the House. He may act constitutionally on a letter signed outside the House by a majority of the members,

(vi) that British Constitutional history did not offer any but a general negative guide as to the circumstances in which a Sovereign can dismiss a Prime Minister. Discussion of constitutional doctrine bearing upon a Prime Minister's loss of support in the

House of Commons concentrated upon a Prime Minister's duty to ask for liberty to resign or for a dissolution rather than upon the sovereign's right of removal,

(vii) that it was vain to look to British precedent for guidance upon the circumstances in which or the evidential material upon which, a Prime Minister can be dismissed, where dismissal was an actual possibility,

(viii) that the right of removal, which was explicitly recognized in the Nigerian Constitution, must be interpreted according to the wording of their own limitations and not to limitations that wording did not import,

(ix) that it was the wording of the constitution of Western Nigeria itself that was to be interpreted and applied and this wording can never be overridden by the extraneous principles of other constitutions which were not explicitly incorporated in the formula that had been chosen as the frame of this constitution.

By this decision, the Privy Council established the principle that the meaning of parliamentary democracy as enunciated in the 1960 Independence Constitution must be determined from the Nigerian Independence Constitution itself not withstanding that the 1960 Independence Constitution took its root from England. As the Privy Council maintained, it was vain to look to the British precedent for guidance upon the circumstances in which or the evidential material upon which a Prime Minister can be dismissed where dismissal was an actual possibility. The Privy Council further expressed the opinion that the right of removal which was explicity recognized in the 1960 Nigerian Constitution must be interpreted according to the wording of

their own limitations and not to limitations that wording did not import[58].

One additional point that should be made in this regard is that despite universal concepts and principles inherent in the idea of democracy, the practice of it may have to be contextually examined. Thus, democracy which means the system of government through elected representatives or through representatives determined or sanctioned by the people could be regarded as a universal idea, having been globally accepted. Despite its universal acceptance or the universality of its concepts and principles however, it should be stated that this idea must be complemented by local nuances, dictates and requirements as clearly and eloquently provided in the relevant constitutions or enabling laws and conventions for the purpose of achieving the best of results in governance or good governance[59].

Conversion of a Foreign Statute to a Local Statute — Effect on Areas Left Out

One method by which English law became adopted in Nigeria was by local enactment of some English statutes or statutes deriving their origin from Britain. An example in this regard is the criminal code. The Nigerian Criminal Code derives, in the main, from the criminal code of the State of Queensland, Australia, 1899. This code was also based, in the main, on a Criminal Code which was drafted by sir James Fitzstephen in 1878. It was meant to replace the common law. It was however not enacted by the British Parliament. Although the Criminal Code began to operate in the Northern Nigeria from 1904 by Proclamation, it became extended to the whole country in 1916 after the amalgamation of 1914. Necessary amendments were subsequently made to it[60]. Following the above, the practice was

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[58] See ***Adegbenro v Akintola*** (1962) All N.L.R (Pt. II) 462

[59] See Ademola Yakubu, ***Democracy, Good Governance and Phenomenon of Corruption in Nigeria,*** fn. 1 ***Proceedings of the Law Teachers Conference,*** Nigerian Association of Law Teachers, University of Maiduguri, Maiduguri, Nigeria, 2000.

[60] It should be noted that in 1959, the Penal Code was enacted as the code dealing, in the main with the regulation of the Criminal Justice System in the northern part of Nigeria.

to make reference to English decisions or provisions of the law on diverse issues contained in the Criminal Code. It therefore became necessary to determine the efficacy, plausibility and legality of this approach. This issue was discussed in *Ogbuagu v Police*[61]. The court considered whether section 7 of the English Libel Act 1843 otherwise known as Lord Campbell's Act was applicable in a charge of publishing a seditious libel under section 51 of the Nigerian Criminal Code. Bairamian J. delivering the judgment of the court held inter alia:

> The learned crown counsel has argued that that section does not apply in Nigeria and I agree with him. We have in Nigeria a Criminal Code which is meant to be complete and exhaustive; it has provisions on criminal responsibility, e.g acting in concert or counseling or abetting, it had provisions on the general defences which may be made e.g insanity or intoxication, it defines the offences and in regard to some provides special defences e.g provocation in a charge of murder or assault. There is no similar provision in regard to seditious libel in the code, and one must presume that the legislature did not wish to make the defence available in a charge of seditious libel (if it is available at all in England)[62].

His Lordship referred to the decision of Combe C.J. in *R v Kehinde Coker*[63] and held thus:

> It was essential that that part of section 6 of the Act which was incorporated in the Criminal Code should be dealt with by the code if it was intended that the publication of a defamatory matter could be justified, as after the enactment

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[61] (1953) 20 NLR 139
[62] *Ibid*. pp. 141 - 142
[63] 8 NLR 7

> of the code the court would have to look to the code and not to the Act to ascertain what the prosecution must prove to establish the offence of publishing a defamatory matter, and whether the publication of a defamatory matter could be justified. If the provision of section 377 of the Code which incorporates a portion of section 6 of Lord Campbell's Act had not been inserted in the code, the publication of a defamatory matter could not be justified in Nigeria notwithstanding that the publication is for the public benefit and the matter published is true[64]

In *Wallace Johnson v R*[65] the appellant was charged with the offence of sedition under section 330 of the Gold Coast Criminal Code. The appellant put up a defence to the effect that the common law requirement of an intention to incite to violence should be read into the section of the code dealing with sedition. In rejecting this argument, the Privy Council held inter alia:

> The fact remains … that it is in the criminal code of the Gold Coast colony and not in English or Scottish cases that the law of sedition for the colony is to be found. The Code was no doubt designed to suit the circumstances of the people of the Colony. The elaborate structure of section 330 suggests that it was intended to contain as far as possible a full and complete statement of the law of sedition in the colony. It must therefore be construed in its application to the facts of this case free from any glosses or interpolations derived from any expositions however authoritative of the law of England or of Scotland.

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[64] *Ibid*. pg. 14
[65] (1938) 5 WACA 56

Furthermore, in *R v Omoni*,[66] the court was faced with the interpretation of the defence of insanity under section 28 of the Criminal Code of Nigeria as opposed to the defence of insanity under the Macnaughten's rule which followed from the *Macnaughten's Case*.[67] The court held inter alia:

> ...even more marked is the inclusion in the Nigeria section of the words "to deprive him of capacity to control his actions". Not only do these words depart from the rules of Macnaughten's case but they are in direct conflict with the line of English decisions subsequent thereto in which the Judges in England have declined to accept the defence of "irresistible impulse" which these words appear to have introduced into the law of Nigeria. As to the wisdom of introducing or maintaining this departure from English law, it is for the legislature to judge, this court can only apply the law as we find it[68].

On the other hand, in certain instances, the court had resorted to English statutes and decisions in interpreting some local statutes. For example, in *R v Edgal*[69], The West African Court of Appeal was faced with the problem of interpreting section 230 of the criminal code especially the use of the word "unlawfully" twice with respect to the offence of abortion. WACA relied on the English case of *R v Bourne*[70] and held thus:

> The omission of a definition or a declaration merely throws the enquirer back to ascertain what is the law of the land in regard to when it is lawful and when unlawful to procure a

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[66] (1949) 12 WACA 511
[67] (1843) 10 C.L & F. 200
[68] *Ibid.* pg. 512
[69] (1938) 4 WACA 133
[70] (1939) 1 KB 678

miscarriage. This question had never arisen for decision even in England until the case of *Rex v Bourne*[71]: now it has arisen and been answered, and the answer is that it is unlawful except for the purpose of preserving the life of the mother. This in my view is the law in Nigeria as well as in England...[72]

The best approach was that stated by Lord Herschell in *Bank of England v Vagliano Brothers*[73]. His Lordship held *inter alia:*

> I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, depending

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[71] fn 70

[72] at pp. 137 – 138. See also ***Motayo v COP*** (1950) 13 WACA 114 ("under the colour of" in section 404 (1) of the Criminal Code) and ***Akerele v R*** (1941) 8 WACA 5 (on gross negligence).

[73] (1891) AC 107 at 144 – 145 (House of Lords). This was approved by the Privy Council in ***Robinson v Canadian Pacific Railway Co,*** (1892) AC 481 at 487.

> upon a knowledge of the exact effect even of an obsolete proceeding...

Furthermore, in *Brennan R*[73a], Lord Herschell said thus of the Western Australian Criminal Code:

> A Code intended to replace the common law and its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the code and then to see if the code will bear an interpretation which leaves the law unaltered.

Expiration of Law and its Utility or Non-Use of Law on the ground of Inconsistency with the Constitution

Some laws were made by Britain and made to apply in Nigeria or provided for in the codes enacted for Nigeria. Some were specifically made for Nigeria for ease of governance. The law of sedition could be regarded as one of such laws. Sections 50,51 and 52 of the Criminal Code are relevant in this regard. These sections are still part of the Criminal Code. It fell to be determined the relevance of these sections in view of the provisions of the 1979 Constitution. By virtue of section 1(1) of the 1979 constitution, the constitution was regarded as supreme. Section 1(3) of this constitution provided that any law that was inconsistent with the constitution was null and void. This is also the position under the 1999 Constitution.

Two cases decided during the democratic dispensation of the Second Republic led to the conclusion that sedition is no longer a living law in Nigeria. The two cases were *Ivory Tower Trumpet*[74] and *Arthur Nwankwo v The State*[75]. Stating that notwithstanding the provisions of sections 50,51 and 52 of the

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[73a] (1936) 53 CLR 253. See also ***Okonkwo v Naish. Criminal Law in Nigeria,*** Sweet & Maxwell, 2nd ed. 1980 pp. 11 – 17.

[74] (1983) 3 FNR 60

[75] (1983) 2 FNR 283

Criminal Code, the offence of sedition could not be maintained under the 1979 constitution, Olatawura JCA held inter alia:

> It is my view that the law of sedition which has derogated from the freedom of speech guaranteed under this constitution is inconsistent with the 1979 constitution more so when this cannot lead to a public disorder as envisaged under section 41(1) (a) of the 1979 Constitution. We are no longer the illiterates or the mob society our colonial masters had in mind when the law was promulgated. The whole of chap xxxiii which deals with Defamation is sufficient guarantee against defamatory libel. The safeguard provided under section 50(2) is inadequate more so where the truth of what is published is no defence. To retain section 51 of the Criminal Code, in its present form, that is even if not inconsistent with the freedom of expression guaranteed by our Constitution will be a deadly weapon and to be used at will by a corrupt government or a tyrant. I hereby express my doubt about its retention in our Criminal Code for criminal libel. Let us not diminish from the freedom gained from our colonial masters by resorting to laws enacted by them to suit their purpose. The decision of the founding fathers of this present constitution which guarantees freedom of speech which must include freedom to criticize should be praised and any attempt to derogate from it except as provided by the constitution must be resisted. Those in public office should not be intolerant of criticism. Where a writer exceeds the bounds there should be a resort to the law of libel where the plaintiff must of necessity put his character and reputation in issue. Criticism is indispensable in a free society[76].

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[76] *Ibid.* pg. 309

By this decision, the utility, validity and potency of the law of sedition deriving from the English idea of the need to protect those in government is no longer valid.

That this should be the position could be further seen from the observations of Professor Ben Nwabueze in his book *Constitutional Law of the Nigerian Republic* with respect to the reasons for recognizing the offence of sedition by the Criminal Code. He said:

> Based, as it is on stephen's digest of the criminal law, this definition is believed to have been specially designed to strengthen the hands of the colonial administration in dealing with the possibility that a handful of educated natives might incite the gullible populace to hatred, disloyalty or violence against the Government. Because of the easy excitability of illiterate peasants and the bitter emotions which imperialism is apt to generate in the minds of colonial peoples, it was thought unnecessary that words alleged to be seditious should have a tendency to provoke violence, as is the case in English law. As was anticipated, the colonial administration found it necessary to make rather ample use of the law, particularly against the militant zikists of the forties[77].

Non-Utilization of English Conventions, Statutes and Decisions

In some cases, the decisions of English courts on some principles of law bearing the same name[78] were disregarded by the Nigerian courts either on account of the level of development or local circumstances as in *R v Adekanmi*[79] with respect to the defence of provocation or because of some

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[77] *Ibid*. pp. 181 - 182

[78] It should be noted that a legal concept may bear the same name under the English and Nigerian laws but the content may not be the same e.g domicile.

constitutional or statutory provisions. The decision of the court in *Ivory Trumphet*[80] was along this line. Reasons for non-utilisation of English laws or principles in this respect may be based on the fact of the sovereignty of Nigeria, statutory provisions conferring supreme authority on the local laws made by competent legislative authorities, decisions of courts of competent jurisdiction in Nigeria or on account of constitutional provisions which may be directly or indirectly incompatible with the English laws or statutes.

As verity CJ. maintained in *R v Omoni*[81]:

> As to the wisdom of introducing or maintaining this departure from English law, it is for the Legislature to judge, this court can only apply the law as we find it.

As the Privy Council noted in *Adegbenro v Akintola*[82] in construing section 33 (10) of the 1960 Constitution of the Western region which derived from the English convention, it was vain to look to British precedent for guidance upon the circumstances in which or the evidential material upon which, a Prime Minister could be dismissed.

Judicial Precedent, English Courts' Decisions and the Nigerian Courts

One of the cardinal principles of the judicial precedent concept is that lower courts in the judicial hierarchy must give effect to the decisions of higher courts. It follows that the highest court deserves the respect of all courts. It is in view of this fact that the Supreme Court of Nigeria is supreme in authority and power with respect to judicial decisions in Nigeria. It should be

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[79] See ***R v Adekanmi*** (1944) 17 NLR 99. Note the view of Francis J. at pg. 101. In this case, Francis J. noted the easy excitability of the passions of illiterates and peasants as opposed to educated and enlightened ones. See also ***R v Igiri*** (1948) 12 WACA 377, ***R v Okoro*** (1942) 16 NLR 63 and ***Obaji v State*** (1965) 1 All NLR 269 at 275

[80] ***supra*** fn. 74

[81] (1949) 12 WACA 511

[82] supra fn. 56

maintained that the idea of judicial precedent envisages a relationship between courts in the same hierarchical link. The point could be explained in the perspective of the rungs of a ladder. The rungs form the connective basis that enables one climb to the highest level with the protective cloak of two poles which the judicial institution stands for as the institution recognized for the resolution of disputes and interpretation of laws.

It is usual to divide the concept of judicial precedent into original, derivative and declaratory precedents. Whatever the variant, each reflects the principle that the decision of a higher court binds the lower court(s).

At the time the idea of judicial precedent developed in England, the concept was formulated for the purpose of ensuring order, logical reasoning and perpetuation of principles with respect to issues of vital importance to human existence. The ingenuity of the English judges became reflected, early enough, in the growth of the common law principle that like cases should be decided alike and that there is value in giving respect to the judgments of higher courts or the judges who man higher courts, given their accumulated knowledge and experience.

When the British became the colonial overlord of many of the African countries or to put it more appropriately, the commonwealth countries, it was felt that the importation of the common law and the principles and concepts embedded in this idea was inevitable. But, the British was cautious in the utilization of the common law and equitable principles for the resolution of disputes in their countries of conquest and dominion. Hence, courts were established along the line of the English judicial system but with the additional establishment and recognition of indigenous courts to cater for the interest of the indigenous people and all others who accepted to be subject to the sway of the indigenous laws. Furthermore, the British established a hierarchical system of courts distinct from the courts in England. Notwithstanding the towering existence of the House of Lords, the highest English court of pre-eminence and distinction, it was felt that the common heritage of most of the commonwealth countries, historical homogeneity of some of them, confluence of governance and the need to promote

fairness or equity, demanded the creation of distinct courts but with a common arrow head. Hence, various distinct national, regional and common courts were established. The common courts included the West African Court of Appeal (regional) and the Privy Council which was the highest court for the commonwealth countries. The effect was the development of distinct jurisprudential principles based on their distinct values, cultural demands and social milieu. The further effect was the creation of judicial precedent from the decisions of these commonwealth courts. In some cases, decisions diverged on common facts as a result of the social milieu within which those decisions were to operate. After independence, the decisions of these courts which had become extinct were handy for followership, application and attention. The tenor or level of bindingness of these decisions depended and still depends on the level of such courts at the time of their existence as previously discussed.

However, notwithstanding the lack of hierarchical link between the strict English courts in England, outside the Judicial Committee of the Privy Council, and the commonwealth courts, it has been the fortune of Nigerian judges to refer to the decisions of the House of Lords and the English Court of Appeal, among others, to establish very vital principles of law in Nigeria even though there is no hierarchical link especially between these English Courts and the Nigerian courts. It is often said, that decisions of these English courts are merely persuasive and not binding. This conclusion is historically valid and logically indisputable but it should be stated and noted that most of the vital principles of law in almost all the areas of human endeavour and relevance were established by these English courts and often referred to by the Nigerian judges. It is therefore necessary to re-assess the idea of judicial precedent, in view of the historical fact of colonialism and its effect on the judicial development in the commonwealth countries, Nigeria inclusive. It seems the conclusion that such decisions are persuasive is too shaky and pedestrian considering the level of reliance on these decisions by the Nigerian judges and in appropriate cases by the judges of the commonwealth countries. Indeed, most of these English decisions form the basis of

subsequent decisions of the common law courts in the commonwealth countries. The word persuasive should be reserved for the courts on the same plane or lower in status in the hierarchical ladder of a particular judicial system. The effect of colonialism and reliance on decisions of the extinct courts established by Britain as the colonial overlord of Nigeria, and by extension the commonwealth countries call for the need to now speak or refer to the judicial precedent idea in terms of "direct judicial precedent" which should relate to the effect of decisions of the extinct courts established for each of the commonwealth countries and the courts currently in existence in each of these commonwealth countries and "indirect judicial precedent" which should relate to decisions of English courts not in the same hierarchical link with the relevant country in the commonwealth family, but which are utilized in substantial compliance with the decisions and tenor or reasoning of the English judges. While direct judicial precedent should be binding with all the weight and requirements of classical judicial precedent formula, the indirect judicial precedent should be binding on the relevant common law court in the commonwealth family except where it would be unreasonable, illogical, inequitable, unfair, oppressive or against public policy, in its dynamic formulation. This reflects the truth of the position and what has been happening in most commonwealth countries, Nigeria inclusive. Nigerian courts have been following English decisions reached by the English courts not in any hierarchical relationship with the Nigerian courts either in the past or now to establish fundamental principles and notions of justice necessary for human existence, interaction, commercial pursuits and governance. Nigerian courts have been refusing to follow some of these English decisions on account of the factors stated above.

Furthermore, two additional points are relevant for consideration. The first is the source of the common law itself. Common law was developed in England through the ingenuity of the English itinerant judges. It became a thorough, complete and comprehensive system of law, which today, ranks among the best of legal discoveries in the resolution of disputes through the courts. Secondly, the reception laws of the various states and

at the federal level, in importing the English system of justice found in the common law and the doctrines of equity have imported these two ideas for the purpose of achieving excellence in judicial decisions. It seems hypocritical to appreciate the importance of these common law and equitable principles in one breadth and to deny their potency as sources of law in another breadth on account of unnecessary adherence to the classical idea of judicial precedent. One notable thing about law is its dynamism and its adaptability to changes. The doctrine of judicial precedent should also be viewed in this perspective for it to accord with the factual situation of modern law and the idea of justice. To view the relevant decisions of strict English courts, in this dynamic way is to return to the source of the common law and principles of equity. The idea and effect of "indirect judicial precedent" was appreciated by the drafters of the reception laws since the common law, the doctrines of equity and the statutes of general application were and are still meant to be applied in so far as local rules and local circumstances permit. This qualification marks the point of departure between direct judicial precedent and indirect judicial precedent.

Some areas of the law may be considered in this respect for a better appreciation of the point being made here.

Company Law

Salomon V Salomon & Co Ltd.[83] The case of *Salomon v Salomon & Co Ltd.* was decided on the 16th day of November 1896. In this case, the appellant, A. Salomon, for many years carried on business, on his own account, as a leather merchant and wholesale boot manufacturer. With the design of transferring his business to a joint stock company, which was to consist exclusively of himself and members of his own family, he, on July 20, 1892, entered into a preliminary agreement with one Adolph Anholt, as trustee for the future company, setting the terms upon which the transfer was to be made by him, one of its conditions being that part payment might be made by him in debentures of the company. The A. Salomon's solvent business was sold to a limited company with a nominal capital of 40,000

[83] (1897) A.C. 22.

shares of 1l each, the company consisting only of the vendor, his wife, a daughter and four sons, who subscribed for one share each, all the terms of sale being known to and approved by the shareholders. In part payment of the purchase money, debentures forming a floating security were issued to the vendor. Twenty thousand shares were also issued to him and were paid for out of the purchase money. These shares gave the vendor the power of outvoting the six other shareholders. No shares other than these 20,007 were ever issued. All the requirements of the Companies Act 1862 were complied with. The vendor was appointed managing director. Bad times came, the company was wound up, and after satisfying the debentures there was not enough to pay the ordinary creditors. It became necessary to determine the status of the new company – the limited liability company which was formed.

Lord Halsbury L.C. deciding the case on appeal to the House of Lords held inter alia:

> I observe that the learned judge (Vaughan Williams J.) held that the business was Mr. Salomon's business and no one else's, and that he chose to employ as agent a limited company; and he proceeded to argue that he was employing that limited company as agent, and that he was bound to indemnify that agent (the company). I confess it seems to me that the very learned judge becomes involved by this argument in a very singular contradiction. Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr Salomon. If it was not, there was no person and no thing to be an agent at all; and it was impossible to say at the same time that there is a company and there is not.

Lord Macnaghten held inter alia:

> When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate "capable forthwith", to use the words of the enactment, "of exercising all the functions of an incorporated Company". Those are strong words. The company attains maturity on its birth. There is no period of minority – no interval of incapacity. I cannot understand how a body corporate thus made "capable" by statute can lose its individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. This is, I think, the declared intention of the enactment.

The decision of the House of Lords as far back as 1896 has been taken as establishing the principle of corporate personality in all the common law countries, including Nigeria. The Nigerian court in deciding *Lasisi v Registrar of Companies*[84], had to determine the status of a registered company. Belgore J. following the reasoning of the House of Lords in *Salomon v Salomon & Co* held inter alia:

> A Company is an artificial human being and its registration is its birth and its certificate of registration is its birth certificate…the certificate

[84] (1974) 3 A.L.R. Comm. 85. See also **A.C.B. Plc. V. Emostrade Ltd** (2004) 10 WRN 42

> therefore, is not only the company's birth certificate, evidencing the fact that it has been created a legal person; it is also conclusive evidence that the company was rightly born after proper ante-natal procedure had been followed.

Other Nigerian courts including the Supreme Court of Nigeria have been following the 1896 reasoning of the House of Lords in *Salomon v Salomon & Co.* Indeed, section 37 of the Companies and Allied Matters Act 1990 provides:

> As from the date of incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum together with such other persons as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an incorporated company including the power to hold land, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in the Decree.

Law of Contract

A contract is an agreement between two or more persons to enter into a legal obligation. The essential requirements of a valid contract include an offer, an acceptance, consideration, intention to enter into legal relations, and capacity. Others include the fact that the contract should not be vitiated by factors like mistake, misrepresentation, duress, undue influence and such other factors. Only parties to the contract, as a general rule can make claims under the contract. Appropriate remedies may be sought in a court of law and parties could be discharged from a contract for justifiable and recognized reasons.

One fact about the law of contract is that it came into being through the ingenuity of the courts, although various statutes

now complement the efforts of the courts, the principles have come to stay. One thing that could be said of the Nigerian law of contract is that almost all the principles follow the English law of contract. Thus, English decisions are usually resorted to and indeed serve as the base or *locus classici* in the interpretation and application of the basic principles of the Nigerian law of contract. The general principles of the English law of contract and the English cases establishing these principles which have been followed in Nigeria are shown in Table II.

TABLE II
GENERAL PRINCIPLES OF THE ENGLISH LAW OF CONTRACT AND NIGERIAN CASES

	PRINCIPLES OF THE LAW OF CONTRACT	ENGLISH CASES	NIGERIAN CASES FOLLOWING THE ENGLISH CASES
1	*Unilateral Contract*	Carlill v Carbolic Smokeball Co. (1893) 1 Q.B. 256	Federal Government of Nigeria v. Zebra (2002) 12 SCNJ 330
2	*An Invitation to Treat*	(1) Pharmaceutical Society of Great Britain v Boots Cash Chemists (1952) 2 Q.B. 795 (2) Fisher v Bell (1961) 1 Q.B. 394	NEKA B.B. Manu v. A.C.B. (2004) 14 WRN 01
3	*Counter Offer*	Hyde v Wrench (1840) 3 Beav. 334	Afrotech Ltd v MIA & Sons Ltd (2001) 6 WRN 65
4	*Variation of Contractual Rights* (a) *The Rule in Pinnel's Case (1602) 5 Co. Rep. 117a* (b) *Promissory Estoppel*	Pinnel's Case (1602) 5 Co. Rep. 117(a) Central London Property Trust Ltd v High Trees House Ltd (1947) K.B. 130 Hughes v Metropolitan Railway Co. (1877) 2 App. Cas. 439	Bulet v International Nig. Ltd v Tajudeen Kolawole Balogun (2001) 48 WRN 173 Imoto v H.F.P. (2001) 30 WRN 126 Tikatore Press v Abina (1974) 4 UILR 145 Ajayi v R.T. Briscoe (1964) 3 All ER 556 B.O.N. v Yau (2001) 29 WRN 1
5	*Express Terms*	Jacobs v Batavia and General Plantations	Mbonu v Nwoti (1991) 7 NWLR (pt. 206) 737

		Trust (1924) 1 Ch. 287	Akanmu v Olugbode (2001) 13 WRN 132 Union Bank Ltd v Ozigi (1994) 3NWLR (Pt.333) 385.
6	**Fundamental Breach (Exemption Clauses)** *Fundamental Breach* **(Exemption Clause) contd.**	Suissee Atlantique (1970) 2 All ER 774 UGS Finance Ltd v National Mortgage Bank of Greece SA (1964) 1 Lloyd's Report 446 Harbutts Plasticine v Wayne Tank & Pump Co. Ltd (1970) 1 Q.B. 447 Photo Productions Ltd v Securicor Transport (1980) A.C. 827	Niger Insurance Co Ltd v Abed Brothers Ltd & anor (1976) 7 SC 35 Narumal & Sons v Niger Benue Transport Co. Ltd (1989) 4 SCNJ 107 **Akinsanya v UBA (2001) 42 WRN 67**
7	Non est Factum	Thorough good's case (1584) 2 C. Rep. 9a Foster v Mackinnon (1869) L.R. 6 C..P. 704 Muskham & Finance Ltd v Howard (1963) 1 Q.B. 904	Ogunleye v The State (1991) 3 NWLR (pt. 277) 1 Awosile v Sotunbo (1992) 5 NWLR (Part 243) 514 Oluwo v Adebowale (2001) 25 WRN 138 Okoya v Santili (1994) NWLR (pt. 338) 256 Tijani v Olufowobi (1994) 7 NWLR (pt. 611) 506 U.B.A v Ishola (2001) 41 WRN 77
8	Privity of Contract	Dunlop Prieumatic Tyre Co. Ltd v Selfridges Ltd (1915) AC 847	Makwe v Nwukor (1915) AC 847 Alhaji Ali Shuwa v Chad Basin Development Authority (1991) NWLR (pt.205) 550.
9	Damages	Hadley v Baxendale (1854) 19 Ex. 341	NEPA v Alli (1992) 8 NWLR (pt. 259) 291 Universal Vulcanising (Nig) Ltd v I.U.T.T.C (1992) 9 NWLR (pt. 266) 388

Other areas of the law where some principles of English Law or derivative principles of English Law were upheld by the Nigerian Courts are shown in Table III.

TABLE III

SOME PRINCIPLES OF ENGLISH LAW AND ENGLISH DECISIONS FOLLOWED BY THE NIGERIAN COURTS IN RESPECT OF SOME AREAS OF THE LAW

		ENGLISH CASES	NIGERIAN CASES
1	*MEDICAL LAW* *(infamous conduct)*	Rumball v. Schmidt (1882) 80 BQD 603	Medical and Dental Practitioners' Disciplinary Tribunal v. Okonkwo. (2001) 19 WRN I
2	**CONFLICT OF LAWS** *(i) Domicile* *(ii) Public Policy* *(iii) International Contract* *(iv) International Tort* *(v) Marriage (Dissolution of a marriage)* (vi) *Administration of Estates (Executor de son tort)*	Le Mesurier v. Le Mesurier (1895) AC 517 Lin Poh Choo v. Camden & ors (1979) 2 All ER 910 Unterweser Reederel G. M. B. H. V. Zapata Offshore Co. "The Chaparral" (1968) 2 LL. L.R. 1581 The Halley (1863) L.R. 2 P.C. 193 Phillips v. Eyre (1870) L.R. 6 Q.B.1 Boys v. Chaplin (1968) 2 Q. B. 1 Herd v. Herd (1936) P. 205 Thomson v. Harding (1853) 22 LJ Q.B. 448	Sonnar Nig. Ltd & anor v. Norwind & anor (1988) NSCC (pt II) 28 Sonnar (Nig.) Ltd & anor v. Partenreedri M.S. Norwind & anor (1988) NSCC (pt. II) 28 Amanambu v. Okafor (1966) 1 All NLR 205 Benson v. Ashiru (1967) NMLR 363 Odiase v. Odiase (1965) ANLR 515 Alhaji Saura Yusuff v. Yetunde Dada & 3 ors (1990) 7 SCNJ 68
3	**PUBLIC INTERNATIONAL LAW** *(Rights created under a community law)*	Schlorsch Meier GMBH v. Hennin (1975) 1 ALL E.R. 152	General Sanni Abacha & ors v. Chief Gani Fawehimi (2000) 4 SCNJ 400
4	**ARBITRATION** *(Scott v. Avery Clause)*	Scott v. Avery (1856) 5 H.L. Cas. 811	Obembe v. Wemaboard Estates Ltd. (1977) 5 SC 129
5	JURISPRUDENCE & LEGAL THEORY *(Grundnorm)*	State v. Dosso (Pakistan) [1958] 2 PSCR 180 Uganda v. Commissioner of prisons(Uganda) (1966) EALR 514	Lakanmi V. Attorney General, West (1971) 1 U.I.L.R 201

6 7	**LAND LAW** *(Possession)*	Fowley Marine (Emsworth) v. Gafford (1968) 1 All ER 979	Dosunmu & ors v. Bamisebi & anor [1974] 4 U.I.L.R (pt. II) 216
	LAW OF INSURANCE *(The Principle of utmost good faith)*	Carter v. Boehm (1766) 3 Burr. 1905	Century Insurance v. Obi Atuanya (1960) 2 All NLR 317
8	**COMMERICAL LAW** *(Title of a Seller in a contract of sale – section 12 Sale of Goods Act 1893)* *(a C.I.F. contract)*	Rowland v. Divall (1923) 2 K.B. 500 C. Crown Std v. Barber (1915) I K.B. 316 Re Weis & Co Ltd and Credit Colonial et Commercial Antwerp (1916) I K.B. 346	Akosile V. Ogidan 19 NLR 87. Okereke (Trading as P.D.O. Okereke & Sons v. Comptair Commercial Industrial Afrique (Nig.) Ltd. (1975) 5 UILR (pt II) 213
9	**FAMILY LAW** *(Divorce, Living Apart)* *(Custody of children)*	Warr v. Warr Re L. (1962) 3 All ER 1	Janet Ajayi Vs. Alfred Ajayi (1974) 4 UILR (Part III) 338 Adetohun v. Adetohun (1972) 2 UDLR 289
10	**ADMINISTRATIVE LAW** *(Discretion)*	Sharp v. Wakefield (1891) A.C. 173 Roberts v. Hopwood (1925) AC 578	Chairman of the Board of Inland Revenue v. Joseph Rezcallah & Sons Ltd (1961) NRNLR 32 R. v. Minister of Lagos Affairs, Ex parte The Cherubim & Seraphim Society (1960) LLR 129
11	**LAW OF TORTS** **(Negligence)**	Donoghue v Stevenson (1932) A.C. 562	Nigerian Bottling Co. Plc v Okwejiminor (1998) 8 NWLR (Pt. 561) 295

12	**CONSUMER PROTECTION**	Donoghue v Stevenson (1932) A.C 562	Nigerian Bottling Co. Plc v Okwejiminor (1998) 8 NWLR (Pt. 561) 295
13	**INTELLECTUAL PROPERTY (Copyright Infringement)**	Colborn v Simms (1843) Ha. 543	Plateau Publishing Co. Ltd v Chief Chuks Adophy (1986) 4 NWLR (Pt. 34) 265
14	EQUITY *(Equitable doctrine of notice)*	Picher v. Rawlins (1872) L. R. 7 Ch. App. 269, (1872) 25 L.T. 924 Jared v. Clements (1903) 1 Ch. 428, (1903) 88 L.T. 97	Ogundiani v. Araba (2001) 38 WRN 117
15	TRUST *(Resulting Trust)*	Eves v. Eves (1975) 3 All ER 768. Cooke v. Head (1972) 2 All ER 38. Grant v. Edwards (1986) 2 All ER 426.	Idirisu v. Obafemi (2003) 7 WRN 1

Notwithstanding the above issues, Nigerian courts refused to follow English decisions or principles in certain cases. Reasons for the refusal include constitutional provisions and different procedural requirements for assertion or pursuit of rights under various procedural laws. Some relevant cases in this respect are listed below.

(I) *Media Law*: Qualification of the decision of the English court in *British Steel Corporation v. Granada Television Ltd* (1981) I All ER 417 in *Tony Momoh v. Senate of the National Assembly and ors* (1981) I NCLR 105 and *Innocent Adikwu (Editor, Sunday Punch Newspaper) & ors v. Federal House of Representatives & ors* (1982) 3 NCLR 394.

(II) *Procedural Law*: Qualification of the rule in *Smith v. Selwyn* in *Nosiru Bello v. Attorney General of Oyo State* (1986) 5 NWLR 828.

(III) *Constitutional Law:* Refusal of the Privy Council to follow the English convention on the determination of

how a Premier may be removed by the House of Assembly in *Adegbenro v. Akintola* (1962) All NLR (pt. II) 462

(IV) *Sedition:* Refusal of the Nigerian courts to follow the rationale in the English court decision in *Francis v. Chief of Police* (1973) AC 761 in *Ivory Tower Trumpet* (1983) 3 FNR and *Arthur Nwakwo v. The State* (1983) 2 FNR 283.

(V) *Custom/Customary Law*: The meaning of a custom in England which must be of immemorial antiquity as explained in *Mills v. Mayor of Colchester* (1867) L.R. 2 CP 567, *Simpson v. Wells* (1872) L.R. 7 Q.B. 214, *Perry v. Barnett* (1885) 15 QBD 388 and *North & South Trust Co. v. Berkeley* (1971) 1 All ER 980 and the meaning and features of a custom or customary law under the Nigerian law as shown in *Owonyin v. Omotosho* (1961) All NLR 304, *Lewis v. Bankole* (1908) 1 NLR 81 and *Oyebanji v. Attorney General of Osun State* (2004) 51 WRN 94.

Personal Law, Principle of Extraterritoriality and the Issue of the Law Within and Without

Personal law deals in the main with the law of an individual. It is the law which attaches some incidents to one by way of rights and duties on account of that person's status or on account of that person's membership of a particular community. It also deals with the law which regulates one's affairs as a consequence of certain events[85]. It differs from the general law which applies to all. Personal law may attach to one by reason of one's birth, choice, or as a member of a particular community or in consequence of being a partaker in a legal event or incident. In order to regulate or give effect to a personal law, there may

[85] For example, domicile of choice or the issue of formal validity of a marriage.

be a personal system of law[86]. In the context of Nigeria, being a member of a community may endow one with some values and some incidents which may be personal to one as such. Thus, being resident in a place outside one's indigenous community may create some problems as the law of the place of residence (territorial law) outside one's indigenous community by birth may be outside the purview or legal dictates of one's personal law. Thus, a distinction is usually drawn between the territorial law and personal law[87]. In this context, there may be a situation of the law within and without. The implications of this may be very important to note. The case of ***Olowu v. Olowu***[88] may be considered in this respect. The issue for determination before the court, in this case, was the proper customary law or personal law of the deceased – Ayinde Olowu, at the time of his death. The estate of the deceased was the subject-matter of litigation between the parties. The deceased was a Yoruba of Ijesha origin by birth. He married Bini women, settled and established a home in Benin City. During his lifetime, the deceased applied to the Oba of Benin to be "naturalized" as a Bini, that is, to be conferred with Bini status under the Benin native law and custom which permitted the conferment of such status. The Oba of Benin gave his assent to the request and the deceased became a Bini subject by reason of which he was subject to all the rights enjoyed by and obligations imposed on an indigene of Benin under the Bini native law and custom. As a result of the change in his status, the deceased was able to acquire a lot of landed property in Benin City. On account of the above facts, the trial judge held that the deceased had voluntarily relinquished his cultural heritage as a Yoruba man and had become a Bini by "naturalization". The trial court further held that the Bini native

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[86] For example, Sharia Court or Sharia Court of Appeal or customary Court or Customary Court of Appeal regulate issues relating to Islamic law or customary law.

[87] See section 23 of the Customary Courts Law of Eastern Nigeria (and states carved out of the region). Section 20 of the Native Courts Law 1956 of Northern Region (and states carved out of this region and section 20 of the Customary Courts Law of Western Region 1957 (and the states carved out of this region)

[88] (1985) 12 SC 84

law and custom was the proper personal law of the deceased at the time of his death and accordingly that the Bini native law was the proper law for the distribution of his estate consequent upon his death intestate. The Court of Appeal dismissed the appellant's petition by reason of which there was a further appeal to the Supreme Court. Bello JSC, who gave the lead judgment held inter alia:

> The word "naturalization" 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 this 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 culturalisation with its attendant change of personal law which may take place by assimilation or by choice[89].

In the earlier case of *Rasaki Yinusa v T.T. Adebusokan,*[90] Bello J. (as he then was) held thus:

> Subject to any statutory provision to the contrary, it appears from both cases that mere settlement in a place, unless it has been for such a long time that the settler and his descendants have merged with the natives of the place of settlement and have adopted their ways of life and custom would not render the settler or his descendants subject to the native law and custom of the place of settlement. It has not been shown in this case that the parents of the testator and the

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[89] *Ibid.* p. 88
[90] (1968) NNLR 97

> testator himself had settled for such a long time in Lagos and have adopted the Yoruba ways of life and if he had died intestate his estate would have been subject to "Idi-Igi" distribution – On the contrary, the evidence of an old friend and compatriot of the testator shows that the latter had always regarded himself as a native of Omu-aran ...therefore the testator was a native of Omu-aran subject to the native law and custom of Omu-aran in the Kwara State.

It is clear from this judgment, that the issue of the law within and without from the point of view of personal law under customary law has legal implications. Thus in order to adopt the law of the place of settlement as one's personal law, the adoption of the ways of life of the people in the new place of settlement and other incidents such as marriage, adoption of names of the place and conferment of chieftaincy title(s) in appropriate cases are factors to be taken into consideration.

One other variant of law which used to be grouped under customary law and which operates as a personal law in Nigeria is the Sharia law. Sharia law is a prominent personal law from which a personal system of law has developed. The Nigerian 1999 Constitution which is the foremost law in Nigeria provides in section 10 that "the Government of the Federation or of a state shall not adopt any religion as state Religion". Sharia law is thus a law relevant to the adherents of the Islamic religion. It was in view of this fact that the Penal Code was enacted as the *basic* law or statute for the criminal justice system in the northern part of Nigeria. On account of the principle that criminal law does not have extra-territorial application, the Penal Code does not operate in the southern part of Nigeria where the Criminal Code holds sway. Thus in *Aoko v Fagbemi*[91], it was held that adultery though an offence under the Penal Code in operation in the northern part of Nigeria, cannot form the basis of any criminal prosecution in the

[91] (1961) ANLR 400

southern part of Nigeria where it has not been recognized as an offence.

The Sharia Penal Code Law though enacted by various northern states beginning with Zamfara state in the year 2000[92] is not a general law. It applies only to Moslems in those states[93]. Some punishments provided for by these Sharia penal code laws have been found to be very excessive especially with respect to offences such as adultery[94]. The public outrage which became the consequence of some decisions reached by the various Sharia courts became so pronounced that it became a subject of global condemnation[95].

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[92] See the Sharia'h Penal Code Law of Zamfara State 2000 which came into operation on the 27th day of January 2000.

[93] For example, issue C of the general part of the Zamfara State Shari'ah Penal Code which provides thus: "every person who professes the Islamic faith and/or every other person who voluntarily consents to the exercise of the jurisdiction of any of Shariah courts established under the Shariah Courts (Administration of Justice and certain consequential changes) Law, 1999, shall be liable to punishment under the Shariah Penal Code for every act or omission contrary to the provision thereof of which he shall be guilty within the state".

[94] For example under sections 126 and 127 of the Kano State Shariah Penal Code Law, the punishment for adultery is stoning to death, whereas, under the Penal Code in operation in the same Northern Nigeria, Kano State inclusive, the punishment is two years imprisonment, with or without fine under section 388 of the Penal Code Cap. 89, Laws of the Northern Nigeria 1963.

[95] Especially with respect to the decisions reached in *Safiyat Tungar Tundu* and *Aminat Lawal*. See Agaju Madugba, Ahmed Oyerinde, Juliana Taiwo and Yakubu Musa "Sharia Appeal Court Frees Safiya – Decision is Victory for Islamic Law", *This Day*, Vol. 8 No. 2529, Tuesday, March 26, 2002; Constance Ikokwu, "Safiya's Acquittal: The Triumph of Reason over Law", *This Day*, Newspaper, Sunday March 31, 2002 pg.13; Abubakar Umar & Friday Oboh, "Sharia" Appeal Court Frees Safiya" *The Post Express*, Tuesday, March 26, 2002 pp 1 and 2; Muyiwa Adeyemi & Erik Meya "Court saves Safiyat from Death by Stoning, *The Guardian*, Tuesday, March 26, 2002 pp 1 and 2. For comments on this case see Akpo Mudiaga Odje "Safiyat's Acquittal and the Rule of Law in Nigeria". *The Guardian*, Tuesday April 23, 2002 pg. 76; Isioma Daniel, "Touched by Sharia," This Day, Saturday, March 23, 2002 pg. 44; Shaka Momodu "How it All Began", *This Day*, Vol. 8 No. 2526, March 23, 2002 pp 43-44; Anayo Goddy Uwazunke, "Sharia v. The Constitution, *This Day*, Vol. 8 No. 2536, Tuesday April 2, 2002 pg. 39; John Oziegbe "Safiya: A Second Look at Capital Punishment, Vanguard Law and Human Rights" *The Vanguard Newspaper*, Friday, April 5, 2002; Tawey Zakka "Coming to Rome", *New Nigerian*, Sunday, September 15, 2002 pg. 19; Toye Akinrinlola, "Safiya: Italian embassy replies Ahmed", *The Punch*, Tuesday; September,

A catalogue of some of the cases decided by the various Sharia courts upon the inception of Sharia law as a penal system in some states in the northern part of Nigeria is shown in Table IV.

TABLE IV
CATALOGUE OF CASES DECIDED UNDER VARIOUS SHARIA PENAL CODE LAWS

S/NO	Year	Names	Occupation	State	Offence(s)	Punish-ment
1	2001	Maniru Abdullahi	Not stated	Zamfara	Carrying a Moslem woman on motorcycle	126 lashes
2	2001	Jafaru Isa	Not stated	Kastina	Carrying a woman on motorcycle	126 lashes
3	2001	Sule Sale	Not stated	Kastina	Stealing three packets of cigarette	80 lashes
4	2001	Yakub	Not stated	Niger	Making love with his mother-in-law	Amputa-tion
5	2001	Bariya	Not stated	Zamfara	Fornication	180 lashes
6	2001	Livinus Obi	Igbo Trader	Kano	Taking alcohol	100 lashes
7	2001	Muhamm ed Fauzi, 58 years Old	Not stated	Kano	Homosexual act with a 12-year old boy	Two years impri-sonment with a fine of ₦5,000 after

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2002 pg. 8; Raymond Tedunjaye, "Women lawyers Protest death by stoning" *New Nigerian*, No. 11, 641 Thursday September 5, 2002 pg. 1; Paul Altat & Abayomi Adesida, "Sharia Court Frees Safiya", *The Vanguard*, Tuesday March 26, 2002 pg. 1; Gbemi Olujobi, "Pains of Sharia Law, by Women and Groups" *The Guardian*, Saturday, March 23, 2002; Alex Igho "How Safiya left for Rome by Envoy" *The Guardian*, Vol. 19 No. 8, 699, Saturday September 14, 2002 pp. 1 and 2

The trial judge was Mohammed Bello Sayinnawal. He said his judgement was based on Islamic jurisprudence. See Yemi Banjo and Gbenga Odugbesan "... The Road to Freedom", *The Punch* Tuesday March 26, 2002 pp 1 and 2 at pg. 2.

						receiving 100 lashes
8	2001	Isa	Not stated	Zamfara	Fornication	100 lashes in presence of lover
9	2001	Bashiru Sule	Trader	Zamfara	Taking alcohol	80 lashes
10	2001	Aliu	Not stated	Zamfara	Slapping his wife	100 lashes
11	2001	Yinusa	Herdsman	Niger	Making love with mother-in-law	Amputation
12	2001	Ibrahim Magazu	Teenage Mother	Zamfara	Fornication	100 lashes
13	2001	Sule Abdullahi	Herdsman	Kastina	Stealing nine donkeys	Amputation
14	2001	Maru Aliyu	Not stated	Sokoto	Stealing sheep	Amputation
15	2001	Isyaku Sani Ingawa	Herdsman	Kastina	Stealing donkeys	Amputation
16	2001	Sani Jibiya	Imam	Zamfara	For taking alcohol	80 lashes
17	2001	Samaila Dan Gawo	Imam	Zamfara	For taking alcohol	80 lashes
18	2001	A. A. Sani	Imam	Zamfara	For taking alcohol	80 lashes
19	2001	Abdubakar	Not stated	Sokoto	Making love with a mad woman	100 lashes and one year imprisonment
20	2001	Ambaya Nahuche	Not stated	Zamfara	Gambling	15 lashes
21	2001	Sani Chanya	Not stated	Zamfara	Gambling	15 lashes
22	2001	Baba Karegita	Herdsman	Zamfara	Stealing	Amputation
23	2001	Lawali Inchitara	Herdsman	Zamfara	Stealing	Amputation
24	2001	Muhammed Jabi Shuni	Director, Sokoto State National Orientation	Sokoto	Stealing	40 lashes, ₦7,000 fine and one month imprison-

						ment
25	2001	Bello Ahmed	Not stated	Sokoto	Taking alcohol	80 lashes
26	2001	Isa Abdullahi	Accountant, Sokoto NOA	Sokoto	Stealing	Amputa-tion
27	2001	Bello Jangedi	Herdsman	Zamfara	Stealing a cattle	Amputa-tion
28	2001	Ahmed Binji	Not stated	Sokoto	Taking alcohol	80 lashes
29	2001	Lawali Gummi	Not stated	Zamfara	Stealing a cattle	80 lashes
30	2001	Sani Muhamm ed	Herdsman	Sokoto	Stealing and selling carcases of animals to a food seller	Imprison-ment
31	2001	Atahiru Umaru	Not stated	Kebbi	Sodomy	Death sentence by stoning
32	2001	Sani Wangy	Not stated	Sokoto	Armed Robbery	Amputa-tion
33	2001	Garba Dandere	Not stated	Sokoto	Armed Robbery	Amput-ation
34	2001	Hafsatu Abubakar	Not stated	Sokoto	Armed Robbery	Amputa-tion
35	2001	Miss Safiyat Tungar Tundu	Unemploy-ed	Sokoto	Adultery	Death by stoning sentence but now set free
36	2002	Alimat Lawal	Housewife	Katsina	Adultery	Death by stoning, later set free.

Two cases Safiya Hussaini Tungar-Tudu and Aminat Lawal caught international attention. The sentences in respect of the two cases by the courts of trial were globally condemned. The sentence of stoning to death on account of adultery in each of the two cases was quashed on appeal.

These Shariah Penal Code Laws are inapplicable to the non-adherents of the Islamic religion even in the northern part of Nigeria where these Sharia Penal Code Laws were made. The potency of a Sharia Penal Code Law is relevant only to the adherents of the Islamic religion.

Having regard to the preceding discussion, the word "frontier" becomes relative. Thus, a place outside the applicable personal law of a person may be a place "without" in the consideration of the operation of that personal law. The same can be said of criminal law which has no extra-territorial application. Thus in a country like Nigeria with a dual criminal justice system each operating within a segment of the country, the relevance of one law in the other part in this context may have to be determined from the general idea of non extra-territorial application of a code in the criminal justice system within the country as clearly shown by the case of *Aoko v Fagbemi*[96]. The same can be said of the Shariah law which is a personal law with its own personal system of law even with respect to criminal law in the northern part of Nigeria.

International Law and Concept of the Law Within and Without - The Dynamism of Operation, Relevance and Potency

International law has become recognized as a system of law in contradistinction from the municipal law. It has developed as a coherent system of law. It is usual to distinguish between private international law and public international law.

Private international law developed from the state of affairs in the early Roman Empire. As a result of the existence of a number of urban communities, conflicting territorial laws became inevitable[97]. The connection of every inhabitant was either to Rome or to one of the urban communities. The facultative element was either citizenship or domicile. The fall of the Roman Empire led to the recognition of personal laws[98]. The interplay of territorial and personal laws led to the formulation of basic private international law rules. The emergence of modern states led to the recognition and establishment of many facultative factors for the resolution of

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[96] Supra

[97] See v. Savigny The Conflict of Laws (Gulthrie's Transl.) S. 351 pg. 45. *See also* Ademola Yakubu, ***Harmonisation of Laws in Africa***, Malthouse Law Books 1999 pg. 4

[98] Gibbon, *Decline and Fall of the Roman Empire CXXXVIII*

disputes and governance of private issues but of international dimension. The factors of promotion of international commerce, international comity, international co-existence and the idea of reciprocity of recognition of vested rights and legal duties in the area of private law led to the further development of private international law.

Public international law developed by way of rules of conduct formulated to regulate relations between independent communities. The Greek states were noted for the embryonic or limited form of international law which was then called intermunicipal law. The intermunicipal law was made up of customary rules. Of particular importance were rules relating to war. The growth of independent modern states around the fifteenth century in Europe led to the development of international law. This was further helped by the discovery of the New World, the renaissance of learning and the reformation as a religious revolution. These developments put an end to the façade of the political and spiritual unity of Europe and shook the foundations of medieval christiandom[99]. The jurist ensured the development of international law through the use of the principles of Roman law which had become an object of revived study in Europe around the eleventh century, precedents of ancient history, theology and the Canon law and the semi-theological concept of the law of nature. This was between the fifteenth and eighteenth centuries. By the nineteenth century, international law had fully developed as a result of the further rise of powerful new states both within and outside Europe, modern technological advancement, modern transport and communication[100]. The convergence of states and regulation of affairs of mutual interest through treaties also contributed to the development of public international law. Other developments were the establishment of the Permanent Court of Arbitration by the Hague Conferences of 1899 and 1907, the establishment of the Permanent Court of International Justice in 1921 which was succeeded by the present International Court of Justice in 1946.

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[99] J.G Starke, *Introduction to International Law*, 10th ed. Butterworths (1989) pp 8 - 10

[100] J.G. Starke, op.cit, pg 13

The United Nations Organization was set up and its Charter was signed on 26 June 1945 in San Francisco. It came into force on 24 October 1945. Many bodies have been set up under the United Nation's Charter. International law has grown to become a coherent system of law that has brought peace and harmony to the world. Recent war situations and laws made to regulate wars, conventions and treaties made for the purpose of achieving peace have proved beyond doubt the relevance and importance of international law.

It is usual to differentiate between private international law and public international law. While public international law deals, in the main, with relations between states, organs of states and institutions[101], private international law deals, in the main, with relations between persons. Such relationships take international dimensions because they cut across states[102].

From the point of view of the theme of this discourse, it is necessary to discuss the interplay of municipal law and international law—private and public—and the potency and relevance of these laws within a municipal set-up as well as under the general umbrella of the international institutions set up in pursuance of the aims and objectives of public international law.

Within and Without: The Operation of Private International Law Principles

Every law operates within its own territorial base. This is known as the municipal law. However, the economic and social affairs of men have not been restricted to the geographical limits of the municipal units. One consequence of this development is the need to recognize rights and obligations which may have attached or consequences of conduct which may have happened through the acts or omissions of persons across boundary lines. Municipal laws are meant to operate within the confines of each state. The fluidity of movement of persons with the attendant

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[101] Although it should be stated that individuals are now subjects of public international law.

[102] States may also be subjects of private international law in certain cases e.g with respect to cases of expropriation or arbitration.

economic, legal and social consequences calls for the provision of adequate legal measures for the purpose of taking care of the consequences of this development. It is in consequence of the above that rules of private international law developed. Thus, the essence of the rules of private international law is to promote international comity, co-existence and for the purpose of protecting rights, regulations and obligations which are the necessary fall-out of these issues. Furthermore, it is the objective of private international law to ensure that the outcome of a law-suit does not depend on the venue of the action[103]. Conflict of laws promotes the idea of universal justice and giving effect to the reasonable expectations of the parties on account of their agreement or the nature of the legal action or conduct.

As stated above the nature of the sovereignty of each country makes the potency of the laws enacted within a particular state of vital importance and relevance in operation to the extent provided by the enabling law. Therefore, each state is the master of its own laws. Modern developments have made the principle of standing alone practically impossible, hence the idea of conflict of laws. So important is conflict of laws that Baty said of it that "there is a sweep and range in it which is almost lyric in its completeness"[104]. It is the fugal music of law. It is this reason that has earned it the appellation "one of the most baffling subjects of legal science". In its general sense, a given conflict problem may present one or more of the following three basic problems. They are the problems of jurisdiction, choice of law and recognition and enforcement of foreign judgments.

With respect to the problem of jurisdiction, it may have to be determined, the appropriate court to adjudicate upon a matter. The occurrence of an event within a particular geographical location may lead to the court of that location becoming seised of the matter in a simple municipal case. This may not be the position in an international situation as the nature of the case or

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[103] See ***Dicey & Morris, Conflict of Laws,*** Sweet and Maxwell, ***Cheshire & North's Private International Law.*** Butterworths, J.D. Mcclearn, ***Morris: The Conflict of Laws,*** Buttenworths, ***Scoles. Hay, Conflict of Laws,*** West Publishing Company, ***Goodrich & Scoles, Conflict of Laws,*** West Publishing Company.

[104] Baty, ***The Polarised Law,*** p.g 5

the agreement of the parties may lead to a different conclusion as to the court that should be seised of jurisdiction. The issue of jurisdiction is fundamental to the decision of the court on a particular matter[105]. A court that possesses the jurisdiction to adjudicate over a matter is clothed with the legal authority to reach a decision that will be potent in its nature and effect. Ordinarily the decision of that court should have the weight of authority it deserves wherever it is presented for recognition and enforcement. This would have been otherwise but for the development of private international law.

Private international law has also made it possible to have a choice of law or combination of laws to be applied to solve a problem beyond the laws of a particular territory. Thus, the choice of a particular court may not necessarily mean the choice of the law of that territory. The effect is that the territorial boundaries of a nation and the laws made within no longer determine the relevance and potency of the laws to be applied in particular situations.

What is more, a decision reached by the court of a particular state may need to be recognized and enforced in another territory. The effect of this is that the relevance and potency of a decision may not be confined to the territory of its pronouncement. Thus, a valid decision of the court of a particular state may be given necessary effect in another jurisdiction. It is therefore possible for the judge of a particular state to have a universal tongue of authority with respect to his decision on a matter in the cherished pursuit of international co-existence, international comity and in the promotion of international commerce. The idea of the law within and without and the relevance and potency of same usually orchestrated in the municipal system, becomes in private international law, the systems of law of segmental and universal application depending on the nature of an event or transaction or depending on the agreement of the parties. Each state thus becomes a concrete geographical location for the determination of issues

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[105] See ***Oloba v Akereja*** (1988) 2 NWLR (Pt. 84) 508, ***Madukolu & ors v Nkwmdilim*** (1962) 1 All NLR 587, ***Westminster Bank Ltd v Edwards*** (1942) AC 529 ***Alade v Alemuloke*** (1988) 1 NWLR (Pt. 69) 207

and choice of laws from a variety of laws and systems of law. Each time a situation provides a dislocation of this conclusion, principles of reservation clothed in the names of public policy, "fraude a la loi", non extra-territorial application of law or non-observance of the rules of natural justice are usually called in aid to make for the continuance and relevance of private international law. A development of this nature may create a "dismal swamp filled with quaking quagmires[106]" as conflict of laws was referred to. Notwithstanding this comment, it is a thing of universal joy and acceptance that private international law principles have been recognized in the pursuit of a dynamic private jurisprudence of segmental and universal validity and acceptance. It must however be ***cautiously noted*** that it is not in all cases that the rules of law in the area of private international law will be of universal application as in the case of a convention or a treaty. It may be that the law to be recognized for application in a particular state or in the determination of a matter may be the municipal law in operation in another state, that is, a court of a municipal state may apply the municipal law of another state or its idea of private international law in the resolution of the dispute or problem before it. To put it simply, a municipal court in a private international law matter, may step down its own substantive internal law, and make use of the municipal or private international law of another state in the resolution of the problem before it. Ordinarily, the judgment of the forum court in this regard, is meant to be the judgment which the court of the relevant country would have reached on the matter hence the judgment is meant to have universal validity. It may also be that the court of the forum must use a combination of the law of the forum court and the law of the *lex causae* in trying or determining the matter before the forum court as in the case of a foreign tort. The issue or relevance of the law to be applied by the municipal court is not dependent on the law of the forum alone except where the case has no foreign complexion or where the justice of the case or the public policy of it does not allow the operation of a law beyond the domestic law.

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[106] Dean Prosser, "Interstate Publications" (1953) 51 Mich. L. Rev. 959 at 971

The advent and acceptance of a dynamic private law jurisprudence of international dimension allows the law of one country to operate in another with the vigour, relevance, dynamism and potency it deserves. Specific issues will be considered in this respect for the purpose of explaining the above stated principles.

Characterization

Characterization is the process of allocating the issue raised before a court into its correct legal category for the purpose of determining the appropriate choice of law rule. It is the preliminary stage in the process of choosing the applicable law for the purpose of reaching an acceptable or just decision. The differences in the systems of law and the classification of legal transactions, consequences and events have led to the need to determine the nature of the issue before the court. Thus the factual situation has to be determined in order to know the head of the law it falls into after which the appropriate connecting factor or rule of law for the determination of the issue has to be determined. Thus, a matter that has something to do with the formal validity of a marriage as the category or factual situation must be determined in accordance with the *lex loci celebrationis* as the facultative element or connecting factor. With respect to the determination of an intestate succession to a movable, the connecting factor to be used by a court like the Nigerian court is the *lex domicilii,* although theories run riot on the method(s) of determining this. Thus, there are theories like the *lex fori, lex causae,* primary and secondary classification, via media, enlightened *lex fori*, autonomous theory, analytical jurisprudence and comparative law. [107]

Jurisdiction

Jurisdiction relates to the power of the court to try a matter. The issue of jurisdiction is very radical as it forms the basis of any adjudication[108]. In private international law and under the

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[107] See ***Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)*** (1996) 1 WLR 387, ***Re Cohn*** (1945) Ch. 5, ***Re Maldonado's Estate*** (1954) p. 223 ***Anton v Bartolo*** (1997) *Clunet 225*

[108] fn. 21

common law, the issue of jurisdiction is usually determined from the points of view of jurisdiction ***in personam*** and *jurisdiction* ***in rem***. It should be noted that the fact that a court is seised of jurisdiction in private international law does not mean that the law of that particular court or jurisdiction will be used in the resolution of the substance of that dispute.

For a court to have jurisdiction *in personam,* the writ of summons must have been served on the defendant or he must have submitted to the jurisdiction of the court. The basis of assumption of jurisdiction in this regard is a truism as far as the common law is concerned. It is not based on the municipal law of the defendant who is to be served with the writ of summons as to conclude that it is the law relating to the defendant that will be considered for the court to be seised of jurisdiction. As Lord Haldane noted in *John Russell & Co v Cayzen, Irvine & Co Ltd*[109].

> The root principle of English law about jurisdiction is that judges stand in the place of the sovereign in whose name they administer justice and *that therefore whoever is served* (emphasis mine) with the king's writ and can be compelled consequently to submit to the decree, is a person over whom the courts have jurisdiction.

Thus in *Colt v Salie,*[110] the defendant, who was not a British citizen nor resident in the U.K., while visiting London for a few days for a business reason was served with a writ claiming an amount adjudged against him by the Supreme Court of the state of New York, the subject-matter of the dispute not being connected with England. It was held that as there had been no fraud inducing the defendant to enter the country for the real purpose of serving him with the writ, the jurisdiction was well

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[109] (1966) 2 AC 298

[110] (1966) 1 All ER 678. Note however the rules as to the facultative issues on assumption of jurisdiction in contract and non contractual issues in the Eastern States of Nigeria.

founded by the service of the writ, although the defendant was a foreigner who was there merely casually.

With respect to jurisdiction in rem, the basis of jurisdiction over things (res) is the location of that thing within the jurisdiction[111].

Domicile

The idea of personal law stems from the fact that it is of utmost importance to regulate issues that are personal in an orderly manner to avoid unnecessary dislocations. It is felt that to subject a person to the law of the forum or the municipal law which is no more than a territorial law without any sentimental attachment or relevance in matters concerning his personal affairs may frustrate his reasonable expectations. As it was pointed out in *Bruce v Bruce*[112]:

> If the *lex fori* is to be the guide then the court may be required in the distribution of the same estate to enquire into the different laws of many foreign nations. The same circumstances may be attended with great inconvenience to families, for it is plain that to apply different laws to every detached part of the estate is to multiply the sources of litigation in an infinite degree.

Domicile has become a rule of law recognized in private international law for the regulation of affairs of personal nature. Such personal issues include family relationships or the person or persons to inherit one's property especially movables. The issue of one's status is usually determined by the law of domicile given the personal nature of it. The idea of personal law relates to the aggregriate of one's person as determined by the law which is closest to one and to which one looks up to for the determination of intimate issues or affairs as a person in the

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[111] See ***British South Africa v Compagnia De Mozambique*** (1893) AC 602, ***Lanlehin v Rufai*** (1959) FSC 184, ***Ijaola v Banjo*** (1958) LL.R 56, ***Nigerian Ports Authority v Panalpina World Transport*** (1974) 4 UILR 89

[112] 2 B & P 229

society or in a particular community. Under the common law, the *lex domicilii* determines this. Thus, it is expected that a person's status remains the same even in his travels from one jurisdiction to another. The idea that one's personal law follows him from one jurisdiction to another is very important as the territorial law where one is temporarily based may not affect the potency or relevance of this personal law. Thus, domicile may be regarded as the pre-eminent headquarters possessed by each person for the determination or regulation of issues of personal status or nature. Domicile may be any of the three variants: domicile of origin, domicile of dependence and domicile of choice. Domicile of origin is attached to one at birth. A person who cannot acquire a domicile of choice either on account of his age, condition or status may acquire a domicile of dependence. Domicile of choice is that which a person acquires by his conduct or voluntarily. To acquire a domicile of choice, a person must be physically present at the domicile of choice but it does not mean he cannot travel. He must also possess the *animus manendi,* the intention of making the place his permanent place. In a discourse relating to the law within and without, the relevance of the law of domicile is not based on the territorial law or the view that a municipal law does not operate outside its frontiers. The determination of one's personal law in private international law depends on the law of domicile of origin, or of dependence or choice as may be relevant to the issue to be determined. In *Winans v A.G.*[113], the court was faced with the determination of whether or not the deceased had lost his American domicile of origin and acquired an English domicile of choice. The deceased as at the time of his death had lived the last 37 years of his life mainly in England after he arrived there in 1859 following medical advice. He never re-visited the United States after his departure in 1850. It was held by an English court that the deceased was in England as a sojourner and a stranger and remained a sojourner and a stranger until he died. Thus, English law, the law within, was not used to determine this case, despite the fact that the deceased lived the

[113] (1904) A.C. 289

last 37 years of his life in England, and the fact that an English court tried this matter.

The idea of domicile is meant to be a dynamic process for the regulation of personal matters. Apart from the rules of domicile stated above, it is a rule of domicile that one cannot have more than one domicile for the same purpose. One problem in this area with respect to the Nigerian law is the rule that a married woman does not have a separate domicile. The earlier English rule to this effect has been changed by virtue of the Domicile and Matrimonial Proceedings Act 1973.

Renvoi

Renvoi simply means to return. In the determination of the distribution of property, it is felt that the desirable thing is that the mode of distribution should be the same everywhere. By this is meant that no matter what national court deals with the matter, there ought to be universal agreement as to what particular legal system shall indicate the actual beneficiaries. Thus it is felt that the municipal law of each country must not necessarily govern, for example, the devolution of the property of a deceased or the allocation of the rules to be followed by its own courts. Although there are problems inherent in the renvoi idea as could be seen from the recognition and use of theories like rejecting the renvoi[114], partial or imperfect renvoi[115] and the total, perfect or the foreign court theory[116], it could be said with particular reference to the theme of this inaugural lecture that it is not in all cases that the law within determines the relevance and potency of laws to be applied in this respect. The law without, or the law outside the frontiers of a state may determine the relevant law to be applied by the municipal court for the resolution of the dispute before the court. Thus, in *Re Ross*[117], Luxmoore J. held.

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[114] See ***Re Annesley*** (1926) Ch. 259 at 278, ***Bremer v Freeman*** (1857) 10 Moo P.C. 306, ***Hamilton v Dallas*** (1875) 1 Ch. D. 257.

[115] See ***Casdagli v Casdagli*** (1918) P. 89, ***L'affaire Forgo*** (1883) 10 Clunet 64, ***Re Askew*** (1930) 2 Ch. 259

[116] ***Collier v Rivaz*** (1841) 2 Curt 855, ***Frere v Frere*** (1847) 5 N.C. 593, ***Re Duke of Wellington*** (1948) Ch. 118, ***Re O'keefe*** (1940) Ch. 124

[117] (1930) A. C. I

> In my view the general trend of authorities establishes that the English courts have generally, if not invariably, meant by the law of the country of domicile the whole law of that country as administered by the courts of that country.

Contract

Contract is one area of the law where a valid agreement is based on the intention of the parties. The municipal law or the law within may not be that relevant except as chosen by the parties, since a contract is an agreement between two or more persons to enter into a legal obligation. The idea of private 'legislation' is allowed in the area of the law of contract[118]. The municipal law is not relevant except where the chosen law is illegal, has been fraudulently chosen or against the public policy of the forum. Although the idea of the *lex loci contractus* or the *lex loci solutionis* were the determining factors when the classical theories of contract held sway as the inflexible choice of law[119], rules, the recognition of the intention of the parties as the basis for determining the choice of law between parties to a contract has given the parties the power to determine the law to resolve the dispute which may arise between them. This is now called the proper law of the contract.

Thus in *Vita Food Products Inc v Unus Shipping Co Ltd*[120], Lord Wright held:

> It is now well settled that by English law the proper law of the contract is the law which the parties intended to apply. That intention is objectively ascertained and if not expressed, will be presumed from the terms of the contract and the relevant surrounding circumstances[121].

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[118] See ***Printing and Numerical Registering Co. v Sampson*** (1875) 19 Eq. Cas. 462 at 465

[119] See ***Robinson v Bland*** (1970) 1 Wm. Bl. 234 2 Burr 1077. *See also* American First Restatement.

[120] (1939) A.C. 277

[121] *Ibid*. pp. 289 - 290

Lord Wright speaking further in this regard held thus:

> Where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bonafide and legal and provided there is no reason for avoiding the choice on the ground of public policy[122].

He concluded thus "connection with English law is not as a matter of principle essential"[123]

Tort

The fluidity of movement of persons has led to some consequences. One of the consequences is the possibility of the commission of a tortuous act beyond the borders of one's residence, domicile or nationality. It needs to be determined whether it is the municipal law of the place of the commission of the tort or the *lex loci delicti commissi* that determines the issue of liability. The position was lucidly discussed by Morris when he said:

> Just as the law of contract responded to the pressures of international trade in the nineteenth century, so in the twentieth century the law of torts has responded to the pressures of the technological revolution as applied to the manufacture and distribution of products and to the means of transport and communications. Most of these pressures operate regardless of national or other frontiers. Dangerous drugs can cause babies to be born without arms or legs thousands of miles from the laboratory where the drugs were made. Unfair competition is no

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[122] Ibid p. 290
[123] Ibid p. 290

> longer confined to a single country. Every year, English motorists visit the continent of Europe in their thousands; accidents occur, people are injured or killed. English television viewers see programmes via satellites from all over the world, private reputations sometimes suffer. For all these reasons, the conflict of laws can no longer rest content with solutions designed for nineteenth century conditions[124].

To solve the problems in the area of the law of foreign tort, theories such as *lex fori* theory and the theory of obligation were formulated. Each of these theories has its own defects. As noted by Morris, "it is as though someone has at last released the safety valve with the result that a vast mass of words suddenly issues from the academic power-house in a cloud of escaping steam"[125].

Morris speaking further on the law of torts said:

> the law of torts has long since been emancipated from the criminal law and furthers very different objectives. The general purpose of the law of torts, said Holmes J. is to secure a man indemnity against certain forms of harm, not because they are wrongs, but because they are harms. The law of torts, like the law of contract serves the purpose of adjusting economic and other interests. It is increasingly an instrument of distributive rather than of retributive justice. Nor is it in any way easier to maintain that the law of torts is more closely connected with the fundamental policy of the forum than is the law of contract[126].

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[124] Morris, The Conflict of Laws, ***Sweet & Maxwell*** pg. 277

[125] Ibid

[126] op.cit at pg. 277

Whatever may be the theory, the modern law of foreign tort under the common law system can be discussed from the rule in *Phillips v Eyre*[127] and *Boys v Chaplin*[128]. Willes J. laying down the general rule of foreign tort in *Phillips v Eyre* held thus:

> 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... Secondly, the act must not have been justifiable by the law of the place where it was done[129].

The Nigerian court approving of the rule in *Phillips v Eyre*[130] in *Benson v Ashiru* held thus:

> *The Fatal Accidents Law of Eastern Nigeria makes the tort alleged to have been committed in Zaria, actionable here had it been committed here and secondly, the Fatal Accidents Law 1956 of the Northern Region makes the same tort actionable in Zaria where it occurred. The tests of Phillips v Eyre are therefore satisfied*[131].

The double actionability rule was established by the House of Lords in *Boys v Chaplin*[132].

The conclusion that could be drawn from this discussion is that municipal law alone does not determine the issue of liability

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[127] (1870) L.R. 6 Q.B. 1

[128] (1921) A.C. 356

[129] at pp 28 – 29. See also ***The Halley*** (1868) L.R. 2 Q.B. 193, ***Machado v Fontes*** (1897) 2 Q.B. 231, ***The Mary Moxham, Canadian Pacific Railway v Parent*** (1917) A.C. 195 at 205, ***Koop v Bebb*** (1951) 84 C.L.R. 629, ***Naftalin v L.M.S.*** (1933) SC. 259, ***M'Elroy v Mallister*** (1949) S.C 110 and ***Boys v Chaplin*** (1968) 2 Q.B. II

[130] (1967) N.M.L.R. 363

[131] at pg. 365

[132] (1971) A.C. 356

or otherwise in respect of a foreign tort. Indeed, with respect to the theme of this inaugural lecture, it is a case of the **combination of the law within and without** that determine the potency and relevance of the law to be applied in respect of foreign tort cases.

Marriage

The family as a social unit is a fact of life in many communities. The methods of family formation differ from one community to the other. The institution of marriage has been recognized as a way of ensuring a coherent family relationship. Although a marriage is usually referred to as a contract, it is a contract of a special specie. Two forms of marriage have been recognized. They are (a) a monogamous marriage or a statutory/Christian marriage and (b) a customary marriage which is a combination of a marriage under native law and custom and an Islamic marriage. One consequence which a marriage brings about is that of a relationship for the lifetime of each of the parties to the marriage[133].

In respect of a marriage under native law and custom, it is expected that the personal law of the parties would be considered. The personal law of the bride is very important because of the requirements of a valid customary law marriage. Such requirements include the bride price, consent of the family of the bride, the marriage formality and other incidents necessary to bring about the marriage relationship. The customary law of the husband becomes relevant once the relationship of marriage is concretized between the parties to the marriage. In respect of a marriage under Islamic law, the muslim law which may be the law of both parties to the marriage, forms the basis for the creation of the status of marriage. What should be done in this regard depends on the Islamic school of jurisprudence to which the parties to the Islamic marriage belong.

With respect to a monogamous, Christian or statutory marriage, it is expected that the marriage must satisfy the dual requirements of formal validity and essential validity of the

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[133] See *McCabe v. McCabe (1994) FLR 410*

marriage. The formal validity of a marriage is determined in accordance with the law of the celebration of the marriage otherwise called the *lex loci celebrationis.* As Lord Dunedin stated in *Benthiaume v Dastrous*[134]:

> ...if there is one question better settled than any in international law, it is that as regards marriage ... *locus regit actum.* If a marriage is good by the laws of the country where effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of domicile of one or other of the spouses....

The essential validity of the marriage is determined by the *lex domicilii.* Two forms of domicile have struggled for supremacy in this regard. They are the ante-nuptial domicile otherwise called the dual domicile[135] or the matrimonial domicile[136].

The fluidity of movement of persons across boundary lines has made it possible for the place of celebration of marriage to be different from the lex domicilii. The end of racial discrimination and other discriminatory tendencies has also made it possible for people of different colours to get married to each other without any barrier or legal impediment. Thus, as long as the legal requirements either in the form of the formality or essential validity are complied with, the law will give effect to the marriage or the effect which it is sought to achieve in respect of the marriage relationship. For example in *Warter v Warter,*[137] a husband domiciled in England but resident in India divorced his wife in India for adultery. She married in England a man domiciled in England less than six months after the decree absolute. Section 57 of the Indian Divorce Act 1869 provided

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[134] 3 Cl. & Fin 529

[135] See ***R v Bentwood Superintendent Registrar of Marriages*** (1968) 3 All ER 279

[136] See ***Brook v Brook*** (1861 – 73) All ER 495, ***Sottomayor v De Barros*** (No. 1) (1874 – 80) All ER 94

[137] (1890) 15 P.D 152

that it should be lawful for the parties to remarry after the expiration of six months from the date of the decree absolute and without any appeal therefrom, but not before the expiration of six months as stated above. Sir James Hannen P. (an English judge in an English Court) held that the re-marriage was invalid on the basis that the restriction on re-marriage imposed by a foreign law (Indian Law) was an integral part of the proceedings by which both parties may either be released or not released from their incapacity to contract a fresh marriage. This restriction, being that imposed on both parties, was held not to be penal.

From the above, it could be said that an issue relating to the validity of a marriage or the potency of it or an effect relating to the marriage may be that which may touch on the position of the law in more than one jurisdiction. This may be the position with respect to a monogamous marriage. With respect to a customary law marriage, the global recognition of customary law and the incidents relating to this form of marriage has made it imperative to recognize the law outside the territorial law in respect of a marriage within the municipal system[138]. In relation to a customary marriage across boundary lines, it is now fashionable to consider the personal law or customary law of the bride especially with respect to issues relating to the validity of the customary law marriage. Now that customary law marriage has been recognized even in jurisdictions[139] that had earlier considered this form of marriage as an unknown form of marriage or a marriage between infidels[140], it is now possible to determine the validity of this form of marriage and its effect in countries outside the place of celebration of the marriage,[141] or

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[138] The personal law, in this case the personal customary law or in a simple language, ordinarily, the original or customary law of birth of the person is usually looked unto.

[139] See ***Winn J. Shahnaz v Rizwan*** (1965) 1 Q.B. 390 at 397; See also Parker CJ in ***Mohammed v Knott*** (1969) 1 Q.B. 1 at pp 13 – 14.

[140] See ***Warrender v Warrender*** (1835) 2 CL. & F 488 at 532 and ***Hyde v Hyde*** (1866) L.R. 1 P & M 130 at 133 - 136

[141] See McCabe *v McCabe* (1994) FLR 410 See also Essentials of An Akan Customary Marriage McCabe v McCabe (1993) JAL 199; Yakubu Ademola, "Opting to contract a Polygamous Marriage: A Consideration of McCabe v McCabe" (1998) Vol. 5 No 1 **Abia State University Law Journal 49**.

indeed outside Africa where issues relating to the determination of the validity of customary law marriages were, before now, confined.

Succession

Succession relates to the transfer of the asset of the dead to the living either in accordance with the wishes of the propositus or in accordance with settled principles of law put in place for the achievement of the presumed intention of the propositus or conclusion of the law in this regard.

Succession may be testate or intestate. Testate succession means succession in accordance with the stated intention of the testator or in accordance with his will or his will and codicils. Intestate succession relates to succession not in accordance with the stated intention or will of the decedent but in accordance with conclusions of law in the pursuit of the presumed intention of the decedent.

Testate Succession

It has been realized that the fluidity of movement of persons during their sojourn on earth may create incidents which may transcend state boundaries. For example, in relation to a will, the assets of the deceased to be administered on the basis of the will may be in various jurisdictions. Yet, the reasonable expectations of the deceased as contained in the will should be made good except in the case of invalidity of the will for failure to comply with necessary legal requirements. Page Wood V.C. speaking on testamentary disposition held in *Campbell v Beaufroy*[142] thus:

> You must obtain probate ... in the country where the property exists; and when this is done, you regulate the manner in which you distribute or dispose of it by the law of the country where the testator was domiciled[143].

The issue of testamentary disposition is so complex that where it is necessary to have recourse to several jurisdictions, many

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[142] (1859) John 320

[143] Ibid p. 326

connecting factors may have to be made use of depending on the issue that is to be decided. Thus, a testamentary disposition with a foreign element may have to be considered from the angles of capacity, formal validity, essential validity, construction of the will and its revocation. These issues are not governed by a sole facultative element. Capacity with respect to movables is governed by the lex domicilii of the decedent. As Lord Denning pointed out in *Philipson – Stow v Inland Revenue Commissioner*[144]:

> Apart from this one question of construction, succession to movables is regulated by the law of his domicile; and succession to immovables is regulated by the lex situs.

Even then, it needs to be determined whether in respect of capacity, the issue of domicile has to be determined at the time of the making of the will or at the time of death. This is because the possibility of a change of domicile between the time of the making of the will and the time of death cannot be ruled out. The Anglo – American law looks unto domicile at the time of the death of the testator. This conclusion accords with the view of some continental authors. Authors like Graveson, Cheshire, Dicey and Morris are of the view that domicile at the time of the exercise of the testamentary capacity should be preferred. Nygh, an Australian author suggests a mid-way approach in the consideration of the issue of capacity either from the point of the exercise of the power of testamentary disposition by the testator or at the time of death. While the suggestion of Nygh is to be preferred, the earlier suggestion has some merit. The merit of a consideration of capacity at the time of the exercise of testamentary disposition considers the law at the time of the purported exercise of the power and if a testator did not have the power of testamentary disposition at this time, looking forward to it seems too uncertain to be accepted as a principle of law. However, it could be said with respect to a consideration of capacity at the time of death that if a will remains unrevoked till the time of death, the time of death could as well be taken as the

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144 (1961) A.C. 727

time when the will becomes relevant for consideration. Thus the lingering intention or wishes of the testator till the time of death should be given necessary legal efficacy as that which concretizes at the time of death.

The formal validity of a will under the common law was determined by the law of domicil at the time of death. The problems created by this method led to the passing of Lord Kingdown's Act or the Wills Act of 1861. The problems inherent in this Act led to the passage of the English Wills Act of 1963[143a]. The essential validity of a will is governed by the last domicil, that is domicil at the time of the death of the deceased.

On the construction of a will, the general principles that the *lex situs* determines the construction of an immovable asset and that the *lex domicilii* governs movables are subject to the overriding principle that the proper law of the will governs both. As Lord Denning pointed out in *Philipson - Stow v I. R.C*[145]*:*

> If a question arises as to the interpretation of the will and it should appear that the testator has changed his domicile between the time of the will and his death, his will may fall to be construed according to the law of his domicile at the time he made it.[146]

Incidentally, Lord Denning was considering the will relating to an immovable in this case.

In relation to revocation, it could be said that if a person possesses the power to make a will, he should also have the power to revoke it. In this regard, apart from the general power to revoke a will by a codicil, the revocation of a testamentary disposition should be determined by the *lex situs* in respect of an immovable and *lex domicilii* in respect of a movable. Where

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[143a] Note the Fourth Report of the Private International Law Committee (Cmnd. 491) 1958 and the International Convention on the Formal Validity of Wills made at the Hague in 1961. (Cmnd 1729 (1961). See also Kahn – Freund (1964) 27 M.L.R. 55 and Morris (1964) 13 I.C.L.Q. 684.

[145] (1961) A.C. 727

[146] Ibid. p. 761

there has been a change of domicile between the time of revocation or alleged revocation and the time of death, the governing law should be the law at the time of the revocation or alleged or attempted revocation, the time of performance of the act of revocation should be preferred in these circumstances.

The law relating to the exercise of the power of appointment, whether special or general, is as complex as the law relating to the determination of the validity of a will.

From the above, it could be seen that the fact that the issue of the validity of a will is being determined by a particular court may be relevant only with respect to the issue of jurisdiction and the characterization of the issue before the court. The law to be used in the resolution of the dispute before the court may transcend the municipal law or the relevant foreign law may be very potent in application more than the municipal law even in a municipal court.

Intestate Succession

Just as in the case of testate succession, where the issue involved relates to intestate succession, it has to be determined whether the issue has something to do with an immovable or a movable. In the case of an immovable, the *lex situs* governs. Lord Selbourn speaking on the rule relating to succession to an immovable in *Freke v Lord Carbery*[147] said:

> the territory and soil of England, by the law of nature and of nations, which is recognized also as part of the law of England, is governed by all statutes which are in force in England[148].

Furthermore, in *Drummond v Drummond*[149], it was held inter alia that:

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[147] (1873) L.R. 16 Eq. 461

[148] at pg. 466

[149] (1793) 6 Bro. P.C. 601. Justice White of the United States Supreme Court speaking on the position in the United States of America, in this regard, said in ***Clarke v Clarke (1900) 178 U. S. 186, (1900) S. ct. 873*** that this doctrine is "firmly established that the law of a state in which land is situated controls

> ... yet the same cannot affect or interfere with the succession to his real estate, situated in a different country and governed by a different law. Land, which cannot be removed from one country to another at the pleasure of the proprietor, must necessarily be subject to the rules of the jurisdiction within which it is situated; and it can only be acquired and transferred according to the forms, and under the qualifications which the law of the jurisdiction points out, so it must be subject to all those burdens and limitations which the law impose.

In respect of a movable, it is the law at the time of death at the *lex domicilii:* As Kay J. pointed out in *Duncan v Lawson*[150], in respect of movables

> when (they) are in places other than that of the person to whom they belong their accidental situs is disregarded, and they are held to go with the person.

Furthermore, in *Sill v Worsurick,*[150a] Lord Loughborough held, *inter alia,* in respect of movables thus:

> the maxim of the civilized world is, *mobilias sequitor personam*, and is founded on the nature of things. When movables are in places other than the home of the person to whom they belong, their accidental status is disregarded and they are held to go with the person.

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and governs its transmission by will or its passage in case of intestacy". See also the American Restatement (Second) on conflict of Laws, section 236(1).

[150] (1790) 1 H. B 665

[150a] (1791) I H. BL 665

Given the above rules and the possibility of the assets of the deceased being in several countries, the municipal law may not regulate more than the procedure, an immovable situated within the municipal system and the issue of classification. The law beyond the frontiers may be more relevant and potent in the determination of other issues or in giving effect to other issues relating to succession.

Administration of Estates

The possibility of becoming rich or becoming a man of affluence with the effect of having assets outside the borders of one's nationality or domicile makes the law of the place where the property or asset is situated very important. In the event of death, it may be necessary to administer the estate of the deceased person. The rule under the Anglo-Nigerian law is that administration of the estate of a deceased person can only be done by the person who has obtained the authority of the court in this regard. If a deceased made a will and appointed the executors who are willing to act, necessary authority may be granted to the executors to administer the estate by a grant of probate of the will. In the event of the death of the deceased intestate, necessary authority to administer the estate may be granted to some next of kins or the children of the deceased[151]. Where a will has failed to appoint an executor, a grant may be made with the will annexed. The executor(s) or administrator(s) are generically called personal representatives. In this position, they have the authority to deal with the property of the deceased and clear the estate of debts and other duties or expenses and distribute the surplus to those entitled under the will or intestacy.

It needs to be pointed out that the determination of the facultative principle to be applied to determine the appropriate law to be applied in the distribution of the property of a deceased as in the case of domicile or *lex situs* is one thing, the issue of a grant of probate is another thing entirely. While the

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[151] See for example, the Administration of Estates Law of Oyo State, Cap. Laws of Oyo State 2001; See also ***Salubi v Nwariaku*** (2003) 20 WRN 53, ***Shittu v Olanrewaju*** (2003) 29 WRN 85, ***Jadesinmi v Egbe*** (2003) 36 WRN 79, ***Okelola v Adeleke*** (2004) 1 SCNJ 309 and ***Yekini Otun & ors v Asimi Otun & anor*** (2004) 7 SCNJ 344.

facultative principle that governs the asset to be administered may be relevant, the rule is that probate must be sought from and granted by the court of the place where the asset to be administered is to be found. Thus, where a person dies domiciled in a foreign country the court will make a grant in the first instance to the person entrusted with the administration of the estate by the court of the deceased domicile failing which the court will make a grant to a person who would have been entitled to administer the estate by the law of the deceased's domicile. The court however has a discretion to exercise, in the making of the grant[152]. It should be pointed out that the administration of the estate of a deceased person is governed by the law of the country where the personal representative(s) obtained the grant[153]. If a personal representative intermeddles with the property of the deceased he becomes an *executor de son tort*[154].

The principles relating to administration of estates shows an interplay of rules between the law of the domicile of the deceased person which is utilized by the personal representative(s) of the deceased to administer his estate and the *lex domicilii* in this regard may be a foreign law with the potency and relevance demanded of such choice and the law of the place where the grant is sought, that is where the property or asset, is located. Such is the dynamism of this interplay of rules of law in the administration of the estate of the deceased person.

Recognition and Enforcement of Judgments

One area where the impact or the efficacy and relevance of a law outside its frontiers is felt is in the area of recognition and enforcement of foreign judgments.

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[152] See ***In the Goods of Kaufman*** (1952) P. 325, See also ***Practice Direction*** (1953) 1 W.L.R. 1237 and See ***Bath v British and Malayan Trustee Ltd*** (1969) 2 NSWR 114, the court made a grant to a residuary legate instead of the domiciliary administrator because the latter would have been obliged to remit, the assets to the country of the domicile in order to pay death duties. See generally, Morris, ***The Conflict of Laws,*** 4th edition, pp 340 – 347.

[153] See ***Preston v Melville*** (1841) 8 Cl. & F. 1

[154] See ***New York Breweries Co Ltd v Attorney General*** (1899) A.C. 62. See also ***Alhaji Suara Yusuff v Yetunde Dada & 3ors*** (1990) 7SCNJ 68

After the judgment of a court may have been rendered, it may be necessary to give effect to that judgment outside the jurisdiction of the court that gave the judgment. It is instructive to note that but for the development of the law giving effect to laws and incidents beyond the borders of the court that pronounced the judgment, it would have been necessary to re-open each case on every territory where the effect of the judgment ought to be felt or where the subject-matter of the judgment is situated whether a movable or an immovable or any other issue, for that matter. Except a case falls within one of the factors of reservation such as public policy, collection of the revenue or revenue law of another country, the penal status of a judgment or issue decided, non-observance of the rules of natural justice, competence of the court that gave the judgment, or whether the judgment is final and conclusive and whether the judgment has been fraudulently obtained, a judgment rendered in the court of a municipal system may be very potent and relevant in another country, no matter the distance and indeed no matter the difference in the legal system of the country where the judgment is to be recognized and enforced[155]. This is the position in respect of arbitral awards and judgments. For the purpose of ensuring coherence of principles in this area, the principles have been formulated that a judgment will be recognized if it is not vitiated by any of the factors of reservation earlier stated. With respect to the enforcement of judgments, a judgment may be enforced by action and by registration.

Enforcement by action means that the judgment forms or constitutes a cause of action upon which a foreign court may give judgment. This is based on the theory that the judgment though creating an obligation is incapable of enforcement outside the jurisdiction of its pronouncement without the institution of a fresh legal proceeding. But for this idea, it would have been possible to raise a defence of *res judicata.* The judgment of a court of another country is thus given effect through a fresh proceeding based on it.

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[155] See ***Russel v Smyth*** (1842) 9 M & W 810 and ***Schibsby v Westenholz*** (1870) L.R. 6 Q.B. 155

A foreign judgment may also be enforced through statutory provisions. This method is usually based on reciprocal provisions in relevant statutes. For example, beginning with the Administration of Justice Act 1920 by which reciprocal recognition of judgments given in the courts of the commonwealth countries was made possible, through the Foreign Judgments (Reciprocal Enforcement) Act 1933[156] to the Foreign Judgments (Reciprocal Enforcement) Act 1960, now chapter 152 of the Laws of the Federation of Nigeria 1990, it is possible to register the judgment of a foreign court with a reciprocal agreement with the local court and vice-versa. The effect of this is to make the judgment of that foreign court the judgment of the local court with all the efficacy and potency of the judgment of a local court of competent jurisdiction. It should be shown that the judgment will not be vitiated by any rule of reservation like those mentioned above and further it should be a judgment to which the Act applies.

In a Federation like Nigeria, each state is autonomous with respect to making laws within its legislative competence. Thus, each state, has for example, its own high court. The High Court of one state is independent of the High Court of another state together with the incidents relevant to the conclusion of the status of the court of each state.

In order to achieve coherence of legal system and effective legal order, despite the conclusion on the effect of federalism, section 287(3) of the 1999 Constitution provides:

> The decisions of the Federal High Court, a High Court and of all other courts established by this Constitution shall be enforced in any part of the Federation by all authorities and persons, and by other courts of law with subordinate jurisdiction to that of the Federal High Court, a High Court and those other courts, respectively.

Nigeria is not alone in the pursuit of this idea. For example, Article 4, section 1 of the United States Constitution, usually

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[156] See ***Yukon Consolidated Gold Corporation v Clark*** (1938) 2 K.B. 241 at 253.

referred to as the "Full Faith and Credit Clause" provides *inter alia:*

> Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state... and that congress may by general laws present the manner in which such acts, records and proceedings shall be proved and effect given thereof.

With respect to the methods of enforcement of a judgment of one state in another, sections 104, 105 and 108 of the Sheriffs and Process Act are relevant.

Section 104 of the Sheriffs and Civil Process Act provides thus:

> Any person in whose favour a judgment is given or made in a court of any state or the Capital Territory may obtain from the registrar or other proper officer of such court a certificate of such judgment in the form and containing the particulars set forth in the second schedule or as near thereto as the circumstances will permit, which certificate such officer is hereby required to grant under his hand and the seal of such court.

Section 105 of the Sheriffs and Civil Process Act in the pursuit of the intendment of section 104 provides thus,

> 105(1) Upon production of such certificate to the registrar or other proper officer of any court of like jurisdiction in any other state or the Capital Territory such officer shall forthwith register the same by entering the particulars thereof in a book to be kept by such officer and to be called "The Nigerian Register of Judgment".

(2) from the date of registration the certificate shall be a record of the court in which it is registered, and shall have the same force and effect in all respects as a judgment of that court, and the like proceedings may be taken upon the certificate as if the judgment had been a judgment of that court.
(3) .....

Section 108 of the Sheriffs and Civil Process Act 1990 further provides:

> 108(1) the court in which any such certificate of a judgment has been registered shall in respect of the issue of process upon the certificate and the enforcement of the judgment, have the same control and jurisdiction over the judgment as if the judgment were a judgment of such court.

The above shows the dynamism of operation of private international law and its valuable rules and principles in various jurisdictions.

Public Internation Law

Public international law has developed into a coherent system of law. Indeed, it is now fashionable to discuss in terms of municipal law and international law. The history of public international law has earlier been discussed. It should however be emphasized that the earlier rules of conduct regulating relations between independent communities, the growth of states, the writings of jurists, technological advancement, improvement in communication and transport system and the recognition of the idea of treaties and conventions for the regulation of affairs between states and institutions have combined to ensure the development and recognition of international law as a significant variant of law. Although international law could be divided into private and public international law, it is the latter perspective of it that forms the

basis of discussion in this section, the former having been earlier discussed.

In the context of this work, the determination of the potency or relevance of public international law was a constant issue of debate. It also became necessary to know the position of international law within the state. This led to the monist and dualist views of public international law.

Debate about whether International Law is really Law

The debate was constant as to the relevance of international law or indeed whether international law can really be called law. Many reasons accounted for this debate. The reasons included:

(a) the view that international law was nothing but a code of rules of conduct having moral force as it did not emanate from a sovereign authority with the requisite legislative authority as in the case of a modern state

(b) that unlike in the case of a state, law breakers may hardly be properly handled given the absence of supra-national system of sanctions and law enforcers.

These two problems have been taken care of given modern developments. In respect of the first issue, many international law instruments are now being incorporated into the laws of many modern states just by a method of ratification and adoption or domestication. Indeed, such international law instruments are being given the force of law even where the municipal law of the relevant state has failed to ensure the necessary legal succour required at the dire need of legal protection as it happened in the case of *General Sanni Abacha & ors v Chief Gani Fawehinmi.*[157]

In respect of the second issue, the system of extradiction has solved the problem of enforcement of law in part, secondly, even within the municipal system, miscreants abound. Modern treaties and conventions have made the process of enforcement

[157] (2000) 4 SCNJ 400

of international law easier. Furthermore, the recognition of international institutions such as the United Nations, the Permanent Court of Arbitration, the International Court of Justice and the International Criminal Court as well as regional institutions such as the ECOWAS Court of Justice have helped in solving the problem of taking care of law breakers and enforcement of laws at the international level. The resolution of the Land and maritime boundary dispute between Cameroon and Nigeria[157a] over the Bakassi Peninsula by the International Court of Justice at the Hague and the acceptance of the decision by both countries is an example in this regard. As Gray J. noted in *The Paqyuette Habana*[158]

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

Monist and Dualist views of International Law

In determining the relationship between the municipal law and international law, it becomes necessary to consider the monist and dualist views of international law.

The monist view was earlier developed. This was prior to the nineteenth and twentieth centuries. International law and municipal law were regarded as concomitant aspects of just one system, that is, law in general. Law was regarded as a single unity made up of binding rules. The view was that international law and municipal law were two sides of the same system of rules of a truly legal character, of unity of purpose and legal science binding on all, either as individuals or states, that they were interrelated parts of a legal unity or structure.

The dualists, taking a cue from the legislative presence within the municipal system, viewed international law as a separate system of law. To them, international law was no law

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157a See Cameroon v. Nigeria [2002] 43WRN 43. The judgment delivered on the 10th day of October, 2002.

158 (1900) 175 U.S. 677.

but a rule of positive morality. Austin,[159] a proponent of state theory from the angle of a commander and the commanded and the idea of sovereignty viewed international law as a totally different system that could, at best, be regarded as that relating to "positive morality". To Triepel[160], there were fundamental differences between international law and municipal law as state laws were directed at individuals while international law was directed at the states exclusively and also, that the judicial origins of both were different as the source of state law was the will of the state while the source of international law was the common will of states. It was also said that state legislation formed the basis of obedience to municipal law while the basis of obedience to international law was conditioned by the principle: *Pacta Sunt Servanda* (that is, that agreements between states should be respected).

It should be pointed out that modern developments have ensured the harmonization of municipal and international law. This has been achieved through some methods or processes described below.

The use of the "Blackstonian" Doctrine

The Blackstonian doctrine emphasizes the fact that customary rules of international law are deemed to be part of the law of the land. In this regard, it is said that:

> the law of nations, wherever any question arises which is properly the object of its jurisdiction is here adopted in its full extent by the common law, and it is held to be part of the law of the land.

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[159] Austin, ***Lectures on Jurisprudence***, 4th ed., revised and edited by R. Campbell, 1873) Vol. 1 pp 187 – 188, 222

[160] See the views of positivists like Triepel, Anzilloti, Richard Zouche and Bynkershock.

Furthermore, in *Chung Chi Chueng v R,* [161] *Lord Atkin* said:

> "The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law, so far it is not inconsistent with the rules enacted by statutes or finally declared by their tribunals.

Treaties and Conventions

Treaties and conventions are by-products of agreements between states. Validly made treaties and conventions, upon ratification and adoption, become part and parcel of most municipal laws. As Lord Macmillan noted in *Compagnia Naviera Vascongado v Cristina SS*[162],

> It is a recognized prerequisite of the adoption in our municipal law of a doctrine of public international law that it shall have attained the position of general acceptance by civilized nations as a rule of international conduct, evidenced by international treaties and conventions, authorities, textbooks, practices and judicial decisions[163]

Provision for Domestication in Municipal Statute or Constitution

Some states provide that a treaty or convention entered into should be domesticated as a way of showing local acceptance of it. For example, a treaty entered into on behalf of Nigeria should be enacted into law by the National Assembly. In this regard, section 12 of the 1999 Constitution provides thus:

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[161] (1930) A.C. 168
[162] (1939) A.C. 485
[163] Ibid. p. 497

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.

Furthermore, in *Higgs & anor v Minister of National Security & ors,*[164] the Privy Council held thus:

> In the law of England and the Bahamas, the right to enter into treaties was one of the surviving prerogative powers of the Crown. Treaties formed no part of domestic law unless enacted by the legislature. Domestic courts had no jurisdiction to construe or apply a treaty, nor could unincorporated treaties change the law of the land. They had no effect upon citizens' right and duties in common or statute law. They might have an indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizens that the government, in its acts affecting them, would observe the terms of the treaty.

Furthermore, in ***Chung chi Cheung v. The King***, the Privy Council held that:

[164] The Times of December 23, 1999.

> It must always be remembered that, so far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rule upon our own code of substantive law or procedure.

The above discussion reflects the dynamism with respect to the operation of municipal and public international law and the potency and relevance of each of them within the municipal system or the interplay of public international law and municipal law. The case of *General Sanni Abacha & ors v Chief Gani Fawehinmi,*[165] can be used to close the discussion with respect to the operation of international law within the municipal system.

In this case, the respondent Chief Gani Fawehinmi was arrested and detained by some operatives of the Federal security agencies. No warrant of arrest was shown to him before and after he was arrested. He was not informed of the commission of any offence by him and he was not charged with the commission of any offence in any court. He sued the appellants by way of an action under the Fundamental Rights (Enforcement Procedure) Rules, 1979 for some reliefs aimed at getting redress for violation of his fundamental rights guaranteed under some provisions of the 1979 Constitution of the Federal Republic of Nigeria and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap.10 of the Laws of the Federation of Nigeria, 1990 otherwise referred to as the African Charter. Chapter IV of the 1979 Constitution was suspended in 1984 and during all material times, the African Charter was neither repealed nor suspended. There was no special procedure prescribed for the enforcement of the provisions of the Charter.

The appellants filed a notice of preliminary objection before the trial court, the Federal High Court, in which they contended that the court lacked the jurisdiction to entertain the suit on the grounds that the appellants were immune to legal liabilities for

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[165] Supra

any action done under Decree 2 of 1984 pursuant to which they acted in arresting and detaining the respondent; that some decrees ousted the jurisdiction of the court and that the court lacked the constitutional jurisdiction to entertain any action relating to the enforcement of any of the provisions of Chapter IV of the 1979 Constitution (as amended); and that the African Charter on Human and People's Rights (Ratification and Enforcement) Act applied.

Decree No 2 of 1984 empowered the Chief of General Staff to issue a detention order. By amendments to the decree, the power was given at various times to other public officers including the Vice-President in 1990. As at the time of the promulgation of Decree No 11 of 1994 only the Vice- President, a non-existing office at the time, could issue a detention order. The Chief of General Staff had not been given back the power.

In his ruling, the trial judge upheld the preliminary objection and struck out the suit for want of jurisdiction. The respondent appealed to the Court of Appeal. The Court of Appeal allowed the appeal in part and remitted the case to the trial court. The appellants then appealed against the judgment of the Court of Appeal to the Supreme Court. The respondent also filed a cross-appeal. The Supreme Court unanimously dismissed the main appeal by the appellants. The cross-appeal was allowed by a majority of 4 to 3. The Supreme Court, per Ogundare JSC held inter alia:

> Before its enactment into law by the National Assembly, an international treaty has no such force of law as to make its provisions justifiable in our courts... where, however, the treaty is enacted into law by the National Assembly, as it was the case with the African Charter which is incorporated into our municipal (i.e domestic) law by the African Charter on Human and People's Right (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria 1990, (hereinafter is referred to simply as Cap.10), it becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the courts. By Cap 10, the

> African Charter is now part of the laws of Nigeria and like all laws the courts must uphold it[166].

Ogundare JSC held further:

> No doubt, Cap. 10 is a statute with international flavour. Being so, therefore, I would think that if there is a conflict between it and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent I agree with their Lordships of the Court below that the charter possesses "a greater vigour and strength" than any other domestic statute. But that is not to say that the charter is superior to the constitution ... Nor can its international flavour prevent the National Assembly, or the Federal Military Government before it, from removing it from our body of municipal laws by simply repealing Cap. 10.[167]

The above dicta reflect, very appropriately, the interplay of the law within and without in a municipal system. The relevance and potency of the law beyond the frontiers of the municipal system can be seen from the case of *General Sanni Abacha & ors v Chief Gani Fawehinmi.*

Conclusion and Recommendations

It is clear from the above discussion of various pertinent legal issues that the totality of the laws of any nation in the modern world must be determined from within and without. The operation of the law within and without is undoubtedly a dynamic process. Modern-day activities to which the appropriate law or laws try to give necessary legal effect are

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[166] at pg. 422

[167] at pp 422-423. See also ***Chae Ching Ping v United States*** 130 U.S. 181

dynamic. The expectation of each individual is that law is a device for the promotion of peace and order, happiness, established and virile legal order, political order, constitutional validity, a virile legal intercourse between nations and individuals and promotion of the reasonable expectations of each person and communities. Law must not lag behind in the promotion and realization of the above objectives. It is in the light of the above that this inaugural lecture has been delivered.

Having regard to the above, and the theme of this inaugural lecture, the following recommendations are hereby suggested:

(1) Since the history of a nation may not be divorced from its subsequent status as an independent nation and subsequent make-up, therefore, in the case of Nigeria, the common law or the British legal system inherited by Nigeria should be regarded as a jewel which should be made use of and consulted not only as a historical monument but as a dynamic legal system that should help in the development and operation of our legal system.

(2) The various customary laws in existence in Nigeria now operate as personal laws. These customary laws reflect the ethos and values of the people. They vary in content and method(s) of their application. Since they regulate personal issues or affairs they should not be abrogated. They are mirrors of accepted usage(s). The otiose and repugnant customary laws can appropriately be disregarded through a functional use of the repugnancy doctrine.

(3) Sheer adherence to judicial precedent should not make our courts the conservators of barbarous legal usages. Thus the doctrine of judicial precedent should be a dynamic process.

(4) The idea of doctrine of judicial precedent should no longer be understood in terms of original, derivative or declaratory precedent in the classical version. It should

now be discussed in terms of direct or classical judicial precedent as previously understood and indirect judicial precedent having regard to the system of most common law or commonwealth countries that look up to English principles of law and decisions in the formulation and recognition of vital principles or doctrines of law although these common law or commonwealth courts are not hierarchically linked with the English courts. It should be added that while direct judicial precedent should ordinarily be binding between the courts that are hierarchically linked in line with the status of each court in the same legal order of a nation, with respect to indirect judicial precedent, decisions of English courts especially the House of Lords on fundamental principles of law derived from English law should be regarded as binding except in situations where to do so will be patently unreasonable or not in accordance with local circumstances or local nuances or the public policy of the forum, in its dynamic formulation.

(5) The idea of sovereignty as a basis for clothing municipal laws with more authority than laws derived from conventions or treaties lawfully entered into is isolanist and against the current trend towards globalization, even of the legal order.

(6) The universal validity of human rights tenets which took a cue from the United Nation's Charter on Human Rights and which is now globally accepted should be recognized and enforced not just spatially but universally and should not be subject to the chauvinistic consideration of unscientific application of the public policy doctrine.

(7) The incessant wars in the various African countries can be curtailed through mutual understanding and help by way of peace discourses and peaceful interventions on the part of global, continental and regional bodies like the United Nations, the African Union and the

Economic Community of West African States respectively.

(8) During a period of war, caution should not be thrown to the winds, thus the laws on war and international and non-international humanitarian laws, as appropriate, should be applied in order to avoid savagery and holocaust as the world witnessed in Rwanda, Liberia and Sierra Leone, among others.

(9) Peaceful methods for the resolution of conflicts at whatever level should be pursued as opposed to incessant and unnecessary wars as exemplified by the Cameroons and Nigeria in the resolution of the Land and Maritime Boundary dispute over the ownership of Bakassi Peninsula and the respect accorded the judgment of the International Court of Justice situated at The Hague, The Netherlands.

(10) Functional appreciation and utilization of the rules of private international law should be ensured to promote and give effect to reasonable expectations of parties with respect to various legal incidents now that the world has become a global village and transactions and events having legal significance take place across boundary lines.

(11) The rule of Nigerian law that the domicile of a married woman depends on the domicile of the husband except in the case of desertion should be changed along the line of the English Domicile and Matrimonial Proceedings Act 1973.

(12) The use of habitual residence for the purpose of regulating affairs or issues of personal nature should be encouraged to avoid the pitfalls of the concept of domicile.

(13) Punishments in respect of certain offences, especially under the Sharia Law, should be in accordance with universal standards for punishment and a scientific approach should be adopted in this regard for the purpose of promoting one or the other of the aims of criminal punishment.

(14) There should be co-operation or collaboration with respect to the study of the legal orders in respect of each of the two main divisions of civil and common law systems now that emphasis is on unification or harmonization of laws.

(15) It is usual to refer to African countries as emerging democracies given the embryonic level of acceptance of the general principles and ideals of democracy, the need to ensure the entrenchment of democratic values is hereby suggested. This is a necessary antidote against incessant military incursions into politics and unnecessary diversionary antics of divisive tribal leaders. Furthermore the colonial carving up of African countries along geographically contiguous and unscientific lines for administrative convenience should be re-examined the way the colonial overlords did at Berlin.

(16) African universities and law schools should co-operate with respect to exchange of staff and study of various legal systems and indeed the study of the same legal system but with varying contents.

(17) Peculiar local circumstances should be considered in the application of foreign laws and statutes without necessarily throwing away the whole of the legal system from where a relevant law or statute is derived.

(18) Certain legal issues and legal effects bear different legal consequences as a result of the local social milieu within which such legal issues or effects are to be

considered. Thus, in respect of marriage, the decision in *Smith v. Smith*[168] should be supported in relation to the status of a person who may have contracted a monogamous marriage. Francis J. delivering the judgment of the court in this case held *inter alia*:

> "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 stage 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* (1) – 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. The fact that a man has contracted a marriage in accordance with the rites of the Christian Church may be very strong evidence of his desire and intention to have his life generally regulated by English laws and customs, but it is by no means conclusive evidence. In my opinion the question as to what law it is equitable to apply in any given case can only be decided after an examination of all the circumstances of the case.

(19) It should also be stated that given marriage rites in Nigeria, a marriage ceremony, even a monogamous marriage, is usually preceded by a marriage under

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[168] (1924) 5 NLR 105

native law and custom, otherwise called engagement. It should be pointed out that as far as customary law is concerned, this is a complete marriage. Thus, if a monogamous marriage is contracted, subsequent to a marriage under native law and custom, two forms of marriage should be taken to have taken place. If the monogamous marriage is subsequently dissolved, it does not lead to the dissolution of the initial marriage under native law and custom. It is hereby recommended that any person who decides to go through these double marriage ceremonies should be considered married under native law and custom and under the Act. The dissolution of one should not lead to the dissolution of the other. Thus except both are dissolved, the dissolution of one leaves the other still existing, potent and valid.

(20) The ills or problems of globalization in its various facets of operation can be obviated through a judicious use of concepts like (i) necessity (ii) public policy and (iii) reservation.

(21) Legal co-operation at global, continental and regional levels especially with respect to economic, social and cultural issues should be encouraged.

(22) African countries should be encouraged to promote and build functional continental and regional organizations especially in the areas of human rights and economic issues, thus the African Charter on Human and Peoples' Rights is a legal instrument to be cherished. Furthermore, economic initiatives like The African Economic Treaty, New Partnership for Africa's Development (NEPAD), and the Organization for the Harmonisation of Business Laws in Africa (OHBLA), or in its French connotation, Organisation Pour L'Harmonisation du Droit des Affaires en Afrique (OHADA) should be supported.

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