Gauging the Current Position of the Principle of Domicile in Nigeria

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ABSTRACT

The paper is an overview of the essentials of domicile. Its origin and historical background is analysed fully to the point where it became part of English law applicable in most common law jurisdictions. Domicile is also differentiated from similar concepts such as nationality and residence which is substituted for domicile in some jurisdictions. Furthermore, the classifications of domicile as given by English common law is given and explained in detail. The problem tackled by this article is the existence of domicile of dependence and its implication. The article is a critique of the domicile of dependence and the countryâ€™s position on the principle itself as it is still an area of law in Nigeria of great uncertainty and requires judicial activism. This being said, the article goes further to provide solution to the problem aforementioned through recommendations. These recommendations are geared to provide some form of certainty on the age old issue.

Keywords: *Domicile, Residence, Intention, Nationality, Personal law, Tenacity, Capacity.*

Introduction

Domicile in Nigeria is the same as it was over a hundred years ago in England. This archaic position of domicile has been retained in Nigeria with little or no judicial activism to redress this to suit modern trends in law and society. This has wrought a lot of injustice especially because of the pivotal position held by domicile in our legal system. Domicile has a lot of personal consequences as it is the factor used in determining what laws to apply as regards instances like marriage and matrimonial causes, contracts, taxation, intestate and testate succession, and yet others. The far reaching effects of domicile cannot be over emphasised as seen above and because of the pertinence of this concept, there is need for an overhaul. The defects of this concept is to be analysed below along with recommended substitutes.

Meaning of Domicile

The term â€˜domicileâ€™ is not an easy concept to define. Indeed, Sir. George Jessel in D*oucet* v G*eoghegan**[1]* noted that it â€œis impossible of definitionâ€. This, Morris John reiterates, when he stated that it â€œis easier to illustrate than to defineâ€.[2] However, domicile is generally perceived to entail â€˜permanent homeâ€™. This, Lord Cranworth V-C in *Whicker v Hume**[3]* adopted in his dictum stating that, â€œBy â€˜domicileâ€™ we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to itâ€¦ I use that word rather than definition; to describe what I mean.â€

This definition J.G Collier criticized stating that it is â€œfar too simplistic and indeed somewhat misleadingâ€.[4] Though, a probable reason for such a plain adoption of the general view by the learned judge in a juristic setting can be deduced from the etymology of the word â€œdomicileâ€, which in common law is derived from Roman law and the *usus modernus**[5]* through the Canon law. According to Canonists, the term â€˜domiciliumâ€™ is derived from the Latin phrase â€˜domum colereâ€™ which means to foster or inhabit the home. They refer to domicile as not just any place of residence, but a place of habitual residence. However, Morris John also objects to this line of reasoning on the ground that a personâ€™s domicile may not always be his permanent home. According to him, â€˜a person may be domiciled in a country which is not and never has been his home; he may be homeless, but he must have a domicileâ€™.[6]

As a result of the pitfalls in Lord Cranworthâ€™s definition and some other traditional definitions which are now obsolete, it goes to re-echo Morris Johnâ€™s position that domicile â€œis easier to illustrate than to defineâ€.[7] Thus, in the case of *Moorhouse v Lord**[8]* it was held that: the present intention of making a place a personâ€™s permanent home exists only where he has no other idea than to continue there without looking forward to any event, certain or uncertain which might induce him to change his residence. If he contemplates that an event may occur which may cease his residence, it is not his present intention of making it a temporary home even though his residency is for a period indefinite and contingent. Thus, the fact that a person (propositus) stayed long in a particular country is not sufficient to ascribe the domicile of that country to him without more factor(s) (intention).[9] This definition, or better said- description, of the principle of domicile is however very muchÂ obsolete.[10] Given the contemporary world of tension and increased mobility, it is difficult to deem anything certain in human affairs, just as Graveson stated that this definition â€œno longer fits the complexity, movement and sophistication of modern life in which many of our best intentions become temporary through frustrating circumstancesâ€.[11]

However, for the sake of the fact that Nigerian law was greatly influenced by English Law (thus, the principle of domicile being part), it is somewhat justified to state at this point that, according to the English legal system the principle of domicile is a creation of law that annexes a person to a particular legal system.[12] It is an idea of law that denotes the relation between a person and a particular territorial unit.

Historical Background

In private international law, the principle of domicile was first propounded and developed in the Middle Ages by the Italian school of Post glossators,[13] as a result of the development in the ease of mobility of persons from one state to another. This led to the reasoning that persons should be attributed to a particular legal system. The reason for this line of thinking include the perceived importance attached to the notion of belonging to a country/state; this Martin Wolff

appropriately posited as ascribing to any given individual a legal â€˜centre of gravityâ€™; and determining which legal system has jurisdiction in cases pertaining to personal law.[14] The idea of personal law is based on the conception of man as a social being, so that those transactions of his daily life which affect him most closely such as marriage, divorce, legitimacy, capacity and succession, may be deemed most suitable and adequate for the purpose.[15] Personal law generally governs questions concerning the relationships between members of a family.[16] Thus, are the reasons for the development of the principle of domicile in private international law.

The principle of domicile had no rival for over five hundred years. Until the beginning of the nineteenth century, domicile was universally recognized as the basis for the application of personal law[17] However, in the mid-nineteenth century, things changed as a result of the rise of national feelings emanating from the American Revolution (1776) and the French Revolution (1789) the idea of nationalism arose. France were the first to adopt nationality as a basis for the determination of personal law via Article 3 of the French civil code (1804).[18] The idea of nationalism was greatly influenced by the Italian nationalist leader Giuseppe Mancini[19] and soon the principle of nationality was incorporated into the Italian Civil Code as Article 6 of the Italian civil code 1865. The idea of Nationality denotes attachment to a particular legal territory or state. This concept is said to be an offshoot of the feudal doctrine of allegiance, i.e. the status or feeling of belonging to a particular state or nation.

The principle of domicile is however, now practiced by the common wealth countries and USA, while in the whole Europe the principle of Nationality prevails except Norway and Denmark which followÂ Â Â the principle of domicile, as it is that their Federal nature also make the principle of domicile more appropriate and necessary.

Classification of Domicile

Domicile is a construct of law that determines a personâ€™s permanent home. It is so that everybody must have at least a domicile at every point in time.

There are three classifications of domicile and they are as follows:

- Domicile of Origin
- Domicile of Choice
- Domicile of Dependence

Domicile of Origin

The first domicile which a person acquires is the domicile of origin. This type of domicile is determined by the domicile of the parents at the point of a personâ€™s birth, as determined in *Bell v Kennedy*.[20]

In determination of domicile of origin, if the child is legitimate, the domicile of the father at the time of birth is acquired but in a case of an illegitimate or posthumous child, the domicile of the mother is acquired.[21] This type of domicile may also be acquired upon adoption and probably retrospectively.[22]

Furthermore, it is essential to state that the domicile of origin is the most tenacious form of domicile; it can never dissipate.Â This form of domicile merely goes into abeyance when a new domicile is acquired by other means to be discussed below. This tenacity was noted by the Nigerian court in *Bhojwani v Bhojwani*[23] when reference was made to the dictum of Lord Mcnaughton in *Winans v Attorney General****[24]*** and it goes thus, *â€œ*So heavy is the burden cast upon who seek to show that the domicile of origin has been superseded by a domicile of choice!â€

Also, Lord Westbury in the same case gave as follows;

The domicile of origin is the creature of law and independent of the will of the party, it would be inconsistent with the principle on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicile and it does not require to be reacquired or reconstituted *animo et facto* in a manner which is necessary for the acquisition of a domicile of choice.[25]

Domicile of Choice

This is domicile acquired by a person of full capacity. This is gotten by fulfilling all the requirements of domicile all the requirements of domicile of the particular state one wants to get domiciled in. This can be acquired by an adult of full mental capacity acting in his own will to permanently settle elsewhere. Once the domicile of choice is acquired, the domicile of origin of such person goes into abeyance.[26]

The reason for the dormancy of domicile of origin is because of the fact that no person can have two domiciles existing side by side for the same purpose as thus will cause a lot of ambiguities when it comes to determining what domicile qualifies for the matters of succession and divorce.

Elements of Domicile of Choice:

1. Residence in the country chosen
2. An intention to reside permanently or *animus manendi*

The two factors must be proved for domicile of choice to be established. *Animus manendi* as an element of domicile of choice is the requisite intention to permanently reside in a place. Residence in a country for a long period of time may evince the intention to reside permanently in such country thereby proving the two factors instantaneously. *Albert Lefevre v Mary Lefevre* per Taylor CJ, it was held that the petitioners in the case had acquired a domicile of choice

having lived in Nigeria for 35 years.

Domicile of Dependence

This classification of domicile focuses on married women, children under 21 years, and mentally disordered persons.[27] Married women acquire domicile being that of the husband upon celebration of a valid marriage. This domicile of dependence can apparently be terminated either by divorce or death of one of the couple.

This classification though applicable in Nigeria by way of reception clause[28] that gave way for English laws; it has been subject to a lot of controversy and has been an area of legal quagmire. This domicile is generally the same as with the domicile of the person the law presumes the owner of the domicile of dependence to be legally dependent.

A childâ€™s domicile during his minority will depend on the domicile of his father during the fatherâ€™s lifetime, then that of his mother after his fatherâ€™s death. It is worthy to note that this classification of domicile as it relates married women has been abolished in England by way of *Domicile and Matrimonial Proceedings Act 1973*. As regards the Nigerian situation, the controversy stated above pervades. In the case of *Osibamowo v Osibamowo***[29]**, the Court of Appeal, recognised three types of domicile â€“ origin, choice and dependence. The Court of Appeal further contradicted itself in the landmark case of *Bhojwani v Bhojwani***[30]** as stated by Uwaifo, JCA that;

> â€œthere are strictly two types of domicile. One is domicile of origin and the other, domicile of choice. There is no separate domicile known as domicile of dependence as was canvassed by Professor Adesanya in the present case and also in *Osibamowo v. Osibamowo*, and there in that case accepted by this court.â€

The court in the said case rejected the tripartite classification of domicile, hence, excluding the domicile of dependence. This recognised just domicile of choice and domicile of origin as the two existing classifications in Nigeria, hence not conforming to the common law classification.

The Current Position of the Principle of Domicile and Personal Law Â Â in Nigerian

In the determination of personâ€™s rights in matters of civil status, capacity to marry, succession (testate or intestate) legitimacy, adoption, jurisdiction in divorce proceedings and some other (incidental) matters, as well as matters involving taxation, it has been found necessary in every legal system to identify a link between the relevant person (or propositus) and a particular law district.[31] Corollary to the idea of personal law, is that a person must belong to a particular state, the rules of which determines his civil status.

In determining the applicable personal law, the binding factor that annexes a person to the *lex causae****[32]*** is left to that particular system of law, what it deems sufficient to link the person. In the Nigerian legal system, as adopted from the British (via the Statutes of General Application and Received English law) the principle of domicile is the basis for determining personal law. This is the position of the court in the case of *Fonseca v Passman***[33]** where Thomas J**.** held that, â€œTo establish a domicile in Nigeria the mere factum of residence here is not sufficientâ€¦ There must be unequivocal evidence of *animus manendi* or intention to remain permanentlyâ€. However, this position or rule of domicile has been faulted as a result of its shortcomings in relation to the evolution of society. One of the major shortcoming, is that it is very difficult to ascertain the intentions of persons as to whether he or she will reside in a place permanently regardless of any situation, bearing in mind increased tension (insecurity) and the ease of mobility in todayâ€™s world. As such, modifications ought to be made to that rule. This, the English courts have done as seen in the case of *Henderson v Henderson***[34]** where it was held that a person who intends to reside in a country indefinitely might be domiciled although he envisaged the possibility of returning one day to his domicile of origin. This position was also upheld in a more recent case of *Re Furse***.[35]**

So, Nigeria in light of the obvious shortcoming(s) in the rule of domicile as the determinant of personal law which has made it incompatible with the society for which it was made for, we ought to modify the rule of domicile, rather to the distaste of a concerned sound legal mind of a Nigerian, this flawed rule remains the position of the Nigerian judiciary as in *Udom v Udom***[36]** where Coker J**.** upheld the same faultedÂ position on the principle of domicile. This continues to be the situation as seen in the more recent cases of *Osibamowo v Osibamowo***[37]** and *Bhojwani v Bhojwan*i.**[38]**

Present Position of Domicile of Dependence in Nigeria

The case of *Osibamowo v Osibamowo* provides for three types of domicile in Nigeria: that is, domicile of origin, domicile of choice and domicile of dependence. This case law recognises the domicile of dependence. This case law recognises the domicile of dependence as was in existence in England pre 1973. Domicile of dependence in Nigeria is similar to that in existence in England by operation of the reception clause[39] which allows for application of common law in Nigeria. This domicile of dependence deals with the domicile acquired by women by circumstance of a valid marriage which imposes the domicile of the husband upon the wife.

This concept is an archaic and anachronistic one which views the wife as incapable of having an independent existence from the husband, therefore appurtenant to the domicile possessed by the husband. Law being a dynamic element: forward thinking jurisdictions such as England has abolished this by enacting the *Domicile and Matrimonial Proceedings Act 1973* which provides that married women can have domicile independent of their husbands. This has been exemplified in cases such as *Inland Revenue Commissioners v Duchess OF Portland***.[40]**The existence of this class of domicile eludes common sense and objective reasoning especially because of the fact that the woman before and during the existence of marriage may be subject to different laws from that of the husband and by reason of the relationship that exists between them, will not offer justification for the imposition of the domicile of the husband upon

the wife. Lord Denning in relation to this point stated, â€œthe last barbarous relic of a wifeâ€™s servitudeâ€. He made this statement in reference to the domicile of dependence.

On the side of judicial activism, Nigerian court has put a step forward in the abolishing of this class of domicile. The court in *Bhojwani v Bhojwani* per Uwaifo JCA stated that;

there are strictly two types of domicile. One is domicile of origin and the other, domicile of choice. There is no separate domicile known as domicile of dependence as was canvassed by Professor Adesanya in the present case and also in *Osibamowo v. Osibamowo*, and there in that case accepted by this court.

This position of the court is commendable but this alone does not clarify the position of Nigerian law on domicile. Legislative competence needs to be exercised to the effect of abolishing domicile of dependence in Nigeria.

Recommendations

The deficiency of the legislative bodies in Nigeria is glaring and this has resulted in the existence and continuous enforcement of archaic, anachronistic and stale principle(s) and concepts such as: the principle of domicile as adopted from the Received English laws and the concept of domicile of dependence.

First, in modifying the obsolete Nigerian position on the principle of domicile, this paper will suggest that the requiredÂ element of â€˜intention to reside permanentlyâ€™ should be erased and replaced with, â€˜intention to reside indefinitelyâ€™ this position the American judiciary have also adopted as seen in the case of *Putman v Johnson*. [41] In this way, theÂ ease in mobility together with the air of uncertainty (insecurity in Nigeria) that envelops the contemporary Nigerian society can be reflective on the law, just as Professor Beale posited that, the circumstances of life in a country have weight on the Judge in determining the meaning of domicile.[42]

Second, regarding the present position of domicile of dependence, the correct position was upheld by the court in *Bhojwani v Bhojwani,***[43]** however, this area of law is still uncertain as there exists contradictory precedents as gotten in *Osibamowo v Osibamowo.*[44]To solve this quagmire, there needs to be an enactment that abolishes totally this â€œlast barbarous relic of a wifeâ€™s servitude.â€[45] Another route would be by case laws and this would be done by the affirmation of the decision of the court in *Bhojwani v Bhojwani*, which disregards the existence of this class of domicile.

Conclusion

Succinctly put, domicile is pivotal and of great worth because it is a determining factor of far reaching legal consequences for the bearer of such domicile. As seen above, there are three classes of domicile which pertain different methods of acquisition. The domicile of origin as treated is one that is held by everyone and can never be lost, hence the tenacity of this domicile. It only goes into abeyance while another domicile is acquired. This tenacity as noted above is of some sort of sentimental value. Yet again, Graveson criticised this positon of the English Court as it causes a lot of difficulties especially in terms of certainty. He posits that a person should be able to determine what domicile determines his personal consequences and that the domicile of origin one had no say in choosing should not be paramount.Â Furthermore, domicile of choice as seen above requires two essential elements so as to exist and they are: *animus manendi* and permanent residence. Lastly, domicile of dependence as seen above is an archaic concept which has no justification whatever in the modern world. This type of domicile as gotten above has been abolished in forward thinking jurisdictions and the aim of this paper is to implore that such feat is repeated in Nigeria by way of judicial activism or exercise of legislative competence.

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[2] Dicey and Morris on the Conflict of Laws, (8th ed. by J.H.C Morris London Press) 9

[3] (1858) 10 HLC 124.

[4] Greenwood Collier, *Conflict of Laws* (2nd Ed, Cambridge University Press 1994) 40.

[5] Another name for the Historical School of Law, established by Friedrich Carl von Savigny (a German jurist and historian).

[6] ibid 10

[7] ibid

[8] (1863) 10 HLC 272 at 285-286; This position was also adopted in *RAMSAY V LIVERPOOL ROYAL INFIRMARY* (1930) A.C 588.

[9] As in *WINANS V ATTORNEY GENERAL (1904) A.C 287)*.

[10] Though it might have worked during its formative era, that is the Mid-Victorian England era which comparatively had an air of certainty, simplicity and tension.

[11] Graveson, Conflict of Laws [1969] p.207.

[12] Ibid p.60

[13] (championed especially by the Italian jurist BARTOLUS DE SAXOFERRATO (1314-1357) together with other jurists such as; the Dutch jurist ULRICH HUBER (1635-1694), the German juristÂ Â FREDERICK KARL VON SAVIGNY (1779-1861), the French jurist Dâ€™Argentre (1519-1590).

[14] Martin Wolff, Privte International Law (2nd ed. Clarendon Press 1950) 5

[15] R.H Graveson, Conflict of Laws 188[7th Ed. 1974].

[16] Martin Wolff, Private International Law (2nd Ed. Oxford Press 1950), 165.

[17] According to G.C. Cheshire, Private International Law (7th Ed.) 180.

[18] Enacted by **Napoleon** which inter Alia provides that â€˜laws concerning status and persons, govern Frenchmen even though they are residing in foreign countriesâ€™ (civil code [100 Ed Dalloc: Paris 2001) 8.

[19] As a result of his famous lectures delivered in Turin in 1851. See â€˜Annuaire de lâ€™Institur de Droit internationalâ€™ [1877] (1) 123 et seq.

[20] (1868) UKHL 566 1.

[21] E.I. Nwogugu, *Family Law in Nigeria.*

[22] *Bhojwani v. Bhojwani [1995] 7 NWLR (Pt. 407) 349*.

[23] [1995] 7 NWLR (Pt. 407) 349.

[24] (1904) A.C.287 at 291.

[25] similarly put in *Udny v Udny (1869) LR 1 HL 441*.

[26] â€œThis is usually difficult to assess because of the tenacity of the domicile of origin as seen aboveâ€ *Udny v. Udny (Supra)*; *Winans v. Attorney General (Supra).*

[27] ibid

[28] Interpretation Act, section 45.

[29][1991] 3 NWLR (Pt. 177) 85.

[30] Supra.

[31] J.G. Collier, *Conflict of laws* (2nd ed Cambridge C.U.P 1994) 41.

[32] Refers to usage of particular local laws as the basis or cause for the ruling.

[33] [1958] W.R.N.L.R.41 at 42.

[34] [1969] at 77.

[35] [1980] 3 All ER 838.

[36] [1962] LLR 112 at 117.

[37] Supra.

[38] Supra.

[39] Interpretation Act, Section 45.

[40] [1982] BTC 65.

[41] [1813] Mass, 488,501; This position is also synonymous with the new position of the English courts as in *HENDERSON V HENDERSON* (supra).

[42] Joseph Beale, â€˜Treatise on the Conflict of lawsâ€™ [1935] 1.

[43] Supra.

[44] Supra.

[45] Lord Denning.