SOME THOUGHTS ON HABITUAL RESIDENCE AS AN ALTERNATIVE TO THE CONCEPT OF DOMICILE UNDER THE NIGERIAN LAW*

Abstract

The doctrine of domicile is a foreign concept which has been received and adopted in Nigeria by reason of her political nexus with her colonizers, the British. Through the doctrine, an individual or a propositus was connected to some legal systems for particular legal purposes. Domicile is used in Nigeria as a connecting factor in a large number of questions that need to be determined by the personal law of the individual. The concept as received and adopted in Nigeria, is fraught with difficulty in its application due to unrealistic and artificial rules leading to uncertainty of outcome. Through the doctrinal research method, this article has found that domicile of origin has the potential of reasserting itself as the person's actual domicile. It also found that, domicile of origin referred to as the revival doctrine has the characteristic of connecting a person to a legal system which may be far and remote from the circumstances of his life. A way forward is to share some thoughts on Habitual Residence as an alternative to the concept of Domicile since habitual residence is without the various legal artificialities of domicile such as the doctrine of revival. Also, habitual residence has been used as a connecting factor for jurisdiction with regard to divorce, separation, and nullity of marriage, the recognition of foreign divorces, the formal validity of wills, international adoptions and child abduction as a compromise between the common law concept of domicile and the civil law notion of nationality.

Keywords: Habitual Residence, Domicile, Connection, Alternative, Nigerian Law

1. Introduction

It has been universally recognized that questions affecting the personal status of a human being should be governed constantly by one and the same law irrespective of where he may happen to be or where the facts giving rise to the question may have occurred.[1] But unanimity goes no further. There is disagreement on two matters. What is the scope of this 'personal' as it is called, and should its criterion be domicile or nationality? In England, just as in Nigeria however, it has long been settled that questions affecting status are determined by the law of the domicile of the propositus and that broadly speaking, such questions are those affecting family relations and family property. To be more precise, the following are some of the matters that are to a greater or lesser extent governed by the personal law: the essential validity of a marriage; the effect of marriage on the proprietary rights of husband and wife; jurisdiction in divorce and nullity of marriage; though only to a limited degree; legitimacy, legitimation and adoption; wills of movables, intestate succession to movables and inheritance by a dependent.[2]

Domicile is an English concept which has been received and adopted in Nigeria by reason of her political connection with the British.[3] The concept of domicile before the nineteenth century was universally recognized as the basis for the application of personal law.[4] According to Cheshire and North,[5] the principle of domicile had no rival for over five hundred years. The principle was first developed in the Middle Ages by the Italian School of Post-glossators. The post-glossators distinction between real and personal status led to the universal recognition that questions affecting the personal status of a human being should be governed constantly by one and the same law, irrespective of where the facts giving rise to the question may have occurred.[6] Thus, in the 19th Century, English Courts struggled to determine whether the personal law indicating a connection between an individual and the place should be that of nationality or domicile. Many of the cases concerned English men or Scotsmen who had left their places of birth and gone abroad in the service of Empire.[7] At a later date, questions would arise as to whether the individual retained sufficient connection with England or Scotland. Given that, in the 19th century, the English courts tended to regard their justice as superior to that in less happy lands,[8] the English Judges

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[1] JJ Fawcett and J M Carruthers, *Cheshire, North and Fawcett Private International Law* (14th edn, Oxford University Press 2008) 154

[2] ibid

[3] Caroline Mbafan Ekpendu, *'The Challenges of Domicile in Conflict of Laws in Nigeria'* (Degree of Doctor of Philosophy in Law thesis, Benue State University, Makurdi 2016)

[4] I O Agbede, *Themes on Conflict of Laws* (Shaneson Limited 1989) 49

[5] G C Cheshire and P M North, *Private International Law* (8th edn, Butterworths 1970) 180

[6] ibid 153; Can this statement still stand given the realities of the 21st Century. For instance, in Nigeria, there is the indigene settled paradigm as a result of which there is spontaneous crisis all over Nigeria?

[7] Colonel Udny in *Udny v Udny* (1869) LR1SC & Div441 had left Scotland to serve in the Guards and then travelled to France to escape creditors.

[8] To the British Colonisers, their home was the best. Even as they went out to colonise other people, they regarded justice in their countries as superior and in the colonies as inferior and less happy lands. Furthermore, principles of common sense, natural justice, equity and good conscience by British judges to give England justice the unique face it carries around the world.

came to regard domicile rather than nationality as the important link between the individual and the place.[9] The 19th century witnessed an important legal development in common law countries. The personal law tended to become that of domicile, while in continental/civil countries, the personal law tended to be that of nationality.

The concept of domicile has been received and adopted in Nigeria,[10] where it operates alongside other personal connecting factors giving rise to conflict of laws problems. The adoption of domicile in Nigeria is said to be justified on ground of practical necessity as 'Nigerian Nationality' covers a number of independent legal systems.[11] Problems however arise in the automatic adoption of the concept of domicile. One problem is that domicile was received from a country where the social and geographical background of its people is different from Nigeria. Secondly, the complex rules of the concept make it difficult to work effectively in the face of indigenous personal systems of law. Thirdly, the concept is fraught with several short comings which made Fawcett and Carruthers state that; 'The English concept of domicile is bedeviled by rules, these are complex, often impossible to justify in policy terms, and lead to uncertainty of outcome.'[12] Therefore, an automatic adoption of the concept of domicile from a country where the social and geographical background of its people is different from Nigeria would further work injustice.

It is the injustice caused by the strict adherence to the unreformed principles of domicile in the connection of an individual to a particular state or place where he has no ties on the guise of revival of domicile of origin that this Article shares some thoughts on Habitual residence as an alternative to the concept of domicile under Nigerian law.

2. Conceptual Clarifications

Domicile

The concept of domicile is not uniform throughout the world. To a civil lawyer, it means habitual residence, but at common law, it is regarded as the equivalent of a person's permanent home.[13] Black's Law Dictionary has defined domicile in two perspectives. The first definition is, 'The place at which a person has been physically present and that the person regards as home, a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere.' The second definition refers to domicile as, 'The residence of a person or corporation for legal purposes.[14] In *Mitchell v US*,[15] the Supreme Court of America defined domicile as:

> A residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time…
> By the term domicile, in its ordinary acceptation, is meant the place to be his domicile until facts advanced establish the contrary.

Domicile is also in the Nigerian case of *Omotunde v Omotunde*,[16] defined as;

> The place at which a person is physically present and that which the person regards as home, a person's true, fixed, principal and permanent home to which that person intends to return and remain even though currently residing elsewhere- same is also termed permanent abode.

The basic idea of domicile was that of permanent home. Lord Cranworth in *Whicker v Hume*,[17] observed; 'By domicile we mean home, the permanent home. And if you do not understand your permanent home, I'm afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it.' Though the idea of permanent home is the central practical feature of domicile, Lord Cranworth's definition has a deceptive simplicity; for domicile is a conception of law which, though founded on circumstances of fact, gives to those circumstances an interpretation frequently different from that which a layman would give them.[18] For instance, while it is acknowledged that a domicile must be imputed to everyone, yet there are some persons who lack a home in the conventional sense of the word and others who have more than one home.[19] A consideration of both the dictionary and case law definitions of domicile would lead to the irresistible conclusion that, domicile is the

[9] J O'Brien, *Smith's Conflict of Laws* (2nd edn, Cavendish Publishing Limited 1999) 65
[10] Interpretation Act Cap 123 Laws of the Federation of Nigeria 2004, s 32 provides for the reception and adoption date.
[11] Agbede (n4) 49
[12] Fawcett and Carruthers (n1) 154
[13] *Whicker v Hume* (1858) 7HL Casl24 at 160
[14] B A Garner (11th edn, Thomson Reuters 2019) 614
[15] 88 US 350, 352 (1874)
[16] (2001) 9 NWLR (pt. 718) 252 at 281 (per Adekeye, JCA)
[17] Whicker (n 13)
[18] R H Graveson, *Conflict of Laws* (7th edn, Sweet and Maxwell 1974) 185
[19] C O Ndifon, *Issues in Conflict of Laws* (Vision Connections Digital Publishers 2001) 319-320

connecting link between a person or cooperation to a particular legal system for the determination of his personal laws.

Habitual Residence

According to Black's Law Dictionary,[20] habitual residence is 'A person's customary place of residence, especially, a child's customary place of residence before being removed to some other place.' Black's Law Dictionary further explained that, 'the term, which appears as an undefined term in the Hague Convention, is used in determining the country having a presumed paramount interest in the child.'[21] The concept of habitual residence is used in a number of international conventions, beginning with the Hague Convention on Civil Procedure of 14 November, 1896 and a number of International Conventions dealing with conflict to complement or supplant the traditional connecting factor of domicile, example in the Rome Convention 1980.[22] The concept has been widely employed in English Statues, even those not implementing international conventions. It has been used as a connecting factor for jurisdiction with regard to divorce,[23] separation,[24] and nullity of marriage,[25] the recognition of foreign divorces,[26] the formal validity of wills,[27] international adoptions,[28] and child abduction.[29] It has also been used in commercial areas of law such as in relation to contractual obligations as a result of the Contracts (Applicable Law) Act 1990. The term is a pivotal part of the Hague Convention on International Child Abduction, which Article 4, uses the term but does not define it, as follows: 'The Convention shall apply to any child who was habitually resident in a contracting state immediately before any breach of custody or access rights. The Convention shall cease to apply where the child attains the age of sixteen years'.

3. General Principles of Domicile

Every person must have a domicile.

The evolving 19th century case law made it clear that every child is accorded a domicile by English law.[30] It is a settled principle that nobody shall be without a domicile and in order to make this rule effective, the law assigns what is called a domicile of origin to every person at his birth, namely, to a legitimate child the domicile of the father, to an illegitimate child the domicile of the mother and to a foundling the place where he is found.[31] This domicile of origin prevails until a new domicile has been acquired. For instance, if a Nigerian leaves Nigeria, his country of origin with an undoubted intention of never returning to Nigeria again, his domicile of origin adheres to him until he actually settles in another country, for instance, in Australia, with the requisite intention. The reason advanced for the above rule is stated to be the practical necessity of connecting every person with some legal system by which a number of his legal relationships may be regulated.[32]

Possibility of dual Domiciliaty for Singular Purpose?

This rule also arises from the necessity of connecting every person with a legal system by which a number of his legal relationships may be regulated.[33] The facts and events of a person's life frequently impinge upon several countries. It is necessary on practical grounds to hold that a person cannot possess more than one domicile at the same time at least for the same purpose.[34] The application of this rule in Nigeria according to Agbede,[35] provoked a good deal of controversy which found expression in a number of irreconcilable decisions. It has produced two schools of thought (whose proponents are the Federal school of thought and the State school of thought) one in favour of state domicile,[36] the other in favour of a federal domicile.[37] The arguments advanced for both the Federal and States Schools of thought were that matters which depend on the application of domicile are shared between the Federal and the State governments. Since domicile in the federation as such will not be adequate to connect a person with the law of a particular state and since the rule of English law, as claimed prescribes that a person

[20] Garner (n 14) 1565
[21] ibid
[22] https://en.wikipedi.org/wiki/habitual_residence accessed 8 September 2011.
[23] Domicile and Matrimonial Proceedings Act 1973, s.s 2 (British)
[24] ibid
[25] ibid s (3) (b)
[26] Family Law Act, 1986. S 46 (1) (b) (British)
[27] Wills Act 1963 s1 (British)
[28] Adoption and Children Act 2002 S.47 (3) (British).
[29] Child Abduction and Custody Act. 1985, Schedule 1, Article 4
[30] Bell v Kennedy (1808) LR1SC and DIV. 307 at 320; Udny v Udny (1869) LR1SC and DIV 141 at 448-457, Mark v Mark (2006) 1HC 98
[31] Fawcett and Carruthers (n 1) 155
[32] D McClean and K Beevers, *The Conflict of Laws* (6th edn, Sweet and Maxwell 2005) 28
[33] ibid
[34] Fawcett and Carruthers (n 1)156 Also Udny (n 7)
[35] Agbede (n4) 66
[36] *Machi v Machi* (1960) LLR 103; *Adeyemi v Adeyemi* (1962) LLR; See *Udom v Udom* (1962) LLR 112
[37] See *Nwokedi v Nwokedi* (1958) LLR 94, *Odunjo v Odunjo* (1964) LLR 43; *Odiase v Odiase* (1965) NMLR 196

cannot have more than one domicile, the state school argued that only a 'State' domicile was feasible. The 'Federal School' on the other hand, argued that at least for purposes of those matters within the jurisdiction of the federal legislature, 'domicile' should be based on residence anywhere in Nigeria with an intention to remain in Nigeria permanently.[38] Perhaps the argument of the 'State School' was an over simplification for the reason that a person is said to be domiciled in a law district and not the composite state as operated in unitary states such as the United Kingdom. Such reasoning is contradicted by social circumstances in Nigeria, a federal state where for the purpose of Matrimonial Causes Act,[39] for the entire federation for which domicile is the only connecting factor. With the above controversy laid to rest by the Matrimonial Causes Act, it is safe to agree with Fawcett and Carruthers,[40] that 'a person cannot possess more than one domicile at the same time, at least for the same purpose.'

Domicile signifies connection with a Law District, that is, a territory subject to a single system of law

Domicile signifies a connection with a single system of territorial law but does not necessarily connote a system that prescribes identical rules for all classes of people.[41] It may well be that in a unit such as Nigeria, different legal rules apply to different classes of the population according to their religion, race or tribe, but nonetheless it is the territorial law of Nigeria that governs each person domiciled here, notwithstanding that Customary law may apply to one case, Islamic law to another. Also, in the case of a federation, where the legislative authority is distributed between the state and federal legislatures, this law district is generally represented by the particular state in which the propositus has established his home. In Nigeria for instance, the legislative authority is distributed between the federal and the state legislatures and a person can be domiciled in any one of the states in Nigeria. But for purposes of matrimonial causes, a propositus need not be domiciled in any of its states per se for the Matrimonial Causes Act,[42] which is a direct consequence of the division of legislative powers in Nigeria for the Act to apply to such a person. Also, Australia which is a federal state has introduced rules that for the purpose of matrimonial proceedings a person can be domiciled in the Federal State.[43] Thus, for the purposes of divorce, a person could be domiciled in Australia while being domiciled in say, Queensland for other purposes.[44]

Presumption of the Continuance of an Existing Domicile until Proved that another is Acquired

There is a presumption in favour of the continuance of an existing domicile. The burden of proving a change of domicile lies on the person alleging the change.[45] Conflicting views have been expressed as to the standard of proof required to rebut the presumption. According to Scarman J. In The Estate of Fuld (No.3),[46] the standard is that adopted in civil proceedings, that is, proof on a balance of probabilities and not proof beyond reasonable doubt as is the case in criminal proceedings. But Sir Jocelyn Simon P. has observed that the standard of proof goes beyond a mere balance of probabilities.[47] Sir Jocelyn Simon's observation might have stemmed from the conclusions reached in the cases of *Winans v AG*,[48] and *Ramsey v Liverpool Royal Infirmary*.[49] According to Scarman J, in *Re Fuld's* Estate after observing the words used in Winans and Ramsey cases emphasised that preference should instead be given to the nature and quality of the intention to be proved. He summarised his position as follows, 'Two things are clear; first, that unless the judicial conscience is satisfied by evidence of change, the domicile of origin persists and secondly, that the acquisition of a domicile of choice is a serious matter not to be lightly inferred by slight indications or casual words.[50] It is obvious from the cases that the standard adopted in proving a change of domicile is greatly influenced by the type of domicile that is under consideration. For an allegation that a domicile of origin is lost, a higher standard is required unlike where it is one of choice where the standard is on the balance of probabilities. The presumption of continuance of domicile therefore varies in strength according to the kind of domicile which is alleged to continue. It is weakest when the domicile is one of dependency and strongest when it is that of origin.[51]

Domicile of a person is determined according to the Received English Law and not according to any Foreign Concept of Domicile.

This principle suggests that the domicile of a person is to be determined according to English law or the received English law as the case may be and not according to any foreign concept of domicile. There is however one

[38] Agbede (n 4) 66
[39] CAP M7 Laws of the Federation of Nigeria 2004
[40] Cheshire, North and Fawcett, Private International Law (n 1) 156
[41] ibid
[42] Cap M7 (n39). See also *Odiase v Odiase* (n 37)
[43] Australian Family Law Act 1975, s 39 (3) (b)
[44] CMV Clarkson & J Hill, *The Conflict of Laws* (Oxford University Press 2006) 21
[45] *Bhojwani v Bhojwani* (1995) 7 NWLR (pt. 407) 349 at 353
[46] (1968) 675 at 685-686
[47] *Henderson v Henderson* (1967) 77 at 80; Steadman (1976) AC 538 at 538
[48] (1904) AC 287
[49] (1930) AC 588
[50] McClean and Beevers (n 32) 28
[51] ibid

statutory exception to this rule in the United Kingdom, under section 46 (3),[52] a foreign divorce (or other matrimonial decree) is entitled to recognition on the basis that one of the parties is domiciled in the country where the judgment is obtained. Thus, for the purpose of this rule, domicile may mean either domicile according to English law or domicile according to the law of the country in which the divorce was obtained.[53] In Nigeria, the domicile of a person is determined according to the characterization of the lex fori and not according to any foreign concept of domicile.[54] This, it is submitted, agrees with the practice under English law where the English courts normally apply their own rules of domicile to determine where a person is domiciled.[55] The connecting factor, domicile, must be classified according to English law, the lex fori (the law of the forum). If this results in a reference to a country where the law is not territorially based, it is necessary to adopt that country's criterion of personal law to lead to the applicable law.[56]

4. The Effects of Domicile on the Nigerian Legal System

The concept of domicile though desirable, the revival doctrine of domicile of origin runs counter to the fundamental principle of domicile, as it may locate a person's domicile in a country which cannot be his home by any stretch of the imagination. A close perusal of the doctrine reveals its serious adoption under the Nigerian legal system. Domicile of Origin has the potential of reasserting itself as the person's actual domicile. If a domicile of choice is abandoned without being replaced by a new domicile of choice, then the domicile of origin revives.[57] This rule was settled by the House of Lords in 1869 in *Udny v Udny,*[58] Lord Westbury stated 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 wherever there is no other domicile and it does not require to be reaquired or reconstituted, animo et facto in a manner which is necessary for the acquisition of a domicile of choice.[59]

The revival of origin rule, conceived and developed in Victorian England, assumes that if ever a person ceases to have a permanent home, the most appropriate personal law to allocate to him is the law of the original native home.[60] These rules were designed for the class of persons who might have an ancestral home to which they would long feel a commitment. However, in the more migratory modern world, it would normally be more sensible to attribute to a person the law of the country which was most recently the home, rather than that of a country which has been abandoned, perhaps very many years previously. A person may have few or no connections with the domicile of origin, and even may never have been there.[61] Nigeria having been tutored along the lines of the common law, acquired the revival doctrine as part of her colonial heritage.[62] However, the social-political structure of Nigeria greatly differs from that of England and thus, the concept of domicile as received from English Law cannot adequately meet the needs of the Nigerian legal system. However, the rules of domicile as adopted in Nigeria operates in the same manner as in the country of adoption, the British without any modifications. For instance, the concept of domicile relates to countries or territories or states and not to localities within countries or territories. Given the hardship caused by the revival doctrine in domicile of origin in technically connecting a person to a country or constituent state which he has abandoned or may never have set foot on, the article shares some thoughts on habitual residence as an alternative to the concept of domicile in Nigeria.

5. Habitual Residence as an Alternative to Domicile in Nigeria

Habitual residence is a new connecting factor which has emerged over the last forty years.[63] Initially, this was a concept developed by the Hague Conference on Private International Law as a compromise between the common law concept of domicile and the civil law notion of nationality when uniform jurisdictional rules for divorce, separation, and annulment were introduced throughout the European Union, habitual residence was adopted as the main connecting factor.[64] Habitual residence is therefore a concept without the various legal artificialities of domicile, such as the doctrine of revival and analogies with that concept are not appropriate.[65] Although, determination of a person's habitual residence particularly that of a child, has perhaps inevitably also become

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[52] (The English) Family Law Act 1986 which has no application in Nigeria.
[53] Clarkson and Hill (n 44) 22
[54] Agbede (n 4) 53
[55] See *Re Annesley* (1926) Ch 692
[56] Clarkson and Hill (n 44) 22
[57] ibid at 25
[58] (1869) LR1SC & DIV 141
[59] ibid at 458
[60] Clarkson & Hill (n 44) 26
[61] ibid
[62] Interpretation Act Cap 123 Laws of the Federation of Nigeria 2004 s.32 (1)
[63] Clarkson & Hill (n 44) 43
[64] ibid
[65] *Re S* (A minor (Abduction) 1991 2 FLR 1 at 20, CA

partly a question of law, and the law on habitual residence has become increasingly complex. The burden of proof is upon the person seeking to show a change of habitual residence to establish this:[66]

Acquisition of a new habitual residence

In determining the acquisition of a new habitual residence, the House of Lords in RcJ (Abduction Custody Rights)[67] held that residence for an appreciable period of time and settled intention to reside on a long term basis are needed for acquisition of a new habitual residence. An examination of the requirements essential to the acquisition of a new habitual residence as deduced from the House of Lords decision in Re J's case shall be undertaken.

Residence

From the reported cases, before a child or adult can be habitually resident in a country, he must be resident there.[68] This does not necessarily require physical presence at all times. Situations such as temporary absence, for example on holidays,[69] or for educational purposes,[70] or for an attempt to effect a reconciliation with an estranged spouse,[71] will not bring an end to habitual residence. Indeed, it can continue despite considerable periods of absence.[72] In *Ikimi v Ikimi*,[73] a petitioner was held to be habitually resident in England for the whole of the preceding year, despite spending 204 days of that year in a concurrent habitual residence in Nigeria and spending only 161 days in England. In all these cases, the court's focus is on the past experience of the individual and not so much on future intention unlike in domicile cases. Thus, the objective fact of the residence is decisive and the intentions of the person are of little importance even if it is clear that the person has no desire to live in the country.[74] In Re J (Abduction: Custody Rights),[75] Lord Brandon stated that 'a person could never acquire a habitual residence within a single day but only after an appreciable period of time.' In *Nessa* v Chief Adjudication Officer,[76] the House of Lords interpreted this to mean that a person must have taken up residence and lived there for a period. It must be shown that the residence has become habitual and is likely to be habitual. The facts of the *Nessa* case were that, a woman from Bangladesh, who had a right of abode in the United Kingdom, arrived England and applied for income support four days later. She was held that, even though she had come here for the settled purpose of remaining (and so could even be domiciled here), she had not acquired habitual residence within four days. However, the period could be short but this depends on the degree of settled purpose. In *Re AF* (a minor) (child abduction),[77] the Court of Appeal had said that one month could suffice.

Settled Intention

Residence must be accompanied by a 'settled purpose'[78] or 'settled intention'[79] of remaining in the country for the time being. The element of '*animus*' required here is less than that for domicile. There is no need to show a person intended to stay there permanently or indefinitely. The settled intention can be for a limited period of time.[80] Thus, a person who goes to a country for the purpose of study or of taking up employment under a fixed term contract can become habitually resident there. In *Kapur v Kapur*,[81] a man who came to England to study for the English exams, was held to be habitually resident here for the purposes of divorce jurisdiction. Unlike domicile where the courts attempt to discover the necessary intention thereby producing absurd results, a settled intention or purpose is not something to be searched for under a microscope. If it is there at all, it will standout clearly as a matter of general impression.[82] The settled intention is easier to show when the period is longer in habitual residence whereas in domicile, long residence does not confer a domicile of choice.[83] Indeed, it has been suggested that where there is a long period of residence, the objective facts will then point to this being the habitual residence.[84]

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[66] *F v S* (Wardship: Jurisdiction) 1993 2 FLR 686
[67] (1990) 2 AC 562 at 578
[68] *Re M*. (Abduction: Habitual Residence) 1996
[69] *Findlay v Findlay* 1994 SLT 709; Rellis v Hart 1993 SLT 738
[70] *Re A* (Wardship Jurisdiction) (1995) 1 FLR 767
[71] Re B (Child Abduction: Habitual Residence (1994) 2 FLR 915
[72] *Oundjian v Oundjian* (1979) 1 FLR, where over one-third of the period was spent abroad.
[73] (2001) EWCA CIV 873, (2001) 3 WLR 672
[74] MVM (Abduction: England and Scotland (1997) 2 FLR 263.
[75] (n67)
[76] (1999) 1 WLR 1937
[77] (1992) 1 FCR 269
[78] *Shah v Barnet London Borough Council* (1983) 2AC 309 at 344.
[79] Re J (Abduction Custody Rights) (n 67) 578
[80] *Al Habtoor v Fotheringham* (2001) 1 FLR 951 at 966
[81] (1934) FLR 920
[82] Fawcett & Carruthers (n1) 190
[83] *Winans v AG* (n 48)
[84] *Zenel v Haddow* 1993 SLT 975

Abandonment

Unlike domicile, a person can cease to be habitually resident in a country in a single day if he or she leaves it with a settled intention not to return to it but to take up long term residence in another country instead. Habitual residence in one jurisdiction does not necessarily come to an end merely because the person concerned leaves for a short period or for a temporary purpose, such as formal education.[85] The abandonment of a habitual residence can take place without acquisition of another habitual residence elsewhere,[86] with the inevitable result that a person has no habitual residence.[87] Since habitual residence can be abandoned in one day but not acquired until there has been residence for a period showing that residence has become habitual, this gap when there is no habitual residence will correspondingly last for that period. During this period, for example, a child will be without the protection of the legislation on child abduction,[88] and an adult such as already seen in the Nessa case will not get income support.[89] Habitual residence as seen from the discussion above, has for some time been used as a connecting factor. It has played a most important role in the Conventions of the Hague Conference on Private International Law, since it is perceived as providing an alternative to nationality and as being free of the difficulties associated with domicile, such as those in regard to intention, origin, dependency and prolepsis.

6. Conclusion and Recommendations

The concept of habitual residence is best suited to modern conditions where people have freedom of movement around the world than in the past and is ideally suited for purposes of divorce, jurisdiction or child abduction where the aim is not to establish a 'real home' or 'permanent home' as in the case of domicile but rather to identify a jurisdiction with which a person has a legitimate connection. In Nigeria, where for instance, the policy is to discourage ethnic loyalty, the alternative of habitual residence is best suited to where a *propositus* will be taken to be habitually resident in a state where he intends to reside and make a living. Besides the domicile of a nomad, for instance, nomadic Fulani may be fluid, given the strict rules of a domicile of choice but with the alternative of habitual residence, such a *propositus* has a connecting factor. The above submissions do not portray habitual residence without any flaws, as habitual residence is said to be unsuitable for general choice of law purpose as it generates as link with a country that may be tenuous.[90] For instance, an English domiciliary working on a one or two-year contract can become habitually resident in Saudi Arabia. If habitual residence were to replace domicile as a general connecting factor for choice of law purposes, this would mean that questions such as his capacity to marry more than one wife would be governed by Saudi Arabian law. Such an approach would be inappropriate and could encourage people to engage in a deliberate evasion of the law that would normally be applicable to them. Further, one could not countenance habitual residence as a general connecting factor when it is possible to have no, or more than one, habitual residence.[91] Attempts to employ habitual residence as a general substitute for domicile has been rejected by the Law Commission.[92] Despite the flaws of habitual residence pointed above, it is opined that habitual residence could be employed in certain choice of law situations in Nigeria where an adherence to the rigid principles of domicile would create injustice to the propositus (person). Habitual residence could therefore be established based on a simple inquiry to establish where a person has his habitual residence. For instance, the length of time spent in a place other than the country of origin, a person's investments, connections and so on, in another country or state which he is habitually resident rather than the rigid principles of domicile.

[85] *P v P* (2007) 2 FLR 439
[86] *Re M* (Abduction: Habitual Residence) (n 68)
[87] *Mark v Mark* (2006) AC 98
[88] *Re F* (A Minor) (Child Abduction) (1992) 1 FLR 548, CA
[89] Nessa (n76)
[90] Clarkson & Hill (n 44) 50
[91] ibid
[92] Ibid 51