A REFLECTION ON NATIONALITY AS AN ALTERNATIVE TO DOMICILE UNDER 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 the British. Through this 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. Although the concept has been adopted in Nigeria, it is alien to the Nigerian legal system with its diverse ethnicity and culture and its complex rules which makes the concept too difficult to work effectively in the face of indigenous personal systems of law. Through the doctrinal research method, this article has found that given the problems posed by the reception and adoption of the concept vis-a-vis other personal connecting factors operating in Nigeria, whether the concept can be replaced with the alternative of Nationality. It is also found that the concept as applied in Nigeria has promoted ethnicity and has caused untold discrimination and undesirable results in contradistinction to the Constitution of the Federal Republic of Nigeria 1999 (as amended) which provides for citizenship by birth. A way forward is that Nationality compared with domicile enjoys the advantages that it is relatively easy to understand as a concept and normally easily ascertainable. Also, the seeming lapses created by the Constitution of Nigeria in promoting state of origin and indigenship over citizenship will be eliminated.

Keywords: Domicile, Nationality, Citizenship, Nigeria

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

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

[2] ibid

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

[4] I O Agbede, *Themes on Conflict of Laws* (Shaneson Limited 1999) 3

[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?

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 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 in the light of the problems posed in the reception and adoption of the concept of domicile vis-à-vis other personal connecting factors operating in Nigeria that this Article is necessary for the purpose of determining whether the concept can be better replaced with the alternative of nationality.

2. Conceptual Classifications

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

[7]Colonel Udny in Udny v Udny (1969) 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.

[9] J O'Brien, *Smith's Conflict of Laws* (2nd edn, Cavendish Publishing Limited 1999) 65

[10] Interpretation Act Cap 123 LFN 2004, s 32 provides for the reception and adoption date.

[11] Agbede (n 4) 49

[12] Fawcett and Carruthers (n 1) 154

[13] Whicker v Hume (1858) 7HL Casl24 at 160

[14] B A Garner, Black's Law Dictionary (10th edn, Thomson Reuters 2014) 592

[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

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

Nationality

According to BBC English Dictionary,[20] Nationality is defined as, 'the country that people belong to, because they were born there or have been legally accepted by it'. Nationality, therefore, is that quality or character which arises from the fact of a person's belonging to a nation or a state as a citizen. Nationality determines the political status of the individual especially with reference to allegiance or loyalty.[21] It is partly a legacy of the rise of nationalism in 19th century Europe and partly, it is a consequence of the *Code Napoleon,*[22] Nationality was attractive to emerging states anxious or insecure about their own national identity.[23] Nationality may arise in various ways as follows:

By Birth

Every child born within a state or its colonies, if any, automatically acquires its citizenship.[24] For example, in the United States of America where anybody born in the country is a citizen whether or not the parents are themselves citizens. The only exceptions are the children of members of the Diplomatic Corps born in foreign countries.[25]

By Descent

Any child whose parents are at the date of his birth citizens of a state acquires the nationality of that state by descent.[26] In some cases too, nationality by descent may be acquired even when only one of the parents is a citizen of the state of birth. For instance, in Nigeria, section 25 (1) of the Constitution[27] provides that the following persons are citizens of Nigeria by birth namely, every person born in Nigeria before the date of independence, either of whose parents or any of whose grandparents belong or belonged to a community indigenous to Nigeria.

By Naturalization

This is the process by which a person acquires nationality after birth and becomes entitled to the rights and privileges of a foreign country. Such an alien who wishes to naturalize needs to satisfy certain conditions stipulated by the receiving country before his application for naturalization can be fully accepted and formalized.[28] For instance, in Nigeria, section 27 (1) provides that, subject to the provision of section 28 of this Constitution, any person who is qualified in accordance with the provisions of this section may apply to the President for the grant of certificate of naturalization. Section 27 (2) [29] further provides that;

> No person shall be qualified to apply for the grant of a certificate of naturalization, unless he satisfies the President that;
> (a) he is a person of full age and capacity;
> (b) he is a person of good character;
> (c) he has shown a clear intention of his desire to be domiciled in Nigeria;
> (d) he is, in the opinion of the Governor of the state where he is or he proposes to be resident, acceptable to the local community in which he is to live permanently and has been assimilated into the way of life of Nigerians in that part of the Federation;
> (e) he is a person who has made or is capable of making useful contribution to the advancement, progress and well being of Nigeria.
> (f) he has taken the oath of Allegiance prescribed in the seventh schedule to this Constitution; and

[19] C O Ndifon, *Issues in Conflict of Laws* (Vision Connections Digital Publishers, 2001) 319-320
[20] BBC English Dictionary (HarperCollins Publishers 1992) 776
[21] T O Dada, *General Principles of Law* (3rd edn, T O Dada & Co 2006) 15
[22] O'Brien (n 9)88
[23] ibid
[24] Dada (n 21) 16
[25] ibid
[26] ibid
[27] Constitution of the Federal Republic of Nigeria 1999 (as amended)
[28] Dada (n 21) 16
[29] CFRN (n 27)

(g) he has, immediately preceding the date of his application, either resides in Nigeria for a continuous period of fifteen years, or resided in Nigeria continuously for a period of twelve months and during the period of twenty years immediately preceding that period of twelve months has resided in Nigeria for periods amounting in the aggregate to not less than fifteen years.

By Marriage

An alien woman married to a citizen may acquire nationality by registration such as in Nigeria where a foreign wife automatically becomes a citizen by registration.[30] In real practice, however, naturalization of such a person is usually preferred.

By Conquest or Cession

When a territory is conquered through war or is transferred or merged with another state by arrangement, the persons within the newly conquered or transferred territory acquire new nationality by reason of the political development.[31] For instance, the Soviet Union broke up in the 1990s, so did Yugoslavia and Czechoslovakia became two countries, the (Czech and Slovak Republics)

Citizenship

Black's Law Dictionary defines citizenship in two perspectives as follows: first as 'The status of being a citizen'; Secondly as 'The quality of a person's conduct as a member of a community'.[32] According to BBC Dictionary,[33] 'If you have citizenship of a country, you are legally accepted as belonging to it'. The Constitution of the Federal Republic of Nigeria[34] did not define citizenship but provides for persons who are said to be citizens of Nigeria under sections 25 (1), 26 (1) and 27 (1), which are citizenship by birth, citizenship by registration and citizenship by naturalization respectively. The discussion under Nationality applies to citizenship as both terms have similar meaning. This is so because a person is said to be either a citizen or a national of a country where he owes allegiance to a sovereign state and thereby receives certain protections within that state.

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.[35] 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.[36] 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.[37]

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.[38] 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.[39] The application of this rule in Nigeria according

[30]'A call for the Harmonization of Foreign Spouses' Rights to Citizenship under Nigerian law' WWW.africaadvocacygrp.org accessed 30th September 2010
[31] Dada (n 24)
[32] Garner (n 14) 298
[33] BBC Dictionary (n 20) 198
[34] 1999 (as amended)
[35]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
[36] Fawcett and Carruthers (n 1) 155
[37] D McClean and K Beevers *The Conflict of Laws* (6th edn, Sweet and Maxwell 2005) 28
[38] ibid
[39] Fawcett and Carruthers (n 1)156 Also Udny (n 35)

to Agbede,[40] 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,[41] the other in favour of a federal domicile.[42] 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 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.[43] 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,[44] 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,[45] 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.[46] 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,[47] 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.[48] Thus, for the purposes of divorce, a person could be domiciled in Australia while being domiciled in say, Queensland for other purposes.[49]

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.[50] 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),[51] 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.[52] Sir Jocelyn Simon's observation might have stemmed from the conclusions reached in the cases of *Winans v AG*,[53] and *Ramsey v Liverpool Royal Infirmary*.[54] 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

[40] Agbede (n 4)66
[41] Machi v Machi (1960) LLR 103; Adeyemi v Adeyemi (1962) LLR 70; See Udom v Udom (1962) LLR 112;
[42] See Nwokedi v Nwokedi (1958) LLR 94, Odunjo v Odunjo (1964) LLR 43; Odiase v Odiase (1965) NMLR 196
[43] Agbede (n 4) 16
[44] CAP M7 LFN 2004
[45] Cheshire, North and Fawcett, *Private International Law* (n 1) 156
[46] ibid
[47] Cap M7 (n 44). See also Odiase v Odiase (1965) NMLR 196
[48] Australian Family Law Act 1975, s 39 (3) (b)
[49] C M V Clarkson and J Hill, *The Conflict of Laws* (OUP 2006) 21
[50] Bhojwani v Bhojwani (1995) 7NWLR (pt 407) 349 at 353.
[51] (1968) 675 at 685-686
[52] Henderson v Henderson (1967) 77 at 80; Steadman v Steadman (1976) AC 538 at 568
[53] Winans v AG (1904) AC 287
[54] (1930) AC 588

acquisition of a domicile of choice is a serious matter not to be lightly inferred by slight indications or casual words.[55] It is obvious from the cases that the standard adopted in proving a change of domicile is greatly 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.[56]

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 statutory exception to this rule in the United Kingdom, under section 46 (3),[57] 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.[58] 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.[59] 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.[60] 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.[61]

4. Application of Domicile in Nigeria

In Nigeria, the doctrine of domicile has been applied in different instances to resolve conflict that usually arise in matters involving persons governed by different legal systems. Nigeria having been tutored along the lines of the common law, acquired the doctrine of domicile as part of her colonial legal heritage. However, the sociopolitical structure of Nigeria greatly differs from that of England and other jurisdictions. Thus, the concept of domicile as received from English law cannot adequately meet the needs of our legal system. The federal character principle as operated in Nigeria provides a fundamental departure from the English legal system- so fundamental that the rules of English conflict of laws can only operate based on the recognition of this fundamental difference and an adaptation of the rules to local circumstances. It is therefore not an exaggeration, but a reality, that the Nigerian judiciary is highly a reflection of the English system which was introduced in Nigeria due to colonization. The bulk of the rules of private International Law in force in Nigeria are essentially rules of English Private International Law received into Nigeria in one form or the other. Nevertheless, particular application of the concept of domicile under English law is becoming interestingly unrealistic and artificial on account of its unpredictability and multiformity.[62] Most of the rules of this concept are no more than lawyers' elaborated technicalities quite unrelated to social needs and convenience.[63] What is surprising is the loyalty with which most of the Nigerian Judges have adhered to the rules of domicile laid down by the English and Scottish courts to fit a situation almost as different from theirs,[64] with special and very different social and geographical conditions. It is clear from decided cases that, to acquire a domicile in a territory, it is necessary to establish residence and an intention to remain there permanently or indefinitely. This rule of domicile might have worked well during its formulative era[65] of comparative certainty, simplicity and legalism. But in the contemporary world of tension and mobility, few things in human affairs can be certain, one of which is one's intention. As stated by North and Fawcett, singular indeed would be the man who could unreservedly warrant that whether good or evil might befall

[55] McClean and Beevers (n 37) 28
[56] ibid
[57] (The English) Family Law Act, 1986 which has no application to Nigeria.
[58] Clarkson and Hill (n 49) 22
[59] Agbede (n 4) 53
[60] See Re Annesley (1926) Ch 692
[61] Clarkson and Hill (n 49) 22
[62] Agbede (n 4) 49
[63] ibid
[64] ibid 50
[65] ibid (within the period of 1858-1869)

him, he might never return where he came.[66] It is worthy of note that, the English concept of domicile has been adopted in Nigeria without qualification. For instance, Coker, J. in *Udom v Udom*[67] said;

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

The decision in Udom's case was an interstate conflict problem, yet it was decided as if it was an international conflict problem between two different countries thereby employing the full requirements of an acquisition of a domicile of choice in a new territory or country. The dictum also appears to ignore the warning of Beale, that the circumstances of life in a country must have great weight with the judge in determining the meaning of domicile.[68] Similarly, in *Fonseca v Passman*,[69] Thomas J. held that, 'to establish a domicile in Nigeria, the mere *factum* of residence here is not sufficient… there must be unequivocal evidence of *animus manendi o*r intention to remain permanently. It is submitted that the above decisions are not satisfactory for the following reasons: The needs of national integration presently demand that Nigerians should feel at home in any constituent state they choose to make their permanent abode. Thus, this work agrees with the comment of Agbede on Udom's case, that it is in the best interest of the Nigerian people to discourage ethnic cohesions and to minimize its attendant evils. Such a social policy ought to influence judicial decisions. But the decision in Udom v Udom does not appear to take account of this policy.[70] Thus, there should be a judicial acknowledgment promoting unity; for doing otherwise would be tantamount to strengthening of primordial sentiments that tend to divide rather than unite. Again, going by Cooker J's dictum in *Udom v Udom*, where shall we locate the domicile of the nomadic cattle Fulani? It is common knowledge that an Igbo man, for example, who was born in a Northern state, who has been living in the North all his life and who has no fixed intention as to when he would leave there, would nonetheless entertain a hope, however remote of returning to the East dead or alive.[71] It is also worthy of note that a person who indefinitely might be domiciled there although he envisaged the possibility of returning one day to his domicile of origin.[72] It is opined that, we must not deny local domicile to a man who has settled in a place without intending to remain there forever but simply intending to make his life there as long as circumstances allow him to do so. Moreover, in a union, were inter-state movements are unrestricted, it will be difficult to find people who will wish to reside in a particular state for better for worse. Thus, the definition of domicile under English law which has been holistically adopted in Nigeria vis a vis the freedom of movement guaranteed by the Nigerian Constitution,[73] may be seen to be somewhat a contradiction of the Constitutional freedom of an individual. This is because, the freedom of movement granted negates the requisite intention to reside permanently to constitute domicile. This however remains the position in Nigeria.

5. Effects of Domicile on the Nigerian Legal System

As earlier on discussed in this work, the concept of domicile though desirable, has invariably become one of the menaces threatening the natural unity in Nigeria today. A close perusal of the doctrine reveals its serious adoption under the Nigerian legal system. The point here is that, the issue is that of parentage and origin and not of the place of birth. It is only a foundling[74] that takes the domicile of the place where it is found, presumably its place of birth. The other children take the domicile of either the father or the mother depending on the legitimacy or otherwise of the child in question. Curiously, the question of domicile is not mentioned at all in the Constitution of the Federal Republic of Nigeria.[75] What is comparable to this concept is citizenship by birth. in this regard, section 25 (1) (a), (b) and (c) of the Constitution articulate the fact that only those born in Nigeria before the date of Independence or after Independence or born outside Nigeria either of whose parents or grandparents belongs or belonged to a community indigenous to Nigeria are citizens by birth. This provision therefore imputes the requirement of indigenship into Nigerian citizenship. Furthermore, in terms of place of origin, all that is required to be elected into a political office in Nigeria is

[66] North and Fawcett, *Cheshire and North's, Private International Law (*13th edn, Butterworths 1999) 145
[67] (1962) LLR 112 at 117
[68] J H Beale, *Treatise on the Conflict of Laws* (Baker, Voorhis 1935) 106
[69] (1958) WLNLR 41 at 42
[70] Agbede (n 4) 52
[71] ibid
[72] In The Estate of Fuld (n 51)
[73] CFRN 1999 (as amended) s 41 (1)
[74] Fawcett and Carruthers (n 1) 155
[75] 1999 (as amended)

to be a citizen by birth.[76] This fact raised a number of questions, principally among which is, 'from where comes the discrimination in respect of who is an 'indigene', 'native' and 'settler' in a state or local government in Nigeria, where the operative phrase is 'citizenship by birth?' It has been argued that the lapses in the Constitution are to be blamed largely for this crisis. Whereas the Constitution in section 42 prohibits all forms of discrimination, disabilities or deprivations on the grounds of tribe, ethnicity, place of origin, sex, religion or political affiliations, it contradicts itself by encouraging discrimination by the introduction of the Federal Character Principle and Indigenous Communities. The Constitution of the Federal Republic of Nigeria[77] contains the provision on Federal Character which states as follows;

> The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to replace the Federal Character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few states or from a few ethnic or other sectional groups in that Government or in any of its agencies.

Following the above section, section 217 (3) of the Constitution provides for the composition of the officer Corps and other ranks of the Armed Forces of the Federation to reflect the Federal Character of Nigeria. Also, the Constitution and rules of a political party shall ensure that the members of the executive committee or other governing body of the political party reflect the Federal Character of Nigeria.[78]

Also, the notion of indigenous communities is very much ambiguous in the Constitution. It has been interpreted in the case of *Chediak v Permanent Secretary, Ministry of Internal Affairs*,[79] the Court held that;

> What in the context is the meaning of community indigenous to Nigeria? The Concise Oxford Dictionary defines indigenous as follows:- "Native, belonging naturally." Exhibit "A" attached to the affidavit of the Applicant shows that his parents are described as Lebanese… This to mind is a clear indication that, the Applicant's parents are non-natives and consequently not belonging to an indigenous community in Nigeria.

Although the phrase was rightly interpreted as one's parents or grandparents belonging to a community, the ambiguous interpretation is that, one's parents belonging to a particular state as indigenes of that particular state. These two factors have constituted in no small way to the somewhat lopsided and inconsistent interpretations of domicile. For example, in almost all the states in Nigeria, what qualifies a person to certain rights and privileges is your ancestors' place of origin and not the fact of being a Nigerian citizen. Also, appointments of traditional leaders and local representatives are based on the place of origin of such a person and linkage to the indigenous tribe in such a place. Certain positions are not given to non-indigenes especially in the civil service and federal institutions.[80] Furthermore, in educational setting, non indigenes are made to pay higher school fees in good public schools, while paying the same taxes as 'indigenes'. Even admissions into universities, especially state universities, are done along that line. The above attitude has undermined the very essence of Nigerian citizenship for the reason that one is not really a Nigerian citizen but only a citizen of the place to which he or she is indigenous. These have eroded the value of being a Nigerian citizen, and killed the patriotic spirit in Nigerians. Given that the operation of domicile as received from English law has remained unchanged till today, with the attendant ills as seen above, can Nationality be a viable alternative to domicile in Nigeria?

6. Nationality as an Alternative to Domicile in Nigeria

Nationality is a possible alternative to domicile as the criterion of the personal law in most civil law systems, such as those operating in Continental Europe and the former colonies of those countries.[81] The main advantages of nationality as a determinant of the law to govern status and personal rights have been generally agreed upon by legal writers on the topic. To Fawcett and Carruthers[82] nationality, as compared with domicile, enjoys the advantages that it is relatively easy to understand as a concept, and normally it is easily ascertainable. To Clarkson and Hill,[83]

[76]ibid ss 65, 106, 131 and 177 (that is, for the positions of the membership of National Assembly; membership of House of Assembly; the President of the Federation and the Governor of a state respectively).
[77] ibid s 14 (3)
[78] ibid s 223 (1) (b)
[79] (1980) FNLR 143 at 145
[80] See for instance, Federal Character Commission (Establishment etc) Act Cap F7 LFN 2004
[81] Such countries include: France, Italy, Germany, Holland, Greece, Portugal, Cameroon, Togo, Libya, Tanzania and Angola
[82] ibid 181
[83] *The Conflict of Laws*, ibid 42

> The advantages of nationality over domicile are that it can easily be ascertained and is, therefore, more certain,: whereas most people know what their nationality is, fewer can be certain as to where they are domicile; it is difficult to change one's nationality, making evasion of the law more difficult; in times of crisis a person may turn to his state of nationality for protection and so it is only appropriate that he should be subject to its laws for conflict of laws purposes.

Despite the advantages of nationality as stated above, nationality has distinct disadvantages making the concept objectionable as a criterion of the personal law. First, there is the problem posed by stateless persons or those with dual nationality.[84] Recall that in the eyes of English law or Nigerian law, no person can be without a domicile, no person can have more than one domicile at a time. Under nationality however, a person may be stateless or may simultaneously be a citizen of two or more domiciles.[85] Secondly, the concept does not work efficiently when dealing with composite states, such as the United Kingdom, the United States, Australia and Nigeria just to mention a few, comprising more than one legal system. Nationality breaks down as a connecting factor in these countries when there is no unity on several issues. The application of the concept of nationality in such countries will be meaningless given the diverse legal systems.[86] Finally, as with domicile, it can lead to highly unrealistic results, in that persons who have long since left a country, but failed to become naturalised elsewhere, continue to be subject to the law of their former country.[87] For instance, a Briton who emigrated to Nigeria in his youth without becoming naturalised in Nigeria, should throughout his life remain subject to British law with regard to such matters as marital and testamentary capacity despite his forty years residing in Nigeria, he has retained his United Kingdom nationality. Given that the concept of nationality as against the concept of domicile has several disadvantages especially in a federating state such as Nigeria, would the concept of nationality even though a proper test of political status and allegiance be adopted in replacing domicile in Nigeria? It is submitted that a way forward will not be in doing away with the concept of domicile completely. But to move for a constitutional amendment that will do away with the notions such as 'indigenes', 'natives' and 'settlers' contained in the Constitution on Nigerian citizenship and federal character, so that a Nigerian citizen knows his allegiance is first to the nation and not the indigenous group that he or she comes from.

7. Conclusion and Recommendations

In conclusion, one can say that it is very clear that the concept of domicile as received and adopted in Nigeria from English law cannot adequately meet the needs of the Nigerian Legal System particularly as practiced in some of the few instances pointed out and is in dire need of radical modifications to fit our socio-political structure and peculiar problems. It is obvious that the lapses created by the Constitution of the Federal Republic of Nigeria,[88] in promoting state of origin and indigenship over citizenship can be resolved by a Constitutional amendment placing national unity and integration above ethnic, religious and linguistic ties. Thus, principles of nationalism must be encouraged. Section 15 (4) of the Constitution entrenches the principles of nationalism. It provides that; 'the state shall foster a feeling of belonging and involvement among various peoples of the Federation, to the end that loyalty to the nation shall override sectional loyalties.' Therefore, an amendment placing nationality or citizenship over state of origin to eliminate all forms of discrimination associated with the lopsided interpretations given to the words such as 'Federal Character' and 'indigenous communities' contained in the Constitution.[89] Finally, nationality tends to bring up a feeling of unity and oneness than domicile which has the tendency to pick out a specific locality to which one belongs. In a country like Nigeria where there are diverse legal systems, the concept of nationality could be utilized alongside the concept of domicile in order to foster the feeling of togetherness and discourage discrimination on the grounds of origin or tribe or ethic group which are inherent in the concept of domicile.

[84] ibid
[85] See for example the case of Torok v Torok (1973) 1 WLR 1066
[86] Re O'Keefe (1940) Ch 124
[87] Clarkson and Hill (n 41) 42
[88] 1999 (as amended)
[89] ibid s 14(3)