Journal of Islamic Law and Culture

Editorial Office:

The Journal of Islamic Law & Culture
Islamic World Studies Program
DePaul University
2327 N. Racine Avenue
Chicago, Illinois 60614

Email: jilc@depaul.edu

Phone: (479) 575-5610

Judicial Imbalance in the Application of Islamic Law As a Personal System of Law in Nigeria: Making a Case for Legislative Reforms

15

A.O Yekini, Dept of Jurisprudence & International Law, Lagos State University, Lagos, Nigeria

1.0 Introduction

Islamic law is the Muslims' law revealed to them by *Allah* [1] through prophet Muhammed, (pbuh). The law applies to all Muslims irrespective of colour, race and geographical location. It is partly written and unwritten, universal and eternal.

Islamic law is also known as *Shariah*. It has been described as a law derived on the theological foundations of Islam – foundations that declare that God exists and that God has sent, by way of revelation, all the rules and guidelines that humans need to prosper in this world and in the afterlife

Islamic law was well entrenched in Nigeria in the early part of the 19th century as a legal system and since then, it has continue to apply to its adherent. Islamic personal law particularly, has been elevated to a

constitutional status and there is no doubt that it applies to all Muslim in Nigeria.

In the recent time, its application has been relegated particularly in the southern part of the country as a result of the failure of our judges to appreciate the difference between a personal and territorial systems of law and in some cases, there appears to be prejudice against the application of the law.

2.0 The Concept of Personal Law and Territorial Law

Historically, legal administration over the ages has been diagnosed from two primary perspectives. While one is based on persons' race or nationality or religious affiliation, the other is based on territoriality [2]. Hence, the law applicable to one's action in some cases is determined by his race, ethnicity or religion while in other cases, the law is fixed and is applicable to everyone in that geographical area irrespective of his ethnicity, race or religion.

Personal law [3], according to Cheshire, is the law relating to personal status, and the matters which are to a greater or lesser extent governed by the personal law, are essential validity of marriage, mutual rights and obligations of husband and wife, parents and child, guardian and ward, the effect of marriage on property, divorce, annulment of marriage, legitimation and adoption, certain aspects of capacity, and testamentary and intestate succession to movables [4]. Therefore, a personal system of law is a legal system in which laws or legal norms bind different people differently, sorting people into various legal regimes depending on what 'type of person' the person is [5]. However, personal law system is better illustrated by Agbede as a system of law 'addressed to a number of persons by virtue of their belonging to a particular race, ethnic groups, or religion' [6]. Examples of these laws include Islamic law, Yoruba customary laws and other ethnic laws all existing side by side in within the national legal order.

On the other hand, a territorial system of law is a law that normally applies to all persons and things within the territory of its sphere of application [7]. For instance, in Nigeria, the Criminal Laws [8] are applicable to everyone in the country irrespective of his nationality, domiciliary, religion, race or ethnic group.

It has been reported that recent historical researches have shown that the

evolution of personal system of laws emerged after the dissolution of the Roman Empire [9]. The barbarians having conquered the Roma Empire continued to follow their primitive customs while allowing the Romans to continue to live according to the Roman law. Hence, within the same territory, different laws apply to different people according to the racial origin [10]. When the Muslim army conquered Constantinople also, they allowed the non-Muslim population to be governed by their laws while the Muslims are subjected to the jurisdiction of the Shariah courts [11].

It is particularly noted that personal law system was more pronounced in the aftermath of the Roman Empire as there was need to regulate the differences or disputes between the Romans and the barbarians since both set of people did not share the same legal view. According to Nwabueze, 'the logical solution adopted in the circumstances was to allow each person, Romanor barbarian, the application of his personal aw' [12]. Since then, personal law has flourished and is the sole bases for regulating people's affairs in the matters of family related issues. Hence, irrespective of where a person finds himself, the law of his race, ethnic or religion is the applicable law to his family related matters.

However, the concept of personal law declined with the emergence of feudalism around 11th century and territorial laws was given prominence [13]. Territorial law as earlier stated has strong regard for geographical limitation and does not distinguish between its subjects.

Personal system of law again resurfaced with advent and expansion of colonialism. The colonialists in virtually all the territory they administered institutionalised a centralised legal system and at the same time allow each community to be governed by their customary or ethnic laws especially in area of personal status. The same situation has played out in Nigeria. While the English laws were received and made to apply generally to everyone throughout the country, the various customary laws and Islamic law were preserved and continue to apply to its subject wherever they may reside in Nigeria [14].

2.1 The Connecting Factors for Personal Law System

The goal of private international law is to apportion laws applying to causes having foreign element by pointing out the general principles upon which all legislation on the matter is based and developed [15]. In area of personal law, these principles with which persons are connected to a particular legal system for the purpose of determining his personal status

and proprietary relations between family members are membership of an ethnic or religious group, the will of the parties, domicile and nationality [16].

Vitta has asserted and I agree with him that 'the main connecting principle is the ethnic or religious association of the parties. Nationality or domicile of the parties, the two connecting principles on which the main systems of private international law are based, may not be resorted to in the conflict of personal laws'. This statement is particularly as it relates to Nigeria. He opined that Nationality could only be relevant if the legal relation to be determined involves parties who are nationals of different State but not persons who are subject to different legal systems but all national of the same State. The same reasoning applies to domicile as it could not have been a relevant factor in determining choice of applicable personal law of persons who are domiciliaries of a State [17].

a. Membership of ethnic or religious group

Nigeria is a heterogeneous society comprising about three hundred tribes. These tribes are spread all over the country. Prominent among them are the Yorubas which are located in the southwest of the country, the ibos in the south east Nigeria, the Hausa/Fulani spread all over the northern part of Nigeria and the Ijaw/Itshekiri group in the south-south of Nigeria.

In reality, Nigeria is as well a multi-religious country [18]. The Muslims constitute about 50% of the population and the Christians are about 40% while about 10% of the population are either traditionalists or atheists [19].

Every Nigerian belongs to an indigenous community and each community has its customary laws firmly established. These customary laws have existed from time immemorial and are generally regarded as binding among the indigenous people. Every member of the community is attached to his customary laws by virtue of being a member of that indigenous community. It need be added that membership of an indigenous community is by birth. A person automatically becomes an indigene of a community if his parent especially his father is a native of that community. This is because, Nigeria is a patrilineal society.

Therefore, a person's personal status is determined by the law of his community, tribe, ethnic or of his origin. There appears to be a presumption that a person cannot change his personal law in this regard since he cannot change the circumstance of his birth [20]. As Guterman puts it, 'the personal law was acquired principally through birth which also determined

tribal or national membership. No one renounced this subjective right "without abandoning a title of himself' [21]. Although, the judicial practice in Nigeria does not agree with this position [22].

b. Domicile

In the common law jurisdictions, domicile is the personal connecting factor for personal law. Nigeria inherited the laws of England like other common law countries [23] and including its conflict of law rules. To that extent, domicile is the connecting factor used by Nigerian courts to fix every person to a legal district for the purpose of determining questions of personal status.

Domicile is an elusive concept very difficult to define. According to Lord Cranworth, your domicile is your permanent home and he added 'and if you do not know your permanent home, I'm afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it' [24]. Lord Cranworth explanation is too simplistic and does not really portray the meaning of the term.

A description of domicile was given by Lord Lindley in *Winans v Attorney General* [25] when he observed that:

> Further, take it to be clearly settled that no person who is *suijurïs* can change his domicile without a physical change of place, coupled with an intention to adopt the place to which he goes as his home or fixed abode or permanent residence, whichever expression may be preferred.

Therefore, to be domiciliary in a place, one would have to establish a permanent residence in that locality together with an intention never to leave that locality except for temporary purposes.

Domicile could be of origin and this is affixed to everyone at birth. No one can exist without belonging to a particular legal district. The domicile in question now will be that of the father if he is a legitimate child and that of his mother if it is an illegitimate child [26]. This position may not be valid in the case of Nigeria as the Constitution has abolished the distinction between a legitimate and illegitimate child [27]. Therefore, every Nigerian child adopts the domicile of his father at birth.

One could change his domicile of origin to acquire a domicile of choice. The conditions though very stringent are that one must establish a different permanent residence of choice with an intention never to return to his country of domicile [28]. Where a person's domicile of choice is not successfully established, then his domicile of origin is resuscitated even if

the person has lost all connection with his domicile of origin [29].

All said, once a person's domicile has been ascertained, the law of his domicile is regarded as his personal law.

c. Nationality

Nationality emerged in the 19th century among the civil law countries of the continental Europe as the personal connecting factor in conflict of laws. This was unconnected with the Mancini's famous lecture delivered at the University of Turin in 1851 [30].

Mancini advocated that an individual's persona1 law should be determined by his political allegiance, *i.e.* his nationality. It is generally believed especially among the Civil law jurisdictions that Nationality is an easier test than domicile. Since nationality is based on birth [31], it is easier ascertained that a person's domiciled which is determined by the court.

However, it should not be assumed that nationality is a perfect criterion. One will readily run into problem when a person is a national of more than one State. Then determining his personal law becomes a problem.

d. The Will of the parties

Although, the will of the parties is traditionally used as a connecting principle in the law of contracts, Vitta has observed that it is widely resorted to the field conflict of personal laws as well. Giving historical antecedents especially from the barbarian States and the Ottoman Empire, parties are usually allowed to express their will in respect of the courts and law to be applicable to their disputes [32].

Where parties are members of the same community, usually they consent to the jurisdiction of the court. By their action, they had conferred jurisdiction to the court and since they all belong to the same community, their communal law applied. On the other hand, where the parties are from different backgrounds, the law give them the option of submitting to the jurisdiction of the forum court by consent and they can agree as to the law they wish to apply to the case.

A similitude of the above scenario can be seen under s.15(c) of the Area Court Laws of the Northern Nigeria where foreigners (non-Africans) can only be subjected to the jurisdiction of the court if they consented. Thereafter, the court may then adjudicate base on the law that has been agreed upon or binding by the parties under s.20 (a). Therefore, the will of the parties is given consideration in such an instance.

In the southern part of the country, similar provision exists in the customary court law of various states [33]. The law provides that where:

- (i) both parties are not natives of the area of jurisdiction or the court; or
- (ii) the transaction the subject of the cause or matter was not entered into in the area of the jurisdiction of the court; or
- (iii) one of the parties is not a native of the area of jurisdiction of the court and the parties agreed or may be presumed to have agreed that their obligations should be regulated, wholly or partly, by the customary law applying to that party;

the appropriate customary law shall be the customary law binding between the party

It can be deduced that in these cases where one or both parties are not from the jurisdiction of the court, the will of the parties is also a connecting factor.

3.0 Judicial Attitude of Nigerian Courts to the Application of Islamic Personal Law

3.1 North

In the northern part of the country, there is less controversy in the application of Islamic Personal Law. The resultant effect of the Dan Fodio Jihad was the assimilation of the Native people to the Islamic laws. As Islamic law was elevated to the law of the caliphate and its wide application over the years, the customs of the people soon gave way for Islamic law. While we must admit that Islamic Law has supplanted customary law (at least among the Muslims), it is not the case that customary law has extinct in the north. Non-Muslims and particularly the traditionalists still maintain some of the customary laws of the indigenous people. Therefore, Christians and traditionalists are not governed by Islamic Law.

In line with section 277, where there is any matter before a court falling within the scope of personal law, the question the court ask is, are the parties Muslims?, did the deceased died a Muslim?, was the marriage conducted by Muslims and under Islamic Law?. Where the questions are answered in the affirmative, Islamic Personal law is applied.

The Supreme Court per Ogundare JSC, as he then was has maintained that:

> Where a case involves Islamic personal law as in this case **which is about a gift between Muslims**, an appeal from the decision of the area court on the matter lies to the Sharia Court of Appeal of that State. **The cause of action in this appeal involves a gift and the donors are Moslems.** Section 242(2)(c) of the Constitution of the Federal Republic of Nigeria, 1979 as amended by Decree No.26 of 1986 vests the Sharia Court of Appeal with jurisdiction to exercise appellate and supervisory jurisdiction in civil proceedings involving question of Islamic law which the court is competent to decide in accordance with the provisions of sub-section (2) of that section [34] (emphasis mine)

It could be deduced that the connecting factor emphasised by his lordship is the religion of the parties. This is the direct interpretation of the section 277 of the 1999 Constitution as amended and the various Sharia Court of Appeal Act of the States of the northern Nigeria. It is on this basis that Islamic Personal Law is applied before the courts in the northern part of the country whenever the parties before them are Muslims.

While commenting on the conditions that make Islamic Personal Law to be applicable to a matter, the Court of Appeal has this to say:

> The issues and conditions are:
>
> (a) Both parties must be muslims. There must be evidence that they are in fact Moslems and not bearing what is called Moslem name. Some litigants in Nigeria can be called Ibrahim, Musa and Ishaq. These names for example are common to both Christians and Moslems. Also, Yakubu, Ismail and Haruna may be common to Christians, Moslems and even pagans or non-moslems. This hurdle inter alia must be crossed before we go to the next one [35]

In a similar view, Okunola JCA has once held that:

> Once a person is born into Islam or converted into same when he merely has to believe LAILLAHA ILLA ALLAH MOHAMMED RASULULLAHI (meaning I accept the oneness of Allah and the Prophethood on Mohammed SAW) he is a Muslim and Islamic law becomes the personal law of the person [36]

In *Ubudu v Abdul-Razak* [37], the appellant was excluded from inheritance from the estate of her deceased mother because she was a non- Muslim. She applied to court to set aside the distribution on the basis of her exclusion. The Court of Appeal found that under Islamic law, evidence admitted need not be proved and since the appellant admitted that she converted to Islam after the death of her mother, she is disentitled to inherit her deceased mother. The court therefore affirmed the decision of

the Sharia Court of Appeal.

In *Husaina v Tsiriko* [38], the parties were married under Islamic law. When the marriage had broken down irretrievably, the woman sought to get separation order (khul') from the court. The court agreed to separate the parties and deed separated them. However, in Islamic law, if a woman is the one that wants to seek divorce from her husband, she must be ready to return the dowry paid to him by the man. When there was a dispute as to the amount of dowry payable, the court ordered a reduced dowry and asked the wife to pay N13,000.

Unfortunately, the wife could not refund this money and the trial court ordered her to go back to the man's wife as she was unable to fulfil the condition of khul'. The Court of Appeal set aside the decision of the lower courts and affirmed once the separation has been ordered by the court; the court cannot force the woman to go back to the man's house again under Islamic Law [39].

In all, there is no controversy in the application of Islamic Personal Law to Muslims in the northern part of the country as the cases presented above have depicted.

However, two cases needed to be mentioned here. The first case is *Yinusa v Adebusokan* [40]. In this case the plaintiff is the eldest son of Yinusa Saibu lived and died as a Moslem of Maliki sect and all his surviving children and wife are also Moslem. He made a will under the Wills Act 1837 where he bequeathed £5 to his son (the plaintiff) and shared his three houses between his two other sons from another marriage.

The plaintiff brings this action against the defendant who is executor of the will of his deceased father and to whom the probate of the will has been granted. He challenges the validity of the will on the ground that the testator being a Moslem was not entitled to dispose of his properties by his will made under the Wills Act 1837 in a manner contrary to the Islamic law. He seeks to have the probate of the will set aside. The question to be decided by the court is whether the deceased was subject to Islamic law (because he from the southern part of the Northern Nigeria, Omuaran, now in kwara State) or the native law and custom of Lagos where he is domiciliary.

Bello J.(as he then was) held that Islamic law is the personal law of the deceased because he is from Omuaran and not Lagos native law and custom. His lordship reasoned as follows:

> Subject to any statutory provision to the contrary, it appears from both cases that mere settlement in a place, unless it has been for such a long time that the settler and his descendants have emerged with the natives of the place of settlement and have adopted their ways of life and customs, would not render the settler or his descendants subject to the native law and custom of the place of settlement. It has not been shown in this case that the parents of the testator and the testator himself had settled for such a long time in Lagos and have adopted the Yoruba ways of life that if he had died intestate his estate would have been subject to "Idi-Igi" distribution. On the contrary the evidence of an old friend and compatriot of the testator shows that the latter had always regarded himself as a native of Omuaran. I find therefore that the testator was a native of Omuaran subject to the native law and custom of Omuaran in the Kwara State

His lordship was of the view that Islamic law is a variant of native law and custom applicable in Omuaran and because the testator is from Omuaran, Islamic law applies. He therefore, set aside the Will of the testator as it failed to comply with Islamic Law [41].

While Bello J. has arrived at the correct conclusion, his reasoning with due respect is wrong. His Lordship seems to be treating Islamic Personal law as a territorial rather than a personal law which firmly attaches to a person irrespective of where he stays. The court ought not to have concluded on the basis that the testator is from Omuaran or because he has not acquired a domicile of choice in Lagos. It ought to have been swayed by the singular fact that the testator is a Muslim and not because he hailed from the north. It means that the position of the court would have been different if it had found that the deceased had acquired a domicile of choice in Lagos.

On appeal, the Supreme Court overturned the decision of the court and affirmed the validity of the Will. The court further held that the Maliki law is incompatible with the Wills Act and as such is null and void. The court opined though *per incuriam* that Islamic law is not applicable in the southern States. The Supreme Court posits thus:

> In other words, it means that nothing in the High Court Law shall deprive any person of the benefit of any native law or custom including Moslem law, which is not incompatible directly or by implication with any law for the time being in force, and in the present case the Wills Act, 1837… In any case, the question hardly arises since there is no provision, to our knowledge, of any law which makes Moslem law, whether of the Maliki sect or any other sect, enforceable, either on its own, as such, or as part of any customary law, in any of the courts of the Southern States [42].

This decision has been widely criticised by learned writers [43]. It is perhaps noted that the decision might have been influenced by the north/south divide in the application of Islamic law. Had the testator been from core north, the matter might have been decided differently.

The unpalatable situation that may be ocassioned by the Supreme Court decision was corrected in kwara State which seems to be the only 'southern State' that is categorised as a northern State for political reasons. The State legislature has amended the Wills law of the State to be subject to Islamic Law. The law provides that:

> It shall be lawful for every person to bequeath or dispose of by his will executed in accordance with the provisions of this law, all property to which he is entitled, either in law or in equity, at the time of his death. Provided that the provisions of this law shall not apply to the will of a person who immediately before his death was subject to Islamic Law [44]

Hence, in *Ajibaiye v Ajibaiye[45]*the deceased in his will shared in accordance with the English Law and as contained in his Will having chosen English Law to guide his transactions and affairs in his life time notwithstanding the fact that he was a Muslim. He further directed that his burial should be done in accordance with Muslim rites without drinking of alcohol either on the date of his death, burial or the 8 days prayer.

The plaintiff contested the will on the ground that the deceased being a Muslim and subject to Islamic law cannot make a Will under the Wills Law of kwara State. The High court agreed with his position and nullified the Will. The court of Appeal affirmed the judgment of the High Court. With this decision, it is now crystal clear that the personal law of all Muslim in the northern part of the country is Islamic Law.

3.2 South

In the southern part of the country, the application of Islamic Personal Law is shrouded in controversy. The Supreme Court in *Adesubokan v Yinusa* held *per incuriam* that Islamic law is not in force in any part of southern part of the country. One expects more disturbing decisions from the lower courts if this level of mis-statement with all respect has come from the apex court.

The situation in southern part of Nigeria admittedly, is attributed to the attitude of the Muslims of that region. There is high reference for customary laws and institutions of the indigenous people all over the

southern part of the country. When Islam came to the region, the people accepted Islam and firmly belief in his laws and teachings. However, at the same time, they have not left their customary laws unpractised. In most cases, one sees both being observed in the life of an average southern Muslim.

A popular adage for instance among the Aworis [46] goes thus: *'esin oni ka ma shoro ile wa ooo'* (religion does not debar us from participating in traditional practices); *'efun omo laye oo, e fun omo laye ko mo oo she le baba re ooo'*(a child should be allowed, a child should be allowed to carry out his family traditions). It is common to find Muslims at the forefront of traditional festivals like *eyo, egungun, oro* etc., while at the same time, they hold religious titles.

The implication of this is that customary and Islamic laws are ordinarily applicable as personal law of the Southern States Muslims. However, one noticeable trend now is that, the Muslims are now more conscious of their religion and have continuously advocate for Islamic law as against customary law especially in the area of personal law. This may not be unconnected with the Islamic revivalism that has been going on all over the world for some decades now as the Islamic identity is now more obvious among the Muslims than before.

Unlike their northern counterpart, Muslims in southern part have not enjoyed the application of the constitutionally guaranteed Islamic Personal Law. The courts have continuously denied them the benefit of their law in some cases ignorantly and in other cases out of prejudice to Islamic law.

In *Asiata v Goncallo* [47] , Alli Elese, a Yoruba, was taken to Brazil as a slave. There he married Selia, an African freed woman. They were married first in accordance with Mohammedan rites, and then Christian rites in a Christian church. Selia took her husband's Brazilian name of Marques, and two daughters, now in Brazil were the issue of that marriage. Subsequently Alli Elese returned to Lagos with Selia, and there, during the lifetime of Selia, and subsequent to the passing of the Marriage Ordinance, 1884, he married Asatu in accordance with Mohammedan rites. By Asatu he had one child, Asiata , the plaintiff.

One of the questions to be decided by the court was the validity of the second marriage with Asatu. The court held as follows:

> there can be no doubt that the Christian marriage between Alli and Selia was legal, and in Brazil all the legal incidents of marriage would have

> attached to such a marriage. There undoubtedly Alli could not legally marry another woman whilst Selia remained his wife. Nor could he, whilst Selia was his wife, have legally married any other woman in any other Christian country. But this is not a Christian country, and by the native law (including the Mohammedan law) a man can legally have several wives. Such polygamous unions would not of course be recognized in Christian countries, but here they are of everyday recognition. It is clear from the evidence that Alli was a bona fide follower of the prophet, and as such was legally entitled to marry several wives. In such circumstances why should his previous Christian marriage render illegal his subsequent marriage by Mohammedan rites? Suppose a Turk in England marries a Turkish lady by Christian rites, would that render illegal in Turkey a subsequent marriage by Mohammedan rites? I should think not. The case before us is stronger, as the parties to it were ex-slaves, dragged against their will to a Christian country, whilst to make it clear that they were not altogether satisfied with the Christian ceremony, they first went through the form of a Mohammedan marriage. *For the purposes of this case Lagos is as much a Mohammedan country as Turkey, and as we ought to apply the Mohammedan law in deciding as to the legality of this marriage, I am of opinion that the marriage with Asatu was legal, and that therefore the issue of it is lawful and entitled to the usual rights of a child under Mohammedan law* [48] (emphasis mine)

It is noted that the principal connecting factor which swayed the mind of the court to decide the matter the way it did was the religion of the deceased. As Olaniyan has rightly enumerated [49], the indices are as follows:

- a. Alli Elese was a Muslim
- b. Sella the wife married in Brazil was also a Muslim
- c. They first contracted a Muslim marriage and the Christian marriage conducted in Brazil was for the purpose of recognition of their status and nothing more
- d. Alli Elese subsequently took a second marriage in accordance with Islamic law after returning to Lagos

Although, the court was not faced with a situation of choosing between customary law and Islamic law, one would have expected the court to arrive at the same decision even if it had to choose between the two laws. Islamic law seems to be more connected with the transactions having highlighted the localising factors. As Olaniyan opined and I agree, this decision seems to be the only sound decision to have been handed down by Nigerian courts in respect of the application of Islamic Personal Law in

southern part of the country.

In *Anjorin v Anjorin* [50], the parties were married under Islamic Law and in fact the marriage was solemnized by the Chief Imam of Lagos State University mosque. The relationship between the parties went sour and the wife approached the customary Court for a divorce. The husband maintained that the parties went through Islamic marriage and if the court must dissolve the marriage, then it should be dissolved at under Islamic law [51]. The court disregarded the papers filed by the husband and all his submissions. The court refused to apply Islamic Law and dissolve the marriage between the parties (presumably under Yoruba customary law).

This decision is clearly wrong as the court has wrongly refused to apply Islamic Law despite the fact that the marriage was conducted under Islamic law and husband protested that he was only bound by Islamic Law. The attitude of the court confirmed that there seems to be some aversion to Islamic Law by some judicial officers. Otherwise, there is no basis for rejecting Islamic Law in this case despite the fact that the new Customary Law in the state now officially recognises Islamic Personal Law as applicable to Muslims [52].

In *Tapa v Kuka* [53], the plaintiffs are the cousin and sister of one Abudulai Tapa who died intestate and left property at No. 60 Mosalasi Street, Obalende, Lagos, and as such claim a grant of letters of administration of the estate. The defendant, as the widow, entered a caveat. The question of the person entitled to the grant is, it is agreed by both parties, to be settled by native law and custom and the law to be applied is that of a Nupe Mohammedan of Bida in Niger.

After taking evidence on the of an old friend of the deceased as to the content of the Mohammedan law applicable in Bida, the court per Brooke J. found that the plaintiff and not the wife is entitled to the grant of administration as follows:

> There is the evidence of an old friend and compatriot of the intestate who is also a native of Bids (Tapa-Nupe) and a Mohammedan: he has told the Court on whom the estate devolves in the absence of a will. His evidence is to the effect that the brother under Nupe Mohammedan law is the proper person to receive and take care of the estate: if there is no brother the sister by the same father takes. There is no brother; Awawu the second plaintiff is the sister. This accords with principle but the sister steps in when there is no brother surviving. One reads in Notes on the Tribes that the heirs are responsible for all debts incurred by the deceased whose property

> is divided between his eldest son, his other sons, his whole brothers and his daughters in a fixed and decreasing proportion. If the children are infants the money is held in trust for them by the brothers of the deceased. If there is no family a woman may inherit from her husband and in some cases where there are no children and she is known to have been a specially good wife the brothers of the deceased forgo their right in her favour. 54

This decision is a wrong one. It is clear from the decision that the court has clearly rejected Islamic Law despite the fact that all parties and the court agreed that Islamic Law is applicable (though 'Nupe Mohammedan law'). Firstly, the evidence of the friend of the deceased called in the case did not represent the position of Islamic Law. He is not an expert in Islamic law and has not even cited any authority. Assuming but not conceding that the evidence represent the position of Islamic Law, Brooke J. clearly refused to follow it but rather his lordship relied on something else 'Notes on the Tribes' and based his decision on that book. It is on this note that I agreed with Olaniyan that 'what Brooke J. applied was Nupe custom and not Islamic or 'mohammedan' law of any locality in Nigeria' 55 .

In *Apatira v Akanke[56]*the testator made a Will in English form though devise the property in a manner consistent with Islamic law. It was proved that the deceased did not sign or acknowledge his signature in the presence of two witnesses, both being present at the same time. Consequently, the requirements of the Wills Acts of 1837 and 1852 were not complied with.

The court refused to apply Islamic law to the estate of the testator despite the fact that he was a Muslim and the will complied with Islamic law. Strangely, the court opted for English law. The court reasoned as follows:

> The Will reads as if it was intended to be a will made in accordance with English law. Moreover, the fact that it makes legacies to his heirs (as they would be in Mohammed law) and disposes of all his property, contrary to Mohammedan law, also suggests that it was intended to be made according to English law to enable him to do so 57 .

Also in *The Estate of Aminatu Alayo, (Deceased) Administrator-General v T. A. Tunwase and Others* 58 the deceased an Ijebu Muslim lived and died a Moslem and that there had been no divorce. It was however admitted that the parties had not lived together for forty-five years. There were four witnesses that testified to the fact that the deceased lived as a Mohammedan and was buried in accordance with the Muslim rites.

It was that the estate of the deceased should be administered under native law and custom and that law is Mohammedan law. It was further argued that because the deceased conducted Islamic marriage, Mohammedan law should be applicable to her estate by virtue of the decision in *Asiata v Goncallo.*

Brooke J. once again held that 'no authority was quoted for this and it is clear that the Court will only take judicial notice of native law and custom, which may include Mohammedan law, after it has been established by decisions in this Court'. He therefore, refused to accept all the evidence led by the witnesses and applied customary law. The judge rather made the following astonishing remarks:

> There is no personal law in this country as there is, e.g. in India; and under section 17 of the Supreme Court Ordinance native law and custom shall be deemed applicable in causes and matters where the parties are natives and in this case they are natives of Ijebu. This may include Mohammedan law and in the Northern Emirates it is the Maliki Code that is followed, but Ijebu is not a Mohammedan area and there is not only no provision for the application of that law but also there is no reliable evidence of any custom to be applied [59]

This decision does not obviously, represents any sound legal or factual reasoning but at best may be an expression of personal bias of Brooke J. with due respect against Islamic Law. It is unthinkable whether then or now that there is no personal law in Nigeria or that Islam is alien Ijebu. The effect of all these approaches by the courts is an attempt according to Oba to 'ensure that Islamic law was not applied to the estates of Muslims. Yoruba Muslims were particularly victims in this regard'. [60]

4.0 The Problem of Choice of Personal Law

The question of choice of law between systems of personal law has posed some problems for the courts and academic writers over the years. The approach of the courts has been largely based on considering under what system of law has the parties or the deceased contracted the union which led to the establishment of the family. In *Cole v Cole* [61] and *Coker v Coker* [62], the courts were persuaded by the fact that because the parties had contracted Christian marriage, then they have adopted the English law as their personal law. However, in *Bamgbose v Daniel* [63] and *Alake v Pratt* [64], the courts affirmed the inheritance rights of children whose legitimacy were validated under customary law despite the fact that the

deceased in those cases had contracted Christian marriages.

The Court formulated a new approach in Smith v Smith [65] by opting for the 'manner of life' test. According to the court, 'the fact that a man has contracted a marriage in accordance with the rites of the Christian Church may be very strong evidence of his desire and intention to have his life generally regulated by English laws and customs, but it is by no means conclusive evidence.' [66] Therefore, the way the deceased lived his life, his taste, style and preference- all will be considered to fix a personal law for the deceased. The manner of life test was finally reaffirmed by the Supreme Court again in *Olowu v Olowu*. [67]

It is submitted that the 'manner of life test' may not be the most appropriate solution to the problem of choice of personal law particularly as it affects the southern Muslims. How will the court decide the manner of life of a deceased who is a devoted Muslim (e.g bearing Muslim name, prays five times daily, give beautiful Muslim names to his children and always love to call them with those names) and a traditional chief [68]. Will the court consider the Islamic factors to have outnumbered or outweighed the traditional factor? Or is any weight to be attached to any particular incidence or factor? As Olaniyan has observed, we may never have such incidence of 'naturalisation' as seen in *Olowu v Olowu* again where there will be an overwhelming indication of an intention to change from one personal law to another [69].

The manner of life test with respect need to be supported by concrete guidelines or objective criteria that could be resorted to by the courts otherwise, it may be subject to judicial abuse. A person's personal law should not be shrouded in secrecy more especially that the deceased will not be available to testify. A person's personal law should be known to him and those who have genuine interest in his estate.

It is on this basis that domicile as a connecting factor is not a better alternative and in fact not desirable. Nigerians are free to live in any part of the country for as long as they may wish. Ethnic and religious settlement of non-indigenes exist in every part of the country. The fact that a Yoruba Christian has lived in the north for over eighty years may not necessarily mean that Islamic law should be his personal law because he has chose to live in the north. He may always dress like a *Fulani* man and his children may speak only *fulfude,* but that does not mean they reasonably expect that their personal affairs would be govern by the law of that place.

Domicile cannot be used to solve the question of choice of personal law as

the Supreme Court and other learned authors [70] have suggested in a heterogeneous and pluralistic society like Nigeria. At best, it can only direct us to the area where we can find a person's personal law. If a person is domicile in Lagos, has his domiciliary in Lagos answered the question of what is personal is? Definitely no. There are varieties of laws which the person may be subjected to in Lagos *vis-a-vis* Islamic Law, English Law, customary law etc.

5.0 Conclusions and Recommendations

5.1 Conclusions

Islamic Personal Law applies to the adherents of the Islamic faith. As a personal law, it attaches to its subjects wherever they choose to live on the surface of the earth. It remains the personal law of Muslims so long they remain a Muslim and a person who converts from Islam has no doubt changed his personal law and will cease to be subject to Islamic Personal law.

The northern Nigerian Muslims as a result of long courtship with Islam has assimilated Islamic law and now, there is hardly any difference between Islamic law and the customary law of the northern Nigeria Muslims. Therefore, Islamic law is generally regarded without controversy as the personal law of the Muslims of the northern part of Nigeria. Hence, there is no much ado about conflict of personal law in that part of the country.

However, in the southern part of the country, the story is not the same. The southern Muslims are treated differently from their northern counter parts. The reason is not farfetched. The majority of the Muslims, while professing and adhering to the dictates of their religion, they are strongly attached to their customary laws as well. This has created a serious case of conflict of personal law in the southern part of the country.

The attitudes of the courts in respect of the application of Islamic Personal Law in the south has been borne out of ignorance of the appreciation of the nature of personal law and choice of personal law in conflict situations. The courts have continued to treat Islamic law as a territorial rather than a personal system of law. They usually reason that it applies to those who are in the north and not southern Muslims.

On the other hand, one discovers as well that there appears to be some prejudice against Islamic law by some judges in respect to the application of Islamic law in the south as a result of the 'secular' nature of the society.

Some prefer in anyway, to apply the customary law over Islamic law even when all the significant connecting factors points to Islamic Law.

It is noted that the concept of domicile used by Nigerian courts to determine applicable personal law to Nigerians is not desirable for heterogeneous society like Nigeria. It does not answer the question of conflict of personal laws which primarily affects Nigerians. Likewise, the manner of life test is not a better alternative as it may not be helpful where a person conducts his life in both traditional and religious way.

In other jurisdictions, it is not in dispute that where parties undergo an Islamic form of marriage at least, it goes without saying that the parties have adopted Islamic law as their personal law. The courts are usually prepared to apply Islamic law to such persons save that it does not run contrary to the public policy of that State especially if the parties are not domiciled in that State [71] .

It is opined that personal laws in a diverse society like ours should be determined in line with peoples' belief system. Nigeria is a multi-religious society. Virtually all Nigerians are either Christian, Muslim or traditionalist. Our laws too are shaped along religious line. Islamic Law is developed from Islam. The English law is Christian law [72] and no wonder anyone who conducts Christian marriage is automatically deemed to have adopted English Law as his personal law. The customary laws too are product of tradition. Therefore, priority should be given to which of the systems the deceased or parties had affirmed. This could be identifiable and easily determined by everyone.

5.2 Recommendations

Following from the conclusions highlighted above, the following recommendations are suggested:

- a. There is need for a legislative intervention to regulate the application of personal systems of law in Nigeria. The current judicial attitude does not take cognisance of the socio-religious background of Nigeria. A legislative framework may be put in place to address this as it is currently being enjoyed by the Christian/court marriages. Similar provisions could be made for other to benefit from this ascertainable mode of determination of personal law. A person who contracts marriage under Islamic law and was buried under same law should be subjected to that law [73] . A regime of customary marriage could be created for whoever does not want to be subject to Islamic or English

law. This is the practice that has been adopted in other jurisdictions that have similar peculiarity of legal pluralism with Nigeria 74 . By this, there will no longer be any serious dispute as to what the personal law of a person is.

- b. Pending while a legislative framework is put in place, the court need to approach Islamic personal law from the proper perspective as a personal and not a territorial law. The court should attach more weight to the belief system of the party especially if deceased.
- c. Muslims in the southern part of the country in particular may need to expressly provide in their will that they are subject to Islamic law.
- d. The various States should fortify and give necessary support and recognition to the various Independent Shariah Panel in the southern part of the country where parties voluntarily submit their case to it. The decisions awarded by the panels or other Islamic Tribunals should be recognised as a valid arbitral award which could be enforced at the High Court of each state.
- e. Shariah courts should be established in each State of the federation or at least an Islamic law division in the High Court of each state which will adjudicate on questions of Islamic Personal Law. Muslims learned in Islamic Law should be appointed to handle cases of Islamic Personal Law so as to avoid a misinterpretation of the law which could lead to crisis as once witnessed in the post Shah Bano 75 saga in India.

Notes

[1] Muslims name for God.

[2] J.A Redding, 'Slicing the American Pie: Federalism and Personal Law', *Yale Law School Faculty Scholarship Series*, Paper 10, 2007.

[3] One may note here that the term 'personal law' is used here in its restrictive sense i.e the law of personal status. In the general sense, if one would go by the ordinary meaning of 'personal law' as being a law that binds people differently on the basis of some specified criteria like religion, race or ethnicity, then so many other laws that bind people differently may be taken for personal law while they are not. For instance, criminal responsibility is apportioned to different set of people differently. In this regard, what constitute a criminal offence for an adult may not be an offence if committed by a lunatic or a child. So also, a Tax statute which applies to all citizens but specifies different tax rates for different class of persons

[4] G.C Cheshire, *Private International Law*, 4th ed., (London: University of Oxford Press,1952) p.150. According to Rabel, it is the It is thelaw of that territory or tribe or race with which a person is permanently connected and which determines *his* status or family relations, see E. Rabel, *The Conflict of Laws: A Comparative Study,* 2nd ed., vol.1, (Ann Arbor: The University of Michigan Press, 1950). p. 109; Arthur Nassbaum defined it as, 'the system determining the status and other lasting relations of a person', see A. Nassabaum, *Principles of Private International Law,* (London: Oxford University Press, I943), p. 140; see also a similar view expressed by professor Agbede. See, I.O Agbede, *Legal Pluralism*, (Ibadan: Shaneson Limited, 1991), pp. 254-255

[5] J.A Redding, supra, p.7

[6] I.O Agbede, supra, p. 256

[7]Ibid.,

[8] The Criminal Code Acts/Laws and The Penal Code

[9] For a historical account of Personal legal systems see, E.Vitta, 'The Conflict of Personal Laws', *Israel Law Review*, Vol. 5, No.2, 1970, pp.170-202; R.N Nwabueze, *The History and Sources of Conflict of Laws in Nigeria, With Comparisons to Canada,* LL.M thesis, Faculty of Graduate Studies, Faculty of Law, University of Manitoba, Winnipeg, Manitoba, 2000.

[10] Ibid. However, Agbede has identified another reason for the emergence of personal law system after the Roman Empire dissolution. According to him, after the Peace Treaty of Constance in 1183, the Italian wealthy mercantile cities asserted their separation from the central authority of the Holy Roman Empire. Since then, they began to establish their own system of law. They escaped from the concept of territoriality of laws which had characterised the Roman law. They divided rule of law into *statuta realia, stauta mixta* and *statuta personalia*. While *Statuta Realia* applied exclusively within the territory of the sovereign, *Statuta Personalia* follows a person from one jurisdiction to another, hence, having extra-territorial effect. See I.O Agbede, supra, pp. 254- 255

[11] Ibid. pp. 172-177

[12] R.N Nwabueze, supra, p. 153

[13] Ibid.

[14] See for instance, J. N. D. Anderson, 'Conflict of Laws in Northern Nigeria: A New Start', *The International and Comparative Law Quarterly*, Vol. 8, No. 3 (Jul. 1959), pp. 442-456; B. Yusuf, 'Legal Pluralism in Northern Nigeria, Ph.d Thesis, Bufallo University, 1974.

[15] E. Vitta, supra, p.337.

[16] *Ibid*.; R.N Nwabueze, supra also identified domicile, nationality and ethnic or religious ground. Agbede, though restricting himself to Nigeria, has identified domicile as connecting factors for application of personal law. see I.O Agbede, supra, 256-263; Morris has identified Residence, Habitual residence, Domicile and Nationality as principal personal connecting factors. See Morris, The Conflict of Laws, 7th ed.,(London: Sweet & Maxwell (Legal) Limited, 2009).

[17] E. Vitta, supra, p. 337. Although, the attitude of Nigerian courts seem to be different from this position in respect of domicile as our courts still make reference to domicile as a choice of personal law in matters affecting Nigerians. This will be discussed fully in the next chapter.

[18] Although, the 1999 constitution (as amended) is insinuated to have proclaimed that Nigeria is a secular state. This proclamation negates the reality on ground. Despite the constitutional provision, the government recognizes the major religions in the country, declares public holiday to mark their festive periods, governmental meetings and occasions are commenced and closed with prayers, there mosques and churches established and managed by the government at all levels and we can continue to mention other factors. For a discussion of the secular/multi religious debate see: I. O. Agbede, "Legal pluralism: The symbiosis of Customary and Religious Laws: Problems And Prospects" in *Fundamentals of Nigerian Law*, M. A Ajomo ed., (Ibadan: Spectrum Books, 1989); A. Adegbite, "Shariah in the Context of Nigeria" in *the Shariah Issue*: Working papers for a dialogue (Lagos: Committee of Concerned Citizens, 2000); B. O. Nwabueze, 'Constitutional Problems of Sharia' in the *Sharia Issue*, supra; A.H. Yadudu, 'The Shaira Debate in Nigeria: Time for reflections' paper delivered at the National Seminar on the Place of Women Under the Sharia organized by Constitutional Rights Project 1st-3rd March, 2000, Abuja, published in Sharia issue, supra; N. Tobi, "Law, Religion and Justice" in *Fundamental Legal Issues in Nigeria, Essays in Honour of Andrew Obaseki, JSC* (RTD), W. Owaboye ed., (1995); A.I Abikan, 'Constitutional Impediments To The Enthronement Of Shari'Ah In Nigeria', *University of Ilorin Law Journal*(2006) UILJ 1:2

[19]National Bureau of Statistics, Federal Republic of Nigeria, 2006 Population Census (2006), *available at* http://www.nigerianstat.gov.ng /nbsapps/Connections/Pop2006.pdf;The World Fact Book, Nigeria, People, Religions (last updated Jan. 10, 2006). U.S. Intelligence Agency, http://www.cia.gov/cialpublications/factbook/geos/ni.html#top (accessed 15- 07- 12)

[20] See R.N Nwabueze, supra, p. 162,

[21] S.L Guterman, 'The Principle of the Personality of Law in the Early Middle Ages: A Chapter in the

Evolution of Western Legal Institutions and Ideas', 2 University of Miami Law Review, (1966), p. 296

[22] See the decision of the courts in Olowu v. Olowu (1985) 3 N.W.L.R. (Pt. 13)372; Yinusa v Adesubokun(1971) N.N.L.R. 77.

[23] Nwabuaeze 154

[24] Whicker v Hume (1858) 7 H.L.C 124 at 160

[25] (1904) A.C 287 at 299.

[26] *Udny v Udny* (1869) L.R 1 Sc. & Div. 441

[27] See s.42(4)1999 Constitution of the Federal Republic of Nigeria. See also P.O Itua, 'Legitimacy, legitimation and succession in Nigeria: An appraisal of Section 42(2) of the constitution of the Federal Republic of Nigeria 1999 as amended on the rights of inheritance'*Journal of Law and Conflict Resolution,* Vol. 4(3), pp. 31-44, March 2012

[28] It is often said that domicile of choice is almost impossible as virtually all the cases reported on it were not successful except for very few of them. Morris confirmed that of all the 13 cases decided by the House of Lord on change of domicile, it was in only 2 that the House of Lord affirmed that a domicile of origin had been lost. For a list of those cases, see Morris, The Conflict of Laws, (supra), p. 35.

[29] See for instance *Winans v Attorney General* (supra), *Ramsay v Liverpool Royal Infirmary* (1930) A.C 588. For a critique of the revival of domicile of origin as it applies to Nigeria, see E.Ojukwu, Domicile as a determinant of Personal Law, A Case for the Abandonment of the revival Doctrine in Nigeria' available at www.nigerianlawguru.com/artiles (accessed last 12-07-12)

[30] Morris, The Conflict of Laws, supra, p. 50;

[31] or in some cases nationalisation or naturalisation. In all of these the State grants nationality and there is usually no ambiguity in deciding whether a persona is a national of the state since it is not a self-acquired status.

[32] E. Vitta, *The Conflict of Personal Law*, supra, pp. 340-343

[33] See for instance s.26(2) of the customary Court law of Lagos State, 2011

[34] *Usman v Kareem* (1995) 2 NWLR (Pt.379) 537 at 541

[35]*Maiwarwaro v Garba* [2001] 7 NWLR (pt. 711) 40 per Muntaka-Coomassie, J.C.A. However, what his lordship is trying to say is that the parties must be Muslims. One should not be misled with the manner of expression used by his Lordship as he could not be intended that what his Lordship meant was that the parties must be 'practising' Muslims.

[36]*Fadaya v. Isa*, unreported appeal no. CA/J/81s/90 cited and relied upon in *Agbebu V Bawa* [1992] 6 NWLR (PT. 245) 80

[37] [2001] 7 NWLR (PT. 713) 669. Similarly, in *Baba v. Baba*[1991] 9 NWLR (Pt. 214) 248, the Court has no difficulty in applying Islamic Personal Law to the estate of a deceased Muslim. See also *Hamza V Lawan & Anor*[2006] 10 NWLR (PT. 988) 238; *Muhammadu v Mohammed* [2001] 6 NWLR [PT. 708] 104; *Soda v Kuringa* [1992] 8 NWLR (Pt. 261) 632; *Sidi V Shaaban [1992] 4 N.W.L.R. (pt.) 131*

[38] [1991] 1 NWLR (Pt. 167) 356

[39] See also *Jimoh* v *Adunni* [2001] 14 NWLR [PT. 734] 519

[40] (1968) NNLR 97

[41] His lordship further reason that the testator though is free to make a will under the Wills Act, such a will must not deprive any person of the benefit of any such native law or custom(i.e Islamic law) by virtue of s.34 of the High Court Law of the State.

[42] Adesubokan v Yunusa [1971] ANLR 227 per Ademola CJN. With due respect, the position of the Supreme Court is wrong. The Court has not approached the issue from the right premise, i.e what is the personal law of the deceased. If the Court has ventured to inquire about this, perhaps the

decision might have been different. However, this may not even been so because of the interpretation given by the court to the incompatibility test. The court would still have held that even if Islamic law is the personal law of the deceased, since he has opted to make a Will, he would be deemed to have opted out of Islamic law. This approach is different from the one used by the Supreme Court in cases where testators have made wills in a manner inconsistent with customary law. See See *Ogiamen v Ogiamen*(1967) NMLR 245, *Arase v Arase*(1981) 5 SC 33, and *Idehen v Idehen*(1991) 7 SCNJ 196. The court has held that a testator cannot validly dispose a property that is subject to customary law in a manner contrary to customary law.One may ask if this is not a double standard. The position that Islamic law is not enforced in southern States too is misplaced with due respect. The following decisions prove this point.

[43] See; A. A. Oba, "Islamic Law as Customary Law: The Changing Perspective in Nigeria" 51 (2002) *International and Comparative Law Quarterly* 817 829; A.I Abikan , ' The Application of Islamic Law in Civil Causes in Nigerian Courts' , *Journal of International and Comparative Law* (June 2002) 6 JICL Pp 88-115; Ajia, 'Legal Pluralism and the Mishandling of Muslim Wills: Further Considerations of Adesubokan v Yinusa and the Internal Conflict Rules' *Nigeria Current Law Review*, (1986) 127

[44]Section 4 (1) (b) of the Kwara State Wills Law, Cap. 168 Laws of Kwara State 1991

[45](2007) ALL FWLR (Pt. 359) 1321

[46] The Aworis are a tribe of the Yoruba people speaking a distinct dialect of the Yoruba language. They constitute majority of the settlers of Lagos State. They can be found in Ogun State as well. See. A Ajayi et al, A History of the Awori of Lagos State (Lagos, AOCOED, 1998)

[47][1915] 1 NLR 41

[48] @ 42-43

[49] H.A Olaniyan, 'Personal Law of Succession in South Western Nigeria: The Dilemma of Muslims', *University of Ilorin Law journal*, vol. 2, p.5

[50] Suit no. IG/19/CC/2012

[51] This would be khul' under Islamic law. Therefore, the woman must refund the dowry paid by the husband before the wife could get separation order.

[52] This is just a scenario that a party protested the application of customary law. The Customary courts decide over 95% of the matrimonial proceedings in Lagos and the parties are in virtually all the cases Muslims. They contracted their marriages under Islamic Law (even if in some cases, it is a mixture of customary and Islamic law marriages) and the customary courts have always applied customary law to dissolve the marriages. This is why some Muslims have continued to submit their matrimonial issues to the Independent Shariah Panel than the Customary Courts (see A. Kola Makinde & P. Ostien , The Independent Sharia Panel of Lagos State, Emory International Law Review, Vol. 25, 2011.). It is this mischief that the legislators intend to cure which necessitated the passage of the Customary Law, 2011. However, the Lagos State Judicial Service Commission ought to designate some special courts to adjudicate on Islamic Law matters by virtue of s.22(3). This, the commission has failed to do. So, it can be argued whether the Customary Courts as presently constituted can adjudicate on Islamic Law with the commission having made no designation.

[53]NLR [XVIII] 5

[54]NLR [XVIII] p.6

[55] H.A Olaniyan, supra, p. 8

[56](1944) 8 WACA 39.

[57] Ibid., at 151

[58]NLR [XVIII] 88

[59] Ibid. p.92

[60] A.A. Oba, 'Can a person subject to Islamic law make a will in Nigeria?:*Ajibaiye v Ajibaiye* and Mr. Dadem's wild goose chase'*Review of Nigerian Law and Practice* Vol. 2(2) 2008, p. 135

[61] (1898) 1 NLR 15

[62]NLR [XVII] 55

[63] (1954) 14 W.A.C.A. 116

[64] (1955) 15 W.A.C.A. 20

[65]NLR [1938] 105.

[66]The court further rejected the view that *Cole v Cole* laid down any

general rule that once a person conducts Christian marriage, he has chosen English law as his personal law.

[67]supra

[68] For a list of possible conflict situations, see: K.A Olatoye, 'Inheritance in a Muslim Family: The Nigerian Experience', in *A Digest in Islamic Law and Jurisprudence in Nigeria: Essays in Honour of Hon.Justice Umar Farouk Abdullahi*, Z.I Oseni ed., (Auchi, Darun- Nur NAMLAS, 2003), p.65

[69] H.A Olaniyan, A critical Appraisal of the Application and Enforcement of Personal Systems of Law in Nigeria, in A blue Print For Nigerian law, A. Obilade ed., (Lagos, UNILAG, 1995), p.97

[70] I.O Agbede, Legal Pluralism, supra, pp. 253-257.

[71] For south Africa see; *Amod v Multilateral Motor Vehicle Accidents Fund* 1999(4) SA1319*; Daniels v Campbell N.O. and Others(2004) ZACC 14; Hassam v Jacobs NO and Others[2009] ZACC 19.* For the Unkited kingdom, see*Alhaji Mohammed v Knott*[1969] 1 QB 1, Quazi *v. Quazi*[1979] 3 All E.R. 897. For United States see, *Farah v. Farah*429 S.E.2d 626 (Va. Ct. App. 1993); *Chaudry v. Chaudry*388 A. 2d 1000 (N.J. Super. Ct. App. Div. 1978).For India see, *Shema Beg v Khwaja Mohiuddin Ahmed* ILR 1972 Delhi 73; *A.S Parveen Akhtar v The Union of India* ILR 2002*; Akhtar Begum v Jamshed Munir* AIR 1979 Delhi 67*; Moulvi Mohammed & ors v Mohaboob Begum* AIR 1984 Mad 7*; Mukkattumbrath Ayisumma v Vayyaprath Pazhae Bangalayil* AIR a953 Mad 425

[72] In *Bowman v Secular Society Ltd*., (1917) AC 406 @ p. 425 & 464, Lord Summer said: 'It has been repeatedly laid down by the courts that Christianity is part of the law of the land, and it is the fact that our civil polity is to a large extent based upon the Christian religion ….Ours is, and always has been a Christian State. The English family is built on Christian ideals, and if the national law is not Christian there is none. English law may well be called a Christian law, but we apply many of its rule and most principles, with equal justice and equally good government, in heathen communities and its sanctions, even in courts of conscience are material and not spiritual…'

[73] This is similar to the approach used by the courts in Cameroun. Joseph Ebi, while commenting on when Islamic law could be the personal law of a person has observed thus: 'Without any doubt Muslim law constitutes the personal law of an individual where it is the fundamental or even the dominant law. If it is the fundamental law, it is the personal law of

everyone within its jurisdiction. If it is the dominant law it would pass as under the denomination of "native laws and customs prevailing in the area of the jurisdiction" of a customary court and is the personal law of the natives of that area. Neither of the above exists in Cameroon and so Muslim law could only become the personal law of persons who profess the faith and conduct themselves in a manner to show that they intend such a consequence. Professing the faith merely gives rise to a rebuttable presumption that a person has adopted Muslim law as his personal law'. See, J.N Ebi, 'The Structure of Succession Law in Cameroon: Finding a Balance Between the Needs and Interests of Different Family Members', Ph.D Thesis, University of Birmingham, 2008, p. 257

[74] For instance in India, there is Parsee Marriage and Divorce Act, 1936 (as amended) which applies to Parsees, Dissolution of Muslim Marriages Act, 1929, Special Marriage Act of 1954(person professing any faith,) , Hindu Marriage Act(1955) , Christian Marriage Act, 1872 and a host of other Acts for other major ethnic groups in the country. A marriage under any of these laws signifies the acceptance of that law as the personal law of the person in question. In addition, there is the Muslim Personal Law (Sharia) Application Act, which applies Muslim Personal Law to any legal matters involving personal law for Muslims. For Ghana, before the Unification Law, see, G. R. Woodman, 'Ghana Reforms the Law of Intestate Succession', Journal of African Law, Vol. 29, No. 2 (Autumn, 1985), pp. 118-128. He has identified Marriage Ordinance, 1884 (English Law as personal law), Marriage of Mohammedans Ordinance (Islamic law as personal law), and Customary Marriage and Divorce (Registration) Law, 1985 (Customary law as personal law). Article 34 of Ethiopia's constitution allows for 'adjudication of disputes relating to personal and family laws in accordance with religious or customary laws'. See also, M. Abdo, ' Legal Pluralism, Sharia Courts, and Constitutional Issues in Ethiopia', *Mizan Law Review* Vol. 5 No.1, Spring 2011

[75]Mohd. Ahmed Khan v. Shah Bano Begum and others, AIR 1985 S.C. 945

(479) 575-2000
uofa@uark.edu
make
a **gift**
socialmedia.uark.edu

- Emergency Information
- Fraud Prevention
- Contact Us

In the news

- Feed could not be located.

Calendar of events

- Law Final Exams (4/27/2015 - 5/8/2015)
- Quickbooks Introduction (5/7/2015)
- OLLI: Tree Identification of Arkansas (5/7/2015)
- OLLI: The Art of Food Carving - Bring Your Fruits and Vegetables Alive! (5/7/2015)