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THE BEARING OF DOMICILE ON MARRIAGE AND MATRIMONIAL CAUSES: A COMPARATIVE PERSPECTIVE.*

Introduction

At the micro level, most matters of family relations and family property such as the essential validity of marriage, effect of marriage on proprietary rights of husband and wife, mutual rights and obligations of parents and children, legitimacy and legitimation, adoption, jurisdiction to grant divorce of marriage,[1] the essential validity of wills of movables and intestate succession to movables are governed by the personal law of an individual. Such personal law is basically predicated on the notion of territorial application of law. At the macro level, such family matters of family relations and family property are often dependent upon various rules of conflict of laws of two or more countries with which a person has the necessary connection. In England as well as in all other common law jurisdictions, the basis of application of such personal law is domicile.[2] In essence, a person will have as his personal law the territorial law of the country of his domicile relating to personal status. Domicile therefore generally indicates a person's civil status and it provides the law by which his personal rights and obligations are determined.

In Nigeria, the adoption of domicile as the connecting factor for the determination of personal law is said to be borne out of practical necessity as "Nigerian nationality" covers a

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1 In most common law jurisdictions, to a limited extent, residence is also now a basis for the assumption of jurisdiction by the courts in matrimonial causes. See *infra.*

2 The law of nationality as an alternative to the law of domicile was first adopted in the French Civil Code (Code Napoleon) in 1804 as the basis of ascertainment of personal law after which some of the Continental European countries such as Italy, Germany, Greece, Portugal, Syria and Venezuela also adopted nationality in preference to domicile.

number of independent legal systems.[3] Religious and customary laws fully co-exist with the general law in matters of personal status. Therefore, although the territorial law of Nigeria generally governs every individual domiciled within the country, different legal rules apply to different classes of the population according to their custom or religion. For instance, matters bothering on marriage are governed by the dual marriage laws in Nigeria – the statutory marriage laws which comprise the common law and the statutes - and the customary marriage laws which, though largely unwritten, comprise the well-entrenched customary systems and values of the people. The validity of any marriage contracted by any person domiciled in Nigeria is therefore to be determined by the type of marriage contracted and the applicable law thereto. Thus, all natives of Nigeria who have not contracted the statutory marriage, which is sometimes designated as Christian marriage, are governed with respect to most matters of their personal relations in respect of their marriage, by the relevant customary law or Islamic law.

It is intended in this paper to make a comparative analysis of the impact of domicile on marriage and matrimonial causes laws in Nigeria and the United Kingdom with particular reference to England with a view to ascertaining the incontrovertible gaps in the current Nigerian law as a springboard for suggesting viable reforms thereto.

Meaning and Types of Domicile

It was once declared by Sir George Jessel in *Doucet v Gechagan*[4] that the term "domicile is impossible of definition". However, in *Bell v Kennedy*,[5] it is said that "domicile . . . is an idea of law. It is the relation which the law creates between an individual and a particular locality or country". Prof. Graveson has also defined domicile to mean "a conception of law employed for the purpose of establishing a connection for certain legal purposes between an individual and the legal system of the

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3 See Agbede, I.O., *Themes on Conflict of Laws,* Shaneson, Lagos, 1989, p. 48.
4 (1878) L.R. 9 Ch.D. 444 at p. 456
5 (1868) LR.1 SC & Div. 307 (H.L.) 216 at 221.

territory with which he either has the closest connection in fact or is considered by law so to have because of his dependence on some other person"[6] In essence, domicile is generally connected to a given territory over which a single system of law operates. It is the chain of connection between a person and a particular legal system which is relevant for the determination of his personal rights. However, in a federation such as in Nigeria where legislative authority is distributed between the federal and state governments on matters which depend on the application of domicile,[7] a propositus can only be domiciled in the particular state he has chosen to establish his home and in which he has the intention of residing permanently.

Domicile is generally classified into three categories: domicile of origin, domicile of dependence, and domicile of choice.[8] The first two are acquired by operation of law while the third, as the name implies, is acquired by choice.

Domicile of origin is that which the law assigns to every person at birth or adoption in order to give effect to the principle that no person shall be without a domicile. Thus, a legitimate child takes the domicile of the father;[9] an illegitimate or posthumous child takes the domicile of the mother;[10] a foundling

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6 See Graveson, R.H., *The Conflict of Laws* (7th ed), Sweet and Maxwell, London, 1974, p. 187.

7 The formation, annulment and dissolution of marriages other than marriages under Islamic law and Customary law including matrimonial causes relating thereto are on the Exclusive Legislative List of the Constitution of the Federal Republic of Nigeria on which only the Federal Government is competent to legislate upon. Thus, while State Legislatures can legislate on matters relating to Customary and Islamic marriages, only the Federal Legislature is vested with the power to legislate on matters relating to statutory marriages. See Item 61 of the Second Schedule to the 1999 Constitution

8 See Cheshire and North, *Private International Law* (10th ed.) , Butterworths, London, 1979, p.178

9 See *Somerville* v *Somerville* (1801) 5 res 750 at 787; *Forbes* v *Forbes* (1854) Kay 341 at 353.

10 *Udny* v *Udny* (1869) L.R. 1 SC & Div. 441 at p. 457; *Enwonwu* v *Spira* (1963) 2 ANLR 233.

takes the domicile of the place where he is found[11] and an adopted child takes the domicile of whoever is adopting it, probably retrospectively.

Domicile of dependence is that which attaches to a class of people, who are in law, deemed to lack the capacity to acquire a domicile of their own either because of non-age, their physical dependence on others or lack of mental capacity.[12] In this category are the infants, married women and persons of unsound mind. An infant's domicile is dependent on that of the father and a change of the father's domicile correspondingly changes that of the infant. Thus, a child who has not reached the age of majority is utterly incapable of acquiring by his own volition an independent domicile of choice.[13] In case of married women, the common law rule is that by marriage, the husband and the wife are one person in law and that the very being or legal existence of the wife is superceded during the marriage or at least incorporated and consolidated into that of the husband.[14] Thus, the domicile of the husband was communicated to his wife immediately on marriage and it was necessarily and inevitably retained by her for the duration of the marriage. Indeed, a divorced woman retains her former husband's domicile until she either reverts to her domicile of origin or acquires a domicile of choice[15] while a widow retains her husband's domicile until she changes it. This rule was indeed castigated as the "last barbarous rule of a wife's servitude."[16] It is gratifying to note that this common law rule has been abrogated in England by the

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11 See Cheshire, G.C., *Private International Law* (7th ed), Butterworths, London, 1965, p. 165

12 Cf. the view of Uwaifo, J.C.A. in *Bhojwani* v *Bhojwani* (1995) 7 NWLR (Pt. 407) 349, C.A. at p. 364. that there is no separate domicile known as domicile of dependence. With due respect however, one can reasonably infer that the domicile of origin is severed from the domicile of dependence because of the revival nature of the domicile of origin and the difficulty involved in proving its abandonment.

13 See Cheshire (note 11 above) p. 165

14 See Blackstone Commentaries, p. 442

15 *In the Goods of Raffenel* (1863) 3 SW & Tr. 49.

16 See Lord Denning, MR in *Gray* v *Formosa* (1963) P. 259 at 267

provisions of sections 1 and 3 of the Domicile and Matrimonial Proceedings Act, 1973 which have empowered any person of either sex aged 16 or married to acquire an independent domicile.[17] It is however disheartening to note that this rule is still being adhered to rigorously under the received English rule of domicile in Nigeria.

Domicile of choice is that which every person of full age and capacity is free to acquire in substitution for that which he is assigned at birth. Generally, an existing domicile may be terminated by ceasing to reside in a place coupled with the intention of never to return. Domicile of choice is thus acquired by *factum* of residence in a particular place coupled with *animus manendi*, that is, with the intention of remaining there permanently or indefinitely.[18] In *In the Estate of Fuld (No 3)*,[19] it was stated that:

> A domicile of choice is acquired only if it be affirmatively shown that the propositus is resident within a territory subject to a distinctive legal system with the intention formed independently of external pressures, of residing there indefinitely.

Therefore, to acquire a domicile of choice in Nigeria for example, it has been held in *Fonseca v Passman*,[20] that the mere *factum* of residence therein is not sufficient, it must be accompanied by an unequivocal evidence of *animus manendi* or intention to remain permanently or indefinitely. The underlying idea is that a man will be expected to follow the custom of the people with whom he has permanent ties at least in matters which have enduring and socially important repercussions even when he is living

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17 The conception of matrimonial domicile finds no application in a number of countries such as Norway, Denmark and Russia.

18 See Cheshire (note 11 above) p. 151. See also *Omotunde* v *Omotunde* (2001) 9 NWLR (Pt 718) 252; *Koku* v *Koku* (1999) 8 NWLR (Pt. 676) 672.

19 (1968) P. 675 at p. 684; See also *Henderson* v *Henderson* (1967) P. 77 at p. 79.

20 (1958) WRNLR 41 at 42; *Udom* v *Udom* (1962) L.L.R. 112; *Moorhouse* v *Lord* (1963) 10 H.L. Cas. 272.

elsewhere no matter for how long if he is going to return to live with such people.[21] On acquisition of such domicile of choice however, the domicile of origin remains in abeyance and only revives and comes again into operation when the domicile of choice acquired in the meantime is abandoned. Thus, in *Ugo v Ugo,*[22] wherein the respondent sought a decree for the dissolution of his marriage to the appellant at the High Court of the Federal Capital Territory, Abuja, the appellant by way of preliminary objection challenged the jurisdiction of the court on points of law which included citizenship and domicile. The appellant alleged *inter alia* that both parties had after 1999 renounced their Nigerian citizenship and had acquired the citizenship of the United States of America; had got married under the American law in America and that she (the wife) was still resident and domiciled in the USA with the three children of the marriage. After hearing the arguments by the parties, the trial court in its Ruling dismissed the objection. On appeal to the Court of Appeal by the appellant, the Court unanimously allowed her appeal and held *inter alia* that a domicile of choice is a domicile established by physical presence within a state or territory coupled with the intention to make it a home and that if parties have acquired American citizenship and have not abandoned same, their domicile of choice remains valid and subsisting and endures until their Nigerian citizenship, which is held in abeyance and being their domicile of origin is revived.

It is noteworthy however that Domicile of origin cannot be terminated without overwhelming evidence to that effect. Also, there is a strong presumption that the domicile of origin continues until rebutted and the onus of proving that a domicile of choice has been chosen in substitution for the domicile of origin lies upon the party who asserts that fact. Such proof must be shown by cogent and overwhelming evidence, with perfect

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21 See Agbede, I.O., "Personal Law and Personal System of Law: Synthesis or Symbiosis" in J.A. Omotola and A.A. Adeogun (Eds.) *Law and Development,* Lagos University Press, University of Lagos, Lagos, 1987, p. 125 at 130.

22 (2008) 5 NWLR (Pt. 1079) 1C.A.

clearness and upon available facts as ". . . its character is more enduring, its hold stronger and less easily shaken off."[23]

Domicile in Marriage Laws.

Conventional marriage[24] may be defined as a social institution whereby two people of opposite gender come together to form a union for companionship and/or for procreation. It is a contract *sui generis* that automatically confers spousal status on the contracting parties and all the legal incidents of marriage with its attendant rights and obligations. Generally, social prescriptions typifying cultural values represent the directive principles which have greatly influenced development of human law in every community all over the world and have served as one of the functional pillars in juristic thinking and social engineering.[25] However, such social prescriptions have been formulated in every community bearing in mind that they are neither immutable nor perfect either at their origin or at other times. This has always been the implicit understanding that such social prescriptions will develop with the developing values in each community from time to time. As such, each legal system generally prescribes and upholds within its territory such maters that are classified as the essentials of marriage, as distinct from

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23 See Lord MacNaughten in *Winans* v *A.G.* (1904) A.C. 287 at 290.

24 There are also variants of uncanny aberration in the marriage institution manifesting as marriages between same gender, for men as homosexuals and for women as lesbians and proliferating at several social centres including very recently, in the Christian churches. See e.g. the Civil Marriage Act, 2005 (Canada); the Civil Union Act, 2006 (South Africa). In *Halpern* v *Canada* ((2002) O.J. No. 2714 (Div. ct.) the court held that the common law definition of marriage discriminated against homosexuals and was unconstitutional and in violation of the equality provisions of the Canadian Charter of Rights and Freedoms. See also *M* v *H* (1999) 2 S.C.R. 3, V*riend* v *Alberta* (1998) 1 S.C.R. 493. In some States in the United States of America, including Massachusetts, Connecticut, Vermont and Alberta, legal recognition has been given to same-sex relationships. In Nigeria however, under sections 214 and 217 of the Criminal Code Act, homosexuality is illegal and criminal.

25 See Vihelm, A.,*Sociology of* Law Penguin Books Ltd, London, 1975, *passim*..

such matters of mere formalities that would necessarily confer the status of husband and wife on the parties. The *lex domicilii* basically governs the creation, duration, nature and determination of a marriage contract and of any domestic status imposed thereby. However, the validity of such a marriage contract is not determined solely on conformity with the *lex domicilii* but is also determined by simultaneous conformity with the *lex loci celebrationis,* that is, the law of the place of celebration in respect of the formalities of such marriage. Therefore, whether any particular ceremony constitutes marriage depends solely upon the law of the country where the ceremony takes place irrespective of whether such ceremony would not have constituted marriage in the country of the domicile of one or other of the parties concerned.

Thus, in England, the conferment of the status of husband and wife on parties to a marriage contract depends on two conditions: that the marriage conforms in its essentials with the law of each party's domicile at the time of marriage and that normally, it has been performed in accordance with all necessary formal requirements of the place where the ceremony of marriage takes place, that is, the law of the place of celebration.[26] The validity of a marriage contract may therefore be subject to a number of different legal systems as between the parties *inter se*, such as where the *lex domicilii* of the husband differs from that of the wife and reference to *lex domicilii* includes also reference to its relevant conflict of laws rules; or where the marriage is contracted outside the territorial application of the *lex domicilii*. It is however generally well settled that matters of capacity and statutory provisions prohibiting marriage on various grounds, such as for example, infancy or consanguinity, which are treated as essentials of marriage are governed by the *lex domicilii* while the formalities, such as length of notice to be given before celebration of marriage or number of witnesses required to be present at a marriage ceremony, are governed by the *lex loci celebrationis*.[27] In essence,

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26 *Ibid,* p. 250.

27 See *Brook* v *Brook* (1861) 9 H.L. Cases, 198 at p. 207

those matters which are considered as vital to the maintenance of an accepted standard in the matrimonial and family relations of any given society, whether on grounds of consanguinity or affinity, religion or otherwise, lack of age, lack of parental consent in so far as it is not treated as a mere formality, previous marriage and physical incapacity, in short all impediments to marriage, other than formal ones and lack of consent of parties, are generally regarded as essentials of marriage.[28] In *Kenward v Kenward*,[29] the court stated that:

> In English law, essentials comprise capacity to marry, statutory prohibitions rendering marriage between persons within certain degrees of consanguinity or affinity illegal and void and the nature of the marriage itself, which, so far as concerns the marriages of persons domiciled in England at the date of the marriage ceremony, must be of the Christian kind . . . The consent to marriage of the parties themselves (as distinct from that of third parties, such as parents) is a matter of essentials and governed by the personal law of each party.

Despite this seemingly settled rule of law, it is however impossible to state categorically and with some certainty how this rule will be applied in all cases because the social and policy reasons for the various impediments are not always the same, and this may possibly justify the application of different conflict rules especially as it relates to capacity of both parties to marry each other where domicile has its most potent application in marriage law. In England, although the classification of any requirement in marriage as an essential is generally done according to the law of each party's domicile to ascertain whether the essential requirements have been complied with, however, so far as concerns marriages celebrated in England, English ideas of public

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28 See Morris, J.H.L., *The Conflict of Laws,* (5th ed) Sweet and Maxwell Ltd, London, 2000, p. 192.

29 (1951) P. 124 at 140

policy prevail and the courts apply the process of classification generally according to the *lex fori* and that of England. Thus, whether a particular requirement is an essential or a formality is decided according to English law when the marriage takes place in England, wherever the parties are domiciled.[30]

In Nigeria, three types of marriage are given legal recognition, namely, statutory, customary and Islamic marriages. Statutory marriage as its name implies is a marriage celebrated in accordance with the statutory law – the Marriage Act[31] and the Matrimonial Causes Act[32] and its validity is determined by these statutory laws[33] as well as common law rules. Customary law marriage is a marriage entered into in accordance with the customs and traditions of the particular locality, which though largely unwritten, are well entrenched in the system that the requirements for its validity are not in doubt. Islamic marriage is a marriage that is celebrated in accordance with the requirements of Islamic law. The validity of any marriage contracted by any person domiciled in Nigeria therefore is to be determined by the type of marriage contracted and conformity with the applicable law thereto. Thus, all natives of Nigeria who have not contracted statutory marriages are governed, with respect to most matters of their personal relations, by their appropriate customary law or Islamic law as the case may be. For the purposes of this paper however, the Islamic law marriage is treated as an aspect of the customary law marriage because of their similar features except

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30 See Graveson, (note 6 above) p. 255. See also *Ogden* v *Ogden* (1908) P. 46; *Sottomayor* v *De Barros (No 2)* (1879) L.R. 5 P.D. 94.

31 Cap. M6, LFN 2004. This Act is a re-enactment of the Marriage Ordinance, 1914, No 18. This Act stipulates the formal and essential requirements for a valid statutory marriage.

32 Cap M7, LFN, 2004.

33 The law governing statutory marriage in Nigeria is the Marriage Act, Cap. M.6 LFN, 2004 which is a re-enactment of the Marriage Ordinance, No 18 of 1914 and the Matrimonial Causes Act, 1970, Cap M.7 LFN, 2004. However, principles of common law, equity and rules of conflict of laws are still applicable to Nigeria, where they are not inconsistent with any statutory law.

in cases where the Islamic requirements are in contradistinction to the general customary marriage law.

For marriages contracted under the Act, the essential validity comprises capacity or incapacity to marry occasioned by infancy or any prior marriage by a party, whether customary or statutory with some other person; statutory prohibitions rendering marriage between persons within certain degrees of consanguinity or affinity illegal and void and consent of the parties.[34] The essential requirements of a customary marriage which are common to most systems with minor variations are parental consent; consent of the intended spouses; minimum age; dowry; prohibited degree of relationship and capacity to marry under customary law.[35]

Therefore, the objective consciousness of the particular segment of the community whether Christian or Muslim (or people of alternative faith) would appear to be the crucial factor and barometer of the relevance and competitiveness of the particular standards embedded in the respective classification and definition of essential requirements within a given group of people. Both in quantity and in substance, the society through the instrumentality of law as well as the prevailing and acceptable norms have been unremitting in defining its focus and compass concerning the scope of the requirements that must be met in order to qualify for the status of marriage. Consequently, the ancient requirements of marriage are incomparably different from the modern requirement for a valid marriage. In sum, the social value content in the variety of the essential requirements of a valid marriage in every community has always been its overriding aspect from the perspective of the members of the particular community under consideration. It is therefore immaterial that the differences in social values and in the specific characteristics of respective essential requirements of a valid marriage in a given community within the same time frame may be widely different,

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34 See sections 11 and 18 of the Marriage Act, 1914; See also section 3 (a) (b) and (e) of the Matrimonial Causes Act (MCA), 1970.

35 See Kasumu, A.B., and Salacuse, J.W., *Family Law in Nigeria,* Butterworths, London, 1966, p. 73

one from another. Generally however, the classification of any requirement of marriage as an essential validity or a formality has been said to depend largely on the degree or intensity of the public or social interest which it embodies and expresses.[36] As such, failure to comply with the essential requirements or lack of capacity to marry on the part of either of the parties to the marriage contract will *ipso facto* render the marriage void.

The application of the *lex domicilii* to each of these essentials of marriage in England and Nigeria will be our next focus of attention.

Application of the Rule

A. Capacity

Capacity or incapacity is one of the legally defined incidents of a legally imposed status. It is the sum total of powers attached by law, and not by act of the party, to a status.[37] It is a restriction imposed upon a person that is not shared by the normal person. Thus, capacity or incapacity of a party to contract a valid marriage relates to the natural incapacity for example, of an infant under puberty, or of a person already monogamously married to contract a second concurrent marriage, or of a lunatic incapable of agreeing to marry. Lack of capacity to marry will *ipso facto* make the marriage void.

In England, although it is well settled that the *lex domicilii* is the applicable law to determine the capacity or otherwise of a party to a marriage contract, there are however two opposing theories on the choice of law rule. The first theory, which represents the orthodox and prevalent view, "the dual domicile theory", postulates that capacity to marry, is governed by the law of each party's ante-nuptial domicile. The second is the intended matrimonial home theory which postulates that capacity to marry should be determined by the place where both parties intended to establish their matrimonial home.

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36 Graveson, (note 6 above) p. 251.

37 *Ibid*, p. 231.

It is the belief of the proponents of the dual domicile theory that a marriage is invalid unless each party has capacity to enter into such a marriage by their respective *lex domicilii*. This view is based on the idea that the community to which each party belongs is interested in his or her status, and that in these days of sex equality, no preference should be shown to the laws for one community rather than to the laws of the other.[38] In *Re Paine*,[39] an English testatrix, who died in 1884 left a sum of money on trust for her daughter, W, for life and if she died leaving any child or children surviving, then on trust for her absolutely. W was a British subject domiciled in England. In 1875, she travelled to Germany and married H, her deceased sister's husband, a German subject. One daughter of the marriage survived W. The Court adopted the dual domicile doctrine and held that the marriage was void because of the incapacity attaching to W under her pre-marriage *lex domicilii* because at that time, a marriage between a woman and her deceased sister's husband was prohibited by English Law. In *Pugh v Pugh*,[40] incapacity was based on the age of one of the parties. A British officer, domiciled in England but stationed in Austria married a Hungarian girl in Austria. The domicile of origin of the girl was Hungary. She was only fifteen years of age and therefore, if her capacity had been governed by English domestic law, the marriage would undoubtedly have been rendered void by the Age of Marriage Act, 1929 which prohibits a marriage between persons either of whom is under the age of sixteen. By Austrian law, the marriage was valid while by Hungarian law, it had become valid in that it had not been avoided before she had attained the age of sixteen. The English Court however held *inter alia* that the marriage was void for want of capacity because the husband was a British subject with an English domicile and therefore bound by the 1929 Act.

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38 See Dicey and Morris, *Conflict of Laws* (11th ed.) Sweet and Maxwell Ltd. London, pp.622 *et seq.*

39 (1940) Ch. D. 46

40 *Supra.* See also, *Padolechia v Padolechia* (1968) P. 314.

Furthermore, where neither of the parties is domiciled in England and both lack capacity by their respective *lex domicilii* to contract a valid marriage, such marriage would be declared void even though they would have had capacity if they had been domiciled in England. But, where either of the parties is domiciled in England, the courts will not take into account any incapacity imposed by the *lex domicilii* of the other party which is not recognized by English law.[41] In *Sottomayor v De Barros (No 2)*,[42] first cousins, were minors under Portuguese law and were forbidden by that law on grounds of consanguinity to intermarry. This prohibition could be overcome only by papal dispensation. At the time of marriage, the wife had possessed a Portuguese domicile while the husband alone was domiciled in England. They married with requisite parental consents, but without such dispensation, in England, where first cousins might legally intermarry. The marriage was arranged by the parents of the parties primarily as a means of avoiding financial difficulties; the parties themselves were only young children and no cohabitation or consummation followed. The wife petitioned in England for a decree of nullity of marriage. The court supported the English as against the Portuguese and upheld the validity of the marriage.

On the other hand, under the "intended matrimonial home" doctrine, there is the basic presumption that capacity to marry is governed by the law of the husband's domicile at the time of the marriage, for normally it is in the country of that domicile that the parties would normally intend to establish their permanent home. This presumption however is rebutted if it can be inferred that the parties at the time of the marriage intended to establish their home in a certain country and that they did in fact establish it there within a reasonable time.[43]

The "intended matrimonial home" doctrine is based on two principles. The first principle, which is based on sociological

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41 See Bromley, P.M., and Lowe, N.V., *Bromley's Family Law* (8th ed) Butterworths, London, 1992,. *p.29;* Dicey and Morris (note 38 above) p. 272.

42 (1879) L.R. 5P.D. 94. See also, *Ogden v Ogden* (1908) P. 711.

43 See Cheshire & North (note 8 above) p. 334.

consideration, is that marriage is an institution that closely concerns the public policy and the social morality of the state. This view was given judicial backing in *Mordaunt V Mordaunt*[44] where it was stated that:

> Marriage confers a status on the parties to it and upon the children that issue from it. Though entered into by individuals, it has a public character. It is the basis upon which the framework of civilized society is built, and as such is subject in all countries to general laws which dictate and control its obligations and incidents, independently of the volition of those who enter it.

The second principle is founded upon the theory that where the parties are domiciled in different countries before their marriage, principle dictates that questions of the essential validity of the union, including their personal capacity, should be governed by the law of the place where they propose to establish their home. In *De Reneville v De Reneville*,[45] the court affirmed that:

> To hold that the law of the country where each spouse is domiciled before the marriage must decide as to the validity of the marriage in this case might lead to the deplorable result, if the laws happened to differ, that the marriage would be held valid in one country and void in the other country. For this reason, I think it essential that the law of one country should prevail, and that it is reasonable that the law of the country where the ceremony of marriage took place and where

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44 (1870) L.R. 2 P & D. 109 at p.126

45 (1945) P. 100 at 120. per Bucknill L.J. See also, *In The Will of Swan* (1871) 2 V.R. (LE & M) 47, where the issue was whether a marriage celebrated on a temporary visit to Scotland between parties domiciled in the State of Victoria could be held to revoke a will made by the husband before marriage the wife was the niece of the husband's deceased wife and it was assumed that the marriage though voidable by Victorian law, was void by Scots law. It was held that the marriage was valid and this revoked the will.

> the parties intended to live together and where they in fact lived together should be regarded as the law which controls the validity of their marriage.

In *Radwan v Radwan (N0 2)*,[46] the court had to consider the capacity of a domiciled Englishwoman to enter into a polygamous marriage in France with a domiciled Egyptian who was already married polygamously, the parties intending to establish their matrimonial home in Egypt where polygamy was the normal form of marriage. The parties in fact established their home in Egypt and later in England and in the course of twenty years had acquired a family of eight children. The court held that the capacity of the woman was referable to the law of the matrimonial home.

It has been contended that the "dual domicile" doctrine has the special advantage of referring capacity to marry to that law which up to the time of marriage has governed the status of each party as well as preserving the equality of the sexes by looking at the *lex domicilii* of each of the parties. Furthermore, it is a doctrine that is relatively easy to apply and it enables the parties' marital status to be ascertained with certainty at the time of the marriage.[47] The dual domicile doctrine has however been criticized as a rule that admits of its own evasion. It has been criticised as being sociologically unsound, wrong in principle, and in practice ineffectual in the sense that in the majority of cases, its apparent object can be frustrated without difficulty.[48] Furthermore, because of the inflexibility of many of the rules relating to acquisition and loss of a domicile, a person's capacity to marry may be determined by the law of a country he has never visited.[49]

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46 (1972) 3 All E.R. 1026; (1973) Fam. 35

47 See Bromley and Lowe (note 41 above). p.28

48 See Cheshire & North, (note 8 above) p.335. See also Cheshire (note 11 above) p.277.

49 See e.g. *Winans v Attorney-General* (1904) A.C. 287; *Ramsay v Liverpool Infirmary* (1930) A.C. 583.

The "intended matrimonial home doctrine" has also been rightly criticized on the ground that it makes it impossible to predicate whether a marriage is valid or void at the time of its celebration and also that it is contrary to basic principles to permit the parties to be able to change their legal capacity merely by conceiving an intention.[50] It has also been criticised as being unjust and quite impracticable that the validity of a marriage should be reassessed every time the parties change their domicile.[51]

In all, the balance of judicial authority is still greatly in favour of the traditional view that the essentials which concern the formation of marriage are governed by the law of each party's domicile at the date of marriage.[52]

(i) Age

At common law, a valid marriage could be contracted only if both parties had reached the legal age of puberty which was 14 in the case of a boy and 12 in the case of a girl.[53] If either party was under this age when the marriage was contracted, it could be avoided by either of them when that party reached the age of puberty; but if the marriage was ratified, as it would impliedly be by continued cohabitation, it became irrevocably binding.[54] The situation has however since changed in England with the enactment of the Age of Marriage Act in 1929. Section 1 of the 1929 Act which has been re-enacted in section 2 of the Marriage Act, 1949 provides that a valid marriage could not be contracted unless both parties had reached the age of 16, and any marriage to which either party was under this age is void and not voidable as before. The provisions of this law are binding where

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50 See e.g. Bromley and Lowe, (note 41 above) p. 27

51 See Morris (note 28 above) p. 193.

52 In support of this assumption, see section 1(3) of the Marriage (Enabling) Act 1960; section 4 of the Matrimonial Proceedings (Polygamous Marriages) Act 1972 which was re-enacted in the section 11 (d) of the Matrimonial Causes Act, 1973.

53 See Bromley and Lowe (note 41 above), p. 35; See also *Harrod* v *Harrod* (1854) 69 E.R. 344

54 *Ibid,,* p. 35.

either party is domiciled in England at the time of the marriage regardless of wherever the marriage is celebrated. Furthermore, this section not only imposes a prohibition on a person under sixteen from contracting a valid marriage but also prevents a person of full age, domiciled in England from validly marrying another person under sixteen, even though by the *lex domicilii* of the latter, no prohibition or disability exists. If either party to such a ceremony were domiciled in England at the date of the ceremony, the attempted marriage would be void, wherever it was performed.[55]

In Nigeria, there is nowhere in the Marriage Act or the Matrimonial Causes Act where the age of marriage is specified as it is statutorily provided for under the English law. However, section 11(1)(b) of the Marriage Act provides that parties will be deemed to have capacity to marry if they satisfy the Registrar that each of them (not being a widow or widower) is twenty one years old, or that if he or she is under that age, the written consent of the father or mother or the guardian – where both the parents are dead, of unsound mind or absent from Nigeria – has been obtained and attached to the affidavit. Furthermore, section 18 of the Marriage Act requires the written consent of the father, or if he is dead or of unsound mind or absent from Nigeria, of the mother, or if both be dead or of unsound mind or absent from Nigeria, of the guardian of such party, before a licence can be granted or a Certificate to marry is issued. Sections 49 of the Marriage Act makes it a punishable offence for anyone knowing that the written consent required by the Act has not been obtained, shall marry or assist or procure any other person to marry a minor under the age of twenty-one years, not being a widow or widower. Similarly, section 3(1)(e) of the Matrimonial Causes Act merely provides that a marriage is void where either of the parties is not of marriageable age without defining the phrase "marriageable age" anywhere in the Act. It would appear that the exception given to the widow or widower of a statutory marriage is based on the assumption that such widow or widower

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[55] See *Pugh v Pugh (Supra).*

who is under twenty-one years would have obtained written parental consent for her first marriage, and would not therefore require it for the second marriage. However, absence of such parental consent per se would not invalidate a statutory marriage as would be seen in the case of *Agbo v Udo,*[56] wherein the respondent claimed that her marriage to the petitioner was invalid under the Act since it was contracted without the written consent of her father, she being a minor at the time. The court held that notwithstanding the absence of the consent of the parent under section 18, the marriage was nonetheless valid within the meaning of section 33(3) of the Act which provides that no marriage shall after celebration be deemed invalid by reason that any provision of the Act other than those specified in the two preceding subsections of that section has not been complied with.[57] Also, in *Aiyegbusi* v *Aiyegbusi*[58] the court having found on thorough appraisal of the history of the marriage that the father would have willingly given his written consent had he been asked to do so as his evidence showed clearly that it was his own desire that the petitioner should marry the respondent held that the marriage having been celebrated was protected and preserved under section 33(3) of the Act and that lack of written consent of the father was not enough ground on which to nullify the marriage.

Under the Customary marriage law as well as the Islamic marriage law, there is also no provision for minimum age of marriage as the paramount consideration in this respect is the

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56 (1947) 18 N.L.R., 152

57 By section 33 (1) of the Marriage Act, no marriage shall be valid where either of the parties thereto at the time of celebration of such marriage is married by native law and custom to any person other than the person with whom such marriage is had and section 33(2) provides that a marriage shall be null and void if both parties knowingly and willfully acquiesce in its celebration in any place other than the office of a Registrar of marriages or a licensed place of worship; under a false name or names or without a Registrar's certificate of notice or by a person not being a recognized minister of some religious denomination or body or a registrar of marriages.

58 High Court of Western State, Ibadan Judicial Division, Suit No. 1/238/71 delivered on 29 April,1974

ability of the boy or the girl to have children. Once there are obvious signs of puberty on the part of the prospective spouses, the actual age in years was immaterial to a customary law marriage. This accounts for the wide variations amongst the various communities as to the permissible age of marriage. For instance, in the Northern Nigeria, girls can be married at 13 or 14 but men usually at 25. Amongst the Yorubas of the Western Nigeria, it is usually 14 for girls and 17 for boys.[59] Indeed, it is said that under the Islamic marriage law, marriage to a minor is valid as long as the parents of the girl approve of it. The parent's decision is usually dependent on their observation of the physiological development of their daughter.[60] Thus, there is some flexibility in the system as regards minimum age for marriage.[61] In *Mohammed v Knott*,[62] a Nigerian, domiciled in Nigeria had there married a thirteen year old girl according to Moslem law which was valid under the Nigerian law. Three months later, they both traveled to England where a complaint was made against the husband that the girl was in need of care and protection within the meaning of the Children and Young Persons Act, 1963. The Justices had refused to recognize the marriage and concluded that a thirteen year old girl living with a man twice her age was in need of care and protection. The Divisional Court however differed and ruled that the marriage between the parties was a valid marriage which should be recognized as conferring the status of a "wife" on the girl.

Although the Criminal Code Act in section 218 and section 221 thereof makes defilement of girls under 13 and defilement of girls under 16 and above 13 respectively punishable offences, section 6 of the Act has however defined unlawful carnal knowledge to exclude sexual relations between husband and wife. Thus, where a girl under 16 years marries under

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59 See Sagay, I., *Nigerian Family Law,* Malthouse Press Ltd., Lagos, 1999, p. 822.

60 See Akintola, I., "Yerima Has Done Nothing Wrong As Far As Rules of Islam Are Concerned" in *The Guardian,* (Nigeria), May 23, 2010, p. 58

61 See Onokah, M.C., *Family Law*, Spectrum Books Ltd, Lagos, 2000, p.79.

62 (1969) 1 Q.B.D.1.

customary law or marries under the Marriage Act with requisite written parental consent, the consummation of that marriage would not constitute carnal knowledge of her under the Criminal Code Act.

However, statutory measures have been deployed in some states to prescribe the minimum age of marriage in order to curb the incidence of child marriage. For instance, the Age of Marriage Law, 1956 of the then Eastern Region, which now has application in all the Eastern States, stipulated the minimum age of marriage of 16 for all sexes and renders void any marriage between or in respect of persons either of whom is under the age of 16.[63] Also, the various Declarations of the Native Authorities of the Northern States prescribe marriageable ages for their respective areas which range from between 12 and 14 years.[64] There is however no similar provision for the Western Region except for the Infant Law of Oyo State, 1978[65] which prescribes the age of 21 as the age of capacity. The Child Rights Act, 2003 however in section 277 thereof defines a child "as a person under the age of 18 years" and specifically declares in section 2 thereof that every child shall be given such protection and care as is necessary for the well-being of the child. The Child Rights Act 2003 also expressly prescribes that the best interest of the child shall be of primary consideration in every action. It came therefore as a rather shocking news when a Senator of the Federal Republic of Nigeria and former Governor of Zamfara, Ahmed Sani Yerima, was alleged to have contracted a marriage with a 13-year old Egyptian girl at the Abuja National mosque, in flagrant contravention of the provisions of the Child Rights Act. Despite the public outrage which the act attracted at the time, the

63 See section 3(1) of the Age of Marriage Law, 1956.(Eastern Region).

64 See e.g. sec 2(1)(a) Native Authority (Declaration of Idoma Native Marriage and Custom) Order, N.A.L.N., 63 of 1959 - 12 years; N.A. (Declaration of Tiv) Order, N.A.L.N. 52 of 1961 - age of puberty; Native Authority (Declaration of Borgu Native Marriage Law and Custom) Order, 1961, sec. 2(1) (a) – 13 years and Native Authority (Declaration of Biu Native Marriage Law and Custom) Order, 1964, sec. 1(a) – 14 years.

65 Cap 50, Laws of Oyo State, 1978.

Senator has found justification in his personal law, the tenets of Islamic law, which he asserted he has not violated.[66]

(ii) Subsisting Marriage

In England, incapacity imposed on the basis of either of the parties having been legally married to another person would preclude such party from contracting a valid marriage with another person while the first marriage subsists.[67] In *Baindail v aindail*, it was held that a polygamous marriage valid according to the *lex domicilii* of the parties is valid in the eyes of English law and therefore an effective bar to a subsequent marriage with a third person in England.

In Nigeria, the statutory marriage is monogamous in nature. The Marriage Act is an enactment of the Colonial Administration which emphasizes the concept of the legal unity of the spouses as espoused in *Hyde* v *Hyde*[68] as "the voluntary union for life of one man and one woman to the exclusion of all others." Thus, by section 11 (1)(d) of the Marriage Act, parties are required to satisfy the Registrar by affidavit before a Certificate to marry is issued that neither of them is married by native law or custom to any person other than the person with whom such marriage is proposed to be contracted. Under section 33 of the Marriage Act, no marriage shall be valid where either of the parties thereto at the time of the celebration of such marriages is married under customary law to any person other than the person with whom such marriage is had. Thus, while a second marriage under the Act may be contracted between the same parties who had previously contracted a customary marriage, which is termed "double-deck marriage", the Act precludes either of such parties from contracting such statutory marriage with a third party until the customary law marriage is dissolved. In

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66 See *The* Punch, April 15, 2010, p.40; Abati, R. "A Distinguished Senator's Private Matter" in *The Guardian* (Nigeria) May 23, 2010, p. 62.

67 See e.g. Marriage Act, Cap M 6, LFN 2004, Section 35. *Towoeni V Towoeni* (2001) 12 NWLR (Pt. 727) 445 at pp 466-467. C.A.

68 (1886) L.R. 1 P&D 130 at 133

Jadesimi v *Okotie Eboh,*[69] the deceased had in 1942 married his wife under Itsekiri native law and custom. In 1947, he made a Will and deposited same at the Lagos Probate Registry. In March 1961, he contracted a statutory marriage with his customary law wife. One of the issues for determination was whether or not a subsequent statutory marriage nullifies a prior customary marriage. The court on this issue held that where the same parties undergo a form of marriage under customary law and subsequently go through another marriage under the Marriage Act, the second marriage is, clearly, valid as a monogamous marriage. However, in *Oshodi* v *Oshodi,*[70] the respondent had first married a certain woman under native law and custom and thereafter married the petitioner in England under the Marriage Act of England. The court having found that the first marriage under the native law and custom was valid and subsisting at the time the respondent went through the ceremony of marriage with the petitioner in England, declared the second statutory marriage with the petitioner a nullity. Conversely, by section 35 of the Marriage Act, any person who is married under the Act, or whose marriage is declared by the Act to be valid, lacks capacity, during the subsistence of such marriage, of contracting a valid marriage under customary law either between the parties themselves or one of them with a third party. In *Taiga* v *Taiga,*[71] the appellant, had a subsisting marriage with a third party, which marriage was contracted in 1974. The parties lived together until 1994 when they separated. The appellant soon entered into a relationship with the respondent which led to the birth of a set of twins between them in year 2001. According to the appellant, the respondent was at all times aware of his subsisting statutory marriage with another person. The appellant further averred that there was no ceremony of marriage between him and the respondent, and even if there was, such could not have been valid because of his subsisting statutory marriage. The court held that

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69 See e.g. *Jadesimi* v *Okotie Eboh* (1996) 2 NWLR (part 429) 128; *Ohochukwu* v *Ohochukwu* (1960) 1 All E.R. 253.

70 (1963) 2 All NLR 214.

71 (2012) 10 NWLR (Pt. 1308) 219

by the provisions of section 35 of the Marriage Act, a person who has a prior subsisting marriage to a third party cannot later engage marriage to another person under native law and custom while the earlier statutory marriage was subsisting. Also, in *Onwudinjo* v *Onwudinjo,*[72] the deceased having married first under the Marriage Act had, during the subsistence of that marriage, purportedly married another woman under customary law, the customary marriage was held invalid by the court. Thus, a person who is lawfully married to another either under the Act or by native law and custom lacks capacity to contract a second concurrent marriage with a third party under the Marriage Act. Section 3(1)(a) of the Matrimonial Causes Act (MCA) renders void *ab initio* any marriage in which either of the parties is, at the time of the marriage, lawfully married to some other person.

Under the customary marriage law, marriages contracted under native law and custom are potentially polygamous. As such, there is no law precluding a man who is married under native law and custom from contracting a second concurrent marriage with a third party while the first marriage subsists. Indeed, the man is allowed to marry as many wives as he desires. But, under the Islamic law, a man, whose personal law is determined by the tenets of his faith, can only marry four wives at a time.

Another aspect of capacity to marry under the customary law concerns the capacity of a foreigner to marry a Nigerian under native law and custom. Whilst the Marriage Act draws no distinction between a native of Nigeria and a non-native,[73] a non-native of Nigeria cannot validly contract a customary law marriage. It is of no consequence if the non-native is domiciled in Nigeria or in any of the States. In *Savage* v *Macfoy*,[74] the marriage of Macfoy, a Sierra Leonian from Freetown (where polygamy

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72 (1957) E.R.N.L.R. 1

73 Section 11 (1)(a) of the Marriage Act only requires that one of the parties has been resident within the district in which the marriage is intended to be celebrated at least fifteen days preceding the granting of the certificate by the Registrar.

74 (1909) 1 Renner's Gold Coast Report, 504.

was unlawful) domiciled in Lagos, to a Nigerian woman according to Yoruba customary law was declared void for want of capacity on the part of Macfoy. Whilst delivering its judgement, the court considered the provisions of section 20 of the Supreme Court Ordinance, 1914, which empowered the court to apply native law and custom "to causes and matters between natives and non-natives where it may appear to the court that substantial injustice would be done to either party by a strict adherence to the rules of English law" and held that the said provisions did not apply to a contract of polygamous union when expressly repugnant to English law. The court further held that the mere fact that a man had made Lagos his domicile of choice would not necessarily make him subject to or given the benefit of native law and custom and that no effect would be given to a polygamous union which would not be recognized as valid by the laws of the domicile or origin of either party. Also, in *Fonseca* v *Passman,*[75] the plaintiff claimed as widow of the deceased, to be entitled to letters of administration of his estate. She had been married to the deceased, who was a Portuguese resident in Nigeria, in accordance with Efik customary law. The court held that an European domiciled in the country of his nationality could not contract a valid marriage by native law and custom in Nigeria. The court further held that even if the deceased had acquired a domicile in Nigeria, he could not contract a valid marriage in accordance with native law and custom. The judicial decisions in these two cases are obviously contrary to the rules of private international law earlier discussed in this paper that capacity to marry is governed by the law of the domicile at the time of marriage. Some States in Nigeria have however enacted laws to define the categories of persons to whom customary law is applicable which would invariably determine capacity to contract a valid customary law marriage. For instance, in the Eastern, Western and Mid Western States, customary law is applicable to persons of Nigerian descent. Nigerian descent in this context has been defined as a person whose parents were

[75] (1958) W.R.N.L.R. 41. See also *Nelson* v *Nelson* (1951) 13 WACA, 248.

members of any tribe or tribes indigenous to Nigeria and the descendants of such persons, and include any person or one of whose parents was a member of such a tribe.[76] In the Northern States, customary law is applicable to any person whose parents were members of any tribe indigenous to some part of Africa, or one of whose parents was a member of such tribe.[77] Similarly, in Lagos State, customary law is applicable only to natives.[78] A native in this context is defined to mean, persons of Nigerian descent and African descent.[79] Thus, as far as Lagos and Northern States are concerned, the decision in *Savage and Macfoy*[80] is no longer the law.

Exceptions to the Rule

By and large, although capacity to contract a valid marriage is generally governed by the *lex domicilii,* there are however some exceptions. First, it is not impossible for a marriage to be declared void if the parties lack capacity by the *lex loci celebratinis.* Thus, capacity existing under the personal law of the parties would be limited by the type of marriage which could be celebrated in a foreign country. For instance, in England, where marriages celebrated within the jurisdiction are deemed monogamous, a party permitted by his *lex domicilii* to practice polygamy can contract a valid monogamous marriage in England only if he is not already married.

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76 See the High Court Law of Eastern States, 1963, Cap 61, section 20; High Court Law of Western States, 1959, Cap 44, section 12, High Court Law of the Mid-Western State, 1964, section 13. See also e.g. section 11, Customary Courts Edict (No 2) Edict, 1966, Eastern States; section 2 of Customary Courts Law, Laws of Western Nigeria, 1958, Cap. 31; section 17 of the Customary Courts Edict, 1966, Mid-Western State.

77 See High Court of Northern States Law, Cap 49, section 34. See also e.g. section 15(1), Area Courts Edict, 1967, Kwara State; Area Courts Edict, No 2 of 1967, Kano State; Area Courts Edict, No 4 of 1968, Benue State and Area Courts Edict, No 2 of 1967, Borno State..

78 See section 27, Cap 89, LFN, 1958, applicable to Lagos and section 27 of the High Court of Lagos Act, dealing with the application of native law and custom.

79 See the Interpretation Act.

80 Supra.

Also, English law will not permit a marriage to be contracted within the jurisdiction between persons under the age of sixteen or related within prohibited degrees on grounds of public policy.[81] In *Cheni vCheni,*[82]the proper test to apply was lucidly formulated by the court thus:

> I believe the true rule to be that the courts of this country will exceptionally refuse to give effect to a capacity or incapacity to marry by the law of the domicile on the ground that to give it recognition and effect would be unconscionable...What I believe to be the true test is whether the marriage is so offensive to the conscience of the English Court that it should refuse to recognize and give effect to the proper foreign law. In deciding that question, the Court will seek to exercise common sense, good manners and a reasonable tolerance.

Another exception is that no legal system will give effect to any incapacity imposed by the *lex domicilii* if it is penal in nature on the basis that no legal system will help another enforce its penal laws. This exception has been held to cover such cases as prohibition against marrying outside one's caste[83] and against the re-marriage of a divorced person such as in *Scott v A.G.*[84] where two persons domiciled in South Africa were divorced in that country and thereupon became subject to a rule of South African law which provided that the guilty party could not remarry as long as the other party remained unmarried. The wife who was the guilty party remarried in England while her former husband was still unmarried. The second marriage was held valid by the English Court on the ground that the restriction on remarriage was a penalty and therefore, inoperative out of the jurisdiction under which it was afflicted.

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81 See Bromley and Lowe, (note 41 above) p.30.
82 (1965) P. 85.
83 *Chetti v Chetti* (1909) P. 67.
84 (1886) 11 P.D. 128. Cf. *Warter v Warter* (1890) L.R. 15 P.D. 152.

B. Statutory Restrictions.

Apart from the natural incapacity which may preclude a person from contracting a valid marriage, there are statutory provisions which regulate other aspects of the essential requirements of a marriage such as marriage of persons within the prohibited degrees of consanguinity and affinity, consent of parties, parental consent and nature of marriage. Such statutory provisions must be complied with to give validity to any marriage contract either under statutes or the customary law.

(i) Prohibited Degree of consanguinity and Affinity.

Most, if not all civilized communities prohibit certain marriages as incestuous and thus prohibit marriages in which the parties are in any way related either by blood (consanguinity) or by affinity (relationship by marriage). In the case of consanguinity, prohibition is based on moral and eugenic grounds. There is the general perception that the more closely the parties are related, the greater will be the risk of their children inheriting undesirable genetic characteristics.[85] Thus, in English law, marriages between persons who are within defined prohibited degrees of consanguinity (i.e. blood relationship) or affinity (i.e. relationship by marriage) are prohibited and therefore illegal and void. The degrees of relationship based on consanguinity are set out in Part I of the Schedule to the Marriage Act. It includes not only relationships traced through the whole blood but also those traced through the half blood, and it is immaterial that the parents of either of the parties (or of any person through whom the relationship is traced) have not been married to each other.[86] Marriages within these degrees are completely prohibited on eugenic basis.[87] On the other hand, where parties are within the prohibited degrees of affinity, the conditions set out in the Marriage Act, 1949 must be observed for such marriage to be valid in law. Marriages between persons

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85 See Bromley and Lowe (note 41 above) p. 37

86 See *R* v *Brighton Inhabitants* (1861) 1 B & S 447. See also Bromley and Lowe *ibid* p. 37

87 See section 1(1) of the Marriage Act, 1949.

within prohibited degrees of affinity were also originally considered incestuous and therefore prohibited. In *Brook* v *Brook*[88] a marriage took place between a widower and his deceased wife's sister. While both parties were and remained domiciled in England, the ceremony took place during a temporary visit to Denmark, such a union being legal under Danish law. The House of Lords held that the marriage was void. Also, in *Mette v Mette*[89] wherein a German who had naturalized and domiciled in England had after the death of his first wife, and while on a visit to Germany, married his deceased wife's half-sister. The latter was a German national domiciled in Germany. The marriage was held void by an English court on the ground that the affinity of the parties prevented their forming a legal marriage. The prohibited degrees of affinity have however been relaxed to permit marriages between such persons upon the fulfillment of certain conditions. The Deceased Wife's Sister's Marriage Act, 1907 initially permitted a man to marry the deceased wife's sister, and it was not until 1923 that he was allowed to marry his deceased brother's widow. In the Marriage Enabling Act, 1960, the pre-condition of death of such wife, brother, uncle or nephew at the time of the proposed marriage was modified to permit such marriages during their lifetime after a decree of divorce or nullity. Thus, it is now possible for instance, for a man to legally marry the sister of his divorced wife while the latter is still alive. A condition precedent to the application of this law however is that both parties to the marriage must be domiciled in England.[90] No such marriage shall be valid if either of the parties to it is at the time of the marriage domiciled in a country outside Great Britain and under which law, there cannot be a valid marriage between the parties. Further extensive changes were made in 1986 by the Marriage (Prohibited Degrees of Relationship) Act. The remaining prohibited degrees of affinity include those geared towards protecting step children against possible exploitation, which preclude a person from marrying his or her stepchild or

88 (1861) 9H.L.C. 193.
89 (1859) 1 Sw. & Tr. 416.
90 See Marriage Enabling Act, 1960 (U.K.) Section 1(3)

step grandchild unless both parties have attained the age of 21 and the latter was not at any time before reaching the age f 18 a child of the family in relation to the other.[91] Furthermore, a man may not marry his son's wife unless both his son and the son's mother are dead; similarly, a woman may not marry her daughter's husband unless both the daughter and the daughter's father are dead. In addition, in either case, both parties must be over the age of 21.[92]

In Nigeria, section 11 (1) (c) of the Marriage Act requires a party wishing to contract a marriage under the Act to ensure that there is no impediment of kindred or affinity between them. The list of such prohibited degrees of consanguinity or affinity which apply to statutory marriages is contained in Schedule I of the Matrimonial Causes Act, 1970. For instance, marriage of a man is prohibited on grounds of consanguinity if the woman is, or has been, his ancestress, descendant, sister, father's sister, mother's sister, brother's daughter or sister's daughter. Similarly, marriage of a woman is prohibited on grounds of consanguinity if the man is, or has been, her ancestor, descendant, brother, father's brother, mother's brother, brother's son or sister's son. Because of the eugenic basis of the prohibition, the list has included not only relationships traced through the whole blood, but also those traced through the half blood or to any person of illegitimate birth. Also, marriage of a man to a woman is prohibited on grounds of affinity if the woman is, or has been, his wife's mother, wife's grandmother, wife's daughter, wife's son's daughter, father's wife, grandfather's wife, son's wife, son' son's wife or daughter's son's wife. In the same vein, the marriage of a woman to a man is prohibited on grounds of affinity if the man is, or has been, her husband's father, husband's grandfather, husband's son, husband's son's son, husband's daughter's son, mother's husband, grandmother's husband, daughter's husband, son's daughter's husband or daughter's daughter's husband. Any

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91 See Part II of the Schedule to the Marriage Act

92 See Marriage (Prohibited Degrees of Relationship) Act, 1986, section 1(3) & (4); Marriage Act 1949, section 1(4)(5) and Schedule 1, Part III (as amended)

marriage contracted in contravention of these statutory provisions is void.[93] The prohibition of marriage between a woman and her deceased husband's son which is included in the list does not however reflect the social norm of the society which permits marriages such as "wife inheritance".[94] Under section 4 of the Matrimonial Causes Act 1970 however,[95] where two persons within the prohibited degrees of affinity wish to marry each other, they may apply in writing to a Judge for permission to do so and if the Judge is satisfied that the circumstances of the particular case are so exceptional as to justify the granting of the permission sought he may, by order, permit the applicants to marry each other. It is noteworthy however that the provisions of this section 4 of the Matrimonial Causes Act are applicable only to those who wish to contract their marriage under the Marriage Act.

Under the Customary law, the prohibited degrees of consanguinity or affinity are not well-defined as it was done under the Marriage Act. However, some prohibitions are common to customary law marriages with minor variations from one community to the other. Also, because the family under customary law is composed of not just the nuclear family but also a large umber of collaterals claiming blood or kinship affinity with the parties to a marriage, the prohibited degrees of consanguinity in particular, are wider under the customary law than under the Marriage Act.[96] For consanguinity, marriage between blood relations is regarded as incestuous and therefore generally forbidden by customary law but the relevant degree of blood relationship varies. While some communities prohibit marriage between persons who are related in the smallest degree, some do allow cross-cousin marriage. For instance, while some communities in the Eastern part of the country prohibit marriage between parties who have any traceable blood relationship, some

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93 See section 3(1)(b) of the M.C.A.

94 It is worthy of note that the prohibited degrees of relationships listed in the M.C.A. are as contained in the First Schedule to the English Marriage Act, 1949 as amended by the Marriage (Enabling) Act, 1960.

95 Cap M7 LFN 2004

96 See Onokah, (note 61 above) p. 74.

do allow marriages between distant cousins and members of the same extended family. However, in the Western part of the country, marriage is forbidden in the same blood, and as descent is traced on both sides of the house, it is consequently forbidden both in the father's and mother's families.[97]

As regards prohibited degrees for reasons of affinity, customary law generally prohibits a man from marrying his wife's mother or the mother of his son's wife. It has however been said that whether a man lacks the capacity to marry his wife's sister or half-sister, or even his step-daughter depends on the community in question, as a man is allowed in some communities, but legally barred in some, from so marrying.[98] Such marriage, though not expressly prohibited, is not generally approved by the families of either the man or the woman because of the reluctance to put their eggs in one basket.[99] Thus, in some communities in the Eastern States, a man is not generally allowed to marry the sister of his wife during the lifetime of the latter while in some others it is sometimes permissible for a man to marry his wife's sister, either as a second wife or after the death of his first wife.[100]

Furthermore, it is not uncommon for a widow to be taken over in marriage by the brother or other male relative of her deceased husband or by a son of his whom the husband had by another woman.[101]

In Islamic Marriage law, the prohibited degrees of marriage may be classified into two, namely: the permanently prohibited degrees and the temporary prohibited degrees, which can be removed by a change of circumstances. Under the permanently prohibited degrees, a muslim is completely forbidden to marry persons such as his mother; his step mother;

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97 *Ibid,* p. 75.

98 See Obi, S.N.C., *Customary Law Manual – A Manual of Customary Law Obtaining in the Anambra and Imo State of Nigeria,* Government Press, Enugu, 1977, pp. 221-222.

99 See Nwogugu, E.I., *Family Law in Nigeria,* Heinemann Educational Book (Nig.) Ltd.,, Ibadan, 1974, p. 46

100 *Ibid.*

101 See Kasumu and Salacuse (note 35 above), p. 87.

his grandmother; his daughter(s); his sister; his father's sister(s); his mother's sister; his brother's daughters; his father's mother; his brother's daughters; his father's mother; his father's mother's sister; his sister's daughter(s); his foster sister; his wife's mother; his step-daughter and his son's wife. Under the temporary prohibited degrees, a man must not marry two sisters in marriage at one and the same time. However, this temporary prohibition is removed as soon as the wife dies and he takes his sister in marriage. This provision also applies to a man's aunt and niece. Also, under the temporary degree of prohibitions, a man must not have more than four wives at a time. But this impediment is removed as soon as one of the wives dies or is divorced.[102]

(ii) Consent of Parties

When viewed from the perspective of the law of contract, all requisite elements of a valid and binding contract need be present in the marriage arrangement such as, but not limited to offer/offeror and acceptance/offeree, In England, there can be no valid marriage without the requisite consent of each of the parties to the marriage contract which is a matter of essential and governed by the personal law of each of the parties.[103] Such consent must be free and voluntary. Where it is obtained by fraud or duress, such that the will of one of the parties thereto has been overborne by genuine and reasonable held fear caused by threat of immediate danger to life, limb or liberty, so that the constraint destroys the reality of consent to ordinary wedlock, the marriage contract is vitiated and the applicable law for determination of duress s the law of the domicile of that party suffering duress at the date of marriage.[104] Furthermore, by section 2 (c) of Nullity of Marriage Act, 1971, lack of consent, however arising, makes

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102 See Doi, A.I., *Shariah: The Islamic Law,* To Ha Publishers, London, 1997, p. 124.

103 See *Kenward* v *Kenward, (*1950) 2 All E.R. 297, C.A.; *Way* v *Way* (1950) P. 71.

104 See Sir Jocelyn Simon P. in *Szechter* v *Szechter* (1971) P.286 at 298.; Graveson (note 6 above) p. 252.

voidable any marriage taking place after the Act comes into effect.

In Nigeria, Although the Marriage Act did not make any provision for consent of the intending parties, the Matrimonial Causes Act, in section 3(1)(d)(i) thereof requires for real consent of each of the parties. Real consent in this context means a consent that is obtained without "duress or fraud". Where a marriage is contracted without the requisite consent of each of the parties such as when it has been obtained by duress or fraud; or that the party is mistaken as to the identity of the other party or as to the nature of the ceremony performed; or that the party is mentally incapable of understanding the nature of the marriage contract, such marriage is void *ab initio* for lack of capacity.[105]

Under the customary law, notwithstanding the general perception that marriage is more often than not an arrangement between the families of the spouses, customary law still requires that both parties themselves individually give their formal consent to the marriage.[106] Under the Islamic marriage law, parties must freely consent to the union. Any marriage contracted without the consent of either of the parties is voidable at the instance of the affected party.[107] The practice of forcefully giving out a daughter in marriage without her consent or marrying a wife for a boy is long gone in most communities. Any marriage concluded without the requisite consent of each of the parties especially the bride is a nullity. In *Osamwoyi* v *Osamwuyi,*[108] the Supreme Court held that the consent of the bride-to-be is a condition precedent to a marriage under Benin Customary law. Similarly, in *Okpanum* v *Okpanum*[109] it was held that the consent of the bride to-be is an essential requirement in Ibo customary marriage.

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105 See *Agbo* v *Udo* (1947) 18 N.L.R. 152

106 See Kasumu and Salacuse, (note 35 above) p. 76.

107 See Nwogugu, (note 99 above) p. 59. See also Akintola, (note 60 above) p. 58

108 (1973) NMLR, 25. See also; *Obele* v *Iniya* (1973) NMLR, 155.

109 (1972) 2 E.C.S.L.R. 561

(iii) Parental Consent

In English law, if either party is over the age of 16 but under the age of 18, certain persons are normally required to give their express consent to the marriage or are given a power to dissent from it. Although the law relating to those whose consent is required was extensively changed by the Children's Act 1989, the consent required in this instance is normally the consent of each parent with parental responsibility and each guardian (if any).[110] Where a residence order is in force with respect to the child, the consent required is that of the person or persons with whom the child is living or is to live under the order and not that of the parents or guardians. If a care order is in force, the local authority designated in the order must consent in addition to parents and guardians. However, where the minor is a widow or widower, no consent is required at all.[111] If the minor is a ward of court, the court's consent must be obtained.[112] Where the necessary consent is impossible to obtain or withheld, the consent of the court may be obtained instead.[113] The purpose of all this has been said to prevent minors' contracting unwise marriages.[114]

Parental consent in England is classified by the courts as a formality and is thus governed by the *lex loci celebrationis.* Thus, in *Ogden V Ogden*[115]where a domiciled French man aged 19 married in England, a domiciled English woman without the consent of his parents as required by Article 148 of the French Civil Code which provided that a son who had not attained the age of 25 years could not contract a valid marriage without the consent of his parents. The parties lived together in England for a few months after which the husband returned to France, leaving the wife in England. He thereafter obtained a nullity decree of the marriage from the French Court on the ground of lack of parental

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110 See Bromley and Lowe (note 41 above) p. 43.

111 See section 3(1)(1A) and (1B) as amended and added by the Children Act, 1989. Schs 12 and 15.

112 Ibid, section 3(6).

113 Ibid, section 3(5) as amended by the Family Law Reform Act, 1969.

114 See Bromley and Lowe (note 41 above) p. 43.

115 (1908) P. 46

consent. The English Court of Appeal however held that the marriage was nevertheless valid in England because, *inter alia,* the requirement of parental consent was a mere formality. However, an exception to this rule has been made by the Royal Marriage Act, 1772 which confers on matter of parental consent, the character of essentials and thus requires the consent of the Sovereign, which is generically similar to parental consent to the marriage of a member of the Royal family as a matter of great public interest.

In Nigeria, by the combined provisions of section 11(1)(b) and section 18 of the Marriage Act, parental consent to a statutory marriage is an essential requirement only where either or both of the parties are under the age of twenty one. The only exception to this is where the affected party is a widow or widower. Indeed, it has been held in *Aiyegbusi* v *Aiyegbusi*[116] that lack of such parental consent would not invalidate a marriage.

Under the customary law however, the giving of parental consent is generally an indispensable requirement for the validity of a customary law marriage and is generally accorded much importance as marriage is viewed as a union between the families of the spouses. In recent times however, while the parental consent of the groom is gradually being dispensed with, the same cannot be said of the parental consent of the bride to-be. It has been stated that a boy is free to marry a woman of his choice without first obtaining the consent of his parent or the family head to such marriage, especially where he is financially in a position to do so by himself.[117] However, a customary marriage which did not receive the consent of the parents of the girl, irrespective of the economic independence of the girl or the fact that she is over the age of twenty one, is invalid.[118] In *Savage* v *Macfoy*[119] the court regarded the consent of the girl's family and the presentation and acceptance of dowry as the legal essential. The Native Authority Declarations of some states in the North

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116 Suit No. 1/238/71, Odunlami, J., delivered on 29 April 1974

117 See Obi, (note 98 above), p.21.

118 See Onokah, (note 61 above) p.86.

119 (1909) Renner's Gold Coast Reports, 504 at 506

also expressly provided that the consent of the parents of the bride is a legal essential to a valid customary marriage.[120] However, in the Western States of Nigeria where the Marriage, Divorce and Custody of Children Adoptive By-Laws, 1958 are in force, section 5 thereof makes allowance for dispensation of the consent of parents who are adamant in cases where the bride is 18 years of age or above.

(iv) Dowry or Bride Price

A distinctive feature of a customary marriage which is not available under a statutory marriage is the dowry or bride price. Dowry is *sine qua non* to a customary marriage without which there cannot be a valid marriage. The dowry which is a specific fee, paid at a specific moment during the marriage ceremony to the girl's family constitutes the formal sealing of the union.[121] In *Okpanum* v *Okpanum,*[122] the court stated that the most important evidential requirement constituting a valid customary marriage is the payment or part-payment of bride price or dowry. In this regard also, there have been some statutory interventions in some states to curtail the practice of demand for exorbitant bride price by the girl's parents.[123]

Nature of Marriage

Apart from determining the capacity of parties to contract a valid marriage, domicile also plays considerable role in the determination of the nature of marriage that is, whether it is monogamous or polygamous. It is generally believed by a school of thought that while a marriage owes its existence to the *lex loci*

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120 See e.g. Native Authority (Declaration of Idoma Native Marriage and Custom) Order, N.A.L.N. 68 of 1959.

121 See Sagay (note 59 above), p. 813; Kasumu and Salacuse, (note 35 above), p.77.

122 Supra at p. 563

123 See e.g. Western Nigeria's Marriage, Divorce and Custody of Children Adoptive By-Laws Order and the Eastern Region's Limitation of Dowry Law, 1956, which have fixed the highest amount of dowry payable in these Regions to ₦70 and ₦60 respectively. It is however a common knowledge that these limits are not being observed by the people.

contractus and is no doubt subject to that law in respect of ceremonial formalities and other purely contractual matters, the appropriate law by which to test the monogamous or polygamous character of a marriage is the law of the matrimonial domicile. It is believed that to apply the *lex loci celebrationis* is a flagrant contradiction of the fundamental principle that matters of status, especially, the status of husband and wife, are regulated solely by the law of the domicile.[124] Under the English law for instance, the common law rule is that a marriage should be monogamous and must not be for a limited period. In *Hyde v Hyde*[125] marriage according to English law is defined as "the voluntary union of one man and one woman to the exclusion of all others." Thus, an English marriage must be monogamous whatever the personal law of the parties may say. In *Warrender v Warrender,*[126] an English man marrying in Turkey contracted a marriage of the English kind, that is, excluding a plurality of wives because he was an English man and only residing in Turkey and was under Mohometan law accidentally and temporarily. The court having established that he married with a view of being a married man and having a wife in England for English purposes held that the incidents and effects, the very nature and essence, must be ascertained by the English and not by Turkish law. However, in *Russ v Russ*[127] W, a spinster domiciled in England married H at an English Marriage Registry in 1913. H was domiciled in Egypt and by Egyptian law, he was entitled to have four wives. Shortly afterwards, the parties went through a Muslim ceremony of marriage in Cairo. They lived together in Egypt until 1932 when H divorced W in the Muslim manner by pronouncing the word *talaq* three times in the presence of witnesses. The court held that the marriage was potentially polygamous notwithstanding its celebration in England. It was further held that it was by virtue of the English ceremony that W became domiciled in Egypt,

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124 See Cheshire and North (note 8 above) p. 299.

125 (1866) L.R 1 P&D 130

126 (1835) 2 CL& Fin, 488 at p. 535. See also Denning, L.J. in *Kenward v Kenward* (1951) P. 124 at p. 145.

127 (1964) P. 315

thereby presumably acquiring a polygamous status. The divorce was accordingly held to be effective in English law. Also, by section 1 of the Nullity of Marriage Act, 1971, as amended by section 4 of the Matrimonial Proceedings (Polygamous Marriages) Act, 1972, provides that a marriage which takes place after the commencement of the Act shall be void on the ground *inter alia* that in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.

There is the other school of thought however which believes that the nature of the ceremony according to the law of the place of celebration and not the personal law of either of the parties, determines whether a marriage is monogamous or polygamous.[128] In *Qureshi v Qureshi*[129] the parties were both muslims. The husband was domiciled at all material times in Pakistan. The wife was apparently domiciled before her marriage in India and after her marriage, she assumed her husband's domicile in Pakistan. By the personal law of each of the parties, the marriage was potentially polygamous. Their marriage was performed in an English Marriage Registry, followed by a religious ceremony. The question which arose for determination was the recognition in England of an extra-judicial divorce by talaq. It was held that this was a monogamous marriage for the marriage "having taken place in England, where monogamy is the rule must be regarded as monogamous for the purpose of invoking the jurisdiction of the court."

Furthermore, since a married woman is legally entitled to have a domicile separate from that of the husband, the problem of determining the nature of the marriage would naturally arise where the wife has chosen a separate domicile. The only practical solution in situations such as this is for the nature of marriage to be determined by the *lex loci celebrationis* .

In Nigeria, legal recognition is accorded both monogamous and polygamous marriages. Thus, the personal laws of the parties in terms of religion or customary law

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128 See Morris (note 28 above) p. 2

129 (1972) Fam. 173. See also *Re Bethel,* (1887) 38 Ch. D. 220.

notwithstanding, the determinant of the nature of any marriage contracted in Nigeria is the applicable law to which the parties have subjected themselves, that is, the Marriage Act or the customary law. In essence, a marriage celebrated in Nigeria is a marriage in the English sense, that is, monogamous, if contracted under the Marriage Act with the two attributes of being potentially for an indefinite period and to the exclusion of all other persons, while a marriage contracted under the customary law or the Islamic law is inherently polygamous.

It is important to note however that a marriage which is potentially polygamous at inception may nevertheless be converted to a monogamous marriage once there is a change of domicile. In *Ali v Ali*[130], the husband's subsequent change of domicile from India to England and his continued residence in England was held to have converted his potentially polygamous marriage to a monogamous one. This point was also emphasized in *Cheni v Cheni*[131] that "there are no marriages which are not potentially polygamous, in the sense that they may be rendered so by a change of domicile and religion on the part of the spouses.[132] The converse question whether an initially monogamous marriage may be converted into a polygamous one is probably less likely to arise but such authority there is indicates that such a conversion is possible. Thus, in *A.G. of Ceylon v Reid*[133] the respondent was domiciled in Ceylon and his capacity to marry depended upon his religious faith. Whilst he was a Christian, he contracted a monogamous Christian marriage. He was then converted to Islam and went through a second marriage without having the first dissolved. He was charged with bigamy and the question of law raised by the relevant penal statute was whether the second marriage was valid or void. The Privy Council held that it was valid for having changed to the Muslim faith, Reid was permitted to practice polygamy by the law of Ceylon and was therefore not guilt of bigamy.

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130 (1946) P. 122

131 (1965) P. 85 at p. 90

132 See also *Ohochukwu* v *Ohochukwu* (1960) 1 All E.R. 253.

133 (1965) A.C. 720

Domicile in Matrimonial Causes Laws

Matrimonial causes include proceedings for divorce, separation, nullity of marriage, presumption of death and dissolution of marriage or a declaration of status.[134] In Nigeria, matrimonial causes have been statutorily defined to mean *inter alia* proceedings for a decree of dissolution of marriage, nullity f marriage, judicial separation, restitution of conjugal rights or jactitation of marriages.[135]

At common law, domicile in matrimonial causes has its most potent application in determining jurisdiction of courts. Where therefore the domicile of a petitioner is not established, the court will lack jurisdiction to entertain such matter and the determinant factor on jurisdiction for matrimonial causes is the domicile of the husband.[136] In *Le Mesurier v Le Mesurier,*[137] it was held that domicile in the true and technical sense of the term, of the husband at the time of the suit was the sole general test of jurisdiction. Also, in *Koku v* Koku[138] it was held that jurisdiction for divorce petition is governed by the domicile of the husband and the court that had jurisdiction to adjudicate on a divorce matter is the court of the domicile of the husband.

This rule, no doubt, had for a long time imposed greater hardship on wives because of the concept of unity of matrimonial domicile which bound the wife to the husband even where they have been judicially separated from each other until statutes intervened to give a measure of relief by basing jurisdiction in matrimonial causes on other grounds apart from domicile. Indeed, in a number of countries including England, Norway, Denmark and Russia, the concept of unity of matrimonial

134 See Morris, (note 28 above) p. 223.

135 See Matrimonial Causes Act, 1970, Cap. M.7 LFN 2004, Section 114. See also *Harriman V Harriman* (1989) 5 NWLR (Pt. 119) 6 C.A.

136 See *Bhojwani v Bhojwani* (1995) 7 NWLR (Pt. 407) 349, CA.

137 (1985) A.C. 517. See also, *Salveson v Administrator of Austrian Property* (1927) A.C. 641.

138 (i999) 8 NWLR (Pt. 616) 672 C.A. See also, *Omotunde v Omotunde* (2001) 9 NWLR (Pt. 718) 252.

domicile has since been abandoned.[139] In *Indyka v Indyka*[140] the court noted that:

> In the last century, if a wife was deserted by her husband whether domiciled here or not, she was tied to him until he died. But now society in this and many other countries was no longer content with that situation. She must be free to live a normal life; and it was felt that on the ground of morals, humanity and convenience she should be able to obtain a divorce in the country where she genuinely lived.

As such, the domiciliary basis of conferring jurisdiction on court has been augmented by factors such as residence. In England, by the Domicile and Matrimonial Proceedings Act, 1973, the court may assume jurisdiction assume jurisdiction over matrimonial causes on the bases of domicile or habitual residence of parties. By section 5(2) of the 1973 Act, the court has jurisdiction in divorce or judicial separation if (and only if) either of the parties to the marriage (a) is domiciled in England and Wales on the date when the proceedings are begun; or (b) was habitually resident in England and Wales throughout the period of one year ending with that date. Thus, in the first instance, either of the parties to the marriage can institute divorce proceedings if he or she is domiciled in England and Wales on the date when proceedings are begun. Jurisdiction here is based on the domicile of either of the parties and the time at which domicile is to be determined is the inception of such proceedings. In *Leon v Leon,*[141] the court assumed jurisdiction on a husband's petition for divorce on the ground that the wife, the respondent is domiciled in England, while the husband himself was domiciled abroad and had never visited England. Secondly, the English court will assume jurisdiction over divorce petitions if either of the parties to the proceeding is habitually resident in England

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139 See e.g. Domicile and Matrimonial Proceedings Act, 1973 (U.K.) section 1.
140 (1967) 3 WLR 510 at p.540
141 (1967) P. 275.

throughout the period of one year up to the date when proceedings were begun.[142] In *Ikimi* v *Ikimi*[143] the parties, who were Nigerians, maintained homes of equal status in both England and Nigeria. The wife filed a petition for dissolution on the basis that she had been habitually resident in London for the preceding year. The husband, who had already started divorce proceedings in Nigeria, challenged the jurisdictional basis of the wife's petition contending that since the period spent by her in England over the preceding year amounted to only 160 days she had not been habitually resident in the jurisdiction over the period required b section 5(2) of the Domicile and Matrimonial Proceedings Act 1973. on determining the matter as a preliminary issue, the Judge held that an individual could occupy two habitual residences concurrently, providing he spent at least same time in each but otherwise regardless of the precise amount of time spent, and on that basis concluded that the wife had been habitually resident within the jurisdiction throughout the period of a year as required by section 5(2). On the husband's appeal, the court dismissed the appeal and held that a person could be habitually resident within the jurisdiction for the whole of the one-year period required by section 5(2) of the of the 1973 Act despite also being habitually resident in another country; that the appropriate test was whether the residence in question had been adopted voluntarily and for a settled purpose throughout the relevant period apart from temporary or occasional absences; that the bodily presence required to form a basis for habitual residence had to be more than merely token in duration; but that in the circumstances the wife had spent a sufficient appreciable time in the country to found the jurisdiction for her petition.

In Nigeria, the High Court of any State of the Federation will be properly seized of jurisdiction in Matrimonial Causes where the proceedings are instituted by a petitioner domiciled in Nigeria. The effect within the context of the matrimonial causes

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142 See also section 40 of the Matrimonial Causes Act, 1950 which has vested jurisdiction in an English court to hear a petition by a wife who had been resident in England for at least three years.

143 (2001) 3 WLR 672

is to create a Nigerian as distinct from a state domicile. Thus, it is provided in Section 2(1) and (3) of the Matrimonial Causes Act, 1970, that:

> "2(1)- Subject to this Act, a person may institute a matrimonial case under this Act in the High Court of any State of the Federation .....
> (3) For the avoidance of doubt, it is hereby declared that a person domiciled in any State of the Federation is domiciled in Nigeria for the purposes of this Act and may institute proceedings under this Act in the High Court of any State whether or not he is domiciled in that particular State."

The combined effect of these provisions is that for purposes of matrimonial cases, the basis of domicile of the petitioner forms the foundation or pivot of adjudication in a divorce petition and as such, a Nigerian domicile is ascribed to a person domiciled in any State of the Federation who may institute proceedings in any state of the Federation.[144] Although there is no provision in the MCA, 1970 which specifically provides for the trial of a divorce proceedings on a neutral ground where husband and wife are resident in the same venue and the provisions of section 2 of the MCA 1970 appear *ex facie* to give a petitioner the unlimited right to institute proceedings in the High Court of any State of the Federation, the Court is however empowered under section 9(2) of the Act to exercise its discretion in appropriate cases and in the interest of justice to transfer such cases to a more convenient forum of both parties. In *Adegoroye v*

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[144] See also *Ani v Ani* (2002) 6 NWLR (Pt. 762) 166 C.A. Prior to the MCA, 1970, there were two schools of thought about Nigerian domicile namely Federal and National view as decided in *Nwokedi v Nwokedi* (1958) LLR 112 and State or regional view as decided in *Okonkwo v Eze (1960) NNLR 80; Adeoye v Adeoye* (1962) NNLR 63; *Marchi v Marchi* (1960) NLR 103. These two schools had their adherents until the MCA 1970 put the dichotomy into a quietus in its section 2(3). See also Divorce Act of Canada, 1968; the Family Law Act of Australia where there are similar provisions.

Adegoroye[145] the respondent as petitioner filed a divorce petition against his wife, the appellant, at the Benin High Court claiming dissolution of their marriage together with other ancillary reliefs. After pleadings had been filed, the appellant filed an application praying the court for an order transferring the divorce proceedings to the High Court, Lagos State. The said application was supported by a 13-paragraph affidavit in which the main reasons for the application were (i) that both the appellant and the respondent as well as their four children of the marriage were all resident in Lagos; (ii) that the appellant was an elderly woman of 65 years of age and would undergo great strain and stress in shuttling between Lagos and Benin if the matter was heard in Benin; (iii) that the appellant was a retired nurse, currently on a small monthly pension and could be financially inconvenienced by travelling to and from Benin for the hearing of the mater. The respondent did not file any counter-affidavit to controvert any of the stated averments but relied on legal arguments made by his counsel to the effect that the court had no power to make an inter-state transfer of cases; that the court could only make inter-state transfers by virtue of section 9(2) of the MCA Act, 1970. At the end of the argument, the trial court found that both the appellant and respondent were living in Lagos; that they were about the same age group and that they shall both suffer the same burden and held that the appellant has not been able to show an exceptional circumstance why the petition should be transferred to Lagos. It therefore refused the application and struck same out with no order as to cost. The appellant appealed to the Court of Appeal contending *inter alia* that the trial court failed to properly exercise its discretion in considering her application. Unanimously allowing the appeal, it was held *inter alia* that by virtue of section 2(1)(a) of the MCA, the High Court of any state in Nigeria has jurisdiction to hear and determine matrimonial cases instituted under the Act. It follows therefore that although there is no specific provision in the Matrimonial Causes Rules for the transfer of a petition for dissolution of a marriage from one

[145] (1992) 2 NWLR (Pt 433) 712 C.A.

High Court of a State to another, such power can be inferred since the entire country constitutes one jurisdiction under the Act. The court further held that going by the basic rule in non-matrimonial causes that a suit should be tried in the forum where the defendant lives or carries on business in order to facilitate the execution of judgement where a judgement is obtained against the defendant, one would expect that a forum in which both a petitioner and the defendant were resident was to be preferred to another venue in which none of the parties was resident. Also, in *Folorunsho v Folorunsho*[146] it was held that section 9(2) of the MCA entitles a trial Judge, after considering the interest of justice as involved in the Suit before him to transfer to anther court for trial and determination, the matrimonial suit in litigation before him and this can be done at any stage either on application by any of the parties or of its own motion. Thus the issue of transfer of a matrimonial suit under section 9 of the MCA is purely discretionary. In transferring such matters however, the court is enjoined to exercise its discretion judicially and judiciously and in the interest of justice.

Furthermore, section 7 of the MCA has also assigned two platforms upon which matrimonial causes may be instituted in the court by married women. The section provides that:

S. 7 – For the purposes of this Act-

(a) a deserted wife who was domiciled in Nigeria either immediately before her marriage or immediately before the desertion shall be deemed to be domiciled in Nigeria; and

(b) a wife who is resident in Nigeria at the date of instituting proceedings under this Act and has been so resident for a period of three years immediately preceding that date shall be deemed to be domiciled in Nigeria at that date.

[146] (1996) 5 NWLR (Pt 450) 612 CA

The implication of the provisions of section 7 therefore is that a Nigerian domiciled woman married to a foreigner for instance, is conferred with a Nigerian domicile when deserted for purposes of matrimonial causes while retaining her husband's domicile for other purposes. Similarly, a wife who is a foreigner herself and who has been resident in Nigeria for a period of three years, whether married to a Nigerian domiciled man or not, is also conferred with a Nigerian domicile for purposes of matrimonial causes. The rule that no person can have more than one domicile at the same time in this instance would now mean that no person can have mare than one domicile at the same time for the same purpose.[147]

Perceived Inadequacies in the Nigerian Law

The irresistible inference one would draw in the light of the present judicial approach to the ascertainment and application of the conflict of laws rules on domicile is that it has led to unpredictability of applicable laws in appropriate cases. Consequently, the concept of domicile is far becoming unrealistic and artificial on account of the unpredictability and of its endless species. In the candid words of a leading scholar, "most of the rules of this concept are no more than lawyers' elaborated technicalities quite unrelated to social needs and convenience."[148] There is no gainsaying the fact that the legal concept of domicile has created a lot of problems more than it has resolved in a number of cases in marriage laws as best illustrated in the case of *Ogden V Ogden*[149] and ought to be discarded forthwith.

Moreover, the continued application of the concept of unity of matrimonial domicile in Nigeria has no relevance to Nigerian situation and is far becoming anachronistic in contemporary Nigerian society. The concept is definitely not in consonance with the social realities of the Nigerian society whereby the union brought about by birth has always been

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147 See also *The American Second Restatement of Conflict of Laws* on the same point.

148 See Agbede, (note 3 above) p. 49

149 (1908) P. 46

considered to be stronger and more precious than that brought about by marriage. It is a concept that should no longer have a place in a legal system supposedly based on justice and equality of all citizens.[150]

Moreover, a major gap in the law concerning statutory marriage is the failure of the Marriage Act to specify the minimum age for marriage. The legal implication of the combined provisions of section 11(1)(b) and section 18 of the Marriage Act, which give validity to a statutory marriage of a female minor under the age of sixteen years once parental consent is sought and obtained, would appear to be that tacit approval is being given to the practice of child marriage that is prevalent in some communities, especially in the Northern States. Similarly, the absence of a common customary law rule on the minimum age of marriage is a major drawback of customary law marriage. Child marriage is not only socially and morally wrong; it is a bad practice for the participants as well as for the institution of marriage. Apart from the physiological problems of assuming marital responsibility and motherhood when the brain and the physical body is ill-prepared yet for such responsibilities, coupled with the health hazard of the risk of Vesico-Vaginal Fistula (VVF) which has been very prevalent in the Northern part of the country where the practice of child marriage is relatively rampant in the country, it also has the negative impact of denying the adolescent girls the privilege of education.

The distinction drawn between Nigerians and foreigners as regards capacity to contract a customary law marriage is no longer in accord with the emerging social realities of the contemporary Nigerian society.

Proposals for Reforms

The place of law as a continuing moral force in any community can only be secure if law possesses an element of growth such as will make it adaptable to new situations and to

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[150] See e.g. sec. 17(1) of the Constitution of Federal Republic of Nigeria, 1999 which provides that the State social order is founded on ideals of Freedom, Equality and Justice.

the constant shifting of social pressures which are inevitable in the society.[151] It is in this light that proposals for reforms of the current law are now enumerated as follows:

The Marriage Act ought to be amended to provide for a uniform minimum age of marriage in Nigeria. This would hopefully curb the incidence of child marriages in Nigeria whatever the personal law of the parties involved may permit.

Marriage of a child below the age of sixteen should be totally prohibited on account of under age. However, the provisions of section 11(1)(b) of the Marriage Act which requires written parental consent where either of the parties to an intending marriage, not being a widow or widower, is under the age of 21, ought to be amended to require parental consent where either of the party is above 16 but below 18 years of age in order to curb unwise marriages as well as reduce the incidence of marital instability. This would on the one hand balance competing cultural/religious interests with the general societal interest and more especially, the interest of the child.

The present barrier in the way of foreigners contracting a customary law marriage that is still applicable in some parts of Nigeria ought to be removed forthwith because there is no imaginable justification for it any longer.

There is need to bring some of the essential validity of the statutory marriage in conformity with the acceptable norm and the social realities of the Nigerian society. Issues such as for example, the impediment of subsisting marriage to another marriage of a man with a third party under section 11(1)(d) and section 33(1) of the Marriage Act or the prohibition of statutorily married spouses from subsequently contracting a customary marriage under section 35 of the Marriage Act have existed merely on the statute books as they are hardly adhered to or the punitive measures enforced. These marriages though "legally

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[151] See Mr. Justice Audney-Frazer, A., 'The Law and the Illegitimate Child' – Lecture delivered at Centre of Multi-Racial Studies, Cove Hill, Barbados, June 30, 1971, cited in H. Thompson-Ahye, 'The Relationship Between Social Change and the Law – The Concept of Family and the Child Born Out of Wedlock', *The International Survey of Family Law* (1997) 446.

invalid" are "socially valid" and this may well explain the relative paucity of case law on these matters. Issues of second concurrent marriages only arise as an issue mostly in inheritance claims to intestate succession.[152] Indeed, in most cases, the traditional customary marriage is accorded more significance than the statutory marriage with its monogamous nature which is generally regarded as an alien culture. For instance, in *Oloko* v *Oloko,*[153] in which the couple had earlier celebrated the statutory marriage in a London Registry and subsequently celebrated the customary law marriage in Nigeria, the husband averred at the trial that the second marriage under the customary law was celebrated to show the community that they were actually husband and wife. It is our view that what section 35 especially seeks to control, that is, by preventing and discouraging Nigerians from contracting a customary law marriage after a statutory marriage is a sheer waste of precious time and is ineffective. It is submitted that the section is a dead letter because it has been honoured more in its breach than in its observance. In the interest of social realities of the Nigerian community, that section ought to be repealed forthwith.

The concept of unity of matrimonial domicile still operating in Nigeria ought to be jettisoned as it has been done in other common law countries including England by the provisions of sections 1 and 3 of the Domicile and Matrimonial Proceedings Act, 1973 which have empowered any person of either sex aged 16 or married to acquire an independent domicile.[154]

Moreover, the provisions of section 7 of the Matrimonial Causes Act, 1970 which have assigned married women special domicile for purposes of seeking matrimonial reliefs are no doubt salubrious and it is a first step in the right direction. However,

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[152] See e.g. *Cole* v *Akinyele,* (1960) 5 F.S.S.C. 84; *Osho* v *Phillips* (1972) 1 All N.L.R. 276; *Salubi* v *Nwariakwu & Ors,* (1997) 5 NWLR (Pt. 505) p. 442; *Muojekwu* v *Muojekwu,* (2001) WRN, Vol. 27, p. 142; *Muojekwu* v *Ejikeme* (2000) 5 NWLR (Pt. 657) 402; *Bassey-Ita Okon* v *Administrator of Cross Rivers State* (1992) 6 N.W.L.R (Pt. 248) 473.

[153] (1956-61) W.N.L.R. 101

[154] The conception of matrimonial domicile finds no application in a number of countries such as Norway, Denmark and Russia.

independent domicile of the wife should not be limited to matrimonial causes but should be all-inclusive especially in situations where the wife has separated, divorced or has been deserted by the husband. This would no doubt give a measure of relief to married women who may find themselves in any of these unpleasant situations. However, it is in the interest of justice that the same opportunity be given to "deserted husbands" who have been so resident in Nigeria for the same number of years. In *Bhojwani v Bhojwani*[155] the appellant/petitioner was born in Singapore while the respondent was born in Lagos. Both of them were of Indian stock. The appellant has however been in Nigeria since 1979 for business purposes. The marriage between the parties was solemnized in England in accordance with the English Law. The appellant filed a petition for divorce in the High Court of Lagos State. Against this petition, the respondent brought a motion seeking an order that as the appellant was not domiciled in Nigeria, the High Court of Lagos or any High Court in Nigeria for that matter had no jurisdiction to hear the petition for the dissolution of the marriage. The trial Court ruled that it had jurisdiction. On appeal, by the respondent against the Ruling, the Court of Appeal set aside the Ruling of the trial Court and held that the petitioner was domiciled in Singapore and not in Nigeria as claimed by him. The appellant's appeal to the Supreme Court could however not be concluded so as to give opportunity to the apex Court to rule on the petitioner's domiciliary status and the consequential jurisdiction of the Nigerian Court because whilst the Nigerian Courts were busy pursuing the issue of jurisdiction, the respondent had filed her own petition for divorce in an English Court based on residence qualification and had been granted a decree nisi for the dissolution of the marriage. Undoubtedly, the legal position of the petitioner in the instant case would have been incontrovertible if there was a similar law to give special domicile to deserted husbands as it has been given to deserted wives.

[155] (1996) 6 NWLR (Pt. 457) 661