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RESEARCH ARTICLE:

The Concept of Domicile in Matrimonial Causes in Nigeria: A Critique of the Status Quo

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Abstract

Proof of domicile is a condition precedent to the assumption of jurisdiction by High Courts in Nigeria. Under the Nigerian legal framework, it is the husband's domicile that matters in matrimonial causes. The wife is incapable of independent domicile. Women have always suffered untold hardship because of this rule. The husband seems to be at liberty to institute matrimonial proceedings anywhere he is domiciled with disregard to the wife's convenience. This research highlighted the difficulties confronting women as a result of this gender-insensitive mode of determining domicile in a matrimonial dispute. The paper employed the black letter research methodology and comparative learning to develop more effective and acceptable tests for determining domicile in matrimonial causes in Nigeria. This research concludes by recommending that the parties to the marriage's connecting factors, such as residence and convenience should be used in determining jurisdiction as opposed to solely the husband's domicile.

Keywords: *domicile; connecting factors; jurisdiction; habitual residence; matrimonial causes*

Introduction

Domicile is a prerequisite to the commencement of matrimonial causes in common law jurisdictions. A married woman's domicile is dependent on her husband's domicile (Latey, 1965) and the domicile of the children of the marriage is the same as the domicile of origin of their father (Collins, 2006). The concept of domicile is of common law origin, it is a significant connecting factor to the desired jurisdiction and legal system (Pitel *et al.,* 2022). Under the common law, the domicile of the husband is deemed to be the domicile of the wife even when the marriage is on the rocks or when the parties are already separated and not living together. This situation is described by Lord Denning as "*the last barbarous relic of a wife's servitude*" Gray v Formosa (1963: 267). The onus of proving domicile lies on the person alleging, otherwise, this will be the wife in most cases since the husband's domicile is the significant test of ascertaining jurisdiction (Grossi, 2014).

This has posed difficulties for women over a long and sustained period. The domicile rule is linked with the husband's domicile irrespective of the choice of domicile of the woman or regardless of where she works and lives. It has severely occasioned hardship for women. For example, even where the husband and wife are separated, and the wife does not know the domicile of the husband or has no connecting factor to the husband's domicile and lives in a different jurisdiction, the husband may still proceed to commence matrimonial causes dispute in his preferred chosen domicile. At other times the husband keeps changing his domicile to avoid the divorce proceedings thereby making the service of court process difficult and burdensome for the wife to attend court sessions. This rule falls short of treating women as chattel incapable of domicile independence (Abrams, 2013). The domicile rule has also produced divergent and contradictory jurisprudence in Nigeria. Unfortunately, the common law principles in relation to domicile have been incorporated into the Matrimonial Causes Act 1970 and

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remain so to date. Section 2(2) of the Matrimonial Causes Act confers jurisdiction on the High Court of a State in Matrimonial causes for the dissolution of marriage, nullity of a voidable marriage, nullity of a void marriage, judicial separation, restitution of conjugal rights and jactitation of marriage. However, some common law countries have abolished the application of the common law concept of domicile in their jurisdictions. For example, Australia, Canada, New Zealand and the United Kingdom have abolished the common law concept of domicile in their jurisdictions for being inconsistent and chauvinistic (Pitel *et al.,* 2022).

This paper is divided into five segments. The first segment is introductory. It focuses on the meaning of domicile in Nigeria and under the common law. This section also highlights the importance of domicile in matrimonial causes. The second segment evaluates judicial decisions based on the concept of domicile under the common law and the Nigerian Matrimonial Causes Act. The third segment is a comparative study that interrogates the domicile rule in Canada, the United Kingdom and the EU. The fourth segment highlights the lessons to be learned from practices in other jurisdictions and recommends that the Matrimonial Causes Act be amended to recognize and affirm the right of a woman to independent domicile. The fifth segment concludes.

Analysis of Domicile as a Legal Concept

A domicile is acquired at birth and everyone has a domicile because some rights, obligations and liabilities depend upon a domicile, no one can be left without a domicile. It is generally acknowledged that domicile may change from time to time but domicile is distinct from residence or habitual residence. One can have dual citizenship but only one domicile at a time. Hence, domicile is distinct to nationality or residence. Domicile is the home of a person, Whicker v Hume (1858). In Mark v Mark (2005: 42), Baroness Hale held that:

> "*domicile…is a concept of the common law. A person must always have a domicile but can only have one domicile at a time. Hence it must be given the same meaning in whatever context it arises...it governs capacity to marry or to make a will relating to moveable property; it is one of the factors governing the formal validity of a will; the domicile of the deceased also governs succession to moveable property and is the sole basis for jurisdiction under the Inheritance (Provision for Family and Dependents) Act 1975; legitimacy, to the extent that it is still a relevant concept, is governed by the law of the father's domicile...*"

Domicile is different from residence, in Omoniyi v Omoniyi (2000: 31-34), the Nigerian Court of Appeal held that the fact that the petitioner moved to the United States of America in 1988 to work there as a medical practitioner, returned to Nigeria in 1993, and shortly afterwards left back to the United States does not make him to be domiciled in the US. Moreover, he has not taken up the citizenship of the US. Adekeye JCA held: "Domicile is not residency and a person is not domiciled in a particular place simply because he is resident there". It was further held in Koku v Koku (1999: 672) that:

> "*Jurisdiction of Court to hear a divorce petition is governed by the domicile of the husband and not by the residence of the husband. And by operation of law, a married woman, on marriage, takes on the domicile of her husband. Consequently, the Court with jurisdiction to adjudicate on a divorce matter is the Court of the domicile of the husband*"

Importance of jurisdiction in matrimonial cases in Nigeria

Section 2(2) of the Matrimonial Causes Act Cap. 220 Vol. XII of the Laws of the Federation, 1990 provides that for a court to assume jurisdiction in Matrimonial Causes in proceedings for a decree of dissolution of marriage, nullity of a voidable marriage, nullity of a void marriage, judicial separation, restitution of conjugal rights or jactitation of marriage, the suit is to be instituted only by a person domiciled in Nigeria. Section 2(3) of the MCA further provides that a person domiciled in any State in Nigeria may institute matrimonial causes in the High Court of any State regardless of whether or not such person is domiciled in that particular State. In essence, for the court to assume jurisdiction in a matrimonial causes matter, the Petitioner must be domiciled in Nigeria without which the court would be precluded from assuming jurisdiction. Jurisdiction is the life-wire of litigation. Proceedings conducted in the absence of Jurisdiction amount to a nullity. It is trite that a court is only vested with jurisdiction when the following conditions exist: there must be proper parties before the court, the subject matter must be within the court's competence, the composition of the court in terms of qualification and members must be appropriate, the suit must be commenced by due process of law and upon fulfilment of any conditions precedent to assumption of jurisdiction. All of these conditions must be satisfied otherwise the court will lack jurisdiction to entertain the suit Madukolu v Nkedilim (1962: 341). In Dr. Roy Pedro Ugo v Augustina Chinyelu Ugo (2017: 10) Ejembi Eko, J.S.C.:

> *"The Petitioner by coming to Nigeria to take up the divorce proceeding even though both himself and the respondent in the petition were domiciled in the USA, he was guilty not only of "international (forum) shopping" which is an aspect of abuse of Court process, but also that he had come to the Nigerian Court that was without jurisdiction".*

In Dr. Joshua Omotunde v Mrs. Yetunde Omotunde (2000), Oyelola Adekeye, JCA held:

> "*The basis of jurisdiction in matrimonial causes under the Matrimonial Causes Act, 1970, is domicile. It is the domicile of a person that confers jurisdiction on the Court to entertain his or her petition for dissolution of marriage. Where the domicile of a petitioner is not established the Court will lack jurisdiction to decree a dissolution of marriage.* Osibamowo v. Osibamowo (1991); Bhojwani v. Bhojwani (1995). *The issue of the domicile of the petitioner forms the foundation or pivot of adjudication in this petition. Jurisdiction in this regard is normally territorial. Where a petitioner is supposed to be domiciled in Nigeria, and he is domiciled in another country, jurisdiction of the court anywhere in Nigeria is not applicable. Where a Court lacks jurisdiction it lacks the necessary competence to try the case*".

It is clear from the above judicial decisions that for the Petitioner to commence a divorce petition in Nigeria such a petitioner must be domiciled in Nigeria and where there is a conflict between the domicile of the husband and the wife, the domicile of the husband takes priority because strictly speaking, under the Nigerian legal framework, domicile of the husband takes priority over the domicile of the wife. See Koku v Koku (1999).

Classification of domicile

i. Domicile of origin

Every child acquires a domicile of origin at birth. It is acquired through the domicile of the father. It is not established based on residence or place of birth (Fentiman, 1986). However, the domicile of a child without a parent is the domicile of where the child is found (Uddin, 2018).

ii. Domicile of choice

An adult is entitled to voluntarily change his domicile. He may acquire a domicile of choice until the domicile of choice is acquired, the domicile of origin subsists" (Fentiman, 1991). "And while the intention of the party is important in that the intention to make a home in a place must coincide with his physical presence there, no one would question that both elements are necessary to make a legal domicile. Domicile cannot ordinarily be established by intent alone, and it seems to be granted that in the absence of evidence of intention to the contrary, the parties are presumed to take the husband's domicile as their matrimonial domicile," (Goodrich, 1917: 50). A domicile of choice arises "when a man fixes voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time, (Collins, 2006: 12) as Lord Justice Buckley outlined in IRC v Bullock (1976). In Udny v Udny (2001) the court held:

> *"Domicile of choice is a conclusion or inference which the Law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. To acquire a domicile of choice, a person must reside in a country with the fixed intention of settling there and making it his or her sole or principal home for an indefinite period. Residence simply means 'physical presence in a country as an inhabitant of it. Having acquired a domicile of choice, a person retains it until it is abandoned. Once abandoned, it is possible to acquire a new one. But if there is a hiatus, the domicile of origin revives. Abandonment only takes place when the person has left the country with no further intention of ever residing there again".*

It has been established that residence does not exclusively determine domicile but a long period of residence may show an indication that the petitioner intends to reside permanently in the country. In Lefevre v Lefevre, Taylor CJ held that the Petitioner acquired a domicile of choice in Nigeria, Domicile of choice replaces the domicile of origin in a sense, at least for divorce proceedings, in order to establish the divorce jurisdiction. In Lefevre v Lefevre (1974), the petitioner, a Frenchman had lived in Nigeria since 1947 and married a Scottish Lady here. On the question of whether a Nigerian Court had jurisdiction to dissolve the marriage. Taylor CJ found that the petitioner had acquired a Nigerian domicile of choice having lived in Nigeria for a period of 35 years.

Residence in a country for a long period of time may evince the intention to reside permanently in such country thereby proving the two factors instantaneously. Albert per Taylor CJ, it was held that the petitioners in the case had acquired a domicile of choice having lived in Nigeria for 35 years. In Ugo v Ugo (2008: 25) per Adekeye JCA (as she then was), the Court of Appeal held thus: "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". The court held that parties who had acquired US citizenship had acquired the US as their domicile of choice. It behoves the court to also look at the intention of a person who jumps from one place to another to seek a divorce. Also see the case of Omotunde v Omotunde (2001) in this case the petitioner, had been consistently domiciled in the United States of America since 1993 up to the time he filed his petition on the 21st day of April 1998, the court held it could not be said of him that as at 21st day of April 1998 when he was filing his petition through his learned Counsel, he was domiciled in Nigeria. These principles are further explained in the case of Mark v Mark (2005) where the concern was about a husband and wife who were Nigerian nationals. The wife filed a divorce petition and also applied for ancillary relief in England. The issue was whether the court had jurisdiction over Nigerian citizens. It was held that the wife has the domicile of choice or habitual residence in England. It is stated in Mark v Mark (2005) case that domicile of choice is not a question of law but fact. It requires the combination and coincidence of residence in a country and a bona fide intention to make a home in that country indefinitely.

Determining domicile

Domicile is a requisite criterion for the assumption of jurisdiction in matrimonial causes proceedings for a decree of dissolution of marriage and divorce proceedings can only be instituted by a person domiciled in Nigeria before a High court can assume jurisdiction applicants must be domiciled in Nigeria. Domicile is the only basis on which a High Court can assume jurisdiction in statutory marriage. See Section 2(2) of the Matrimonial Causes Act 1970. Domicile is the home address of the parties. See Sodipo v Sodipo (1990). The court will only have jurisdiction in matrimonial proceedings if the parties are domiciled within the jurisdiction of the court. See Osibamowo v Osibamowo (1991. Every individual has at all times a domicile. It is trite that a person can only have one domicile at any given point in time. See Kelly v Pyres (2018). If a new domicile is obtained by choice, the previous domicile is no longer applicable. See Moorhouse Ltd v. Lord (1863) per Lord Chelmsford. Everyone has a domicile, there is no individual without a domicile. There is only one domicile for everyone at a time. No one can have more than one domicile at a time. A domicile subsists until another domicile is acquired.

Evaluation of judicial approaches on domicile

Prior to the enactment of the Matrimonial Causes Act, there were divergent views and jurisprudence on factors to consider in establishing domicile under the matrimonial proceedings. The Federal/National school's perspective is reflected in the case of Nwokedi v Nwokedi (1958) while the State/Regional perspective is reflected in the cases of Okonkwo v Eze (I960) (Hurley, C.J.). This dichotomy continued until the enactment of the Matrimonial Causes Act. 1970. Section 1(1) of the MCA provides that "after the commencement of this Act, matrimonial causes shall not be instituted otherwise than under this Act". The MCA confers jurisdiction in the Matrimonial Causes on State High Courts including the High Court of the Federal Capital Territory. The differing judicial perspectives have now been resolved through the intervention of sections 2 (3), 7 (a) and (b) of the Matrimonial Causes Act. Domicile is now the test of jurisdiction. Section 2 (3) MCA provides that:-

> *"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 Decree and may institute proceedings under this Decree in the High Court of any State whether or not he is domiciled in that particular State".*

Thus, this provision has established a uniformity of domicile in Nigeria. In Awonusi v Awonusi (2015) Mohammed Ambi-Usi Danjuma, JCA emphatically held: "I wish to emphasize that in matrimonial causes, the entire country is seen as one single jurisdiction. Every State's High Court is competently clothed with jurisdiction to entertain and determine any issue of matrimonial cause irrespective of where the matter arose". It is noted, however, that while it has resolved the dichotomy of judicial perspectives on the proper court between states, region and federal, it has created further problems. Spouses now deliberately window-shop judicial forums for personal and selfish purposes to upset the other spouse. Spouses now go outside their matrimonial homes and judicial divisions to commence proceedings in judicial divisions where they have no connections enabled by the principles of uniformity of domicile evident in the legal provision, that a person domiciled in Nigeria may institute matrimonial proceedings in the High Court of any State. This provision gives the liberty to a Petitioner to commence matrimonial causes proceedings

in the judicial divisions outside their matrimonial homes or judicial divisions where they are not ordinarily residents. For example, in the case of Ibru-Stankov v. Aleksandar Stankov (2016: 55-56) the husband to the irritation and annoyance of the wife instituted the divorce proceedings in Owerri rather than in Lagos where both parties live and reside.

Section of the 7 MCA however 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. See* Zaneli v Zaneli (1948: 356)

The intendment of this section is to offer protection to a wife whose husband has deserted or abandoned her while the husband has gone ahead to acquire another domicile of choice in which case the wife would have lost her domicile in Nigeria in accordance with the common law principle of domicile. That would have made the wife incapable of petitioning for divorce in Nigeria. This section now offers protection to the wife to be able to commence matrimonial causes in Nigeria. Nevertheless, the most fundamental problem subsists, why would the wife's domicile be made dependent on the husband's domicile? Is the wife a chattel that is incapable of independent domicile?

The High Court however appears to have the power to transfer the matter to a more convenient forum for the parties. However, before the court can transfer the matter, it is important that the Respondent registers a complaint before the court. See section 9(2) of the Matrimonial Cause Act, 1970. In Adegoroye v Adegoroye (1992) where both parties live and reside in Lagos but the Petitioner commenced matrimonial proceedings in Benin, the Respondent who was a retired Nurse of about 65 years old prayed that the matter be transferred to Lagos where both parties live, the Court of Appeal held that the trial judge ought to have transferred the case from Benin City to Lagos. See also Folorunsho v. Folorunsho. (1996). The Court of Appeal acknowledged that Matrimonial Causes in Nigeria have a uniform jurisdiction and that transfer of matrimonial causes is purely discretionary and dependent on the fact of each case but a jurisdiction where both parties live and reside should be preferred to other jurisdictions. Ita George Mbaba, J.C.A showed judicial empathy for women in Ayeverhuvwu Oduvesiri Vivi Ibru-Stankov v Aleksandar Stankov (2016: 55-56) supporting the perspective held by Akpabio J in Adegoroye v. Adegoroye (1992: 712) that a forum in which both the Petitioner and the Defendant were resident should be the convenient forum for matrimonial causes instead of a forum where none of the parties is resident.

> *"It is, indeed, curious that the Respondent, who resided with his wife and children in the same address at 2/4 Mosely Road, Block BPH-7, Ikoyi, Lagos, decided to leave Lagos State (where their marriage was also contracted) and came, all the way, to Owerri Imo State, passing over 5 States, in between, to institute divorce proceedings against his wife. And he manipulated the service processes, to ensure that the wife was kept "incommunicado" and away from knowing the mischief he planned, in the name of the law, as he deceived, misled and goaded the trial Court to grant him order nisi to dissolve their marriage, which later became absolute, and to grant him custody of the children of the marriage".* (Akpabio J., Adegoroye v. Adegoroye (1992:712)

However, in another breath, in the same judgment. Ignatius Igwe Agube, JCA (47-49, para. C-C) expressed the view that "the Petition ordinarily ought not to have been initiated/instituted in Owerri rather than Lagos where both the Petitioner and Respondent reside or where the Defendant resides and does business. With the provisions of Section 2 of the Matrimonial Causes Act, the Petitioner had the right anyway to institute the action in Owerri …or 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." In Ayorinde v Ayorinde (2023) the husband Petitioner, the Respondent and the children of the marriage all have permanently settled in Texas and are US citizens. The Petitioner has lived in the US for upwards of 20 years. They all permanently live and work in Texas, USA. The Petitioner and the Respondent's resident cards were exhibited, their US passports and allegiance of Oath to the US were all exhibited. The children permanently school in Texas, USA. Why then will the Petitioner surreptitiously

come to Nigeria to file a divorce behind his family? And lay claim to the domicile of origin in Nigeria? The only explanation is that he thinks he can get away in Nigeria with things he cannot get away with in Texas, USA. In Ugo v Ugo per Ejembi Eko, JSC, the Supreme Court held that a husband who filed divorce proceedings in Nigeria even though he and his wife were domiciled in the USA, was guilty not only of "international (forum) shopping, which is an aspect of abuse of court process", and the Nigerian court lacked jurisdiction. In these circumstances, such Petitioners cannot be said to be domiciled in Nigeria, simply to seek a better divorce deal.

Comparative Analysis: Determining Domicile in Canada, EU and the United Kingdom

This segment interrogates the practices in Canada, the EU and the United Kingdom because the selected jurisdictions shared a common law legal heritage and their laws on matrimonial domicile have evolved from laws with similar provisions to the Matrimonial Causes Act applicable in Nigeria which forms the subject matter of this discourse.

Canada

In the Canadian legal jurisdiction, domicile has the basis for connecting factors and jurisdiction has since changed under common law choice of law rules and legislation (S. 104 Family Law Act, S.A. 2003, c. F-4.5, Alberta Canada). In Davies v Davies (1985), a case for a petition for the nullity of a voidable marriage. The wife commenced the Proceedings in Alberta where she was permanently living. However, the husband was domiciled in Ontario. Under the common law, the domicile of the wife is dependent on the domicile of the husband. In determining, whether to assume jurisdiction, McDonald J, held that since the legislation in Ontario had abolished the married woman's domicile of dependence on her husband, the wife should be regarded as having a domicile of choice in Alberta and not a domicile of the husband in Ontario. There have been several statutory interventions in Canada in relation to the concept of domicile (Robertson, 2010) S. 59(1) of Prince Edward Island's Family Law Act states that "a married person has a legal personality that is independent, separate and distinct from that of his or her spouse". Under S.3 (1) of the Divorce Act, R.S.C. 1985 (2d Supp.), the assumption of jurisdiction in matrimonial causes is no longer based on husband domicile but is based on the concept of ordinary residence. In addition, in relation to the division of property and child custody in many provinces across Canada jurisdiction is now based on the concept of habitual or ordinary residence. S. 3 (1) Divorce Act, RSC 1985, c 3 (2nd Supp)"A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been habitually resident in the province for at least one year immediately preceding the commencement of the proceeding"(1967:540) 3 WLR 510. See S.3 Children's Law Reform Act, R.S.O. 1990, c. C-12, S.3 of the Matrimonial Property Act, R.S.A. 2000, c. M-8, section 67 of the Family Law Act of Ontario and s 22 (1) Divorce Act.

The EU and United Kingdom

The criteria that are being used to determine domicile in the EU countries differ from the common law criteria discussed above. The Brussels I Regulation, Regulation (EC) No 1347/2000, has been repealed by Regulation (EC) No 2201/2003 (the 'Brussels IIa'). Further, recast with Regulation (EU) 2019/1111 (Brussels IIa Recast Regulation), which becomes applicable as of 1 August 2022, as well as its successors, set out rules for determining domicile in matrimonial causes, and civil and commercial matters. To ensure predictability in legal proceedings and prevent forum shopping, these regulations seek to create a unified legal framework for member states. In the EU, Regulation (EU) 2019/1111 (Brussels IIa Recast Regulation), Article 3 states that in any matter relating to matrimonial causes, including divorce, legal separation or marriage annulment, jurisdiction is vested in the courts of Member States. Factors to consider in ascertaining the domicile of the spouses include habitual residence within the jurisdiction of the Member State. Habitual residence is a significant connecting factor for determining domicile and applicable laws to matrimonial causes in the EU. The court will be able to assume jurisdiction if either of the spouses resides in the Member state. The Petitioner will be deemed to be habitually resident if he or she resided within the jurisdiction of the Member State for at least a year immediately before the commencement of the matrimonial proceedings, where the Petitioner is a national of the Member State, he or she needs to have habitually resided within the Member State for at least six months immediately before the commencement of the matrimonial proceedings. It is noteworthy that this provision giving context to habitual residence is an improvement of the previous Regulation (EC) No 2201/2003 failed to define or provide guidance to the court to determine what constitutes habitual residence (Hilbig-Lugani, 2017). Thus, leaving the Member States' courts a margin of appreciation to give context to habitual residence. Habitual residence is generally understood to mean "settled

practice or usual," Oundjian v Oundjian. In Nessa v. Chief Adjudication Officer (1999). Lord Slynn of Hadley quoting Lord Brandon In re J, said, on page 578:

> "*In considering this issue it seems to me to be helpful to deal first with a number of preliminary points. The first point is that the expression 'habitually resident,' as used in article 3 of the Convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B. The fourth point is that, where a child of J.'s age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers*".

His Lordship finally held that the fact of each case should be investigated to determine whether the residence of a party to the suit could be accepted as habitual or settled or the residence has some degree of continuity. In Indyka v Indyka (1966: 1) the House of Lords decision assumed jurisdiction on the basis of a real and substantial connection to the court and held 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*"

In the United Kingdom, the Domicile and Matrimonial Proceedings Act 1973 abolished the husband-dependence rule for women and also reformed the rules dealing with the domicile of minors in the United Kingdom. A married woman can now independently assert her domicile. A married woman is now recognized as a distinct person who can voluntarily determine her domicile. She may choose to retain her husband's domicile by choice and she also enjoys the liberty to change her domicile by choice. Ascertaining the wife's domicile for the purposes of matrimonial jurisdiction will be by reference to the same connecting factors as in the case of any other individual capable of having an independent domicile, including her habitual residence and intention. See sections 1 and 3 and 5(2) of the Domicile and Matrimonial Proceedings Act, 1973. Under the Domicile and Matrimonial Proceedings Act 1973 there are only two grounds for the court to assume jurisdiction in matrimonial proceedings in the UK. The Petitioner or the Respondent is required to be:

a) Domiciled in England at the date of commencement of the proceedings; or be
b) Habitual residence in England throughout the period of one year ending with that date.

Where the Applicant is from an EU country that is a Signatory to Article 3(1) of Brussels II revised on Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, the parties must be domiciled in England and Wales, it is sufficient to found jurisdiction in accordance with Section 5(2)(b) of the Domicile and Matrimonial Proceedings Act 1973, without the need to establish a residence. This Regulation applies to all European Union member states with the exception of Denmark. However, where the Applicant is resident outside an EU signatory country, the Applicant can only commence proceedings in England and Wales, it is sufficient to find jurisdiction in accordance with Section 5(2) (b) of the Domicile and Matrimonial Proceedings Act 1973, "if no court of a contracting state has jurisdiction under the Council Regulation and either of the parties to the marriage is domiciled in England and Wales on the date when the proceedings are begun, the English court has jurisdiction." The Applicant from outside the EU countries must prove that either one of the parties is domiciled in England and Wales, for the court to assume jurisdiction under Section 5(2) (b) of the Domicile and Matrimonial

Proceedings Act 1973. In addition, the court is required to consider whether the Applicant has sufficient connection with England and Wales for the court to be able to assume jurisdiction.

Another significant legal principle the courts in the EU and the UK take into consideration in the assumption of jurisdiction in matrimonial causes is the concept of Forum Non Conveniens which relates to the discretionary power of a court to decline to hear a matter because it would be convenient for another court or forum to hear the matter, particularly where there might be a potential conflict of laws or jurisdiction between courts in different jurisdictions and legal regimes. The principle emphasises that for the interests of all the parties to the matrimonial cause and in the interest of justice the matter should be tried in a more convenient forum or court, see, Clements v. Macaulay [1866] 4 Sess. Cas. (3d ser.) 583. In deciding on the most convenient jurisdiction, the court will take into consideration the residence of the spouses, the interest of the children, the location of witnesses, the ease of accessing the court, undue hardship to the defendant, vexatious motive, malice and the location of evidence. The principle of Forum Non Conveniens is interrogated in Hallam v Hallam (1992). Waite J held that the welfare of the children was the paramount consideration. Waite J further provided a useful list of some factors the court will consider in deciding upon jurisdiction which include: the financial means of the parties, their ability to obtain legal representation, the relevance of expert evidence and the means of providing it within the competing jurisdiction and the likely dates of hearing. Other considerations include the connection of the children and parties with each jurisdiction.

Findings and Lessons from Other Jurisdictions Discussed Above

The concept of domicile, as conceived under the common law and the Nigerian jurisprudence is fundamentally defective, oppressive and patriarchal. It urgently needs significant reforms (Grossi, 2014). The present position in Nigeria is that the domicile of a married woman is the same as, and changes with, the domicile of her husband. It was held in Koku v Koku (1999) that the jurisdiction of the Court to hear a divorce petition is governed by the domicile of the husband and not by the residence of the husband. And by operation of law, a married woman, on marriage, takes on the domicile of her husband. Consequently, the Court with jurisdiction to adjudicate on a divorce matter is the Court of the domicile of the husband Bhojwani v Bhojwani (1996). This is an affront to and violation of sections 15 (2) and 42 of the Constitution of the Federal Republic of Nigeria 1999 that protects against discriminatory practices against any citizen of Nigeria on the basis of belonging to a particular community, ethnic group, place of origin, sex, religion or political opinion. The law of domicile in Nigeria accords privileges to the husband that it does not accord to the wife. This is a classic example of gender discrimination. The practical application of the rule of domicile in Nigeria favours men to the exclusion of women. This rule promotes inequality between the sexes and promotes a chauvinistic attitude against the wives in matrimonial proceedings.

The impropriety of this common law rule affirmed in Koku v. Koku militates against women and is repugnant to natural justice, equity and good conscience. Condemning similar discriminatory practices against women in Anekwe and Anor v Nweke (2014) Ogunbiyi, JSC (36-37, paras. B-D) in strong words held:

> *"I hasten to add at this point that the custom and practices of Awka people upon which the appellants have relied for their counterclaim is hereby out rightly condemned in very strong terms. In other words, a custom of this nature in the 21st century societal setting will only tend to depict the absence of the realities of human civilization. It is punitive, uncivilized and only intended to protect the selfish perpetration of male dominance which is aimed at suppressing the right of the womenfolk in the given society. One would expect that the days of such obvious differential discrimination are over… Any culture that disinherits a daughter from her father's estate or wife from her husband's property by reason of God instituted gender differential should be punitively and decisively dealt with. The punishment should serve as a deterrent measure and ought to be meted out against the perpetrators of the culture and custom. … It is indeed much more disturbing especially where the counsel representing such perpetrating clients, though learned, appear comfortable in identifying, endorsing and also approving of such a demeaning custom".*

Similarly, in Ukeje v. Ukeje (2014) the Supreme Court condemned laws which discriminate against women and held that such practices that discriminate against women are in breach of S. 42 of the CFRN 1999 as amended.

Conclusion

From the above discourse, it is apparent that the Nigerian legal framework needs to urgently address the difficulty and hardship being experienced by the defendant-spouse in matrimonial cases in Nigeria, particularly the hardship being suffered by women because when there is a conflict of domicile, the domicile of the husband prevails as the woman is perceived as incapable of having independent domicile. The difficulty of how to properly deal with a Petitioner who elects to sue the Respondent in a court which, although has jurisdiction nevertheless unsuitable and undesirable from the point of fairness to the parties, including the Respondent and the Children is best illustrated in Ayorinde v. Ayorinde above cited, the case is indicative of the hardship spouses are facing in defending matrimonial causes. In that case, a Nigerian High court was called upon by the Petitioner who is a US citizen and has lived and worked in the US for upwards of 20 years, to make a pronouncement over the custody of the children of the marriage who were US citizens, live and school in the US. And the court was going to be urged to make orders with respect to the maintenance of the Respondent who is also a US citizen, live and work in the US and the children of the marriage or the custody of or access to children. It would be more appropriate and convenient to litigate this matrimonial dispute in the US. This is based on the facts that the parties permanently live and work in Texas, USA; the children of the marriage habitually reside and school in Texas, USA; the children are at all material times located in Texas, USA.

It is in the interests of justice that the case be dealt with in the US. See also Ibru-Stankov v. Stankov above cited, where both parties habitually reside in Lagos and the husband deliberatively commenced the divorce in Owerri to cause the wife some hardship. In sum, the common law rule codified in the Matrimonial Causes Act that the wife does not have an independent domicile is an ancient rule that should be abolished. Using the husband's domicile without consideration to the wife, for ascertaining jurisdiction has produced problematic judicial outcomes as shown in the cases analysed above. It is a chauvinistic attitude and discriminatory against women and children. In addition, it violates the principle of non-discrimination in S.42 of the CFRN 1999 and other international instruments. The Supreme Court has also in the highlighted jurisprudence in this discourse, frowned at legal instruments and cultural practices that discriminate against women. In addition, as has been discussed above, Canada, the EU, and the UK are also common law countries, which have abolished the anachronistic common law rule that deprives a woman of independent domicile. This paper recommends that the Matrimonial Causes Act be amended to recognise the independent domicile of the woman and to recognise and incorporate the principle of habitual residence of the spouses and the doctrine of forum non-convenience to prevent women and the children of the marriage from enduring further hardship.

Declarations

Interdisciplinary Scope: This paper integrates perspectives from the humanities to analyse and explore the effect of an inherited and retained patriarchal-centred legal concept that gives priority to the husband's domicile in determining jurisdiction in matrimonial causes. This outdated legal concept has inflicted untold hardships on women by perpetuating gender inequalities. This paper proposes credible alternative considerations for determining jurisdiction in matrimonial causes in Nigeria.

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