



CHALLENGES OF PROVING CHANGE OF CUSTOMARY PERSONAL LAW IN INTESTATE SUCCESSION IN NIGERIA: RE-VISITING *OLOWU .V. OLOWU* AND THE CONCEPT OF ACCULTURATION

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Abstract

The rules governing change of personal law are usually domicile, change of nationality or change of religion depending on the nature of personal law. However the Supreme Court of Nigeria in *Olowu v. Olowu* recognised that personal law could also be changed by the adoption of a new culture; a process described by the Supreme as culturalization/acculturation. In spite of the innovation introduced through this decision, the decision did not include a proper criteria for determining when a person could be said to have changed his culture. This paper therefore examined the general criteria for change of personal law under the conflict of laws and their relevance to change of customary law. The study found that while the principle of acculturation is an important innovation, the absence of clear guidelines for its application could impair its effectiveness. It was recommended that other principles that are used to determine change of personal law under conflict of law rules have become fairly certain having benefited from long usage and consistent judicial pronouncement. Acculturation on the other hand has not accrued the benefits of long usage. However leaving its subsequent development to judicial pronouncement could further complicate its development. It is therefore recommended that legislative intervention is necessary to regulate its development. This would ensure consistency and certainty of the law.

Key Words: Change of Personal Law; Acculturation, Intestate Succession, Nigeria

A. Introduction

The right of an individual to change his personal law is well-recognised under international law. This could be achieved through change of nationality, change of domicile and change of religion (depending on the system of law governing the

individual's personal law). In customary law systems however, the right to change personal law is not usually well-conceived. In Nigeria, it was not generally recognised that an individual whose personal law is determined by tribal connection to a particular community could change his



personal law. This is because it is pre-supposed that such change can only be arise through a change of tribe or community. Given that membership of tribes and communities are determined by biological factors, this right has not been historically recognised under customary law.¹

B. Problem Statement

The Supreme Court of Nigeria in *Olowu v. Olowu*² however opened up the opportunity for a divergence from the traditional approach when it formally recognised the right of indigenous Nigerians to change their tribal affiliation and by implication their customary personal

personal law through the process of long settlement and assimilation of a non-indigene into a community other than the one into which they are born. This process likened by the Supreme Court to the process naturalization was described as culturalization.

While the benefits that are accruable from the process of culturalization have been well-conceived, particularly its ability to promote national integration, its limits and requirements for its proof have not been provided. This can be attributed to the fact that while the decision in *Olowu v. Olowu* has been acclaimed has an important

¹Sagay for example noted that before the decision in *Olowu v. Olowu* (1985) 3NWLR pt.3 372, the ability of persons subject to customary law to change their ethnic group and by implication their personal law was not recognised was not recognised under the law. He noted that there was a perception of permanence of the connection of an individual with his tribe of origin notwithstanding long settlement. He attributed this to the fact that no matter the length of settlement of a family in an alien area, “..the settler family would retain links with its motherland...The dead of the family would still be conveyed home for burial” see I.E. Sagay, ‘The dawn of Legal Acculturation in Nigeria- A Significant Development in Law and

National Integration’ *Journal of African Law* (1986) p.179 see also Tanyi Mbeng Dickson and Ntoko Ntonga Rene, ‘ Conflict of Law in the Management of the Deceased’s Estate under Cameroonian Law’ (2020) p.6 available <https://SSRN.com/abstracts-3705365> accessed 20th Dec. 2024 , it was observed by them that in Cameroon most settlers do not fully get integrated in their host communities, this can be seen in constant pattern whereby Tribal Unions of settlers are created. In addition when settlers die, their remains are conveyed back to their ancestral homes/villages for burial.

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development in Nigerian's legal jurisprudence, the potential challenges that can arise from its actual practice has not been well-articulated, hence this study.

C. Research Objectives

This aim of this Study were to:

1. Examine the evolution of the concept of personal law;
2. Analysed the requirements for change of personal law under the rules of conflict of law vis-à-vis change of personal law under customary law in Nigeria;
3. Examine the concept of culturisation and its requirements;
4. Analyse the requirements for culturalization and the potential challenges that could arise in the applications particularly in intestate succession when the personal law of the deceased is disputed.

D. Research Methods

A doctrinal methodology was adopted, consequently the primary sources and secondary sources of information were relied on. The primary sources included the Nigerian legislations such as the Constitution of the Federal Republic of Nigeria 1999 (as altered), the Area Courts Law of Kwara State and the High Court Law of Kwara State. The Study also relied secondary sources of information such as books and articles in journals. Information gotten from all these sources were subjected to content analysis.

E. Research Results and Discussion

It was found that two main factors influenced the Supreme Court in affirming the decision of the Supreme Court to affirm the decision of the court of instance that the deceased Olayinka Olowu had changed his personal law, these were long settlement of the deceased in the Bini Society and his complete assimilation into Bini Society coupled with his formal application to the



traditional ruler to be granted Bini Citizenship. While this reasons can be regarded as a framework for proving change of culture, the Supreme Court stopped short of formally setting the requirements for proving it. It therefore remains uncertain whether both factors are expected to occur concurrently or whether can on its own satisfy the requirements for proof.

In the light of these uncertainties, it was concluded that the requirements for proving change of personal law remain far from been settled and it is therefore recommended that given the increasing level of migration and social integration of Nigerians across ethnic divides, legislative intervention give greater coherence to the requirements that should be satisfied before change of personal customary law can be said to have taken

place. This will help to bring certainty to the law and prevent acrimonious disputations that sometimes arise in intestate succession among Nigerians who are subject to customary law.

1. Concept of Personal Law

In the general schemes for the classification of laws, personal law is usually contrasted with territorial/national law. It is thus described as the set of rules that are attached to a person and have extra-territorial effect as against the set of laws that apply within the spatial limits of a particularly territory.³ For this later set of laws, they generally apply to all persons, but the issues they govern are usually those other than that which are subject to personal law.

Usually personal law governs issues that relate to the family affairs of an

³ Hubert Izdebzki defined territorial law as the law effective with respect to all the legal subjects acting in a given territory (in principle the territory of a given state) or in a given jurisdiction. See Hubert Izdebzki,

“Contemporary Expressions of Personal Law: Co-existence or Conflict with Territorial Law” *ACTA Universitas Lodziensis Folia Iuridica* vol. 94, 2021 hlm. 142.



individual. This scope has been influential in the conceptualization of personal law. Pereira, for example posited that it connotes the set of legal rights pertaining to family affairs of an individual. In the Blacks' Law Dictionary, it was also defined as the law that governs a person's family matters regardless of where that person goes.⁴

From these definitions, it may be inferred that the scope of personal law is limited to personal status and the administration of personal affairs of an individual. In relation to personal affairs, this may include issues that relate to marriage, divorce and custody of children, succession and distribution of estates.⁵ This scope has been however been criticized for its narrowness and its failure to accommodate other important issues that are equally

governed by personal law particularly Gifts, and religions charitable endowments such as Waqf under Islamic Law and Damdupat in Hindu Law. It is on this basis that it has been suggested that since charitable endowments are also governed by personal law, defining personal law within the narrow confines of marriage and succession may not be a true reflection of its scope.⁶

Notwithstanding these criticisms, the most prevailing perspectives from which it continues to be conceived is limited to issues on succession and family relations.⁷ It is however important to note that the constitutional provisions on the jurisdiction of the Shariah Court of Appeal in Nigeria is

⁴ Bryan Garner (ed.) *Black's Law Dictionary* 9th ed., West, A Thompson Reuters Business, St. Paul, 2009, hlm 1259

⁵ Faustina Pereira, *The Fractured Scales, The Search for a Uniform Personal Code* 4, Mandira Sen for STREE, Calcutta, 2002

⁶ 'Personal Law : A Conceptual Framework' < <https://ir.nbu.ac.in/bitstreams/ef6f6f7a-a23b-46da-a649-7a51593716e0/download> > p. 17 accessed 23rd Deember 2024

⁷ D. F. Mulla, *Principles of Hindu Law*, 15th ed., N.M. Tripathi Bombay 1982



reflective of the wider scope of personal law as conceived under Indian Law.⁸

a. Basis of Personal Law

The most common basis of personal law around the world is religion. This is particularly so in India and other countries in Asia, where provisions on personal law are used to protect religious diversity. In recognition of this narrow scope, the Indian Courts have tended to conceive personal law from its religious basis. In *Mitar Sen v. Maqloul Hassan*⁹ the court held thus:

“Personal laws are those laws that govern a particular religious community and are consonant with the belief of and apply to the

regulation of that community and its adherents...”

In spite of the dominance of the religion

as a determining factor for personal law, ethnicity¹⁰ and caste¹¹ are also an important basis for it. Their inclusion may be attributed to the over-lap of customary law with personal law.¹² Halperin has noted that in relation to Hindu Law, there is an over-lap of customary law with personal law.¹³

b. Application of Personal Law

Historically the issue of conflict of law in the context of the choice of applicable law first arose in the Italian City States in the Middle-Ages as a result of commercial

⁸ S. 262, Constitution of the Federal Republic of Nigeria 1999.

⁹ AIR 1930, PC 251, (252).

See also *Fanny Barlow v. Sophia Order* (1870) 13 MIA 277 (307). Where it was held that the personal status of an individual in India is usually determined by his religious.

¹⁰ Parth S. Ghosh, *The Politics of Personal Law in South Asia: Identity, Nationalism and the Uniform Civil Code* (Routledge, 2007) in Marc Galanta and Jayanth Krishna, “Religious Law Systems and Religious Conflict: A Comparison of India and Israel” in G.J. Larson (ed), *Religion and Personal Law in Secular India: A Call to Judgement*, Indiana University Press, Bloomington and Indianapolis, 2001, hlm.271.

By regimes of personal law, we refer to legal arrangements for the application within a single Polity

of several bodies of laws to different persons according to their religion and ethnicity.

¹¹ *Lucas v. Lucas* ILR, 32 Cal, 187.

¹² Jean-Loius Halperin, “Personal Law: Undetermined Norms and un-determined Concepts” *Law Review* vol.40 no. 3, 2019, hlm. 267.

¹³ Although customary law can be a basis for personal law, the scope of customary law usually exceeds issues that come under personal law. In Nigeria for example, customary law also governs land transactions and traditional chieftancy disputes. Indeed in the High Law, customary law is expected to be applied to all disputes between Nigerians except where its application is expressly or impliedly excluded. See s.34 High Law of Kwara State, Laws of Kwara State 2006



interactions between citizens of these city states and foreigners.

In resolving disputes arising from these transactions, the courts were faced with the challenge of deciding what ought to be the applicable law. The statutory doctrine was developed by the Post-glossators as a means of resolving such disputes. Under this doctrine, laws were divided into personal law and real statutes. The application of real statutes were held to be restricted to the territory of the enacting sovereign, while personal statutes followed a person everywhere and its application could be effected in the territory of the enacting sovereign and beyond.¹⁴ This doctrine was thus used to guarantee the rights of foreigners to have their dispute in foreign courts resolved in accordance with their domestic law.

¹⁴ Regimus Nwabueze, "Historical and Comparative contexts for the Evolution of conflict of Laws in

It can be said that the evolution of this principle was predicated on the inherent injustice that would be attached to subjecting a person to a foreign system of law. In resolving such conflicts, great pains was therefore taken to identify the personal law of parties and ensure its application. Since the middle Ages, the most prevalent approach that has been adopted by countries is the application of personal law on issues that bother on personal status of an individual. The inequity that could arise from the failure to do so was reiterated in *Re Goodman's Trusts*.¹⁵

Since the Middle-Ages when the application of personal law in foreign courts was recognized, the standard for determining personal status has been domicile. Rabel on this point said:

In all the centuries since the post-glossators, the traditional contact

Nigeria" *ILSA, Journal of International Comparative Law* 8 (31), 2001 , hlm.33.

¹⁵ 17 Ch.D.266 (1881)



for the determination of a person's status has been his domicile. "in earlier, ancient and medieval organizations, the legal condition of an individual in its totality was created by his "*origio*" as a member of a political unit, in Roman Law his *origo*, signifying his citizenship in an autonomous city.¹⁶

The initial domicile of all persons was connected to birth and descent. This generally is the domicile of the father at the time of birth. This domicile was described as *domicilium origins*.

The use of domicile in determining personal has since its emergence remained the most important criteria for its determination. Its adoption under English law has been the historical basis for its application in Nigeria.

In contrast to England, where domicile has been remained the primary criteria for determining personal law, in continental Europe, preference was given to the use of

Nationality in determining Personal Status.

This standard was first introduced in the Code Napoleon, which provided that French laws would determine the personal status of Frenchmen in France and while residing in a foreign country. The same standard was accorded to foreigners living in France.

2. Change of Personal Law

The use of both domicile and nationality for determining personal status both accommodate the right of a person to change his personal status. This could be achieved by change of domicile or nationality. The right of a person to depart from his personal law of origin in both regimes, particularly domicile is however subject to various conditions. The conditions that are attached to change of nationality and personal law as follows:

¹⁶ Ernst Rabel, *The Conflict of Laws: A Comparative Study* vol.I (The University of Michigan Press, Ann Arbor 1945) hlm.109, see also James Fawcett and Jean M. Carruthers, *Cheshire, North and Fawcett, Private*

International Law, 14th ed. Oxford University Press, 2008, hlm 179-180. where he noted that the principle of domicile had no rival for over five hundred years since it was first developed by the post Glossators.



a. Change of Nationality

While the application of nationality as standard for determining personal status would on its face appears to be fairly straightforward. The challenges that emerged from the use of this standard generally relates to individuals with dual/multiple nationality. In such instances the court have had to determine the operative nationality. In Art 3 of Convention on Conflict of National Laws¹⁷, it was provided that the principles that guide the determination of applicable law have evolved over-time and based on this principles, the national law to be applied will be the law of the country where the person is domiciled or is in habitual residence. In the sixth conference on International Private Law,¹⁸ domicile as a factor was removed, and standard was limited to habitual residence or

residence *simpliciter* as at the time when the legal issue arose. While interpreting the provision, Rabel suggested that for marriage, it may be residence at the time when the marriage was celebrated.

The test was further improved in 1930 in the Hague convention on conflict of National Laws of 1930 where it was provided that the applicable national law in case of individuals with multiple nationality will be determined based on habitual residence/principal residence or the “nationality of the country with which in the circumstances he appears to be in fact most closely connected”. This later criteria was described by Rabel as the nationality that appears to be most effective.¹⁹

b. Change of Domicile

¹⁷ 1930

¹⁸ Hague Conference on Private International Law in 1928.

¹⁹ Rabel, op. cit. hlm. 121. The application of the effective connection test will also be very important in context of recent situations where individuals have been stripped of their nationality.



As is the case with nationality, the use of domicile as the criteria for determining personal status is not a permanent standard either. It is generally accepted that personal status is changed if an individual changes his domicile. This is achieved when the original domicile which is the domicile of origin is abandoned in favour of a new domicile, which is called domicile of choice.

Unlike the case with change of nationality when the complexity emerges in individuals with dual/multiple nationality or undetermined nationality, the challenges that is usually associated with domicile is how to identify when a person has changed his domicile. This is usually inferred and it is deemed established when *animus manendis* is established.

While examining what constitutes *animus manendi*, it has been held that it constitutes of two factors;

- 1) Establishment of a new residence.
- 2) Intention to make the new residence a permanent home²⁰

This requirement in relation to Nigeria was examined in the case of *Fonseca v. Passman*²¹ Thomas J. while examining application of the principle in determining intention of a foreigner resident in Nigeria to change his domicile from the country of his birth to Nigeria stated thus:

“To establish a domicile in Nigeria the mere factum of residence here is not sufficient....There must be unequivocal evidence of *animus manendi* or intention to remain permanently”.

c. Challenges of Domicile

Although domicile is the oldest standard for personal status, its application

²⁰Per Lord George Jessel in *Doucet v. Geogheghan*, (1878) L.R. 9, Ch. D. 441, at p. 456.

²¹ (1958) W.R.N.L.R. 41 at 42



within the context of the structure of modern society has raised challenges that were not envisaged as at the time it was initially developed.

It has been suggested that domicile was most suitable for the structure/nature of the British society prior to the twentieth century, which was then characterized by a tendency to have a life-long association with the region where an individual born. It was thus presumed that a British citizen no matter how farther from home he may travel always retains a connecting factor with the place of their birth and will ultimately return at some point. This place thus remains his domicile for life, unless and until he settles in another place and manifests an obvious intention to make his new place his permanent abode. In *Succession of Steers*²² it was held that the culture in England tended to keep families

together and they may grow for generations on the same spot.

The unwavering commitment to the hegemony of domicile began to decline when concerns began to be raised about its strict application in the United States. The courts there have subsequently tended to adopt a more flexible approach to the right of a person to depart from his domicile of origin and adopt a domicile of choice. Beale had on this point argued that in contrast to British society, the population in America tended to be more mobile and eschewed the habit of remaining in a particularly locality indefinitely. He went further to suggest that a strict application of the English Law on domicile will deprive many Americans the opportunity of changing their domicile²³

The peculiar migratory pattern of the American society was therefore emphasised

²² 47 L. Ann, 1551, 1553, 18, S. 503 (1895).

²³ J.H.A. Beale, *Treatise on the conflict of Laws*, 1st ed. Baker Voorhis and Co. New York, 1935, hlm. 106.



in *Putnam v. Johnson*²⁴ where Parker J. stated as follows:

In this new and enterprising country, it is doubtful whether one half of the young men, at the time of their emancipation, fix themselves in any town with an intention of always staying there. They settle in a place by way of experiment to see whether it would suit their view of business and advancement in life, and with an intention of removing to some more advantageous position, if they should be disappointed. Nevertheless they have their home in their chosen abode while they remain.

The major challenge that has been associated with the use of domicile in determining personal law has therefore been the uncertainty surrounding its change, and the absence of a universal standard for ascertaining when this has occurred. This has limited its effectiveness and has sometimes been the cause of acrimonious contentions among surviving relatives in intestate succession.²⁵

In spite of the obvious limitations of domicile, a peculiar situation where its relevance has become obvious is in determination of personal law of citizens of countries without composite personal law regimes. In such countries, the application of the nationality test would be futile because of the absence of a uniform/national personal law regime. Generally in such countries personal law is usually determined based on the “rules that governs the group of persons to which the individual belong”²⁶

The problem that has arisen in relation to this, is in ascertaining the appropriate personal law when there are competing laws that can be applied. Domicile is usually resorted to, as the means of establishing the connection between an individual and the appropriate personal law.

²⁴ 10 Mass 488, 501 (1813).

²⁵ Rabel has suggested that a possible way by which this challenge can be rectified is by regularizing the process of change of domicile by mandating the

registration of voluntary change of domicile, see Rabel op. cit., hlm. 159

²⁶ Rabel, op. cit. hlm. 124 – 125.



3. Change of Personal Law in Composite Legal System and the Challenges in Nigeria

In counties across the world, the general trend is for personal status to be determined by either the national laws or domicile. There is however a third category which adopts the use of ethnic or religious laws. This third approach is common among countries that were previously subjected to colonial rule. Their legal system is often characterized by dual application of national law, which is often based on the national law of the colonizing country and the diverse customary laws, which constitute of the indigenous laws of the various ethnic entities that make up the country. In addition, in countries with religion populations who have well-established laws²⁷ religious laws are also a major component of the applicable laws.

In the hierarchy of norms that has traditionally been laid-down by the colonial governments, and maintained by government even after independence, the application of customary laws are usually confined to well-defined spheres.

a. Conceptualisation and Application of Personal Law within the Nigerian Legal System

Personal law as a legal concept and a means for classifying the law is only directly referred under Nigeria law in relation to the limits of the application of Islamic Law. The 1999 constitution²⁸ provides that the jurisdiction of Sharia Courts of Appeal shall include the determination of any question of Islamic personal law. These aspects of Islamic Law were stated to be issues of marriage, endowments and matters relating

²⁷ Such are Hinduism, Islam and Judaism

²⁸ S. 262 (1) (a)



to infants, prodigals and persons of unsound mind who are Muslims.

In the various Area/Customary Courts laws²⁹, however, while it is acknowledged that customary law will apply in disputes between Nigerians, the applicable customary law is neutrally described as the “customary law binding between the parties”.³⁰ The absence of such specific restriction may be attributed to the fact that customary law generally has a much wider scope of application than Islamic law, which in addition personal law issues also includes

other forms of disputes such as chieftaincy, conveyance of land and chattels etc.

While the existing laws have generally not referred to customary law in relation to personal law, the courts have shown no such restraint and have generally been willing to converge the two, particularly in succession, where there has to be a posthumous determination of the “applicable law”. Without the benefit of the opinion the deceased, whose estate is the subject of dispute, the question of applicable law is

²⁹ Customary Courts are courts which exercise jurisdiction over all disputes between Nigerians except disputes that arise from statutory laws or which are expressly excluded from the jurisdiction of customary courts.

³⁰ S. 20 of the Area Courts Law of Kwara State (Area Courts are the equivalent of customary courts in the Southern part of Nigeria. Kwara State is regional state created from the old Northern Region of Nigeria) provides as follows:

s.20 (1) Subject to the provisions of this Law and in particular of s.21, an Area Court shall in civil causes and matters administer

(a) the customary law prevailing in the area of the jurisdiction of the court or **binding between the parties**.

The Area Court Law of Kwara State is a replica of the Area Court law that is applicable throughout the Northern Region in Nigeria and it can represent the

law throughout the North. However a distinct approach is adopted in the Old Mid-western Region, now replaced initially by Bendel State and now by Delta and Benin States. In the Customary of both States, express provision is made for the applicable law in succession. This is different from the generalised approach that is adopted in the Customary/ Area Courts of other states. See Customary Court Law of the Midwestern State, no. 38 of 1966

S. 23(1) In land matters, the appropriate customary law shall be the customary law of the place where the land is situated

23(2) In causes and matters arising from inheritance, the appropriate customary law shall, subject to subsection (1) and (4) of this section be the customary law applying to the deceased

23 (3) In all other civil causes or matters the appropriate customary law shall be the law of the area of the jurisdiction of the court.



usually settled by a determination of the personal law of the deceased.

The determination of this question has however proven to be contentions and subject to disputations particularly when parties cannot agree on what was or should be the personal law of their deceased progenitor.³¹

In these cases the contention in relation to the applicable, law had been whether the ancestral personal of the deceased or the *lex situ* should apply. In the straight-forward contest between personal law and *lex situ*, the courts have generally shown greater preference for personal law.³²

Another dimension to the dispute on applicable law however emerged in *Yinusa v. Adesubokan*.³³ Unlike in previous cases

where the dispute between the contending parties is limited to contesting the applicable law based on a direct contest between *lex situ* and personal law, in Adesubokun's case however, an important dimension was added to the dispute when the defendants defence was founded on the argument that their father due to his long set *Tapa v. Kuka* (1945) 18, N.L.R. 5; *Re Estate of Alayo Tunwase* (1946) 18 N.L.R. 88; *Kharie Zaidan .v. Fatima Zaidan* [1974] 4 U.I.L.R. 283; *Michael Romaine v. Christopher Romaine* (1992) LLJR-SC settlement in Lagos State had acquired a new personal law, which is the Yoruba Customary Law³⁴, rather than the Islamic Law, which is his personal law of birth, having been born in the old Northern

³¹ See generally. *Tapa v. Kuka* (1945) 18, N.L.R. 5; *Re Estate of Alayo Tunwase* (1946) 18 N.L.R. 88; *Kharie Zaidan .v. Fatima Zaidan* [1974] 4 U.I.L.R. 283; *Michael Romaine v. Christopher Romaine* (1992) LLJR-SC

³² It has been generally observed that in converse to the rule under Private International whereby succession to personal chattels is governed by the personal law of the deceased while succession to land is governed by the *lex situ*; in internal conflict laws,

succession to land is governed by the personal law of the deceased. Where the personal law cannot be determined, the *lex situ* will then apply. See generally on the general principle *Tapa v. Kuka* Supra and for the exception, *Ekem v. Nerba* (1947) 12, W.A.C.A 258 ³³ (1968) N.N.L.R. 97 at 99.

³⁴ Lagos though initially a Colony and subsequently designated as a Federal Capital territory was populated by an indigenous population that were of the Yoruba ethnic group.



Region.³⁵ It was claimed he had acquired this new personal law due to his long settlement in Lagos. In addressing the question whether long settlement in a new place is sufficient to displace personal law of origin, Bello J. (as he then was) has stated obiter thus:

Mere settlement in a place, unless it, has been for a long time that the settler and his descendants have merged with the native of the place of settlement and have adopted their ways of life and custom, would not render the settler or his descendants subject to the native law and custom of the place of settlement.

The question of change of personal law as a result of long settlement was however more comprehensively examined in *Olowu v. Olowu*³⁶. In *Olowu*, the point of contention among the children of the deceased was whether the application of *lex situ*, which is Benin customary law in the distribution of the estate of the deceased was justified. The plaintiff/appellants had contended that

Yoruba customary law being the ancestral customary law of the deceased ought to have been used. The defendants on the other hand had justified the use of Benin customary law not simply because it was the *lex situ* but on the ground that the deceased has in his lifetime became a Bini citizen and had thus changed his personal law. The trial court had agreed with the position of the defendants that the deceased had indeed changed his personal law through his integration into Benin Society. This therefore became the most important point upon which the subsequent appeals were fought, until the affirmation of the decision of the trial court by the Supreme Court.

The importance of novelty of the issues upon which *Olowu* was fought was acknowledged by the Supreme Court Per

³⁵ He had been born in Omun Aran, a town in Kwara State, which was created from the Old Northern Region in Nigeria.

³⁶ (1985) 3, NWLR (pt. 13) 372.



Bello JSC. In his observations, he noted as follows:

Within my knowledge, this is the first time that a case which raises the issue of a change of personal law as a result of culturalization by choice has reached this court for determination. Having regard to the evidence that the deceased had voluntarily chosen to become a Bini citizen and the evidence relating to the consequences of his choice under Benin native law and custom, I am satisfied that the court of Appeal rightly upheld the decision of the trial judge.³⁷

Although the Supreme Court objected to the use of the term naturalization by the trial in describing the process through which the status of the deceased had changed, they nonetheless agreed that a process similar to naturalization had taken place, but preferred

to adopt the term acculturation to describe it.³⁸

In arriving at this decision, the factors that appear to have weighed on the mind of the court are the following:

- a. The deceased had lived in Benin from childhood until his death.
- b. He had applied during his lifetime to the Oba of Benin to become a Benin Citizen.
- c. He had gotten the consent of both the Oba of Benin and District officer to become a Benin indigene.
- d. He had through the new status acquired rights and privileges of a Benin

³⁷ *Oluwu .v. Olowu, Supra*, p. 390.

See also C. Osim Ndifom, "Personal Law in Crisis: *Olowu v. Olowu* Revisited-A Trend or Alternative Approach" *Sri Lanka Journal of International Law*, vol. 21 No. 1 2009, hlm. 67. He had observed the issues in *Olowu v. Olowu* were not only fundamental and important but they marked the first time the notion of the inviolability of the laws of our ancestors were being challenged.

³⁸ Per Bello JSC at 389.

The world Naturalization, which takes place when a person becomes the subject of a state to which he was before an alien, is a legal term with precise meaning. Its concept and content in domestic and international law have been well defined. To extend its scope so as to include a change of status, which takes place under native law and custom, when a person becomes a member of a community to which he was before a stranger, may create confusion. I would prefer to describe a change of status under customary law as "Acculturation."



Indigene which included the right to own land.

- e. He had married Benin women, who had bore him children.³⁹

While analysing the factors that the Supreme Court had identified as having influenced their decision, Ndifom, observed that the totality of these factors ensured that the deceased had satisfied two important requirements for determining change of personal law which are the test of assimilation or merging into the community and the test of nature of life lived by the deceased.⁴⁰

4. Challenges of the Application of the Principle of Culturalization

Although the importance of the decision in *Olowu v. Olowu* has been widely acknowledged, its limitations have also been obvious. Ndifom for example has argued that

while the decision acknowledged the importance of the intention of the deceased, it did not put in place a proper standard for proving the existence of that intention. In making his point he asked ‘how do we locate the intention of the propositus’.⁴¹ The merits of his argument would become evident in a case where level of assimilation into the host community inspite of long settlement is disputed.

In such situations the argument would not be if assimilation has taken place at all but if the level of assimilation and integration is to such a degree that it can be said that an intention to totally merge into the new community had existed and culturalization had taken place. While the the Supreme Court was able to birth the new concept of culturalization in its decision in *Olowu*, it stopped short of giving practical guidelines

³⁹ Per Coker JSC.

⁴⁰ Ndifom op. cit. p. 81.

⁴¹ Ndifom, op. cit. p. 72.



for its subsequent application. This has therefore created the need for further jurisprudential/legislative developments to regulate and create standards for determining when the level of assimilation is sufficient to have given rise to an abandonment of the culture/ethnic group of origin in favour of a new ethnic identity, or has described by the Supreme Court when acculturation has taken place.

In addition, the context in which Olowu and Olowu occurred has also not been properly considered by the Supreme Court. It is important to note that Ayinde Olowu, the father of both parties in this case had died in 1960; the incident which was the direct genesis of the case was not so much his death as his application in 1947 to become a Benin indigene. It is important to note that this occurred during the colonial era when

traditional rulers still wielded considerable political, authority. Since independence much of this authority is now been exercised by Local Government Authorities, this includes the grant of indigeneship certificates.

In the process of acquisition of Benin indigene ship it was stated that he had sought the approval and consent of both the Oba of Benin and the District Officer, who may be equated with the Local Government Chairman in the present political structure in Nigeria. While the process of acquisition of indigene ship certificates still involves the two parties,⁴² it is not clear whether the present powers of a traditional ruler includes conferment of indigene ship on persons who are not otherwise indigenous native of their communities, and if they do have such rights what are the parameters and criteria that

⁴² The present procedure for the issuance of certificate of indigene ship involves both the local Government Authority and the Traditional rulers. The traditional

rulers have to certify that every applicant is a true member of their community, while the certificate is issued by the Local government Authority.



would be fulfilled before such an acknowledgement is made and an official recommendation, subsequently made to the Local Government.

Aside from the challenges that may be associated with indigene ship and assimilation, another factor that could be the basis of future controversies is whether the two requirements identified by Ndifom that manner of life and assimilation should be proved concurrently or if either on its own would be sufficient. The Supreme Court while considering the circumstances of Olowu's change of status, considered all the factors together. It is however not clear whether all these factors must exist in all future cases or whether the existence of one would suffice in establishing an intention to change the individual's personal status.

F. Conclusion

Although the case of Olowu and Olowu was stated to be fought on the basis of

culturization and change of personal law, however apart from the jurisprudential issues that have arisen from the case particularly those relating to conflict of laws within plural a legal system. It may be also be argued at its most basic, and conceptual level, the case may also be related to the issue of indigene ship and the legal effects, if any that change of indigene ship may have of personal status of a deceased Nigeria.

The uncertainties surrounding these issues are bound to emerge in future and certainty of the law would be ensured if sufficient legislative interventions are made to standardize the process by which Nigerian can change their personal law and acquire the indigene ship of a community other than the one into which they are born.

This paper therefore recommends that insights can be gotten from the requirements for the change of domicile so that there is greater certainty on the guidelines to prove



the existence of an intention to change personal law through culturalisation.

It is also recommended that although the indigenship certificates are presently used in the process of employment into government institutions and also presented by students when seeking admission into government-owned tertiary institutions as evidence of their state of origin, it is recommended that if the process of change of

personal law is recognised as an official process, as was the case in Olowu, where the deceased was issued a certificate evidencing his acquisition of Bini, indigenship, the issuance of certificate of indigenship can be issued to Nigerian citizens who indicated their interest in acquiring the indigenship of a new community, other than the one into which they were born.

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