

# HISTORICAL AND COMPARATIVE CONTEXTS FOR THE EVOLUTION OF CONFLICT OF LAWS IN NIGERIA

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## I. INTRODUCTION

Knowledge of the history of conflict of laws in Nigeria, the ideas behind its development, and the numerous problems that beset the application of its principles, is in itself the history of the socio-economic structure of the society, between feudalism and capitalism. Conflict of laws often found more fertile soil for germination in societies with capitalist tendencies, like the Italian city-states of the fourteenth and fifteenth centuries. Its historical context identifies the themes that matter in the development of laws in Nigeria.

In Egypt, Rome and the Greek city-states, citizens had dealings, contacts and commercial intercourse with foreigners which ought to have raised the question of conflict of laws in disputes arising from such intermingling and transactions. The Egyptians traded with the Greeks; the Romans traded with most parts of their world, *e.g.*, the Carthaginians and Europeans; and the Greek city-states traded among themselves and with their neighbors. What was the law applied by the courts of each of these ancient peoples in the settlement of disputes which had foreign elements? It does not seem that clear choice of law rules as known today were developed and applied by the courts of these ancient states. However, it appears that disputes which arose from intercourse with foreigners were settled in a peculiar manner by means of treaties and bilateral agreements<sup>1</sup>

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under which the application of the local legal system was extended to foreigners. For instance, under the bilateral agreement between Rome and Carthage, law applicable to Roman citizens alone, *jus civile*, was extended to Carthaginians. In addition, Rome appointed a special magistrate, the *praetor peregrinus*, to adjudicate disputes between Romans and foreigners or between two foreigners in Rome. However, the *praetor peregrinus* did not settle such disputes on the basis of rules analogous to contemporary choice of law rules in conflict of laws, but relied on general notions of fairness and justice. The body of law emanating from the *praetor peregrinus*'s decisions formed the part of Roman law known as *jus gentium*.

But it was in the Italian city-states in the Middle Ages that a scientific approach was adopted toward the solution of disputes arising from transactions and intercourse with foreigners. They had separate courts, laws and magistrates for that purpose. The city-states were legally and politically independent and had huge trading transactions and intercourse among themselves. A citizen of Bologna would conclude a contract in Padua, with a citizen of Modena, to be performed in Florence. Such transactions had contacts with four city-states whose laws were not necessarily identical with respect to issues arising from the contract. The question became, "what law was applicable to such disputes?" The Roman jurists of this period, the glossators of whom Accursius is an example, tried to answer such questions by means of glosses on the Justinian Code. However, this approach was fictitious because that Code did not have choice of law rules.<sup>2</sup>

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1. RUDOLPH SOHM, *THE INSTITUTES: A TEXT BOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW* 65-66 (2d ed. 1940). P. VINOGRADOFF, *THE COLLECTED PAPERS OF PAUL VINOGRADOFF, VOL. II: JURISPRUDENCE* 260-61 (1928).

2. A celebrated seventeenth century writer stated:

It often happens that transactions entered into in one place have force and effect in the territories of a different state, or have to be adjudicated upon in another place. Moreover, it is well known that the laws of every nation differ in many respects, for since the breaking up of the provinces of the Roman Empire, Christendom has been divided into almost innumerable nations, not subject to one another and not sharing the same system of government. It is not surprising that there is nothing on the subject in Roman law, for since the sovereignty of Rome extended to all parts of the world and was regulated by a uniform law it could hardly give rise to a conflict of different laws.

ULRICH HUBER, *DE CONFLICTU LEGUM DIVERSARUM IN DIVERSIS IMPERIS: PRAELECTIONES 1707*, translated and reprinted in D.J. Llewelyn, *The Influence of Huber's De Conflictu Legum on English Private International Law*, 1937 BRIT Y.B. INT'L L. 64-78.

The post-glossators, e.g., Bartolus, approached the question of applicable law engendered by intercourse with foreigners from the perspective of statutory doctrine. A statute was used by the post-glossators to refer to all laws of a city, whether the laws emanated from custom, legislative enactment, or executive acts.<sup>3</sup> Under statutory doctrine, a statute was real if things were mentioned first, and personal if persons were mentioned first.<sup>4</sup> Real statutes applied to all things within the territory of the sovereign who enacted the statute and had no force outside the territory of that enacting sovereign. Personal statutes followed a person everywhere and had force within and outside the territory of the enacting sovereign. By this analysis, a court in Modena, for instance, could apply the personal statute of Padua but not its real statute. It was often a matter of great controversy whether a statute was real or personal. Is a statute on conveyance of land to minors real because it mentions land, or personal because it mentions persons?

This statutory doctrine approach continued in France in the sixteenth century. France also had the problem of conflict of laws arising from its diversity of regional laws, i.e., *coutume*, mainly written, which varied from province to province and had to apply to inter-provincial trade. The foremost exponents of the statutory doctrine in France were Charles Dumoulin (1500-1566), who established the principle that the law mutually intended by the parties, or presumed to have been intended by them, should apply to disputes arising from their contract; and D'Argentre (1519-1590), who added a third class of statute: mixed statutes, i.e., statutes that mentioned both persons and things. He considered mixed statutes to be in the nature of real statutes which did not have extra-territorial application.

This statutory doctrine—adopted in the Italian city-states, in France, in Germany, and later in America by Samuel Livermore—bears close resemblance to modern choice of law rules. Choice of law rules, e.g., *lex domicilii*, *lex contractus*, and *lex loci delicti*, ensure that in certain circumstances the court of a country could apply foreign law as providing the rule of decision. Likewise, the statutory doctrine gave extra-territorial effect to foreign law where such law was personal, as defined above. In the same way that a modern court can hold that legitimation is governed by *lex domicilii*, and therefore should apply foreign law if it is the law of domicile, a court in Padua would apply the statute of Modena if it dealt with the legitimation of Modena citizens, i.e., was a personal statute and gave effect to it.

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3. A. K. KUHN, *COMPARATIVE COMMENTARIES ON PRIVATE INTERNATIONAL LAW* 4 (1937).

4. BARTOLUS ON THE CONFLICT OF LAWS 45-46 (J.H. Beale ed., 1914).

However, the Dutch theorists in the seventeenth century, notably Paul Voet (1619-1677), Ulrich Huber (1636-1694) and Johannes Voet (1647-1714), did not base the solution for conflict of law problems on the statutory doctrine. They resorted to the comity doctrine as the basis of their solution to disputes arising from international transactions or intercourse. The Netherlands, like France, were divided into independent provinces with their own separate legal systems. Intercourse among these provinces and between them and other countries ensured the emergence of conflict of laws problems. The Dutch jurists tried to respond to such problems on the basis of the comity doctrine, under which foreign law was applied by reason of the comity or friendly relations existing between nations.<sup>5</sup> The implication seems to be that a Dutch province applied a foreign law, *e.g.*, English law, not on the basis of lucid choice of law rules but solely on the ground of whether or not friendly relations existed between the province and England. What happened when, for instance, the relationship between it and England became frosty? Would English law then be inapplicable? We know today that courts give recognition to foreign law in order to obviate the injustice that would arise by doing the contrary. When courts apply foreign law, it is not out of any courtesy or respect to the foreign country. For instance, when a court holds that a marriage celebrated in a foreign country would be determined, as to its formal validity, by the foreign law, it so holds not because of any friendly relationship or respect for that foreign country but because of the injustice that might arise if the local law was applied to determine the validity of that marriage. It could be that under the local law the marriage is formally invalid, though formally valid by the foreign law under which it was celebrated. The result could be that the children of the marriage might be legitimate, *i.e.*, by virtue of valid celebration of the parents' marriage

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5. Huber writes:

For the purpose of unfolding the difficulty of this particularly intricate subject we shall formulate three maxims which, being accepted as undoubtedly it appears they should be, seem to clear the way for us for the solution of the remaining questions. They are these:

1. The laws of every sovereign authority have force within the boundaries of its state, and bind all subject to it, but not beyond.
2. Those are held to be subject to a sovereign authority who are found within its boundaries whether they be there permanently or temporarily.
3. Those who exercise sovereign authority so act from comity that the laws of each nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the power or rights of another state or its subjects.

under the foreign law, but illegitimate under a local law which had no connection with the celebration of the marriage in a foreign country.

The point is that in The Netherlands the comity doctrine was employed in a way similar to the modern function of choice of law rules, *i.e.*, used as the basis for the application of a foreign law to a case having a foreign element.

It was in England and America in the nineteenth and twentieth centuries that choice of law rules as we know them today were developed for conflict of laws. Instead of approaching the question of conflict of laws from the perspectives of the statutory and comity doctrines, the judges in these countries applied judicially developed rules of selection, *i.e.*, choice of law rules, to such questions. For instance, in *Holman v. Johnson*, Lord Mansfield observed:

There can be no doubt, but that every action tried here must be tried by the law of England; but the law of England says, that in a variety of circumstances with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern.<sup>6</sup>

Thus, *lex loci contractus* as a choice of law rule was recognized and applied in that case. Some of the jurists responsible for the formation of conflict of laws rules, both in England and America, include J. Story, C. Kent, A. V. Dicey, G. Cheshire, J. Westlake, and F. Harrison.<sup>7</sup>

## II. PRE-COLONIAL NIGERIA

Where then is Nigeria in this configuration of conflict of laws history? As an independent nation on October 1, 1960, Nigeria gained its sovereignty from British colonial rule.<sup>8</sup> In 1914, the northern and southern parts of the country, hitherto separately administered by British colonial government, were amalgamated by Sir Frederick Lugard. Before colonialism the amalgamated territories consisted of politically and legally independent tribes. Earlier, about 1898, Flora Shaw, who later became

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6. 98 Eng. Rep. 1120, 1121 (K.B. 1775).

7. Works by these jurists include: COMMENTARIES ON THE CONFLICT OF LAWS (1834); COMMENTARIES ON AMERICAN LAW (1873); THE CONFLICT OF LAWS (Acollina et. al. eds., 1993); PRIVATE INTERNATIONAL LAW (P.M. North & J.J. Fawcett eds., 12th ed.1992); PRIVATE INTERNATIONAL LAW (N. Bentwich ed., 7th ed. 1925), JURISPRUDENCE AND CONFLICT OF LAWS (1919).

8. Nigeria Independence Act, 1960, 8 & 9 Elizabeth II, c. 55.

Lady Lugard, had suggested in an article for *The Times* that the several British protectorates on the Niger be known collectively as Nigeria.<sup>9</sup>

Long before the arrival of the British colonists on the territory now known as Nigeria, and the subsequent colonization of the people thereof, the geographical area now called Nigeria had been the abode of strong and independent kingdoms. As Crowder put it:

Within its frontiers were the great kingdom of Kanem-Borno, with a known history of more than a thousand years; the Sokoto Caliphate which for nearly a hundred years before its conquest by Britain had ruled most of the savannah of northern Nigeria; the kingdom of Ife and Benin, whose art had become recognized as amongst the most accomplished in the world; the Yoruba Empire of Oyo, which had once been the most powerful of the states of the Guinea Coast; and the city-states of the Niger Delta, which had grown partly in response to European demands for slaves and later palm oil; the largely politically decentralized Igbo-speaking peoples of the south-east, who had produced the famous Igbo-Ukwu bronzes and terracottas; and the small tribes of the Plateau, some of whom are descendants of the people who created the famous Nok terracottas.<sup>10</sup>

In Nigeria, the history of the legal science known as conflict of laws has been largely neglected by the few Nigerian jurisprudential writers on the subject.<sup>11</sup> Their discussion of the subject starts from the date when English law was received into Nigeria:<sup>12</sup> 1863 for Lagos and 1900 for the rest of the country. No serious inquiry has been made on the position before the reception statutes. Nigerian writers seem to content themselves with an *a priori* conclusion that the Nigerian pre-colonial legal regime did not have conflict of laws rules<sup>13</sup> and, by extension, such problems. It seems therefore a Sisyphean task for the legal historian to attempt a construction or exposition of conflict of laws in pre-colonial Nigeria.

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9. M. CROWDER, *THE STORY OF NIGERIA* 11(1962) (quoting A.H.M. KIRK-GREENE, *WHO COINED THE NAME NIGERIA?* (1956)).

10. CROWDER, *supra* note 9, at 11.

11. See generally I. O. AGBEDE, *THEMES ON CONFLICT OF LAWS* (1989); A. YAKUBU, *HARMONISATION OF LAWS IN AFRICA* (1999).

12. A.E.W. PARK, *THE SOURCES OF NIGERIAN LAW* 16-20 (1963).

13. AGBEDE, *supra* note 11, at 28; YAKUBU, *supra* note 11, at 25.

Our initial survey of the general history of conflict of laws teaches us that two factors must be simultaneously present before any issue of conflict of laws can arise: social and economic interaction by people of different sovereign states, and a diversity of legal regimes. The whole history of conflict of laws is intertwined with these factors. Until people begin to cross their national, state, local, or tribal boundaries and intermingle with one another, there can be no foreign element in disputes. As Merrill noted:

The introduction of steam power for purposes of locomotion by sea as well as by land, and the employment of telegraph wires and submarine cables, have led to a marvelous increase in travel and commercial intercourse, and to corresponding increase and complexity in the relations existing between numerous individuals, and the governments and laws of states other than their own. The vast immigration from almost all parts of Europe to America, with a view to permanent settlement and naturalization, the establishment by thousands of individuals of their residences in foreign countries without any transfer of allegiance, and the extra-territorial operations of numerous corporations, have given rise to many interesting and important questions growing out of the conflict of laws.<sup>14</sup>

The *ius gentium* in ancient Rome was the product of transnational movements. Such movements, and the subsequent intermixture between people of different legal backgrounds, gave birth to conflict of laws in the Italian city-states of the fourteenth century and later in France, The Netherlands, Germany, England, and the United States and Canada. According to the recent authors of Cheshire and North: “The *raison d’etre* of private international law is the existence in the world of a number of separate municipal systems of law—a number of separate legal units that differ greatly from each other in the rules by which they regulate the various legal relations arising in daily life.”<sup>15</sup> Pavel Kalenský echoed the same sentiment:

It is generally known that most textbooks and systems raise as the conditions of the origin and existence of private international law on the one hand the fact that there exist in

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14. GEORGE MERRILL, *STUDIES IN COMPARATIVE JURISPRUDENCE AND THE CONFLICT OF LAWS* 1 (1886).

15. CHESHIRE & NORTH, *PRIVATE INTERNATIONAL LAW* 3 (12th ed. 1992).

the world parallel to each other many sovereign states with different legal systems and, on the other hand, that the citizens of these states, who are non-sovereign subjects, *i.e.*, natural and legal persons, establish contacts and relations of civil law [or family law], labour law or procedural character. Of course, it should be seen that the two aforesaid preconditions are far from being static and that in the past decades they have undergone a very dynamic development.<sup>16</sup>

Many questions arise in the application of the above principles to the Nigerian situation: first, were there contacts and dealings between the various independent primordial and pre-colonial Nigerian tribes? Second, were those tribes regulated by different and divergent legal rules or customary laws? Third, if the answer to both of the above is yes, then how was the ensuing conflict of laws resolved? Here, we shall explore possible answers to the above questions.

Within the northern part of Nigeria, there had flourished the Kanem-Bornu Empire, the Sokoto Caliphate, and the Hausa states of Gobir, Katsina, Rano, Daura, Kano, Zaria, Kebbi, Zamfara, Nupe, and Gwari. There were intermingling, communication and contacts among these groups. There was from earliest times intensified commercial intercourse among these northern Nigerian kingdoms and states, and between them and the outside world, especially with Algeria and Morocco through the Sahara desert. The corollary was the introduction of Islam to the northern part of Nigeria in about the eleventh century. According to Crowder:

West Africans participated eagerly in the growing trans-Saharan trade, which brought them much needed salt from the desert, as well as clothes, weapons, horses and beads. The new states of the Western and Central Sudan also traded among themselves. Kano cloth, for instance, was to become much prized throughout the Western and Central Sudan. One of the most extraordinary achievements of these empires, from the accounts of Arab travelers, was their maintenance of security of trading conditions over vast areas of West Africa. Probably the most important results of the Sahara trade were the penetration of the Sudan by Islam and the introduction of writing.<sup>17</sup>

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16. PAVEL KALENSKÝ, *TRENDS OF PRIVATE INTERNATIONAL LAW* 28 (1971).

17. CROWDER, *supra* note 9, at 25.



The introduction of Islam to the northern part of Nigeria meant the regime of Islamic law,<sup>18</sup> as both are axiomatically inseparable. Even today, Islamic law is the personal law of Moslems in the northern part of Nigeria.<sup>19</sup> The common application of Islamic law in northern Nigeria left no room for choice of law problems. The legal system was a monistic one, analogous to the unitary legal system in England, which, in the formative stage of conflict of laws, frustrated the doctrine's growth and development in that country.

Even before the introduction of Islam in northern Nigeria, about 1080 A.D.,<sup>20</sup> trading contacts had existed among the various tribes in the northern part of Nigeria, and between each of them and the outside world. The trade was by means of barter. In this pre-Islamic period, one would expect that the commercial intercourse amongst these northern Nigeria tribes and the outside world must have engendered some conflict of laws problems. However, that was not to be. The economic system of exchange, *i.e.*, barter, left little room for substantial disputes requiring choice of law considerations.

There were also trading contacts between the tribes in the northern region of Nigeria and the kingdoms of the forest in the southern part of Nigeria, especially the Yoruba kingdom. According to a leading authority on Yoruba history:

Light and civilisation with the Yorubas came from the north with which they have always retained connection through the Arabs and Fulanis. The centre of life and activity, of large populations and industry was therefore in the interior, whilst the coast tribes were scanty in number; ignorant and degraded not only from their distance from the centre of light, but also through their demoralizing intercourse with Europeans, and the transactions connected with the oversea slave trade.<sup>21</sup>

Crowder made the same point when he said that “[i]ndeed there is strong reason to suppose that from an early stage Hausa and Yoruba traded with each other.”<sup>22</sup> Again, the trade was by barter. As argued below, the

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18. POLITICS AND GOVERNMENT: AN INTRODUCTORY AND COMPARATIVE PERSPECTIVE 164 (A.O. Ikelegbe eds., 1995).

19. Usman v. Umaru, 7 NIGERIAN WKLY. L. REPS. 377 (Part 254) (1992).

20. That was the year a Kanem king, Mai Hume, converted to the Islamic faith. Islam was introduced into the neighboring Hausa states in the fourteenth century.

21. SAMUEL JOHNSON, THE HISTORY OF THE YORUBAS 40 (1921).

22. CROWDER, *supra* note 9, at 43.

barter system did not yield disputes that warranted the application of conflict of laws rules.

Thus far, the indigenous legal system, *i.e.*, customary laws of these tribes and kingdoms, had no occasion to ponder conflict of laws problems. Economic activities carried on by a system of barter where, presumably, the goods were exchanged on the boundary lines, and which could hardly have given rise to substantial disputes in the area of conflict of laws. As Diamond noted, "barter presupposes something of an objective standard of values, a preliminary stipulation as to the form which the return is to take, and an instantaneous return."<sup>23</sup> The inability of this medium of exchange to raise disputes which would have necessitated a discussion of choice of law in pre-colonial Nigeria is evidenced by Diamond's postulation:

To sum up, the only commercial transactions of importance, except among tribes who possess currency, are ready barter and credit barter, and among the few tribes who use currency, cash sale and loan of money are added. There is little else. Of these transactions, ready barter and cash sale produce little litigation.<sup>24</sup>

Thus, in the northern part of Nigeria, the barter system and the subsequent unitary legal system resulting from the introduction of Islam hindered growth and development for rules of conflict of laws.

However, this conclusion presupposes that the barter transaction went on smoothly and successfully, that the parties involved in the exchange were mutually satisfied with their bargains, and that no objections were raised by any of them after the barter transaction. For instance, a Kano man in pre-colonial Nigeria subject to Islamic law as his customary law exchanged his horse for the gold of a Gao man in Western Sudan who was subject to Gao customary law. The Kano man was happy with the gold and the Gao man was happy with his horse. No dispute arose, and therefore no question of whether Islamic law or Gao customary law was applicable to that transaction arises.

However, if we complicate these facts, a lot of difficulties interpose. Assume that the Kano man subsequently discovered that the gold he received in exchange for his horse was not genuine, and that he felt cheated and wanted his horse back. His Islamic law, in furtherance of our assumption, allowed him to get back his horse in the circumstances. On the other hand, the Gao man was not inclined to return the horse and relied on his customary law which, for instance, provided that after an exchange

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23. A.S. DIAMOND, *PRIMITIVE LAW* 393 (1935).

24. *Id.* at 400-01.

of the goods in a barter transaction, the parties were automatically discharged from any liabilities arising from the contract, and goods already exchanged could not be returned.

The above facts face two conflicting systems of law: Islamic law and Gao customary law. Also, the parties involved in the case were subject to these two divergent legal systems. Whether the action was brought in Kano or Gao, there would be the same question: which of the two systems of customary law would provide the rule of decision? If the barter transaction had taken place in a third tribal territory, *e.g.*, the Yoruba Kingdom of Oyo, the complexity would double because the question would be whether it is the Yoruba customary law, Gao customary law, or Islamic law that should govern the case. There is no doubt that the type of barter we are analyzing is of a litigable nature and could raise questions within the province of conflict of laws, *i.e.*, the question of choice of law.

It is not clear how these pre-colonial tribes and kingdoms resolved the type of questions raised by the above hypothetical case. In other words, there seems to be no evidence that specific choice of law rules, or other ascertainable rules of selection of the applicable law, were applied. The absence of this evidence suggests that barter transactions giving rise to litigable disputes must have been few in those pre-colonial times. This can only be explained on the basis that the actual exchange in a barter transaction must have been preceded by long and detailed negotiations between the parties, during which they tried to ascertain the quality of their individual goods, terms of exchange, and allowances for unexpected or latent defects.

This level of circumspection and wisdom on the part of the traders is expected, knowing that one or both of the traders involved in the barter transaction might have come from a long distance that involved travel for weeks or months. For instance, it was likely that the man from Gao (present day Ghana in West Africa) must have traveled for several weeks or months on the back of a camel, the only means of transportation at that time, across the Sahara desert before getting to Kano (in the present day Nigeria). It is therefore not unexpected that such a man would try to obtain the most favorable bargain and take care of the most minute aspect of the contract, especially with respect to latent defects in the articles of exchange. For instance, if he reasoned that the horse might have a latent disease, and that returning it after the barter exchange might be legally and practically impossible because of the distance involved, he might decide only to accept the horse in exchange for an inferior merchandise in his store instead of his gold, and then take the horse as he found it.

The Kano man would likely operate on the same reasoning. He knew that his customer came from Gao, a faraway land, and that getting back his

exchanged horse, if things went wrong, might be practically impossible in the circumstances. He would then take care to bargain in such a way that, if the gold turned out to be fake, he would not lose completely. For instance, he could subject the gold to the strictest examination and could even hire local experts to examine it for him. If he had doubts he could refuse to accept the gold in exchange. But if he decided to take the risk, then he could accept the gold only in exchange for an inferior article of his, other than his horse, and live with the consequences of his bargain.

The above type of circumspection naturally would leave little room for litigable disputes arising from barter. However, where this level of prudence was not exercised, the scenario changes and the problem of the applicable system of law comes to the fore. We have already said that there seems to be no evidence that any rules of selection of the applicable law were applied by these tribes, but we can speculate that such disputes might have been settled on the basis of the local law, *i.e.*, the *lex fori*. In other words, the court where the action was brought would apply the customary law of the tribe to which that court belonged. This hypothesis is based on the fact that in pre-colonial times, the legal systems of the above tribes were elementary. The means of communication and travel were at the rudimentary stage, mainly by horses and camels. In fact, the camel was metaphorically called "the ship of the desert."

The judicial system was also basic. Some, like the Hausas and Yorubas, had something like formal courts, while the Ibos lacked any formal court structure and settled disputes democratically. These early legal systems, without law reporting, juristic writing, or publication and distribution of legal commentaries, coupled with the difficulties in communication and travel, must have inhibited cross-fertilization of legal ideas and were unlikely to have generated adequate knowledge of legal systems obtainable in other tribes. Proof of other tribal or customary laws must have been difficult, if not impossible, in the circumstances. Even in modern times, judges do not envy legal situations requiring proof of a foreign law.<sup>25</sup> One can then guess how absurd it must have been to expect

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25. In a situation that required an English judge to establish what was the law of Spain on a particular point, the judge lamented:

It would be difficult to imagine a harder task than that which faces me, namely, of expounding for the first time either to this country or to Spain the relevant law of Spain as it would be expounded by the Supreme Court of Spain, which up to the present time has made no pronouncement on the subject, and having to base that exposition on evidence which satisfies me that on this subject there exists a profound cleavage of legal opinion in Spain and two conflicting decisions of courts of inferior jurisdiction.

DUKE OF WELLINGTON, *GLENTAR V. WELLINGTON AND OTHERS* 515 (1947).

a court of one tribe to establish by proof the customary law of another tribe, probably in a faraway land.

Consequently, one would imagine that the court of each tribe applied its tribal or customary law to disputes between a member of its tribe and a foreigner or between one foreigner and another. That was the law with which it was most familiar. Therefore, if such a local court ever assumed jurisdiction in the matter, it would apply its tribal law. On this postulation, one could generally say that litigable disputes arising from barter transactions in the pre-colonial period must have been rare, and must have been settled on the basis of the *lex fori*: the local law of the tribe in which the action was brought.

The Ibos in the eastern part of Nigeria also had contacts with their neighbors in the Middle Belt and the various city-states of the Niger Delta. These contacts were mainly by way of trade carried on by barter. According to Dr. Osmund Anigbo:

The Hausa\Yoruba traders can be regarded as the oldest settlers in the Ibagwa community [Ibo tribe]. Oral tradition traces the permanent settlement to the history of a long war fought between Ibagwa Aka on the one hand and a combined force of Obukpa, Iheakpu Awka and Itchi on the other. The Hausa and Yoruba tribes had been frequenting the Nkwo market, bringing with them horses, dried fish and talismen. The market offered palm oil in exchange.<sup>26</sup>

On the relationship between the Ibos and the city-states of the Niger Delta in the south southern part of Nigeria, Obaro Ikime stated, "The mode of life of the Itsekiri people (one of the tribes on the Niger Delta) has been determined by their environment. The Itsekiri are primarily fishermen and, like their Ijo neighbours, are known as suppliers of fish and 'crayfish' to the peoples of the hinterland (*i.e.*, the Ibos)."<sup>27</sup> And Crowder added that, "the Ijo traded with the peoples of the hinterland, who were mainly Igbo and Ibibio . . . . The Ijo exported dried fish and salt, which they panned in the salt water creeks, to the peoples of the hinterland, in exchange for vegetables and tools, particularly those made of iron."<sup>28</sup>

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26. OSMUND ANIGBO, COMMENSALITY AND HUMAN RELATIONSHIP AMONG THE IGBO: AN ETHNOGRAPHIC STUDY OF IBAGWA AKA, IGBOEZE L.G.A. ANAMBRA STATE NIGERIA 47 (1987).

27. OBARO IKIME, MERCHANT PRINCE OF THE NIGER DELTA 1 (1968).

28. CROWDER, *supra* note 9, at 60.

As we have already noted, this type of trading contact based on the barter system could not, generally speaking, generate conflict of laws problems. However, this is subject to the misgivings expressed on the litigable aspects of barter, based on the hypothetical case above. Generalizing on the socialization pattern in pre-colonial Nigeria, Dr. Eteng opined, "Periodic markets, themselves symbolizing the underdevelopment of the pre-colonial distributive and exchange systems, provided occasions for barter and information and diplomatic exchanges among contiguous communities."<sup>29</sup>

We can now posit that for problems of conflict of laws to arise from inter-tribal or trans-boundary contacts, such contacts must be of such quality and intensity as to affect personal or family status or profoundly entail commercial contracts of a litigable nature. These factors were seemingly absent in the tribal contacts we have so far examined. Kalenský rightly points out:

[I]n order for private international law to progress further, it was necessary for the initial, sporadic contacts between non-sovereign subjects subordinated to the laws of different states and juridically exceeding the boundaries of a single jurisdiction to grow to a certain level both quantitatively and as regards the general and essential character of such contacts for the life of society.<sup>30</sup>

Obviously, this required a level of contact lacking in pre-colonial Nigerian societies. Because the prevailing economic system of barter entailed an instantaneous exchange and gave little room for disputes, there was no question, for instance, of a contract concluded in the Yoruba kingdom between Hausa and Yoruba merchants being litigated in the local courts of Kanem-Bornu or Benin Kingdom. However, this is only with respect to simple barter transactions that were concluded successfully without disputes thereafter.

Though we have reasoned above that most barter transactions in the pre-colonial period must have belonged to this class, *i.e.*, raised non-litigable disputes, it is entirely possible that some barter transactions might have given rise to litigable disputes. In that case, the analysis above on the suggested method of solution is also germane here. There is no authoritative evidence that at this period people from one tribe domiciled or permanently resided in another tribe, *e.g.*, a Yoruba man in the

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29. I.A. ETENG, CHANGING PATTERNS OF SOCIALIZATION AND THEIR IMPACT ON NATIONAL DEVELOPMENT 348 (1980).

30. KALENSKÝ, *supra* note 16, at 29.

thirteenth century or earlier taking up permanent residence in the Ibo area. The insularity of the Nigerian pre-colonial tribal societies, the difficulties in communication and travel, and the differences in language, manners, culture, and political organizations, must have made inter-tribal residence or settlement unattractive. As such, intercourse among pre-colonial Nigerian tribes must have been superficial and transitory. Concomitantly, the local jurists of these tribes never had the opportunity to ponder the application of their local or customary laws to foreigners. Equally untested was the resourcefulness of Nigerian customary laws in resolving cases with foreign elements. However, one writer has confidently asserted, to the contrary, that Nigeria's customary law has rules of conflict of laws:

The problem of choice of law arises in court where citizens have relations or transactions with foreigners. It also arises where this arises extra-territorially. The solution is often found in established rules of conflict of laws or what is sometimes called private international law. There is even here a greater problem of this kind because customary laws mainly vary from place to place and as between families or kindred. There are however areas of common ground. Nonetheless it cannot be suggested that customary law is devoid or [*sic*] rules for solving issues of conflict of laws.<sup>31</sup>

This is quintessential *a priori* reasoning. Suffice it to say that the analysis thus far challenges Onyechi's postulation. But he might well be right with respect to some barter transactions that could actually give rise to disputes, as shown in the above hypothetical case of a barter exchange between a Kano man and Gao man.

However, Onyechi did not tell us how customary law resolved such disputes with multi-tribal contacts. What were those customary law "rules for solving issues of conflict of laws?" Is there any evidence of them? These points were not addressed by him but, as already examined in detail, insofar as litigable disputes arose from barter transactions it seems that such disputes were settled by the customary law on the basis of *lex fori*. It is for the reasons canvassed above that we agree with P.C. Lloyd's conclusion:

With each Yoruba group claiming that its own customary law differs from that of its neighbours there seems to be

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31. AFRICAN INDIGENOUS LAWS 292 (T.O. Elias, S.N. Nwabara et al., eds. 1974) (proceedings of workshop held in Nsukka, Nigeria, on August 7-9, 1974).

scope for conflicts of laws. In fact such conflict does not seem to have arisen. This is partly because the alleged differences in law between the traditional kingdoms refer often to variant customs and not to any differences in the basic legal system. Land cases are always heard by the court within whose area of jurisdiction the land is situated and they are judged according to the local law. It is conceivable, though I recollect no case, that a stranger might claim that in his home town a grant of land similar to that he gained in his new settlement would confer greater rights; but the rights granted to a stranger are those usual in the grantor's town, and the stranger well knows this. Cases involving the divorce or inheritance laws are almost invariably taken by strangers to their home towns for settlement.<sup>32</sup>

It remains to add that the legal situation did not change even with exploration of the River Niger and the emergence of the British merchants on the coast of Nigeria about the sixteenth century, which led to trading relationship between members of the coastal tribes of Nigeria and the British traders. This relationship ultimately resulted in the political subjugation of the Nigerian people.

### III. CHRONICLE EVIDENCE FOR COMMERCE AND CONFLICTS

During the era of slave trade, which reached its peak about the seventeenth and early nineteenth centuries, and its Victorian replacement with legitimate trade, the British merchants maintained the economic system of trade by barter. The implication of this system for conflict of laws in Nigeria has already been noted, and justifies the lengthy quotation of James Barbot, describing the operation of the barter system between the British merchants and Nigerian coastal middlemen:

The king had on an old fashion'd scarlet coat, laced with gold and silver, very rusty, and a fine hat on his head, but bare-footed; all his attendants showing great respect to him and, since our coming hither, none of the natives have dared to come aboard of us, or sell the least thing, till the king had adjusted trade with us.

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32. P. C. LLOYD, *YORUBA LAND LAW* 26 (1962).



We had again a long discussion with the king and Pepprel his brother, concerning the rates of our goods and his customs. This Pepprel, being a sharp blade, and a mighty talking Black, perpetually making objections against something or other, and teasing us for this or that Dassy, or present, as well as for drams, etc., it were to be wish'd that such a one as he were out of the way, to facilitate trade . . . .

Thus, with much patience, all our matters were adjusted indifferently, after their way, who are not very scrupulous to find excuses or objections, for not keeping literally to any verbal contract; for they have not the art of reading and writing, and therefore we are forced to stand to their agreement, which often is no longer than they think fit to hold it themselves . . . . We adjusted with them the reduction of our merchandize into bars of iron, as the standard coin, viz: one bunch of beads, one bar . . . . The price of provisions and woods was also regulated.

Sixty king's yams, one bar; one hundred and sixty slave's yams, one bar; for fifty thousand yams to be delivered to us. A butt of water, two rings. For the length of wood, seven bars, which is dear; but they were to deliver it ready cut into our boat. For a goat, one bar. A cow, ten or eight bars, according to its bigness. A hog, two bars. A calf, eight bars. A jar of palm oil, one bar and a quarter<sup>33</sup>

The last clause of the first paragraph above, "or sell the least thing, till the king had adjusted trade with us," is explained by the detailed examples which show that Barbot was not referring to conflict between the customary laws of the Nigerian tribes on the coast and English law. Barbot was just describing the nature of the barter transaction between the English merchants and Africans, which a further passage from him will illustrate.

Barbot's account herein generally shows that the trading system, if it was limited to the type of instantaneous exchange implied in the passage, was immune to commercial disputes of any litigable nature. This is evident from the fact that actual exchange in the barter transaction referred to by Barbot was preceded by days of negotiations during which every

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33. James Barbot, *An Abstract of a Voyage to New Calabar River or Rio Real in the Year 1699*, in CHURCHILL: A COLLECTION OF VOYAGES AND TRAVELS 459-60 (3d ed).

aspect and detail of the contract were mutually agreed by the parties. Barbot recounted:

On the twenty fifth in the morning, we saluted the Black King of Great Bandy, with seven guns; and soon after fired as many for captain Edwards, when he got aboard, to give us the most necessary advice concerning the trade we designed to drive there. At ten he returned ashore, being again saluted with seven guns; we went ashore also to compliment the King, and make him overtures of trade, but he gave us to understand, he expected one bar of iron for each slave more than Edwards had paid for his; and also objected much against our bafons, [*sic*] tankards, yellow beads, and some other merchandise, as of little or no demand there at that time.

The twenty sixth, we had a conference with the King and principal natives of the country, about trade, which lasted from three a-clock till night, without any result, they insisting to have thirteen bars of iron for a male, and ten for a female; objecting that they were now scarce, because of the many ships that had exported vast quantities of late. The King treated us at supper, and we took leave of him.

The twenty seventh the King sent for a barrel of brandy of thirty five gallons, at two bars of iron per gallon; at ten we went ashore, and renewed the treaty with the Blacks, but concluded nothing at all, they being full of same mind as before.

The twenty eight, we sent our pinnace up the river to Dony, for provisions and refreshments; that village being about twenty-five miles from Bandy. Transacted nothing with Blacks of Bandy all this day.

The twenty ninth, had three jars of palm-oil, and being foul weather, did not go ashore.

The thirtieth, being ashore, had a new conference which produced nothing; and then Pepprell, the King's brother, made us a discourse, as from the King, importing, He was sorry we would not accept of his proposals; that it was not his fault, he having a great esteem and regard for the

Whites, who had enriched him by trade. That what he so earnestly insisted on thirteen bars for male, and ten for female slaves, came from the country people holding up the price of slaves at their inland markets, seeing so many large ships resort to Bandy for them; but to moderate matters, and encourage trading with us, he would be content with thirteen bars for males, and nine bars and two brass rings for females. Upon which we offered thirteen bars for men, and nine for women, and proportionably for boys and girls, according to their ages; after this we parted, without concluding anything farther.

On the first day of July, the King sent for us to come ashore, we staid there till four in the afternoon, and concluded the trade on the terms offered them the day before; the King promising to come the next day aboard to regulate it, and be paid his duties.<sup>34</sup>

The above apparently shows that Barbot was describing the trading conditions of barter between the European merchants and African traders. That transaction carried with it the potentiality of conflict of laws problems because the two groups, Europeans and Africans, were subject to at least two different systems of law. There is no doubt that disputes arising from such transactions would have raised the question of choice of law: is it the African system of law or the system to which the European merchants were subject that would provide the rule of decision? But it seems that the occurrence of the above type of problem or dispute was mitigated by the detailed and lengthy negotiations that preceded the actual barter exchange. With the type of transaction described by Barbot, in which the parties mutually came to satisfactory terms before the actual exchange, disputes which would have necessitated conflict of laws problems were practically avoided. If the entire barter transaction on the Nigerian coast was carried on solely on the basis of Barbot's description, *i.e.*, with mutually accepted negotiated terms followed by instantaneous exchange of goods, one would have been tempted to conclude that conflict problems did not arise. However, things did not remain entirely as Barbot described. He gave another side of the barter transaction: credit barter, which was full of potentialities for conflict of laws problems.

According to Barbot, the European merchants gave credits in the form of goods to the African Kings and merchants. The Africans paid back the

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34. *Id.* at 459.

credit with slaves and other commodities needed by the Europeans. The credit system existed probably to facilitate trade and ensure that the European merchants spent less time on the African coast; with the credits the Africans would keep the slaves and other goods ready before the Europeans made a return trip. Barbot described the credit system:

We also advanced to the King, by way of loan, the value of a hundred and fifty bars of iron, in sundry goods; and to his principal men, others, as much again, each in proportion of his quality and ability.

To captain forty, eighty bars. To another, forty. To others, twenty each.

This we did, in order to repair forthwith to the inland markets, to buy yams for greater expedition; they employing usually nine to ten days in each journey up the country, in their long canoes up the river.<sup>35</sup>

The questions then become: did the Africans pay back the credits or fulfil their own obligations under the credit barter? If not, how did the European merchants react or enforce payments? If so, did the method of enforcement generate disputes? How were those disputes settled? Which legal system was applied to the settlement of such disputes? Barbot's account did not answer most of the above questions, but he described the method of repayment:

It is customary here for the King of Bandy to treat the officers of every trading ship, at their first coming, and the officers return the treat to the King, some days before they have their compliment of slaves and yams aboard. Accordingly, on the twelfth of August, we treated the King, and his principal officers, with a goat, a hog, and a barrel of punch; and that is an advertisement to the Blacks ashore, to pay in to us what they owe us, or to furnish with all speed, what slaves and yams they have contracted to supply us with, else the King compels them to it. At that time also such of the natives as have received from us a present, use to present us, each with a boy or girl-slave in requittal. According to this custom we treated the Blacks ashore on the fifteenth of August, and invited the

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35. *Id.* at 460.

Portuguese master to it, as also the Black ladies; the King lending us his musick, to the noise of which we had a long diversion of dances and sports of both sexes, some not unpleasing to behold . . . .

On the twenty second, we let fly our colours, and fired a gun, for a signal to the Blacks, of our being near ready to sail, and to hasten aboard with the rest of the slaves, and quantity of yams contracted for.<sup>36</sup>

Barbot has just described the custom by which the Africans paid back their loans or discharged their own obligations under the credit barter transaction. According to him, the African King ensured that the African merchants paid back their loans and in fact enforced repayment in that he, "compels them to it." That is clear.

But what of the loan given to the African King himself? How was repayment by the King enforced and by whom? Where the African King refused to pay back his loan and a dispute naturally resulted, what law was applied to the resolution of that dispute? Barbot did not give any clue to the answers for the above questions. His silence on the point may well mean that the African King himself was not found wanting in repaying his own loan. Otherwise, he would have recorded such an important event which would have had the effect of disrupting trade and adversely affecting the relationship between the European and African merchants. One thing seems to be clear: disputes which resulted or would have resulted from such credit transactions involving people from different legal and political backgrounds obviously belonged to the field of conflict of laws. As we shall see later, the frequency of similar disputes in the nineteenth century led to establishment of a special type of court called "the court of equity," not in any way connoting the Chancery Court in England which developed its principles of equity.

Again, during this era, the British merchants merely conducted their transactions on the Nigerian coast without any settlement or intention to settle in the Nigerian territory. This is particularly true in the early periods of their presence in Nigeria, *i.e.*, about the fifteenth and sixteenth centuries. The African land, its peoples and cultures, were strange to them. Malaria resulting from mosquito bites ensured a very high mortality rate on the part of the foreigners. This was such a serious impediment to settlement that most parts of West Africa, including Nigeria, were euphemistically called the "white man's grave." It was not until the

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36. *Id.* at 463.

British merchants started residing in Nigeria on a more permanent basis, probably following the discovery of the malaria prophylactic chloroquine in the early nineteenth century, that serious and full disputes of a conflict of laws nature began to arise.

Trade disputes between Nigerian merchants and British traders led to the latter's call to their home government for help and protection. The British government reacted by appointing a first British Consul, John Beecroft, to Nigeria in 1849. He was himself a British merchant and already familiar with the trade and politics of the Niger Delta.<sup>37</sup> The consul's primary duty was to protect the lives and property of the British traders.<sup>38</sup> We shall presently discuss how the conflicts between the British and Nigerian merchants were settled.

Having described, as the primary evidence allows, the extent and effect of social and economic interaction in Nigeria to the period of the arrival of European traders, mainly British, the next step is to establish the existence of the diversity of tribal or customary laws in pre-colonial Nigeria.

#### IV. CUSTOMARY LAW AND SYSTEMS

There is no doubt that each of the various pre-colonial Nigerian tribes had, and still has, its own tribal, native, or customary law which exclusively applied to it, and was different in some ways from the customary legal system applicable in another tribe. Even today one speaks of Yoruba customary law, Ibo customary law, and the Islamic law that is applicable in the northern part of Nigeria. According to Justice A.G. Karibi-Whyte, "the various customary laws are indigenous to the ethnic groups and were formulated by them to meet the different social challenges in their development over the ages. Islamic law does not enjoy the same natal origin, and like English law is exotic."<sup>39</sup> Similarly, then-Justice Dan Ibekwe stated extra-judicially:

In the beginning, the various communities which made up what is today known as Nigeria were developing in their own simple ways. It is however, correct to say that . . . those communities were not integrated as is the case now. In the process of time, each community had evolved into

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37. IKIME, *supra* note 27, at 14.

38. *Id.*

39. A. G. KARIBI-WHYTE, *THE RELEVANCE OF THE JUDICIARY IN THE POLITY-IN HISTORICAL PERSPECTIVE* 31 (1987).

an organized society. Each had its customary law and, in many cases, there were sanctions behind such law<sup>40</sup>

Since different social, political and even religious structures obtained in these tribes, the customary laws emanating therefrom were bound to diverge. As Yntema put it:

In early times, when the legal order was intimately connected with actual or supposed kinship groups and was part of the peculiar religious and social structure of the particular community, law was inalienably personal. It was inconceivable, for example, that the *ius civile*, the common law of the Roman citizenry, should be available to a *peregrine* in Rome or, *vice versa*, that an Athenian in Attica should claim the protection of some barbarian custom. This identification of local law with the interests of the social group has by no means disappeared<sup>41</sup>

Similarly, Ezra Zubrow opined that "[t]his universality of legal systems is probably matched only by their diversity. They range from systems based on kinship to property, from secular to religious principles, and from consensual to dictatorial impositions. Different societies have differing mixes at various times."<sup>42</sup> Finally on this point, Professor Nwabueze has stated, "It should be explained that customary law is not a single body of law throughout the country. Far from that being the case, customary law is as various as the number of independent communities comprised in Nigeria."<sup>43</sup>

It should be emphasized that the existence of a multiplicity of tribal or customary laws in pre-colonial Nigeria, and the exclusive application in a tribe of its customary law, did not generate legal pluralism. Legal pluralism implies the simultaneous existence and interaction of two or more different systems of law, one of which is superior to the others.<sup>44</sup> In pre-colonial Nigeria, where the customary law of a tribe was the only

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40. D. O. Ibekwe, *Conflict of Cultures and our Customary Law*, in AFRICAN INDIGENOUS LAWS 297 (T.O. Elias, S.N. Nwabara et al., eds. 1974) (proceedings of workshop held in Nsukka, Nigeria, on August 7-9, 1974).

41. Hessel. E. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 298 (1953).

42. THE IMPACT OF FOLK LAW ON THE DEVELOPMENT OF THE EARLY STATE, paper from the 11th International Congress of Anthropological and Ethnological Sciences, Canada 334 (1983).

43. B. O. NWABUEZE, THE MACHINERY OF JUSTICE IN NIGERIA 3 (1963).

44. M.B. HOOKER, LEGAL PLURALISM 6 (1975).

applicable law, the question of interaction with or subservience to any other law did not naturally arise.

Although the pre-colonial Nigerian societies had their different customary laws, *i.e.*, existence of legal diversity, the emergence of conflict problems of choice of law depends on the view one takes of the apparently superficial social and economic interaction, and on the impact of the barter based economic system. In other words, if one takes the view that the barter system actually led to disputes, that is a strong argument for the existence of conflict of laws problems at that period; but a contrary view of barter may mean that conflict of laws problems did not exist. We have already examined both perspectives. However, whatever dispute arose, be it between individuals from different tribes or between natives and European traders, it was settled in a clearly identifiable pattern and without reference to any judicial process.<sup>45</sup>

This naturally takes us to the last question: what was the mode of resolution of disputes, if any, arising from inter-tribal contacts? The first approach will be to tackle the mode of dispute resolution before the advent of Europeans. Thereafter, we shall examine the style of dispute resolution in the colonial era.

The argument here on dispute resolution in pre-colonial Nigeria is without prejudice to the earlier suggestion that the *lex fori* was likely applied to disputes of a conflict of laws nature. The following is in the nature of an alternative argument. In pre-colonial Nigeria, disputes that resulted from the superficial inter-tribal contacts were not referred to any adjudicatory body. This might have been due to the ethnic and tribal nature of the different customary laws. During this period, violence was usually and freely resorted to in the settlement of such disputes. Few references will suffice. Professor Obaro Ikime stated:

The development of the palm oil trade had another effect on Itsekiri-Urhobo relations. Although through the system of pledges and 'diplomatic marriages' it was often possible to maintain friendly relations between the middlemen and the producers, disputes between the Urhobo and the Itsekiri were not always resolved peacefully. Sometimes the Itsekiri traders, offended by the non-fulfillment of promises made by their Urhobo customers sent their slaves, usually described as their 'boys' to raid the villages of the offenders concerned; the idea was that slaves taken

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45. For traditional judicial process, see E.K. Quashigah, *Reflections on the Judicial Process in Traditional Africa*, 4 NIGERIAN JURIDICAL REV. 1 (1990).



during such a raid would, by working for the Itsekiri, eventually make good the loss sustained by the non-fulfillment of the obligations previously agreed on. Once under way such raids tended to become indiscriminate, since the 'boys' did not always confine their depredations to specific individuals or villages. This practice usually referred to as 'chopping' was to be frowned upon by the British administration in the years after 1891.<sup>46</sup>

Violence and self-help as dispute resolution methods were characteristic of "primitive" law. They were equally employed by the Greeks, as Vinogradoff noted:

As frequently happens in ancient law, distress was used as a means of obtaining justice by self-help. Another feature of the procedure was that distress or reprisals are not necessarily directed against one's opponent, but might be leveled against relatives of his or even against his countrymen at large. Such cases were considered as a justified taking of hostages.<sup>47</sup>

Gluckman added that "[i]n polysegmentary societies there may be no authoritative means of settling disputes between opposed segments and hence there is resort to vengeance or self-help."<sup>48</sup>

The advent of colonialism, at least initially, did not alter the above mode of dispute resolution. The Europeans naturally refused to submit to legal regulation by customary law, which was considered alien. However, Nwabueze submitted: "At first these foreign traders resorted to the traditional tribunals for the settlement of their disputes with the natives."<sup>49</sup> No authority was cited for this proposition. What he said could have been true of Canada, but definitely not Nigeria. The Canadian position has been stated by Bradford W. Morse: "There is in fact a wealth of information indicating that early travellers, traders and colonists willingly chose to accept local Indian law as governing their affairs in the Canadian

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46. IKIME, *supra* note 27, at 7.

47. P. Vinogradoff, *Historical Types of International Law*, in THE COLLECTED PAPERS OF PAUL VINOGRADOFF 260 (1928).

48. M. GLUCKMAN, IDEAS AND PROCEDURES IN AFRICAN CUSTOMARY LAW 69 (1969).

49. NWABUEZE, *supra* note 43, at 46.

Prairies.”<sup>50</sup> Certainly this was not the position in Nigeria, because the prevailing barter system entailed instantaneous<sup>51</sup> return which, generally speaking, hardly generated litigable dispute.

Again, this point is substantiated by the account of James Barbot: “they [Africans] have not the art of reading and writing, and therefore we are forced to stand to their agreement, which often is no longer than they think fit to hold it themselves.”<sup>52</sup> Thus, with this unequal bargaining power, the question of resort by the European traders to the customary laws or traditional tribunals did not arise and could not have arisen. Professor Crowder clearly made the same point:

The palm-oil traders were as rough a lot as the old slave traders, and well deserved their title ‘palm oil Ruffians.’ The African chiefs could not actually bring these traders before their own courts, so they resorted to the expedient of imposing collective punishment on the European community through the banning of trade. This was fairly effective, since conditions on the coast were such that most traders were very anxious to get back to Europe as quickly as possible, and could stomach no delays. The ban on trade was always absolute because of the strict control African chiefs exercised over their subjects. There was no ‘scabbing’ on the African part, to use a modern trade-union term. On the other hand, the Europeans found it difficult to combine effectively, since whenever a European community stuck out for lower prices, there was usually one of their number willing to trade at the African’s price.<sup>53</sup>

The imperative of some form of adjudicatory body to resolve disputes between African and European traders did not arise until the latter began to settle on a more permanent basis in the larger territory that became Nigeria. Consequent upon this settlement, disputes between Nigerian and British merchants increased. These disputes were clearly of the nature of conflict of laws since they naturally involved the question of which legal system, English or customary law, was applicable. Because the British

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50. INDIGENOUS LAW AND STATE LEGAL SYSTEMS: CONFLICT AND COMPATIBILITY, COMMISSION ON FOLK LAW AND LEGAL PLURALISM, paper from the 11th Int’l Congress of Anthropological and Ethnological Sciences, Canada 334 (1983)

51. DIAMOND, *supra* note 23, at 393.

52. BARBOT, *supra* note 33, at 459-60.

53. CROWDER, *supra* note 9, at 123.

merchants were reluctant to employ the traditional process of dispute resolution, they appealed to their home government for help. This, as we have already noted, led to the appointment of the first consul, John Beecroft, whose primary responsibility was the protection of the lives and property of British traders in the Niger Delta.

The various consuls did not apply any judicial form of inquiry or technical rules of justice. Rather, they resorted to intimidation and violence against the Nigerian traders whenever there was a dispute between them and their British counterparts. The *modus operandi* of the British consul was graphically captured in the account of Ikime:

But while he [John Beecroft] was actually in the district, the people of the town of Bobi, led by their chief Tsanomi, attacked and looted Horsfall's factory. The cause of the attack is not known but, judging from subsequent incidents, it is unlikely that it was undertaken out of sheer desire for loot. Beecroft was filled with great indignation. In a note to the naval authorities, he requested that a gunboat be sent to the Benin River to mete out condign punishment: 'the sooner a man of war arrives the more pleasing it will be for me, for these scoundrels must be well chastised with powder and shot.' This was characteristic. Beecroft was determined to leave no doubts as to the power and authority which the consul could bring to bear on these perennial disputes between white traders and the delta peoples. The gunboat requested did arrive, and Beecroft proceeded to bombard and burn down Bobi, thereby establishing the pattern of Afro-British relations in this as in other parts of the delta: whenever a dispute arose between British traders and the delta middlemen, the latter had almost invariably to face punishment irrespective of the rights and wrongs of the case.<sup>54</sup>

No doubt, dispute settlement based on gunboat diplomacy hindered trade, and even social intercourse between Africans and Europeans. Both parties set out to find a formula for the resolution of such disputes with traces of foreign elements. This search resulted in establishment of a "Court of Equity" in 1854 for the adjudication of disputes between Africans and Europeans. It was composed of African middlemen and European supercargoes, the "foreign traders" as they were known, and presided over by the latter in monthly rotation. Its judgment was

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54. IKIME, *supra* note 27, at 15-16.

confirmed by the African king.<sup>55</sup> The Court of Equity was described by Dr. Baikie, who explored the River Niger up to Lokoja in Nigeria:

A commercial or mercantile association was, by the exertions of captain Witt and others formed, the members being the chief white and black traders in the place, and the chair is occupied by the white supercargoes in monthly rotation. All disputes are brought before this court, the merits of the opponents are determined, and with the consent of the king, fines are levied on defaulters. If any one refuses to submit to the decision of the court or ignores its jurisdiction, he is tabooed, and no one trades with him. The natives stand in awe of it, and readily pay their debts when threatened with it.<sup>56</sup>

Disputes before the Court of Equity obviously had a foreign element and were most likely to have involved the question of choice of law. Was it English law or African customary law that would provide the rule of decision? However, the Court of Equity did not decide disputes before it, based on any ascertainable pattern or system of law. Rather, it based its decisions on general notions of justice.<sup>57</sup>

The emergence of these courts of equity in various parts of Nigeria after 1854, though they entertained problems in the nature of conflict of laws, did not lead to the introduction of a full system of conflict of laws or its rules in Nigeria. This is because the Court of Equity did not decide disputes before it on the basis of choice of law, *i.e.*, by asking which of the potentially applicable laws would provide the rule of decision. It was historically in the nature of pure equity, as employed in the English court of Chancery, that the judge's "conscience" ruled according to reason and fairness.

On 30 July 1861, King Dosunmu of Lagos ceded Lagos to Acting Consul McKoskry, in return for a yearly payment of one thousand and thirty pounds sterling. Consequently, a governor was appointed for the newly-acquired colony of Lagos in the person of Henry Stanhope Freeman. This appointment marked the beginning of a permanent British colonial administration in Nigeria. Obviously, an administration of this nature required a complete legal system for effective operation. This led to the

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55. See CROWDER, *supra* note 9, at 123.

56. NWABUEZE, *supra* note 43, at 51-52 (quoting BAIKIE: NARRATIVE OF AN EXPLORING VOYAGE UP THE RIVERS KWORA AND BINUE IN 1854, 356).

57. A. O. OBILADE, THE NIGERIAN LEGAL SYSTEM 18 (1979).

introduction of English law in the colony of Lagos in 1863,<sup>58</sup> subsequently extended to the rest of the country.<sup>59</sup> By the Supreme Court Ordinance of 1863,<sup>60</sup> the first Supreme Court was established for the colony of Lagos. This Ordinance was subsequently repealed and replaced with the Supreme Court Ordinance of 1876.<sup>61</sup> This statute received into the colony of Lagos the common law of England, the doctrines of equity, and statutes of general application in force in England on 24 July 1874.

In 1900, both northern and southern Nigeria were declared British protectorates and a Supreme Court was established for each.<sup>62</sup> The common law of England, doctrines of equity and statutes of general application in force in England on 1 January 1900 were received into each protectorate. The reception of English law was continued and confirmed by many statutes passed after Nigeria's independence.<sup>63</sup>

Thus, the reception of English law into the colony of Lagos in 1863 and the rest of the country in 1900 marked the introduction in Nigeria of complete and mature rules of conflict of laws derived from England.

## V. CONCLUSION

This legal historical reconstruction has concentrated on the state of conflict of laws in Nigeria from the pre-colonial period to establishment of full British administration in Nigeria in 1863. The existence of conflict of laws during this period can be mirrored from the barter economic system and was conditioned by it. There were two arguments on the impact of barter: first, that barter was preceded by such circumspection, prudence and detailed negotiation that disputes of a conflict of laws nature which might have arisen were practically averted; and second, that the barter system, especially the credit barter, actually resulted, or was likely to have resulted, in disputes which belonged to conflict of laws. Disputes which came before the court of equity in the nineteenth century were clearly of a conflict of laws nature. To the extent that conflict of laws problems existed during the period under review, there was no clear evidence of the rules which were adopted in the resolution thereof. Apart from the

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58. Ordinance No. 3 of 1863.

59. A.N. Allott, *The Common Law of Nigeria in Nigerian Law: Some Recent Developments*, in A REPORT FROM THE BRITISH INSTITUTE OF INT'L AND COMP. L. 31(1964).

60. Ordinance No. 11 of 1863.

61. Ordinance No. 4 of 1876.

62. Supreme Court Proclamation No. 6 of 1900 (for Southern Nigeria), and Protectorates Court Proclamation No. 4 of 1900 (for Northern Nigeria).

63. *Nigerian Tobacco Co. Ltd. v. Alloysius Olumba Agunanne* (1995) 5 NIGERIAN WKLY. L. REPS. 541, 580-81 (Part 397) (decision of Supreme Court of Nigeria).

traditional settlement by war; reprisals; gunboat diplomacy; and reference to the Court of Equity, which did not apply any systematic body of principles or rules, disputes of a conflict of laws nature were likely settled by application of the *lex fori*, because of the peculiar difficulty of proving foreign law during that period.

We conclude that a full system of conflict of laws, as we know it today, was introduced into Nigeria in 1863. The primary evidence for conflict of laws in Nigeria during the colonial period, which are still valid sources today, were the reception of English common law, doctrines of equity, and statutes of general application.