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The Jurisprudential Issues Arising from Legal Transplant: An Appraisal

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Abstract
The paper appraises the jurisprudential issues arising from legal transplant generally. Based on the appraisal it was established that the Jews who moved to Egypt was known to have been the first group of people to have transplanted their laws, values and culture voluntarily without the prompting of the host Country Egypt and while leaving after 43o years of sojourn they left with their laws, values and culture to the promised land. The paper also discovers that Roman laws were one of the initial laws that preceded and was eventually transplanted to the most the European Countries such as Germany, England, Jewish State of Israel, Portugal, French, Dutch and their colonized territories and American colonies and uninhabited areas where it was established through the activities these countries and members of the academic community who have embraced these laws in Europe. The paper further appraises of some foreign religions and laws such as Islamic religion and laws, Hindus laws, common law on the countries they have been transplanted. In conclusion the paper was to note that the following factors, Objective, Political, Cultural, Economy, Chance, Literary factors and Centres of law propagation namely the courts, the bar and the law schools are responsible for transplantation.
Keywords: Jurisprudential issues**,** *legal transplant, Roman laws, foreign religions*

1. Introduction

Legal transplant has literarily been interpreted to be the acceptance of law of a different society or race by another; which may be either by imposition or voluntarily. The transplantation of large bodies of law from one society to another can be seen to be an old exercise. It is difficult to say when or where it first started, but it seems clear that it took shape during the formative period of the conception of societies in the world.

While the authors[1] stand to be contradicted, it is our submission that the first known transplantation occurred when the Israelites first moved into Egypt[2] and when they were leaving Egypt some four hundred and thirty years later[3], they both received each other's laws and when the Israelites were leaving Egypt, they took their integrated laws with them and spread it for forty years as they journeyed to the promised land. The great literatures of the Hebrew surviving in the Old Testament contains much that relates to their law, especially in the Pentateuch[4] which is an ancient code of true law[5] contained in the book of Exodus.[6] The clauses are precisely drafted showing clear evidence of development, amendment and addition. Over a succession of centuries[7] During the ***Roman era*** there occurred also transplantation to almost, if not more than half the surface of the world where the Roman Empire then extended to. This occurred as far back as 450 BC, when codification of the law was first made[8] This law stated is migration when Rome Started achieving Paramount supremacy in Italy;

> *where most of the communities were now either subservient allies or strategically place colonies of Roman Empire.*

When the first Punic war was fought in the middle of the third century, and Rome emerged victorious, one by one it annexes the territories of its rivals that it has defeated:- North Africa and Spain. With the conquest of curettage, Greece with that of Macedonia. By 100BC whatever part of the Mediterranean seaboard that was not Roman territory[9] was very much under Roman influence and by the last years of the Republic[10] virtually all Europe south of the Rhine and the Dambe, most of Asia Minor, Syria Palestine, Egypt and North Africa were Roman Lands.

In 88 BC after the social war, all Italy south of the Po received Roman citizenship. The rest of the Roman do Mains became governed as province by former Roman Magistrate,[11]as a result of the continuous expansion of Rome in other territories, and as a great trading nation and power. Roman law was applied in the

[1] Supra
[2] Genesis chapters 46[28] & 47,[1-]
[3] Exodus 2[40] – 51
[4] Pentateuch is a book of History Edited in the fourth century BC
[5] Circular law of the land
[6] Exodus 21 - 22
[7] As Diamond: Primitive law; Past and Present P. 19
[8] The Gorton Code or the 12 tables
[9] Mostly in the Eastern Mediterranean
[10] After 50 BC
[11] AM Richard: Roman Private law P. 4

political, administrative and commercial sphere of its influence…..

Back in Africa, we have abundance laws among the various people. The only problem we are faced with is that, there are no available documents to show which tribe or people transplanted their laws to the other. Suffice to say that instances for example can be found in various laws of the people[1] Again among Moslem people of Nigeria, the concept of purdar is common particularly among the Hausas and some Yorubas. This concept is unknown to Islamic Law.[2]

A look at the customary land law in Africa, shows that the concept of individual ownership of land is unknown.[3] Traces of the Nigerian Yoruba customary law is found among the Binis[4] of Edo State and among the Ajase of the Republic of Benin. Most Customary laws in Africa in the law of domestic obligations, have similar provisions for payment of dowry, leading of bride to the bridegrooms house and the subsequent publicity of the marriage by celebration. Transplantation sometimes occurred as a result of the advancement of one society economically, socially, and politically and the other society is still backward or the process of advancement of is rather slow.

What transplantation does is to try to narrow the gap between the development and the developing society by the use of the imported societal norms of the developed. Thus it is sometimes possible for societies which have different cultural, social, economic and political background to transplant each other's laws, once it benefits the importing society. But it has been submitted that the laws of a more developed society cannot take root easily in a least developed society, because of the low level of literacy and poor technical administration capabilities[5] while the opinion may be right in certain situations, it is still possible for the less developed societies to import laws of the developed societies once there is an understanding of the law by those to implement it, and that the law will suit the local circumstances. For instance Liberia which has never tested colonisation imported the laws of America and Britain, and likewise the Sudan imported that of Britain but the case of the Ethiopian importation of English and French laws landed them into problems. They started on a very bad note by translating the law into their lingua franca which was not yet properly developed, so that there existed a lot of lacuna for words which the lingua franca have no equivalent. This certainly have created to our mind chaos in their legal system. Hopefully normalcy have returned when the right step was taken[6]

With the current advancement of the world, reception of laws of other countries is now a matter of choice; no more by conquest or colonisation as it used to be[7] for a proper perception of the laws the background of some of the predominant laws that have existed and still existing would be examined.
While limiting the scope of this to the various types of laws received, the technique of reception in the countries and harmonisation of the laws.

2. THE FAMILIES OF LAWS AND THEIR TRANSPLANTATION:

2.1 ROMAN LAW:

Tradition has it that Rome was founded around 753 BC, and during the twenty seven centuries that followed, Roman law, has lived two lives. When it was the law of the city of Rome, and in its victim ate maturity of the whole Roman empire, being brought to a close in the sixth century AD. But five and a half century later it was revived, when the teaching of it started again; spreading to almost all parts of Europe, Except England which stood against its reception and retained its common law; largely but not entirely uninfluenced by Roman law[8] During the era of Roman civilization, its rulers had to fight wars against other nations, and conquered them; thus expanding the Roman empire with a government under a magistrate with imperium.[9] The territories in which Roman law was introduced included Italy, North Africa, Southern Spain, Greece and almost the whole of Europe, when the empire disappeared in the fifth century around 476AD, the law as expanded and transplanted still remain.

[1] The Efik speaking people and some other tribes of the cross River States of Nigeria have similar customary laws with the Bayorn gispeaking people of South West Province of Cameroun.
[2] This view as held by Mallam Ibrahim Naiya Sade, a Moslem Scholar at the centre for Islamic legal studies ABU, Zaria in 1986 during a lecture he delivered. He submitted that the concept was an Housa custom since there is no where that it is stated that a Moslem
[3] According to historians the first Oba of Benin was an Ife Prince see Davidson and Ajayi. The Growth of African Civilization: A history of West Africa since 1100 to 1800 P. 129
[4] Beckstorm: Transplantation of Legal systems: An early Report on the Reception of Western laws in Ethiopia in 1973 21 American Journal of comparative law P. 557
[5] Beckstorm: Transplantation the reception of the western laws in Ethiopia 1973, 21 American Journal of comparative laws P 557 @ 558.
[6] By blending their legal system with the imported laws instead of the 100% unworkable laws.
[7] Nigeria was a victim of colonization in 1861 AD.
[8] Nicholas B: An Introduction to Roman law P. 1 - 3
[9]

In the eleventh century legal science suddenly rewoke along with such other learning in the universities of North Italy and France where Roman law as contained in Justinian's Digest was put to Study by series of great scholars until around 1250 AD when the commentaries on the Digest and other text had grown to huge proportions. Along this period the canon law which derives many of its rules and methods from Roman law was also being developed.

Roman law also influenced the Common law. In France and England there grew up the practice of resorting to the Roman law as set out and explained by the Glossators[1] where the Customary law was defective as it so often was while the Common law was being built up; a school of students, of Roman law got established in Italy. These students, the post glossators or Bartollish fulfilled the need of making glossed Roman and Canon law suitable for the practice of the law courts. Then in the fifteenth century, the lands, North of the Alps began to feel the full impact of the revival. In 1473 Burgundy established a court that would hear appeals from its territories in 1495, Maximilian established a similar court for all German lands; and these courts were staffed primarily by men trained in the Roman and canonical systems. The jurisdiction was made of varying customary laws, which the vast majority abandoned and "***received***" as the Roman or civil law: The reception coincided with a new wave of interest, in what; an era of study was being born. Some Students in France like Cujas, Duneau and code Froy developed a new approach to Roman law, studying the subject with the background of Rome. In Holland the perception brought out a portion of great lawyers particularly poet and the Dutch learning led to the reception in the Roman Dutch system went with the Dutch to South Africa and Ceylon, whilst French law went to Quebec and other territories of the British, Even in Germany, the influence of Roman law is still felt there.

Today Roman law can be said to be living part of relatively most legal systems, most of the countries of Europe that retained or received it have now codified their systems and the law is consisted in these codes and their interpretation.

The influence of Roman law on English law have been quite considerable traces of direct importation of it or the canon law can be found in different periods of their history for instance feudal on which the common law was built; some laws of the chancery jurisdiction of the probate, Divorce and admiralty Division have the influence of Roman law Moreover English Courts are not averse from going to Roman law solution.

The question may be asked, of what use is the Roman law in a country of Common law and other laws? It can be asserted that the theory of law jurisprudence has built very much or the ideas, conceptions and classification of Roman law and so a knowledge of it is important, indeed essential for that with Common law a quality which no other developed system posses; it is a system that was built empirically relying solely on observations and experiment and a study of the texts will show that the lawyers of Rome were more concerned with doing justice in the particular case with making rules, conform to social policy in point and to the public opinion of the day than English law has been.

This can be appreciated by not only reading a text book containing a compendium of Roman law, but by reading the topics particularly those that have meaning in modern life, example theft, on sale, hire purchase and negligence.

By seeing the problems that arose for the Roman lawyers and how they tackled them, one can truly gain an appreciation of individual rules and solutions deeper understanding of a practical legal technique and humility of thought essential for legal progress.

2.2 THE ROMANO – GERMANIC LAW

The Romano – Germanic system of law was formed in continental Europe by the scholarly efforts of the European universities about the twelfth century, hence it took its name from the joint efforts of the universities in Latin and Germanic Countries. This system of law has been said to be linked to the renaissance of the twelfth and thirteen centuries in Western Europe. Which led to the emergence of cities and commerce, with the new society becoming conscious of the need for law to assure that order and security would ensure social progress.[2]
The system was founded on a community culture and existed independently of any political consideration based on study of Roman Laws.

The uniqueness of this system lies in its flexibility, and its persuasive authority, despite the fact that it was codified: France being the first country to codify its laws and her formular was adopted by almost all countries in Europe except Germany which later followed suit.[3]

The European Countries which have embrace this law transplanted it to their colonised territories this law transplanted it to Portuguese, French and Dutch acquired colonies in America and they established in practically uninhibited areas; or those where the ingenious civilization was eventually to disappear, the accepted

[1] commentators
[2] R. David and J.E. CBrierley: Major Legal Systems in the World today P. 39
[3] German laws were codified in.

characteristic legal ideas of the Romano – Germanic family naturally.[1]

This was done by their first applying rudimentary law in practice outside the towns and a few Centres, since, there was no established government and also the absence of jurists. As the development of the colonies progressed, the law as practiced drew close to the scholars and the mother Countries and afterwards was incorporated in codes drafted according to European Examples. With the coming together of the Countries in America to form the United States of America, most of the former colonies which have embraced the Romano – Germanic law, have given it up, and embraced the Common-Law system as a result of the political domination; for instance, some former Spanish colonies which are now States in the United States of America[2] have become Common law jurisdiction so to have panama canal zone and Guyana. Some others like new mexico, Arizon and Texas etc have preserved certain institutions of the old colonial law despite having become Common law jurisdictions. Others like the States of housisiana, St. Lucia etc have maintained and preserved their private law up to the present time, thus having mixed jurisdictions, borrowing certain elements from Common law and only to some extent retaining their membership in the Romano – Germanic family law.

As a result of the colonization of Africa and Madagascar, the Romano – Germanic law was received in Africa. Prior to colonisation no truly established system of law was received in most of the societies, rather the fragmented tribal structures paralyse Legal revolution. The colonial power imported the ideal of law along with peace and order. States which came under French colonial empire, the former Belgian Congo, Rwanda and Burundi and the Spainish and the Portuguese possessions became members of the Romano – Germanic legal system. Within the Commonwealth, only Mauritius and the Seychelles belong to this legal system for historical reasons. Before their annexation by England, the countries which make up the union of South Africa belonged to the Romano – Germanic group by reason of their Dutch colonization; the Roman Dutch law applied there was endangered by English rule. Under the later influence, changes were made which suggest that today the laws of South Africa, Zimbabwe, Botswana and Lesoto are mixed laws, North Africa as well belongs to the Romano-Germanic group because the different countries into which it is divided, received either Pronoh or Italion laws, through the effects of colonization. However mullein has continued to play an important role in these countries; their laws today combine ideas from systems; thus making it to be considered as mixed law.

Ethiopia in 1960 promulgated a new civil code which was drawn along continental lines with the help of French and Swiss jurists.[3] Although Ethiopia of its own volition adopted the code, but because of the difficulty in its implementation as explained earlier in the essay, a critic has said that "codification was thrust on Ethiopia as it is thrust on all countries which find themselves in an analogous situation"[4]. The reason for the criticism is given by J.H. Beekstom when he observed "the problem with the Ethiopian code is that there are a lot of inconsistencies, and its translation into the Linqua franca not fully developed has created more problem over interpretation since there are no equivalent for certain words used in the draft which was in French and English.[5] The process from reception was by the enactment of a reception statute. This was drafted in general terms and without citing specific laws, declared the law of one country to be in force in another, for example in the case of Guinea, the laws of Senegal were received. The provision of Decree of 11th May 1892 which establishes the courts of Guinea provides;

> *In any matter, the courts of French Guinea shall conform to the civil, commercial and criminal Legislation of Senegal in so for as it is not contrary to the present decree.*

Subsequent legislations when introduced are made either specifically for the colonial federation or legislation already in force in France was already applicable, upon promulgation and publication, this then becomes effective.

Certain Local enactments in the forms of orders were made under specific legislation was by the Metropolitan legislation. The Governor-General of the federation was normally vested with the power, the scope of which was never precisely defined. In general the power extended to matters of public law, especially police and local government organization.[6] The Romano-Germanic law gained adherents at the two extremities of Asia. Turkey since 1839 has used continental codes for modes to modernise its laws. Despite being muslim country, it has removed all muslim elements from its laws and by reasons of legislation has become a full member of the Romano-Germanic group.

Iran is currently governed by mixed law: partly Islamic, partly Romano-Germanic. Afdhanistan has indicated its desire to move towards the Romano-Germanic group. Following the break up of the Ottoman Empire in 1918, the Arab States which were formed have retained and emphasised their legal ties with France;

[1] Ibid P. 75
[2] Florida, Californice etc
[3] R. David: A Civil Code for Ethiopia, 1963 37 Tulane Law Review P. 182
[4] Ibid P. 182
[5] See footnote 9 at P. 563
[6] Augustine Akpan: Historical Survey of legal Transplant. Unpublished work. 1989 Faculty of Law, University of Lagos. P 4 -

bequeathed by the Ottoman Empire and corresponding more over to their own inclinations.

Israel and Jordan are a special case, because of the British mandate; the influence of the Common law largely supplanted that of the Franco Ottoman law formerly in force. The same thing occurred in Iraq but the disappearance of the British mandate in this country was followed by a return to the concepts of Romano-Germanic law to the same extent as in other Arab states.

In China, the Romano-Germanic law have only a transient success, as thee preponderant position of continental European laws was destroyed by the success of the communist party, similar events occurred in North Vietnam and North Korea. However links with the Romano-Germanic group remain in the case of Japan, South Korea, Formosa/Siam and Taiwan while the situation in south Vietnam, Cambodia and Laos is more complex; the reception here being colonization and spontaneous reception. Spanish colonization brought the Philippines into the group; but fifty years of occupation by the United States of America have introduced new elements, making the law there a mixed system. The law of law Ceylon has undergone an evolution similar to that of South Africa. It is now considered a mixed law. To a certain extent Indonesia colonized by the Dutch belongs to the Romano-Germanic group, but they combine the Romano-Germanic concept with Muslim and customary law in such a way that it is appropriate to consider this system as mixed too.

An interesting feature of this legal system is that the laws are formulated by the juries consults based on the realities of life, unlike some systems where it is left to the judge alone. In some jurisdiction within the group, judges are prohibited from even laying down general regulatory rules for instance Article 5 of the French code Civil is to this effect. The laws formulated is a product of reflection founded partly on observation of judicial practice, consideration justice, morality, policy and consonance of the system. This work of reflection implies a certainty that the rule must be general enough to provide a principle for the decision of concrete cases in the future. The legal rules decant and purifies judicial practice by rejecting what is discordant or superfluous. The concept of codification makes the law to be certain and predictable, but the code "should not attempt to provide rules that are immediately application to every conceivable concrete case, but rather an organised system of general rules from which a solution for any given problem may be easily deduced by a simple process as possible.[1]

2.3 THE SOCIALIST LAW

The socialist law was developed on the basis of the doctrine of Marxism-leninism, which was begun in Russia. The law surfaced in 1917 when the Russian began to build a new type of society which was to be communist, having features opposite to the captaining society. Until date this idea of communist society has not been achieved in Rassia, where only a socialist state has been created, characterized economically by the collectivization of the means of production and politically by the omnipotence of the communist party. The proposed and promised communist society idea has not yet been achieved.[2] As regard the present law in Russia it has been submitted that it has undoubted affinity with the Romanist laws; it has to a large extent retained the terminology of these laws and in appearances at least, their structure; it has a concept of the legal rule which seems no different from that of French or German jurist.[3]

Prior to the Bolshevik revolution of 1917, Russia has been ruled by various dynasties starting with Rurik head of a Scandinavian tribe called the varagians, which began in the ninth century. Around 989 AD the rulers of Russia were converted to Christianity. The church introduced the concept of writing to Russia, and in so doing introduced Roman law to Russia. The Russian customary laws were reduced into written form in the first half of the 14th century. The church applied both Roman and Russian laws together, the latter being applied with respect to extensive Land holdings in which its jurisdiction was exercised. Its use was further extended by means of arbitration and by various interpolations/additions in the drafted customary laws. In 1236 the Mongol domination began in Russia, but there was no major legal development, except that in 1649, the code of Alexis II comprising twenty five chapters and nine hundred and sixty three articles of Russian law was complied. In 1689, the Mongol domination came to an end. Between 1689 and 1917, the only major advancement in Russia law was witnesses during the period of 1777-1855, when it was properly codified. Towards the end of 1855, a penal code was brought into existence, and in 1864, there was a reform in the judicial organisation.

The Russia laws despite the fact that it was not supplied with codes as the other continental countries of Europe have traces of the Roman-Germanic law; for instance, its code were drafted not by virtue of the case law, but of customs and the prevailing social circumstances the weakness of the Russian law lies in the fact that it was not made for the vast population but for the small class of merchants and a small middle class, nor was it based on social consciousness of the people as in other countries of Europe.

The law was largely the arbitrary work of an autocratic sovereign, or a privilege of the bourgeoisie. It

[1] R. David and J.E.C. Brierley Ibid P. 96
[2] Ibid P. 155
[3] Ibid P. 156

was against this background that the 1917 revolution began. The revolution was aimed at the creation of a communist society with socialist law. Socialist law migrated to other countries on its free will ie it was borrowed from Russia.

These countries have similar history with the Russia. They have been suppressed for long for example the Balkan state made up of Albania, Bulgaria, Roman and the Serbia etc were colonized by the Turkish and gained their independence with outside help, after which they voluntarily submitted themselves to the cultural influence of central or Western European states, and through Russian armies. Some states in Africa, Europe and Asia have become socialist countries, their leaders declaring their support and adhesion to Marxist teachings and the hope of the communist society that will come.

Other countries in this group include Tanzania, Libya, Czechoslovakia, Yugoslavia, Bulgaria Cuba, Somalia, Romania-which last December 22nd 1989 plotted a successful coup against communism, so too did Poland last January 1990; and they have decided to join the West block capitalism states, Hungary etc. the trend of events in communist countries now is to break the ties and join the capitalist group. Russia is contemplating on such now.Socialist law as conceptualized today is simply as foundation for the advent of communism. The key note for the preparation lies in the word discipline and coercion and law both play a role far from exclusive, but incontestable none the less, and therefore not to be underestimated, in assuring this strict discipline. Law and society are necessary at the present stage and will disappear when communism arrives.

By conforming to law, the various parts of the administration, state enterprises, cooperatives and citizens work for the accomplishment of government police, and make way for the advent of communism. Strict compliance with the principle of socialist legality is absolutely imperative. Therefore the law simply meets the necessities of a transitional period. Commenting on the present state of socialist law, Professor v. Knapp remarked the law is generally speaking, just from the point of view of a socialist society, but unjust on the contrary from the point of view of the latter phase of communism. The dialectic contraction between the just character of socialist law and its unjust character in a communist society will only disappear with the withering away of law upon the advent of communism itself[1].

These observations implies that the communist society will be without law and state and at present there are institutions in Russia, which are working within the framework of the principles of legality, presage and preparing for the non-juridical forms of tomorrows society, like there exist institutions which do not appear to be fully in agreement with the principles of legality itself. It follows thus that soviet society does not structure is dominated by Marxist-Leninist ideology.[2]

2.4 THE COMMON LAW

The Common law is that part of the law of England formulated, developed and administered by the old Common law courts, based on the Common customs the country and unbitten. Its formative year was 1066, as a result of the activities of the royal courts of Justice in England after the Norman conquest of that year. These courts at first did not have sufficient jurisdiction to deal with all matters, but in due course, their jurisdiction was enlarged.

In the transplantation of the Common law, equity and the statutes of general application, went with it to the various colonies of Britain which now referred to as the Commonwealth; some of the territories, were ceded or conquered or colonised by Britain. The view has been expressed that the common law has never being voluntarily adopted by any country practicing it[3]. While the learned Professor is right from his own part of the world, in Africa, at least there are some counties which have voluntarily embraced the Common law. We will discuss the case of Liberia and Sudan later in this paper. The bases of this expansion of the common law, doctrines of equity and the statutes of general application have been described as being in essence feudal[4] having an evolution which was empirical; reason being that a conquered or ceded colony retain its previous law except in so far as the crown might alter it, and subject of course to the application of common law in matters pertaining to the function of government itself and there was no doctrine of territorial limitation on the scope of the common law or sovereign in parliament[5]. Generally, when the Englishman (Merchants or Explorers) finds a territory which is in an uninhabited country or an inhabited country without a civilized community or having an effective legal system, then English law will be transplanted there by the colonists to the extent necessary to regulate their affairs in their new environment. As soon as the original settler had reached the colony, their invisible and unescapable cargo of English law to the soil and it get attached to it[6].

The law that will fall from them and attach itself to the soil on which they stood. Subsequent settlers

[1] Filosoficke problem socialistckeho Prava (1967) Knapp (v) Quoted in R. David and J.E.C. Brierley Ibid P. 215
[2] The notes on socialist law were based on the materials in R. David and J.E.C. Brierley Ibid P. 155-280
[3] Professor A.L.G. Goodhart; What is common law? 1960 76 the Law quarterly Review P. 45
[4] Professor T.B. Smith; Reception of the Common law in the Common Scope and Extend in the Older Commonwealth; Proceedings and P.of the Sixth Commonwealth Law Conference Lagos Nigeria 17th -23.
[5] Beckstorm Ibid at 510
[6] Augustine Akpan Ibid P. 20

did not like their founders bring with them the law of England as they left it but entered into the colony as they would into any other country becoming subject to the establish territorial law.[1]

The technique of introduction of English law depend on how the territory in question was acquired. In the case of settled territories as explained earlier, the settlers drop their invisible and uncescapable cargo of English law to the soil and it get attached to it.[2] The date of reception of English law is to be ascertained as applying to the territory has been fixed by enactment. For instance in the case of New South Wales and Tasmania, the 25th July 1828[3] was fixed, while some others like New Zealand and Malaya had no fixed date, but never the less subject to English law.

2.5 ITS TRANSPLANTION TO AMERICA

Prior to 1776, the territories that were in America, were mostly governed by the Romano-Germanic law, as they were territories of countries operating that system of law. In 1776, the territories decided to come together to form the united States of America with the English territories, thus paving the way for common law to be applicable all over American common law, because the English common law could not meet the conditions of the territory, and also it was enacted for a feudal society which was very remote to the kind of community that make up the American settlement, and the English settlers were not prepared to accept the view that the common law was a bastion of personal liberties as they have been forced to emigrate to America in order to escape prosecution in England. As a result of this, the American (English settlers) developed their own common law, but the spirit of the English common law is still very much present in their system. The American common law is a judge made photo type and it is also codified an the Romano-Germanic codes.

2.6 AUSTRALIA

Australia was an uncivilized community inhabited by a Stone Age people in which there no existing system of law, which could be applied in a society of Europeans coming to the territory in 1788 for settlement and occupation.

The first colony founded in Australia was New South Wales, which was a penal settlement and goal was built there. It was ruled by governors who made Ordinances as they though proper. Their first English statute that was passed for Australia was that which provided for the establishment of a criminal court in 1787; to enforce the English criminal law transplanted there. An English statute of 1828 provided for the reception of all laws and statutes in force in England on July 25th 1828 to be applied so far as the same can be applied within the colonies of New South Wales and Tasmania-the only existing colonies then. The other colonies established were in the same position in relation to English law.

An interesting aspect of the common law as applied in Australia was its supremacy over local statutes. If the common law is in conflict with a local statute, the local statute will be declared to be void even if it was made for the betterment of the colony. The colonial validity Act 1865 provides that colonial statues should be void if repugnant to English statutes and then only so far as they are repugnant. The fact that a colonial statute make a provision which as inconsistent with some principle of common law as not to affect its validity.

2.7 INDIA

When the first English traders arrived India in 1600, they met the territory inhabited and the natives were well organized within the framework of their local laws; so that the British traders first have to sign treaties with the local chiefs before they could trade and the their trading camp, where they first applied their English law to matters concerning themselves and gradually they extended it to natives who came to trade with them and those that consent, until the whole of India came to their grip.

The sovereign normally grants this trading companies charters which gave them power to make reasonable laws for the good government of the company and its officers, provided it is not contrary to the and statutes or customs of the English realm. This was how English law came to be applied in India, which was neither conquered nor ceded nor can it be described as a settlement. From making laws for the company, they tactfully and piecemeally extend the laws to the Indians, thus bringing them under the influence of English law. The Privy Council have described the mode of reception of English law to India as a gradual process; for as Lord Brougham observed in India acquisition of sovereignty was slowly made by imperceptible steps and that therefore the sudden application of a foreign law was in the highest degree improbable ….[4] Till date, the predominant laws of the Indian is still very much in practice among the people. The common law could not displace it, except that it has succeeded to mould the thoughts of the people during its transplantation period.

[1] Supra
[2] Ibid P. 25
[3] Ibid P. 30
[4] Gibb. Har Kramers JA (1953) short Encylopedia of Islam Foreign Bills Publications P. 16

Various statutes based on the common law were enacted and they remain as they were over the centuries, eg the penal code the Evidence Act etc.

In conclusion the only certainty about the migration of the common law of England into India is that the English brought it, their judges administered it and that it infiltrated deep into the laws of this country and has to some extent, mounded it thoughts and customs.[1]

2.8 AFRICA

Apart from Ethiopia and Liberia, almost all other African countries were colonised and were ruled either as a protectorate or protected state or trust territories. The mode of transplantation of English law varies according to the territories. In the case of settled territories, the English settlers were presume to take their English law in force at the time to the newly acquired territories. It is only so much of the English law is suitable to the circumstances of the territory that is brought into it. As regard conquered and ceded colonies (protectorates), and trust territories, it was by express enactment[2] thus the legislation provided for the introduction and observance of English law or somebody of general law, (as with Roman-Dutch law in the colony of Basutoland[3] such legislation may be made by the crown by order-In-council, acting in virtue of prerogative or powers conferred by the British settlement Act 1887 (for settlement). And by the foreign jurisdiction Act 1890 (for protectorates, protected states and trust territories (mandated territories Kenya is an example of such direct provision by the crown see Article (2) of the Kenya colony order-in-council. The alternative is for English law to be introduced by colonial legislature by means of local legislation (ie through Ordinances, Proclamations, Acts etc) by virtue of powers granted to such legislature by the crown, it was by this means that English law was introduced into West Africa territories, for instance court ordinance cap 4 of Ghana; ordinance No 3 1963 of Nigeria. The mode of reception in the Gambia is an interesting exception to the general rule. In the Gambia, the law of England (Application) ordinance cap 3 (1955 revision) applying the English law at 1st November 1888, is the only colonial ordinance expressly providing solely for the general reception of English law. The title is "An ordinance to declare how far the law of English shall be in force in Gambia and to reform the Common law so applied in certain respects". This certainly is an admirable initiative and if more fuller and explicitly provisions are made giving room for reform after the reception of English law, it might be imitated in other territories.

A third method of reception is by the general reception of all English law or of all English law on a particular subject by local enactment; for instance the Tanganyika land (Law of Property and Conveyance Ordinance) cap 114. A fourth method is the adoption of specific English enactments eg the Sierra-Leone Imperial Statutes (criminal law) Adoption Ordinance cap 107 1946 revision.

The fifth method is the Adaptation and re-enactment of English law in local Ordinances, making additions or subtractions to suit the local circumstances eg the just repealed Companies Act of 1968. The mode of reception just discussed is peculiar of most countries that are within the commonwealth. But, can there be a reception from outside the commonwealth? This question will be answered by taking a short survey of the laws in Liberia and the Sudan.

2.9 LIBERIA

It has never been in colony in the asual acceptation of that term, but it has been under strong American influence. It, of its own volition received the Common law, after years of being influenced by the United States of America. The influence is detectable in laws which establish the legal principles to be applied by Liberian Courts. The earlist such law in (1820) applies the Common law as in force and modified in the United States, and applicable to the situation of the people; in 1824 this was amended to read the Common law and usuages of the Courts of Great Britain and the United States in 1839, there was an amendment which says… and such parts of the Common law as set forth in Blackstone's commentaries as may be applicable to the situation of the people. In 1956, the General Construction law Title 16 of code 1956 in section 40 of Chapter 38 it was provided that;
Except as modified by laws now in force and those which may hereafter be enacted and by the Liberian law:

(a) The rules adopted for chancery proceedings in England and
(b) The common law usages of the Courts of England and of the United States of America, as set forth in case law and in Blackstones' and Kents' commentaries, and other authoritative treaties and digest".

2.10 SUDAN

Prior to the resort to English law, the government of the Sudan found that no system of justice worthy of the name existed in the country; they therefore had to sit down to create one. They then looked to India, and found

[1] Ibid
[2] Mitchell et al (1998) Handbook of conflict Resolution The analytical problems solving Approach (London) Printer
[3] Ibid at P. 50

that the India Penal Code suits the needs of the Sudan. The Indian Penal code itself was an adaptation of English law. Their civil Courts were divided into civil law (ie English law) and Muslim law courts-applying Islamic law to Muslims in personal matters. The civil courts were given a code of civil procedure, and were to be guided by the Civil Justice Ordinance of 1900, which was vague as to what law was to be applied; for instance its section 9 provides;

> *In cases not provided for by this or other enactment for the time being in force, the courts shall act according to justice, equity and good conscience.*

The phrase justice, equity and good conscience was introduced into India by sir Elijah Impey and was used as a cloak for the introduction of English law by the English judges "since the assumed with incredible insularity that the principles of justice etc could best be found in the rules of English law[1]

The Judges in the Sudan went further when they administered English statutes passed after the Civil Justice Ordinance freely applying them not withstanding that they were enacted in a foreign Country. The only criterion was that the judges must have concluded that they are just and do not embody artificial qualifications on the law. A contrast situation exist in Nigeria where only English statutes passed before the date of reception (1st January 1900) are in force. The way and manner in which the Sudan was able to clear the almost chaotic situation in its legal system; by receiving English law and blending it to suit the needs of the Sudan, has made its laws to be borrowed by sister African countries; for instance the present Penal and Criminal Procedure Codes of the Northern states of Nigeria, was borrowed from the Sudan to replace the English-Nigeria criminal code; similarly too have been much adoption of the Sudanese Legislation relating to Registration of Title to land in Lagos and Kenya.[2]

2.11 HINDU LAW

Hindu law constitutes a second system of traditional law recognized and revered by a vast community. The law itself is primarily based upon Dharmasastras or the Smritis. This law which is the law of almost all Indians, was not imposed upon them by the authority of any person, nor was it promulgated at any one time for all Hindus, rather it came to be accepted through the willing obedience of the Hindus themselves, who believed in its devine origin and the law itself aggress with the Hindu life and sentiment, and the reverence in which the authors of the Dharmasastras were themselves held, combined, to help to invest the with authority and sanction and their rulers found it easy to accept the law and enforce it. The regard to its transplantation, it has followed most Indians to wherever they put up a settlement, hence the law has found its way to parts of East Africa like Kenya, Tanzania, Uganda and to the West Indies, Singapore Sri-Lanka and Malaysia among the Indian population and any other person who subscribe to the faith.

When the common law was imposed on the Indians, they still preserve their traditional law, having legislation drafted in it. Till date the common law has never succeeded in displacing the Hindu law.[3] It can thus be described as a national law of the Indians. With regard to the Chinese and Japanese laws, there are no traces and records of their transplantation outside their country of origin, only that the nationals carried it along with them to wherever they go, but they have not succeeded into converting many others.

3 THE EXTENT OF THE APPLICATION OF COMMON LAW

The reception of Common law was effected in some instances though local legislations; and the statutes were differently worded in most countries. For a reading of some statutes[4] it is clear that certain conditions exist for the applicability of the common law namely:

(i) The local jurisdiction and local circumstances shall permit. But if the results that will be produced will be manifestly unreasonable or contrary to the intention of the statute, the court will not permit the application of the statute,[5] most customary laws have been preserved by this condition.

(ii) To facilitate reception, verbal alterations not affecting substance as to; names, localities etc can be made. Thus where a particular substance will be lacking or no equivalent is found in the locality , then the statute cannot be enforce within the local courts' jurisdiction[6] and

(iii) It must be within the matters for which the local legislature is competent to make laws.

It should be noted that certain statutes have made provisions directing the courts to apply the law and practice for the time being in force in England. Section 4 of the State Courts (Federal Jurisdiction) Act cap 117 laws of the Federation of Nigeria 1958 contains similar provision this

[1] Agbede 10: The Different system of law; the nature and basis of conflict of laws in Nigeria, a seminar presented At NIIA Lagos 1990. P. 10.
[2] Buergenthal T. (1977) Implementing the UN Racial XII convention, Texas, Texas International law Journal Vol vi
[3] Lew IM (1966) Islam in Tropical Africa, London, Oxford University Press.
[4] Agbede 10 Ibid at. 10
[5] Harkin L (1981) The international Bill of Rights: New York, colonmbia University Press
[6] Ibid

type of provision allows for the application of the point in time of reference.

The last point to note here is as regards the reception date if it is applicable to the three arms of English law. It is not the intention of this writers to dabble into the arena of academic debates as advanced by professor Allot[1] and professor Park[2], as to whether the limitation dates to the three arms of English law or only to the statutes of general application after which the date normally follows. All what we intent doing is to express our personal opinion.

By literal rule of statutory interpretation, words in a statute are to be given their ordinary meanings unless there are special circumstances which admit of another rule. Certainly there is no debate about the statutes of general application; only that of Common law and the doctrines of equity. From our little knowledge about Nigerian judiciary, it has been the practice for the Nigerian court judges to apply the Common law as it exists in England even though it may have been abolished by an English statute[3]. The Nigerian courts continuingly fall to English decisions on issues before them even though there are local decisions; and even in the interpretation of some Nigerian statutes, Nigerian courts have continued to fall to English decisions as guide. The Supreme Court have warned that in doing this, the statutes must be in pari-materia with the Nigerian statute that is being interpreted[4] at Common law it was stated that the categories of negligence are never closed.[5] New heads of negligence in tort have continuously being recognized. For instance only in 1962 a principle of negligence were established in Hedley Byrne & co v. Heller & partners[6] and this has been applied in the Nigerian courts and the principle even extended in some cases.[7]

Thus since the Nigeria courts are not obliged to apply the strict text of the English Common law, the question of limitation date is not useful, and should be regarded as sterile. Since the common law has no limitation date, it is suggested in England, that principle should not apply in Nigeria too. We say this, because there are certain principles of Common law which have being abrogated in English, but are being used as a cover up to commit atrocities and interfere with the fundamental rights of the law abiding citizen, since he has no redress. A good example is the maxim Rex non protest peccary. (The king can do no wrong). This anachronistic Common law doctrine has been abrogated by the Crown Proceedings Act of 1947. But it is still part of our law. Their disciple it should be noted that the positive laws of Muslim countries in their present form differ greatly among them because their social condition and traditions are extremely varied Note withstanding that I will attempt to look at some of these countries from groups, in order to distinguish them and appreciate the transplantation that have taken place.

The first group consists of countries with a majority Muslim population which have become socialist republics: the countries include Albania and the socialist Republics of Central Asia (Kazak SSR, Turmen SSR Uzbek SSR, Tadzheek SSR and Kirgiz SSR). In these countries founded on the principle of historical materialism of the Marxist-Leninist doctrine, Islamic religion/law is considered an error by the established authorities. No attempts have been made to preserve Muslim law, since it is looked upon as evidence of an obscurantism designed to safeguard an cut moded class structure.[8] The countries have rather adopted secular laws which designed to promote a new type of society based principles and ideology different from those of Islam. There are therefore no courts to apply Muslim law, although it is still observed almost clandestinely-outside the law by portions of the population which official policy would like to see separate from Islam.

The next group consist of countries least influenced by modern ideas. They include Saudi Arabia, the two Yemen Republics, the Persian Gulf emirates, Afghanistan and Pakistan. These countries are theoretically governed by Muslim law, but in fact are under customary law, while admitting the superiority and excellence of Muslim law, sometimes differs greatly from it.

The third group consists of states in which Muslim law has been more or less amalgamated with custom, but its application have been limited to matters of personal status, public benefactions and occasionally, land law otherwise modern law has been adopted to govern new social relationships.

This last group can be divided into two sub-groups according to whether the modern law in point is based on the common law. The countries in the group include Pakistan, India, Bengal, Malaya, Northern Nigeria, the French speaking African States, Arab speaking States other than the Sudan and Iran or the Dutch model (Indonesia). The Sudan is a special case[9]: Turkey occupies a special position among the Muslim countries of the world today. As far as 1926, it has imported the Swiss Civil Code which complete and clarified every details. It also adopted a

[1] Shaw MN (1997) Human Rights and the International law4th ed. Cambridge
[2] Schwab E (1964) Human Rights and the International community Chicago Quadrangle Books
[3] Ibid
[4] ibid
[5] Ake C (1987) The African context of Human Rights, Lagos Africa Today 1st and 2nd Quarters.
[6] Ibid
[7] ibid
[8] Okpara o (2005) Human Rights Law and Practice in Nigeria, Enugu, Chenglo Vol 1
[9] Miller C.A. A Glossary of Terms and concepts in peace and conflict studies (General University)

law of persons, family and inheritance based on western model, which did break the traditional Muslim countries. Part from Iran and Pakistan where a return to Islamisation and a strict service of the Koran and its tenet is strongly advocated, there is no country of the world today which is governed by Muslim law, rather they belong to one of the families or group of law already discussed or their law is already westernized. What many of them do is to make provisions for adherence to the principles of Islam in their constitutions. For example Tunisia, Syria etc in their Civil Codes like others, allow judges to fill the gap in the law according to the principles of Muslim law in relation to matters of personal status. The laws of Indonesia provide for the conformity of institutions to the principles of Muslim law.

4 MUSLIM LAW IN AFRICA

It is interesting to note that despite the fact that most African countries are secular states, unlike other religious laws, Muslim law is still being applied in some States in certain matters. In defining native law and custom the Interpretation Ordinance 1990 says it includes Islamic law. In Nigeria, one of the few enactment that makes reference to Islamic law is the Enforcement of Judgments and Orders Ordinance 1945. The incoming constitution like its predecessor will also contain provisions for the establishment of a sharia Court of Appeal in States that wants it. The court as the name implies will have jurisdiction only in matters pertaining to Islamic law, and no more.

In Ghana and Sierra-Leone, the only specific mention of Islamic law is to be found in their respective Muhammadan marriage and regulates it. In the Gambia, there also exists the Muhammadan Law Recognition Ordinance 1905 which regulates Muhammadan marriages and also establishes courts under it in respect of matters relating to civil status, marriages, succession, donations testaments and guardianship among Muhammadans. In Nigeria, Ghana, Sierra-Leone and the Gambia, there exists statutory provision for the establishment of native courts in their respective native Courts Ordinances. The native courts are now known as Area Courts in Northern States of Nigeria and Customary Courts in the Southern States.

The jurisdiction of the courts is to apply the native law and custom prevailing in its area of jurisdiction, so far as it is not repugnant to justice, equity and good conscience, nor is incompatible either directly or by necessary implication with any ordinance or law for the time being in force. In the Sudan, Islamic law is preserved in the Sudan Muhammadan law Courts ordinance 1902. It sets up a hierarchy of courts headed by Qadis of carious grades with jurisdiction as provided under section 8 as follows;

(a) Any question regarding marriage, divorce, guardianship of minor or family relationship, provided that the marriage to which the question related was concluded in accordance with Muhammadan law or the parties are all Muhammans.

(b) Any question regarding wafq,gift, succession, wills interdiction or guardianship of an interdicted or lost person, provided that the endower donor or the deceased or the interdicted or lost person is a Muhammadan.

(c) Any question other than those mentioned in the two sub-sections provided that all the parties, whether Muhammadans or not, make a formal demand signed by them asking the court to entertain the question and starting that they agree to be bound by ruling of Muhammadan law. In Kenya, only two statutes makes express reference for the application of Islamic law. They are the Waqf Commissioners' Ordinance 1900 repealed and replaced in 1956 and the Muhammadan Marriage and Divorce Registration ordinance 1906.

In Tangayika (Tanzania) there are quite an appreciable statutes making reference to the application of Islamic law: They include Marriage, Divorce and succession (Non-Christian Asiatices) Ordinance 1923, the Administration (small Estates) (Amendment) ordinance 1947, the Muhammadan Estates (Benevolent Payments) Ordinance etc. In Uganda, and outstanding ordinance concerning Islamic Law is the Marriage and Divorce of Muhammadans Ordinance 1906.

It is all these statutes and many others not mentioned, that gave express recognition to Islamic law in the various countries

5 CONCLUSION

It must be observed from the paper that the following factors are responsible for transplantation.

(a) Objective factors
(b) Political factors
(c) Cultural factors
(d) Economy factors
(e) Chance factors
(f) Literary factors
(g) Centres of law propagation namely the courts, the bar and the law schools.

After examining these factors, consideration must be given to the following points where a new foreign

law is to be transplanted or to be imposed on the old domestic law.

(1) Accord
(2) Conflict
(3) Lacunae in the domestic law supplied by the imposed law
(4) New legal institutions created by the imposed law.

When there is accord of old law and new law, obviously there is no problem of reception, but when a body of law is imposed on a country, it is always a question apart from matters of how much of the new law in matters of substance actually will produce important differences in the concrete results of litigation or moulding the thoughts of the people or in favouring or obstructing freedom of economic transactions. Where there is conflict, quite obviously the factors which hinder or promote reception will come into play. We will conclude by saying that transplantation is a necessary evil and its aims would be better realised if the necessary steps of properly investigating the laws to be received is carried out and only if found suitable that it will be wise to import it. It is not enough to import a law simply because it has worked miracles in other places, it is better to test the law by comparing it with the community it is supposed to regulate their affairs.

It is suggested that all the received laws in any country should be subjected to vigorous screening by the country's law reform commission and those that do not meet the expectation of the country's applicable to them and which may be borrowed, should be taken away from the statute books.

The various law reform commissions existing in the receiving countries should go into their archives, and recommend for the repealing of all the antiquated laws which no longer serve any useful purpose. Provisions should be made for reforms of all received laws not withstanding that their country of origin have not deem it fit to do so, bearing in mind the factors and points enumerated above.

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