# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed JournalMulti Disciplinary
Peer Reviewed Edition :

www.ijlra.com

 ISSN: 2582-6433

# DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions ofthe authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Boardnor IJLRA shall be held liable or responsible in any manner whatsever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

IJLRA

ISSN: 2582-6433

# EDITORIAL TEAM

## EDITORS

## Megha Middha

*Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar*

*Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society*

## Dr. Samrat Datta

*Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board*

ISSN: 2582-6433

## *Dr. Namita Jain*

*Head & Associate Professor*

*School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.*

*Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India.India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020).Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019*

## Mrs.S.Kalpana

Assistant professor of Law

*Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi.Formerly Assistant professor of Law,Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration.10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.*

## Avinash Kumar

*Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship.He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi.Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi.He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.*

ISSN: 2582-6433

# ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANLAYSIS ISSN
2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

ISSN: 2582-6433

# LEX FORI AND LEX LOCI CELEBRATIONIS - ROLE PLAYED IN DETERMINING THE VALIDITY OF MARRIAGE

AUTHORED BY - ARYAN TOMAR*

## Abstract-

*Each nation has their respective sets of private international law rules. So, in the age of growing legal interactions across borders the conflicting private international rules poses a problem. The effort to reduce differences among national legal systems is commonly referred to as "harmonization." Well, if one talks about harmonization of procedural law the first principle that is needed to be harmonized is the principle of lex Fori, because this is the principle which forms the crux of any procedural aspect of any set of private international law rules. This article first gives a brief introduction about what is lex Fori Followed by its exceptions. Afterwards this article talks about lex loci Celebrationis which is related to marriages that occur between individuals of two different nations. The number of marriages possessing foreign elements is increasing rapidly in today's globalized world where international movement of people across nation states' boundaries has gained significant momentum. In order to conclude a legally valid marriage, many of the modern legal systems stipulate that certain substantive and formal conditions shall be satisfied by the parties to the marriage. However, the scope and meaning of these conditions vary considerably from one legal system to the other. However, it is hard to say that there is an international uniformity with regard to the application and interpretation of the said rule. This article determines the validity of marriage in private international law on 3 grounds namely the nature of marriage, capacity of the parties to marry and ceremonies of the marriage. Exceptions to the principle of lex loci celebrations are also elaborated followed by case laws relating to the two principles that is lex fori and lex loci celebrationis.*

**Keywords**- Private International Law, Marriage

ISSN: 2582-6433

## lex Fori

The theory of lex Fori was first proposed by the German and French writers, Kahn[1] and Bartin[2] in the 1890s. it is a prevailing theory which has been adopted and implemented by the English Courts as well. Each nation has their respective sets of private international law rules. So, in the age of growing legal interactions across borders the conflicting private international rules poses a problem. The effort to reduce differences among national legal systems is commonly referred to as "harmonization." Well, if one talks about harmonization of procedural law the first principle that is needed to be harmonized is the principle of lex Fori, because this is the principle which forms the crux of any procedural aspect of any set of private international law rules.

The law of the forum, or lex fori theory, is a method of addressing the problem of characterization. The notion of characterization governs the issue of legal disagreement. The notion of characterization enables a court to determine which law will apply in a given situation. It will be difficult to apply the proper conflict of law rule until and until the same is resolved.[3]

According to the idea, a particular issue should be classified in accordance with both the applicable domestic laws and the foreign norms of law in accordance with their nearest and closest domestic law.

If the components involved in a case are domestic, the Court will apply domestic laws; nevertheless, when foreign components such as domicile are involved, the Court must examine three primary factors:[4]

- Whether the Court in question has the authority to hear the matter.
- The problems' classification
- In the issues so classified, the law to be applied is a matter of choice.

[1] Vol. no. 30, F. Kahn, Gesetzkelten, Jehrings Jahrbucher (1891).
[2] F. Bartin, De L'impossibilit D'arriver La Suppression D'finitive Des Conflits Des Lois (1897)
[3] Aishwarya Sandeep, "*Theory of Lex Fori*" *available at:* https://aishwaryasandeep.com/2021/06/14/theory-of-lex-fori/ (last visited on March 14, 2023).
[4] *Ibid.*

Unless the parties object or there is a foreign element involved, the Court that accepts jurisdiction usually tries the matter in line with its own domestic laws. According to the Court, it is in their best interests to have their own law used because the forum's law is regarded to be better under the better-law method.[5]

Bartin's argument in favor of the lex Fori hypothesis is that judges and courts are oath-bound: "to the obligations of their own legal system and no one else and can therefore only administer the same."
So that there is no misunderstanding as to which forum's laws should be followed, the choice of law should simply be the one that leads the matters of the Court of jurisdiction.[6]

If the lex Fori does not include an equivalent law, the Court must apply the rules of a similar law that exists in its jurisdiction.

## Exception to the lex Fori rule- Lex Causae

Judicial procedure is the process by which the competent local authorities resolve disputes between parties. Its object is twofold: (1) to regulate the exercise of the jurisdiction by local authorities and (2) to end a legal dispute based on substantive law. To accomplish these two objectives, there are rules of procedure that deal with the exercise of jurisdiction and are regulated by lex Fori, as discussed above, and rules of procedure related to the substantive law that will be applied to the dispute. The second group of rules is not regulated by lex Fori. Instead, it is governed by the law that is applied to the merits of the dispute--lex causae.[7]

Thus, if a suit is commenced in Country A against a defendant domiciled in Country B, the law of Country A may have to be applied to all procedural acts that take place in Country A's jurisdiction and the law of Country B to those acts--such as service and the collection of evidence--that take place in Country B.

[5] Britannica, *available at:* https://www.britannica.com/topic/conflict-of-laws/Choice-of-law (last visited on March 09, 2023).
[6] Supra note 3 at 2.
[7] Jacob Dolinger & Carmen Tiburcio, THE FORUM LAW RULE IN INTERNATIONAL LITIGATION WHICH PROCEDURAL LAW GOVERNS PROCEEDINGS TO BE PERFORMED IN FOREIGN JURISDICTIONS: LEX FORI OR LEX DILIGENTIAE?, 33 TEX. INT'L L.J. 425, 430

ISSN: 2582-6433

Therefore, lex Fori is the technical term for when a country applies its own local law. Whereas lex causae in conflict of laws, is the law chosen by the forum court from the relevant legal systems when it judges an international or interjurisdictional case

## Lex loci Celebrationis

The ***lex loci Celebrationis*** is the Latin term for "law of the place where the marriage is celebrated" in the conflict of laws. Conflict is the branch of public law regulating all lawsuits involving a "foreign" law element where a difference in result will occur depending on which laws are applied.[8]

## Explanation

When a case comes before a court and all the main features of the case are local, the court will apply the *lex Fori*, the prevailing municipal law, to decide the case. But if there are "foreign" elements to the case, the forum court may be obliged under the conflict of laws system to:

1. consider whether the forum court has jurisdiction to hear the case;
2. characterise the issues, i.e., allocate the factual basis of the case to its relevant legal classes; and
3. apply the choice of law rules to decide which law is to be applied to each class.

The *lex loci Celebrationis* is a choice of law rule applied to cases testing the validity of a marriage. For example, suppose that a person domiciled in Scotland and a person habitually resident in France, both being of the Islamic faith, go through an Islamic marriage ceremony in Pakistan where their respective families originated. This ceremony is not registered with the Pakistani authorities but they initially establish a matrimonial home in Karachi. After a year, they return to Europe. For immigration and other purposes, whether they are now husband and wife would be referred to the law of Pakistan because that is the most immediately relevant law by which to precisely decide the nature of the ceremony they went through and the effect of failing to register it. If the ceremony was in fact sufficient to create a valid marriage under Pakistani law and there are no public policy issues raised under their personal laws of lex Domicilii or habitual residence, and under the lex Fori, they will be treated a validly married for all purposes, i.e., it will be an in-rem outcome.

[8] https://dictionary.lawyerment.com/topic/lex_loci_celebrationis/

ISSN: 2582-6433

# VALIDITY OF MARRIAGE IN PRIVATE INTERNATIONAL LAW

## Introduction

Capacity to marry is a significant factor contributing towards the validity of marriage. There cannot be any valid marriage unless each party to the marriage is capable to marry. The capacity of parties to the marriage differs from one legal system to another legal system and the nature of marriage differs from culture to culture and country to country.[9]

The challenge is to ascertain validity of marriage in a manner that can be universally accepted. In the present situation following criteria are to be taken into consideration to ascertain validity of marriage, these are-

i) **The nature of marriage** involves two aspects. These are (i) whether the marriage is monogamous or polygamous (potential or otherwise) and; (ii) what does make a marriage sacrament or contract.

ii) **Capacity of the parties** to marry &

**iii) Ceremonies of the marriage.**

## The Nature of Marriage

The nature of marriage is ascertained by the marriage ceremonies according to the law of the place where the marriage has been celebrated. In many countries Polygamy is legally recognized as valid form of marriage while in some other countries it is practically impossible to enter into a polygamous form of union. To some, polygamous form of union is against public morality. A number of legal systems have included 'Bigamy' as a crime in its Criminal Code in order to discourage polygamous form of marriage.[10]

Bigamy has made punishable in both common law countries & Civil law countries. However, polygamous or potentially polygamous marriage is recognized as valid in countries like United Kingdom or Germany if,

i) Such marriage has been taken place in any country where this particular form of

---

[9] Indrani Kundu, "*Validity of Marriage : A Study in Private International Law*" *available at:* https://www.studocu.com/en-za/document/university-of-the-free-state/international-private-law/validityofmarriage-astudyinprivateinternationallaw/31225867 (last visited on Nov 16, 2023).

[10] Supra note 9 at 4.

ISSN: 2582-6433

marriage is legalized, &

ii) During the time when marriage took place the parties to the marriage were domicile of the country where polygamous form of marriage is legalized.[11]

The crucial question is whether the law under which the marriage is celebrated permits polygamy, if it does not, the marriage is monogamous. If a country has provision for both polygamous and monogamous marriage the parties' choice of form of ceremony will determine the nature of marriage. If the husband is not allowed to take more than one wife at one point of time by the law, then the keeping of concubines is also prohibited as concubinage is a status recognized by the law which prohibits such.[12]

In *Venugopal K. v. Union of India* the Kerala High Court has decided that the provision of bigamy under section 494 of IPC shall be applicable to everyone domiciled in India irrespective of the fact that he/she is Hindu/ Muslim/ Christian or Parsi.

**II.I.I. The Conflict of Law Situation: What law to determine the nature of Marriage?**

This question arises mainly in marriage where any foreign element is involved. In *Lee v. Lau* the Court has tried to come up with a satisfactory answer to the question as to which law shall determine the nature of marriage where there exists a foreign element. *Cairns J.* in this case considered that reference should be made to the law of the place of celebration of marriage to ascertain the nature and incidents of such union so taken place. Though, it has also been made clear by *Cairns J.* that when a Court is called upon to make decision on the nature of marriage it must be made according to the Lex Fori.[13]

**II.II. Parties Capacity to Marry**

The general rule in Private International law governing capacity of parties to marriage is Lex Domicilii i.e., law of the place where the parties to the marriage have domicile prior to the marriage. Where in common law system the rule of Lex Domicilii is applied by the Forum in order to choose between possibly relevant foreign laws involved in any lawsuit, the Civil law system applies the rule of Lex Patriae. Therefore, countries where civil law system is followed

---

[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*

the capacity of the parties to marriage is governed by the law of nationality of the parties.

**II.II.I. The Conflict of Law Situation: Conflict as to the law governing Capacity**

Conflict arises due to the difference of understanding regarding the 'prohibited degrees' of relation by different legal systems. A particular relation may not be regarded as within prohibited degrees by one legal system while any other legal system may consider the same relation as within prohibited degrees. This is what happened in *Brook's* case. The parties to the marriage were not allowed by the English law to marry each other as the relationship they share came under the prohibited degrees of relationship and they were related to each other by affinity. To overcome this problem the couple chose Denmark where the relationship they share did not come under prohibited degrees. The House of Lords stated that 'it is the settled rule of international law that a contract must be valid according to the law of the place where it is made, and its validity must be accepted throughout the world'. But there are two exceptions to this rule. It was further observed by the House of Lords that the present suit came under the second exception to the general rule which stated that 'the contract though valid in the country where made, is prohibited in any other country by express law and all the subjects by later country are forbidden anywhere and under any circumstances to enter into such contract'. Therefore, the marriage was held invalid basing upon the second exception to the general rule.[14]

Conflict also arises when the age limit (i.e., the marriageable age of a person) varies from one legal system to another. For instance, in Australia, Germany the marriageable age is 18 years while it is 16 years in United Kingdom. In France the marriageable age is 18 for male and 15 for female while in India it is 21 for male and 18 for female. Another situation where conflict often arises is the area regarding parental consent. In case of a marriage of a minor the consent of the guardian of the minor is needed.

## Ceremonies of Marriage

The general rule of private international law provides that the formal validity of the marriage involving foreign element is governed by the Lex Loci Celebrationis. While explaining formal validity of marriage involving foreign element following important questions arise, these are,[15]

[14] Supra note 9 at 4.
[15] *Ibid.*

ISSN: 2582-6433

i) What determines whether the matter in question is related to forms of marriage? &
ii) The threshold question is where does 'form' end and 'capacity' begins?

*Simonin v. Mallac* is a leading case in the field of determination of formal validity by English Court. In this case, a French woman filed a petition before the English court seeking it to declare her marriage as null and void with a French man on the ground that the marriage lacks essential requirements to be valid. English court had jurisdiction over the suit as the place of celebration of the marriage was England. Lord Creswell in the aforementioned case observed that the parental consent so essentially required by the French law is just a matter of form of marriage. According to the English conflict of laws rule the formal validity of marriage is governed by lex loci celebration is rule. Thus, the formal validity of this case was governed by the English conflict of laws rule, for, England being the place of celebration of the marriage. It was held in this case that 'the parties by professing to enter into a marriage contract in England have mutually given to each other the right to have force and effect of the marriage contract determined by the English Tribunal.'

## Exception to the Lex Loci Celebrationis Rule

Lord Eldon in *Sussex Peerage* case was clear that the 'parties can invoke the common law if they could not avail themselves of the law of the place of celebration or if there was no local law'.
In *R v. Mills* the House of Lords held that a marriage celebrated in Ireland by Presbyterian minister according to the rites of Presbyterian Church was invalid. It was held that marriage in Ireland is governed by common law system and is invalid if not performed by Episcopally ordained priest or Dracon.

## Case Laws:

- Ogden V Ogden[16]

**Facts:**

A French man (defendant) married an English woman (plaintiff) in England. However, he did not obtain the consent of his parents before marriage (According to French law, there is a rule which

[16] Ogden v Ogden, 144 S.W. 355 (France).

ISSN: 2582-6433

required parental consent to marriage). Hence, by a decree of the French Court, this marriage was annulled, on the ground that the consent of the parent, as required by French law, had not been obtained. The defendant subsequently married a Frenchwoman in France. Later, the plaintiff filed a suit in England for the dissolution of her marriage with the defendant on the ground of his adultery and desertion.

The English Court applied the English conflict rule by stating that the place of celebration of marriage is England, after considering the French requirement as a matter of forum. The Court thus found the French law of requiring parental consent as invalid and upheld the validity of marriage.

However, a French Court, while deciding on the validity of the same marriage applied the French conflict rule. While defining the necessity of parental consent to marry, the Court declared the marriage as null.

**<u>Issues:</u>**

The issues in the case were the nullity of marriage, bigamy, irregularity of French law, jurisdiction of the case, conflict of law.

In the present case, both England and France had same conflict rules regarding the place of celebration of marriage and party's domicile. Nonetheless, the result was different due to difference in the definition of issue. This challenge of defining and classifying the issue as well as the connecting factor is called as characterization.

**<u>Judgement:</u>**

The lex loci contractus must prevail. The marriage later contracted by the defendant was bigamous and must be annulled.

- Re Berchtold[17]

**<u>Facts:</u>**

A Hunagrian man died, leaving behind his will which dealth with his estate in England. By that

[17] Re Berchtold (Berchtold v. Capron.), 1913. B. 2773, [1923] 1 Ch. 192 (United Kingdom).

ISSN: 2582-6433

will he devised and bequeathed all his freehold estate and all other his real estate and all his personal estate in the United Kingdom to his trustees upon trust for sale and conversion. He was domiciled in Hungary and hence by English laws of intestacy concerning movable properties, the law of domicile would be applicable i.e. Hungary.

**Issues:**

The issues were the conflict of Laws for the land devised on trust for sale, Lex situs Lex domicilii.

**Judgement:**

The court chose to administer the lex situs rule as to determining movable and immovable property and thus treating the freehold as money. When a person domiciled in a foreign country dies intestate leaving an interest in the proceeds of sale, of English freeholds which are subject to a trust for sale but not yet sold, such an interest is an immovable, and the succession thereto is governed by the lex situs.[8]

This case illustrates the inefficacy in suggesting a single theory as a model in conflict of laws. In this case, the Court decided the case with the most logical means while dealing with the said immovable property.

# Conclusion

A general application of the doctrine of lex fori would result in the implementation of neither the forum nor the causae law, but rather the law that is neither. This notion is also false when it comes to international regulations and law, and it falls flat when there is no distinction between forum and foreign law. As a result, the lex causae theory and other characterization theories have been developed in contrast to Bartin's idea.

The problem in conflict of law is regarding classification of connecting factor. In a law suit regarding validity of marriage involving foreign element the court often finds it difficult to classify whether a particular requirement is related to formality only or is more than that and extends to capacity of parties to the marriage. There are some areas where confusion is recognizable.

ISSN: 2582-6433

Thus, in conflict of laws the areas of confusion are,

i) Characterization of the connecting factor,

**ii)** Characterization of cause of action and allocation of it to correct legal category, &

**iii)** Post characterization application of law i.e., choice of law.