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THE VALIDITY OF MARRIAGE IN DOMICILE LAW

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Introduction

People who are subject to personal laws in jurisdictions where personal laws are applied may exploit differences between the law of their domicile and the law of a jurisdiction other than their domicile. As a result, property located in their domicile may eventually pass according to a view of the law not prevailing in their domicile, and immovable property located in a jurisdiction other than their domicile may pass according to the law obtaining in the jurisdiction in which they are subject to personal laws.¹ This contradictory stance initially seems to run afoul of established principles of private international law. The criterion of domicile is used to link a person with a certain legal system in regards to personal status and succession in all countries throughout the world that adhere to the Common Law concept or tradition.²

This is crucial in cases of conflict of laws where it is uncertain whether a resident or national of another country has the legal ability to marry or when it must be decided who will inherit the deceased person's personal property. The idea of “domicile” is one that either falls under the purview of private international law or the area of conflict of laws. A basic legal notion known as “domicile” refers to the nation you perceive to be your “roots” or your primary residence. A person's or an individual's domicile often applies to the entire nation, not just a portion of it. No person or individual may be without a domicile, according to common law.³ A person who owns several homes is likewise prohibited from living in more than one place at once. Until a change is shown by the propositus on the balance of probability, a domicile is deemed to remain the same. And it is clear from this that the idea of residence in and of itself varies from country to country according to the laws and values that are upheld there.

¹ ATUL M. SETALVAD, CONFLICT OF LAWS 121 (3rd ed. 2014).

² Law Incomes Tax Reform Group, Domicile? LAW INCOMES TAX REFORMS GROUP, <https://www.litr.org.uk/sites/default/files/Domicile%202017%20FINAL.pdf>

³ The Law Essay Professionals, Domicile in Common Law Systems, LAW TEACHER, <https://www.lawteacher.net/free-law-essays/commercial-law/domicile-in-common-law-systems-commercial-law-essay.php>.

A person's place of residence, as a legal document, plays a crucial part in their daily lives in the global community. A person who chooses their domicile is subject to several legal repercussions and implications of the notion of domicile. It frequently establishes (i) main jurisdiction for will and estate administration; (ii) primary authority to levy state income and death taxes; and (iii) judicial jurisdiction over an individual.⁴ Additionally, a person's domicile affects where and how they can exercise their legal rights and privileges, such as voting. In general, the term "Nationality" refers to a certain status of membership that is granted to a person by a nation state. According to Fenwick, it is a bond that binds a person to a certain state, establishes his membership in that state, entitles him to that state's protection, and commits him to the obligations imposed by its laws.⁵ What makes nationality significant? Additionally, a person's nationality grants him or her worldwide access to certain rights. Some advantages of having a nationality include devotion to a particular nation; the nation's right to refuse to extradite its own citizens in cases of disagreement; the ability to ascertain an individual's enemy character through a state; the state's authority over all of its citizens; etc. Domicile, as we understand it, is a connection between a person and their place of abode, which is also seen as their permanent home.⁶ Even though the person has left home, domicile may still exist. On the other hand, nationality is a connection between a person and a nation (to which a person owes his allegiance to). A person's nationality often entails certain duties on the part of the individual as well as some protection from the state.

Understanding Domicile And Its Types

DOMICILE OF ORIGIN

No person may stay or exist without a domicile, which is one of the fundamental foundations that underpins the law of domicile. The law of domicile grants each person a domicile at birth in order to put this idea into practise. The term "domicile" or "origin" refers to this. The person's natal country need not necessarily be their domicile of origin. In the event of a legitimate kid, the domicile of the individual is often granted, and in the case of an

⁴ Cummings and Lockwood, The importance of Domicile, C L LAW, <https://www.cl-law.com/news-events/theimportance-domicile/pdf>.

⁵ Hafiz Muhammad Azeem, Nationality, Domicile and Citizenship, BLOG SPOT, <http://hmazeem.blogspot.in/2015/05/nationality-domicile-and-citizenship.html>.

⁶ The Essayist, The law of Domicile, LEGAL RESCUE, <http://legalrescue.blogspot.in/2013/01/the-law-ofdomicile.html>

illegitimate child, the domicile of the mother. The retention of a domicile of origin is fundamentally important unless there is conclusive proof that another domicile has been obtained.⁷

Domicile Of Choice

The principle of private international law that an independent person may change his or her domicile is well-established. In this context, "Independent" refers to a person who is 16 years of age or older. Domicile of choice is what is meant here. Any other outlying area can serve as your temporary domicile for a while. In order to create a domicile of choice, a person must sever most or all links to his domicile of origin and move to the area where he wants to set up residence with the obvious purpose of residing there permanently. The burden of proof is on the individual seeking to create a domicile of choice in order to show that the domicile of origin has been moved as a result. In order to acquire the domicile of one's choice, it is essential he establishes a state of residence in that nation, accompanied by a mental state to live indefinitely in that place.

Domicile Of Dependents

Dependents include children under the age of sixteen, married women, and those with mental disabilities like lunatics and morons. Dependents can also be classified as persons or as people who are unable to choose a domicile under the law of domicile, nevertheless. As a result, it is generally accepted that the dependent person takes over the other person's domicile of reliance. If the person on whom the dependent depends moves, the dependent's residence may also shift. According to private international law, the domicile of dependency is controlled by English law rather than the legislation of the countries whose residence the person may soon acquire or whose residence they have already held.

As a connecting factor in a conflict of laws, domicile is particularly significant. It is crucial to tax laws, marital laws, and property laws, and it is highly helpful when there are disagreements. It establishes the contracting parties' authority to enter into the agreement

⁷ Jikku Seban George, Domicile and Nationality, LEGAL3, <http://legaljas.blogspot.in/2010/11/domicile-andnationality.html>.

under certain legal theories. Domicile of origin is unbreakable. Even if an individual or a person acquires a domicile of choice, the domicile of origin will always be available to fill in any gaps if the individual subsequently decides to give up the domicile of choice. Every person has an origin residence at birth, and it typically remains for life (if only in abeyance). A new domicile of choice is to be taken over or the domicile of origin automatically re-enters the picture when a person or an individual abandons the domicile of choice by ceasing to dwell in that nation. Therefore, it is crucial to comprehend the notion of domicile in private international law, as well as in all other areas of law.

Position Of Indian Law On Domicile

The Constitution of India doesn't explicitly define what a domicile is, but Article 5 enumerates the criteria to be a citizen, and it mentions that one must have a domicile in India, besides any other of the subsequent criteria defined under clauses (a) to (c). Specifically, clause (c) mentions about one having to fulfil the need of being an ordinary resident for the past five years. This provision was made keeping in mind the partition of India, which resulted in the formation of two new countries, namely Pakistan and India. There is clear distinction clearly discernible from reading of this provision that there lies a distinction between citizenship and domicile, and while domicile is a determining factor, it is not the sole factor. As was held in *Inland Revenue Commrs. Bullock*⁸, while domicile refers to a person's civil rights, citizenship relates to one's political status. Unlike the legal system in the US, in India there is no recognition accorded to dual citizenship.⁹ In the landmark case of *DP Joshi v. Union of India*¹⁰ it was held that since states have the prerogative to decide on the applicable legal systems for personal laws, regional domicile isn't unconstitutional and was therefore recognized and authorized by the court. However, subsequently, in the historic case of *Pradeep Jain v. Union of India*,¹¹ Justice Bhagwati held that personal laws being under the Concurrent List, on which both State and Centre can make laws- and the Centre's mandate will prevail over that of the State, in case of a clash between the two- it cannot be compared

⁸ [1976] 1 WLR 1178 (CA)

⁹ Corwin, *Constitution of the United States*, 1952, pp. 967-9

¹⁰ 1955 AIR 334

¹¹ AIR 1984 SC 1420

with the legal system in the US, wherein personal laws don't form part of the legislative powers of the Congress and therefore remains the forte of the state legislatures. Thus, the idea of regional domicile has no role in India anymore and the only recognized, legal domicile is related to the nation as a whole.

The Theory Of Dual Domicile And Its Shortcomings

One of the critical aspects of domicile, as has been noted above, is to find out the applicable laws on the individual whose rights and privileges are under question. To arrive at the legal system to which one should be subjected, his or her identity ought to be ascertained. This is where one's domicile comes to the rescue. To elaborate the case for the significance of domicile, we are dealing with the validity of marriage and how domicile plays a major role in securing its validity before the court of law. In English law, marriage is a consensual union of a man and a woman, to the exclusion of others.¹² This idea of marriage being exclusive between two people is the foundation of the prohibition placed on polygamous marriages. Earlier the capacity to marry someone would be governed by *lex loci celebrationis*. The Hague Conference on Private International Law, which drafted Hague Convention on the Celebration and Recognition of the Validity of Marriages, 1978 made the validity of the marriage between two people contingent on whether the parties adhered to the applicable laws in the place of celebrations. Although Australia adopted the Convention, the other commonwealth countries didn't adopt the Convention. The leading case in England which deals with the requirements for validity of a marriage is *De Barros v. De Barros*¹³. Here, the question was whether a marriage between two cousins, domiciled in Portugal, was valid in England since the same was solemnised in England. The court answered in the negative, since the capacity to marry would depend upon the law laid down in the domicile of the individual, and here Portuguese law didn't allow marriages between such relations. This is the antenuptial domicile rule, or as also known as, the double-domicile theory. Critics have argued that the application of double domicile theory is unfair due to its mechanical approach

¹² Hyde v. Hyde (1866) LR 1 P&D 130

¹³ (1877) 3 PD 1

and its sheer disregard of the autonomy of the individuals to take advantage of a legal system that is in sync with their choice. The 1985's Law Commission Working Papers on Domicile and the Choice of Law Rules, though laudable for its attempt to reform the laws pertaining to marriage and domicile, recommended against discarding the dual domicile theory, and showed scant sensitivity for a more flexible and just legal system.¹⁴ It ignores the reality that by applying this theory, one's choice of personal matters becomes conditional on the country he or she is domiciled in. This is the reason why Sir George Baker P had said that courts should avoid applying the "*tyranny of domicile*" test to decide on the validity of marriage.¹⁵ The same view was shared by Lincoln J, Ackner LJ, and Sir David Cairns in *Lawrence v. Lawrence*¹⁶. If we follow the judicial precedents, it is clear that courts take the approach which would avoid taking the route of dual domicile theory. For example, in the case of *Radwan v. Radwan*¹⁷, the court applied the intended matrimonial home by reasoning that in matters involving polygamous marriages the theory of dual domicile doesn't apply. Similarly, in *Perrini v. Perrini* the court, instead of addressing the question of validity of a remarriage, reframed the question to make it one about the validity of a decree of nullity by a foreign court. In the landmark case of *Lawrence v. Lawrence*, the issue before the court was whether the marriage between a couple was valid, after the woman's divorce with her previous husband. There can be two questions for the court to answer- one answering the validity of the divorce, and the other adjudicating upon the capacity of the couple to get married. Had the second question been framed by the court, the answer would have been negative owing to the prevalence of the menace of dual domicile theory; however, since the court decided the matter by making the question on validity of divorce as germane to the case, the parties were awarded a just order and the divorce of the lady with her previous husband was recognized. In India also, the position of law on the question of one's capacity to get married is the same as it is applicable in England. Thus, if two individuals of differing domiciles get married to each other, the court will test the validity of the marriage based on the dual domicile theory and enquire into the capacities of the parties to the marriage based on the law of their respective domicile.

¹⁴ Working Paper No. 88, *The Law of Domicile* (1985); Working Paper No. 89, *Choice of Law Rules in Marriage* (1985)

¹⁵ *Perrini v. Perrini* [1979] Fam 84, 92

¹⁶ [1985] 2 WLR 92

¹⁷ [1973] Fam 24

In the case of *Bhagwan Ghamshamdas v. Charlotte Zingg*¹⁸ an Indian resident married a Sri Lankan citizen within one year of the former's divorce under Hindu Marriage Act, 1955. The court held that since the Indian man didn't have the capacity to marry as a result of an express provision, under Section 15, prohibiting remarriage within one year of divorce, the marriage is not valid. Although the observation on the bar on remarriage within a span of one year from the date of divorce is bad in law, the path taken by the court- to adjudicate the question of validity based on the law of the individual's domicile is good in law.



¹⁸ (1959) ILR 1 Cal 4

Conclusion

The role of private international law in today's time and age of globalization and free movement of people is undoubtedly preeminent. The exchange of trade and services, cross-cultural ties, and other means of global connection has eviscerated the internal boundaries among the Nations and has made the whole world a global village. Going forward the idea of home, or residence would be more complex owing to the endless opportunities at people's disposal. With such freedom and boundless possibilities, it becomes essential to constantly evolve the law that swears to protect the rights and privileges of people.

For a smooth growth of the current trend of free movement, the robustness of one's legal system plays a critical role in protecting people's rights. Since such rights arise from one's status as a civil person, the question on domicile gains a renewed vigour. Marriage being a sensitive and personal matter, the laws governing the capacities of parties do need a revisit keeping the current conditions in mind. When two different countries provide diverging qualifications for acquiring the capacity to get married, and the parties are respecting the laws of the nation which allows such union of two people no judicial entity in that country should deprive the parties from taking advantage of liberal marital laws. In the times of which people can shift the base of their company to a tax haven and enjoy lower rates of taxes, it's unfair to deny people the right to choose their life partners solely because the laws of one of the two countries doesn't countenance such union.

We would find valuable wisdom in the words of Brightman J, who, in the case of *IRC v. Bullock*¹⁹, noted that "*What could be more logical than to attribute to the husband-and-wife a personal law which corresponds with the law of the place where they have decided to set up their matrimonial home.*" Thus, a more flexible approach which intends to take into consideration the intention of the parties to a matrimony as to what their intended home is, would serve as a more justified parameter for deciding upon such issues. It is argued that such a test of *intended matrimonial home* would create more uncertainty for the courts to conclude. However, it is submitted that though the law should be simple and straightforward, but to iron the creases in the law, one must not bend the rights of an individual. Complexity cannot be an excuse to extirpate one's liberty and rights.

¹⁹ [1975] 1 WLR 1442