



TOPIC:

THE CONCEPTS OF DOMICILE, HABITUAL RESIDENCE AND
NATIONALITY; THEIR IMPLICATIONS ON
THE VALIDITY OF MARRIAGE IN MALAYSIA

BY:-

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1.0 INTRODUCTION

1.0 INTRODUCTION

It would be difficult to overestimate the importance of the question, what law governs the validity of a marriage. The validity of a marriage may arise in almost any conceivable context, and not merely in judicial proceedings in which it is directly in issue. In no department of the conflict of laws is there a greater need for certainty than in the choice of law rule. Unfortunately the English rules of the conflict of laws exhibit an alarming state of uncertainty in this matter.¹

Therefore, this study is to analyse the present position of the choice of law rule in the context of validity of a marriage.

At the end of this study, suggestions will be made for reform of the choice of law rule, as a way out of the chaotic web of the present state of law.

In Malaysia, there are a limited number of decided cases which deal with the question of choice of law rule in this context. Thus, reference has to be made to English

¹ See J.H.C. Morris, The Conflict of Laws, 1984, London, Stevens and Sons, at p. 149.

cases for possible present applicable rules as guideline as to the position in Malaysia.

Unlike in the United Kingdom, we also lack statutes which postulate rules which may modify the common law position pertaining to the choice of law rule in relation to the validity of marriage.

The Malaysian case becomes more complicated and unique with the presence of two sets of law, ie. for Muslims and non-Muslims, which govern the area of validity of marriage.

While there are plenty of English decided cases that can serve as guide for the possible position in the case of non-Muslims, there are very few decided cases, be it local or from other jurisdictions, that can serve as guide for the position of the Muslims in Malaysia.

Thus, there are many areas of the discussion which are purely academic in nature.

This study will also examine the concepts of habitual residence and nationality as opposed to domicile, and whether they can serve as alternative connecting factors to domicile.

2.0 DOMICILE, HABITUAL RESIDENCE AND NATIONALITY

2.1 Domicile: Definitions, Types, How Acquired, And
General Rules

2.1 Habitual Residence And Nationality As
Alternative Connecting Factors To Domicile

2.1 DOMICILE: DEFINITIONS, TYPES, HOW ACQUIRED, AND GENERAL RULES

A. DEFINITIONS

Gill J., in Re Bhagwan Singh, deceased¹ held that:-

"I think I will be correct in saying that there is no definition of the word "domicile" which is not open to some sort of criticism. For this reason it has been said that the term "domicile" lends itself to illustration but not to definition, unless one is content to define it as "permanent home". In Whicker v. Hume [1858] 7 HLC 126 at 160 Lord Cransworth said: "By domicile we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustrations draw from foreign writers or foreign languages will very much help you to it." Chitty J in Craignish v. Hewitt (1892) 3 Ch 180 at 192 says; "That place is properly the domicile of a person in which his

¹ (1964) MLJ 360 at 362.

habitation is fixed without any present intention of removing therefrom." Thus, the domicile of a person is that country in which he either has or is deemed by law to have his permanent home. The notion which lies at the root of the concept of domicile is that of permanent home, so that in order to acquire a domicile in a country a person must intend to reside in it permanently or indefinitely."

Another interesting observation pertaining to the meaning of the term domicile is given by Lee Hun Hoe J. in the case of Majumder v. AG of Sarawak³ when he says:-

"The term "domicile" is often used in a lax sense, meaning no more than is meant by the term "residence". It is fallacious to think that the term "domicile and "residence" are synonymous. The law has in several instances attributed to a person a 'domicile' in a country where in reality he has not, and perhaps never had a home. Some writers used the term 'residence' as synonymous with the word 'home' i.e. as including both 'habitual

³ (1966) 1 MLJ 41 at 47.

physical presence' and 'intention to reside' (animus manendi). 'Residence' has in many instances been employed by judges and others to denote a person's habitual physical presence in a place or country which may or may not be his home (see *Jopp v. Wood* (1865) 34 LJ Ch 212 at 218; *Gillis v. Gillis* (1814) Ir R8 Eq 597). The word 'habitual' in the definition of residence, does not mean presence in a place either for a long or for a short time, but presence there for the greater part of the period whatever that period may be (whether ten years or ten days). "Residence" connotes the idea of home or at least of habitation, and need not necessarily be permanent or exclusive (Jowitt, Dictionary of English Law). The word denotes the place where an individual eats, drinks and sleeps, or where his family or his servants eat, drink and sleep (*R v. North Curry (inhabitants)* (1825) 4B & C at 959)."

B. TYPES OF DOMICILE

DOMICILE OF ORIGIN

Gill J. in Re Bhigwan Singh decd.⁴ has observed that:-

"The law attributes to every person a domicile at birth which is called the domicile of origin, and a legitimate child born during the subsistence of the marriage of his parents has his domicile of origin in the country in which his father was domiciled at the time of his birth. The domicile of origin changes with the domicile of the person upon whom the child is dependent during the period of his infancy, and on attaining his majority he retains the last domicile which he had during his infancy until he changes it."

⁴ (1964) MLJ 360 at 362.

DOMICILE OF CHOICE

Burton J. in GL O'Hara Hickson v. O'Hara Hickson⁵ quoted Lord Westbury in Bell v. Kennedy LR 1 HL Sc 307 at p. 458 who said:-

"Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation."

⁵

(1935) MLJ 13 at 14.

C. PREREQUISITES IN ACQUIRING NEW DOMICILE OF CHOICE

The two requisites for the acquisition of a fresh domicile are residence and intention. It must be proved that the person in question established his residence in a certain country with the intention of remaining there permanently. Such an intention, however unequivocal it may be, does not per se suffice. These two elements of residence and intention must concur, but this is not to say that there need be unity of time in their concurrence. The intention may either precede or succeed the establishment of the residence.⁶

In Copinger-Symes v. Copinger-Symes and Anor,⁷ Good J. has observed that "the person claiming to have acquired a new domicile of choice must, for his claim to succeed, have 'burnt his boats'. He must have settled in the country of his choice, or at least have taken some step indicating an intention to take up permanent residence there, such as the purchase of a house for his own occupation, the transfer of his effects (as an ancient Roman would have removed his Laves and Penates) or the

⁶ Chesire at page 145.

⁷ (1959) MLJ 196 at 198.

like... I have no hesitation in accepting petitioner's sworn testimony that he has formed the intention not to live in Ireland, but this is a purely a negative intention and it is not sufficient to support the acquisition of a domicile of choice since it only discloses the existence of the animus without establishing the necessary factum."

In this relation it is to be noted that para 434 of Halsbury's Laws of England (Fourth Edition) states as follows:-

"434. Direct and secondary evidence of intention. Direct evidence of intention is often not available, but a person whose domicile is in question may himself give evidence of his intentions, present or past. Evidence of this nature is to be accepted with considerable reserve, even though no suspicion may be entertained of the truthfulness of the witness. Expressions of intention, written or oral, may be given in evidence, but such evidence must be carefully weighed in connection with the circumstances in which it occurred, and even if the expressions are clear and consistent they cannot prevail

against a course of conduct leading to an opposite inference."

And in the next paragraph, under the heading "Residence as Evidence", the following passage occurs:-

"Residence in a country, especially if it is continued for a long period, is evidence of an intention to remain there; in the absence of other evidence, residence alone may support the inference that a domicile has been acquired. Such cases will be rare, and, while residence is always material evidence, it is seldom decisive, for slight circumstances may serve to show the absence of a settled intention."

Paragraph 436 is also relevant, and it states:-

"Residence as a matter of duty. A person may reside in a country as a result of his being under some duty, public or private. Examples include diplomats, and other overseas servants of the crown, members of the armed forces, employees of international organisations or of commercial undertakings with interest in

several countries, and domestic servants attached to such persons. Such residence is likely to be temporary and may be in some measure involuntary. If it is not accompanied by any intention to make a permanent home in the country of residence, the propositus will retain his former domicile. Such a person may be held to have acquired a domicile of choice in the country of residence if the appropriate intention can be derived from all the circumstances. Cogent evidence of such intention is required. The fact that the public office is in the service of the country of residence, an alien country, is material."

D. GENERAL RULES

Generally, there are five general rules⁸ that may be briefly discussed as follows:-

1. Nobody shall be without a domicile, and in order to make this effective the law assigns what is called a domicil of origin to every person at his birth,

⁸

Chesire and North on "Private International Law" 11th Ed. at pg. 143.

namely, to a legitimate child the domicil of the father, to an illegitimate child the domicil of the mother, and to a foundling the place where he is found.

This prevails until a new domicile has been acquired, so that if a person leaves the country of his origin with an undoubted intention of never returning to it again, nevertheless his domicil of origin adheres to him until he actually settles with the requisite intention in some other country.

2. A person cannot have two domiciles. Since the object of the law in insisting that no person shall be without a domicile is to establish a definite legal system by which certain of his rights and obligations may be governed, and since the facts and events in his life frequently impinge upon several countries, it is necessary on practical grounds to hold that he cannot possess more than one domicile at the same time, at least for the same purpose.

3. The fact that domicile signifies connection with a single system of territorial law does not necessarily connote a system that prescribes identical rules for all classes of persons.

4. There is a presumption in favour of the continuance of an existing domicile. Therefore the burden of proving a change lies in all cases upon those who allege that a change has occurred. This presumption may have a decisive effect, for if the evidence is so conflicting or indeterminate that it is impossible to elicit with certainty what the resident's intention is, the court will decide in favour of the existing domicile. The standard of proof necessary to rebut the presumption is that adopted in civil actions, which requires the intention of the propositus to be proved on a balance of probabilities, not beyond reasonable doubt as is in the case in criminal proceedings.

5. Subject to certain statutory exceptions, the domicile of a person is to be determined according to the English and not the foreign concept of domicile. (For our purpose: "Malaysian Concept" of domicile).

2.2 HABITUAL RESIDENCE AND NATIONALITY AS ALTERNATIVE
CONNECTING FACTORS TO DOMICILE

INTRODUCTION

HABITUAL RESIDENCE

NATIONALITY

CONCLUSION

INTRODUCTION

As many people move about the world from one country to another, it is essential to have a means of establishing under which system of law and within the jurisdiction of which country's courts questions relating to their civil status and some aspects of their property rights fall to be determined.⁹

The essential feature of domicile is that it attempts to connect a person so far as it is possible with the country in which he has his permanent home or in which he lives indefinitely.¹⁰

Though domicile is used as the fundamental connecting factor in Ireland, the United States of America, Denmark, Norway, Brazil and the United Kingdom and other Commonwealth countries, different connecting factors, and in particular nationality and habitual residence, are preferred by other countries and by some commentators.¹¹

⁹ See for details The Law Commission Working Paper No. 88 and the Scottish Law Commission Consultative Memorandum No. 63 On Private International Law, The Law of Domicile, para 2.1.

¹⁰ Ibid, para 2.1.

¹¹ Ibid.

HABITUAL RESIDENCE

Although the concept of habitual residence already appears in United Kingdom legislation and has been employed increasingly as a connecting factor in international conventions, it has been adopted as a general substitute for domicile only in Nauru,¹² a precedent which the Irish Law Reform Commission have recently recommended should be followed in Ireland.¹³

The advantages claimed for habitual residence over domicile by its proponents are that it is:-¹⁴

- (a) Generally easier to establish than domicile because it is less dependent on the intention of the person concerned;
- (b) simpler to explain to the layman and hence it is an easier concept than domicile for administrative officials to use; and

¹² Mc. Clean, Recognition of Family Judgement In The Commonwealth (1983) Ch. 1.

¹³ On Domicile and Habitual Residence as Connecting Factors In the Conflict of Laws (LRC 7-1983), as quoted by Law Commission Working Paper No. 88, para 2.2.

¹⁴ Law Commissioner Working Paper No. 88, Ibid.

- (c) applicable directly to all persons without the need for a complicated concept such as the domicile of dependency to connect a child with a system of law.

The major criticism of habitual residence is that as a connection between a person and a country it is not sufficiently strong to justify the person's civil status and affairs always being determined according to the law and by the courts of that country. The point can be illustrated by the position of persons working or living abroad for prolonged but temporary periods;¹⁵

Take, for example, A, an English domiciled oil man working in Saudi Arabia on a long term contract. If habitual residence were adopted in place of domicile and were the sole connecting factor, then, for example;

- (a) the law governing the essential validity of any marriage contracted by A while habitually resident in Saudi Arabia and the legitimacy of any issue would be that of Saudi Arabia.
- (b) If already married, A, while habitually resident in Saudi Arabia, might be precluded from seeking

¹⁵ Ibid at para 2.3.

matrimonial relief in the English courts were his marriage to break down; and

- (c) If A died intestate while habitually resident in Saudi Arabia the rights of succession to his moveable property would be governed by Saudi Arabian law.

In short, the exclusive use of habitual residence would sever the links between many temporary expatriates and their homeland, cutting them and their dependants off from its law and courts despite their remaining closely connected with that country. The results would be particularly dramatic where the cultural background of the country of habitual residence, as reflected in its law, was very different or even alien to the culture of the person's home country.¹⁶

Another objection to substituting habitual residence for domicile (as opposed to using it as an alternative connecting factor) is its allegedly underdeveloped state as a legal concept. There is no judicial consensus about the degree of importance which is to be given to intention in determining whether residence is habitual,

¹⁶

Ibid..

nor is it clear how long residence must persist to become habitual.¹⁷

It also has been argued that a person may have more than one habitual residence, or, indeed, none.¹⁸

In these circumstances, the Law Commission¹⁹ submitted that it might well be regarded as undesirable to substitute habitual residence for domicile, unless special statutory provision were made to clarify the part played by intention and length of residence in establishing whether a residence was habitual and to cover cases where in fact a person might have no habitual residence or have more than one.

It has been claimed that habitual residence -

¹⁷ Irish Law Reform Commission Working Paper No. 10-1981, Domicile and Habitual Residence as Connecting Factors In The Conflict Of Laws, para. 20(2), as quoted by Law Commission Working Paper No. 88, Ibid, para 2.4.

¹⁸ Law Commission Working Paper No. 88, Ibid.

¹⁹ Ibid.