



## RESEARCH ARTICLE

## Doctrine of Domicile in Conflict of Laws: An Appraisal for Determining Private Law

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Domicile is a legal term that contains a dualistic character in conflict of laws. It designates a legal relationship between an individual and an independent state. It is a legal doctrine that expresses global legal solidarity with internal recognition and implementation and autonomous activities in private matters. The importance of identifying the domicile of a person is increasing in the modern era as people are easily relocating from one country to another. Therefore, this study aims to elucidate the nature and function of the doctrine of domicile in determining personal laws in the context of conflict of laws in common law countries, including Malaysia. The researcher utilizes qualitative doctrinal research to deliberate the research and gather research data. The study widely employs an analytical research approach to analyse relevant research data and identifies that domicile emerges with several foreign features, but it indicates a unique legal status of an individual in conflict of laws. This legal position depends usually on the judicial system, the type of conflicts, and the covenants ratified by the domestic laws of the specific state. Hence, this study further asserts that domicile can be used universally in all similar situations since there are not many significant variations in the application of each personal connecting factor. In addition, this study points out the strengths and challenges of domicile in conflict of laws and suggests its possible reforms to minimise the complexity of determining domicile. Therefore, it is expected that the findings of this research would contribute to the determination of a precise character of domicile of an individual to facilitate the decision-making process in international justice systems or inter-jurisdictional matters.

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**INTRODUCTION**

In conflict of laws, the doctrine of domicile typically refers to the home country of a person or a country where a person plans to live indefinitely and permanently (Keyes, 2004, p. 45; Law Commission and Scottish Law Commission, n.d, p. 5; *James Sloan v Sarala Devi Sloan*, 2010). It is considered a personal connecting factor in the judicial system of common law (Dicey and Morris, 1993, p. 115). This doctrine is usually understood to identify the legal connection between a person and his permanent dwelling place (Setalvad, 2014, p. 121). It establishes a unique legal identity of a person even if that person does not have a permanent residence. This idea examines the uniqueness of dwelling of a person (Baty, 1917, p. 133) and confirms a domicile in an aspect that nobody is free from a domicile (McClellan and Morris, 1993, p. 12). However, a person can never have more than one domicile in a specific time (Borchers, 1992, p. 357-361). The present domicile always continues and prevails until a change of domicile is proven on the balance of probabilities (*Joseph Wong Phui Lun v Yeah Loon Gait*, 1978). If domicile of choice of a person cannot be established, domicile of origin will

be taken into consideration in conflict of laws. The burden of proof for changing a domicile of origin is very high (Dicey and Morris, 1993, p. 122).

The establishment of domicile for an individual at a given time is very important to specify the legal status of that individual in conflict of laws. It forms the legal eligibility of a person to marry, determine the legitimacy of children, and distribute the movable property of a deceased person (Akmal and Azhani, 2012, p. 18-19; *Soundara Achi v Kalyani Achi & Ors*, 1953). If there is a conflict of the legality of a marriage of an individual in a foreign country, the case will be judged based on domicile of that person. This process connects an independent country with a foreign jurisdiction to settle the conflicting issues (Nadelmann, 1968, p. 766). For instance, if a married person is permanently living in Malaysia and his domicile is proven in Malaysia, his divorce or dissolution of marriage will be judged based on Malaysian jurisdiction. If this person dies in Malaysia, his properties will also be distributed based on Malaysian properties distribution laws. The importance of identifying domicile of a person is increasing in this modern time as people are easily relocating from one country to another. The question of domicile is mostly arising to know legal status of a person when he is travelling, and which jurisdiction will be specifically relevant to examine the legality of his contracts, marriage, and other legal matters. This study explains in depth the common law doctrine of domicile and its application in conflict of laws and its position in Malaysia.

## DEFINITION OF DOMICILE AND ITS ORIGIN

Domicile is a fixed, and permanent home where a person lives in and always plans to return (Dicey and Morris, 1993, p. 117). It treats a significant connection with the person and a state (Mills, 2009, p. 252; Keyes, 2004, p. 46-47). Domicile is a legal concept that differs from the idea of a permanent residence. No legal study provides any distinct definition of domicile while it entails two fundamental components which must exist for establishing domicile of a person such as physically presence and desire to stay permanently (Stone, 1995, p. 129; *James Sloan v Sarala Devi Sloan*, 2010). In the case of *Mohammad Raza v. State of Bombay* (1966), the Supreme Court of India stated that domicile refers to a permanent home or place where a person wants to remain for an indefinite time. In the *Pradeep Jain v. Union of India* (1984) case, the Court defined domicile as the permanent house by law. The elements of domicile not only go beyond the prerequisite of acquiring a permanent residence in a state, but also require the intention to remain there continuously or indefinitely (*Mark v Mark*, 2005).

Domicile, from a legal perspective, refers to the position or allocation of becoming a permanent resident in a particular jurisdiction. A domicile of a person will remain under a particular jurisdiction as long as he is maintaining an adequate link with that state or not exhibiting any free intention to depart that country permanently. To form a new domicile, the person needs to move from one state to another state with full intention that he will be dwelling there forever. In the *Waicker v Hume* (1858) case, Lord Chelmsford defined domicile as "A place is perfectly the domicile of an individual in which he has willingly fixed the dwelling of himself and his family, not for a mere special or temporary purpose but with a present intention of permanent home..." Similarly, Lord Cranworth expressed domicile as, "Domicile means home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it (Dicey, 1994-1993, p. 115)." A domicile is defined, for judicial purposes, as a fixed habitation, where the person intends to make his principal residence (*Snyder v. McLeod*, 2007).

Modern canonists believe that the doctrine of domicile is rooted in Roman law (Davrados, 2017, p. 129), and the English Canon Law gave its foundation into the contemporary law. The word "*domicilium*," which later domicile in English notion, comes from the Roman "*domum colere*," which means to foster or occupy a house. The meaning of the Roman term indicates that domicile is a place of habitual residence rather than just any place of living. It is found from the history of common law that the Diocese is empowered to judge its ordinary people in the English Consistory Court and domicile of a person is considered as his habitual residence (Law Reform Commission, 1981, p. 97). Therefore, English law implements marriage of a person based on his dwelling place.

Every legal act of a person is governed by the *lex fori* which is the law of the place (Falconbridge, 1954, p. 728) and domicile connects the person to a jurisdiction of a place (Akmal and Azhani, 2012, p. 18). The concept of domicile assists a court in the case of conflict of laws to identify which laws and

which country's jurisdiction should be applicable to administer legal acts of an individual. It also clarifies before a court the factual situation and jurisdiction of a particular case. Therefore, the main rules of domicile are categorised into five major doctrines which were governed in the case of *Mark v Mark (2005)*. They are explained below:

First, everyone is attached to a domicile which is known as domicile of origin. A child at his born achieves domicile of origin by the operation of law. Thus, legitimate children acquire domicile of the father by birth (Bogdan, 2012, p. 97), whereas illegitimate children obtain mother's domicile by birth. In addition, the domicile of a foundling person is in the location where he was discovered (Law Commission and Scottish Law Commission, n.d, p. 4). A person always maintains domicile of origin which is achieved by birth until he legally acquires a new domicile in any jurisdiction.

Second, international law prohibits a person from having two domiciles simultaneously. He might stay different states as a residence, but his legal actions will be governed under one jurisdiction based on his domicile which will be identified by looking to connecting factors.

Third, a domicile ties an individual in a regional legal system. It does not mean to have same principles for everyone in a state because every class or every category of people will have different rules based on religion, custom, and race.

Fourth, everyone will presume that his current domicile will continue unless a change is proven on balance of probability. The evidence of changing a domicile of origin must be heavy one (Wall, 1950, p. 286).

Fifth, in common law practicing countries if there is no statutory exception, the identification of domicile is based on English Common law (Juenger, 1984, p. 44). In *Re Annesley (1926)* case, a British domiciled man was living in France. When conflict of laws arises about the domicile of the person, the court decided that his domicile is established based on English law as *lex fori* or the law of the forum.

In Malaysia, courts have ruled that distribution of immovable property is based on *lex situs* (law of place) while movable property is distributed according to *lex domicilii* (law of domicile) (Akmal and Azhani, 2012, p. 19; *Fatimah Bee alias Batcha Ammal v Mohideen Batcha*, 1946; *Shaik Abdul Latif v Shaik Elias Bux*, 1915; *Soundara Achi v Kalyani Achi & Ors*, 1953). Pursuant to Section 3 of the Civil Law Act 1956, the common law doctrine of domicile which is enforced before the "cut of date" is enforceable in Malaysia. However, Malaysian jurisdiction is vigilantly against depending on case interpretations from other jurisdictions, including England, apart from Singapore where the law is relevantly the same. It cautiously relies on English case interpretations for an English statute which is in *para materia* (on the same subject) with Malaysian statute (*Ching Seng Woah v Cheng Song Huat v Lim Shook Lin*, 1997; *Sivanes Rajaratnam v Usha Rani Subramaniam*, 2002).

## IMPORTANCE OF DOMICILE IN CONFLICT OF LAWS

Domicile is one of the crucial factors in the decision-making process in a court of justice. It offers an option to the court to estimate and accept an international jurisdiction or the necessity estimation of the forum jurisdiction. It affirms the eligibility of a person for certain civil rights in a particular state. For instance, it determines the entitlement for a variety of services in relation to necessities like unemployment or ill health as well as the obligation to pay a variety of taxes in the state. Furthermore, it ensures jurisdiction of family matters of an individual like his marriage and matrimonial property (Abdrakhmanova and Nyssanbekova, 2013, p. 1690). Particularly, intestate succession of a person depends on his domicile (Akmal and Azhani, 2012, p. 18). For instance, in the case of *Gurcharan Singh a/l Karnal Singh v Mninder Kaur a/p Piara Singh (2010)*, the Court rejected to register a foreign divorce in Malaysia because at the time of divorce both parties were not domiciled in Malaysia. Moreover, domicile determines a person's ability to sign contracts and ratify matrimonial cases, wills (Lawrence III et al., 2000, p. 13), marriages, divorces, and other legal transactions as well as succession (Falconbridge, 1954, p. 726). Therefore, for example, the law of the country where a person is domiciled will determine whether he meets the requirements for age and capacity to validly marry in another jurisdiction as well as whether he can obtain a divorce that will be recognised in other jurisdictions. All these facilities cannot be ensured without establishing the domicile of a person.

## CLASSIFICATION OF DOMICILE

The doctrine of domicile is classified into three namely (1) domicile of origin, (2) domicile of choice and (3) domicile of a dependent person. All these categories of domicile are going to be discussed in the following sections.

### DOMICILE OF ORIGIN

The domicile of origin is acquired by birth which is the main feature (Davrados, 2017, p. 129-30). It is usually acknowledged by the law of the birthplace. A domicile of origin is typically derived from the domicile of the parent (Dicey, 1994-1993, p. 124). However, other family members might live in different places and obtain different domiciles by their free choice at the same time. A domicile of origin carries from generation to generation. The landmark case of this principle is *Whicker v Hume* (1858) where Lord Cranworth ruled that the place of permanent home is the domicile of an individual, but domicile of origin is achieved by the operation of law of the birthplace. It does not mean that this domicile is established in the state where the family is living permanently. However, it will follow the domicile of the one or both parents. This principle was illustrated by Dicey and Morris (1993, p.124), and they claimed that "Every person receives at birth a domicile of origin:

- A legitimate child born during the lifetime of his father has his domicile of origin in the jurisdiction in which his father was domiciled at the time of his birth.
- A legitimate child not born during the lifetime of his father, or an illegitimate child has his domicile of origin in the jurisdiction in which his mother was domiciled at the time of his birth.
- A foundling has his domicile of origin in the jurisdiction in which he was found."

The domicile of origin is acquired by the operation of law of the state where the person is born (*Udny v Udny*, 1869). It is not necessarily depending on the birthplace or parents' residence but depending on the domicile of the parents. There is also no need to have a link among the birthplace and the domicile of origin (North, 1993, p. 7). This ruling was governed in *Udny v Udny* (1869) case where an individual was living in Tuscany by birth. His parents were residing in England while their domicile of origin was Scotland. It was decided that the individual obtained domicile of origin by birth.

When a baby is born after the death of his father or when an illegitimate baby is later given legitimacy, the mother's domicile will be considered as the domicile of origin of that baby (Bogdan, 2012, p. 86; *Udny v Udny*, 1869). Similarly, adoption is considered as conferring the status of a lawful child by a lawful marriage where the domicile of the adoptive parents will be communicated to the adopted child (Dicey, 1994-1993, p. 125). Likewise, a foundling child or an illegitimate child whose parents were unknown would obtain domicile of the state in which the child was found because his domicile of dependent and domicile of origin is totally unidentified. In the case of *Re McKenzie* (1951), the court accepted the domicile of the place where an illegitimate child was found as his domicile of origin was unknown to the people (Law Commission and Scottish Law Commission, n.d, p. 4).

In Malaysia, a legitimate child achieves the domicile of the father while an illegitimate child attains the domicile of the mother by virtue of the Law Reform (Marriage & Divorce) Act 1974. Section 3 of this Act identifies that all Malaysian citizens are deemed to be domiciled in Malaysia even residing in abroad unless the contrary is proved. However, it should be noted this Act applies to govern the marriage and divorce of non-Muslims, but not to Muslims in Malaysia.

### Tenacity of domicile of origin and its revival in conflict of laws

A domicile of origin connects a person to a society. This domicile is very hard to lose as it is obtained at the time of birth of the person. It is always revived when a person fails to acquire his domicile of choice. Wherever the person goes, the domicile of origin continuously follows him. Even if the person leaves the state with the intention that he will never return, the domicile of origin follows the person until he achieves his new domicile. The domicile of origin will remain with the person even if he will never visit the particular state unless he will obtain a new domicile. This situation was examined by the House of Lords in the case of *Bell v Kennedy* (1868) where the person was holding the domicile of origin of Jamaica, later he was undecided whether to obtain domicile of Scotland or England. In these facts, the court decided that his domicile of origin of Jamaica remains. In this case, Lord

Westbury ruled that “The domicile of origin adheres until a new domicile is acquired.” The court also ruled similar principles in many other cases like *Grant v Grant* (2002), *Ramsay v Liverpool Royal Infirmary* (1930), *Cyganik v Agulian* (2006), *IRC v Bullock* (1976) and *Winans v AG* (1904). Thus, the tenacity of domicile of origin guarantees that every person does not hold more than one domicile at a time and a change of this domicile must be established with heavy proof.

The domicile of origin is a fundamental principle for connecting a person to a jurisdiction under conflict of laws. The landmark case of the establishment of the domicile of origin is *Udny v Udny* (1869) where the court significantly ruled that the domicile of origin is persistently connected to a person and it's very hard to lose. If a person alleges of accepting a domicile of origin, he must prove the establishment of any other domicile with high standard of evidence which was highlighted in the case of *Henderson v Henderson* (1843). In this case, Sir Jocelyn had proposed that the standard of proof of changing a domicile of origin goes beyond a mere balance of probabilities (Law Commission and Scottish Law Commission, n.d, 6; *Joseph Wong Phui Lun v Yeah Loon Gait*, 1978). However, Scarman J has rejected the standard in the case of *Re Fuld Estate* (No3) (1968) and reaffirmed the decision of the Court of Appeal in *Buswell v IRC* (1974) where such high standard of proof was required only for criminal cases. While the jurisdiction of Malaysia requires similar standard as ruled by Sir Jocelyn in the case of *Henderson v Henderson* (1843). A Malaysian Court stated in the case of *Joseph Wong Phui Lun v Yeah Loon Gait* (1978) that:

“... clear evidence is required to establish a change of domicile. In particular, to displace a domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere balance of probabilities.” Lord Westbury stated that the elements of residence and intention must be proved with “perfect clearness and satisfaction.”

A domicile of origin can never be lost permanently though it can be changed with domicile of choice (McClellan and Morris, 1993, p. 14; Mills, 2009, p. 253). Due to the complexity of the law it is very difficult to achieve a domicile of choice while it is very fundamental to acquire a domicile of origin by birth. If the domicile of choice of a person is rejected, his domicile of origin revives immediately (Law Commission and Scottish Law Commission, n.d, p. 6). This revival principle was first developed by the House of Lords in the case of *Undy v. Undy* (1869) in the mid-nineteenth century, when it was ruled that the domicile of origin should be revived after losing the domicile of choice. In the subsequent case of *Tee v. Tee* (1999) where a British domiciled person achieved domicile of choice in the United States, but later lost it. The Court, adhered to the revival rule developed in *Undy v. Undy* (1869), and decided that the domicile of origin is automatically revived after losing the domicile of choice. Furthermore, the courts acknowledged the revival principles in many other cases namely the *Grant v Grant* (2002), *Ramsay v Liverpool Royal Infirmary* (1930), *Cyganik v Agulian* (2006), *Winans v AG* (1904), and *IRC v Bullock* (1976).

Similarly, the domicile of origin of a dependent will be revived if he does not obtain a new domicile after he reaches at the age of maturity. This rule was governed in *Harrison v Harrison* (2009) case where an eighteen-year-old English domiciled dependent went to South Australia. He moved to New Zealand after a year and married there. At the age of twenty-one, he came back to England. The conflict of laws raised when his wife began a divorce petition in England. It was ruled that the domicile of origin of dependent revived because the person did not obtain new domicile after he reached at the age of maturity. It is, therefore, identified that the revival theory of domicile of origin fills the gap of an individual's lack of domicile until he acquires a new domicile. These benefits of revival can never be obtained in any other types of domiciles in conflict of laws.

### **Advantages of the tenacity and revival of domicile of origin**

The domicile of origin connects a person to his root place and society. It can be exercised in a strange situation when an individual willingly abandons himself from the legal system of his place of origin. In this situation, if the doctrine of revival of the domicile of origin is not exercised, the individual will face a dilemma to remain in any jurisdiction (Law Commission and Scottish Law Commission, n.d, p. 6). For instance, if an individual left Malaysia for New Zealand and intended that he would live there permanently. Few years later he moved to England. Before obtaining a new domicile in England, all his legal matters would be judged under the jurisdiction of Malaysia as his domicile of origin. This principle is applied in all circumstances to always link a person to a jurisdiction. In the case of

*Nanthivarman Pichamuthu Mookiah v Sharmini Pillai* (2011), a Malaysian man was living in England as a permanent resident. He petitioned for divorce in Malaysia. The Court decided that a Malaysian citizen has a Malaysian domicile unless he acquires a domicile of choice another country.

The theory of revival of domicile of origin directs to examine every situation of a person to make a balanced and correct decision. In the case of *Cyganik v Agulian* (2006), Mummery LJ suggested that domicile of an individual is determined on the day of his death. The entire life of the deceased shall be investigated to verify whether he intended to acquire a domicile of choice. Furthermore, the revival concept detects the private law of a person to solve all his legal matters. It ensures the court that a domicile of origin is never revoked or abandoned. This ruling was explained in *Bell v Kennedy* (1868) case where the domicile of origin of an individual was automatically revived when the domicile of choice was abandoned (Law Commission and Scottish Law Commission, n.d, p. 5). Additionally, in *Harrison v Harrison* (2009) case, the court ruled that the domicile of dependency is revived after expiry of dependency period as no domicile of choice is obtained.

### **Disadvantages of tenacity and revival of domicile of origin**

In addition to the profound benefits of the tenacity and revival of domicile of origin, the concept also has several drawbacks. In some situations, the revival concept is considered as an unnecessary theory of law. Because a domicile of choice can be continued before obtaining a new domicile. Sometimes the dependent and domicile of choice choose their domicile adequately to judge their private matters. In England, the Law Commission Report in 1987 indicated that the revival of domicile of origin is redundant as the birthplace and the domicile of the children might be decided by the parents.

The revival theory cannot be applicable to identify domiciles of illegitimate and posthumous children because the legitimacy of the children depends on the domicile while the identification of domicile depends on legitimacy. Domicile of an individual cannot be determined in this complex situation. The revival theory can also be an outdated one as human being are constantly travelling from one location to another, but the doctrine links a person to a jurisdiction which he left long before. Therefore, it might create a strange situation as the person might know nothing about the judiciary of his country of domicile. For example, in *Grant v Grant* (2002) case, it was found that a domicile of origin was continued as dependency from generation-to-generation. It generates the problem that a domicile of origin must still be observed even a generation does not return to the place of origin.

### **DOMICILE OF CHOICE**

Domicile of choice is obtained by a legally qualified adult individual with the genuine intention to reside permanently in a particular state other than the state of his domicile of origin (Law Commission and Scottish Law Commission, n.d, p. 5). This indicates that the person willingly accepts a new legal system to follow indefinitely for the rest of his life (McClellan and Morris, 1993, p. 17). This domicile is declared as a question of fact but not law in the case of *Mark v Mark* (2005). It involves presence in a state as well as a bona fide desire to establish there a permanent and indefinite home (North and Fawcett, 2008, p. 143). This rule indicates that two tests must coexist to acquire a domicile of choice which are the objective test of dwelling and the subjective test of intention. Snyder, J. primarily introduced those principles in the case of *White v Tennant* (1888) and ruled that “the succession and distribution of a deceased’s personal estate is controlled by the law of the state where the deceased was domiciled at the time of death.” In the case of *James Sloan v Sarala Devi Sloan* (2010) the court stated that all circumstances must sufficiently establish that the applicant not only resided but also intended to reside permanently for an indeterminate period of time. Thus, a domicile of choice is a developing or an actual residence in a country with no intention of moving elsewhere (Westlake, 1858, p. 34). However, a state may abandon domicile of choice at any time by operation of law. It can be obtained again as a renewal after meeting the requirements but not revived.

A domicile of choice does not require a long period of living in a place, but a short period of living is sufficient to achieve it. If a person resides in a country but later decides to leave the country with the bona fide intention of returning, if necessary, he will not be able to acquire domicile of choice in the new country of residence even if he lives in that country for a long period. Because obtaining domicile does not require a long stay in a country but a short period is sufficient as long as having an intention

and residence. Lord Chelmsford further ruled in the case of *Bell v. Kennedy* (1868) that a person acquires a domicile of choice in a country if he has a clear intention of living there permanently and a genuine desire to reside there. However, if a person is dwelling illegally in a state, he will not acquire domicile there as it is contradictory of the law of that state (Dicey and Morris, 1973, p. 96). This rule was implemented in *Puttick v Att-Gen* (1980) case where a German criminal obtained an English passport by forgery and the court, therefore, decided that he cannot obtain a domicile of choice by his illegal dwelling.

The first requirement to obtain domicile of choice is residence which is defined as physical presence in a state with the intention of dwelling permanently (Raiteri, 2014, p. 328-29). For instance, Nourse J illustrated in the case of *IRC v Duchess of Portland* (1982) that "Residence in a country for the purposes of the law of domicile is physical presence in that country as an inhabitant of it." An instant arrival with the intention to live permanently is sufficiently fulfilled the requirement of residence for acquiring a domicile of choice. In the case of *High-Tech International v Deripaska* (2006) where a Russian multi-millionaire owned several houses in different parts of the world but had two houses in England. He sometimes visited England without any intention to live there permanently. Thus, the court rejected his domicile of choice. In addition, to acquiring domicile of choice by residence, the dwelling of a person must not be based on external purposes like relief from sickness, completion of official duties, perform a contract and so on (North and Fawcett, 2008, p. 143). In Malaysia, according to section 48(1) of the Law Reform (Marriage and Divorce) Act 1976 [Act 164], the Court may not entertain a petition for divorce unless both parties of the marriage prove that they are domiciled in Malaysia at the time of petition presented in the Court. This ruling was acknowledged in the case of *Melvin Lee Campbell v Amy Anak Edward Sumek* (1988) where the Court examined all living circumstances of the petitioners and found that domicile of choice of husband, an American citizen, was not acquired in Malaysia. Thus, the Court rejected to entertain a joint petition for divorce in Malaysia. However, in *Shaik Abdul Latif & Ors v. Shaik Elias Bux* (1915) case, the petitioner's domicile of origin is Hong Kong. He moved to Singapore and then to Malaysia. He lived 19 years in Malaysia, amassed wealth, built house for family and regarded here his permanent residence. His wife embraced Islam and never visited Hong Kong. The Court decided that he acquired domicile of choice in Malaysia.

The second requirement to obtain domicile of choice is intention which is defined as an unequivocal aspiration of living in a state permanently or indefinitely. The intention of residing for a certain period for a particular purpose is not sufficient for achieving a domicile of choice (Dicey and Morris, 1993, p. 128). An intention to live permanently can be identified by the evidence of intention and the nature of intention. North and Fawcett (2008, p. 143) stated that every incidence of the entire life a person including whims, aspirations, health, prejudices, financial expectations, religion, and any other reasons can be relevantly administered to identify his state of mind which was also ruled in case of *Drevon v Drevon* (1864). Naturalisation in a country is a strong evidence to identify the intention of a person that he has intention to live in a place permanently and indefinitely. In *IRC v Bullock* (1976) case, the court decided that as the person did not change his nationality, his intention to obtain domicile of choice is absent. However, in the case of *Bheekhun v Williams* (1999), the person was given a choice to receive Mauritius or British passport, and he accepted a British passport which was sufficient to show his intention to accept English domicile. Buying a real state property is also a major factor to identify intention to live permanently (*Re Flynn*, 1968).

Similarly, in the case of *Joseph Wong Phui Lun v Yeoh Loon Goit* (1978), a Malaysian citizen admitted on oath that he would apply for Singaporean citizenship as soon as he met the minimum requirement of living ten years in the country. He would travel back to Kuala Lumpur once or twice a week. Later he took a mistress and lived with her in Singapore until his wife discovered their affair, at which point he stopped returning to Kuala Lumpur. He was granted permanent residency in Singapore and also received a blue identity card. He resigned from Malaysian clubs and became a member in several Singaporean clubs. The Court decided that the petitioner acquires the domicile of choice in Singapore. Chua J expressed that as long as the *animus manendi* (intention to remain) is confirmed, the domicile of choice is acquired. In *Kanmani v Sundarampillai* (1957) case, a Ceylon domiciled husband came to the Federation of Malay for employment. Later he was medically dismissed from his job. He went back to Ceylon, but after one and half year he returned to Malaya. His wife became citizen, but he

never applied for citizenship. The Court decided that he does not acquire domicile of choice as he never intended to stay permanently in Malaya.

If a legally eligible person makes a clear and foreseen contingency to move from a state, he will not get domicile of that country (Ramanathan, 2021). This rule was explained in *IRC v Bullock* (1976) case where a man made a contingency that if his wife predeceased him, he would return to the country of his birth. The Court of Appeal rejected his domicile of choice and stated that domicile of origin of the man is still sustained as he had intention to return if his wife dies first. The court also determined that contingency was definite. There was a high probability that the contingency would occur. Scarman J. further explained about a contingency in the case of *Re Fuld's Estate* (No 3) (1968) that:

“If a man intends to return to the land of his birth upon a clearly foreseen and reasonably anticipated contingency, eg, the end of his job, the intention required by law is lacking; but if he has in mind only a vague possibility, such as making a fortune (for example, winning a lottery), or some sentiment about dying in the land of his father, such a state of mind is consistent with the intention required by law.”

However, if the contingency is vague and unclear one, the domicile of choice of a person will be survived. For instance, in the case of *Lawrence v Lawrence* (1985) where a person loved to live in Brazil but contingency to leave there. The contingency was indicated as “if there were to be a revolution and things got badly out of hand.” Thus, it was ruled that the domicile of the person is in Brazil as the contingency is very vague and unclear in nature.

## **DOMICILE OF DEPENDENT PERSONS IN CONFLICT OF LAWS**

The domicile of dependency follows a domicile of another person by operation of law (North, 1993, p. 6). When the domicile of the principle is surrendered, the domicile of the dependent is also automatically surrendered. Under common law, a wife obtains husband's domicile, and the children acquire domicile of their parents (Trakman, 2015, p. 321). By this rule, a child obtains two domiciles at his birth namely the domicile of dependency and the domicile of origin. However, a child can obtain a new domicile of choice when he reaches at the age of maturity. If he is abandoned from his domicile of choice, his domicile of origin will be automatically revived. This type of domicile is divided into two categories such as:

### **Domicile of a child**

It is universally recognised principle that children under the age of maturity acquire domicile of their parents. This dependence on their domicile arises because of their incapacity to establish their own domicile. When the children reach the age of maturity, they can achieve domicile of choice by their free choice. However, the age of maturity differs from country to country. In England, the age of maturity is 16 years under s 3(1) of the Domicile and Matrimonial Proceedings Act 1973 of England, but in Malaysia is 18 years under the Age of Majority Act 1971. Most of other countries confirm that the age of maturity is between 18 to 21 years old (North, 1993, p. 6). According to the Law Commission and Scottish Law Commission (n.d, p. 4-5), legitimate children generally get the domicile of the father. Likewise, illegitimate children who later become legitimate get the domicile of father, but their domicile of origin is inherited from the mother. If the child is born after the death of his father or the child is illegitimate, his domicile is the domicile of his mother. According to the decision in the *Re Beaumont* (1893) case, mothers have the right to change the domicile of their children under certain circumstances for the best interests of the children. Moreover, domicile of adopted children is the domicile of either both or one of the adoptive parents, while domicile of a foundling children is the location where they were found (Dicey, 1994-1993, p. 124).

According to section 4 of the Domicile and Matrimonial Proceedings Act 1973 of England, there are three exceptions which apply only to legitimate as well as legitimated children whose mother passed away or whose parents separated. Firstly, if a child is living with his mother and the father does not have house, domicile of his mother will be recognised. Secondly, the child may petition at any moment to shift his domicile to his mother if the father does not have a home. And thirdly, if the child lived with his mother and the father does not have home, the domicile of the mother will continue after the death of the mother.



### **Domicile of married women**

Married women usually obtain the domicile of their husbands as the unity of marriage (*Gaffney v Gaffney*, 1975). According to this principle, a married woman is bound by law to follow her husband's domicile, even if she has never visited the husband's domicile. This rule forfeits the preference of married women to choose their own domicile. In England, this general principle of dependency is abolished by the enforcement of the Domicile and Matrimonial Proceedings Act 1974. Following this Act, married women including divorcees and widows can obtain their domicile of choice autonomously. The domicile of married women principle was enforced in the case of *Re Scullard* (1957) where an English domiciled woman went to Guernsey after divorce and dwelling there permanently. Based on this fact, the court decided that the woman can acquire a domicile of choice after the death of the husband. The current practice is that a married woman can get the domicile of her husband unless they voluntarily obtain a domicile of choice (Keyes, 2004, p. 56-57). If a woman marries a second time after breaking the first marriage, she will achieve domicile of her new husband if she does not choose a domicile of choice.

In contrast, married women in Malaysia acquire domicile of their husbands (Reddy, 1995, p. 623). This principle was acknowledged by the court in several cases, such as in *Khoo Kay Peng v Pauline Chai Siew Phin* (2014), *Neduncheliyan Balasubramaniam v Kohila Bhanmugam* (1997) and *Charnley v Charnley and Betty* (1960). In *Ang Geck Choo v Wong Tiew Yong* (1997) case, a Singaporean woman married a Malaysian Man. Later she petitioned for divorce in Malaysia, but husband alleged that her domicile is not in Malaysia. The Court held that the wife acquired domicile of dependence upon marriage. Section 48 of the Law Reform (Marriage and Divorce) Act 1976 [Act 164] requires both parties must be domiciled in Malaysia at the time of divorce proceeding taken to the Court. In *Neduncheliyan Balasubramaniam v Kohila Bhanmugam* (1997) case, it was ruled that "On the uncontested material before us we are of the opinion any Malaysian woman upon marriage will acquire her husband's domicile and until that marriage is lawfully dissolved, she will retain the domicile of her husband." A similar decision can be observed in *Kanmani v. Sundarampillai* (1957) and *Siah Teong Woei v Janet Traynor* (2010) cases.

However, a married woman can obtain domicile of choice, but she must prove to the court that her domicile of dependency is abandoned permanently. In *Teo Ka Fook v Loo Chiat Hui* (2010) case, the court accepted wife's domicile of choice in Australia as she proved that abandonment of husband's domicile is permanent. Section 49(1) of the Law Reform (Marriage and Divorce) Act 1976 of Malaysia provides certain exceptions to the rule that Malaysian Courts have jurisdiction to entertain proceedings by a wife even where husband's domicile is not in Malaysia if either: (a) the wife has been deserted by the husband, or (b) the husband has been deported from Malaysia, and the husband was before the desertion or deportation domiciled in Malaysia, or (c) the wife is resident in Malaysia and has been ordinarily resident in Malaysia for two years immediately preceding the commencement of the proceedings.

### **STRENGTHS OF DOMICILE IN CONFLICT OF LAWS**

Domicile connects a person to the judiciary of a particular state. This legal theory ensures that nobody is free from a domicile in a particular time (Law Commission and Scottish Law Commission, n.d, p. 6). In this modern era, people are moving around the world. Wherever the person goes, his domicile of origin follows him unless he obtains a new domicile with his free intention to live permanently in a different country of his origin. The doctrine of domicile also provides a unique system to ensure that a person is bound by a legal system and his wills and properties will be distributed with that judicial system (*Udny v. Udny*, 1869).

### **CHALLENGES OF DOMICILE IN CONFLICT OF LAWS**

Domicile plays an important role in conflict of laws because it determines the law and jurisdiction which can be applied to resolve a person's legal matters. However, determining domicile and its application can be complex due to various factors:

### **Domicile cannot be defined with accuracy**

The common law does not lay down any definitive rules on how to determine a person's domicile which is evident from numerous case judgements. The landmark indication is found in the case of *Whicker v Hume* (1858) where the domicile of a person is defined as "permanent home." However, the court rejected such domicile in many other cases such as a person was living many years in a place, but the court decided that the person did not acquire the domicile of that country. For instance, in *Ramsay v Liverpool Royal Infirmary* (1930) case, a Scottish domiciled person moved to Liverpool. He lived there about 36 years and he never put his foot stem in Scotland in his life. The House of Lords decided that the person had the domicile of Scotland at time of his death. Similarly, in *Cyganik v Agulian* (2006) case, the person was living in England for about 43 years, but the court investigated about his whole life and decided that the person did not obtain the English domicile and thus, domicile of origin remains (Dicey et al., 2007, p. 10). Furthermore, in the case of *Winans v AG* (1904), an individual was staying about 37 years in England and did not go back to his country of origin for last 47 years. However, the court decided that the person did not lose his domicile of origin. Therefore, based on the above case principles, it can be submitted that identification of domicile is not a certain process at common law, but it is very vague in nature as there is no specific criteria for determining the domicile of a person.

### **Impact of human mobility and globalisation**

With increasing human mobility and globalisation, many people have multiple residences and connections to various jurisdictions. This can cause complications in determining a person's domicile (LaFrance, 2019, p. 21). In some cases, people are living for a long time in different states other than the states of their origin. They complete all their dealings according to local norms where they live. When they face any legal problems, they will be judged based on the jurisdiction of their origin even if they have not been visited there for a long time. Thus, this doctrine of revival of the domicile of origin may create a situation where a person may die domiciled in a country to which he has never visited (Law Commission and Scottish Law Commission, n.d, p. 8). It might create ambiguity in the legal system. Some legal jurists claim that domicile is an outdated concept that cannot be applied in this modern world (O'Brien, 1999, p. 75).

### **Complexity in establishing domicile**

Establishing domicile of a person requires an intention and a permanent home to which he intends to return. Achieving these requirements can be complex and contentious. Intention is subjective and requires evidence such as declarations, actions, property ownership, family ties and other personal relationships, which can be difficult to prove on the asserting party. Similarly, proving a permanent home can be challenging especially when dealing with vague or inconsistent personal histories and with individuals who have connections to multiple countries and frequently relocate. Mere physical relocation is not sufficient to establish a changed domicile but also requires an intention to abandon the old domicile and adopt a new one indefinitely and permanently (Law Commission and Scottish Law Commission, n.d, p. 4; *Re Bhagwan Singh Decd*, 1964).

Special groups, such as expatriates, diplomats, and refugees, present transient lifestyles or special legal statuses can complicate the determination of their domicile. In today's world, an individual may have significant connections in multiple places without a clear intention to stay permanently, which may create inconsistencies with traditional notions of domicile. Therefore, establishing the present requirements of domicile can be complicated and contentious in conflict of laws.

### **Multi-jurisdictional factors**

A person with connections to various countries may face complex scenarios where different jurisdictions claim the person is domiciled within their borders. This inconsistency of domicile determination can lead to unpredictable and unfair legal outcomes. This can also lead to conflicting legal obligations and complications in matters such as family law, child custody, taxation and inheritance. In some cases, courts in a particular state may refuse to recognise a person's domicile if it is contrary to public policy, which can introduce an additional layer of complexity in the present doctrine of domicile. For instance, if recognition of a person's domicile results in the application of

foreign law that is significantly different from local laws, the court may refuse to do so. This jurisdictional dispute can also lead to unpredictability and unfairness in the application of the law.

### **Tax evasion and legal manipulation**

In this dynamic and globalised era, a person may have connections to multiple countries, leading to multiple domicile issues that can complicate matters when different countries claim jurisdiction over the same person. This complexity of the determination of domicile can influence individuals to attempt to manipulate their domicile to gain legal advantages, such as favourable tax treatment or to avoid legal obligations.

### **PROPOSALS TO REFORM THE LAWS OF DOMICILE IN CONFLICT OF LAWS**

To minimise the complexity of determining domicile in conflict of laws, a state may consider various approaches, such as:

#### **Clear legal definitions and criteria**

Legal systems should provide clearer definitions and criteria for determining domicile. It should be ensured that these criteria are objective, transparent, and consistent. These criteria should include specifying the necessary period of residence and the type of intent required to establish domicile, reducing the subjectivity involved in the determination. For instance, in the case of *Joseph Wong Phui Lun v Yeoh Loon Goit* (1978), the court reviewed the intention of the petitioner and held that staying 90 days in the USA for the purpose of acquiring permanent residence is not sufficient to constitute a change of domicile. Furthermore, courts should provide clear guidelines and precedents on how domicile is determined, considering factors like physical presence, intention, and social and economic ties. Furthermore, legal systems can use other connecting factors such as habitual residence, nationality, or place of transaction to determine applicable law and jurisdiction.

#### **Harmonisation of the laws of domicile**

Countries can adopt uniform laws or model codes that provide consistent rules for determining domicile of a person. For instance, international conventions, like those facilitated by the Hague Conference on conflict of laws, can help to standardise definitions and rules regarding domicile (Stone, 2006, p. 3). Moreover, countries can enter into bilateral or multilateral agreements to recognise and enforce each other's determinations of domicile, thereby reducing conflicts and ensuring consistency in cross-border cases (Chun, 2012, p. 127; Jubaer, 2021, p. 37). Therefore, it is submitted that this harmonisation of laws would scrutinise claims of domicile changes and prevent individuals from manipulating their domicile to gain legal advantages and prevent tax evasion.

### **CONCLUSION**

Domicile is one of the most significant theories in conflict of laws to connect a person to a judiciary system. This theory examines the uniqueness of dwelling of a person and confirms a domicile in an aspect that nobody is free from a domicile (McClellan and Morris, 1993, p. 12). It governs rights and obligations including marriage, succession, matrimonial property, and other contracts of an individual under a particular legal system. It connects an individual to the legal system of a place where he wants to live permanently and binds him to follow the law of the place (Davrados, 2017, p. 127-28). It further plays an important role in the law of taxation (Abdrakhmanova and Nyssanbekova, 2013, p. 1691).

Every child has a domicile by birth whether he is legitimate or illegitimate child who later becomes legitimate. Similarly, a foundling person has domicile of the place where he is found. An adopted child also obtain domicile of his either both or one of the parents. This domicile can be either domicile of origin which is automatically obtained by birth or domicile of choice which is acquired by the free choice of a person as the age of majority. However, domicile of origin is automatically revived if a person is abandoned from the domicile of choice based on the doctrine that no person can be without a domicile. It is submitted that no person is free from a domicile, thus, every legal act of a person is bound by a judiciary. The theory of domicile indicates that the personal movable property is settled in accordance with the jurisdiction of the domicile of the person, and real property means immovable property is settled based on *lex situs* (the law of the location of the property) (Akmal and Azhani,

2012, p. 18; Chun, 2012, p. 365). Civil law jurisdiction, however, considers the nationality of the person in deciding which law to apply to the disposition of real property (Lawrence III et al., 2000, p. 4). However, the doctrine of domicile has some complexity in conflict of laws. Therefore, it is submitted that states should provide clear legal definitions and criteria for establishing and changing domicile and further unify the laws of domicile to reduce the complexity of inter-jurisdictional matters.

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