Concept of domicile under private international law

By Avinash Singh *

Cite as: (2011) PL April S-33 Differences, which exist between two or more legal systems, provide the theoretical foundation for the subject known as conflict of laws. Every legal system has rules, which tend to distinguish it from others. With particular regards to matters considered as bothering on an individual’s civil status different legal systems have established rules as to the laws, which ought to govern in those cases. These matters usually involve those aspects of the individual’s personal interests for which resort can be had to a single system of law, in making a decision as to the appropriate law that ought to govern.

Concept of domicile Morris has asserted that domicile is easier to illustrate than it is to define. This is probably due to the fact that the traditional definitions have become rather obsolete as a result of judicial modifications, which have attended the concept over time. Lord Cranworth attempted a definition almost a century and a half ago to the effect that domicile we mean 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 language will very much help you to it. That definition has become extremely simplistic is obvious from the subsequent judicial developments on this issue. In fact Collier’s opinion is that Lord Cranworth’s definition is too simplistic, and indeed, somewhat misleading. He goes on to declare that even where a person’s permanent home coincides with his domicile, such a situation is legally coincidental, for the reason that domicile is a legal concept and a person’s basic domicile is his domicile of origin which is ascribed to him at his birth, and not necessarily the country of his family’s permanent home at that time.

Morris also objects to Lord Cranworth’s definition on the ground that a person’s domicile may not always be his permanent home. According to him, a person may be domiciled in a country which is not and never has been his home; a person may have two homes but he can only have one domicile; he may be homeless, but he must have a domicile. He concludes that there is often a wide gulf between the English concept of domicile and the popular notion of a home. Perhaps one way of avoiding the pitfall created by Lord Cranworth’s definition is to describe rather than attempt to define with so much precision. This is because the conception of domicile as an idea of law has become overloaded by a multitude of cases that it has been transmuted into something further and further removed from the practical realities of life.

Why domicile is important Domicile has a dominating role in family and matrimonial property law and a role in other areas such as capacity of persons to make contracts. It plays a part also in the law of taxation. There is only one concept of domicile: accordingly, a case on whether a taxpayer has acquired a domicile in England is also authority for the question whether someone has the capacity to marry or make a will.

Domicile cannot be defined with precision Old cases such as Whicker v. Hume defined domicile as permanent home. However, we will find many reported cases where a person has lived in a place for 30 or 40 years and has not been held to have acquired a domicile there. After reading the cases listed above we may conclude that the persons in question (such a person is often called the propositus) had permanent homes in England, but in none of the four cases was a domicile acquired in England.

Domicile is an idea of law. Domicile diverges from the notion of permanent home in three ways:
1. Firstly, the elements required for the acquisition of a domicile go beyond those required for the acquisition of a permanent home. Thus, to acquire a domicile of choice in a country a person must intend to reside in it permanently or indefinitely.
2. Secondly, the law attributes a domicile to everyone, whether they have a permanent home or not. A vagrant, for example, has a domicile.
3. Thirdly, certain persons, for example children under 16, cannot acquire independent domiciles. They may thus have permanent homes in places in which they are not domiciled, because the person upon whom they are dependent is domiciled elsewhere.

The principles of domicile The basic principles are that:
1. No person can be without a domicile.
2. No person can at the same time for the same purposes have more than one domicile.
3. An existing domicile is presumed to continue until it is proved that a new domicile has been acquired.

The burden of proving a change of domicile lies on those who assert it. The change of a domicile of origin must be proved beyond reasonable doubt: the change of a domicile of choice may be proved on a balance of probabilities. For the purpose of an English rule of the conflict of laws, the question where a person is domiciled is determined according to English law.

Domicile connects a person with the law of a country For these purposes England and Scotland, Victoria and New South Wales, California and Texas, for example, are separate systems. So if X emigrates to USA but cannot decide whether he will live in Florida or Oregon, he does not acquire a domicile of choice, and will retain his existing domicile until he does.
Countries may cease to exist or these boundaries may change. The Soviet Union broke up in the 1990s; so did Yugoslavia, and Czechoslovakia became two countries (the Czech and Slovak Republics). Surprisingly, little thought has been given to the consequences of these changes for the law of domicile. It may be supposed, for example, that someone with a Yugoslav domicile in 1990 who lives in Dubrovnik became domiciled in Croatia when that country was created, and that whether someone with a Czechoslovakian domicile is now domiciled in the Czech Republic or the Slovak Republic will depend on whether he lived in Prague or Bratislava at the time of the split.

Domicile of origin Every person acquires at birth a domicile of origin.
(1) This is the domicile of his father at the time of his birth if he is legitimate. It is the domicile of his mother if he is illegitimate or if his father dies before he is born.
(2) Foundlings have a domicile of origin in the country in which they are found.
(3) A domicile of origin may be changed as a result of adoption, but not otherwise.

A domicile of origin is more tenacious than a domicile of choice. It is more difficult to prove that it has been abandoned. If a person leaves the country of his domicile of origin, intending never to return to it, he continues to be domiciled there until he acquires a domicile of choice in another country. But if a person leaves the country of his domicile of choice, intending never to return to it, he ceases to be domiciled in that country: unless and until he acquires a new domicile of choice, his domicile of origin revives.

Domicile of choice Every independent person can acquire a domicile of choice by the combination of residence and intention of permanent or indefinite residence.

Residence means physical presence as an inhabitant. It is not necessary that residence should be of long duration. In an American case, part of a day was enough. An immigrant can acquire a domicile immediately on arrival if he or she intends to settle. In Puttick v. Attorney General, it was held that a domicile of choice cannot be acquired by illegal residence (in this case it was claimed by a member of a German terrorist group). It may not follow that an English court would say that domicile of choice could not be acquired by illegal residence in a country outside the United Kingdom: for example, an Al-Qa'ida member with a domicile of origin in Saudi Arabia living permanently in Germany.

Intention is intention to reside permanently or indefinitely in a country, that is not for a limited period or a particular purpose. If the person will leave upon the occurrence of a contingency, this possibility will be ignored if the contingency is vague and indefinite (e.g. winning the lottery), but if it is clearly foreseen and reasonably anticipated (e.g. coming to the end of employment), it may prevent the acquisition of a domicile of choice. Naturalisation is relevant, but it is not decisive as a matter of law. It is a circumstance and any circumstance which is evidence of a person's domicile of choice, or his intention to reside permanently or indefinitely, must be considered in determining whether he has acquired a domicile of choice in that country.

Most disputes as to domicile turn on the question of whether the necessary intention accompanied the residence. A court has said:

There is no act, no circumstance in a man's life, however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change the domicile. A trivial act might possibly be of more weight with regard to determining this question than an act which was of more importance to a man in his lifetime.

Cheshire and North say:
Nothing must be neglected that can possibly indicate the bent of the resident's mind. His aspirations, whims, amours, prejudices, health, religion, financial expectations....

A person whose domicile is in question may testify as to his intention, but courts view the evidence of an interested party with suspicion. Declarations of intention made out of court may be given in evidence by way of exception to the hearsay rule. Declarations of intention must be examined by considering the persons to whom, the purposes for which, and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared expressions.

It has been said that to acquire a domicile of choice 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 relief from illness.

Domicile of choice is a question of fact, not of law, requiring the combination and coincidence of residence in a country and a bona fide intention to make a home in that country permanently or indefinitely. A person can be resident in a place where she has no right to be, and could form an intention to remain in a place despite considerable uncertainty as to whether this could be possible. There is no reason in principle why a person whose presence is unlawful could not acquire a domicile of choice.
Domicile of dependent The domicile of a dependent person is the same as, and changes with, the domicile of the person on whom he or she is, as regards domicile, legally dependent. Until 1-1-1974 there were three categories of dependent persons: married women, children and the mentally disordered.

Married women Married women ceased to be dependent persons on 1-1-1974 and since then have been able to acquire a domicile of choice independently. But this Act is not retrospective and many women who married before it came into operation will still have their husband’s domicile (albeit as one of quasi choice).

A dependent person cannot acquire a domicile of choice by his own act. It follows that the domicile of a child who has no parents cannot be changed. Until 1-1-1974 a married woman (even if a minor) was dependent for the purposes of the law of domicile upon her husband. So it was the same as, and changed with, the domicile of her husband. This applied even where they were living apart and had done so for many years [see for example Scullard, In re, Smith v. Brock19 (separation of 46 years; in different countries for 30 of those years)]. Lord Denning, M.R. described the married woman’s domicile of dependency as “the last barbarous relic of a wife’s servitude”20.

The domicile of a married woman is now ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile21. The transitional provision of the 1973 Act Section 1(2) needs to be examined carefully. To date it has only been interpreted by Nourse, J. in IRC v. Duchess of Portland22. The provision states that where immediately before 1-1-1974 a woman was married and then had her husband’s domicile of dependence, she is treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin) unless and until it is changed by acquisition or revival of another domicile either on or after that date. This means that Mrs A who settled in New York in 1970 acquired a domicile of choice in New York on 1-1-1974 but Mrs B who always intended to settle in New York but was still living with Mr B on 1 1 1974 retains his domicile as a domicile of choice (or quasi-choice) and cannot acquire a domicile of choice until she resides as an inhabitant in New York and intends to live there permanently or indefinitely. This can cause problems, as the Duchess of Portland found.

Children The domicile of a child “under 16” is quite complicated; (1) If legitimate, it is that of his father. (2) If he is legitimate, it is that of his father from the time of the legitimation (such a child will have his mother’s domicile as a domicile of origin). (3) If he is illegitimate or his father is dead it is that of his mother. (4) If he has no parents, his domicile probably cannot be changed. (5) If he is adopted, his domicile is determined as if he were the legitimate child of the adoptive parent or parents.

One anomaly that must be understood is that a mother who changes her domicile will only change the domicile of a child dependent on her if what she does furthers the child’s interest. Fathers are not so constrained.23

The 1973 Act created an exception to the rules just set out. You should examine Section 4 of this Act very carefully. It applies to legitimate and legitimated children under 16 whose parents are living apart or were living apart at the death of the mother. In such cases the child’s domicile is determined as follows: (1) If he has his home with his mother and no home with his father, his domicile is, and changes with, the domicile of his mother. (2) If this has applied to him at any time and he has not since had a home with his father, his domicile is, and changes with, the domicile of his mother. (3) If at the time of his mother’s death, his domicile was the same as his mother because of either of these rules, and he has not since had a home with his father, the domicile of the child is the domicile his mother last had before she died.

The mentally disordered The law as regards the mentally disordered can be briefly stated. Such a person cannot acquire a domicile of choice and retains the domicile he had when he began to be legally treated as such. However, if he was born mentally disordered or he becomes mentally disordered while a dependent child, his domicile is determined, so long as he remains mentally disordered, as if he continued to be a dependent child.

The only persons today who have a domicile of dependency are children and the mentally disordered. But married women did formerly, and many who married before the change in the law in January 1974 will still share their husband’s domicile.

Domicile and categories of persons Prisoners A prisoner normally retains his domicile. But he can form an intention to reside permanently or indefinitely in which case he acquires a domicile of choice there.

Persons liable to deportation Such a person’s residence will be precarious and so he is unlikely to be able to form an intention to remain. But if he forms the necessary intention, he acquires the domicile of choice. Once a person has acquired a domicile of choice he does not lose it merely because a deportation order has been made against him24. He loses it only when he is actually deported.
Refugees and fugitives If a political refugee intends to return to the country from which he has fled as soon as the political situation changes, he retains his domicile there unless the desired political change is so improbable that this intention is discounted and is treated as merely an exile's longing for his native land. But if his intention is not to return even when the political situation has changed, he can acquire a domicile of choice in the country to which he has fled.25

In the cases of a fugitive from criminal justice, the intention to abandon domicile will readily be assumed, unless the punishment he seeks to escape is trivial or there is a relatively short period of prescription barring liability to punishment.26 But in Moynihan v. Moynihan, it was held that M, who had left UK to avoid arrest on serious fraud charges, had, at his death, acquired a domicile of choice in the Philippines, where he had lived for 20 years, built up a thriving business, acquired properties, married and had children.

Invalids Does a person who resides in a country for the sake of his health acquire a domicile there? The objections are: (i) the residence has been taken up for a special motive; and (ii) it may not be freely chosen. These factors make it improbable that a domicile has been acquired. If someone goes to a country for treatment, he clearly does not acquire a domicile there. But someone who settles in a new country because he believes he will enjoy better health there may well intend to live there permanently or indefinitely.28

Members of the armed forces It was once thought that members of the armed forces could not, as a matter of law, acquire a domicile of choice during service. But it is now settled that such a person can acquire a domicile of choice if that is his intention.29 Of course, it rarely will be.

Employees If a person goes to a country merely to work, he does not acquire a domicile of choice there. So when a barrister with an English domicile of origin was appointed Chief Justice of Ceylon, and he went to Ceylon intending to stay until he had earned his pension he retained his English domicile.30 However, if a person goes to the country not merely to work, but also to settle in it, he does acquire a domicile of choice.

Diplomats Generally, diplomats do not form the intention of settling in the country to which they have been accredited. But if they form the intention of residing permanently or indefinitely, they can, like everybody else, acquire a domicile of choice in that country.31

Loss of domicile We have seen how domicile is acquired. We must now look at the ways in which it is lost. As we have already learned, domicile of origin cannot be lost as such. Even when a domicile of choice is acquired, the domicile of origin will remain as a resource to fill up any gap when a domicile of choice is abandoned. A domicile of choice can be abandoned by a person when he or she ceases to reside in a country and ceases to intend to reside there permanently or indefinitely. When a domicile of choice is abandoned either a new domicile of choice is acquired, or the domicile of origin revives by operation of law.

Residence â€œResidenceâ€, â€œordinary residenceâ€ and â€œhabitual residenceâ€ are increasingly used as personal connecting factors. Of these â€œhabitual residenceâ€ is the most significant for the student of conflict of laws. The term â€œresidenceâ€ is often found in the Hague Conventions and often makes its way into English law through this route. The Hague Conventions do not define â€œhabitual residenceâ€. The Court of Appeal has said that it is primarily a question of fact to be decided by reference to the circumstances of each particular case.32

â€œHabitualâ€ indicates a quality of residence, rather than its length.33 It has been said that it means â€œregular physical presence which must endure for some timeâ€•. It cannot be acquired in a day since â€œan appreciable period of time and a settled intentionâ€• are required.35 â€œSettled intentâ€• has been identified as one to take up long-term residence in the country concerned. But this comes close to conflating habitual residence with domicile and a settled purpose to reside in a country does not necessarily involve any long term plan. Habitual residence may continue during temporary absences.37 It will be lost if a person leaves a country with a settled intention not to return to it. It is possible to have no habitual residence (but one would have to be a nomad). Habitual residence in two (or more) places is also possible. Many cases which hinge on habitual residence are involved with the sensitive issue of international child abduction.

In Union of India v. Duldul Nath Prasad, it was held that in determining the question of â€œordinarily residenceâ€• of a person the concept of domicile as understood in Conflict of Laws cannot be imparted. Etymologically â€œresidenceâ€• and â€œdomicileâ€• carry the same meaning, inasmuch as both refer to the â€œpermanent homeâ€• but under the Conflict of Laws â€œdomicileâ€• is a little different cone and exhibit many facets. In spite of having a permanent home, a person may have a commercial, a political or forensic domicile. Domicile may also take many colours; it may be domicile of origin, domicile of choice, domicile by operation of law or domicile of dependence. Both are relative concepts and have to be understood in the context in which they are used, having regard as to the nature and purpose of the statute in which these words are used.

Domicile in India The Indian Constitution recognises only one domicile.39 In India, the concept of domicile does not do away with the concept of the subsidiary domicile e.g. domicile of States. The State domicile may prevail for certain purposes, notwithstanding that there is larger and more comprehensive Indian domicile.40

On birth the person acquires the domicile of his father, when he is legitimate child and domicile of mother when he is
illegitimate child.41 If a person wants to acquire domicile of another country, his domicile of origin will continue until the domicile of choice is acquired.42 The burden of proof comes on the person who asserts the change of domicile.43 Even if a person is stateless, he cannot be without domicile. He must be domiciled at one place.44

In D.P. Joshi (Dr.) v. State of M.P.45, the Hon’ble Supreme Court held that the expression â€œdomicile of a personâ€• means his permanent home. In Pradeep Jain (Dr.) case46, the Court held that under Article 5 of the Indian Constitution, every person who is a domicile of the Union Territory of India is a citizen of India and a citizen of India could be domicile of any State forming part of India. Article 5 is very clear and explicit on this point and it refers to only one domicile, namely, â€œdomicile in the territory of Indiaâ€•.

In Yogesh Bhardwaj v. State of U.P.47, it was held that a person is domiciled in a country in which he is considered to have his permanent home. The concept of domicile identifies a person having a foreign element, with a territory subject to single system of law, which is regarded as his personal law. Domicile is of the whole country and not confined to any part of it.

Conclusion Domicile is the most significant connecting factor in Conflict of Laws. It has a dominating role in family and matrimonial property law. It is difficult to define, but easier to understand in practice. There are important principles of domicile. Everyone is born with a domicile of origin, which remains (if only in abeyance). Domicile of choice can be acquired by residence and an intention to reside indefinitely. The nature and purpose are the main things which must be looked upon while dealing with the concept of domicile.

*Final year student, Hidayatullah National Law University, Raipur (Chhattisgarh). The author can be reached at avinashsingh_hnlru@yahoo.com.

- Supra, n. 1, 40.
- Ibid, 40-41.
- Supra, n. 3.
- Sir George Jessel stated many years ago in Doucet v. Geoghegan, (1878) 9 Ch D 441 (CA) that â€œdomicile is impossible of definitionâ€•.
- Ibid.
- Supra, n. 2, 160.
- The notion of domicile as â€œan idea of lawâ€• can be found in Bell v. Kennedy, (1868) LR 1 Sc & Div 307, 320 (HL).
- See Annesley, In re, Davidson v. Annesley, 1926 Ch 692.
- Briggs, in The Conflict of Laws, discusses this briefly, 23.
- White v. Tennant, (1888) 8 SE 596.
- 1980 Fam 1 : (1979) 3 WLR 542 : (1979) 3 All ER 463.
- Drevon v. Drevon, (1864) 34 LJ Ch 129, 133.
- Ross v. Ellison (or Ross), 1930 AC 1, 6-7 (HL).
- Udny v. Udny, (1869) LR 1 Sc & Div 441, 458 (HL).
- 1957 Ch 107 : (1956) 3 WLR 1060 : (1956) 3 All ER 898.
- See, Domicile and Matrimonial Proceedings Act, 1973, Section 1(1).
- Supra, n. 12.
- See, Beaumont, In re, (1893) 3 Ch 490.
- Cruh v. Cruh, (1945) 2 All ER 545.
- See, May v. May and Lehmann, (1943) 2 All ER 146.
- See, Martin, In re, Loustalan v. Loustalan, 1900 P 211 (CA).
- (1997) 1 FLR 59.
- See, Hoskins v. Matthews, (1855) 8 De GM & G 13 : 44 ER 294 for an example.
- Donaldson (or Nichols) v. Donaldson, 1949 P 363.
- Attorney General v. Lady Rowe, (1862) 1 H&C 31 : 158 ER 789.
- An example is found in the South African case of Naville v. Naville, (1957) 1 SA 280.
- Ibid, 942 per Lane, J.
- See Oundjian v. Oundjian, (1979) 1 FLR 198.
- Parwatawaa v. Channawawa, AIR 1966 Mys 100.
- Supra, n. 43.
- Supra, n. 39.