CHAPTER-II

DOMICILE AND HABITUAL RESIDENCE

In conflict of laws, the application of foreign law depends on the domicile or the habitual residence of parties in a case. Traditionally, the principles of domicile is the determining factor for the application of foreign law in disputes relating to personal law matters. However, there is a slight deviation from the concept of ‘Domicile’ to ‘Habitual Residence’ in International Conventions. This chapter deals about the meaning, importance and use of Domicile and Habitual Residence. Based on these factors, the application of foreign law depends in the cases involving personal law matters. Hague Convention on International Child Abduction adopted the Habitual Residence as connecting factor for application of law in the cases involved child custody and abduction. It is submitted that it is a clear-cut deviation from Domicile to Habitual Residence.

There have been several cases reported over the last few years on the meaning of “habitual residence”.¹ This new phrase

is as much in use not only in domestic legislation but also in various Hague Conventions on the reform of private international law and it is in widespread use by the European Commission\(^2\).

Habitual residence is the basis for allocating jurisdiction to that State’s court, especially in relation to matrimonial causes and child custody\(^3\). For example, it has been proposed by the European Commission as a replacement for domicile in the new Convention on Jurisdiction and Enforcement of Judgments in Civil Matters. Habitual residence is also extremely important in connection with tax matters and social security.\(^4\) It is additionally used in the Immigration Act 1971\(^5\). Other than its purpose in allocating jurisdiction, habitual residence is beginning to be adopted as a connecting factor for choice of law, for instance the Rome Convention on Choice of Law in Contract\(^6\). A consumer’s habitual residence may determine the law applicable to consumer contracts (where there is no express choice of law) and a consumer is protected by the mandatory rules of the law of


\(^4\) See for example Swaddling v. Adjudication Officer C-90/97 The Times, 4 March 1999. This use of habitual residence has a developing European and domestic jurisprudence.

\(^5\) ibid

\(^6\) The Contracts (Applicable Law) Act 1990
his or her habitual residence. In addition, a party may in some cases rely on the law of the country of his or her habitual residence to establish that he or she did not consent to enter into the contract.

**Domicile Under Common Law**

The word “domicile” is to identify the personal law by which an individual is governed in respect of various matters such as the essential validity of marriage, the effect of marriage on proprietary rights of husband and wife, jurisdiction in divorce and nullity of marriage, illegitimacy, legitimation and adoption and testamentary and interest in succession to movables.

Every person who has, or whom the law deems to have his permanent home within the territorial limit of a single system of law is domiciled in the country over which the system extends and he is domiciled in the whole of that country even though his home may be fixed at a particular spot within it.”

At common law, the fundamental personal connecting factor is domicile. As a matter of legal definition, every person

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7 Halsbury Laws of England (Fourth Editions) vol.8, Para 442
has a domicile and, subject to below\(^8\), no person can have more than one domicile at any time. The domiciliary law— the *lex domicilii*-has a dominating role in family and property law, but it may also define the capacity of persons especially companies, to make contracts; and it plays a part in the law of taxation. The concept of domicile regulates a wide but diverse range of matters, and it may be that its meaning should adjust from one context to another. It is also essential that it represent a rational connection to a particular law.

**Domicile Of Origin**

The Domicile of origin is the domicile of one’s father (or mother, for one who is born out of wedlock or after the death of father) at the date of one’s birth. The domicile of origin will therefore be the first domicile of child. It will prevail as the actual domicile until superseded by the acquisition of another, either a domicile of choice or a domicile of dependency. This has the result when a later-acquired domicile is lost, then unless at the

\(^8\) The persistence of the domicile of origin constitutes a general-half exception to the rule; the jurisdictional domicile which forms the backbone of the Civil Jurisdiction and Judgment Act 1982 and Civil Jurisdiction and Judgments Order 2001 is a completely separate concept, irrelevant to the common law of domicile
same moment a new domicile is acquired, the domicile of origin reasserts itself as the person’s actual domicile. It is therefore a characteristic of the domicile of origin that can never be shaken off; and if it revives at a point late in a person’s life it has the potential to connect him to a legal system which may be far and remote from the circumstances of his present life. It is sometimes said that this potential to reassert itself goes to illustrate why the domicile of origin should be abolished by legislation, but the truth is less clear-cut. After all, if a refugee flees from the country in which he has made a domicile of choice, it may be more offensive to hold that he remains domiciled in a country which may now be practicing genocide against ethnic group than to revive his domicile of origin until he is able to establish a new domicile of choice somewhere less awful.

Domicile Of Choice

A domicile of choice is acquired by taking up residence in a particular country and intending to reside there permanently or indefinitely. Both conditions must be satisfied in relation to the

*Udny v. Udny* (1869) LR I Sc & Div.441
law district\textsuperscript{10} in which the domicile is to be established before acquisition is complete. The intention must be geographically specific, unconditional and deliberate in order to meet the restrictive conditions of the law. As regards the first of these, if a person emigrates to the United States and has an intention to remain there, but has not yet settled on which state he will, permanently or indefinitely, reside in, he will not have established a domicile of choice in any American State;\textsuperscript{11} by parity of reasoning, if he intends to reside in Texas but not has yet taken up residence there he will not have established a domicile in Texas. As regards the second, the intention must be one of permanent or indefinite residence. So an intention to reside for a certain term, or until the occurrence of a certain specific event, such as retirement or death of a spouse, doest not suffice either,\textsuperscript{12} though if the condition upon which the residence would be determined is vague and unspecific it may be disregarded. It can follow from this that residence even of several decades will not necessarily establish a domicile of choice. An American citizen who was advised on medical grounds to remain in

\textsuperscript{11} Bell v. Kennedy (1868) LR I Sc.& Div.307
\textsuperscript{12} IRC v. Bullock (1976) I WLR 1178
England, but who spent his time planning the destruction of the
British maritime empire by various lunatic schemes, was held
not to have requisite intention either.\textsuperscript{13}

It is difficult to regard these colourful authorities as case of
conditional intention, but what they add to the requirements for
the acquisition of a domicile of choice is difficult to define with
specificity. What constitutes \textit{residence} is hard to say; and the
definition of ‘present as a resident’ hardly advances matters very
much. It has been held that residence originating in unlawful
entry into a country is insufficient, but this may be seen as a
rule of English Public Policy applicable only to residence in
England.\textsuperscript{14} A person can be resident in a country though absent
from it, but is unclear whether he can be a resident in two
countries at once, but to avoid the inadmissible result of this
leading to there being two domiciles of choice, it is probable that
the residence requirement identifies the principal residence if
there is more than one.\textsuperscript{15}

\textsuperscript{13} \textit{Wians v. A-G} (1904) AC 287

\textsuperscript{14} In the case of habitual residence, this will not suffice: \textit{Re J (a Minor) (Abduction: Custody
Rights)} (1990) 2 AC 562

\textsuperscript{15} \textit{Plummer v. IRC} (1988) 1 WLR 292
The domicile of choice can be lost by being abandoned, or by the person ceasing to reside and to intend indefinitely. But if the abandonment is not contemporaneous with the acquisition of a new domicile of choice, the domicile of origin will reassert itself to prevent any domiciliary hiatus.

**Domicile Of Dependency**

A child’s domicile of dependency is that, from time to time, of the parent upon whom, until the age of 16 or lawful marriage under this age, the child is dependent. In principle, therefore, a child may supplant its domicile of origin with a domicile of dependency as soon as the cord is cut. When the age of independence is reached, it is debatable whether the domicile of dependency is lost by operation of law, so that the domicile of origin, if different, revives unless the domicile had from dependency continues as a ‘deemed’ domicile of choice. Statute suggests that the latter is possible, but in principle, and the

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balance of authority, suggests that it is not, and that the domicile of dependence ceases and is defunct on the attaining of majority. The domicile of married women was abolished in 1974.\textsuperscript{18}

It will have become apparent that the rules of domicile, comprising as they do some implausible rules and peculiar authorities, are capable of producing a capricious answer in a given case, and all the more so in Europe as political states and boundaries move and change. However, repeated proposals for reform have been ignored or rejected.\textsuperscript{19} The reasons for this probably lie in the substantial fiscal (and potential adverse) consequences of having a domicile in England and the political clout of those who would stand to lose out if domicile were aligned more closely to simple residence.

**Domicile and Personal Law In India**

It is not surprising that courts and legislatures in British India should have been adopted the English Principle of Domicile as opposed to the continental test of nationality. Domicile

\textsuperscript{18} Domicile and Matrimonial proceedings Act 1973, sec.1

became the basis for the determination of questions of status, especially in the sphere of conflict-jurisprudence.\textsuperscript{20}

Principles of law regarding domicile have been codified in Part II of the Indian Succession Act 1925. In general, they follow the well-known rules of English Private International Law. Thus ‘the domicile of origin prevails until a new domicile has been acquired’ (Sec 9). ‘A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin’ (Sec 10). The word ‘fixed habitation’ has been interpreted by the courts as connoting a permanent home ‘\textit{animo et facto}’. ‘A new domicile continues until the former domicile has been resumed or another has been acquired’ (Sec 13). ‘By marriage a woman acquires the domicile of her husband, if she had not the same domicile before’ (Sec 15). ‘Save as hereinbefore otherwise provided in this part, a person cannot, during minority, acquire a new domicile’ (Sec 17). Further Section 12 incorporates the well-known English rule that an Ambassador or a member of his family does not acquire a new domicile by

\textsuperscript{20} See Prof. T.S. Rama Rao, \textit{Private International Law in India}, Indian Year of International Affairs, 1955, p.219
reason only of his residence in the country to which he has been accredited.

There are deviations from English law in other sections. Thus the explanation to Section 16 provides that the wife’s domicile no longer follows that of her husband if they are separated by the sentence of a competent court or if the husband is undergoing a sentence of transportation. This constitutes no doubt a welcome departure from the strict rule of English law that a women, during covertures, is incapable of changing her domicile. At the same time, this has avoided the extreme view held in the United States that, provided the wife is not guilty of desertion, she may establish a separate domicile even if she has no cause for divorce. Under Section 14 of the Act, the domicile of a minor follows that the parent from whom he derived his domicile of origin.

Another striking departure from English Law is found in Section 11 which provides for a special mode of acquiring domicile in India, i.e. by a declaration in writing one’s desire to acquire such domicile, deposited in a specific Government office, provided it is preceded by residence for one year in India. The
essential requirement for the acquisition of a new domicile under English law and in fact even under Sec 10 of this Act, is that along with residence there should be the ‘animus’ to acquire the new domicile. Under the present section, however, a declaration of intention by the petitioner, which has been rejected as not conclusive in many English cases, is sufficient to establish an Indian domicile. This may lead to a conflict of views between an Indian Court and a foreign Court, if the foreign Court comes to the conclusion that a *de cujus* in spite of his declaration under Section 11 of the Act has not acquired the Indian Domicile. The Indian Court would be bound to apply Indian law as the *lex domicilii*, while the foreign court would apply some other law as the *lex domicilii*. The result would be that each court would refuse to enforce the other Court’s judgment as passed without jurisdiction.

In *Santos v. Pinto* an Indian Christian with a Goanese domicile of origin had migrated to Bombay in his youth, acquired a business there and settled down in Bombay. From his conduct and declarations the court held that he had acquired an Indian Domicile by taking up a ‘fixed habitation’ in India with in

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21 47 Bom, 687
meaning of Sec.10 of the Indian Succession Act and hence succession to his movables was governed by the Indian Law as the *lex domicilii* at the time of his death. Similarly in *Teignmouth v. Hugh Carvey*\(^ {22} \) an English missionary was found to have settled permanently in India and it was held that he had chosen an Indian domicile and was governed by the provisions of Indian Succession Act.

**Attaullah v. Attaullah**\(^ {23} \) where a petitioner brought a divorce suit against her husband who was born and brought up in the North Western Frontier Province and remained there till 1946 where his services were lent by the British Indian Government to the British Embassy in Kabul. Jurisdiction depends upon whether the respondent had an Indian domicile at the time of petition. The court held that the respondent was not habitually resident within that portion of British India which became the Indian Dominion and so he could not be said to have acquired an Indian Domicile on 15.08.47, the date of partition. It

\(^{22}\) 62 Cal 869  
\(^{23}\) AIR 1953 Cal.530
was found that he had not acquired an Indian domicile till after the action was brought, and hence the petition was rejected.

In federal states some branches of law are within the competence of authorities and for these purposes the whole federation will be subject to a single system of law and an individual may be spoken as domiciled in the federation as a whole; other branches of law are within the competence of the states of provinces of the federation and the individual will be domiciled in one state or province only. This is the true of position of domicile in India.

State Governments prescribing domiciliary requirement for admission to medical colleges situate within their territories, is not used in the technical sense but in a popular sense as meaning residence and is intended to convey the idea of intention to reside permanently or indefinitely.25

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24 Halsbury Laws of England (Fourth Editions) vol.8, Para 442

25 D.P.Hoshis's case AIR 1955 SC 334; and also see: Vasundra Vs. State of Mysore, 1971 SC 1439
Personal law in India has, however, been so pervasive that it had further repercussions in the field of Indian Private International Law, which have gone unnoticed by Western jurists. In the matters of status and succession, Hindus, Mohamedans and other non-Christians have been almost completely left to follow their personal law, but with slight legislative interference. Thus, Mohamedans are divided into followers of Shia and Sunni Schools, while Hindus follow four schools, which largely correspond to the territorial divisions of the country. This might have led, in the cases of Hindus, to an inter-territorial conflict of laws, as when a Hindu of the Bombay area settles in Bengal. But conflicts were avoided by the adoption of the view, later endorsed by courts, that the migrating Hindu carries with him his own law to the place where he settles, and will be governed by it till he elects to adopt the new law. The Privy Council adopted this view in Balwant Rao v. Baji Rao. It has further been held that this rule would apply as much to matters of succession as to the purely personal relations of family. In this respect, the rule seems an exception to the

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26 See, Prof. T.S. Rama Rao, ‘Private International Law’ Indian Year Book of International Affairs, 1955 pp. 220
27 (1919) A.C. 145
universal principle that the *lex loci (rei sitae)*, every person being
governed by the law of his personal status\textsuperscript{28}.

In *Khambatta v. Khambatta*\textsuperscript{29} a case came under
consideration, in which a women domiciled in Scotland had
married in that country in accordance with its formalities, a
Mohammedan domiciled in India, and after coming to India
embraced the Muslim faith. Later the husband purported to have
divorce her by ‘Talak’ in accordance with Mohammedan Law. The
lady married second time and in a suit for dissolution for this
marriage, the question arose whether first marriage subsisted or
was validly dissolved. Beamount C.J. held that the *lex domicili* of
the husband was conclusive on the question of nature of the
marriage and the grounds of dissolution, irrespective of the *lex
domicilii* of the wife before marriage.

**Habitusal Residence In English Law**

Although habitual residence is used in a number of
different statutes the courts have reiterated the principle that the
words bear the same meaning in all cases unless the statute

\textsuperscript{28} ibid

\textsuperscript{29} 1959 Bom 278
itself provides otherwise.\textsuperscript{30} This follows from the rule that the
words bear their ordinary and natural meaning and are not term
of art\textsuperscript{31}. Therefore, it is not apparently possible to argue that
because of the different purposes of the various statutes the
words should bear a different meaning by taking into account the
particular purpose in each statute. Wherever the concept of
habitual residence of a person is deployed in a statute the
determination of his or her habitual residence on the facts
should not differ whether that determination is needed for
jurisdiction, choice of law or taxation. However, on closer
inspection of the cases it becomes apparent that the courts pay
mere lip service to this rule and often refer to the purpose of the
statute in determining the actual "habitual residence" on the
facts. For example, in \textbf{Nessa V. Adjudication Officer} part of the
reason why an appreciable period of time was necessary in order
to establish habitual residence was because the purpose of the
statute was to limit entitlement to income support.\textsuperscript{32} In
\textbf{Oundjian v. Oundjian} French J. noted, "the purpose of the use

\textsuperscript{30} This point was made explicitly in relation to ordinary residence in \textit{R.v.Barnet London
Borough council, ex p. shab} (1983)2 A.C. 309 AT P.340 and taken into habitual residence in

\textsuperscript{31} ibid

\textsuperscript{32} The Court of Appeal (1998) 2 All E R 728 Sir Christopher Staughton at p.733
of habitual residence was to ensure a proper connection between the propositus and this country sufficient to warrant the exercise of jurisdiction. He took this into account in deciding whether habitual residence had been established”33.

There are obviously deeper unexpressed considerations at work that might explain the contradictory cases. For instance, courts considering the habitual residence of children under the Child Custody and Abduction Act, 1985 may be more likely find that the children have a habitual residence (rather than none) as otherwise the children deprived of the protection of that Act.

Cases which are concerned with revenue may have undercurrents of public policy considerations such as preventing tax evasion. Courts deciding immigration or social security statutes might tend to reduce number of possible claimants. The principle that habitual residence is a singular concept regardless of context is therefore illusory. “Adhering to the expression of the principle but sidestepping it in practice creates obfuscation34.

34 Means to make less clear and harder to understand especially intentionally.
because the fundamental reasons for a decisions are obscured.”

If a purposive interpretation of habitual residence is the reality, then the purpose must be clearly expressed. The criticism that there will then be a divergence between various uses and meanings of “habitual residence” depending upon the purposes of the particular statute can be countered by the argument that this happens already. Making the purpose an explicit part of reasoning will cause the results of cases to become clearer and easy to predict. Certainty and predictability are perhaps less critically important in cases allocating jurisdiction than in questions of choice of law. It is possible to have secondary rules of allocation to deal with overlaps and gaps in jurisdiction which arises after the event. Nevertheless, it is often necessary to know in advance which law will govern some aspects of personal law matters. The present rule on habitual residence will undoubtly have to be supplemented if they are to be used for choice of law purposes.

Given that the courts adhere to the theory that the words “habitual residence” have the same meaning regardless in which they are found, how have those words been interpreted? In the leading case of Re J.[A Minor](Abduction: Custody Rights)\textsuperscript{36} Lord Brandon of Oakbrook held that the term habitually resident is to be understood “according to the ordinary and natural meaning” of the two words “habitual” and “residence”.\textsuperscript{37} Further, he said that the issue of where someone is habitually resident is a matter of fact to be decided by reference to all the circumstances of the case.\textsuperscript{38} Couched in such circumstances, it appears that a determination of one’s habitual residence should be a straightforward, factual decision that does not require legal rules or the intervention of courts. However, According to Dicey & Morris that “ there is a regrettable tendency of the courts, despite their insistence that they are not dealing with a term of art, to develop rules as to when habitual residence may and may not be established.”\textsuperscript{39} It is submitted that “ the courts will resist

\textsuperscript{36} (1990) 2 A.C. 562, also known sub nom. C.v.S.(A Minor: Abduction)  
\textsuperscript{37} See Levene v. Commissioner for Inland Revenue (1928) A.C. 217; I.R.C. v. Lysaght (1928) A.C. 234  
\textsuperscript{38} See to Lord Scarman’s view in case of R v. Barnet London Borough Council (1983) 2 A.C. 309 at p.344  
\textsuperscript{39} DICEY & MORRIS, “ The Conflict of Laws” pp.126
the temptation to develop detailed and restrictive rules as to habitual residence which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or presuppositions." Nevertheless, of the many reported cases on habitual residence this decade eight were determined by the Court of Appeal\textsuperscript{41} and three decided by House of Lords.\textsuperscript{42} At first sight it is surprising that words with apparently such a commonly understood meaning need the learned discourse of the higher courts, complete with the expensive entourage of silks, juniors and solicitors. On the further inspection it becomes apparent that habitual residence is not so uncomplicated. The courts and the commentators are being rather disingenuous to suggest or otherwise.

**Elements**

First, the concept of habitual residence contains within itself a considerable subjective element which necessitates an

\textsuperscript{40} ibid


\textsuperscript{42} Re j. (Minor) (Abduction: Child Rights) (1990) 2 A.C. 562
investigation “in to the minds of men”. The word “residence” in normal usage denotes something of one’s “home”. This subjective consideration is important part of the rules because it distinguishes residence from mere presence. It also brings with it a need for judicial intervention. The court’s decision is needed to determine the question of where someone is habitually resident where there is a dispute. It is because there is a dispute that one cannot rely on the assertion of one party as to their habitual residence. The court has to decide where someone is habitually resident as an objective observer of the person concerned. The accretion of cases lays down guidelines for future examples. There are many examples of cases in which legal rules to determine habitual residence have been made. Lord Bradon in Re J.( A Minor) ( Abduction) held that the residence had to be adopted “voluntarily and for settled purposes”\textsuperscript{43}. At the same time, the subjective element tends to lead to unpredictability as very similar cases on the facts can be distinguished by almost imperceptible differences in the “minds of men”. The subjective

\textsuperscript{43}(1983) 2 A,C,309
element of the older rules on domicile has been criticised for this reason.”

Mere presence has been used for jurisdiction, for example, in granting the English court Jurisdiction and in determining whether or not to recognize foreign court’s judgment. Presence is a certain and predictable rule but it is not an entirely satisfactory one for allocating jurisdiction to the English Court. Taken to extremes, it can sweep in cases which have little connection with this country. As a result, the strict rule has been tempered by the common law rules on staying of actions in English courts on the grounds of *forum non conveniens.* By applying residence instead of presence a similar end is achieved as residence requires a more substantial connection with a country; residence is obviously something different from and more than mere presence.

44 Fentiman (1991) C.L.J. 445
45 *Maharne of baroda v. Wildenstein* (1972) 2 Q.B. 283
46 *Adams v. Cape Industries Plc* (1990) ch.433
47 For example, it is explicitly excluded as a ground for jurisdiction to be used against those domiciled in the Contracting States to Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil Matters (Art.3)
Period of time:

Secondly, the word “resident” requires not only a certain quality to one’s presence but also that one be present in the jurisdiction for a period of time. In the Re J. (A Minor) (Abduction) this has been defined as “an appreciable time” and it is another example of legal definitions being developed.\(^{48}\) There have been considerable difficulties in determining the period necessary for an appreciable time.

The court of Appeal in **Nessa v. Chief Adjudication Officer**\(^{49}\) held that one-day was too short to amount to an appreciable time but did not go on to say what length of time would have been sufficient. In contrast, Thrope LJ in dissenting was prepared to hold that one-day was enough\(^{50}\). In **Swaddling v. Chief Adjudication Officer**\(^{51}\) it was conceded that habitual residence was established after eight weeks.

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\(^{48}\) (Re J. (A Minor) (Abduction: Custody Rights) (1990) 2 A.C. 562 at pp.578-9

\(^{49}\) (1998) 2 All.E.R 728

\(^{50}\) ibid

\(^{51}\) Case C –90/97, The Times, 4 March 1999
In Re S (Custody: Habitual Residence)\textsuperscript{52} an Irish Woman who came back to England to try and patch her relationship up was found to have reacquired her habitual residence here in even less time than that. In Re B.\textsuperscript{53} is a an example of a result which is very difficult explain. The propositus had emigrated to Canada from England in 1980. In 1992 she returned to England intending to settle here (England) with her children. She was in the event only here for a month. She then went back to Canada for couple of months to attempt reconciliation with her husband. This two-month period was held not a sufficiently appreciable time to lose her newly acquired habitual residence in England and re-acquire one in Canada. On the other hand, a mere month’s stay here was apparently sufficient for her to have acquired that new habitual residence in England. It is possible to argue that as the propositus returned to Canada for the second time she did not cut-off her connection with England sufficiently to able to re-acquire her habitual residence in Canada. In part, the variation in the results of the cases is because the conception of what is an ‘appreciable time’ varies depending upon the state

\textsuperscript{52} (1998) 1 F.L.R 122 \\
\textsuperscript{53} (1994) 2 F.L.R 915
of mind of the person in question. Where that person had definitively and obviously made up their mind to live in particular place for the foreseeable future, the “appreciable time” need only be very short, even a matter of a few days.

There are cases where the habitual residence of a parent is being determined in order to decide whether the court has jurisdiction to decide care and control of a child under the Hague Convention on Child Abduction. The possible vacuum which is created by the rule that holds it possible to lose a habitual residence much more easily than to acquire one leaves children with less protection. The court may lean against decisions which do that and also may tend towards deciding that the parent is habitually resident here in order that the English court has jurisdiction.

In Re B (Minors) (Abduction) (no.2)\(^5\) the family went to the mother’s home in Germany to try and resolve their differences. Waite J held that their intention was only to “wait and see” but that after six months in Germany habitual

\(^5\) (1993)1 F.L.R 993
residence there had been acquired. It may have been important that the parties had disposed of their business in Scotland before moving to Germany but it is not apparent that the disposal was an example of “burning their boats” but more an attempt at enabling a period of consideration before a fresh start of the family whether in Germany or elsewhere. Where it is difficult to identify a really settled purpose to remain in a country, the habitual residence so sound has an air of artificiality.

It is submitted that at one end of the spectrum of cases, the objective facts become totally dominant in determining someone’s habitual residence. As Clive J. has noted, once a person has been objectively present in a jurisdiction for some time, the mere fact of having remained there overwhelms all other, subjective, arguments. He demonstrates that if residence has lasted longer than a year (even with absences for holidays or work) then notwithstanding that the residence is only for a limited purpose, it is considered a habitual residence by the courts. Even where it is clear from the facts that the person whose habitual residence is under consideration desperately

wants to live somewhere else and is only staying in a country because circumstances force her to, the fact of living in that country for over a year outweighs that desire.\textsuperscript{56} It appears that the subjective arguments of lack of connection with the country or a wish to leave will not prevent habitual residence with the country or a wish to leave will not prevent habitual residence from being acquired.

In \textbf{Re A}\textsuperscript{57} the children of family posted to Iceland by the US airforce were found to be habitually resident in Iceland notwithstanding that they would not stay Iceland beyond their posting and had no connection with Iceland other than physical presence. The mother had tried to argue that the Icelandic airforce base was “little America” in order to avoid the conclusion that they were habitually resident there. She proved that they rarely left the base even to shop. Indeed, schools, housing and other facilities were all provided for by the air force in the base

\textsuperscript{56} M.v.M. (1997) 2 F.L.R. 263. It was found that the family only went to and remained in Scotland after leaving Spain in order to earn enough money to live in England. Having lived in Scotland for two years, the propositus was found to have been habitually resident in Scotland notwithstanding that she only went to Scotland reluctantly and never wanted to stay there.

\textsuperscript{57} (1996) 1 F.L.R 1
compound. Moreover, the children’s habitual residence was to be determined purely by reference to the objective fact of them remaining in Iceland for two years.\textsuperscript{58} It is interesting to investigate the position who is a prisoner or whose stay in a country is completely involuntary or enforced in some way. One could argue that whatever the circumstance’s of someone’s residence in a country, once that person has lived there over a year, notwithstanding the lack of voluntariness of their residence becomes an objective fact. It can not very easily be said that such a person is “resident” anywhere other than that country. On the other hand, the court seem to accept, at least \textit{obiter}, that the complete lack of voluntariness in such cases precludes any settled intention or voluntary intention to remain. This exception undermines any suggestion that there is a point at which the question of habitual residence can be completely objectively determined. It adds to the uncertainty of the results in such cases as the matter of “voluntariness” is a question of degree.

Other Cases show, however, that even if the presence in a country was for a specific reason one can still be found to be

\textsuperscript{58} See Supra
habitually resident in that country. This is so even though that reason only holds good for a limited period of time if one stays for longer than one year. **Kapur v.Kapur** is usually cited as authority for this proposition although it is not quite watertight. There was plenty of evidence that the propositus wanted to remain in England for longer than his avowed purpose which was passing the bar examinations and indeed had been here over a year.\(^{59}\) That case can not be contrasted with another first instance in **Re S(Minors) ( Child Abduction: Wrongful Retention)**\(^{60}\) where habitual residence in England was not acquired because the parents were only in England for a limited period of one year.

The difference may be explained by the evidence in **Re S** that the parent had returned to Israel, so it was proven that he did not intend to reside here. Also, by the fact that in **Re S** the period of time in which habitual residence had to have been proven acquired was only six months. We have seen that the objective fact of remaining for a longer period can outweigh any

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\(^{60}\) (1994)1 F.L.R 82
intention of the propositus. Like wise, a restricted right to remain in a country due to immigration controls is insufficient to prevent habitual residence being acquired where one has again actually resided for over a period.\textsuperscript{61}

Most of the difficult cases are decided by reference to the person’s intention to make a country his or her “home”. This qualitative, subjective notion of a home has to be circumscribed by legal rules in order to give the rules some stability and certainty. Without the legal rules, the uncertainty requires more judicial decisions as each case would have to be decided ad hoc on its particular facts.

**Habitual Residence And Domicile**

There are many statements in the courts that habitual residence is not to follow the law of domicile as Lord Donaldson said in *Re J* “the expression is not treated as a term of art with some special meaning.”\textsuperscript{62} However, it is submitted that identifying one’s habitual residence is not quite as straightforward as it appears at first sight. The uncertainty of

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\textsuperscript{61} Kapur v. Kapur ibid

decision in the cases where the propoitus has remained in a
country less than a year is exacerbated by the focus on
subjective element which are inherently less precise. It may be
salutary to recall the fate of domicile. Some 140 years ago Lord
Cranworth blithely remarked that “by 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 languages will very much help you to
it.”63 Since that time the concept of domicile as one’s permanent
home has become so over layered with legal rules as to be
subject to coruscating criticism by Lord Scarman among others.

In R.V.Barnet London Borough Council, ex.p. shah he noted “
the long and notorious existence of this difficult concept in our
law, dependant upon refined, subtle and frequently very
expensive judicial investigation of the devious twists and turns
of the mind of man.64 Indeed domicile has been considered such
a tortuous concept that it has provoked the reforming zeal of the
law commission. At that point the Law Commission did not

63 Whicker V. Hume (1858) 7 H.L.C.124
64 (1983) 2 A.C. 309 at p.345
indeterminate preferring to change the more unacceptable rules of the law of domicile.65

Nevertheless, given the history of the development of the rules on imagination to foresee a time early in the next millennium when similar nature of the common law to have to decide cases which are at the borderlines even with a rule which is generally very clear. It is then impossible for legal principles not to evolve from this inevitable accretion consequences result. If habitual residence is to retains its appeal as a concept with a factual, objectively ascertainable basis then the courts will have to bear in mind. In particular it may be as well to reiterate that in many cases (such as those in which the propositus has remained in a country for more than a year) the objectivity fact of remaining becomes almost conclusive.

There are already some parallels with the rules of domicile which can be drawn and this trend been noticed by the Court of Appeal.66 There is an obvious overlap between the two as “residence” is a common factor. In the opinion of Diecy & Morris

66 Nessa v. Chief Adjudication Officer (1998) 2 All E.R. 728 at p.737
argue that little more than presence is necessary to establish domicile but go on to cite many of the tax authorities on residence.67 The focus in domicile tend to be placed upon the intention to remain permanently or indefinitely and, as we have seen, the settled intention to reside is also a consideration in establishing habitual residence. Another example of a similar rule can be seen where in order to be habitually resident one must be present in the jurisdiction at the same time as having a settled intention to remain here.68 This has clear reasoning with the rule in domicile that one must acquire factum and animus manendi at the same time.69 Nor can habitual residence be lost by wanting to leave the present residence but actually going. On the other hand, just like losing a domicile of choice, habitual residence can be lost in a day be leaving a country with no intention to return.70 The dominance of the domicile of origin or one’s “real home” is reflected in the fact that it is easier to obtain a habitual residence in a country in which one has already

67 Dicey & Morris: The Conflict of Laws at pp.126
69 Bell v. Kennedy (1868) L.R. 1 Sc. & Div. 307 at p.319
70 Re J (A Minor) (Abduction) (1990) 2 A.C. 562
resided.\textsuperscript{71} Similarly in the law of domicile it is more difficult to shake off a domicile of origin.\textsuperscript{72} The most marked difference between the two concepts comes in the treatment of those cases in which the propositus has an intention to remain in a country but only for a particular purpose or for a specially limited time. The limitation may prevent a domicile of choice being acquired,\textsuperscript{73} but will not usually prevent a finding of habitual residence. However, the difference is largely a matter of degree.

**Habitual Residence As Connecting Factor For Choice Of Law**

It is quite probable that the concept of habitual residence will be adopted for other Hague Conventions both for allocation of jurisdiction and as a connecting factor for choice of law. However, exporting a concept for which the case law has been decided for the purpose of jurisdiction into a concept for allocating a legal system to decide a case can have unforeseen consequences. Both for the concept itself (which may have to mutate to take account of the different purposes) and with possibly disastrous results in locating an inappropriate law.

\textsuperscript{71} Nessa v. Chief Adjudication Officer (1999) 1 W.L.R.1937 at p.1943
\textsuperscript{72} Winans v. A.-G (1904) A.C. 287 at p.290
\textsuperscript{73} Udny v. Udny (1869) L.R. 1 Sc & Div.441
role of a connecting factor for choice of law is rather different from that for jurisdiction. When the matter is one of jurisdiction of English court has to decide whether someone is “habitually resident” in England and need not concern itself whether that person is additionally “habitually resident” elsewhere. Therefore, someone might be habitually resident in two places or none. In jurisdictional cases it matters little that two courts have overlapping jurisdiction. It is more of a problem that no court has jurisdiction as the claimant cannot vindicate is rights and the defendant can act with impunity.

It is also apparent that the cases allocating jurisdiction for Hague Convention on Child abduction raise very particular policy concerns. For instance, the special rules preventing one parent from unilaterally changing a child’s habitual residence reflect the necessity for evenhandedness between parents. This policy overrides where the child would otherwise be said to be habitually resident.\textsuperscript{74} Also, these cases have been described as litigation of a \textit{Sui Generis} nature; neither adversarial nor

\textsuperscript{74} See for example \textit{D.V.D. (Custody : Jurisdiction)} (1996) 1 F.L.R. 574;
inquisitive. The courts have said that they need a quick, “panoramic” solution.\(^{75}\)

The cases which are deciding whether someone is habitually resident in England in order that the court may take jurisdiction have to be decided at an early stage of proceedings and as efficiently as possible, usually on affidavit evidence alone without much argument. The recent connections of the child to the jurisdiction in order to make the courts of that country \textit{forum conveniens} are what is important. It is submitted that which the Hague Convention on Child Abduction works requires an application for return of an abducted child almost immediately after the child’s removal. Therefore a court may have to make a decision on the child’s habitual residence within weeks of a change of residence. Moreover that the parties residence in the proceedings period may have been chaotic either as a result of or as a cause of the family break up. As Beaumont and McEleavey point out, there is no reason to disallow multiple habitual residence.\(^{76}\) Flexibility and therefore uncertainty and lack of predictability in the rules allocating jurisdiction can be

\(^{75}\) Re B. (Minors) (Abduction) (1992) 1 F.L.R. 548
accepted for this purpose and are even desirable in these special circumstances. The court is ensuring the best outcome after the event. Although other jurisdiction cases may also have to be decided quickly it is much more likely that the interval between the cause of action arising and the issue of the writ will be no longer and more settled.

It is often important to be able to know in advance which system of law’s rules will apply in order to prevent litigation. Adopting rules developed in the special circumstances either for taxing statutes or for the Hague Convention on Child Abduction would lead to unworkable results. In cases concerned with choice of law, it is important that a single legal system is identified, no more and no less. If two legal systems are identified, we have to have further rules to choose between them if they give a different result on the facts of the case. If no legal system is identified there is no answer to problem raised by the particular case.

Section 41 of the Civil Jurisdiction and Judgments Act 1982 provides more certainty in many of the difficult cases without sacrificing flexibility unduly. Such a presumption would
not answer the problem of overlapping in habitual residence nor that of gap where no habitual residence can be found. For choice of law it is imperative that the lacuna in the present rules is avoided. However, one could never be without a domicile that the doctrine of revival of one’s domicile of origin was necessary. If some one has left a country taking all their belongings with absolutely no intention ever to return there but at the same time has to be habitually resident somewhere. Either leaving their old habitual residence unchanged or giving them a habitual residence in the country to which it is believe that person intends to make his or her home is artificial.\textsuperscript{77} The former residence has been left behind definitively and it is because one cannot conclusively determine the new habitual residence that the problem arises. Such a rule will also be uncertain for the same reason. It might be possible to compromise on some rule such that habitual residence must be acquired after a fixed period of remaining in a country (such as three months) and an old habitual residence continues for the same period after having left a previous residence unless a new habitual residence is acquired earlier. The compromise would increase certainty but would still

\textsuperscript{(1949) 2 All E.R. 34 AT PP.36-7}
be artificial. That artificiality is a precise possibly worth paying even in the most extreme case of perpetual itinerant.

There will have to be some rules as to enable discrimination between habitual residences where two or more habitual residences have been found. This problem has been addressed in *I.R.C. v. Plummer* in relation to domicile. In that case Hoffman J looked to the Chief residence( of two) to determine where the propositus was domiciled. He followed the domicile case of *Udny v. Udny* in which Lord Westbury defined a domicile of choice by reference to a man’s sole or chief residence. The result in that case could be criticised as the chief residence was held to be England where the propositus was at school and university, rather than where she spent her holidays and on the evidence intended to live once she had finished her education. It is submitted that the propositus had more voluntarily settled intention to “reside” where her family lived rather than where she was boarding at school. Although education has been seen to be a settled purpose giving rise to a habitual residence, in no case has merely being at school in another country been sufficient of

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78 (1991) 1 W.L.R 292
itself to make the country the habitual residence. *Plummer* was a case on liability of tax and therefore may have been subject to special considerations. The difficulty lies in establishing principles to decide which residence is chief one. An arithmetical solution based on the number of days (or nights) spent in each residence might be attractive as simple to determine. This is not suitable method for determining a choice of law rule which needs to be clear looking forward in time. It might also be open to manipulation by the propositus. If other principles are used, such as some factors pointing more strongly than others, there seems little reason not to adopt those principles in determining a single habitual residence from the beginning. The danger in this approach might be that those principles become determinative to the exclusion of objective facts. That would be especially true as the principles are likely to be focused on the intention of the individual to make a particular place his "home", as happened in *Plummer*. Again, in deciding these difficult cases of dual or lack of habitual residence the court will have to reiterate that decisions are not of general application so that habitual residence does not follow the same path as domicile.
Conclusion

Habitual residence seems particularly successful in allocating jurisdiction and is very likely to be adopted as the basis of Jurisdiction for the Hague Convention on Private International Law’s new Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters. This might lead to a slightly different problem from that of dual or lack of habitual residence as decided by a single State’s courts. Unless all states define “habitual residence” in the same way, there will be obvious cases of overlap of jurisdiction between states. For example, if a defendant is considered by State A to be habitually resident in State A and by State B to be habitually resident in State B, both States will have jurisdiction under the Convention. Similarly a gap of jurisdiction is possible, if a defendant is considered to be habitually resident in State B by State A and State A by State B. The overlap could be answered by rules on *lis alibi pendens* as in the Brussels and Lugano Conventions on the same subject. The issues of overlapping jurisdiction and lack of jurisdiction should be addressed in the convention.