VALIDITY OF MARRIAGE: A STUDY IN PRIVATE INTERNATIONAL LAW

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I. Introduction

Capacity to marry is an important factor contributing towards the validity of marriage. There can not be any valid marriage unless each party to the marriage is capable to marry. The capacity of parties to the marriage differs from one legal system to another legal system. The nature of marriage differs from culture to culture and country to country[2].

In *Shaw* v. *Gould*[3] Lord Westbury observed that 'Marriage is the very foundation of civil society, and no part of the laws and institutions of a country can be of more vital importance to its subjects than those which regulate the manner and condition of forming, and if necessary of dissolving, the marriage contract'. The observation of Lord Westbury shows the importance and relevancy of marriage in the always changing society.

Question relating to validity of marriage may also arise in several contexts other than the judicial proceedings[4]. As Morris has pointed out that on a matter of such importance there is a need for certainty in the choice of law rules. In *Lawrence* v. *Lawrence*[5] Lincoln J. observed that 'Ideally, the conflict rules relating to the status of married and divorced persons should be simple and easily understood. Unfortunately the relevant English conflict of laws rules have yet to attain the necessary degree of clarity and certainty'[6]. This, unfortunately, is true for India and many other countries. In India the situation is further complicated with the existence of various personal laws and their difference with one another.

The challenge is to ascertain the validity of marriage in a manner that can be universally acceptable. In the present situation following criteria are to be taken into consideration to ascertain validity of marriage, these are-

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2 David McClean, The Conflict of Laws by the Late J.H.C. Morris199, (2010).

3 (1868) L.R. 3 H.L. 55.

4 Judicial proceeding on marriage includes Divorce, judicial separation, annulment of marriage which directly raises the issue of validity of marriage.

5 [1985] 1 All E.R. 506.

6 David McClean, The Conflict of Laws by the Late J.H.C. Morris200, 2010.

i) **The nature of marriage** involves two aspects these are (i) whether the marriage is monogamous or polygamous (potential or otherwise). (ii) what does make a marriage sacrament or contract.

ii) **Capacity of the parties** to the marriage &

iii) **Ceremonies of the marriage**.

II. Problem of Characterization

The Conflict of Laws exists due to the applicability of domestic laws within the territory of countries. But all the legal systems have common denominator which is expressed in terms of connecting factor[7]. Characterization/ classification of connecting factor has been regarded as a fundamental problem in the conflict of laws. Characterization or classification[8] in a suit is a process taken up by authorities of Courts to arrange facts, knowledge and experience into classes in order to decide which law will be applicable to the given situation/ fact. The process of Characterization is easy under municipal law, while, it becomes difficult under private international law where two or more legal systems are involved. The Characterization of connecting factors and cause of action[9] under conflict of law rules unfolds general problems related to choice of law. It is called Conflict of Law rules as conflict arises between two or more legal systems in private international law. Within municipal system, generally, there is one logical or traditional ordering of concepts, principles and rules.[10]

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[7] Conflict of Laws rule is concerned with three factors, such as i. Jurisdiction, ii. Choice of Law, & iii. Recognition of foreign judgement. Questions regarding these three factors are decided by connecting factors. Connecting factor in choice of law can be defined as factor which links a person or an event/ occurrence to a legal system. For example, in a suit for dissolution of a marriage before the courts of England the connecting factor will be habitual residence of the parties to the suit. 'Habitual Residence' is the connecting factor which connects the parties to the suit with the English Legal System.

[8] Classification is the term used by Graveson to indicate Characterization in his book the Conflict of Laws 38 (Sweet Maxwell, 1965).

[9] Cheshire has regarded that classification of cause of action means the allocation of the question raised by the factual situation before the court to correct legal category. Its object is to reveal the relevant rule of choice of law.

[10] R.H. Graveson, The Conflict of Laws 38 (5th ed. 1965).

II.I. The Nature of Marriage

The institution of marriage has undergone various transformations i.e. from Polygyny[11] (subset of polygamy) to strict monogamy and then to serial monogamy[12]. The nature i.e. whether the marriage is polygamous[13] or monogamous[14] is relevant as the validity of a marriage in one country depends on this fact to a great extent. A number of legal systems may permit polygamy while the rest may uphold monogamy and strictly prohibit polygamy at the same time.

The nature of marriage is ascertained by the marriage ceremonies according to the law of the place where the marriage has been celebrated. A polygamous or potentially polygamous marriage between parties who are Muslims is valid if it is celebrated in any country which approves of polygamy. Polygamous marriage will be regarded as valid in England (that prohibits polygamy) only if the marriage has been celebrated in a country which permits polygamy[15]. Marriage between two Muslims domiciled in England shall not be regarded as polygamous or potentially polygamous[16] as the marriage ceremonies have been followed according to the law of England. The marriage between two Muslims domiciled in England shall be regarded as monogamous if it is celebrated in England.[17]

The crucial question is whether the law under which the marriage is celebrated permits polygamy, if it does not, the marriage is monogamous. If a country has provision for both polygamous and monogamous marriage[18]

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[11] Polygyny is a practice which allows a man to keep more than one wife at one point of time.

[12] Serial Monogamy means divorce and remarriage i.e. no one is allowed to marry while his/her spouse is living. One can marry during the lifetime of his/her spouse only when he/she obtains divorce from the spouse.

[13] Practice of having more than one spouse at the same time.

[14] Union of two persons to the exclusion of all others.

[15] Catherine Fairbairn, Briefing Paper on Polygamy, House of Commons Library, January 6th, 2016.

[16] Muslim personal law does not prohibit polygamy. While polygamy or bigamy (subset of polygamy) is prohibited and has been made a punishable offence in most of the common law and civil law countries, there are some countries which permit limited polygamy. English law strictly prohibits polygamy and therefore a marriage between parties governed by Muslim personal law can not be regarded as polygamous or potentially polygamous if the marriage takes place (celebrated) in England. The marriage shall be regarded as Monogamous union between the parties to the marriage if it is celebrated in England.

[17] David McClean, The Conflict of Laws by the Late J.H.C. Morris 231, (2010).

[18] India has provision for both polygamous and monogamous marriage. The reason being that in India each and everyone is governed by their personal law. Muslim personal law permits polygamy while personal laws of Hindus and Christians prohibit polygamy.

the parties' choice of form of ceremony will determine the nature of marriage. If the husband is not allowed to take more than one wife at one point of time by the law, then the keeping of concubines is also prohibited as concubinage is a status recognized by the law which prohibits such[19].

It has been submitted by many that Polygamy is a lifestyle and not a crime. In many countries Polygamy is legally recognized as valid form of marriage while in some other countries it is practically impossible to enter into a polygamous form of union. To some, polygamous form of union is against public morality. A number of legal systems have included 'Bigamy'[20] as a crime in its Criminal Code in order to discourage polygamous form of marriage.

Bigamy has made punishable in both common law countries & Civil law countries. However, polygamous or potentially polygamous marriage is recognized as valid in countries like United Kingdom[21] or Germany[22] if,

i) Such marriage has been taken place in any country where this particular form of marriage is legalized, &

ii) During the time when marriage took place the parties to the marriage were domicile of the country where polygamous form of marriage is legalized.

The Indian Penal code has criminalized the offence of Bigamy under Section 494. Indian Penal Code has made the offence of bigamy bailable and punishable with imprisonment for the term which may extend up to 7 years. As far as family law is concerned, The Hindu Marriage Act, 1955, The Christian Marriage Act, 1872 and the Parsi Marriage and Divorce Act, 1936 do not recognize polygamous form of marriage. So far as these aforesaid three personal Acts are concerned, the provision of IPC regarding bigamy has not been in contradiction with these three Acts. However, Muslim Personal law has permitted polygamy. Therefore, the Muslim personal law is found to be in contradiction to the provision of bigamy as provided under section 494 IPC.

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[19] David McClean, The Conflict of Laws by the Late J.H.C. Morris 231, (2010).

[20] Bigamy is the act or condition of marrying one person while still being legally married to another, and it is generally the legal term used for the offence/crime. Bigamy is subset of Polygamy. Polygamy is a broader, more generic term for multiple marriages and encompasses bigamy.

[21] Available at https://www.gov.uk/government/publications/polygamous-potential-polygamous-marriage-set14/polygamous-potential-polygamous-marriages-set14 (visited on 05.02.2016).

[22] Available at http://www.freerepublic.com/focus/news/1108259/posts (visited on 05.02.2016).

In *Venugopal K.* v. *Union of India*[23] the Kerala High Court has decided that the provision of bigamy under section 494 of IPC shall be applicable to everyone domiciled in India irrespective of the fact that he/she is Hindu/ Muslim/ Christian or Parsi. This was the case filed by a public spirited person before the Kerala High Court pointing out the situation where personal law was misused by a section of people in order to dupe and harass innocent ladies. It was pointed out that in most of the cases husband abandons his previous wife without little or no means of livelihood and gets married. This way, culpable bigamous marriages have been resorted to under the veil of personal laws in order to escape the penal provision under IPC. The Counsel of the petitioner has contended that under Section 494 IPC there is no concept of any personal law and the section envisages punishment to everyone whosoever conduct a bigamous marriage.

The Court in this case stated that "there cannot be any dispute to the submission as advanced by the counsel for the petitioner as the Indian Penal Code is a general code for India". The Court read the crucial words in Section 494 IPC and made it clear that the main ingredient to attract Section 494 IPC is to prove that the marriage contracted (second marriage in the event of husband or wife living) is 'void' on account of husband or wife living.

II.I.I. The Conflict of Law Situation: What law to determine the nature of Marriage

This question arises mainly in marriage where any foreign element is involved. According to Cheshire the law that determines the nature of marriage i.e. whether it is monogamous or polygamous (or potentially polygamous) has not been settled beyond doubt. Cheshire has further explained the problem with the help of the following example. If, for instance, a woman domiciled in England marries a Muslim in London and then cohabits with him in Pakistan where he is domiciled, what law determines whether her marriage is monogamous or polygamous in nature?[24]

What will be the choice of law i.e. which law shall determine the nature of her marriage in this aforementioned example? The choice lies between English law (i.e. the law of the place of celebration and the law of her ante nuptial domicile) and the Pakistani Law (i.e. the law of groom's ante nuptial domicile and presumably the law of their post nuptial domicile). It has also been pointed out by Cheshire that unfortunately there is no case in which this question has been squarely raised and fully discussed.

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[23] 2015 SCC Ker 798.

[24] North, Sir Peter, Fawcett, J.J., et.al. (eds), Private International Law by Cheshire 920, (14th ed., 2008).

In *Lee* v. *Lau*[25] the Court has tried to come up with a satisfactory answer to the question as to which law shall determine the nature of marriage where there exists a foreign element. Cairns J. in this case considered[26] that reference should be made to the law of the place of celebration of marriage to ascertain the nature and incidents of such union so taken place. Though, ithas also been made clear by Cairns J. that when a Court is called upon to make decision on the nature of marriage it must be made according to the Lex Fori[27].

The question as to whether the nature of marriage can be changed from monogamous to polygamous (or potentially polygamous), or vice versa, has also been raised and decided by the Courts of law in several cases. In *Mehta* v. *Mehta*[28], it was observed by the court that the marriage retains its nature until there has been any requisite change. Therefore, the marriage monogamous at its inception can not be regarded as potentially polygamous merely because the husband later on is free to change his religion and join the polygamous sect.

In conformity with decision in Mehta case the court has observed in *Sowa* v. *Sowa*[29] that despite the promise of husband, who belongs to polygamous sect, and despite the fact that husband did not take any additional wife his marriage continued to be regarded as polygamous. Therefore, the nature of marriage does not change automatically or for the fact that neither party has taken additional spouse, until and unless the requisite change takes place.

II.II. Capacity of Parties to Marry

The general rule in Private International law governing capacity of parties to marriage is Lex Domicilii i.e. law of the place where the parties to the marriage have domicile prior to the marriage[30]. Therefore, the capacity of person domiciled in USA shall be governed by the municipal law of that country. Where in common law system the rule of Lex Domicilii is applied by the Forum in order to choose between possibly relevant foreign laws involved in any lawsuit, the Civil law system applies the rule of Lex Patriae[31]. Therefore, countries where civil law system is followed the

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25 (1967) P 14.
26 *Lee* v. *Lau* (1967) P 14
27 Law of the Forum where the case has been instituted.
28 (1945) 2 All ER 690.
29 (1961) P 70.
30 In Private International Law it is known as the ante nuptial domicile of the parties.
31 The law of Nationality.

capacity of the parties to marriage is governed by the law of nationality of the parties[32].

The rule of Lex Domicilii, therefore, refer to the municipal law of a country where the person has domicile (of origin or of choice)[33], while Lex Patriae refers to the municipal law of the country of whose nationality is possessed by the parties to the marriage. So long as there is no foreign element in the marriage[34] confusion as to the applicability of a legal system governing the marriage does not arise. The moment one person marries another from diverse legal background confusion as to the Choice of Law[35] governing the validity of marriage arises.

Capacity of any person, in law, denotes whether the person is legally entitled to do the act or not. Hence, with regard to marriage, capacity of a person means whether the person is legally entitled to get married or not. Capacity is an essential requirement for marriage to be valid i.e. a marriage to be legally valid must ensure that the parties to the marriage must be legally capable to enter into such marriage contract. Marriage is void ab initio[36] if any marriage contract is entered into without fulfilling the essential requirements of marriage. Thorough study of the enactments, governing marriage contract, of some selective countries may help us to understand where and when conflict of laws situation may arise.

Uniform Marriage and Divorce Act was enacted in 1970 in order to give coherence to the scattered laws governing marriage institution in different States of United States of America. The essential requirements of marriage to be fulfilled under this Act are,

i) Consent of the parties is an essential condition
ii) Parties have to be major

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[32] Gian Paulo Romano, "Multilateral Rule on Capacity to Marry and the Italian Constitution", in Bonomi, Andrea, volken, Paul, et.al (eds), *Yearbook of Private International Law*, Swiss Institute of Comparative Law, 2005, p-217.

[33] Municipal law means domestic law of a nation state (sovereign state) which is operative only within the territory of that country.

[34] It means that parties to the marriage belong to similar legal background and therefore, no confusion as to the choice of law governing the marriage arises. 'Choice of Law' situation arises only when there exists any foreign element.

[35] Choice of Law is a subject of Private International law which denotes that every time human transaction can not be governed by the municipal law/ domestic law of a country. This situation arises when there is any foreign element present in a dispute. The affairs of men are often conducted in such a way that a legal dispute contains a foreign element. The 'conflict of laws' is the systematic study of how national courts, in fact and in theory, take account of such foreign elements. Available at http://www.encyclopedia.com/topic/Conflict_of_Laws.aspx (visited on 06.02.2016).

[36] to be treated as invalid from the outset.

iii) Marriage within the prohibited degrees is not allowed.

In United States, civil marriage is governed by the State Laws. State Laws governing the conditions of marriage are subject to State's own Constitution and the United States Constitution. All the 50 states of U.S.A have not permitted polygamy and permitted monogamy or serial monogamy[37].

Marriage Act, 1949[38] The Marriage Act, 1961[39] provided that for a valid marriage (i) parties must be major, (ii) no subsistence of previous marriage, & (iii) no marriage within prohibited degrees of relations.

The essential conditions for a valid marriage in civil legal systems are also in conformity with the essential conditions of valid marriage in common law countries for example the German Civil Code[40] the French Civil Code[41], Italian Civil Code.

In Italy religious marriages are regarded valid along with civil marriages[42]. The Italian Civil Code governs the civil marriage while the Catholic Church governs the religious marriage in Italy[43].

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[37] Serial monogamy denotes the practice of engaging in a succession of monogamous form of sexual relationship. It means a person can marry for the second or third time only in case his/her earlier marriage is dissolved.

[38] Marriage Law of United Kingdom.

[39] The Marriage Act, 1961 is enacted by the Australian parliament in order to govern the rules regarding marriage celebrated in Australia.

[40] Available at http://www.gesetze-im-internet.de/englisch_bgb/ index.html#gl_p0022 (visited on 22.02.2016).

[41] Article 161 of the Civil Code of France-In direct lineage, marriage is prohibited between all ascendants and descendants, legitimate or illegitimate, and the relatives by marriage in the same lineage.
Article 162 of the Civil Code of France- In collateral lineage, marriage is prohibited between legitimate or illegitimate brother and sister.
Article 163 of the Civil Code of France- Marriage is further prohibited between uncle and niece, aunt and nephew, whether the relationship be legitimate or illegitimate.

[42] Civil marriage is the marriage which is solemnized as contract without performing any religious ceremony. Civil marriage in Italy is solemnized under the Italian Civil Code. Italy is the home to the headquarters of 1.2 billion strong Catholic Church. The Bishop of Rome is the world leader of Catholic Church and is also known as the Pope. Therefore, Catholic Church plays very important role in the societal, political and religious life in Italy. In the aftermath of unification of Italian region the religious prescriptions prescribed by the Church regarding marriage have been respected till date. Though Southern region of Italy is less compliant to those prescriptions, than the Northern region of Italy.

[43] Neither the Italian Civil Code nor the Catholic Church has permitted same sex marriage in Italy.

In India the capacity of a person to marry is governed by his/her personal law. Personal laws in India vary from one religious community to another. However, the following conditions remain the same-

(i) Age of majority to marry,

(ii) Bigamy is not allowed (Exception under Mohammedan law where limited polygamy is permitted),

(iii) Consent of parties to marriage or consent of parents in case parties are minor.

(iv) Marriage within the prohibited degrees of relation is not permitted.

II.II.I. The Conflict of Law Situation: Conflict as to the law governing Capacity

Comparative study of the marriage legislation of aforesaid countries has apparently shown that persons related to each other by 'prohibited degrees of relationship' can not marry. But, conflict arises due to the difference of understanding regarding the 'prohibited degrees' of relation by different legal systems. A particular relation may not be regarded as within prohibited degrees by one legal system while any other legal system may consider the same relation as within prohibited degrees. This is what happened in Brook's case. In *Brook* v. *Brook*[44] two persons, domiciled in England and related to each other by prohibited degrees of relationship according to the English law, went to Denmark and married each other. The parties to the marriage were not allowed by the English law to marry each other as the relationship they share came under the prohibited degrees of relationship and they were related to each other by affinity[45]. To overcome this problem the couple chose Denmark where the relationship they share did not come under prohibited degrees. Lord Creswell after observing the facts and circumstances of this case held that the marriage between the parties were invalid. On appeal to the House of Lords 5 other Justices had considered the fact of the case again and stated that 'it is the settled rule of international law that a contract must be valid according to the law of the place where it is made, and its validity must be accepted through out the world'. But, there are two exceptions to this rule. It was further observed by

[44] (1861) 9HLC 193; 11 ER 703.

[45] Relationship by affinity refers to the relation that a person has to the blood relatives of his/her spouse by virtue of the marriage. In this instant case William Leigh Brook wanted to marry Emily Armitage, the blood sister of the deceased wife of William Leigh Brook. The relation between William and Emily came under the prohibited degrees of relationship by the English law. the English law prohibits the marriage between two persons who are related by affinity. Therefore, the couple chose Denmark where their relation was not considered to be within prohibited degrees.

the House of Lords that the present suit came under the second exception to the general rule which stated that 'the contract though valid in the country where made, is prohibited in any other country by express law and all the subjects by later country are forbidden anywhere and under any circumstances to enter into such contract'[46]. Therefore, the marriage was held invalid basing upon the second exception to the general rule.

Comparative study also reveals that the aforementioned countries have statutorily provided certain age as marriageable age and until that age is completed one can not solemnize the marriage. Conflict arises when the age limit (i.e. the marriageable age of a person) varies from one legal system to another. For instance, in Australia, Germany the marriageable age is 18 years while it is 16 years in United Kingdom. In France the marriageable age is 18 for male and 15 for female while in India it is 21 for male and 18 for female.

Another situation where conflict often arises is the area regarding parental consent. In case of a marriage of a minor the consent of the guardian of the minor is needed[47]. While parental consent to the minor's marriage is an essential condition under French Civil Code it is not so under UMD Act 1970[48]. The Uniform Marriage and Divorce Act, 1970, a codified, federal law on marriage in USA, has provided that parental consent in case of the marriage of a minor may be substituted with the judicial approval[49] in case parents of the minor do not give assent to the marriage. Therefore, under French Civil Code parental consent to minor's marriage is an essential requirement while under the UMD Act, 1970 parental consent is just a matter of formality and can be substituted with judicial approval.

The conflict of law rules of other countries is significantly different from Italian conflict of law rules. Italy has restricted benefit of their law particularly to the nationals of Italy, therefore, foreign nationals are left with

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[46] Available at http://uniset.ca/other/ths/11ER703.html (visited on 23.02.2016).

[47] All the marriage legislations of the countries, so discussed in this paper, have statutorily provided marriageable age to enter into the marriage contract. But, a person can enter into a marriage contract even before completing the age so required by the legislation that governs his/her marriage. Such marriage is known as marriage of a minor. In case of the marriage of a minor the consent of minor's parents or judicial approval (where parents did not give consent) is essential.

[48] Uniform Marriage and Divorce Act, 1970.

[49] Judiciary, under Section 205 of the Uniform Marriage and Divorce Act, 1970, may issue the minor (party to the marriage) certificate approving that the minor is capable of understanding responsibilities that come along with a marriage.

no remedy under territorial system of law of Italy[50]. While in France a person can marry a French national even if he lacks capacity to marry under the law of the country whose nationality he possesses, for, it is considered to be enough by the French law if he is regarded capable to enter into marriage contract by the French Civil Code.[51]

Italian conflict of law rule is said to be less clear in matter where the person is not Italian national because, unlike French law, Italy does not have any provision regarding, (i) Persons who are domiciled in Italy and wants to solemnize marriage in Italy, & (ii) Person who wants to marry an Italian national.[52]

II.III. Ceremonies of Marriage

Formal validity of marriage is one of those few areas in conflict of laws where there is almost substantial agreement amongst legal system of the world. The general rule of private international law provides that the formal validity of the marriage involving foreign element is governed by the Lex Loci Celebrationis[53].

While explaining formal validity of marriage involving foreign element following important questions arise, these are,

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[50] Gian Paulo Romano, 'Multilateral Rule on Capacity to Marry and the Italian Constitution', in Andrea Bonomi, Paul Volken, et.al (eds), Yearbook of Private International Law 217, (2005).

[51] Available at https://www.law.kuleuven.be/jura/art/35n4/struyven.htm#N_3_ (visited on 27.02.2016).

[52] According to the Italian conflict of laws rule the Italian court shall exercise jurisdiction over any matter by reference to the nationality of parties to the suit. Thus, Italian court of law has jurisdiction over Italian nationals domiciled in Italy or any place other than Italy. But, at the same time Italian court of law does not exercise jurisdiction over foreign nationals domiciled in Italy. In conflict of laws the principle of Lex Patriae is followed by almost all the civil law countries. Lex Patriae denotes the law of nationality. The Italian conflict of law rules is different from French or German conflict of law rules. German court of law exercises jurisdiction in any lawsuit not only by reference to the nationality of the parties, but it also takes into account i. fact that the place of conducting business by either party to the suit falls within its jurisdiction, ii. Parties own assents in places fall within the jurisdiction of the court (Art. 23 of the German Civil Procedure Code). The French court of law exercises jurisdiction over any person if he is regarded as legally capable to enter into a contract by the French law. These are the grounds of exorbitant jurisdiction exercised by the Court but, there are other grounds such as domicile, habitual residence etc. Italy exercises jurisdiction only by reference to nationality of parties to the suit. Thus, in several circumstances foreign nationals are left to no remedies under Italian conflict of laws rule.

[53] *Supra* note 10.

i) What determines whether the matter in question is related to forms of marriage? &

ii) The threshold question is where does 'form' end and 'capacity' begins?[54]

The answer to the first question may be given well by explaining one leading case law. *Simonin* v. *Mallac*[55] is a leading case in the field of determination of formal validity by English Court. In this case, a French woman filed a petition before the English court seeking it to declare her marriage as null and void with a French man on the ground that the marriage lacks essential requirements to be valid[56]. English court had jurisdiction over the suit as the place of celebration of the marriage was England. Lord Creswell in the aforementioned case observed that the parental consent so essentially required by the French law is just a matter of form of marriage. According to the English conflict of laws rule the formal validity of marriage is governed by lex loci celebration is rule. Thus the formal validity of this case was governed by the English conflict of laws rule, for, England being the place of celebration of the marriage. It was held in this case that 'the parties by professing to enter into a marriage contract in England have mutually given to each other the right to have force and effect of the marriage contract determined by the English Tribunal.'[57]

Cheshire had regarded decision in *Simonin* v. *Mallac* case as proper decision on formal validity of marriage because he considered that the question regarding formal validity of marriage depends upon several important issues. According to him the issues to be considered while ascertaining formal validity of marriage are,

i) Whether non-performance of formal requirement held the marriage void.

ii) Whether non-performance of formal requirement can be made good by the doing of other acts or by mere lapse of time.[58]

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[54] Edward J. Sykes, *The Formal Validity of Marriage*, 2 Int & Comp L.Q. 78-88 April, 1953).

[55] (1860) 2 Sw & Tn 6.

[56] Grounds for the petition for nullity of marriage were that, (i) parental consent, the essential condition of marriage according to French law, had not been obtained, & (ii) the formal publication about the celebration of marriage essentially required by the French Law was also avoided.

[57] Available at http://archive.org/stream/PrivateInternationalLaw/TXT/00000415.txt (visited on 27.02.2016).

[58] Edward J. Sykes, *The Formal Validity of Marriage*, 2 Int & Comp L.Q. 78-88 April, 1953).

While Cheshire has considered parental consent as matter of form of marriage, Dicey holds a totally different view. Dicey in his book[59] has criticized Cheshire's view and considers that 'consent'[60] either affects the capacity of parties or it does not.

In *Sottomayor* v. *De Barros (No 2)*[61], there was an explicit rejection of the views of *Simonin* v. *Mallac* case and complete relegation from that decision. In *Sottomayor*'s case the court has observed that 'old English conflict of law rule governing formal validity of marriage does not hold good anymore'. It has also been held that 'the court, having jurisdiction to ascertain the validity of marriage, needs to examine the nature of consent and its importance in the marriage involving foreign element before terming consent[62] as mere form of marriage'.

As far as lex loci celebrationis rule or locus regit actum rule[63] is concerned a marriage is formally valid if it follows the ceremonies, rites or symbols forming the part of the ceremonies peculiar to the place of celebration of marriage.

However, it has also been made clear by the author[64] that the marriage ceremonies must be a voluntary act of the parties. It has very little

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59 Lawrence Collins, J.D. McClean (eds), Dicey and Morris on Conflict of Law 263-270, (1980).

60 Dicey did not differentiate between the consent of the parties to the marriage and parental consent in case parties to the marriage are minor. He espoused that 'consent' is an essential element in a contract and absence of which can invalidate the marriage contract.

61 (1879) 5 PD 94.

62 In this context by the term 'consent' court implies 'parental consent' as parental consent was considered as just a form of marriage while consent of parties are regarded as matter of substance.

63 Locus Regit Actum rule implies local law of the place where the incident has taken place. Originally formal validity of marriage contract was governed by this principle particularly in England. But post 1769 two separate questions as to the validity of marriage arose to consider. First one was whether the marriage contract is valid so far as essential conditions are concerned, while the second one was that whether parties have complied with the required formalities. The first question could be answered with the help of Lex Domicilii rule, i.e. whether essential condition of marriage was fulfilled or not could be decided by the law of the place whether parties to the marriage had ante nuptial domicile. Now, there remained the second question which was regarding formal validity of marriage. Conflict arises in that field regarding the classification of any particular requirement (for ex. Parental consent) as being matter of either formal or essential requirement. This was the dichotomy that possibly could involve in ascertaining formal validity of marriage.

64 Edward J. Sykes, *The Formal Validity of Marriage*, 2 Int & Comp L.Q. 85, (April, 1953).

of the legal or contractual element in it, for ex. there are certain promises made by both the parties are not remediable in case of breach of those promises (such as promise to love, honor and obey). It does not entail any legal liability. Thus, ceremony is the final door by which the parties enter into the marriage contract.

The answer to the second question[65] is quite difficult as there exists overlapping between formal requirement and essential requirement. We have already known that formal validity of marriage is generally governed by lex loci celebrationis. Now the question as to whether a requirement is formal or essential for marriage is corresponding to its influence to the marriage. For example, marriage ceremonies have already been proved to be a matter of form in a marriage. But, where the requirement affects both the ceremony and capacity of the parties to the marriage the requirement may be regarded as matter of substance. Thus, a marriage between uncleand niece is void because it does not only affect the ceremony but also affects legal capacity of parties to enter into the marriage contract.[66]

Thus, formal requirement and essential requirement can be differentiated by the following test. If the requirement is necessary to capacitate the parties to enter into the marriage contract, it is essential. When the requirement is removable by any other subsequent act of the parties the requirement is related to formal validity.

III. Exception to the Lex Loci Celebrationis Rule

There are certain exceptional circumstances in which a marriage may be recognized even though it has followed the law of the place of celebration of the marriage.

The general rule of private international law is that the formal validity of marriage is governed by the law of the place of celebration of marriage.

Cheshire while explaining the formal validity of marriage celebrated within common law system has espoused that 'common law marriage is better known as cannon law marriage since it emerged at a time when the cannon law governed the matrimonial affairs of Christian throughout Western Europe.'[67]

The only essential to the formal validity of a marriage required by common original law was that parties to the marriage must take each other

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[65] The threshold question is where does 'form' end and 'capacity' begins?

[66] Edward J. Sykes, *The Formal Validity of Marriage*, 2 Int & Comp L.Q. 85, (April, 1953).

[67] Sir Peter North, J.J.Fawcett, et.al. (eds), Private International Law by Cheshire 887, (14th ed. 2008).

as husband and wife[68]. In 1843 further common law condition was added that as Episcopally ordained priest or Dracon, whether of the English or Roman Catholic Church, should perform the ceremony.

In *R* v. *Mills*[69] the House of Lords held that a marriage celebrated in Ireland by Presbyterian minister according to the rites of Presbyterian Church was invalid. It was held that marriage in Ireland is governed by common law system and is invalid if not performed by Episcopally ordained priest or Dracon.

In *Kent* v. *Burgess*[70] it was held that a marriage shall be regarded as formally valid if performed in non-compliance with the local formalities due to some insuperable difficulty. Therefore, the marriage in Belgium was held void for non-compliance with the Belgian residence requirements there being no insuperable difficulties for the parties to wait for the prescribed six months period. The term 'insuperable difficulty' has been expressed in various ways.

Lord Eldon in *Sussex Peerage* case[71] was clear that the 'parties can invoke the common law if they could not avail themselves of the law of the place of celebration or if there was no local law'.

In *Kochanski* v. *Kochanska*[72] the English court again upheld the rule that the parties to the marriage can invoke common law in case they could not avail themselves of the local laws of the place of celebration of marriage due to insuperable difficulty. In this instant case two polish nationals, occupants of displaced persons' camp in Germany, to whom everything German was anathema, were married by a Catholic Priest without compliance with the local forms.

IV. Conclusion

The problem in conflict of law is regarding classification of connecting factor. In a law suit regarding validity of marriage involving foreign element the court often finds it difficult to classify whether a particular requirement is related to formality only or is more than that and extends to capacity of parties to the marriage. There are some areas where confusion is recognizable. This is what happened in Ogden v. Ogden[73] case. In this case the English court applying English conflict of laws rule has characterized 'parental consent' as a matter of form. After that English court

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68 *Ibid.*
69 (1844) 10 Cl & Fin 534.
70 (1840) 11 Sim 361.
71 (1844) 11 Cl & Fin 85.
72 (1958) P 147.
73 (1908) P 46.

applied Lex Fori[74] and upheld the validity of the marriage in question. While, the marriage was already held null and void by the French court by its municipal law for the want of required parental consent.

Thus, in conflict of laws the areas of confusion are,

i) Characterization of the connecting factor[75],

ii) Characterization of cause of action and allocation of it to correct legal category, &

iii) Post characterization application of law i.e. choice of law.

[74] Lex Fori implies the law of the forum.
[75] *Supra* note 14.