

# Conflicts of Laws: Polygamous Marriages with a Foreign element

AGM Pabasara#

*Faculty of Law, General Sir John Kotelawela Defence University, Rathmalana, Sri Lanka.*

#mogamage1@gmail.com

**Abstract:** *Polygamous acts are prohibited under Sri Lankan law; however the Muslim Personal Laws are an exception. Although this fact is grounding, the concept of polygamous marriages occurring between a Sri Lankan national and a foreign national when contracting the Sri Lankan National's subsequent marriages after the first legal marriage is not instituted for, as it is quite a rare occurrence.*

*The legal framework in Sri Lanka only presides over the matters of polygamous marriages occurring between the citizens of Sri Lanka. It does not have a fully-fledged set of laws to regulate or recognize those marriages in an instance if, issues arise in relation to polygamous marriages with a foreign element were to happen to a Sri Lankan national or a partner of a Sri Lankan national.*

*Therefore, the objective of this research is to critically evaluate whether the existing legal framework of Sri Lanka could invalidate an individual's subsequent marriage contracts with a foreigner, and if so, whether such individual could be penalized and whether such marriage would be criminalized under the Sri Lankan law. This research also aims to explore existing legal framework around the world that have addressed this issue and if Sri Lanka could also apply those laws to its native legal system.*

**Keywords:** *Conflicts of Laws, Polygamous Marriages, Private International Law*

## 1. Introduction

The Sri Lankan legal system possesses a full-fledged set of laws on Bigamy with regard to the subsequent marriages that happen

between Sri Lankan nationals after their first legal marriage.

Firstly, it has failed to establish laws on issues such as bigamy between a Sri Lankan who has entered into a subsequent marriage contract (while having a subsisting legal marriage with a Sri Lankan) with a foreign national.

Secondly to establish grounds in the case where a Sri Lankan national contracts a marriage with another Sri Lankan national according to the Sri Lankan law, while he/she is already in a legal marriage contract according to the law of an alien nation. Thirdly, it has failed to institute grounds for in the case where, two Sri Lankan nationals contract a marriage in accordance with a foreign law, while one party subsists in a matrimonial contract according to the Sri Lankan law.

This is the result of the Penal code and the Criminal Procedure Code of Sri Lanka only existing to address and criminalize illegal activities that occurs by its citizens only within the borders of Sri Lanka with regard to issues such as this. Even though polygamous marriages are criminalized in the Sri Lankan context, this research aims to evaluate if Sri Lanka has the authority and jurisdiction to invalidate a marriage contract that occur in the international sphere. It also ventures to see in case where a subsequent marriage occurs abroad, if the victim could bring legal action against the offender, and to recognize if these actions could be criminalized and penalized with laws available in Sri Lanka or if new laws should be set down to address these matters.

## 2. Methodology

This research paper will rely upon a qualitative research method, as it will be taking into consideration the applicable legal standards, related case laws, and expert views in order to evaluate and address the issue at hand so that they could be inculcated into the domestic legal system to cater to issues that would possibly arise in relation to this aspect of the law of persons. As primary sources, existing and relevant local, and international legislative enactments and decided case laws are used. While textbooks, journal articles and web resources have been referred to as secondary sources to conduct the research.

### *DEFINING THE CONCEPTS: POLYGAMOUS MARRIAGES AND PRIVATE INTERNATIONAL LAW*

In accord with the definition of the Merriam Webster dictionary Polygamous Marriages could be defined as acts of entering into one or more subsequent matrimonial contracts with one person while still legally being married to another. Private International Law is a part of each country's state law; it becomes functional when a conflict arises between private individuals of two or more states on deciding which country has jurisdiction and which laws have authority over the legal dispute at hand (Jenson, 1989).

### *VALIDITY OF THE MARRIAGE*

The landmark case *Hyde v. Hyde* (1866, LR 1 PD 130) held that marriage was a voluntary unification for life between two individuals in order to exclude others. This decision pledged the ratio decidendi of the rule that polygamous marriages were prohibited in England as well.

According to Cheshire, the formal requirements of marriage will be governed by the law of the country where the marriage takes place, therefore two parties can enter

into a valid marriage contract if they both fulfill the substantial requirements that are needed by the domestic law of the country that the marriage is celebrated in. (Cheshire, 2008).

However, in this context, one must consider the differences in the substantial requirements that are needed to fulfill the capacity of the parties and the validity of a marriage as it has a foreign element and occurs between two private individuals. The capacity and nature of marriage differ from one legal system to another, in case if it was a polygamous marriage that was contracted under the laws of a foreign nation. Firstly, it would make it rather challenging to decide if the marriage contract that the parties got into is valid under the Sri Lankan law, secondly to ascertain if the victim could bring an action under the Sri Lankan law or if they could seek for a different remedy. (Chaturvedi and Nayak, 2011)

### *CONFLICT OF LAWS PRINCIPLE*

The principle of Conflict of Laws tries to regulate cases with a foreign element. It checks whether the particular country has jurisdiction to determine the question, and, secondly, determines which country's rules should be applied in resolving the dispute. Conflict of Laws is concerned with three factors, namely Jurisdiction, Choice of Law, and Recognition of a foreign judgment. Issues that arise regarding these factors are decided by connecting factors. A connecting factor could be defined as a factor that links a person or an event to a legal system. For an instance, in a suit for divorce before the courts of Sri Lanka, the connecting factor will be the habitual residence of the parties to the case. (Shaw, 2017).

Therefore, in turn, characterization is the process of identifying and arranging the facts and knowledge of a particular case in order to ascertain which law is more suitable to apply in the given situation.

Hence, it is convinced that private international law should be utilized when addressing the issue at hand, as it deals with individuals from two different nations, since Sri Lanka does not contain any laws to regulate polygamous marriages with a foreign element as per section 2 of the penal code, since, a person will only be guilty in respect of the penal code for acts and omissions that were committed within the bounds of Ceylon. (Kundu, 2021)

#### *JURISDICTION AND CHOICE OF LAW*

The question of jurisdiction is intricate due to the issues with the different constitutions and the conflict of laws. However, the law that decides the nature of marriage has not yet been clearly specified even in the English legal framework. To draw out Cheshire's example, for an instance in the case where a woman residing in England enters into a matrimonial contract with a Muslim in London and then cohabits with him in Pakistan where he resides, it is still rather unclear about what law which determines whether the marriage is monogamous or polygamous in nature, because, there are no grounding laws or provisions established yet, to determine the nature of marriage to render it valid or invalid. In the aforementioned case, the choice of law therefore should either be the Pakistani law (place of domicile) or the English law (place of celebration of the marriage).

There are a few types of choices of law doctrines that the authorities may intend to venture upon while selecting which law should be used in a certain suit.

Dual Domicile Doctrine is one and is widely employed in English law. According to this doctrine, a person's domicile at the date of the marriage is considered. For a marriage to be valid, both parties should have had fulfilled the substantial requirements by the law of his or her domicile to venture into a matrimonial

contract. This doctrine is accepted to be comparatively more grounding than the rest because, of the fact that it believes that the parties should be governed by the law of their existing domicile and since this doctrine is easier to be applied in potential future situations. (Cheshire, 2008).

Consequently, through the case *Lee v. Lau* (1967 P 14), legal authorities ventured to discover solutions to the questions that arose; when determining if a marriage that had a foreign element was valid, by claiming that the law which governs any issue which may arise out of that marriage and, the validity of that marriage should be referred to the state which was *Lex Fori*. To illustrate the case *Lee v. Lau*, the marriage was performed in Hong Kong and its domestic law allowed the husband to take secondary wives. Despite that, Hong Kong's law considered this union as monogamous, Cairns, J., held that it was for the English law as the *lex fori* to determine whether it was a polygamous marriage, and whether it was valid or not. Therefore, as per Cairns J. determining the nature of the marriage should be done according to *Lex Fori* (Law of the Forum where the case has been instituted) (Kundu, 2021)

In addition to the above concepts, the Articles 11, 20 and 22 of the Hague Convention on Celebration and Recognition of the Validity of Marriages which was concluded on the 14th March 1978 also highlight marriages that occur between two territorial units and draws out a formal clarification of jurisdiction and the law to be used by the states who are parties and signatories to it, while also clarifying its position on conflicts of laws.

Article 11 (1) of this convention, essentially prohibits the contracting state to recognize a marriage contract if either one of the spouses was already married.

Article 20 enlightens about the jurisdiction and the laws to be applied. It holds that when two or more systems of law applies due to different categories of persons, the contracting state is to construe the rules in force of that state. Which essentially means to follow the domestic law of the contracting state.

Thirdly, Article 22 clarifies the issues that may arise due to conflicts of laws as it declares that the Convention shall replace the laws which has conflicts when it comes to marriages between the states who are parties to the convention. (Hague Convention on Celebration and Recognition of the Validity of Marriages, 1978).

Most of the aforementioned concepts are parts of English law, although the United Kingdom is not a part of the Hague Convention on Celebration and Recognition of the Validity of Marriages. Despite Sri Lanka being a dualist state, and international laws cannot be directly included in its domestic legal system, it is quite possible to establish based on the English common law system, that it would only do justice if Sri Lanka also utilized the Dual Domicile Doctrine and the concept of *Lex Fori* to address to issues that arise in suits that are in relation to marriages with a foreign element attached to it.

### **3. Recommendation and Conclusion**

According to section 362B of the Penal code of Sri Lanka, marrying again during the lifetime of the husband or wife is considered void and the offenders are to be subject to imprisonment and liable to a fine. This situation is valid only for marriages that may occur within Sri Lanka, and we could presume that this could apply to the second scenario that was discussed in the introduction (establishing grounds in the case where a Sri Lankan national who contracts a marriage with another Sri Lankan national according to the Sri Lankan law, while he/she is already in a legal marriage contract

according to the law of an alien nation). Therefore, when establishing validity of the above scenario Sri Lanka has authority to make the marriage contract null and void as the matrimonial contract occurs within the bounds of Sri Lanka, giving authority for Sri Lanka to regulate despite the nationality of the parties. (Penal code, 1883) It is possible to establish that in a way, it does follow the concept of *Lex Fori* to establish this ground.

However, the main issue is whether Sri Lanka has the authority to regulate polygamous matrimonial contracts that may take place according to an alien legal framework. Sri Lankan courts often find it difficult to distinguish whether such marriages that are contracted in relation to a different framework could be accepted as valid in Sri Lanka or not. In relation to this matter, problems in conflicts of laws occur as discussed above.

According to Cheshire, it is the general rule of private international law, that the formal validity of a marriage is governed by the law of the place of celebration of marriage. In addition to that, taking into account the doctrine of *Lex Fori*, in relation to International Law where the issues and problems which may arise regarding a particular suit maybe decided and clarified upon the legal grounds where that suit maybe instituted. (Sykes, 1970)

Thus it is fit to submit that Sri Lanka may have to adhere to the decision that was given by the contracting state, in relation to types of cases that were illustrated prior (Sri Lankan entering into a subsequent marriage contract (while having a subsisting legal marriage) with a foreign national according to the law of a foreign nation AND Sri Lankan national who is already in a matrimonial contract with another Sri Lankan national according to the Sri Lankan law, but had contracted a subsequent marriage with another Sri Lankan according to the law of a different country), as Sri Lanka does not

have a specific set of principles to address to situations aforementioned.

However, as Sri Lanka is a dualist country, it is impractical for Sri Lanka to follow conventions and doctrines without ratifying them, which is why the Hague Convention on Celebration and Recognition of the Validity of Marriages (1978) cannot be readily applied. Hence it is paramount to establish that Sri Lanka should take measures to become parties to such conventions and apply international doctrines such as the Dual Domicile Doctrine and *Lex Fori* into its domestic legal framework so that its easier for authorities to regulate and make decisions in relation to its domestic framework itself, than depending on alien rules and regulations, which cannot be readily incorporated when deciding a case.

#### References

Hyde v Hyde (1866) LR 1 PD 130

Lee v Lau (1967) P 14

Penal code No. 2 of 1883

Jensen, E.G. (1989). Introduction to International Law in Sri Lanka. Open University.

Shaw, M.N. (2008). International Law. 6th ed. New York: Cambridge University Press.  
Cheshire, G.C. (2008). Private International Law. 7th edition ed. Cambridge University Press.

Sykes, E.I. (1970). Cases in Private International Law— 1967. The Australian Year Book of International Law Online, 3(1), pp.222-236.

file:///C:/Users/DELL/Downloads/\_journals\_auaso\_3\_1\_article-p222-preview.pdf

Kundu, I. (2021). VALIDITY OF MARRIAGE: A STUDY IN PRIVATE INTERNATIONAL LAW. [https://www.researchgate.net/publication/356308031\\_VALIDITY\\_OF\\_MARRIAGE\\_A\\_STUDY\\_IN\\_PRIVATE\\_INTERNATIONAL\\_LAW](https://www.researchgate.net/publication/356308031_VALIDITY_OF_MARRIAGE_A_STUDY_IN_PRIVATE_INTERNATIONAL_LAW)

Chaturvedi, N. and Nayak, S., 2011. Marriage & Matrimonial Causes in Private International Law: Issues in Common Law Countries. SSRN Electronic Journal. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1762153](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762153)

Stocquart, E. (1989). Marriage in Private International Law. < file:///C:/Users/DELL/Downloads/23AmLRv775.pdf. >

#### Acknowledgement

I would like to acknowledge the heartfelt support and guidance that was given to me by Mr. Pubudu Alwis, a Senior Attorney-at-Law, my father Mr. Dharmatilake Gamage, a senior Attorney-at-Law, Mr. Anushka Perera, Lectuer (Probationary) at General Sir John Kotelawela Defence University, the panel of lecturers at General Sir John Kotelawela Defence University and mother, Janika Hettiarachchi, brother and well-wishers, who helped me to conclude this research material successfully.